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Fighting Environmental Crime in Spain: A Country Report

Work package 2 on "Instruments, actors, and institutions"

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DISCLAIMER

Abstract

The Spanish legislator has resorted to using criminal law to protect the environment, following the path settled by European Union through its Directive 2008/99/EC of 19 November 2008 on the protection of the environment through criminal law. The problems arising from its implementation in Spain serve to analyse the Spanish penal system and its ancillary relation with the administrative law, as well as the legal and practical consequences of a growing criminalization of environmental offences.

In the Spanish legal system, administrative law and criminal environmental law coexist. The criterion according to which the legislator differentiates between administrative and criminal sanctions is the seriousness or gravity of the attack and the degree of damage or endangerment. Criminal law has jurisdiction where the conduct is administratively unlawful and also exceeds the limits of such offence because of its seriousness. This necessary relation with the administrative regulations requires control of the activity of the administration. Lack of action or inappropriate behaviour may constitute an administrative or criminal offence, depending on the seriousness of the legal infraction or the environmental damage. This failure to act generates impunity. Cases of the so-called active tolerance of the Administration that in some cases lead to corruption are of particular concernThere is no specific Act containing all the sanctioning environmental regulations: Administrative sanctions are fragmented and laid down in different environmental laws and criminal infractions only appear in the Criminal Code that has transposed all the offences set out in Directive 2008/99/CE. Each crime has different levels of completion (presumed endangerment, demonstrated endargerment, damage) and also different objects affected (environment, water, etc, flora and fauna). This creates a very complicated system that lacks clarity when establishing the moment in which the crime is committed. Greater uniformity is needed to determine the protected object and the level of injury required for completion.

There is autonomous criminal liability for corporations and collective entities, allowing them to be sanctioned even when it is not possible to single out the criminal liaibility of a physical person. It must be highlighted that the reform of the Criminal Code of 2010 has excluded local public administrations and institutional government even though they also play an important role in pollution offences as authors or participants.

There are no relevant differentiating factors in the substantive and procedural aspects referring specifically to the environment in the fight against organized crime. The general rules apply. There is no definition of organised environmental crime. In Spain the main form of organized crime in these areas are identified with organized forms of corruption. There is a criminal liability of officials for illicit favourable reports, remaining silent on infringement of laws following inspections, omitted inspections, resolutions or votes in favour of granting illegal licences.

There is a specific police force (SEPRONA) and a public prosecutor (in each provincial headquarters) dedicated to the prosecution of environmentall crimes. There is a mixed system of accusation. The Prosecutor is responsible for the charge and the procedure is the responsibility of the Judge or Court. A private or popular accuser can also join in the trial. The trial is *ex officio*. There is no possibility of plea bargaining in environmental cases however offenders can accept an agreement with the Prosecutor's Office after accepting criminal responsibility.

The evolution of prosecution of environmental crime shows that a large number of the trials and sentencing focuses on urban problems. The conviction rate is very low in strictly environmental crime. It should be noted how such a fact may be influenced by the existence of authorizations and raise problems mainly related to the lack of inspections and technical personnel (experts).

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List of abbreviations

BOE	Boletín Oficial del Estado – Oficial Journal of the Spanish Government
CCAA	Comunidades Autónomas – Autonomous Communities
CrimC	Criminal Code
DP	Defensor del Pueblo - Ombusdman
EAELD	Ecologistas en Acción – Ecologists in Action
FGE	Environmental Liability Directive
INE	Fiscalía General del Estado – Public Prosecutor of the State
LECrim	Instituto Nacional de Estadística – National Institute of Statistics
LOPJ	Ley de Enjuiciamiento Criminal (Act of Criminal Procedure)
MF	Ley Orgánica del Poder Judicial - Organic Act of Judicial Power
	Ministerio Fiscal Ministery of Prosecutions
NGO	Non-governmental organisation
NMP4	Fourth National Environmental Policy Plan of the Netherlands
OSPP	Organic Statute of Public Prosecutions
SC/CE	Spanish Constitution/Constitución Española
STS	Sentencia del Tribunal Supremo (Judgment of the Supreme Court)
STC	Sentencia del Tribunal Constitucional (Judgment of the Constitutional Court)
WP	Work Package
WSR	Waste Shipment Regulation

Summary

1. In the Spanish legal system, the definition of environment has been conditioned by three different perspectives: the anthropocentric, the ecocentric and the mixed perspectives. The main interpretation line states that the SC and CrimC reject extreme approaches and favour a mixed concept.

2. In the Spanish legal system, administrative law and criminal environmental law coexist. The criterion according to which the legislator differentiates between administrative and criminal sanctions is the seriousness or gravity of the attack and the degree of damage or endangerment.

   Criminal law has jurisdiction where the conduct is administratively unlawful and also exceeds the limits of such offence because of its seriousness.

   This necessary relation with the administrative regulations requires control of the activity of the administration. Lack of action or inappropriate behaviour may constitute an administrative or criminal offence, depending on the seriousness of the legal infraction or the environmental damage. This failure to act generates impunity. Cases of the so-called active tolerance of the Administration that in some cases lead to corruption are of particular concern.

3. A clear and detailed definition of environmental crime is not given in the Spanish Criminal Code (CrimC, hereinafter), but instead it uses a broad definition that is, environmental crime is serious breaches of those legal provisions that protect the environment.

   Various groups of crimes are set out from a conception of the environment that recognizes it as an autonomous legal interest and that includes physical and biological factors of the violated ecosystem component:

   - Environmental violation through polluting acts of the resources of the ecosystem (such as pollution of the atmosphere and discharges to water, soil, - Arts. 325, 326, 328, 330, 343, 345, 348-350 CrimC).
   - Environmental violation through acts damaging manifestations of the ecosystem (flora and fauna, e.g. through illegal logging and illegal trapping, Arts. 332-336, 343, 345, 352, 353, 357, 632 CrimC).

4. The competence for the environment is shared between the State, which fixes the basic environmental law, and the Autonomous Communities which have the competence to develop it and may extend or improve the basic regulation but cannot restrict or diminish it.

5. There is no specific Act containing all the sanctioning environmental regulations.

   - Administrative sanctions are fragmented and laid down in different environmental laws.
   - Criminal infractions only appear in the CrimC.

   A mixed system would probably be the best solution: an Environmental Act for the administrative aspects which may be referred to by CrimC. CrimC establishes all crimes related to the environment.

6. CrimC has transposed all the offences set out in Directive 2008/99/CE. Most of them already existed before 2008 (3a, f, g and h). In addition, the Spanish CrimC includes other conduct against flora and fauna, not listed in the Directive as follows:

   - Introduction or liberation of non-local species.
   - Crimes of illegal hunting or fishing.

7. Regulation of environmental offences and crimes in CrimC shows:

   - Hyper-typification. This leads to an overlapping of crimes that requires solving competition among crimes that are not always satisfactorily resolved.
   - Dispersion of the law. There is no overall vision of all types of conduct. On some occasions this leads to overlapping of crimes.

- Use of different terminology for each environmental crime in the CrimC and the fragmented administrative corpus.
- Lack of express reference to the perspective of the legal environment used: ecocentric, anthropocentric and mixed.
- The legislation fails to deal with specific environmental factors, for instance:
    - Indeterminacy of the area of the ecosystem of reference necessary to establish the existence of the environmental crime.
    - Ignorance of the time period to be taken into account in cases of cumulative pollution.
- Each crime has different levels of completion (presumed endangerment, demonstrated endargerment, damage) and also different objects affected (environment, water, etc, flora and fauna). This creates a very complicated system that lacks clarity when establishing the moment in which the crime is committed. Greater uniformity is needed to determine the protected object and the level of injury required for completion.
- Confusion between crimes and administrative offences. This hinders the activity of the police to determine what behaviour should be treated as crimes and what as administrative infractions. When in doubt mostly it opts for the latter.

  As a solution, the completion of the crime could be when the conduct can cause serious damage, exceeding what is established by the administrative infraction, provided that it exceeds the limits marked in the administrative law by a fixed amount or a specific percentage (e.g. 100%).

- There is autonomous criminal liability for corporations and collective entities, allowing them to be sanctioned even when it is not possible to single out the criminal liaibility of a physical person.

    - It is a system of a limited number of crimes (numerus clausus system). No se establece esta responsabilidad de las personas jurídicas para todas las formas de agresión contra el medio ambiente. The liability of legal persons for all forms of aggression against the environment is not set.Thus there is no such provision for wildlife crimes and for crime related to nuclear substances or other hazardous radioactive substances (Art. 345 CrimC).
    - It must be highlighted that the reform of 2010 has excluded local public administrations and institutional government (art. 31bis 5 CrimC) even though they also play an important role in pollution offences as authors or participants. However the establishment of a combined system of fines per day and a fine proportional to the severity of the damage (rather than prison) is recommended.

- Negligent violation of the environment is prosecuted but not in all cases, for example, those against flora and fauna.
- There are no relevant differentiating factors in the substantive and procedural aspects referring specifically to the environment in the fight against organized crime. The general rules apply.
    - There is a minor procedural provision (Art. 282 bis Criminal Procedure Act) concerning the possibility of using undercover agents in crimes of trafficking in endangered species of flora or fauna (Arts. 332 and 334 CrimC) and crimes of trafficking in nuclear and radioactive material (Art. 345 CrimC).
    - Organised crimes are prosecuted by the Anti-Corruption Prosecutor's Office.
- There is no definition of organised environmental crime. The general definitions for criminal conspiracy and criminal groups are used (Art. 570 2-4). They are in themselves crimes which are added to environmental crimes. In Spain the main form of organized crime in these areas are identified with organized forms of corruption.

- There is a criminal liability of officials for illicit favourable reports, remaining silent on infringement of laws following inspections, omitted inspections, resolutions or votes in favour of granting illegal licences.

8. It must be underlined the influence that has on the environment offences relating to urban and land planning, in particular for two reasons:
   - The constructions can be performed in specially protected areas.
   - In this context, the main forms of corruption in Spain manifest. We believe that any study of the environment should include these crimes (in Spain are within the powers of the Environmental Prosecutor. These are the largest group of offences, see statistics below).
9. There is a specific police force (SEPRONA) and a public prosecutor (in each provincial headquarters) dedicated to the prosecution of ecological crimes.
10. There is a mixed system of accusation. The Prosecutor is responsible for the charge and the procedure is in the responsibility of the Judge or Court. A private or popular accuser can also join in the trial.
11. The trial is *ex officio*.
12. There is no possibility of plea bargaining in environmental cases, however offenders can accept an agreement with the Prosecutor's Office after accepting criminal responsibility.
13. Injunctions and precautionary measures must be introduced in prosecuting environmental crimes and offences to prevent permanent damage and loss of biodiversity.
14. Long and costly proceings against environmental crimes and offences are one of the main obstacles for the protection of the environment.
15. The information on environmental crimes, convictions for these crimes and penalties imposed (type and duration) is not readily available, is offered by different agencies using different items and methodology, it does not distinguish from other crimes and it is not comprehensive. This makes it difficult to draw a picture of the application of environmental criminal law. The creation of a national agency to structure these data is recommended or reinforcing the statistics systems of the Environmental Prosecutor's office.
    - The Evolution of Prosecution of Environmental Crime shows that a large part of the trials and sentencing focuses on urban problems (They represented 29,4% of all the trials on environment in 2011).[1] The conviction rate is very low in the strictly environmental crime. For example for 2012 the rate for especific environmental crimes is at 8.5%.[2] Regard to crimes against wildlife is double at 17%.[3] The rate for both sectors is below the rate of convictions for urban planning, which is 52.9%[4]. It should be noted how such fact may be influenced by the existence of authorization and test problems mainly related to the lack of inspections and technical personnel (experts).
    - The specialization of the police and prosecution (the number of prosecutors has grown by 10 % in the last 4 years: it has increased from 126 to 139 in recent years[5]), it is considered as one of the determining factors in the increased prosecution of environmental crime (especially during training phase .) This is an aspect that could be considered when examining the practice in other EU Member States and other countries. It would also be recommended the creation of specialized judges due to the fact that

[1] See table.

[2] 44 convictions in 522 trials.

[3] 119 convitions in 696 trials.

[4] 472 convictions in 892 trials.

[5] This is still insuficient. For a population of 46 million people there is a ratio of an environmental prosecutor for every 331,000 inhabitants.

prosecutions are with very complex in this sector. In fact, the Spanish Prosecutor in Chief has presented recently a proposal in order to increase and improve fighting corruption in Spain.

16. The current economic crisis influences the protection of the environment in a negative way on three aspects :

- It leads to the prioritization of economic needs versus environment, both in the legislative decisions of the administration and performance demands of the population.
- Greater permissiveness regarding the actions of businesses and flexible reinterpretation of the requirements for authorizations.
- Reduction of resources to prevent and investigate attacks against the environment.

1 Introduction

In recent decades, as a consequence of the rising awareness of the damage caused by economic development to the environment, the Spanish legislator has resorted to using criminal law to protect the environment, first, following the guidelines settled by the Council of Europe in its resolutions and its 1998 Convention on the Protection of the Environment through Criminal Law, which however, never came into force and, secondly, with a deeper impact on the criminal legal system, by the European Union through its Directives, in particular, the Directive 2008/99/EC of 19 November 2008 on the protection of the environment through criminal law. This Directive obliges the Member States to enforce most of environmental directives through criminal law but leaves at their discretion the type and the level of sanctions. The problems arising from its implementation in Spain will serve to analyse some of the figures of the Spanish penal system and its ancillary relation with the administrative law, as well as the legal and practical consequences of a growing criminalization of environmental offences.

The problems related with the criminalisation of actions which were not previously criminal offences, can be classified in two general groups, those of an abstract or even doctrinal nature and others of a practical character, enshrined in the implementation and enforcement of the environmental law in the day-to-day practice of actors, such as judges, the forces in charge of the protection of the environment, lawyers, NGOs and citizens.

Regarding the practice, some of the problems are equally related to the lack of a criminal policy to protect the environment and to condemn its aggressions since the legislators, the judiciary and, most of all, the administration have downgraded this specific type of criminality. A criminal policy is needed to fight the dark figure of crime and also other attitudes towards environmental crime that are at the root of its failure to implement and enforce legislation: the active toleration of the administration of bad practices and corruption.

The Spanish Criminal Code (hereinafter, CrimC) has been reformed several times to incorporate environmental crimes. Every time that CrimC has been reformed to introduce a new crime, there have been different debates to point out the reasons: for example, the crime related to land planning introduced in the reform of 1995 was considered as an alternative to the lack of efficiency of the administrative sanctions which were applied to serious land planning abuses.

A quick glance at environmental sanctions in CrimC shows different phases that have established different normative layers in our system.

Art. 45 of the 1978 Spanish Constitution states:

> "All people have the right to enjoy the environment for personal edification and also the duty of conservation.
>
> The public authorities shall oversee the reasonable use of all natural resources, with an aim to protect and improve the quality of life and to reserve and reclaim it with the help of the people.
>
> Criminal or administrative sanctions, as well as the obligation to repair any harm caused, will be applied by law to those who violate the provision of the preceding paragraph".....

The inclusion in our Constitution of an article referring to the protection of the environment and the quality of life and foreseeing that "criminal or administrative sanctions ... will be established by Law" for those who commit environmental offences, was a major step. To develop this constitutional mandate, the Organic Law of 25 June 1983 amended the CrimC to introduce a new *Article 347 bis* stating:

> "The person who: violates the laws or regulations protecting the environment; brings about directly or indirectly any kind of pollution in the atmosphere, earth, fresh, and sea water, creating great danger to the health of the people or great harm to animal life, forests, meadows, farms; will be punished with imprisonment from the month and a day to six months and with a fine from 175.000 pesetas (1.100 euros) to 5.000.000 pesetas (30.000 euros).
>
> Corporations or enterprises that operate secretly without obtaining administrative authorisation or approval for their operations; or that disobey the express order of Administrative Authorities which corrects or suspends the pollution activity; or that obstruct inspections made by the administrations will receive a higher degree of punishment (from six months to six years of imprisonment).

When the activities described in the first paragraph create a catastrophic or irreversible harm, the authors will be punished with a higher degree of punishment as well.

In all cases regulated by this article, the courts have the power to close the polluting premises temporarily or permanently. The courts may also propose that the administration intervene to safeguard the right of the workers affected thereby".

However, the application of this Article 347 bis in the eighties showed the reluctance of the Spanish judiciary and administration to accept criminal law as a tool to protect the environment, reluctance that was shared by academia.[6] The first cases also raised many questions regarding the meaning of the term environment and the scope of the environmental protection. In this early stage of the introduction of the environmental crime in the Spanish CrimC, the case law played a main role. Until 1995, the debate on the application of the *Art. 347 bis* focused especially on the concept of dumping waste, spillage and emissions as the cases of pollution. As there is only one Article it requires a broad interpretation to include all posible forms of contamination. Moreover the demand of demonstrated endangerment makes it difficult to apply the Article since it cannot always be proved. After this initial experience then articulated on this single Article 347 bis, the number of conducts and activities set out in CrimC 1995 were extended.

Ever since then, the problem has mainly revolved around i) the establishment of a difference between criminal and administrative illegality, and ii) the definition of the environment, establishing crimes and offences covered by articles (damage, or presumed or demonstrated impairment), proving the required level of endangerment, the relationships with individual legal interests and, finally, resolving the connection between the different articles.

[6] Vercher (1990) pointed out that "… a number of authors were suspicious of any effectiveness at all. Gimbernat Ordeig, for instance, argued that the penal protection of the environment was neither the sole nor the most effective means of protection. Also Muñoz Conde, based on the conclusions reached by the Twelfth Congress on International Criminal Law, expressed the view that criminal law, when trying to protect the environment, has a quite ancillary mission and foresaw a scant application of article 347 bis", Vercher 1990: 453.

2 Definition of environment

In the Spanish legal system, the definition of environment has been conditioned by three different perspectives: the anthropocentric, the ecocentric and the mixed perspectives.[7]

The Spanish Constitution (hereafter SC) mentions the environment in Art. 45. The main interpretation line states that the SC rejects extreme approaches if it favours a mixed concept: it establishes the right to enjoy an environment *suitable for the development of the person* and establishes the obligation of public authorities to ensure the rational use of all natural resources, in order to protect and improve the quality of life.

The CrimC contains references (direct and indirect) to the environment in several articles (Articles 325, 326, 328, 330, 332-336, 343, 345, 348, 349, 350, 353 CrimC) but the key legal base of CrimC is its Art. 325 on felonies against natural resources and the environment.[8]

Article 325 establishes: *"Whoever, breaking the laws or other provisions of a general nature that protect the environment, directly or indirectly causes or makes emissions, spillages, radiation, extractions or excavations, land fill, noises, vibrations, injections or deposits, in the atmosphere, the ground, the subsoil or the surface water, ground water or sea water, including the high seas, even those affecting cross border spaces, as well as the water catchment basins, that may seriously damage* ***the balance of the natural systems*** *shall be punished with a sentence of imprisonment from two to five years, a fine from eight to twenty-four months and with special barring from his profession or trade for a period from one to three years. Should there be risk of serious damage to the health of persons, the sentence of imprisonment shall be imposed in its upper half".*

This indicates that sanctioned conduct includes discharges, emissions, etc., "[t]hat may damage seriously the balance of natural systems", which is easily identified with the ecocentric approach.

3 Definition of Environmental Crime / Environmental Offence

In Spain types of conduct that damage the environmental can be sanctioned by administrative or criminal rules and proceedings.

Therefore, environmental crime will be, first, that aggression to the environment that is more serious than a simple administrative infringement.

A clear and detailed definition of environmental crime is not given in CrimC but instead a broad definition is used, that is environmental crime will be *serious breaches of those legal criminal provisions that protect the environment.*

Various groups of crimes are set out from a conception of the environment that recognizes it as an autonomous legal interest and that includes physical and biological factors on the ecosystem component under attack:

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[7] De la Mata Barranco 1996: 46 and ff.; Silva Sánchez 1997: 1715; Corcoy Bidasolo 2000: 64 and ff.; ídem, 2002: 625 and ff.; Alcácer 2002: 3 and ff.; Alastuey 2004: 15 and ff.; Jorge Barreiro 2005: 39 and ff.; Olmedo/Rodríguez 2006: 187 and ff.; Alonso Álamo 2008: 25 and ff.; Regis Prado 2008: 122 and ff.; Mendo Estrella 2009: 46 and ff.; Martín Lorenzo 2010: marg. 13647; Puente Aba 2011a: 4 and ff..

[8] Translation of the Criminal Code by the Spanish Ministry of Justice, available at http://www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html

(i) Environmental aggression through polluting acts of the resources of the ecosystem (such as pollution of the atmosphere and discharges to water, soil, - Arts. 325, 326, 328, 330, 343, 345, 348-350 CrimC).

(ii) Environmental aggression through acts injuring (damaging) manifestations of the ecosystem (flora and fauna, e.g. through illegal logging, illegal trapping, Arts. 332-336, 343, 345, 352, 353, 357, 632 CrimC).

In the first group the destruction of flora and fauna is not an essential requirement. In the second group the reverse happens: it classifies the attacks against manifestations of the environment as a type of crime. There is no need to affect water, soil or atmosphere (e.g. by poisoning food left within reach of a protected species).[9]

There is hardly any minor infringement in crimes against the environment, only in Art. 632 CrimC.[10]

4 Substantive Criminal Law Principles

4.1 Role of the principle nullum crime nulla poena sine praevia lege penali

The Spanish Constitution of 1978 enshrines the principle of legality in its Art. 25.1 which states that *"no one may be convicted or sentenced for actions or omissions which when committed did not constitute a crime, misdemeanor or administrative offence under the law then in force."*

In this constitutional regulation of the principle of legality, the following should be noted:

(i) This principle applies both to the criminal law and administrative law and

(ii) The guarantee in Art. 25 SC in its systematic position in the section on fundamental rights is configured as a *fundamental right* of citizens, whose violation can result in an appeal to the Constitutional Court (Art. 53.2 SC).

4.2 The Rule of Law and the role of extra criminal laws, including EU law

In Spain, it is required that criminal law be passed by the national Parliament. The legislative bodies of the Autonomous Communities that also have legislative powers cannot adopt regional laws with criminal provisions because jurisdiction over criminal law is an exclusive competence of the *State* (Art. 149.1.6 º SC). In addition, the criminal law should take the form of an *Act (ley orgánica)*, a class of law requiring approval by an absolute majority of the Congress in a final vote on the entire project (Art. 81 SC).

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[9] In this second group, however, the case law has been sometimes controversial since some persons responsible for poisoning have been acquitted due to lack of evidence; the judge of a superior court upheld the decision of a lower court and rejected the evidence presented by SEPRONA (Servicio de Protección a la Naturaleza de la Guardia Civil - Nature Protection Service of the Guardia Civil).

[10] Art. 632 CrimC says: Whoever fells, burns, tears up, harvests any species or subspecies of endangered flora or its shoots, without serious damages to the environment, shall be punished with the penalty of a fine from 10 to 30 days or community service from 10 to 20 days.

Those who cruelly abuse pets or any other animals in legally unauthorised shows without incurring in the cases foreseen in Article 337 shall be punished with the penalty of a fine from 20 to 60 days or community service from 20 to 30 days.

In criminal law, blank criminal laws are those criminal provisions stipulating the punishment but not setting out the specific elements of the crime, since they refer to other legal provisions of lower rank, adopted by the executive. Moreover, these laws may also involve a violation of the principle of separation of powers, since it enables the executive to establish criminal prohibitions, which should be reserved to the legislature.

The use of these blank criminal laws can be a breach of the principle of legality in criminal law. The principle of legality entails four essential requirements: lex scripta, lex certa, lex previa and lex stricta.

With reference to the EU legislation, both the Regulations and Directives that can be applied as a complementing rule of blank criminal laws must be taken into account. Thus, both the Regulations, from its publication in the Official Journal of the European Union, and the Directives (if they have not been transposed into national law in time) enjoy direct effect in national law and must be considered by the criminal judge when applying blank criminal laws. Then, the judge will use those regulations and directives, referring to them as the "general laws or general provisions" of the area in question. For example, to determine whether emissions into the atmosphere of gases from industrial activity is a crime against the environment (Art. 325 CrimC), it is necessary to check if they have violated "laws or other provisions of general protection of the environment", among which we must include all Community legislation in this matter such as, inter alia, Regulation (EC) 842 / 2006 of the European Parliament and of the Council of 17 May 2006 on certain greenhouse gases.

Moreover, these directives can be used to supplement the “blank criminal laws”, if they have not been transposed or have been transposed inaccurately into national law.

In the case of Directives that have not been transposed into the Spanish legislation, the Office Coordinator in its Annual Report 2012 gives its position on the direct effects of these Directives, (subject to what the courts may decide in the future). It accepts the direct effect of European directives on environmental issues of a criminal nature.

4.3 Principles according to which normally the national legislator chooses to make certain conduct criminal

The power of the State to create and enforcement objective criminal law is subject to certain principles which act as limits on the contents and the normative activity of the legislator. These principles, which are not always grounded on the Constitution, can be articulated in different ways but in any case, must always satisfy two essential questions: when and how criminal law should be employed.

Therefore, principles in force in Spanish criminal law can be organized according to these two questions:

4.3.1 When can the State intervene using criminal law?

1. Principle of offensiveness.

a) Exclusive protection of legal interests.

Criminal law must only act to protect valuable social interests. These are defined as conditions of social life which affect the possibilities of individuals’ participation in the social system. Normally the Spanish Constitution establishes what interests are considered essential. However it does not set out an express list of what may be or can become a legal interest to be protected. For that reason it is said that the Constitution acts as a negative limit: an interest cannot be protected if it is not within the Constitution.

b) Fragmentation of criminal responses.

Criminal action will only be taken against the most serious attacks on essential legal interest.

c) Subsidiary criminal response.

Criminal law has to be the State's last resort to deal with a conflict situation.

2. Principle of guilt

(See below, point 4.6)

4.3.2 How should the State intervene using criminal law?

1. Principle of legality

As we have already indicated at length (see above 4.1), the principle of legality requires that a sanction is imposed for criminal conduct stipulated as such by the CrimC before the commission of the offence, with the penalty previously provided by law, imposed and enforced by the process prescribed legally.

2. Principle of proportionality

The principle of proportionality mandates to (i) the legislator to set the penalty (according to the importance of the legal interest, the severity of the attack and the relationship with other penalties under the CrimC for attacks against the same legal interest or others of greater or lesser importance) and (ii) the judiciary in carrying it out (depending on the extent of damage and the degree of guilt).[11]

a) Proportionality and minimal intervention.

The penal answer should be the minimum intervention necessary to effectively ensure the protection of a legal right. The principle of minimum intervention of criminal law has to be understood, then, as the confluence of the principles of subsidiarity and proportionality.

b) Ne bis in idem.

Prohibition of double jeopardy (substantive aspects) and double procedure (formal or procedural aspects) are based on the assumptions that the acts are equal in subject, act and foundation.

Criminal judicial authority prevails over administrative authority. This means:
(i) Prevalence of the criminal over the administrative sanction;
(ii) Principle of preference for criminal trial over administrative hearing or sanction: obligation of the Administration to inform the criminal jurisdiction of facts that may constitute a crime.

3. Principle of usefulness of penalties

[11] This is not expressly recognised in the Constitution. It is proposed as a solution: (i) a wide interpretation of Art. 15 SC. The prohibition of inhumane penalties demands proportionality, since only this can be considered to conform to the dignity of the person. (ii) Or it can be considered that it is derived from justice as a superior value of the legal order (Art. 1 SC) and inherent rights (Art. 10 SC). It is also linked to the principle of criminal legality and the use of penalties. Finally it is derived from the principle of guilt.

The penalty has to be a necessary and appropriate measure, as a preventive, for the protection of the legal interest from specific attacks whose avoidance is associated with that legal consequence.

4.4 Principles according to which the legislator chooses between administrative and criminal sanctions

In the Spanish legal system, administrative law and criminal environmental law coexist.[12] This situation has been considered to be "one of the most important obstacles when it comes to applying most criminal environmental provisions in countries with civil law jurisdictions".[13] When politically and criminally certain crimes of aggression against the environment have been decided upon and sanctioned by the Administrative and Criminal routes and then the question that has to be resolved is:

- What criteria did the legislator use to establish the distinction?

To respond to this question, regarding the criterion according to which the legislator diferenciates between administrative and criminal sanctions is the seriousness, gravity of the attack (endangerment, damage).[14] This is the criterion adopted by the Spanish Constitutional Court in a decision of 3 October 1983.[15]

The criterion of gravity is incorporated in the environmental field, in which attacks are punishable both by administrative and criminal law, through the principle of the *double standard*[16]. This principle refers, in a strict sense, to the existence, within the model of relative administrative accessoriness[17], of two levels establishing the degree of aggression against the environment.

(1) First level. Normatively, it is established when the pollutant's behaviour may be subject to administrative sanction. It is equivalent to exceeding the risk permitted by the administrative regulation (qualitative difference or "contamination value"). Below those margins, behaviour will be tolerated for all purposes (permitted risk).[18]

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[12] HEINE (1993) distinguishes four models in the relationship between criminal law and administrative law in the field of environmental protection: first, criminal offences which are absolutely independent of administrative law, second, criminal provisions absolutely dependent on administrative law, third, criminal law relatively dependent on administrative law and, finally, environmental offences which are only subject to administrative law and sanctions separated from the real crimes of the penal code. Heine 1993: 289 and ff. See Fuentes Osorio 2012b: 707-733.

[13] See Vercher 1990: 111.

[14] The academia has offered answers about the concept of seriousness: As Vercher summarises "According to J. Galvez, the criterion applicable should be the one which permits a distinction between those environmental disruptions that pose a real or potential danger against humankind, and those that merely disobey an order from the competent and legitimate authority without threatening any real or potential danger against humankind". Rodriguez Devesa expressed a similar opinion, adding that the 'seriousness' of the offence should be the criterion to distinguish between the criminal and the administrative fields." Vercher 1990: 454.

[15] STC 77/83, 3 October 1983.

[16] Prats Canut; Marquès I Banqué 2005: 1187; Corcoy Bidasolo 2000: 91; Mendo Estrella 2009: 104; Fuentes Osorio 2010: 1-61.

[17] Criminal intervention is subsidiary to administration action for two reasons: it is subordinated to it (the administrative legal system determines the normative elements of crimes and the sphere and scope of what is permited) and secondly, it complements administrative action within the process of guarding a specific legal interest: assuming the sanctioning role –the absolute model, or more correctly it acts as the last resort of the sanctionning system –the relative model.

[18] See the Judgment of the Provincial Court SAP Sevilla 623/2004, of 23 November 2004.

Therefore, although not indicated in the definition of the crime, the violation of administrative regulations is necessary in all cases.

For example, dumping in a river that does not exceed the administratively permitted level cannot be sanctioned either administratively or criminally. If the dumping exceeds the administratively permitted level it can be sanctioned by the administration but not necessarily criminally.

The problem in Spain is threefold:

(a) Legalization of forms of pollution and environmental destruction.
This is clearly seen in the field of illegal building that is legalized through autorizations and licences, it is the case of tourist resorts, hotels that are built in or near areas of Natura 2000 Network. So Greenpeace reported that in 2013, with the approval of the new Law of Coasts, there seems little prospect of abandoning massive building or the destruction of last virgin coastal sites. In fact the new law reduces coastal protection levels: "100 of nearly 500 coastal municipalities in our country have called for the reduction of protection."[19]

(b) The failure of Administrations to update environmental regulations.

This problem is self-evident in the resistance to recognizing the polluting effect of certain industrial activities. One example is the current debate about fracking in which, although there are numerous studies that indicate serious effects on the environment and the recent cases of Castor in the coast of Tarragona has proved them right. Nevertheless, it has not yet been banned by the European Union or the Spanish Government, quite the contrary the Spanish Government is appealing against the measures individually adopted by some Autonomous Communities and municipalities.

(c) The Administrations' failure to control over the lack of compliance with authorizations given for the exercise of polluting activities.

This is, for example, the case of what has been called "active toleration" of pollution by administrative authorities. Vercher defines this active toleration as "when administration, in the general pursuit of economic growth, declines to discipline one who breaches pollution regulations. Toleration is thus postulated to legitimize such offences and to avoid sanctions".[20]

The Annual Report of the Prosecutor's Office in 2013 states that the Administrations failure to control licences granted for urban planning is clearly within the scope of these environmental crimes: "The Report of the Prosecutor of Girona summarizes a situation that occurs frequently in the rest of the country. According to this, many prosecutions for urban planning are motivated by prior actual ineffectiveness of punitive actions of urban illegalities, which are in the realm of the competence of Local Government. But it is also true that the Autonomous Administrations do not carry out their functions of control and supervision in urban planning, which, if exercised, would prevent a significant part of the problems that through the application of the criminal law should face prosecution".[21]

(d) The Administrations' failure to enforce existing environmental regulations.

There are three cases:

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[19] See http://www.greenpeace.org/espana/es/Blog/seis-meses-de-nueva-ley-de-costas-20-del-lito/blog/47740/, last consulted 20 June 2014.

[20] Vercher 2002: 113.

[21] The Annual Report of the Prosecutor of the State of 2013: 323.

(I) Granting or maintaining an authorization without due requirements (the Ombudsman refers to cases in which the habitability of housing is granted without requiring the operation of sewerage and subsequent discharges).[22]

(II) The conditions of the authorisations are fulfilled only formally. Ecological organizations claim that the environmental impact assessment state only what the company requires. The ombudsman talks about the "deficiencies in the impact assessment"[23] which is accepted and is even justified by the Administration.[24] The creation of mechanisms to ensure the independence of technicians and scientists who have to make such reports was requested in this case.

These licences can lead to a situation of criminal impunity. The most frequent defence put forward is ignorance of the illegality of the licence (lack of mens rea/error de tipo). The courts do not admit generally this defence as those issuing these reports are technical specialists who are presumed to know the law; equally in cases of collusion with the author of the report. If there is a criminal agreement between the civil servant and the individual, both would be punished (eg by Art. 329 and 325 Art. CrimC respectively in case of spills).

(III) The Administration decides to grant an exceptional (and illegal) authorization motivated by its noncompliance with environmental regulations. For example, the competent administrative Authority may authorize another Authority or a private individual to make untreated discharges due to the lack of resources to build a new treatment plant.[25] Again, the individual actor, e.g. a local mayor, could well argue that he believed his conduct was not illegal. This would lead directly to a lack of mens rea (error de tipo) resuling in impunity or punishment for recklessness (in case that this ignorance could have been avoided).[26]

(2) Second level. When the pollutant's behaviour that may be subject to criminal sanction is fixed normatively. When certain limits are exceeded, which always have to be higher than those required in the first level, the conduct will be absolutely prohibited (quantitative difference or 'limited or intolerable value"). At this point, the level of environmental damage that will be punished criminally must be set (damage, presumed or demonstrated endargement to the environment or its elements).

These cases create evidentiary problems when determining the existence of damage to the environment that will lead to charging the actor with a crime against the environment.

4.5 Indicate the rules on causality of the country's criminal legal system

The theory of objective imputation is used to limit normatively the amplitude of the causation leading to a causal link between action and outcome determined by nature itself.

[22] See Annual Report of the Ombusdman of 2013: 430 and ff., that reports several cases in which there were significant irregularities in the granting of the licence.

[23] Resume of the Annual Report of the Ombusdman 2012: 77.

[24] EA 2013: 1 and ff.; Resume of the Annual Report of the Ombusdman 2012:77.

[25] For instance, the Criminal Court num. 2 of Granada, in the judgment of 14 December 2012, acquitted the Mayors of several small towns in the province for wastewater discharges produced since 1991 because they acted with due administrative authorization and consent of affected local watering communities. There was no other place to evacuate the sewage or means to purify it because the Department of the Environment of the Andalucian Government, the competent body to build the sewage treatment plant, did not undertake its construction until 2010

[26] See Puente Aba 2011a: 11; Fuentes Osorio 2012: 717.

In the crimes of outcome that is crime where actual damage is caused (and not merely the risk of damage) the theory of objective imputation requires that the author of the action is made responsible for the final result taking into consideration:

1. The existence of a causal relationship according to the theory of the equivalence of the conditions.[27]
2. The creation of a legally disapproved risk. It is determined according to its objective foreseeability.[28] It is usually complemented by the criterion of the failure to observe due care.
3. That the risk results in the outcome.

However, objective imputation is not based solely on the idea of objective foreseeability; risk and its realization in the outcome should be also included within the scope of the protection of the law. This last point, in regard to environmental crimes, plays a fundamental role: many types of pollution, for example, will not be subject to sanction as they are within the scope of the permitted risk and socially appropriate conduct. This area is usually established by administrative rules (see 4.2.2).

4.6 Mens rea rules and culpability principle

The Principle of guilt determines:

1. Liability for the act. Not subject to sanctions due to the dangerousness, the character or the mode of being (art. 25.1 SC).
2. Liability for *mens rea* (malice) or negligence (Arts. 5, 10, 14.1 CrimC). The criminal sanction for an act requires an aggression to a legal interest and that such action is driven by the human will, intentionally or recklessly (exceeding strict liability).
3. Attributable Liability. Criminal law may impose sanctions on individuals who have committed responsible acts, i.e., able to know the wrongfulness of his acts and to act on that understanding (Art. 20.1-3 CrimC).

4.7 Party to the offences' rules of country's criminal legal system

1. Concurrency of criminal provisions.

One or more events may be included in various criminal provisions but only one of them can be applied.

Some of the rules contained in Art. 8.4 CrimC may be used: principle of specialty[29] , principle of subsidiarity[30], principle of consumption [31] and the principle of alternativity.[32]

2. Concurrency of crimes.

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[27] Any condition that contributed to the result is considered its cause.

[28] The probability that the conduct, when committed, could cause the final result.

[29] All actions that fall within the definition of the crime set out in law A (general) also fall within the definition of the crime set out in law B (special) but the reverse is not true. Precept B is more specific and is applied preferentially.

[30] This arises when a criminal precept only governs in the case that it does not put another criminal precept at stake.

[31] A precept includes all the damage arising from the facts- Applying law A exclusively includes the damage of an action included in the types of crime of laws A and B.

[32] If the case cannot be resolved by these rules, it must be resolved using the law that establishes the higher penalty.

One or more events may be included in various penal provisions and several may be applied simultaneously.

There are several types of concurrencies with different rules of solution.

Table 1. Concurrency of crimes

TYPE OF CONCURRENCY (FACTS)	RULE OF SOLUTION	PRECEPT
IDEAL: One action / multiple criminal outcomes	The penalty for the severest crime in the upper half (unless the accumulation of all the penalties gives a lower result)	Article 77 CrimC
MEDIAL: Several actions / several criminal outcomes - are in a means-end relationship		Article 77 CrimC
REAL: Several actions / several criminal outcomes	Accumulation of all penalties. Two limits: (i) variable: three times the greatest; (ii) fixed: 20 years (can be extended exceptionally)	Arts. 75, 76 and 78 CrimC
CONTINUED: Several actions / several criminal outcomes - breach of the same or similar precepts occurring at an identical occasion (continued mens rea) or within a preconceived plan (overall mens rea)	(i) From the upper half to the medium level of the most serious offence. (ii) All amounts are added (property crime). If the damage is very high and the people affected are very numerous, the highest punishment can be applied in one or two degrees.	Section 74 CrimC

Source: CrimC - Authors' elaboration.

4.8. Types and content of criminal sanctions' in the national system

Table 2. Types of criminal santions (I)

CUSTODIAL SENTENCES (Arts. 35-38, 53 CrimC)		FINES (Arts. 50-52 CrimC)	
Imprisonment (Pena privativa de libertad/Prisión)	3 months to 20 years (with exceptions)	**Days of fine** (Días-multa)	I. First the number of days is fixed (severity of the conduct). II. Second the amount is fixed to meet the economic value for each day (according to economic capacity of the defendant).
Permanent Location (Localización permanente)	Obligation of the prisoner to remain (i) at home or in the place indicated by the judge (ii)The prison nearest to the prisoner's home on Saturdays, Sundays and holidays (when it is the main sentence). Up to six months.	**Proportional Fine** (Multa proporcional)	The amount of damage, the value of the object of the crime or the benefit obtained.

Subsidiary Criminal liability (Responsabilidad penal subsidiaria)	Failure to pay the fine. One day of freedom for every two payments unmet. If it was a misdesmeanour it can be replaced by the permanent location at home. In the proportional fines, this liability may be freely set by the judge, but may not exceed one year		

Source: CrimC - Authors' elaboration.

Table 3. Types of criminal santions (II)

DEPRIVATION OF OTHER RIGHTS (arts. 39-49 CrimC)		
Absolute disqualification (Inhabilitación absoluta)	Permanent deprivation of all the convict's honours, employment and public offices (also elective). Failure to obtain such honors, jobs or positions.	6 to 20 years
Special disqualification (inhabilitación especial)	Permanent deprivation of all honours, employment, and public offices specifically indicated (also elective). Inability to obtain specific honours, employments or positions.	3 months to 20 years
Deprivation of the right to stand for election (Privación del derecho al sufragio pasivo)	Right to be elected to public office	
Disqualification for profession, trade, industry or commerce or any other right (Inhabilitación para profesión, oficio, industria o comercio o cualquier otro derecho)		
Disqualification for the exercise of parental authority, guardianship, or foster care (Inhabilitación especial para el ejercicio de la patria potestad, tutela, curatela, guarda o acogimiento)		
Deprivation of parental rights (Privación de la patria potestad)		
Suspension from employment or public office (Suspensión de empleo o cargo public)	Indefinite deprivation of exercise of office	3 months to six years.

Deprivation of the right to drive motor vehicles and motorcycles (Privación del derecho a conducir vehículos a motor y ciclomotores)		3 months to 10 years.
Deprivation of the right to possess and carry weapons (Privación del derecho a la tenencia y porte de armas)		3 months to 10 years.
Deprivation of the right to reside in certain places or go to them (Privación del derecho a residir en determinados lugares o a acudir a ellos)		Up to 10 years.
Prohibition of approaching the victim or relatives or other persons identified by the judge or court (Prohibición de aproximarse a la víctima o a aquellos de sus familiares u otras personas que determine el juez o tribunal)		1 month to 10 years
Prohibition of communication with the victim or relatives or other persons identified by the judge or court (Prohibición de comunicarse con la víctima o con aquellos de sus familiares u otras personas que determine el juez o tribunal)		
Community service (Trabajos en beneficio de la comunidad)	Providing unpaid cooperation in certain activities of public utility	1 day to 1 year.

Source: CrimC - Authors' elaboration.

The Spanish Criminal Code establishes three kinds of sentences for crimes against the environment:

1. Sentences involving loss of freedom: prison or weekend imprisonment. Most environmental crimes are punished by prison sentences. Weekend imprisonment is only laid down for storage or dumping.
2. Fines: normally additional to the prison sentences.
3. Disqualification: also additional to 1 and 2 above.

The Criminal Code also foresees the possibility of imposing actions on the defendant which are different to the punishment; the guilty party, for instance, may be ordered to take adequate actions to restore the environment and protect goods (Art. 339 CrimC).

4.9 The system of corporate criminal responsibility

Until the reform of the CrimC by the Act 5/2010, in Spain legal persons had no criminal responsibility that is they could not be convicted for committing a crime with the imposition of a penalty. However, the CrimC of 1995 introduced the possibility that, for certain crimes, a series of measures could be imposed on the legal person. These measures were called "ancillary consequences," contained in the preceding Art. 129 CrimC.[33] However, these measures on the legal person apply only in cases of conviction of an individual who occupied a hierarchical position or acted to the benefit or on behalf of the legal person. Furthermore, Art. 129 was intended to "prevent the continued criminal activity and its effects," a proper purpose of the security measures of penalties.

The Act 5/2010 that reformed the CrimC, first, fixes the autonomous criminal liability of legal persons in the code (art. 31 bis CrimC).

The principal characteristics of this system of corporate criminal responsibility are the followings:

[33] Closure of the company, partnership dissolution, suspension or prohibition or intervention in the activities of the company.

1. It is a system of autonomous liability: for the behaviour of legal persons reflecting a defect in the organizational management. The responsibility for infringements caused by employees is also established when they are in the exercise of social activities for and on behalf of the legal person, provided that it is attributable to the lack of control.
2. It excludes certain entities with legal personality (art. 31 bis.5 CrimC). For example the governments of Autonomous Communities and public administrations which thus cannot be responsible for environmental crimes committed. Art. 31.5 establishes that:

   Provisions relating to the criminal liability of legal entities shall not apply to the State, to regional or institutional public authorities, to regulatory bodies, to public business agencies or entities, to international public law organisations, or to such others as exercise powers of sovereignty or government, conferred by public authority, nor shall such provisions apply to state companies that implement public policy or provide services of general economic interest.

   In such cases, the courts may pronounce criminal liability in the event that they find the entity in question is a legal form created by its promoters, founders, administrators or representatives in order to avoid possible criminal liability.
3. It is determined that legal persons may only be accountable to a limited number of crimes as catalogued (numerus clausus system).
4. Art. 129 CrimC remains alternative, in cases not covered by Art. 31 bis.[34] In the case of companies, organizations, groups or entities without legal personality there remains the possibility of imposing "ancillary consequences" to the penalty for the perpetrator of the crime committed. It must be expressly provided for in the CrimC (numerus clausus system).

The catalogue of penalties is in Art. 33.7 CrimC:

a) Fine by quotas[35] –or proportional to the damage caused- .
b) Dissolution of the legal person. The dissolution shall cause definitive loss of its legal personality, as well as, of its capacity to act in anyway in legal transactions, or to carry out any kind of activity, even if lawful.
c) Suspension of its activities for a term that may exceed five years;
d) Closure of its premises and establishments for a term that may not exceed five years
e) Prohibition to carry out the activities, through which it has committed, favoured or concealed the felony in the future. Such prohibition may be temporary or definitive; if temporary, the term may not exceed fifteen years.
f) Barring from obtaining public subsidies and aid, to enter into contracts with the public sector and to enjoy tax or Social Security benefits and incentives, for a term that may not exceed fifteen years;
g) Judicial intervention to safeguard the rights of the workers or creditors for the time deemed necessary, which may not exceed five years.
h) The intervention may affect the whole of the organization or be limited to some of its premises, sections or business units. The Judge or Court of Law shall determine exactly the content of the intervention and

[34] Art. 129.1 CrimC: "In the case of felonies or misdemeanours committed within, in collaboration with, or through or by means of firms, organisations, groups or any other kind of entities or groups of persons that, due to not having legal personality, are not included in Article 31 bis of this Code (…)",

[35] The system of imposing fines over a number of days establishes the total of the fine according to two factors: the number of days or quotas (for the seriousness of the fact) and the amount of each quota according to the defendant financial capacity. Thus a defendant can be ordered to pay a fine of 40 euros a day for three months (40 € x 90 days = 3600 €).

shall determine who shall take charge of the intervention and within which regularity monitoring reports must be submitted to the judicial body, in the sentence, or subsequently by ruling. The intervention may be amended or suspended at any times, following a report by the receiver and the Public Prosecutor. The receiver shall be entitled to access all the installations and premises of the company or legal person and to receive as much information as he may deem necessary to exercise his duties. The implementing regulations shall determine the aspects related to the exercise of the duties of the receiver, as well as his remuneration or necessary qualifications.

i) Temporary closure of premises or establishments, suspension of corporate activities and judicial intervention may also be agreed by the Investigating Judge as a precautionary measure during investigation of the case.

Joint and several liability of individuals who are convicted of the same offence (arts. 116.3 CrimC in relation to art. 110 CrimC).

5 Substantive Environmental Criminal Law. General Framework of Criminal Laws

5.1 Provisions in Legal Texts

Provisions for environmental crimes in Spain are set out in the Criminal Code, approved by Organic Law 10/1995, of 25 November. The previous Criminal Code contained also some provisions for environmental crimes since its Reform *in 1983*. Art. 347 bis) of the previous Criminal Code was the first ecological crime introduced in Spain.

There is no specific Act containing all the sanctioning environmental regulations.

- Administrative sanctions are fragmented and laid down in different environmental laws.
- Criminal infractions only appear in the CrimC.

This has raised some criticism because it is not easy to specify the normative elements of environmental crime. Either because there is no regulation about it or because it is very difficult to locate, especially in view of the significant existing regulations dispersion.

For this and other reasons, some authors have requested the creation of a General Environmental Law able to

provide some systematic coherence and facilitate the work of criminal practitionner.[36] However, there are authors who do not consider this as adequate.[37]

A mixed system would probably be the best solution: an Environmental Act for the administrative aspects which may be referred to by CrimC. CrimC establishes all crimes related to the environment.In particular, all the criminal provisions specifically related to the enviromment are set out in the CrimC in its Tittle XVI, but also in its Tittle XVII about "crimes against public safety" crimes related to environment (forest fires, crimes related to nuclear energy and ionising radiations and some of the crimes of unnamed disaster) can be founded.

(1) ***Title XVI. Chapter III refers to Crimes against Natural Resources and the Environment.***

The provisions in this chapter may be classified in three groups, althought they are not systematically regulated:

1. General environmental crime: arts. 325 -327
2. Waste: 328 (except 328.2)
3. Corruption of public authorities or public servant: art. 329
4. Damage in natural areas: art. 330

(2) ***Title XVI. Chapter IV refers: Crimes related to the Protection of Flora and Fauna***

The provisions in this chapter related to environmental crime may be classified in:

1. Crimes related to the protection of threatened flora: arts. 332 -333
2. Crimes related to the protection of threatened fauna: art. 334
3. Illegal hunting and fishing: art. 335-336

(3) Besides these specific chapters, in ***Title XVII***, outside the section on the environment, the CrimC punishes several crimes which may affect the followings:

1. Crimes related to forest fires: their connection with the environment is outlined in the crime described in Article 352,
2. Crimes related to nuclear energy and ionising radiation in articles 341 ff,
3. The manipulation of explosive, toxic or asphyxiating substances in article 348, the manipulation, transport or possession of organisms in Article 349,
4. Excavations or demolitions in Article 350.

In these last four cases, there is an explicit reference to the possible damage to the environment. As it has been indicated in point 3, Arts. 343, 345, 348-350 CrimC refer to environmental aggressions through polluting acts of the resources of the ecosystem, while Arts. 343, 345, 352, 353, 357, 632 CrimC are types of aggression through acts damaging manifestations of the ecosystem (flora and fauna, e.g.)

[36] See De La Mata Barranco 1996: 71 and ff..; Huerta 2001: 52; Del Moral García 2004: 145. Por ejemplo en la sentencia anteriormente citada SAP Sevilla 623/2004, de 23 noviembre el MF defiende la sanción (en un caso de inundación de varias parcelas con estiércol y desechos procedentes de una finca dedicada a la explotación porcina al desbordarse las balsas de depuración por causa de las copiosas lluvias) por la falta de un estercolero que consideraba obligatorio pero sin embargo no puede acreditar la fuente legal de donde procede tal obligatoriedad. For example, in the sentence quoted above Sevilla SAP 623/2004 of 23 November the Prosecutor defended the penalty (in a case of illegal filling of various plots of land with manure and waste from a pig farm) due to the failure to provide a public facility for waste management l he considered obligatory but nevertheless he could not prove the source from which such obligation arose.

[37] MORALES PRATS 1997: 237, n. 18 does not rely on this measure and considers "a general law in this area does not seem to project more than a few general operating principles, programmatic and dogmatic, which constantly refer to sectoral environmental protection laws."

As can be seen, CrimC brings together the main forms of environmental aggression. This has an important preventive goal (seeking a demonstrative and educational effect) to highlight the importance of the environment as interest worthy of protection.

However, any attempt to fill the gaps of impunity by a hipertipification can have a negative effect: This leads to an overlapping of crimes that requires competition among crimes to be resolved that are not always satisfactory.

5.2 Description of criminal provisions related to the conduct all listed in art. 3 and 4 of the Directive 2008/99/EC

Most of the conducts listed in the Directive 2008/99/CE were already punished in the Spanish Criminal Code, although not all of them were included among crimes against the environment. However, the implementation of the Directive has required the introduction of some new conducts or modifications in the already existing crimes.

By Organic Law 5/2010 (LO 5/2010) on the reform of the CrimC, Spain has fulfilled its obligation to transpose the Directive. The recitals to the LO 5/2010 expressly state that "the changes in crimes against the environment respond to the need to incorporate elements of normative harmonization in the European Union in this area" and that "incorporates into the Spanish criminal law the provisions envisaged in Directive 2008/99/EC of 19 November".

The following table shows the relationship between Directive 2008/99/EC and its transposition into the CrimC:

Table 4. Link between Directives 2008/99/CE - 2005/35/CE - 2009/123/CE and CrimC

DIRECTIVE 2008/99/EC	CrimC	Existing before Directive 2008/99/EC
Release of substances (art. 3a)	*Art. 325/326 CrimC*	Yes
Release of ionising radiation (art. 3a)	*Art. 343 CrimC*	Yes
The collection, transport, recovery or disposal of waste (art. 3b)	*Art. 328 CrimC*	No
Transnational shipment of waste (art. 3c)		No
Dangerous activities of a plant (art. 3d)		No
Nuclear materials or other hazardous radioactive substances (art. 3e)	*Art. 345 CrimC*	Yes
Killing, destruction, possession or taking of specimens of protected wild fauna or flora species (art. 3f)	*Arts. 332, 334*	Yes
Trading in specimens of protected wild fauna or flora species (art. 3g)		Yes
Conduct which causes the significant deterioration of a habitat within a protected site (art. 3h)		Yes
Production, importation, exportation,	*Art. 348 CrimC*	No

placing on the market or use of ozone-depleting substance (art. 3g)		
DIRECTIVE 2005/35/CE - 2009/123/CE	*Art. 325 CrimC*	Yes

Source: Authors' elaboration.

Almost all of the conduct described by the Directive 2008/99/EC was already subject to punishment by CrimC. That is why it cannot be considered that is has generated a significant change in the degree of implementation and enforcement of environmental criminal law.

The main novelty is the introduction of conduct related to the production, importation, exportation, placing on the market or use of ozone-depleting substances; the collection, transport, recovery or disposal of waste; transnational shipment of waste; dangerous activities of a plant.

So far there are no judgments where the new conduct sanctioned under Arts. 328 and 348 CrimC have been applied.[38]

The report makes an additional reference to Directives 2005/35/EC - 2009/123/EC. Since 1995, Spain has the possibility of sanctioning by virtue of Art. 325 CrimC the discharge of pollutants into the land, sea or groundwater. The reform introduced by LO 5/2010 requires this element, in accordance with Art. 3.1 e) of Directive 2005/35/EC, indicating that the marine waters will include the high sea. This is an extension of the Spanish jurisdiction expressly permitted by Art. 23.4 h LOPJ Organic Act on Judicial Power to cover any offence according to the international conventions and treaties and enables Spain to prosecute them.

5.2.1 Release of Substances that constitute an Environmental Crime.

***Art. 3 (a) of the Directive*: envisages "The discharge, emission or introduction of a quantity of materials or ionising radiation".** The legal provision on environmental crime is set out in Art. 325 CrimC (although in relation to ionising radiation, there is a specific provision in Art. 343 CrimC). It has been amended by LO 5/2010, which has:

- Increased the sanction: prison from 2 to 5 years (which means that the prison cannot be substituted by another sanction or given probation).

This crime consists of directly or indirectly causing emissions, dumping of rubbish, radiations, extractions or excavations, burial, noise, vibrations injections or depositing in the atmosphere, soil, subsoil or in ground, sea or underground waters, including in extraterritorial spaces, high seas and the harnessing of water.

The crime requires that the above-mentioned activities:

- constitute an infringement of a law or other regulation established to protect the environment and,
- may seriously damage *the balance of natural systems.* The law establishes that punishments are imposed in the upper range if human health is placed at risk.

The crime is interpreted as a crime of danger wich requires not only the non-respect of administrative provisions, but also a conduct adequate to endanger the balance of natural systems or the human health.

[38] However the Annual Report of the State Prosecutor for 2013 states that legal proceedings have been initiated (*Operación «Refresco»)* due to the operation led by the Coordinating Unit of Environment and Planning of the State Prosecutor's Office, to combat illegal trade in gases which damage or deplete the ozone layer (HCFC R-22). This was conducted in compliance with EU legislation requiring Member States of the European Union to control and sanction the activities of production and uncontrolled traffic of these substances (Council Regulation 1005/2009). During the legal proceedings, legal persons have been charged as distributors of gas R22 on unlawfully exercising their activity. The judge granted an injunction in order suspend the activity of two legal persons related with trade, storage, distribution and sale of gas R-22.

5.2.2 Release of ionising radiation

***Art. 3 (a) of the Directive*: "The discharge, emission or introduction of a quantity of (…) ionising radiation which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants".**

The Spanish CrimC provided for the conduct related to ionizing radiation as a crime against the environment in the former Art. 325.2 CrimC, but this crime required a harmful result to the life or health of persons.

The Directive required the introduction of a new crime since Art. 325.2 CrimC was insufficient because, although referring to the release, emission or introduction of ionizing radiation into air, soil or water, however, it required a result of death or injury to persons, so that mere danger to the life or health of persons or danger to the natural elements (air, soil or water) or to animals or plants would not be included.

In the reform of 2010, the legislator has chosen to repeal Art. 325.2 CrimC and to incorporate the crime required by the Directive in Art. 343 CrimC, provision located between the crimes of catastrophic risk in Title XVII dedicated to crimes against public safety.

The result of the reform is that the first conduct that the Directive requires to be constituted as a crime against the environment is not located in the CrimC, crimes against the environment but among crimes against public safety. The same is true, as we shall see, with offences relating to nuclear material or other radioactive substances, so that after the reform, there is a dual location of crimes against the environment as there are environmental crimes both in Title XVI and in XVII.

5.2.3 Hazardous Waste

***Art 3 (b) of the Directive*: "The collection, transport, recovery or disposal of waste including the supervision of such operations and the aftercare of disposal sites, and including action taken as a dealer or a broker (waste management), which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants".**

> The Spanish CrimC penalised originally the storage or dumping of liquid or solid waste which is toxic or dangerous and which may seriously damage the balance of natural systems or human health. But it did not include a crime related to waste management. Therefore it has been necessary to introduce a new crime in Art. 328.3 CrimC which faithfully reproduces the list of conducts set out in the Directive:"collection, transport, recovery or disposal of waste including the supervision of such operations and including action taken as a dealer or a broker (waste management), which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants".

The reform has maintained in Art. 328.1 CrimC the previous crime of establishing landfills or dumps, as physically bounded and limited space in which to deposit solid or liquid toxic and hazardous waste. This generates demarcation problems about the choice of provisions in Art. 325 and in Art. 328.3 CrimC.[39] The provision does not require the infringement of administrative laws. The doctrine considers unacceptable a conviction for this crime if the defendants have not violated environmental administrative rules as was done in the

[39] Fuentes Osorio 2011: 133 and ff.

case of STS 29/2007 of 19 March, where the Court condemned those responsible for a deposit of waste and slurry, understanding that the crime did not require the contravention of any administrative rules.

5.2.4 Transnational shipment of waste

***Art. 3 (c) of the Directive*: the shipment of waste, where this activity falls within the scope of Article 2(35) of Regulation (EC) No 1013/2006 (…) and is undertaken in a non-negligible quantity, whether executed in a single shipment or in several shipments which appear to be linked.**

Spanish CrimC incorporated this crime by LO 5/2010 but the transposition has been defectively made because it omitted an essential element, i.e., that the shipment is within the scope of paragraph 35 of Article 2 of that Regulation. Thus Art. 328.4 CrimC punishes those who:

> "Contrary to law or other general provisions ship an important amount of waste, whether executed in a single shipment or in several shipments which appear to be linked".

By omitting the reference to the Regulation, the conduct punished is only "the shipment of an important amount of waste" in violation of administrative regulations in a broad sense and without further requirements regarding to the dangerousness, even presumed, which represents a disproportionate enlargement by the Spanish legislature of the scope of the criminal intervention in cases of waste transport.

It is quite questionable from the point of view of the principles of proportionality and offensiveness to punish as a crime any breach of general administrative regulations on shipments of waste, without demanding even hypothetical danger.

Regarding the requirement that the amount of residue is important, it should be interpreted considering the amount and nature of the waste.

5.2.5 Dangerous activities of a plant

***Art. 3 (d) of the Directive*: the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used and which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants.**

This conduct has been ex novo established in Art. 328.2 CrimC through reform of LO 5/ 2010.

The provision in Art. 328-2 literally copies the terms of the Directive: "the operation of a plant, with infringement of administrative regulations that causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants".

5.2.6 Nuclear materials

***Art. 3 (e) of the Directive*: the production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants.**

The legislature has avoided the consideration the Directive makes of this crime as one against the environment and has transposed the conduct in the preexisting crime relating to nuclear power in Art. 345, located, correctly, as a crime of catastrophic risk in the Title dedicated to crimes against public safety since, before the reform, it did not protect the environment but only the health of persons and their assets.

To comply with the requirements of the Directive, it has expanded the list of conducts included in the original description of the crime, which referred only to "take, provide, receive, transport or possess" and has now included the activities of "production, processing, treatment, use, storage, import or export or disposal of nuclear substances". Thus, it is required that such activities relating to nuclear or radioactive hazardous substances, "cause or likely to cause death or serious injury to any person or substantial damage to the quality of air, soil or water, or animals or plants ", describing the conduct as a crime of presumed endargement but alternatively also of injury.

Obviously, when a result of death or injury to persons arises, the alternative of injury included in that provision shall be displaced by the corresponding crimes against persons.

In the same Art. 345 CrimC a series of aggravations have been included: hence, in the second paragraph, the penalty is increased "if the act is executed using force" and in the third paragraph "if the act is committed with violence or intimidation". But, clearly, this aggravation only makes sense regarding the theft of nuclear material or radioactive elements, which, before the reform, was the main conduct incriminated by Art. 345 CrimC. And finally, the fourth paragraph is devoted to incriminating the conduct of production of nuclear materials or radioactive substances without authorization, but without any reference to the dangerous conduct.

Finally, there is no general provision for criminal liability of legal persons; there is a provision in Art. 343 on materials or ionizing radiation. It would have been more logical to include a general clause for all offences relating to nuclear energy and ionizing radiation or, better yet, for all crimes of catastrophic risk as set-out in Chapter I of Title XVII.

5.2.7 Ozone-depleting substances

***Art. 3 (i) of the Directive*: the production, importation, exportation, placing on the market or use of ozone-depleting substances.**

This conduct has been established ex novo in Art. 348.1 CrimC, in the same paragraph and with the same penalty as the crimes related to explosives and toxic substances which can wreak havoc.

The provision in Art. 348.1 CrimC literally copies the terms of the Directive and punishes the illegal production, importation, exportation, placing on the market or use of ozone-depleting substances.

The typical structure of the new crime related with the substances that destroy the ozone layer is an abstract danger while the other conduct in the same provision requires a specific danger to life, physical integrity or the health of persons or to the environment. Since then, in the communication that States must make to the Commission about the measures they have taken to implement the Directive, a correlation table, it may be difficult to explain the reason why the conduct related to ozone-depleting substances has been deprived of any visibility as a crime against the environment.

The wrong location is an indirect failure to the objective of the Directive.The lack of a provision in our CrimC to punish the conduct when committed with gross negligence results in a clear non compliance with the Directive. Indeed, in the section where the offence has been located (third section of Chapter I of Title XVII) there is no provision which envisages a crime of recklessness for the acts described there in. Admittedly, the choice of incriminating reckless commission of a crime of abstract danger, based on the non compliance of the

administrative regulations governing the activity, can be criticized from the point of view of the principle of minimum intervention, even more so for an offence such as handling ozone-depleting substances which follows the logic of the so called “cumulative offences”.

Finally, the formula used by the legislator to express administrative dependency (" illegally ") is not suitable since it makes no reference to the administrative regulations that have to be infringed for the conduct to be a crime.

5.2.8 Protection of flora and fauna species

1) Crime against endangered species of fauna

***Art. 3 (f) of Directive*: punishes “killing, destruction or possession of protected species”**

Article 334.1 CrimC states: "He who hunts or fishes endangered species, engages in activities that prevent or hinder their reproduction or migration (...) contrary to law or general provisions protective of wildlife species, or trades or deals in them, or their remains".

Mere possession is not included among criminal activities, thus violating the Directive. However, the provision includes conduct not mentioned in the Directive: “activities that prevent reproduction”. There are no exceptions to criminalization in cases of negligible impact as in the Directive. This is not a breach of the Directive, since it allows MS to extend the scope of criminally sanctioned conduct but it is questionable from the point of view of the proportionality of the sentence.

2) Crime against endangered species of flora

***Art. 3 (f) of the Directive*: “killing, destruction or possession of protected species of flora”.**

Art. 332 CrimC has included this conduct since 1995. The crime requires:

- Destruction of flora (cutting, felling, burning, pulling up, collecting).
- Serious damage to the environment.

Criminal conduct does not include mere possession, as the Directive foresees. In addition, serious damage to the environment is required, which excludes the punishment of those activities that cause minor harm to the environment. It is questionable if this is in accordance with the Directive, which only allows cases of negligible impact to be excluded.

5.2.9 Trading in protected wild fauna o flora

***Art. 3 (g) of the Directive*: stipulates the punishment for “trading in specimens of protected wild fauna or flora species or parts or derivatives thereof, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species”.**

This conduct is punishable separately depending on whether it is flora or fauna. Regarding flora, Art. 332 CrimC punishes a person who “with serious prejudice to the environment (...) commits illegal trafficking of any threatened species or subspecies of plant or its derivatives." The requirement of "serious prejudice for the environment" involves that the punishable conduct causes more severe damage than that included in the Directive, which only excludes cases of negligible impact on the conservation status of the species when the number of specimens traded is insignificant.

Regarding fauna Art. 334.1 CrimC punishes trading or trafficking in endangered species, without demanding serious environmental damage. Therefore, any trade or traffic activity is punishable. In this case, the Spanish legislation goes beyond the requirements of the Directive, which excludes cases of negligible impact on the conservation of the species.

5.2.10. Protected habitat

***Art. 3 (h) of the Directive*: punishes "any conduct which causes the significant deterioration of a habitat within a protected site".**

The destruction or deterioration of a habitat was only envisaged in CrimC regarding flora in Art. 332. The reform introduced by LO 5/2010 added the conduct of destruction or deterioration of a habitat of threatened species of fauna in Art. 334. It requires, as in the Directive, that there is a serious alteration of habitat.

The provision does not require that the conduct is carried out within a protected site, so criminalization is wider than required by the Directive. If the conduct affects a protected natural site, the general aggravating factor set out in Art. 338 CrimC shall apply: "When the conducts defined in this Title affect a protective natural site, higher penalties shall be imposed to the extent previously provided for".

5.2.11 Crimes not foreseen in the directive

The Spanish CrimC includes other conducts against flora and fauna, not listed in the Directive as follows:

a) Introduction or liberation of non-local species

Article 333 CrimC punishes the introduction or liberation of non-local species when this damages the ecological balance and infringes laws or general regulations which protect flora and fauna species.

b) Crimes of illegal hunting or fishing

These crimes do not affect only endangered wildlife species but also those whose conditions of hunting or fishing are subject to legal regulation. They are formal crimes, that is, violation of administrative regulations, which do not require danger or harm to be caused to the environment. Therefore, the penalty is a fine and special disqualification from exercising the right to hunt or fish, unless such conduct produces serious damage to the hunting heritage, which is punishable by imprisonment (Art. 335.3 CrimC).

The conducts are:

- Art. 335.1 CrimC. "Hunting or fishing species other than those mentioned in the previous article (endangered species) when expressly prohibited by specific laws on hunting and fishing."
- Art. 335.2 CrimC. "Hunting or fishing on public or private land belonging to others, under a special hunting regime without the permission of the owner."
- Art. 336 CrimC punishes those who, "without being legally authorized, use poison, explosives or other instruments or methods of similar destructiveness or non selected efficacy against wildlife for hunting or fishing." This crime punishes conduct which is prohibited administratively by Art. 62.3. a) of Law 42/ 2007 on Natural Heritage and Biodiversity, which prohibits " the possession, use and sale of all mass or non selective procedures for the capture or killing of animals."

5.2.12 Mens rea

The above provisions require an intentional conduct (dolo) but Art. 331 CrimC states that serious negligence is also punishable but with a lesser penalty.

The intentional conduct requires knowledge by its author that it is in breach of the administrative protective environmental regulations and that such conduct creates a risk of serious harm to the environment or to the health of persons. It is controversial how to punish case where the accused is ignorant of the infringement of the administrative regulations. Most of the doctrine considers it is a "mistake of fact" (art. 14.1 CrimC while in the case law is often treated as a "mistake of law" - art. 14.3 CrimC).

5.3 Environmental aggression through acts of pollution of the ecosystem

5.3.1 Environmental aggression through acts of pollution of the ecosystem

Article 325:[40]

Whoever, breaking the laws or other provisions of a general nature that protect the environment, directly or indirectly causes or makes emissions, spillages, radiation, extractions or excavations, land fill, noises, vibrations, injections or deposits, in the atmosphere, the ground, the subsoil or the surface water, ground water or sea water, including the high seas, even those affecting cross border spaces, as well as the water catchment basins, that may seriously damage the balance of the natural systems.

- Criminal conduct: Felonies against natural resources and the environment.
- Administrative accessoriness: Yes. Violation of general laws and regulations of environmental protection. Aggravation for clandestiny, express disobedience to the administrative authority in the correction or suspension of the polluting activities, falsification or concealment of environmental information, hindering inspection activity, (Art. 326).
- Concept of environment: Natural systems
- Level of damage to resources: Within the scope of the medium. (e.g. water, air etc.) Damage or endargement not required.
- Level of damage to flora and fauna: Not required.
- Relation of offensiveness with natural systems: May seriously damage the balance of the natural systems (presumed endargement). Aggravation in case a risk of irreversible or catastrophic deterioration.
- Connection with individual legal interests:
  - Aggravating effect: Yes. Presumend endargement.
  - Independently of the endangerment of the environment. No.
- Recklessness: Yes. Art. 331 CrimC foresees that "the acts foreseen in this Chapter shall be penalised, as appropriate, by the lower degree punishment, in their respective cases, when committed by serious negligence".
- Criminal liability of legal persons: Yes. Art. 327.
- Range of Sanctions:
  - Imprisonment of 2 to 5 years, a fine of 8-24 months and special barring from his profession or trade for a period from 1 to 3 years.
  - Agravated when affecting individual legal interest: Imprisonment in upper half.
  - Aggravation (art. 326): higher in one degree.

[40] Translation of the CrimC by the Ministry of Justice,

Article 328.1:

(…) whoever establishes deposits or landfills or solide or liquid waste or residues that are toxic or hazardous and may seriously damage the balance of natural systems of the health of individuals.

- Criminal conduct: Establishes deposits or landfills or solide or liquid waste or residues.
- Administrative accessoriness: It is not indicated.
  Aggravation for clandestiny, express disobedience to the administrative authority in the correction or suspension of the polluting activities, falsification or concealment of environmental information, hindering inspection activity, (art. 328.7)
- Concept of environment: Natural systems
- Level of damage to resources: Not required.
- Level of damage to flora and fauna: Not required.
- Relation of offensiveness with natural systems: May seriously damage the balance of natural systems (presumed endargement).
- Connection with individual legal interests:
  - Aggravating effect: No.
  - Independently of the endangerment of the environment. Yes. Presumed endargement.
- Recklessness: Yes. Art. 331.
- Criminal liability of legal persons: Yes. Art. 328.6.
- Range of Sanctions:
  - A sentence of imprisonment of six months to two years, a fine from ten to fourteen months and special barring from profession or trade for a term from one to two years.

Article 328.2:

(…) whoever breaching the laws or other general provisions, carries out explotation of installations where a hazardous activity is perpetrated, or where hazardous substances or preparations are stored or used, that cause or might cause death or serious injury to persons, or substantial damage to the quality of the air, soil, quality, water quality, or to animals or plants.

- Criminal conduct: Explotation of installations where a hazardous activity is perpetrated, or where hazardous substances or preparations are stored or used.
- Administrative accessoriness: Yes. Breaching the laws or other general provisions.
  Aggravation for clandestiny, express disobedience to the administrative authority in the correction or suspension of the polluting activities, falsification or concealment of environmental information, hindering inspection activity, (art. 328.7).
- Concept of environment: No reference
- Level of damage to resources: Damage/ Presumed endargement.
- Level of damage to flora and fauna: Damage/ Presumed endargement.
- Relation of offensiveness with natural systems: Not required.
- Connection with individual legal interests:
  - Aggravating effect: No.
  - Independently of the endangerment of the environment. Yes. Damage/ Presumed endargement.
- Recklessness: Yes. Art. 331.
- Criminal liability of legal persons: Yes. Art. 328.6.
- Range of Sanctions:

- A sentence of imprisonment of six months to two years, a fine from ten to fourteen months and special barring from profession or trade for a term from one to two years.

Article 328.3:

(…) those who, when assembling, transporting, recycling, eliminating or recycling waste, including omission or the duty of surveillance of such procedures, seriously endanger the life, integrity or health of persons, or the quality of the air, ground or water, or animals or plants.

- Criminal conduct: The collection, transport, recovery or disposal of waste und omission or the duty of surveillance of such procedures
- Administrative accessoriness: It is not indicated.
  Aggravation for clandestiny, express disobedience to the administrative authority in the correction or suspension of the polluting activities, falsification or concealment of environmental information, hindering inspection activity, (art. 328.7)
- Concept of environment: No reference.
- Level of damage to resources: Damage/Demonstrated endargement.
- Level of damage to flora and fauna: Damage/Demonstrated endargement.
- Relation of offensiveness with natural systems: Not required.
- Connection with individual legal interests:
  - Aggravating effect: No.
  - Independently of the endangerment of the environment. Yes. Damage/Demonstrated endargement.
- Recklessness: Yes. Art. 331.
- Criminal liability of legal persons: Yes. Art. 328.6.
- Range of Sanctions:
  - A sentence of imprisonment from one to two years.

Article 328.4:

(…) whoever, breaching the laws or other general provisions, transports a major quantity of waste, both in the case of one as well as several related transfers.

- Criminal conduct: Shipment of waste.
- Administrative accessoriness: Yes. Breaching the laws or other general provisions.
  Aggravation for clandestiny, express disobedience to the administrative authority in the correction or suspension of the polluting activities, falsification or concealment of environmental information, hindering inspection activity, (art. 328.7)
- Concept of environment: No reference.
- Level of damage to resources: Not required.
- Level of damage to flora and fauna: Not required.
- Relation of offensiveness with natural systems: Not required.
- Connection with individual legal interests:
  - Aggravating effect: No.
  - Independently of the endangerment of the environment. No.
- Recklessness: Yes. Art. 331.
- Criminal liability of legal persons: Yes. Art. 328.6.
- Range of Sanctions:
  - A sentence of imprisonment from one to two years.

Article 329:

1. The authority or public officer who, knowingly, has reported favourably on granting manifestly unlawful permits that authorise operation of polluting industries or activities referred to in the preceding Articles, or who has silenced breach of laws or provisions of regulations of a general nature thereon during his inspections, or who has omitted the carrying out of the mandatory inspections,

2. (…) authority or public officer who, himself or as a member of a collegiate body, may have resolved or voted in favour of such granting, being aware of the injustice thereof.

- Criminal conduct: Liability for favorable reports, mute infringement laws inspections, skip inspections, resolve or vote in favour of granting unfair.
- Administrative accessoriness: Yes. Manifestly unlawful. Being aware of the injustice thereof.
- Concept of environment: No reference.
- Level of damage to resources: Not required.
- Level of damage to flora and fauna: Not required.
- Relation of offensiveness with natural systems: Not required.
- Connection with individual legal interests:
  - Aggravating effect: No.
  - Independently of the endangerment of the environment. No.
- Recklessness: Yes. Art. 331.
- Criminal liability of legal persons: No.
- Range of Sanctions:
  - Special barring from public employment and office from 7 to 10 years, imprisonment for 6 months to 3 years and a fine from 8 to 24 months.

Article 330:

Whoever seriously damages any of the elements of a protected natural space that were used to classify it as such

- Criminal conduct: Damaging seriously a protected natural area or any of its elements.
- Administrative accessoriness: It is not indicated.
- Concept of environment: Protected natural space.
- Level of damage to resources: Damage.
- Level of damage to flora and fauna: Damage.
- Relation of offensiveness with natural systems: Not required.
- Connection with individual legal interests:
  - Aggravating effect: No.
  - Independently of the endangerment of the environment. No.
- Recklessness: Yes. Art. 331.
- Criminal liability of legal persons: No.
- Range of Sanctions:
  - Imprisonment 1-4 years and a fine of 12 to 24 months.

5.3.2 Environmental aggression through polluting acts of the manifestations of the ecosystem (flora and fauna)

Article 332:

Whoever, with serious damage to environment, cuts, fells, burns, tears up, harvests or conducts unlawful trafficking in any species or sub-species of threatened flora or its shoot, destroys or seriously alters its habitat.

- Criminal conduct: Destruction of Flora or its habitat. Trafficking.
- Administrative accessoriness: Yes. Unlawful trafficking.
- Concept of environment: Environment.
- Level of damage to resources: Damage (destroy or seriously alters its habitat).
- Level of damage to flora and fauna: Damage (cut, fell, burn, tear up, harvest) .
- Relation of offensiveness with natural systems: Not required.
- Connection with individual legal interests:
  - Aggravating effect: No.
  - Independently of the endangerment of the environment. No.
- Recklessness: No.
- Criminal liability of legal persons: No.
- Range of Sanctions:
  - Sentence of imprisonment from four months to two years or fine from eight to twenty-four months.

Article 333:

Whoever introduces non-autochthonous species of flora or fauna so as to damage the biological balance, against the laws or provisions of a general nature that protect species of flora or fauna.

- Criminal conduct: Introduction or release of non-native species of flora or fauna.
- Administrative accessoriness: Yes. Against the laws or provisions of a general nature that protect species of flora or fauna.
- Concept of environment: Biological balance.
- Level of damage to resources: Not required.
- Level of damage to flora and fauna: Not required.
- Relation of offensiveness with natural systems: Damage.
- Connection with individual legal interests:
  - Aggravating effect: No.
  - Independently of the endangerment of the environment. No.
- Recklessness: No.
- Criminal liability of legal persons: No.
- Range of Sanctions:
  - Sentence of imprisonment from four months to two years or fine from eight to twenty-four months and, in all cases, special barring from profession or trade for a term from one to three years.

Article 334:

Whoever hunts or fishes endangered species, perpetrates activities that prevent or hinder their reproduction or migration, or who destroys or seriously alter their habitat, against the laws or provisions of a general nature that protect species of wild fauna, or trades or traffics with them or their remains.

- Criminal conduct: Destruction of Endangered Species of Fauna or its habitat. Trade and traffic of endangered species.
- Administrative accessoriness: Yes. Against the laws or provisions of a general nature that protect species of wild fauna.

- Concept of environment: No reference.
- Level of damage to resources: Damage (destroys or seriously alters its habitat).
- Level of damage to flora and fauna: Damage (hunt or fish); demonstrated endanger (activities that prevent or hinder their reproduction or migration).
- Relation of offensiveness with natural systems: Not required.
- Connection with individual legal interests:
  - Aggravating effect: No.
  - Independently of the endangerment of the environment. No.
- Recklessness: No.
- Criminal liability of legal persons: No.
- Range of Sanctions:
  - Sentence of imprisonment from four months to two years or a fine from eight to twenty-four months and, in all cases, prohibition from exercising profession or trade and from exercise of the right to hunt or fish for a term of two to four years.
  - Aggravation if listed species or subspecies are endangered (upper half of the punishment).

Article 335.1:

Whoever hunts of fishes species other than those stated in the previous article when this is specifically prohibited by the specific rules on their hunting or fishing.

- Criminal conduct: Destruction of non- Endangered Species of Fauna.
- Administrative accessoriness: Yes. Specifically prohibited by the specific rules on their hunting or fishing.
- Concept of environment: No reference.
- Level of damage to resources: Not required.
- Level of damage to flora and fauna: Damage (hunt or fish).
- Relation of offensiveness with natural systems: Not required.
- Connection with individual legal interests:
  - Aggravating effect: No.
  - Independently of the endangerment of the environment. No.
- Recklessness: No.
- Criminal liability of legal persons: No.
- Range of Sanctions:
  - Fine of 8-12 months and special barring from the right to hunt or fish for over 2 to 5 years.
  - Aggravation in case of serious damage to hunting heritage land under special hunting regime (Art. 335.3 CrimC): imprisonment of 6 months to 2 years and barring from the exercise of the rights to hunt and fish by over 2 to 5 years.
  - Aggravation (upper half) when the conduct classified in Article (335.1-3) is perpetrated by groups of three or more persons using tackle or means that are prohibited by law or by-laws.

Article 335.2:

Whoever hunts or fishes species referred to in the preceding Section on public or private land pertaining to others, subject to special hunting regime, without due permission by their owner.

- Criminal conduct: Hunting or fishing of not endangered species on public or private land pertaining to others, subject to special hunting regime.
- Administrative accessoriness: Yes. Without due permission by their owner.
- Concept of environment: No reference.
- Level of damage to resources: Not required.

- Level of damage to flora and fauna: Damage (hunt or fish).
- Relation of offensiveness with natural systems: Not required.
- Connection with individual legal interests:
  - Aggravating effect: No.
  - Independently of the endangerment of the environment. No.
- Recklessness: No.
- Criminal liability of legal persons: No.
- Range of Sanctions:
  - Fine of 8-12 months and special barring from the right to hunt or fish for over 2 to 5 years.
  - Aggravation in case of serious damage to hunting heritage land under special hunting regime (Art. 335.3 CrimC): Imprisonment of 6 months to 2 years and barring from the exercise of the rights to hunt and fish by over 2 to 5 years.
  - Aggravation (upper half) when the conduct classified in Article (335.1-3) is perpetrated by groups of three or more persons using tackle or means that are prohibited by law or by-laws.

Article 336:

Whoever, without being legally authorised, uses poison, explosive devices or other instruments or tackle of a similar destructive, non-selective effect on the fauna to hunt or fish.

- Criminal conduct: Hunting or fishing through poison, explosives or other means or instruments similar destructive arts or non-selective efficacy for wildlife.
- Administrative accessoriness: Yes. Without being legally authorised.
- Concept of environment: No reference.
- Level of damage to resources: Not required.
- Level of damage to flora and fauna: Presumed endargerment.
- Relation of offensiveness with natural systems: Not required.
- Connection with individual legal interests:
  - Aggravating effect: No.
  - Independently of the endangerment of the environment. No.
- Recklessness: No.
- Criminal liability of legal persons: No.
- Range of Sanctions:
  - Sentence of imprisonment from four months to two years or fine from eight to twenty-four months and, in all cases, that of special barring from profession or trade and special barring from exercise of the right to hunt or fish for a term from one to three years.
  - Aggravation (upper half) when the damage caused be notoriously important.

Article 337:

Whoever, by any means or procedure, unfairly mistreats a pet or tame animal, causing it death or injuries that seriously damage its health.

- Criminal conduct: Mistreatment of domestic animals.
- Administrative accessoriness: Yes. Unfairly mistreat.
- Concept of environment: No reference.
- Level of damage to resources: Not required.
- Level of damage to flora and fauna: Damage (death or injuries).
- Relation of offensiveness with natural systems: Not required.
- Connection with individual legal interests:

- Aggravating effect: No.
- Independently of the endangerment of the environment. No.

- Recklessness: No.
- Criminal liability of legal persons: No.
- Range of Sanctions:
  - Three months to a year of imprisonment and special barring from one to three years to carry out a profession, trade or commerce related to animals.
  - When there is no coincidence of death and injuries Art.632.2 applies: "Those who cruelly abuse pets or any other animals in legally unauthorised shows without incurring in the cases foreseen in Article 337 shall be punished with the penalty of a fine from twenty to sixty days or community service from twenty to thirty days".

Common provisions to the offences described

Within the scope of the **protected area (Art. 338 CrimC):** When the conduct defined in this Title affects any protected natural space, the penalties shall be imposed higher by one degree to those respectively foreseen.

Adoption by the judges of measures needed to restore the ecological balance disturbed and any other necessary precautionary measure (Art. 339 CrimC): The Judges or Courts of Law shall order adoption, at the expense of the doer, of the necessary measures aimed at restoring the ecological balance disturbed, as well as any other precautionary measure required to protect the assets safeguarded under this Title.

Attenuation for repairing (Art. 340 CrimC): Should the principal of any of the acts defined in this Title have voluntarily proceeded to repair the damage caused, the Judges and Courts of Law shall impose the lower degree punishment of those respectively foreseen.

5.3.3 Regulations dispersa: other forms of aggression against media and representations contained in other places of penal code

Article 343.1:

Whoever, by tipping, emission or release into the air, the ground or water, of a quantity of materials or ionising radiation, or exposure to such radiation by any other means that endangers the life, integrity, health or assets of one or several persons (…) The same punishment shall be imposed when, by means of such conduct, the quality of the air, the soil or water or animals or plants is endangered.

- Criminal conduct: Discharge, emission or introduction of a quantity of materials or ionizing radiation, exposure by any means to ionizing radiation.
- Administrative accessoriness: It is not indicated.
- Concept of environment: No reference.
- Level of damage to resources: Demonstrated endangerment.
- Level of damage to flora and fauna: Demonstrated endangerment.
- Relation of offensiveness with natural systems: Not required.
- Connection with individual legal interests:
  - Aggravating effect: No.
  - Independently of the endangerment of the environment. Yes. Demonstrated endangerment.
- Recklessness: Yes. Art. 344: lower degree penalty.
- Criminal liability of legal persons: Yes. Art. 343.3.
- Range of Sanctions:

- Sentence of imprisonment from six to twelve years and special barring from public employment and office, profession or trade for a term from six to ten years.

Article 345:

1. Whoever, without due authorization, possesses, transforms, uses, stores, transports, or eliminate nuclear materials or other hazardous radioactives substances that cause or made cause person death or serious injury, or substantial damage to the quality of the air, the quality of the soil or the quality of the waters or to animals or plants (…)

4. Whoever, without due authorization, were to produce such material or substances (…)

- Criminal conduct: produce, possess, transform, use, store, transport, eliminate nuclear materials or other hazardous radioactive substances.
- Administrative accessoriness: Yes. Without due authorization.
- Concept of environment: No reference.
- Level of damage to resources: Damage/Presumed endangerment.
- Level of damage to flora and fauna: Damage/Presumed endangerment.
- Relation of offensiveness with natural systems: Not required.
- Connection with individual legal interests:
  - Aggravating effect: No.
  - Independently of the endangerment of the environment. Yes. Damage/Presumed endangerment.
- Recklessness: No.
- Criminal liability of legal persons: No.
- Range of Sanctions:
  - Sentence of imprisonment from one to five years (345.1)
  - Higher degree of punishment (sentence of imprisonment from five to seven and half years, 345.4)

Article 348.1 (1):

Those who, in manufacturing, handling, transporting, holding or marketing explosives, flammable or corrosive, toxic or asphyxiating substances, or any other materials, appliances or devices that may cause havoc, breach the established safety regulations, specifically endangering life, the physical integrity or health of persons, or the environment (…)

- Criminal conduct: Manufacture, handling, transport, possession or sale of explosives, flammable or corrosive, toxic and asphyxiating substances, or any other materials, equipment or devices that can wreak havoc.
- Administrative accessoriness: Yes. Breach the established safety regulations.
- Concept of environment: Environment.
- Level of damage to resources: Not required.
- Level of damage to flora and fauna: Not required.
- Relation of offensiveness with natural systems: Presumed endanger.
- Connection with individual legal interests:
  - Aggravating effect: No.
  - Independently of the endangerment of the environment. Yes. Presumed endanger.
- Recklessness: No.
- Criminal liability of legal persons: Yes. Art. 348.3.
- Range of Sanctions:
  - Sentence of imprisonment of 6 months to 3 years, a fine of 12 to 24 months and disqualification from public office, profession or trade by time of 6-12 years. Upper Half for directors or managers (348.3).

- Fine for 1-3 years, except if, having proven the damage caused, the amount thereof were greater, in which case the fine shall be two to four times the amount of that damage (348.3).

Article 348.1 (2):

(…) Whoever unlawfully produces, imports, exports, commercialises or uses substances that destroy ozone.

- Criminal conduct: produce, import, export, commercialize or use substances that destroy ozone.
- Administrative accessoriness: Yes. Unlawfully.
- Concept of environment: No reference.
- Level of damage to resources: Not required.
- Level of damage to flora and fauna: Not required.
- Relation of offensiveness with natural systems: Not required.
- Connection with individual legal interests:
  - Aggravating effect: No.
  - Independently of the endangerment of the environment. No.
- Recklessness: No.
- Criminal liability of legal persons: Yes. Art. 348.3.
- Range of Sanctions:
  - Sentence of imprisonment of 6 months to 3 years, a fine of 12 to 24 months and disqualification from public office, profession or trade by time of 6-12 years. Upper Half for directors or managers (348.3).
  - Fine for 1-3 years, except if, having proven the damage caused, the amount thereof were greater, in which case the fine shall be two to four times the amount of that damage (348.3).

Article 349:

Those who breach the established safety measures in the handling, transport or possession of organisms, specifically endangering the life, physical integrity or health of persons or the environment (…)

- Criminal conduct: Handling, transport or holding organisms.
- Administrative accessoriness: Yes. Breach the established safety measures.
- Concept of environment: Environment.
- Level of damage to resources: Not required.
- Level of damage to flora and fauna: Not required.
- Relation of offensiveness with natural systems: Presumed endanger.
- Connection with individual legal interests:
  - Aggravating effect: No.
  - Independently of the endangerment of the environment. Yes. Presumed endanger.
- Recklessness: No.
- Criminal liability of legal persons: No.
- Range of Sanctions:
  - Sentence of imprisonment of six months to two years, a fine from six to twelve months, and special barring from public employment and office, profession or trade for a term of three to six years.

Article 350:

(…) when digging shafts or excavations, during construction or demolition of buildings, dams, channels or other similar works, or in their conservation, conditioning or maintenance, breach the established safety regulations, failure to comply with which may cause catastrophic results, and that specifically endanger the life, physical integrity of persons or the environment

- Criminal conduct: Open pits or excavations, construction or demolition of buildings, dams, pipelines or similar works or, preserving, preparing and maintenance.
- Administrative accessoriness: Yes. Breach the established safety regulations.
- Concept of environment: Environment.
- Level of damage to resources: Not required.
- Level of damage to flora and fauna: Not required.
- Relation of offensiveness with natural systems: Presumed endanger.
- Connection with individual legal interests:
  - Aggravating effect: No.
  - Independently of the endangerment of the environment. Yes. Presumed endanger.
- Recklessness: No.
- Criminal liability of legal persons: No.
- Range of Sanctions:
  - Sentence of imprisonment of six months to two years, a fine from six to twelve months, and special barring from public employment and office, profession or trade for a term of three to six years.

Article 352:

Whoever sets woods or forests on fire (…)

- Criminal conduct: Sets woods or forests on fire.
- Administrative accessoriness: No.
- Concept of environment: No reference.
- Level of damage to resources: Not required. Aggravation due to the serious deterioration or destruction of the resources affected; by covering a considerably large area; by causing major or serious soil erosion effects (353).
- Level of damage to flora and fauna: Damage. Aggravation due to significantly alter the conditions of animal or plant life (353).
- Relation of offensiveness with natural systems: Not required. Aggravation by affecting any protected natural space (353).
- Connection with individual legal interests:
  - Aggravating effect: No.
  - Independently of the endangerment of the environment. Yes. Presumed endanger.
- Recklessness: Yes. Art. 358.
- Criminal liability of legal persons: No.
- Range of Sanctions:
  - Sentence of imprisonment of one to five years and a fine of twelve to eighteen months.
  - Aggravation (individual involvement): Sentence of imprisonment of ten to twenty years and fine of twelve to twenty four months.
  - Aggravation (art. 353) Penalty in the upper half. These penalties shall also be imposed in the upper half when the principal acts to obtain economic profit from the effects arising from the fire.
  - Art. 358: lower degree punishment.

Article 356:

Whoever sets fire to planted areas in non-forest areas, seriously damaging the environment (…)

- Criminal conduct: Fire of non-forest vegetation.
- Administrative accessoriness: No.

- Concept of environment: Environment.
- Level of damage to resources: Not required.
- Level of damage to flora and fauna: Damage.
- Relation of offensiveness with natural systems: Damage (seriously).
- Connection with individual legal interests:
  - Aggravating effect: No.
  - Independently of the endangerment of the environment. No.
- Recklessness: Yes. Art. 358.
- Criminal liability of legal persons: No.
- Range of Sanctions:
  - A sentence of imprisonment of six months to two years and a fine from six to twenty-four months.
  - Art. 358: lower degree punishment.

Article 357:

The arsonist of his own property shall be punished (…) if (…) that may have seriously damaged the conditions of the wildlife, woods or natural environment.

- Criminal conduct: On Arson of Own Property.
- Administrative accessoriness: No.
- Concept of environment: Natural environment.
- Level of damage to resources: Not required.
- Level of damage to flora and fauna: Damage (seriously).
- Relation of offensiveness with natural systems: Damage (seriously).
- Connection with individual legal interests:
  - Aggravating effect: No.
  - Independently of the endangerment of the environment. No.
- Recklessness: Yes. Art. 358.
- Criminal liability of legal persons: No.
- Range of Sanctions:
  - A sentence of imprisonment of one to four years.
  - Art. 358: lower degree punishment.

Common Provisions on Arson

Article 335:

In all the cases foreseen in this Subchapter, the Judges or Courts of Law may order that zoning classification of the land in areas affected by a forest firemay not be changed for a term of up to thirty years. They may also order limitation of suppression of uses to which the areas affected by the fire have been put, as well as administrative seizure of the burned wood from the fire.

5.3.4 Problems related with the Quality of the Administrative and Criminal Legislation

(1) Hyper-typification. This leads to an overlapping of crimes that requires solving competition among crimes that are not always satisfactorily resolved.

(2) Dispersion. There is no joint vision of all crimes. In some cases, this leads to an overlap of legal definitions of criminal conduct.

(3) Use of different terminology for each environmental crime in the CrimC and the fragmented administrative corpus. The protected interest is given different names: natural system, biological balance, environment or is simply not mentioned.

(4) Lack of express reference to the perspective of the legal environment used.

(a) There is no reference to the anthropocentric or ecocentric perspective used.

It would be interesting to study the approaches used in the different states of the EU.

(b) This becomes especially relevant in cases where Articles contain a link with the life and health of individuals.

The relationship between the environment and individual health is not clear in the criminal field. For example, the combination of the two would give an anthropological interpretation that limits the application of the crimes: because they always require an individual's health to be injured together with the environment[41] or even in isolation.[42] This occurs, for example, in the field of noise. The offence of Art. 325 CrimC does not depend on the capacity to endanger the environment but how it endangers life or health. So one trend of the legal precedents only checks the health impairment: SSTS 1091/2006; 540/2007. The result is that most forms of noise pollution will only be sanctioned when physical and mental injuries occur, which usually require repeated acts and the proof of injury.

(5) The legislation fails to deal with specific environmental factors:

For example, there is some indeterminacy of the area of the ecosystem of reference necessary to establish the existence of the environmental crime. Should the ecosystem be the immediate one or a wider area? If it is a smaller area, it will be easier to prove the required damage or endangerment.

Similarly, it is important to know the time period to be taken into account in cases of cumulative pollution¿is it a day or a year? With a longer period it may be easier to prove that damage has occurred when observing the consequences of pollution or the harmful capacity of the conduct but also it may be more difficult to link it to a specific action).

These factors are needed to define and indentify the act of the crime.

(6) Each offence has different levels of completion (presumed endangerment, demonstrated endargerment, damage) and also with respect to a different object (environment, water, ect. and flora and fauna).

(a) Only regarding resources and flora and fauna: presumed endargerment (Arts. 328.2 y 3, 345.1), demonstrated endangermente (Art. 343.1 CrimC).

(b) Only regarding resources: damage (Art. 330 CrimC).

(c) Only regarding flora and fauna: damage (Arts. 334-36 CrimC).

(d) Only regarding the environment: presumed endargement (Arts. 328.1, 348.1 CrimC), damage (Art. 333 CrimC, 348.1, 349-350 CrimC).

(e) All together. Presumed endangerment of the environment (Art. 325, 326 CrimC), demonstrated endangerment (Art. 328.3 CrimC) or its effective damage (art. 332 CrimC). And each of them requires additionally that resources are adversely affected (Art. 325, 326, 328.1 CrimC), el demonstrated endangermente of the resources, animal or plants (Art. 328.3 CrimC), damage of the resources and flora and fauna (art. 332 CrimC).

[41] The judgments SSTS 289/2010 of 19 April and 152/2012 of 2 March establish a coordinating link between environment and health.

[42] See on this debate on Art. 325 CrimC, Fuentes Osorio 2012: 29 and ff.

This creates a very complicated system that lacks clarity in order to establish when exactly the crime was committed. The damage or presumed or demostrated endargement have to be met although the offence does not require it? Should we require a double-damage of wildlife resources and environment although the first are not reflected in the offence? In the latter case, for example, it is normal that the death of fauna is required to apply the Art. 325 CrimC (although that aspect is not required by the crime).[43]

Greater uniformity is required to determine the protected object and the level of damage required for the completion. This problem can be solved through case-law (that will specify the requirements for each offence). However, the principle of legality suggests a clear and specific categorization of each crime.

(7) Confusion between crimes and administrative offences. This depends on the gravity of the damage and it is not easy to determine due to:

(a) The lack of a referencethere is no criterion in order to distinguinsh the crime according to the severity of the aggression (see for Arts. 328.4, 348.1 CrimC).

(b) The lack of a clear criterion to distinguish between the administrative offences and crimes. This poses obvious problems of proof when damage or demonstrated endargerment is required. However, it is also complicated to prove presumed endargerment. The determination of this capacity depends on factors (the subject of protection, the ecosystem area, and the period to be analysed) that are not specified and that depending on how they are defined may lead to conflicting results. So the defence experts will choose the combinations that deny the presence of this capacity of endangerment (eg they will refer tp the entire river basin instead of the affected area, as has been argued in the case ....).

This difficulty of distinguishing between administrative and penal field hinders the activity of the police to determine what acts should be treated as crimes and which as administrative offences.[44] When in doubt most opt for the latter.[45]

A solution could be that completion is achieved when the conduct causes serious damage in excess of what is established in the administrative offence, provided that it exceeds the limits marked in the administrative law by a fixed amount or a specific percentage (e.g. by 100% or 200%).

(8) In the case of environmental damage due to construction, it should be explicitly included in Art. 339 CrimC the possibility of ordering the demolition and the restauration to the original state, as a general deterrent. Currently this is possible because Art. 339 CrimC is interpreted broadly and in any case, if the construction is charged at the same time for a crime against urban planning.

In this regard the influence of urban planning offences on the environment. (Arts. 319 and ss. CrimC) should be noted for two reasons:

(a) Construction can be performed in specially protected areas.

(b) This is the main form of corruption in Spain.

Thus, Greenpeace reports that "between 1987 and 2005 2 acres a day were destroyed in only in the first 500 meters of coastline."[46] "Spain has now lost nearly 60% of the area of coastal wetlands, 70% of coastal lagoons and only 20% of the dune systems are in good condition. The United Nations estimates that Spain lost 62% of the economic and environmental benefits of the coastal ecosystems due to urbanization and pollution. Indeed, one of

[43] See SSTS 2298/2001 4 December; 1182/2006 29 November.

[44] See Quirós 2014: 8.

[45] See regarding discharges Quirós 2014: 8.

[46] See http://www.greenpeace.org/espana/es/Trabajamos-en/Defensa-de-los-oceanos/Destruccion-a-toda-costa/

the main problems identified is the fact that when works are authorised on the coastal ecosystem, the economic impact linked to the loss of natural capital is not contemplated."[47]

An example is the case of the hotel Algarrobico located within the Cabo de Gata Natural Park. After conviction, this case did not lead to the demolition of the hotel but to a succession of contradictory judgments that have finally determined that the land was developable but belongs to the Junta de Andalucía (14 meters from the seashore). The case is still pending an appeal to the Supreme Court after a series of 15 judgments.

We believe that any study on the environment in Spain should include these crimes. In Spain, these are within the competence of the Environmental Prosecutor and are the largest group of offences, as shown in the statistics below).

6 Substantive Criminal Law on Public Servants' Liability in Relation to Environmental Crimes/ Offences

6.1 Analysis of criminal provisions concerning public servants liability in relation to environmental crimes

The Criminal Code includes crimes committed by the Public Administration and its officers (Title XIX), which are crimes of generic administrative malfeasance punishing any officer or authority which, knowing it to be illegal, issues an arbitrary resolution –for instance a permission or licence without justification in an administrative case (Art. 404 CrimC). The offence can be committed in any field of administrative activity. However, in environmental matters, the Code provides for an offence of specific administrative malfeasance or prevarication in Art. 329 CrimC which is broader than Art. 404 and is punished more severely because the penalty for the crime of Art. 404 CrimC adds imprisonment from six months to three years and a fine of eight to twentyfour months. Clearly, the protected legal interest is twofold: public administration and the environment.

After the reform introduced by Law 5/2010[48], of 22 June, Article 329 CrimC provides:

"1. Authority or public official who knowingly, any reported favorably grant clearly illegal licenses authorizing operation of polluting industries or activities referred to in previous articles, or in connection with inspections it any silenced violation of laws or regulations of general provisions that regulate, or omitted to carry out inspections mandatory, will be punishable under Article 404 of this Code and, in addition, with imprisonment of six months three years and a fine of from eight to twenty four months.

2. With the same penalties shall be punishable to the authority or public official himself or as a member of a collegial body would have resolved or voted in favor of granting knowing its injustice.

The main problem with this offence at the legislative level is that the application of Art. 329 in cases where the conduct of the authority or official results in the commencement or continuation of a polluting activity will constitute a crime against the environment (emission, discharge, removal, waste removal, etc.) that may seriously harm the balance of natural systems, the penalty envisaged is lighter than for a group of offences under the general offence of prevarication of Art. 404 and the corresponding crime against the environment. Therefore the doctrine and the jurisprudence understand that a restrictive interpretation of Art 329 should be maintained,

[47] GREENPEACE, *Destrucción a toda costa 2012*: http://www.greenpeace.org/espana/es/Trabajamos-en/Defensa-de-los-oceanos/Destruccion-a-toda-costa/Destruccion-a-toda-costa-2012/

[48] LO 10/1995 of 23 November, ("BOE" June 23) Penal Code in force from *December 23, 2010.*

applying it only to cases where a polluting conduct does not occur. Otherwise, it must apply the prevarication of Art. 404 CrimC jointly with the crime against the environment that the licence has facilitated.

7 Substantive Criminal Law on Organised Crime

There are no substantial provisions on organised environmental crime. There is a minor procedural provision (art. 282 bis Criminal Procedure Act) concerning the possibility of using undercover agents in crimes of trafficking in endangered species of flora or fauna (Arts. 332 and 334 CrimC) and crimes of trafficking in nuclear and radioactive material (Art. 345 CrimC).

The general rules on organized crime apply:

There is no definition of organised crime in the Criminal Code of 1995. In the new provisions introduced by the reform of the Act 5/2010 however, it introduces a distinction between criminal groups and criminal organizations, which are within the offences against public order. The new provisions will permit a wider application of Art. 515 CrimC, referring to racketeering, which was seen by the courts as an abuse of the right of association, derived from Art. 22 SC. Unfortunately, nothing in this reform makes reference to the environment but this is covered by the general rule.

New Art. 570 bis CrimC envisages a definition of criminal organization as "a stable group formed by one or more persons, for an indefinite term, in collusion and co-ordination to distribute diverse tasks or duties in order to commit felonies, as well as to carry out reiterated commission of misdemeanours". It prescribes that "whoever promotes, constitutes, organizes, co-ordinates or directs a criminal organization shall be punished with a sentence of imprisonment from four to eight years, if it has the purpose or object of committing serious felonies, and with a sentence of imprisonment from three to six years in other cases; and whoever actively participates in the organization, forms part thereof or co-operates financially or in any other way therein, shall be punished with imprisonment from two to five years if its purpose is to commit serious felonies, and with a sentence of imprisonment from one to three years in other cases".

The difference between criminal organizations and criminal groups lies in the stability and permanence required to constitute a criminal organization. For the purposes of the CrimC, criminal groups are formed when these do not meet some characteristic of the organization. Criminal groups therefore can be said to be a transitional type of association acting on an occasional basis or a union of persons not subject to a hierarchy although it should pursue the same purpose as the organization: the commission of crimes or concerted and repeated commission of offences.

Art. 570 (3) establishes that "a criminal group shall be construed as the collusion of more than two persons who, without fulfilling any or a number of the characteristics of a criminal organization defined in the preceding section, has the purpose or object of perpetrating felonies in collusion, or co-ordinated, reiterated commission of misdemeanours". It makes no distinction between the constitution of the group, the group coordination and the simple participation in the group. It directly punishes those that constitute, finance or integrate the group.

In Spain the main form of organized crime in these areas are identified with organized forms of corruption that has its principal manifestation in crimes against urban planning.

8 General Criminal Law Influencing the Effectiveness of Environmental Criminal Law: Sanctions in Practice

8.1 Application of sanctions in practice

(1) Three alternative forms of imprisonment are recognized in Spain:

(a) Suspended prison sentence (art. 80-87 CrimC). Envisaged for first offenders who have a sentence of less than two years (the minimum sentence for the ecological crime under art. 325 CrimC is 2 years). Its use is a discretionary decision by the judge (art. 80 CrimC) based on the dangerousness of the subject and to the existence of other criminal proceedings pending against that individual.

(b) Replacement of imprisonment (arts. 88 and ff. Crim C), by a fine or community service (for imprisonment up to 1 year) or permanent location (prison sentences up to 6 months). The defendant must not be a recidivist.

(c) Parole (Articles 90-93 CrimC). Applicable to all penalties when the offender is in third grade in the prison system, has served three quarters of the sentence, is of good behavior, with favorable social rehabilitation prognosis, and has satisfied civil liability.

(2) All those on whom a penalty of up to five years has been imposed (e.g. this is the maximum penalty for the ecological offence under Art. 325 CrimC) shall have direct access to the third grade in the prison system (Art. 36.2 CrimC).

(3) Admission of the facts before the judicial procedure acts as a generic mitigating circumstance (Art. 21.4 CrimC)

(4) Repair of damage or diminution of its effects (prior to the holding of the oral proceedings) acts as a generic mitigating circumstance (Art. 21.6 CrimC). It is envisaged as a specially qualified mitigating circumstance in Art. 340 CrimC and allows to reduce by one degree all conduct described in Articles 325-337.

(5) When passing sentence on a legal person, the following specific mitigating circumstances must be taken into account (art. 31 bis.4 CrimC), namely, that the legal person has:

(a) Confessed the infringement to the authorities before knowing that judicial proceedings will be brought against him or her;

(b) Has collaborated in the investigation of the fact, providing evidence at any point in the process, that were new and decisive to clarify criminal liability arising from the facts;

(c) Has proceeded at any stage in the proceedings and before trial to repair or reduce the damage caused by the offence;

(d) Has established, before the start of the trial, effective measures (compliance programmes) to prevent and detect the crimes that could be committed in the future with the means or under the cover of the legal person;

Regarding compliance programs there are two situations:

If it is proved that the cooperation of the legal person responds to the proper functioning of its mechanisms of prevention of crimes and that he acted with due care, there shall be no accusation.

If there was no due control, but subsequently the defendant collaborates with justice, it will function as a mitigating factor.

9 Responsibility of corporations and collective entities for environmental crimes

As was pointed out in point 4.9, the reform of the Criminal Code by the Act 5/2010 introduced into the Spanish legal system the criminal responsibility of legal persons, that is, the possibility of being convicted for committing a crime with the imposition of a penalty (Art. 31 bis). It is a system of autonomous liability for legal persons (independent of the liability of natural persons) for their own conduct or also for the criminal conduct of employees when they act in the exercise of social activities and on behalf of the legal person, provided that there was a lack of control.

Corporate criminal liability is not a general rule but it is limited to a number of crimes (numerus clausus system), those crimes whose regulation in the Special Part of the Criminal Code specifically foresees criminal responsibility of legal persons.

The reform of environmental crimes by the Act 5/2010 added several provisions establishing the criminal responsibility of legal persons but they do not covered all the crimes against environment mentioned in the Directive 2008/99/CE. It is especially remarkable the lack of such a provision for wildlife crimes and for crime related to nuclear substances or other hazardous radioactive substances (art. 345 CrimC).

The particular provisions establishing corporate criminal liability for environmental crimes are the following:

(1) For the release of substances that constitute an evironmental crime (art. 3 a) of the Directive and Art. 325 CrimC):

Art. 327 establishes the criminal responsibility of legal persons who commit this crime, according to the criteria or art. 31 bis). The penalty to be imposed is a fine (multa) with duration:

- from two to five years, if it is a crime with a penalty over five years of prison for the natural person;
- from one to three years in other cases.

Furthermore, the judge may impose the penalties of letters b) to g) of art. 33.7 CrimC

(2) For the release of ionising radiation (Art. 3 a) of the Directive and Art. 343 CrimC:

Art. 343.3 provides corporate criminal liability for conducts related to ionising radiation with a fine from two to five years. The judge may also impose the above mentioned measures of letters b) to g) of Art. 33.7.

(3) For crimes related to the management of hazardous waste, transnational shipment of waste and dangerous activities of a plant (Art. 3 b), c) and d) of the Directive and other offences of Art. 328 CrimC[49]:

Art. 328.6 foresees a fine as penalty for legal persons responsible of crimes punished in this Article 328. The special thing in this provision is that, although the fine is calculated in a certain duration (system of quotas), it must be substituted by a proportional fine from the double to the quadruple of the damage caused with the crime, if this last amount is higher than the fine calculated in months.

The judge may also impose the above mentioned measures of letters b) to g) of Art. 33.7 CrimC.

[49] Establishes deposits or landfills of solid or liquid waste or residues; exploitation of installations where a hazardous activity is perpetrated, or where hazardous substances or preparations are stored or used; the collection, transport, recovery or disposal of waste; shipment of waste. See above point 5.3.

(4) For crimes related to nuclear materials (Art. 3 e) of the Directive and Art. 345 CrimC).

There is no provision for criminal liability of legal persons in case of crimes related to nuclear materials of Art. 345 CrimC. It is considered a defect of the regulation which would have been avoided with the inclusion of a general clause for all offences relating to nuclear energy and ionizing radiation or, better yet, for all the crimes of catastrophic risk of Chapter I of Title XVII.

(5) For the crime related to ozone-depleting substances (Art. 3 1) of the Directive and Art. 348.1 CrimC).

Art. 348.3 establishes corporate criminal liability for the crime of "production, importation, exportation, placing on the market or use of ozone-depleting substances", newly incorporated in the Criminal Code by Act 5/2010. The penalty foreseen is a fine of one to three years except in the cases in which the conduct causes a higher damage, when the fine will be from the double to the quadruple of the amount of the damage.

The judge may also impose the above mentioned measures of letters b) to g) of Art. 33.7 CrimC.

Before the recognition of the direct and autonomous criminal liability of legal persons it was necessary to find an individual related to the company that also had to be criminally responsible. This created spaces of impunity. With the current model, however, the conviction of an individual is not required. The legal person shall be prosecuted even if a individual cannot be singled out (because the directly responsible person is not known or because the crime is the result of the combination of a plurality of individual actions causing the injury, - Article 31 bis 2 CrimC -, the individual has died or has avoided the course of justice - Art. 31 bis.3 CrimC).

A specific fine has been introduced which is considered adequate to threaten or deter legal persons and companies. However, these pecuniary penalties may be ineffective because they represent an acceptable cost for large companies:

- Low use of proportional punishment (Art. 328.6 and 348.3 CrimC) that can be adjusted in proportion to the seriousness of thedamage.
- The system of fines per day is preferred. For example in the case of Art. 325 CrimC, contamination would have, according to Art. 327 CrimC, a maximum penalty of three years (360x3), 5000 € per day (€ 5.4 million) and a minimum of one year (€ 1.8 million).[50] However, this penalty may be much lower than that which should be imposed in proportion to the seriousness of the damage. It would be more appropriate to establish a system as does Article 328 of CrimC: proportional subsidiary fine when the fine is less than the result of applying the fine per day.

However the problem is not only found in the accuracy of corporate responsibility, which of course has an important general and special preventive roles to play, it is also important to emphasize the legal relationship between legal persons and administration:

(i) Often the Administration is also present as a direct perpetrator or as a participant. From this connection it has to be underlined that the reform of 2010 has excluded local public administrations and government (Art. 31bis 5 CrimC), Organizations with public or administrative powers (professional associations, chambers of commerce, etc.; Bank of Spain, universities, etc.), the State commercial companies (RTVE, SEPES, SEPI). Some authors argue that in these cases limited liability should have been established, restricted to fines.[51]

[50] However, it is superior to administrative sanctions as provided in the Revised Water Law (Royal Decree 1/2001): very serious penalties: 0,5 - 1 m. €, Art. 117.

[51] See Ortiz De Urbina 2011: marg. 1707 and ff.

(ii) Pressure from economic groups.[52] The decision about allowable polluting behaviour is determined by economics, especially in times of crisis. One example is the case of fracking. Originally, the Castor project using fracking to make a store for gas was allowed. However, because of its environmental effects (and whose causal link has been proved) it has been stopped. At the same time the Prosecutor of Tarragona threatened to charge the Company and the Government authorities with environmental crime,[53] (which so far has not occurred).

10 General procedural provisions

10.1 Accusatory system

In Spain there is a mixed system of accusation. The Prosecutor is responsible for the charge and the procedure is in the responsibility of the Judge or Court. A private or popular accuser can also join in the trial.

The Prosecutor must make a formal accusation if the case reported is considered a crime (legality principle v. opportunity principle). The possibility of plea bargaining is very limited.

The injured parties can take part in the procedures as accusers ("private accuser") as can any other citizen with an interest in the case ("popular accuser", art. 125 Spanish Constitution (SC) and 101 Criminal Procedural Law (LECrim). In practice, this second legal figure allows environmental organisations or naturalist groups to take part in the procedures because the Constitutional Court hast interpretated the term "citizen" used by Art. 125 CE and 101 LECrim in a wide sense.

The Supreme Court has limited the scope of the popular action establishing the impossibility of continuing with a proceeding only at the request of the popular accusation because, under Article 782.1 LECrim, "if the prosecutor and the private prosecutor ask for the dismissal of the case for any of the reasons provided for in Articles 637 and 641, the judge must agree (TS 1045/2007 of 17 December, establishing the so called "Botín doctrine"). However, this doctrine has been qualified in the STS 54/2008 of 8 April (Atucha case) in the sense that it does not apply when the crimes deal with the protection of supra-individual legal interests because there can be no private accusation.

Therefore, environmental organisations can take part as popular accuser and they are able to sustain a criminal accusation even against the opinion of the Prosecutor's Office.

10.2 The procedural rules

The Spanish proceedings for serious crimes is divided into a phase of instruction (investigative) attributed to a named "Juez de Instrucción" and a trial (under the adversarial principle) that is in the responsibility of the Criminal Judge or a Provincial Court, depending on the severity of the penalty for the crime prosecuted .

The prosecution of environmental crime can correspond to:

[52] Del Moral García 2004: 165, 168; Barreiro 2005: 19; Morales Prats 2008: 1034.

[53] The prosecutor announced that it will charge a construction company, UGS Scales, formed by the Spanish group ACS (66.67%) and Canadian society CLP (33.33%) and Secretary of State for Climate Change in 2009, that signed the Declaration of Environmental Impact which was required to authorise the project.

(1) The criminal Judge, for summary proceedings (Articles 757 LECr), when the maximum penalty that may be imposed does not exceed 5 years imprisonment (for example, the basic ecological crime in Art. 325).

The Provincial Court shall decide appeals against decisions by the Criminal Judge.
(2) The Provincial Court, by summary proceedings where the imprisonment is more than 5 years but less than 9 (e.g. aggravated environmental crime in Art. 326 CrimC).

(3) The Provincial Court by the ordinary procedure in cases punishable by penalties higher than 9 years (e.g. the emission of ionizing radiations jeopardizing the quality of air, soil or water, animals or plants in Art. 343 CrimC).

However, certain persons are entitled to a special jurisdiction to the Supreme Court. These persons are: Prime Minister -Art. 102 SC and Art. 57.1.2 LOPJ - Presidents of the Congress and Senate, Deputies and Senators -art. 71 SC and Art. 57.1.2 º LOPJ - , Presidents of the High Courts, Presidents of the regional governments, and the members of those governments -arts. 57.1.2° and LOPJ - 73.3.a).

11 Procedural provisions on environmental crimes

There are no special procedural provisions on environmental crimes. They are dealt with like any other ordinary crime and treated before criminal courts according to the procedural rules corresponding to the seriousness of the penalty foreseen for the crime.

However, there are some general procedural provisions that may play an important role in the prosecution and punishment of environmental crimes such as the rules of "conformidad"[54].

The criminal process in Spain is governed by the principle of legality, according to which the Public Prosecutor is obliged to bring charges and apply the penalty provided by the law when it is considered that an illegal act has been committed. It is not possible for the offender to make an agreement with the prosecution to avoid criminal proceedings (e.g. by paying an administrative fine). However, after the reforms introduced by the LO 7/1988 and subsequent reforms, some manifestations of the principle of opportunity have been introduced in criminal proceedings.

Thus, in Summary Proceedings (Procedimiento Abreviado), for crimes punishable by up to nine years of imprisonment, there is the possibility of an agreement between Prosecutor and defendant which avoids a trial. This joint agreement can be made before the Judge of Instruction (Art. 784.3 Criminal Procedure Act) or at the trial, before evidence is given (Art. 787 Criminal Procedure Act). If the agreement is for a term not exceeding six years, the judge or court must pass sentence after carrying out a merely legal control of the agreement, without going into the facts accepted by the parties (Art. 787.1 Criminal Procedure Act). For example, in a trial of pollution under Art. 325 CrimC, punishable by imprisonment for up to 5 years, the parties may agree to accept a penalty of two years (the minimum).

The opportunity principle plays an even more important role in the Rapid Proceedings (Enjuiciamiento Rápido) for certain crimes (Art. 795 Criminal Procedure Act), in which if the sentence requested by the prosecution does

[54] The institution of "conformidad", in theory, is not plea bargaining since there is no prior negotiation (the law only envisages the acceptance of the highest penalty requested by the prosecutor), but in fact, the practice that has been developed allows it (since it was previously negotiated with the prosecutor).

not exceed 3 years; the agreement of the accused is accompanied by a reduction of the sentence by one third (Art. 801 Criminal Procedure Act). Environmental crimes are not prosecuted under this Rapid Procedure.

In practice, this institution of "conformidad" in criminal proceedings is so widespread and to such an extent, it is of concern to the criminal law academics. Official figures indicate that in 2011, and only in the Summary Proceedings, sentences based on the agreement of the defendant are between 48% - according to the General Council of Judicial Power - and 68% - according to the Public Prosecutor- although there is reason to think that there is an important hidden figure that would achieve rates of up to 85% in some courts.[55]

In the prosecution of environmental crime, the difficulty in proving certain elements and its complexity explains why the Prosecutor has a strong interest in reaching agreements of "conformidad" to avoid a trial.

12 Procedural provisions - actors and institutions mentioned in legal texts

12.1 The Reporting of the Crime

12.1.1 Police

In Spain, the prosecution of ecological crimes begins in the vast majority of cases with the action of the police, whether on their own initiative or because the crime has been reported. The police force which is usually in charge of beginning procedures in these cases is the Nature Protection Service (SEPRONA) of the Civil Guard. This police force is in charge of protection of soil, water and air, animal welfare and the conservation of fauna and flora. It is also concerned for example with dumps, environmental pollution, illegal trade of protected species, illegal hunting and fishing, defence of natural areas and the prevention, investigation and extinction of fires. Long before the official establishment of the SEPRONA, there were spontaneous initiatives led by local police services that considered the opportunity to create "groups or sections" specially trained to investigate environmental cases. They have achieved a high quality of the investigation leading later to the official establishment of this section of the civil guard. In those autonomous communities which have their own police forces, the processing of an ecological crime is often begun by the autonomous community police (particularly, in Catalonia by the "Mossos d'Esquadra"). However, none of these above-mentioned police forces has exclusive jurisdiction in these matters, so at times municipal police or forest guards initiate such proceedings as shown in the case law.

There are also specialized units to combat organized crime: GRECO (Special Group Response to Organized Crime) of the National Police or the ECO (Team against Organized Crime) of the Civil Guard.

12.1.2 Government inspectors

In some cases, prosecution is begun as a result of the activity of government inspectors whose task is to ensure that environmental regulations are not contravened. When an administrative process has begun and there is evidence that indicates that an activity may be a crime, the case must be given to the criminal authorities who will always have higher jurisdiction.

[55] See "Una regulación alternativa de las previsiones penales utilitaristas, Grupo de Estudios de Política Criminal, 2014") ("Alternative utilitarian penal provisions, Grupo de Estudios de Política Criminal, 2014 ").

12.1.3 Public Prosecutor

The public prosecutor may also intervene in the case - as he/she receives the report of a crime and requests that certain kinds of investigative procedures are carried out – and some degree of discretion is allowed. The Spanish Prosecutor's Office at the Supreme Court has a coordinator for environmental crime ("Fiscal de Medio Ambiente y Urbanismo") who is responsible for the coordination and supervision of the activity of all public prosecutors in relation to environmental crimes.

Initially, there was no special prosecution office for the environmental crimes. The Spanish prosecutor acted only with Instructions and Circulars (eg the instruction 1/86 and 4/90 in respect of forest fires and Circular 1/90 on the investigation and prosecution of crimes against the environment). However, the technical difficulty of the environment determined the need for specialization. First a Prosecutor of the High Courts and Provincial Courts was appointed with special tasks in the field of the environment. Individual prosecutors specializing in this type of crime created the Environment Prosecution Network in 2002.

It was through Law 1/2004 of 28 December on Comprehensive Protection Measures against Gender Violence, which included the Art. 22 of Law 50/1981 of 30 December, regulating the Organic Statute of Public Prosecutions (OSPP), that created a prosecutor in each Headquarters for prosecution and coordination of crimes and offences against the environment.

Subsequently, Law 10/2006 of 28 April merged the position of Attorney appointed under OSPP, withthe coordinator for offences relating to land use and to the protection of historical and artistic heritage of the environment and forest fires. It also established a Prosecutor in each High Court and Provincial Court, and "Environment Sections" specialized in crimes related to land use, the protection of historical heritage, natural resources and the environment, protection of flora, domestic animals and wildlife and forest fires. The Law 24/2007 of October 9 consolidates this model (arts. 18.quinquies y 18.3 Law 50/1981).

12.1.4 Prosecutor against Organised Crime

At the Supreme Court there is a specialist Prosecutor´s Office against corruption and organized crime ("Fiscalía Antidroga y Anticorrupción"). This latter Office is responsible for the prosecution of economic crimes and of those crimes committed by authorities and civil servants related with the phenomenon of corruption.

12.2 The Judiciary

The Spanish judiciary had started to protect the environment through the criminal law long before the EU directives were adopted, under the influence of the Council of Europe Resolutions and Convention on the protection of the environment using criminal law. Since then, the Spanish judiciary has had serious difficulties in addressing the problems related with environmental protection. The administrative law and jurisdiction was competent for sanctioning activities damaging the environment; criminal sanctions were introduced when the gravity of the damage caused required the deterrent force of the penal law.

Although this is a complicated matter which can give rise to lengthy trial, there are no specialised judges (vid. infra 12.5). .

Prosecutors have criticized the limited resources available to obtain evidence to justify further investigation and to obtain evidence after determining the existence, nature and scope of the damage. This lack of resources explains the frequency of dismissed environmental criminal pre-trial investigations as well as some failures to prove the existence of criminal offences in the trial. The courts dismiss most environmental cases for lack of evidence. This problem of lack of financial as well as human resources makes it very difficult in practice to execute certain examinations that are of utmost importance for the determination of damage, its gravity and scope

that will set the line between the administrative and criminal offence, and sometimes the discharge of the responsible persons.

12.2.1 Cooperation of Prosecutors with the Administration

The Annual Report of the State Prosecutor (2013: 316 and ff.) underscores the improved cooperation with all the administrations whose cooperation is required for the adequate protection of the environment from crime.

Cooperation of Prosecutors with the Regional Administration

Relations between the government prosecutors' offices and the different administrations are still improving. However, some reports still argue that they are not good (Valencia, Castellón ...) and there are only a few complaints received from the government, except in cases of forest fires. In the case of Pontevedra, in relation to the Agency for Protection of Urban Legality, the Prosecution states that it is necessary to promote the zeal of the Agency convening meetings with the prosecutors to achieve greater efficiency. Many of the reports, most notably that of Ávila, simply allude to the existence of a climate of mutual respect and correctness between the State Prosecutor and administrations, especially of Autonomous Communities.

Cooperation of Prosecutors with Local Authorities

Cooperation between prosecutors and municipal authorities improved markedly. Some prosecutors, such as the one of Guipúzcoa praised the rapid response of the municipalities. Others, like Soria, highlighted the support and collaboration of the prosecution, especially concerning illegal landfills and arsons.

Some prosecutors (Huelva, Alicante) also highlight the increased collaboration in urban planning crimes, although this increase is still insufficient. In other cases, the reports which refer, as in the example of Burgos, Almeria, Asturias, is the lack of cooperation from local authorities. The Prosecutor's report underlines the increased sensitivity of the Secretaries of Municipalities for even denouncing irregularities committed by them. According to the report, this can occur in some cases where the secretaries have been accused of inaction over illegal actions of Mayors.

State Authorities

Generally there are no problems in relation to the State Government Environmental Authorities. So, Zaragoza referred very positively to the Ebro River Basin Authority or Murcia Prosecutor referred to the Segura Basin Authority. It is not infrequent, however, that some reports will express their dissatisfaction with the attitude of certain environmental authorities nationwide. This is the case of the Office of Burgos referring to the Water Boards of the Duero and Ebro at its passivity in the face of the petition of documents and reports by the Prosecutor.

Relations of the Public Prosecutors of Environment and Planning with Police Forces Specialized in the Protection of the Environment

The public prosecutors are very positive about the professional behaviour of competent Forces specializing in protecting the environment. Some reports also mention, as in the case of Teruel, the need to standardize and regulate the status of such joint forces in full.

SEPRONA *Servicio de Protección de la Naturaleza de la Guardia Civil – Special Forces for the Protection of Nature.*

There is a widespread positive consideration of this environmental police force by the Spanish Prosecution in relation to the professionalism and efficiency of SEPRONA members. However, there have been some negative complaints. The reports also emphasize the very positive references to the Police Unit Attached to the Coordinating Office of Environment and Planning.

Forestry and Environmental Agents

The vast majority of prosecutors highlighted the laudable volunteerism and commitment to the collective defense of the environment in the course of their work. The report of the Office of Pontevedra and Tenerife call for greater collaboration with the Forest Guards. However, sometimes problems arise. The Office of Huelva, for example, recounts the dismantling of a network of agents who, because of the corrupt environment, had been receiving bribes from the owner of several farms in the Doñana area for not reporting crimes.

It is noteworthy that, little by little, they are overcoming the reluctance of certain senior representatives of the Forest Rangers in respect of claims that arise directly from prosecutions initiated by NGOs, individuals and other Forest Rangers.

This is, in any case, a subject in which the Coordinating Office has been developing a continuous and persevering work almost from its inception.

Local Police

Cooperation with Local police is important in issues such as noise pollution, and this has been reflected in the annual reports of the Office of Huelva. Similar approach expresses the Office of Pontevedra. The Office of Tenerife regrets the little involvement of the police sector and the small number of complaints.

Judicial Perspective

The Report of the Prosecutor in Madrid highlights serious divergences at the time of sentencing by the Courts.

According to the Report of the Public Prosecutor Coordination Office 2012, while some judges condemn the defendant after a rigorous study, others are distinguished by their unalterable tendency to absolve defendants on poor legal argument. The Seville report refers to the "irreconcilable disparity" of judgments relating to demolition, with three sections of the Court granting it quite regularly and a fourth section that does not apply as a general rule.

12.2.2 International Cooperation

About law enforcement cooperation, mutual legal assistance and extradition, Spain has several mechanisms to facilitate judicial cooperation. There are, in particular, two facilitating mechanisms that are principally useful to countries with significant, ongoing cooperation, as well as to investigative and prosecutorial entities established for single investigation cases:

- The organization of regular meetings between the central authorities. In 2012, the Spanish Office Coordinator of Environment and Urban Planning met with specialized prosecutors from Peru and Vietnam.
- The participation in judicial networks. Spain participates in:
    - The European Judicial Network created in 1998, which has played a longstanding intermediary role between authorities of EU Member States involved in mutual assistance practices;
    - The units of the Ibero-American Legal Assistance Network (IberRed) dealing with criminal justice cooperation among practitioners in Spanish-speaking countries.
    - IMPEL, the European Network for the Implementation and Enforcement Environment: for instance, in the IMPEL TFS-Prosecutors project, the Spanish Public Prosecutor participated in this project aiming to stimulate and strengthen the start of a platform or (informal) network of prosecutors in Europe involved in the prosecution of environmental crime with a special focus on the Waste Shipment Regulation 1013/2006. This network should facilitate the exchange of relevant case law, prosecution information like the level of fines, working methods, prosecution approach, interpretation and practical experiences. Furthermore it would like to inform participants on new developments within the compliance of the Basel Convention and WSR. The two main planned project results are a workshop for 20 participants of two days, one taking place in Spain and an outline of a database on the Waste Shipment Regulation for EU prosecutors.

Besides the formal channels of mutual legal assistance, Spain entertains informal relationships with foreign authorities based on personal experience and a history of previous cooperation.

Spanish authorities give priority to the establishing of direct contacts between judicial authorities to facilitate the submission and execution of requests for cooperation and avoid refusal based on misunderstandings. UNODC has reproduced in its Digest of Organised Crime Cases the Spanish mutual assistance model of agreement to facilitate cooperation among the authorities of the countries involved.[56]

The Head Prosecutor on Environment and Planning is responsible for environmental issues of international collaboration and participates on a regular basis on the meetings and projects of:

- IMPEL Programmes (The European Network for the Implementation and Enforcement of the Environmental Law).[57]
- The committees of Multilateral Environmental Agreements such as CITES, Basel or Rotterdam Conventions.
- European Network of Prosecutors.

12.3 The Spanish Ombudsman

The Defensor del Pueblo, the Ombusdman (Ombusdman hereinafter), is the High Commissioner of the Parliament responsible for defending the fundamental rights and civil liberties of citizens by monitoring the activity of the Administration and public authorities. The Ombusdman must perform his or her functions independently and impartially, autonomously and in his/her own good judgment and enjoys inviolability and immunity in the exercise of his or her office.

Any citizen may request the intervention of the Ombusdman, which is free of charge, to investigate any alleged misconduct by public authorities and/or the agents thereof. The office of the Ombusdman can also intervene ex officio in cases that come to their attention without any complaint having been filed. The Ombusdman prepares an annual report for the Parliament and may submit case reports on matters which are considered particularly serious or urgent or requiring special attention.

In the last Annual Reports, it has been denounced that one aspect where it must remain particularly vigilant involves respect and fulfilment of regulations governing the right of access to environmental data, as this is, unfortunately, not the line followed by many administrations with authority in such matters. The Ombudsman has been obliged to remind the administrations, in its reports, of the duty of all public authorities to foster a healthy, sustainable environment. The widespread existence of departments responsible for conducting and approving environmental quality assessments does not diminish the duty of other departments responsible for projects that alter the physical environment to strictly comply with basic regulations on environmental protection.

- The Ombudsman can receive collective action presented to it by citizen groups or NGOs. In 2009, for instance, 5,008 residents of Sagunto (Valencia) denounced the potentially grave environmental impact that would, in their opinion, ensue from executing the Beach-Port Remodelling Project in that locality.
- He also receives individuals' complaints.
- Ex Officio, the ombudsmand can lead investigations relating to the environment, including the Ministry of Public Works and the Ministry of Industry, Tourism and Trade, for instance relating to the potential environmental impact of the projected layout of several infrastructures in the Sierra de Aracena and in Doñana Park, both in Andalusia.[58]

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[56] UNODC Digest of Organised Crime Cases, 2012, https://www.unodc.org/documents/organized-crime/EnglishDigest_Final301012_30102012.pdf.

[57] The Spanish representative before IMPEL is Carmen Canales of the Ministry of Agriculture, Environment and Food, http://impel.eu/national-overview/national-coordinators/spain/

[58] Ombudsman's Annual Report 2009, p. 35.

One other useful tool that the Ombudsman uses is his reminders of duties that hesends to national, regional and local administrations. For instance, the Ombudsman has sent to the Department of the Environment, Land and Infrastructures of the Autonomous Community of Galicia a reminder regarding the legal duty incumbent upon it to start punitive procedures for town planning infractions, and to process them in accordance with the principle of effectiveness included in Article 103.1 of the Constitution and Article 3 of Law 30/1992, of the 26th of November, on the Legal System for the Public Administrations and of Common Administrative Procedures, modified by Law 4/1999 of the 13th of January.

Most of the Autonomous Communities have also their Ombudsmen within the framework of their competences.

12.4 Citizens and NGOs

Citizens and NGOs both have an important role in protecting the environment. On one hand, they perceive directly or monitor the existence of attacks against the environment and they can denounce these attacks to the prosecuting authorities. The latter is possible because, as we have explained, a special procedural rule in Spanish criminal legal system is the right of any citizen to take part as accuser in a criminal procedure, which is called "popular accusation" (acusación popular)[59]. According to Art. 125 SC and 101 Criminal Procedural Law (LECrim), any citizen, even without a particular interest in the case, can take part as the accuser in a criminal procedure.

The possibility to resort to criminal law to protect the environment is a powerful tool for citizens and NGOs.[60]

In the case of administrative offences and the administrative activity in general, the citizens have the right, granted by the Aarhus Convention and the EU directives, to initiate proceedings and have access to justice as incorporated in the Spanish system by the Law 27/2006, of 18 July, establishing rights of access to information, public participation and access to justice in environmental matters (incorporating Directives 2003/4/EC and 2003/35/EC) regulated in its Title IV on Access to Justice and administrative supervision in environmental matters. There are three important aspects, in relation to the jurisdictional scope of this act, transposing into national law the provisions of both the Aarhus Convention and the European Directives in the field.

First, Article 20 recognizes that when the public considers that an act or an omission attributable to a public authority has violated the rights under this Act regarding information and public participation, the public has the possibility of bringing appropriate claims, namely: first, administrative claims regulated by Law 30/1992 of 26 November Regime Law of Public Administrations and the Common Administrative Procedure, and other applicable regulations, and, where appropriate, the administrative appeal provisions of Law 29/1998, of 13 July, regulating the Administrative Courts.

This is a remission to the general system of administrative and contentious-administrative appeals and complies with the requirements of Article 9.1 of the Aarhus Convention, according to which the public can appeal to a judicial body and so prior to a judicial remedy, there must be a procedure for review of the application by a public authority or an independent and impartial body. It also gives effect to Article 9.2, which allows appeal against decisions, acts or omissions within the scope of public participation in specific activities.

Second, Article 21 of Law 27/2006 of 18 July contemplates administrative claims in the actions of third parties considered as public authority, irrespective of whether they are public administrations. It points to the fact that, when the public considers that an act or omission attributable to any of the persons referred to in Article 2.4.2 infringed its rights under the law, it may directly file a complaint with the Public Administration under which the

[59] See above point 10.1.

[60] Vercher (2003: 455) considers that the CrimC "has become a legal instrument in the hands of the ordinary citizen to participate in the fight against pollution, especially since the Spanish system of Criminal Legal Procedure permits the use of class actions to protect the common interests such as the environment of the human welfare".

authority operates. The resolution of this claim puts an end to the proceedings, it is enforceable and, in its absence, the court can enforce it by imposing periodic penalty payments.

Finally, the 27/2006 Law of 18 July, establishes a class action on environmental issues with the following characteristics:

The action may be brought against acts and, if applicable, attributable to the public authorities that contravene the rules relating to the environment listed in Article 18.1 on omissions.[61]

The legitimation for the exercise of the legal action is solely for persons who meet the three requirements set out in Article 23, namely:

- acting in accordance with purposes accredited in their statutes or the protection of the environment in general or any of its elements in particular;
- that have been legally constituted at least two years before the exercise of the action and that actively exercise the activities necessary to achieve the purposes specified in its statute;
- that according to its statutes develop its activities within the territory that is affected by the administrative act or omission.

The popular action works at the administrative and the jurisdictional levels, either through administrative appeal procedure established under Title VII of the Law 30/1992, of 26 November, or through the administrative appeal provisions of Law 29 / 1998 of 13 July.

As the Preamble to Act 27/2006 of 18 July states, there is a "sort of" class action, or as some authors call it, a legitimization for legal empowerment. Indeed, the traditional configuration of the popular action refers to cases in which the law gives standing to any citizen without having to prove any particular circumstance, right or interest, as only acting in the interest of legality. Against this, the Law 27/2006, of 18 July, configures a popular action for non-profit making legal persons who meet specific conditions.

Nevertheless, the Law 10/2012 of 20 November on Taxes and Charges of the Justice System is a major obstacle for NGOs establishing the obligation of paying different taxes to have access to the Administration of Justice. For most NGOs, this is a total hindrance and seriously limits the right to initiate proceedings and access to justice granted by the Aarhus Convention and EU directives. From now on, few NGOs will be in an economic situation that would allow them to pay the abovementioned taxes. The Ministry of Justice taking into account this situation has declared that in the reforms to come the access to free justice will be extended to environmental NGOs.

12.5 Information on the Activities of Institutions

(1) Information is available on the prosecution of environmental crimes. There is no specific agency (eg environmental agency) with powers for ex ante monitoring to locate information. Therefore, we must resort to various sources with different objects and methodologies.

[61] Art. 18. *Standards related to the environment.* 1. The public authorities shall ensure that safeguards are observed on participation laid down in Article 16 of this Act in relation to the development, modification and revision of general provisions that deal with the following matters: a) Protection of water, b) Protection against noise, c) Protection of soil, d) Air pollution, e) Management of rural and urban land and land use, f) Nature conservation, biodiversity, g) Forestry and forestry, h) Management of waste, i) chemicals, including biocides and pesticides, j) Biotechnology, k) Other emissions, discharges and releases to the environment, l) Assessment of environmental impact. m) Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. n) Any other matters established by regional legislation.

(a) Ministry of Interior

(i) Balances on crime:[62] Information available on the site about registered criminal offences does not include references to crimes against the environment.

(ii) Statistical information of facts and known crimes (Información estadística de los hechos conocidos y esclarecidos).[63] There are no references to environmental crimes. Thus we must go to statistical information on "nature conservation", that contains the Guardia Civil environmental complaints but only those of 2012 appear.

(iii) Statistical Yearbook of the Ministry of Interior (Anuarios estadísticos del Ministerio del Interior).[64] It includes references to "Cases studied by the Guardia Civil in environmental complaints" (analysed statistically[65]).

It organizes information distinguishing between crimes, misdemeanors and offences; facts, known crimeand different attacks against the environment. The latter do not coincide with those clasified in CrimC.

It gives important information on the evolution of allegations in the criminal and administrative proceedings. Thus, the 2012 Yearbook states that "In the development of the regular service there have been reported to different authorities a total of 144,235 offences (criminal and administrative), representing an increase of 5.69% over the previous year (136,467). This increase occurred in the number of administrative offences (133,002 in 2011 and 141,050 in 2012), showing a decrease in criminal offences (3,465 in 2011 and 3,185 in 2012). There has also been an increase of 8.00% in the number of detainees (1,349 in 2011 and 1,457 in 2012)".[66]

Similarly, the Statistical Yearbook reveals the very highlevel of effectiveness of the Civil Guard. For example in 2012 of 144,235 complaints on environmental issues, the Civil Guard solved 142,778 (one 98.98%).

However, the lack of correlation with the classification set out in CrimC makes it impossible to know the actual evolution of the environmental criminal law enforcement. It is recommended in this case to mention the CrimC Article that has been used to punish crimes.

(iv) Prison Statistics. Information on the "Distribution of condemned population by type of crime, according to the current code" does not include an item on environmental crime.[67] It would be advisable to incorporate this information in order to asses the number of custodial sentences for these crimes.

(b) INE. The National Institute of Statistics provides statistical information on convicted persons.There is a specific item on the "nature of the offence and degree of completion (3.4)". Although the article of CrimC applied is not specified, INE reports on the number of convictions for each of the chapters of Title XVI CrimC.

However, there is only a general reference to Title XVI when searching for information about the "length of sentence and type of offence (5.6)",[68] As this chapter integrates the crimes on urban planning and historical and artistic heritage it makes it more difficult to know the application of criminal environmental law in a strict sense, especially for the importance of urban planning crimes in Spain.

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[62] http://www.interior.gob.es/web/interior/prensa/balances-e-informes/2014

[63] http://www.interior.gob.es/web/archivos-y-documentacion/documentacion-y-publicaciones/anuarios-y-estadisticas/anuarios-estadisticos-formato-reutilizable/2012/seccion-2/subapartado-2.1

[64] http://www.interior.gob.es/es/web/archivos-y-documentacion/documentacion-y-publicaciones/publicaciones-descargables/publicaciones-periodicas-anuarios-y-revistas-/anuario-estadistico-del-ministerio-del-interior

[65] http://www.interior.gob.es/web/archivos-y-documentacion/documentacion-y-publicaciones/anuarios-y-estadisticas/anuarios-estadisticos-formato-reutilizable/2012/seguridadciudadana/conservacionnaturaleza

[66] Anuario estadístico del Ministerio del Interior 2012, Annual Report on Statistics of the Ministry of Interior 2012, p.315, it includes the infrindgements of urban and town planning.

[67] http://www.interior.gob.es/web/archivos-y-documentacion/documentacion-y-publicaciones/anuarios-y-estadisticas/anuarios-estadisticos-formato-reutilizable/2012/instituciones-penitenciarias

[68] http://www.ine.es/jaxi/tabla.do?path=/t18/p466/a2012/l0/&file=05006.px&type=pcaxis&L=0

Table 5. Punishment by duration in crimes relating to land use and urban planning, protection of historical heritage and the environment

	0 a 2 años	> 2 a 5[69] años	> 5 años
2012	697	15	1
2011	582	5	0

Source: INE

The data reveal a significant number of convictions and most are for a period of less than 2 years imprisonment that may be suspended because of its lenght (see above 8.1). However, in previous years the information referred only to crimes against urban planning.

	Crimes against Urban planning	Crimes against Historical heritage	Crimes against Environment
2010	593	6	3

Source: INE

It can be seen that the volume is such in relation to previous data (sentences for urban planning in 2010 are higher than those in 2011 which include environmental crime in the strict sense) that it is impossible to know the length of sentences imposed for environmental offences.

(c) Prosecutor's Office

The Annual Reports of the State Prosecutor[70] offer very interesting information in order to verify the degree of implementation of environmental criminal law. However, the collection and processing of data is not made by specialists but by willing staff of prosecutors's offices. This can cause technical inaccuracies of various kinds.

In conclusion, information on environmental crimes, convictions for these crimes and penalties imposed (type and duration) is not readily available, although it is offered by different agencies using different items and methodology, not distinguishing among crimes and being incomplete. This makes it difficult to draw a picture of the enforcement of environmental criminal law. The creation of a national agency to structure these data is recommended.

(2) Evolution of Prosecution of Environmental Crime

Table 6. Statistics of Evolution of Prosecution of Environmental Crime 2008-2012.

Trials	2008	2009	2010	2011	2012
Total	4.530	5504	5284	5964	5602
Environment	602	526	596	615	522
Urban Planning	1734	1737	1710	1754	892
Historic Heritage	278	190	231	261	317
Flora and Fauna	551	676	786	719	696
Forest Fires	1257	2170	1780	2306	2671

[69] Art. 325 CrimC establishes a sanction of imprisonment of 2 to 5 years.

[70] http://www.fiscal.es/Documentos.html?cid=1240559967610&pagename=PFiscal%2FPage%2FFGE_sinContenido

Domestic animals abuse	108	205	81	309	504
Convictions	**2008**	**2009**	**2010**	**2011**	**2012**
Total	525	607	687	677	799
Environment	32+1 SC[71]	24+6	31+2	55	39+5
Urban Planning	301 +1 SC	386+3	425+1	408	467+5
Historic Heritage	7	13	10	9	16
Flora and Fauna	84	80	96	80	119
Forest Fires	90	85	96+1	63	115+1
Domestic animals abuse	11	19+1	28	32	32+1
Acquittals	**2008**	**2009**	**2010**	**2011**	**2012**
Total	190	244	282	289	389
Environment	21	16	32	20	25
Urban Planning	96	126	165	161	248
Historic Heritage	3	3	16	7	8
Flora and Fauna	43	45	23	61	55
Forest Fires	21	51	34	30	44
Domestic animals abuse	6	3	12	10	9

Source: Annual reports of the Office Coordinator on Environment and Urban Planning[72] - authors' compilation.

The table shows that a large part of the trials and convictions focus on urban problems. However there is a drop since these crimes represent 29.4% of the trials in 2011 and only 15.9% in 2012). However it still remains the largest category and it should be analysed to see the extent that these attacks on urban planning have affected nature and wildlife and hide the problems of corruption.

Similarly, it can be seen that the conviction rate is very low in strictly environmental crime. For example, for 2012 only 8.5%[73] of trials are for environmental crimes. Crimes against wildlife are double at 17%[74], but in both cases, the conviction rate is well below urban planning, which is 52.9% of the trials.[75]

(3) Aspects that may influence the implementation of environmental crimes:
(a) Problems of existence of authorization (see 4.4).

(b) Author identification problems. In one third of the alleged crimes or offences detected annually, the author is not identified.[76] This is very common in arson or illegal use of poisoned baits and very seldom in cases of pollution of Art. 325 CrimC.[77]

[71] The added figure corresponds to judments of the Supreme Court.

[72] Available at www.fiscal.es

[73] 44 convictions in 522 trials, see table.

[74] 119 convictions in 696 trials.

[75] 472 convictions in 892 trials.

[76] See Quirós 2014: 6, who denounces the lack of identification in more than 1000 cases out of a total of 3000

(c) Lack of economic resources. The State Prosecutor's Office Annual Report (2013: 314) puts it very clearly when reporting on human and material resources: it shows, as in previous reports, "a situation of serious shortcomings, which attempts to overcome with higher doses of commitment. In some cases, such as that of the Prosecutor's Office of Málaga, the situation is described, and has been called disastrous for several years in his Reports,".

(i) Lack of inspectors and appropriate controls, this lack means that the enforcement agents cannot provide adequate evidence to ensure convictions.

For instance, in 2009, the Ombusdman opened and finally send an ex officio complaint against the Madrid Mayor's Office relating to the reduction in the number of monitoring stations, and assessment of factors contributing to pollution in areas of high road traffic density in the capital.

(ii) In this area of specialization of the police and prosecution, the increase of the number of personnel has been a major factor in prosecution of environmental crime. It is an aspect that could be compared with those of the other EU Member States. Nevertheless, the number of prosecutors is considered to be insufficient, although it has has increased by 10% in the last 4 years, 126 to 139[78], yet for a population of 46 million people, there is a ratio of an environmental prosecutor for every 331,000 inhabitants.

Likewise, there are insufficient technical personnel. "Numerous Sections of Environmental Prosecutors have pointed out the need for specialist experts on environmental issues to be able to address the scientific aspects that the application of environmental criminal law entails. In any case, the existence of the Technical Unit has been filling, at least for now, that gap".[79] It should be noted that the technical personnel will be decisive in providing evidence.

(c) There are no specialised judges. Due to the legal, scientific, and technical difficulties of the subject their training is necessary. The goal would be to gain greater efficiency in the fight against this criminal phenomenon.[80]

(d) As indicated in section (4.4) is important to note the role of the administration in conducting attacks against the environment due to its lack of monitoring in compliance with authorizations given for the exercise of polluting activities and lack of compliance with existing environmental regulations. Apart from the decline in preventing criminal behaviour against the environment, this makes it difficult to implementat environmental legislation in the absence of sufficient evidence and it leads, in many cases, to impunity of the polluter (typically covered by a 'error de tipo' –acting under the legal cover of a licence that the Administration has granted illegaly).

(e) Reduction of social concern for the environmental aspect when it collides with economic interests. For example, in the case of the hotel Algarrobico, the mayor and the residents of the nearest town (Carboneras), have always defended the adequacy of its construction in view of the 600 jobs that it would generate. However, this is not a view that is shared by the whole population.

(4) Although there is still a significant way to go an increase in the effectiveness of environmental protection must be recognized. This can be attributed to the greater pressure of some sectors of society that, thanks to environmental awareness, tolerates less the attacks gainst the environment and demands criminal)liability when they occur. In a more technical sense, it may be due to the increase in offences that have covered gaps of

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[77] See Quirós 2014: 6.

[78] State Prosecutor's Office Annual Report 2013: 300.

[79] See the State Prosecutor's Office Annual Report 2013: 315.

[80] In the field of organized crime, the State Prosecutor's Office Annual Report 2013 (p. 749 and ff.) requests the creation of specialized courts for the investigation of organized crime (Juzgados de Instrucción) at the provincial level, but only in those areas where it is required. .

criminality, and the increase of criminal proceedings, in the territories where there are environmental police and prosecutors.

So the State Prosecutor's Office Annual Report of 2013 indicated on illegal oil spills that "the Directorate General of Merchant Shipping has informed the Environmental Coordinating Unit of the State Prosecutor's Office, possibly as a result of the aforementioned criminal proceedings, that there have recent declines of about 90% of the figures of previous discharges by ships in Spanish territorial waters and continental shelf ".[81]

13 Administrative environmental offences

13.1 Types of administrative sanctions

Personal sanctions

Closures.

- Temporary or permanent closure of part or all of the facilities.
- Ultimate sanction or precaution.

Ban on making contracts with the State.

- Prohibition on contracting with the government (usually until they have complied with the corrective measures and/or have paid the penalty).

Termination (termination, suspension) of favorable administrative acts.

- Temporary or permanent withdrawal of the certificate authorizing the performance of some polluting activities, in which the offence has taken place, which means the closure of the establishment or termination of activity.
- Preventive measures intended to prevent the subject being in the situation exercising rights under the administrative acts that enable new breaches against the environment.
- Not really considered a punishment but a result of contractual provisions.

Temporary professional disqualification.

Permanent or temporary exclusion of the possibility of obtaining subsidies and support.

Economic Sanctions

This consists in the payment of a sum of money or the deprivation of an object (confiscation, seizure).

Penalty.

[81] See the State Prosecutor's Office Annual Report 2013: 333.

Seizure of benefits.

Restoration of altered nature.

- **Reversible damage**.
  - Demolish or destroy installations or illegal works.
  - Necessary work for the restoration or improvement.
  - Voluntary adoption of these measures may be considered in mitigation.
- If the damage is irreversible
  - Compensation will have to be paid, in addition to the fine (irreversibility will also be taken into account when setting the fine gradation).
- The lack of restoration conditions the imposition of new sanctions independent of the main sanction.
- Subsidiary restoration by the Administrative authority (with respect to damage after the deadline set by the requirement for restoration/reparation) at the expense of the person condemned (unless in case of inaction or negligence of the administration).

14 The role of administrative authorities

14.1 The Administration and the Protection of the Environment

Double condition of the Administration:

(1) The Administration as the Environmental Advocate. In this condition the Administration can adopt:

- Direct measures (planning tools).
  - Licenses or authorizations.
  - Control on the exercise of polluting activities.
  - Regulating the use of resources.

    ⇓
  - Coercive sanctions for noncompliance.
- Indirect measures.
  - Techniques of positive incentive and promotion.
    - Supplies.
    - Advantages.
  - Negative measures (interference)
    - Taxes.
    - Audits, labelling.

      ⇓
  - Without applying coercion in case of failure to comply.
- The Administration can use cooperative tools and techniques: agreement or arrangement between companies and public administrations and between public administrations (following the cross-cutting of the subject)
- Arbitration activity.
- Utilities. Public services

- Subject: activity whose purpose is to provide a necessary utility/service for the normal development of social life.
- Formal: State or other territorial agent assumes the duty to contribute. This supply may be made directly or indirectly.

  ⇓
- Examples: collection, valuation and disposal of urban waste, water supply and treatment.

(2) Potential offender.

- Techniques for the administration to control itself.

Some authors want a General Environmental Act to be created.[82] This legislative measure, in accordance with the principles of equality and solidarity, should represent a National Pact for the Environment to resolve some of the following issues:

- Economic model.
- Competence framework of the Administrations.
- Preventive / punitive model.
- Financing criteria of environmental policy

14.2 Territorial distribution of competences

(1) The State has the authority to set the basic environmental regulations (minimum regulation): Art. 149.1.23 Spanish Constitution.

- The State establishes the basic legislation by Act.
- Its implementation is the responsibility of the Autonomous communities that have assumed this competence in their statutes:
  - Competence to frame regulations (Art. 97 SC), "which is indispensable and justified by its technical content or its cyclical or seasonal, circumstantial character, and in short subject to frequent and unexpected changes or variations".[83] Sometimes, it is the basic law itself that fixes that the regulatory development is going to have a basic character.[84]
  - Implementing acts.

(2) The regions can expand or improve this regulation, but may not restrict or diminish it (STC 166/2002): Art. 148.1.9 SC.

(3) Local Authorities have powers in matters of environmental protection (Art. 25.2.f LRBRL). They can issue by-laws for penalties while respecting the national and regional regulations and there has to be prior legal authorization. Nevertheless, modification of LBRL by Law 57/2003 recognizes the sanctioning powers of Local

[82] Huerta 2001: 51; Matellanes 2008: 89 and ff.

[83] STC 102/1995, 26 June, see Lozano Cutanda 2010: 103.

[84] Lozano Cutanda 2010: 103.

Authorities (in the absence of specific sectorial regulations) within limits (graduation of breaches: very serious, serious and minor offences, establishing limits for sanctions 3000, 1500 and 750€ respectively).[85]

a) **Local authority competences** in which the environment is included (Art. 25). Direct competence (with more than 50,000 population) and indirectly.

- Parks and gardens.
- Traffic management of vehicles and people.
- Fire prevention and extinction.
- Planning, management, implementation and urban discipline.

b) **Compulsory Services**

- Collection and treatment of waste.
- Cleanliness.

c) **Sewage System**

d) **Additional Activities**

- Education.
- Culture.
- Health.
- Environment: Local authorities can promote the development of environmental policies.
    - Local Agenda 21: non-binding document, municipal management strategic plan for the integration of environmental, social and political policies, with the aim of achieving sustainable development.

14.2.1 Exclusive Competences of the State and the Autonomous Communities that affect the Environment

(1) State:

- Management of water exploitation of more than one Autonomous Community. (Art. 149.1.22 SC).
- Bases of mining and energy (Art. 149.1.25 SC).
- Defense of historical, artistic and monumental heritage (Art. 149.1.28 SC.)

(2) Autonomous Communities, (CCAA hereinafter).

- Land management and urban planning.
- Water Resources Exploitation of interest in the CCAA.
- Hunting and river fishing.

[85] Lozano Cutanda 2010: 294 and ff.

- Conflicts of competence: for example state regulation on flora and fauna protection. Solutions according to the Constitutional Court:
  - Need for collaboration and coordination.
  - Only standards that are immediately connected to the environment (difficult concept to define) can supersede powers of CCAA (STC 102/1995)

Protected natural areas

This is a different competence from the environment competence (STC 102/1995).

It is an exclusive competence of the CCAA: however, according to the STC 102/1995 the State may declare National Parks in cases where there is a general interest of the Nation (a joint management committee that makes use of master plans and management). Also the CCAA must exercise their powers in accordance with the basic state law on the environment. For example, Plans for Natural Resources of the CCAA should respect the general provisions on management and use of natural resources contained in guidelines for the management of natural resources provided by the Law of Conservation of Natural Areas (basic regulatory provisions that belong to the State competence due to its exceptional character).

- Plan of national parks in Spain: outlines the basic conservation principles, provides for the representation of the Autonomous Communities on the Council of the National Network of national parks.
- The process of declaring and creating National Parks belongs to the State Parliament.

14.2.2 Relationship of the State and the Autonomous Communities and the European law.

(1) Jurisdiction of the State

- Transposition of European law (in matters within its competence).
- Position of guarantor of the effective enforcement of European law. The State Government is always responsible for non-compliance.
  - Sanction or penalty.
  - Damages to private persons.

(2) CCAA Jurisdiction.

- Normative Inactivity of CCAA.
  - Mechanism of Art. 155 SC.
  - Adoption of supplementary rules for the State: Art. 149.3 SC (STC 79/1992), not to prejudice the rights of citizens.
- Incorrect transposition: Courts of Justice.

14.2.3 Administrative organization of Ministry of Agriculture, Environment and Food.

The current Ministry of Agriculture, Food and Environment, established by Royal Decree 1823/2011 of 23 December, by which government departments are restructured, is the department of the Central Government which has the competence for the proposal and implementation of the policy of the National Government in environmental, agricultural, fisheries and food stuff, according to the constitutional distribution of powers

between the State and the Autonomous Communities, in collaboration with other ministries and public administrations,

The Ministry has the competence to formulate policies of environmental quality and prevention pollution and climate change, environmental impact assessment, encouraging the use of cleaner technologies and cleaner consumer habits and more sustainable protection of the environment, biodiversity, and conservation and sustainable use of natural resources and proper preservation and restoration.

It is also competent to transpose and implement the EU policy on water, according to the Water Framework Directive with the purpose of achieving a good ecological status of water.

The Ministry of Agriculture, Food and Environment is likewise competent for the proposal and implementation of the state policy for the protection and conservation of the sea and maritime-terrestrial public domain, as well as participation in the planning of research policy Biodiversity of marine ecosystems, all from a perspective that do support the strategic importance of the Spanish coast for economic and social development with the need to preserve the marine environment and prevent its

Its powers shall be in coordination and without prejudice to those corresponding to other departments. In particular, all the competences related to the institutions of the European Union or international organizations shall be exercised in coordination with the Ministry of Foreign Affairs and Cooperation and, where appropriate, with the Ministry of Economy and Competitiveness.

The Secretary of Environment is the highest organ of the Ministry of Agriculture, Food and Environment, under the authority of the Minister, directs and coordinates the execution of the powers of this department in relation to the formulation of policies environmental quality and pollution prevention and climate change, environmental assessment, promoting the use of clean technologies and habits of cleaner and more sustainable consumption. The Secretaru is also responsible for the definition, proposal and implementation of ministry policies concerning the protection of the environment, biodiversity, conservation and sustainable use of natural resources and their proper preservation and restoration, conservation of fauna and flora, habitats and natural ecosystems in the terrestrial and marine environment, and the integration of territorial, environmental and ecological conditions in the actions of its competition considerations.

The Secretary of Environment is directly responsible for the definition, proposal and implementation of ministry policies concerning the definition of the objectives and programs arising from the Water Framework Directive, the direct management of public water.

The Secretary of Environment shall exercise the powers of the department of planning and implementation of policies for the protection and conservation of the sea and maritime-terrestrial public domain, and participation in planning policy research on biodiversity of marine ecosystems.

The following governing bodies depend on Secretary of State of the Environment:

a. The Spanish Office for Climate Change, with the rank of general management.
b. The Directorate General of Quality and Environmental Assessment and Natural Environment.
c. The Directorate General of Sustainability of the Coast and Sea.
d. The Directorate General of Water.

15 Environmental Liability

The transposition into the Spanish legal system of the Directive 2004/35/CE of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage was completed by the Law 26/2007 of 23 October on Environmental Liability that establishes an administrative

regime for environmental liability based on the principles of "prevention" and "polluter pays". This law has been reformed by Law 11/2014 of 3 July in order to reinforce its preventive dimension and to introduce the changes made in Directive 2004/35 by the Directive 2013/30/EU on safety on offshore oil and gas operations.[86] This reform also suffers from the shortcomings derived from the previous Spanish legal system that established a threefold system of environmental liability: administrative, criminal and civil that lacked a damage prevention dimension. It has been harshly criticized because it will significantly reduce the number of operators required to contract financial security and the role of the Administration authorities in risk assessment, as will be analysed below.

The Spanish Constitution envisages in paragraph 3 of Article 45 the obligation to repair the damage caused to the environment by those who breach the administrative and criminal laws. But, despite this provision, the Spanish legal system poses problems in the presentation of tort actions by the administration, the citizens and the courts in defence of the environment since tort actions are generally intended for individual rights and interests, and are limited when only the environment per se is concerned or the legal proceedings are extremely complex and long-drawn out.

Directive 2004/35/CE on environmental liability has been transposed and developed in Spain through a scheme of administrative liability, that is an objective and unlimited liability, set out in the Law 26/2007, of 23 October on Environmental Liability, and that will be examined once the criminal and civil schemes are briefly presented.

Criminal liability derives from the breaching of those provisions of the CrimC that have been previously analysed. The damage resulting from these breaches leads to liability to the State, which will impose a penalty on those responsible for the damage resulting from their unlawful conduct.

Civil liability will be enforceable in accordance with private law rules from contract and tort. In the first case, the contractual civil liability for damage is regulated in Articles 1101 and following of the Civil Code. Therefore, environmental civil liability arises when a contract has been breached causing damage to the environment, along with a fault or wilful misconduct.

Tort liability includes environmental responsibility for damage caused by any human activity, without a prior legal relationship. It is regulated in Articles 1902 and 1908 of the Civil Code. Article 1902 CC establishes the obligation to repair the damage caused by action or by omission to another, with fault or negligence and causation. Article 1908 CC also provides that owners will be responsible for any damage caused by the explosion of machines and inflammation of explosive substances placed in unsuitable places, excessive harmful smoke and fumes or sewer deposits containing infectious materials, which have been built without the proper precautions. For civil liability to apply, both damage and human activity that cause it are required. Thus, civil liability has a compensatory or restorative function, rather than preventive.

The Law on Environmental Liability of 2007 which incorporated into Spanish legislation the provisions of Directive 2004/35/EC on environmental liability envisages also prevention and remedying of environmental damage. This Act, partially developed by Royal Decree 2090/2008 establishes a new regime for remedying environmental damage according to which operators that cause damage to natural resources or threaten to cause it, should take the necessary measures to prevent causation, or when damage has occurred, to limit or prevent further environmental damage and restore damaged natural resources to the state they were in before the damage was caused. Natural resources protected by this law are those contained in the concept of environmental damage, e.g. the damage to water, land, sea shores and estuaries, and to the species of flora and fauna present permanently or temporarily in Spain, as well as habitats for all native wildlife.

This law distinguishes two different schemes of liability.

The first scheme imposes strict liability and applies to dangerous or potentially dangerous occupational activities listed in Annex III of the Act. It covers the activities subject to obtaining authorisation in accordance with Law 16/2002 of 1 July on integrated prevention and control of pollution of industrial installations, activities by which heavy metals are released into water or air, installations producing dangerous chemicals, waste management

[86] See Ley 11/2014 de 3 de Julio, por la que se modifica la Ley 26/2007 de 23 de octubre de Responsabilidad Ambiental, BOE num. 162, 4 July 2014, p. 52139 and ff.

activities (especially landfills and incineration plants) and activities related to genetically modified organisms. Under this first scheme, the operator may be held liable even without having done anything wrong.

The second regime applies to all economic and professional activities other than those listed in Annex III of the Act, but only when they cause harm or pose an imminent threat. In this case, the operator shall be liable only if at fault or has been negligent.

The Act provides a number of exceptions to environmental liability. Thus, the system of liability does not apply in case of damage or imminent threat of damage from armed conflict, natural disasters covered by the Treaty establishing the European Atomic Energy Community, activities of national defence or international security activities and activities covered by some international conventions listed in Annex IV and V of the Act.

When there is an imminent threat of environmental damage, the competent authority (the Autonomous Community Ministry responsible for environment) shall require the operator (responsible for potential pollution) to take the necessary preventive measures, or take such measures itself and later recover the costs arising from such measures.

Where environmental damage occurs, the competent authority shall require the operator concerned to take remedial measures and carry out necessary repair (to be based on the rules and principles contained in Annex II of the Act) or itself take such measures and recover the costs later. If there have been several instances of environmental damage, the competent authority may set priorities for repairing the damage.

The repair of environmental damage takes different forms depending on the type of damage:

- for damage affecting soils, the Act requires that the soils are decontaminated so that they no longer pose a significant threat of adverse effects to human health or the environment;
- for damage affecting waters, protected species and natural habitats, seashore and estuaries, the Act provides for the restitution of the environment to its previous state. For this purpose, natural resources and services must be restored or replaced by equal, similar or equivalent natural elements, either at the scene, or at an alternative location, if necessary.

The Act requires operators of the activities of Annex III to provide a financial guarantee to enable them to meet the repair of damage specifically and exclusively in case of environmental liability. The date of the establishment of the mandatory financial security for each of the activities in Annex III should have been determined by regulation of the Ministry of Environment, Rural and Marine Environment. The new reform that came into force on 5 July 2014 establishes that the amount of financial security shall be calculated after the operator itself performs a risk analysis in accordance with the procedure laid down in Royal Decree 2090/2008 of 22 December, which must undergo a verification procedure. In the previous regime, this was the task of the Administration. The Act after the reform envisages that the operator will be responsible for the risk assessment and not the Administration. The operator will also have to inform the Administration of the establishment of the financial guarantee. The non-fulfilment of this obligation to inform will be considered a serious breach of this administrative rule.

Under this regime, operators have no obligation to provide mandatory financial guarantee for activities likely to cause damage for which compensation is assessed at less than 300,000 euros, or, if assessed in an amount between 300,000 euros and 2,000,000 euros, they show they are accredited to either the Community Eco-Management and Audit Scheme (EMAS) or to the environmental management system UNE-EN-ISO 14001:2004.

Natural or legal persons who may be adversely affected by environmental damage or organizations whose goal is the protection of the environment may request the competent authorities to act before damage occurs. Individuals and entities that submit an application for ad hoc action may take legal action before a court to review the legality of decisions, acts or omissions of the competent authority.

The establishment of a financial guarantee is a requirement of the Environmental Liability Act for companies whose activities are included in Annex III. Thus, it seeks to ensure that the operator has the financial resources to deal with the prevention, avoidance and repair of any environmental damage.

The Government argues that its new legal reform now clarifies that determining the amount of the financial guarantee is first left to the analysis of environmental risks of the activity as proposed by the operator.

There are three forms of financial assurance that the operator of the economic or professional activities included in Annex III of the Environmental Liability Act, which may be alternative or complementary to each other:

- Insurance, signed with insurance operator authorized in Spain to insure such liability.
- Guarantee granted by any financial institution authorized to operate in Spain.
- Fund investments backed by public sector.

The reform of the Act on Environmental Responsibility is based on the following measures:

- Strengthening the preventive aspects of the law.
- Administrative simplification of the procedure for the establishment of mandatory financial guarantee.

    - Those operators obliged to contract a mandatory financial guarantee will themselves now make the risk assessment as well as determine accordingly the amount of the financial guarantee. Until now the competent authority determined the amount of the financial guarantee regarding the intensity and scope of potential damage according to the established regulatory criteria.
    - Art. 24 now clarifies the voluntary character of the financial guarantee for those operators that are not obliged to contract it and that now do not have to inform the competent Administration.

- Art. 33 is reformed in order to adapt the provisions relating to the Compensation Fund for Environmental Damage to adapt it to the current situation of the national legislation under which it is constituted and operates a system of entities. The original fund for insolvency that was constituted by the Act has been supressed and the coverage for damage with delayed manifestation has been maintained.
- Introducing a new course of infringement in Chapter V, in article 37: failure to inform the Administration of the constitution of the guarantee.
- Adapting legal procedures to sue for environmental responsibility.

    - Art. 41 has been clarified in order to determine that the procedure will be started by the competent authority through an agreement of initiating of a procedure for environmental responsibility:

        - Ex oficio.
        - As a consequence of a superior order.
        - On reasoned request of other bodies.
        - By complaint of the operator or the other individuals with an interest.

    - Art. 45.3 has been modified in order to adapt the period foreseen for the procedure as it is highly complex due to various consultations, requests for reports and the interventions of various competent authorities.

- Supression of the Tenth Additional Provision that exempted Public works from application of Directive 2004/35/EC. This rule provided that in the case of public works of general interest, the competent authority may not require the adoption of the measures provided for in the Act, or execute them as subsidiary, when procedure for environmental impact assessment in accordance with existing information has been followed and the requirements established in the environmental impact statement, has been complied with; in order to align the text of the law to Directive 2004/35/EC. The reform has introduced Art. 3.6 and Art. 7.7 that now foresee the application of the Act to State public works of general interest. They foresee the possibility for Autonomous Communities to adopt regional legislation to also apply this regime tho the public works undertaken at regional level and of being of equivalent public interest to that of the State.

Criticisms on this reform have been made by the experts and political representatives. The opposition party PSOE considers that the reform "privatises the issue of environmental liability and exempts 98% of operators from compulsory preventive liability cover."[87] The insurance sector states that ending mandatory financial guarantee for most operators will only have a negative impact "in cases where the operator is insolvent". Only around 10,000 out of 320,000 operators covered by the law have already taken out voluntary insurance.

A source at the European Commission described the reform as "not very encouraging" adding that "although it is in conformity with EU law it has drawbacks which are regrettable". Spain was regarded in Brussels as having led the field in efforts to implement the 2004 environmental liability directive.The European Commission made a critical evaluation of the proposed reform commenting in particular that the authorities' role in developing useful tools for the risk assessment process will no longer be continued after the reform.[88]

Table 7.

<table>
<tr><th></th><th>Administrative Liability</th><th>Criminal Liability</th><th>Civil Liability</th></tr>
<tr><td>Main goal</td><td>To punish, to prevent and to repair environmental damage</td><td>To punish</td><td>To compensate the damage</td></tr>
<tr><td>Who is responsible?</td><td>Natural or/and legal persons</td><td>Natural or/and legal persons</td><td>Natural or/and legal persons</td></tr>
<tr><td>What is it responsible for?</td><td>Administrative infringements of administrative regimes and licences</td><td>Crime and minor crime causing environmental damage</td><td>Environmental damage caused by breach of contract or by tort</td></tr>
<tr><td rowspan="5">Types of sanction</td><td>Fines</td><td rowspan="2">Imprisonment</td><td rowspan="2">Restitution to the original status</td></tr>
<tr><td>Restoration measures</td></tr>
<tr><td rowspan="2">Closure of the facilities</td><td rowspan="2">Fines</td><td>Compensation</td></tr>
<tr><td rowspan="2">Indemnisation</td></tr>
<tr><td>Temporary/ Permanent / Total or partial</td><td>Compensatory measures</td></tr>
<tr><td>Competent Authority</td><td colspan="2">Administrative authorities at: State, Regional and Local Level</td><td>Criminal Judge / Provincial Court / Supreme Court</td></tr>
</table>

[87] See Sevillano, E, “Cañete exime al 98% de las empresas del seguro de daños al medio ambiente”, El País, 12 of February 2014, http://sociedad.elpais.com/sociedad/2014/02/12/actualidad/1392238971_115990.html

[88] See http://www.endseurope.com/28919?referrer=bulletin&DCMP=EMC-ENDS-EUROPE-DAILY.

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