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***Evaluation of Directive 2008/99/EC  
from a Commission Perspective***

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## Main content of Directive 2008/99/EC

- Sets out minimum requirements relating to criminal law in the Member States in order to ensure better protection of the environment; no rules on criminal law procedure
- The offences in Article 3 have to be considered criminal offences in the Member States
- Inciting, aiding and abetting must be punishable too
- Member States must put in place dissuasive, proportionate and effective criminal sanctions
- Liability also of legal persons

## Definition of criminal offences (1)

- The list of offences in Article 3 ECD is a minimum list
- The selected offences represent serious breaches of environmental legislation with potential for substantial damage to the environment or human health
- ECD does not create new illegal acts; criminal sanctions to be attached to existing prohibitions
- All offences must be committed intentionally or by serious negligence, but no definition of these mental elements in the ECD

## Definition of criminal offences (2)

- Complicated legal technique used:
  - List of conducts in Article 3 ECD
  - Clarification in recital 9 ECD
  - Concept of “unlawfulness” in Art. 2(a) - all offences must be unlawful acts, i.e. breach of EU legislation listed in the annexes of Directive 2008/99/EC or national legislation implementing it
  - Annexes include lists of EU environment laws but no concrete provisions
- Large number of undefined terms: legal certainty issues?



# Sanctions

## Commission Proposal of 2007

- Approximation of minimum maximum sanctions (imprisonment for natural persons and fines for legal persons)
- Optional sanctions suggested: obligation to reinstate the environment, ban of engaging in commercial activities, publication of judicial decisions, etc.

## Implications of the ECJ Judgement C-440/05

Adopted Directive 2008/99/EC requires „effective, proportionate and dissuasive criminal penalties“

The responsibility of legal persons can be of criminal or other nature

## Transposition challenges

Large number of undefined terms used for the offence definition: **substantial damage, negligible quantity, negligible impact, dangerous substances, etc.**

**Type and level of sanctions not concretely defined**

Relationship between criminal and administrative sanctions

**No obligation for criminal sanctions in relation to legal persons**

## Conformity check of legal framework

2013 Study by external contractor

- most Member States appear not to have criminalised the full scope of conduct as required by the Directives
- sanctions vary greatly

23 Member States addressed through EU Pilot

Most MS either already changed the legislation or are in the process of amending their legislation

Other Member States may still receive letters of formal notice

# Main outcomes of conformity checking study

Different transposition techniques used

Issues on offence definition:

- not all elements of Art 3 ECD considered
- only intent, not serious negligence covered
- only actual harm, not endangerment sanctioned
- different interpretation of undefined terms

Great diversity of sanctions



## Criteria for assessing sanctions

- 1) comparison with type and level of sanctions mentioned in the annulled Framework Decision preceding the Directive
- 2) comparison with sanctions for the same offences in other Member States
- 3) comparison with sanctions for comparable offences in the same Member State
- 4) overall evaluation of national sanctioning system, inter-play criminal – administrative law

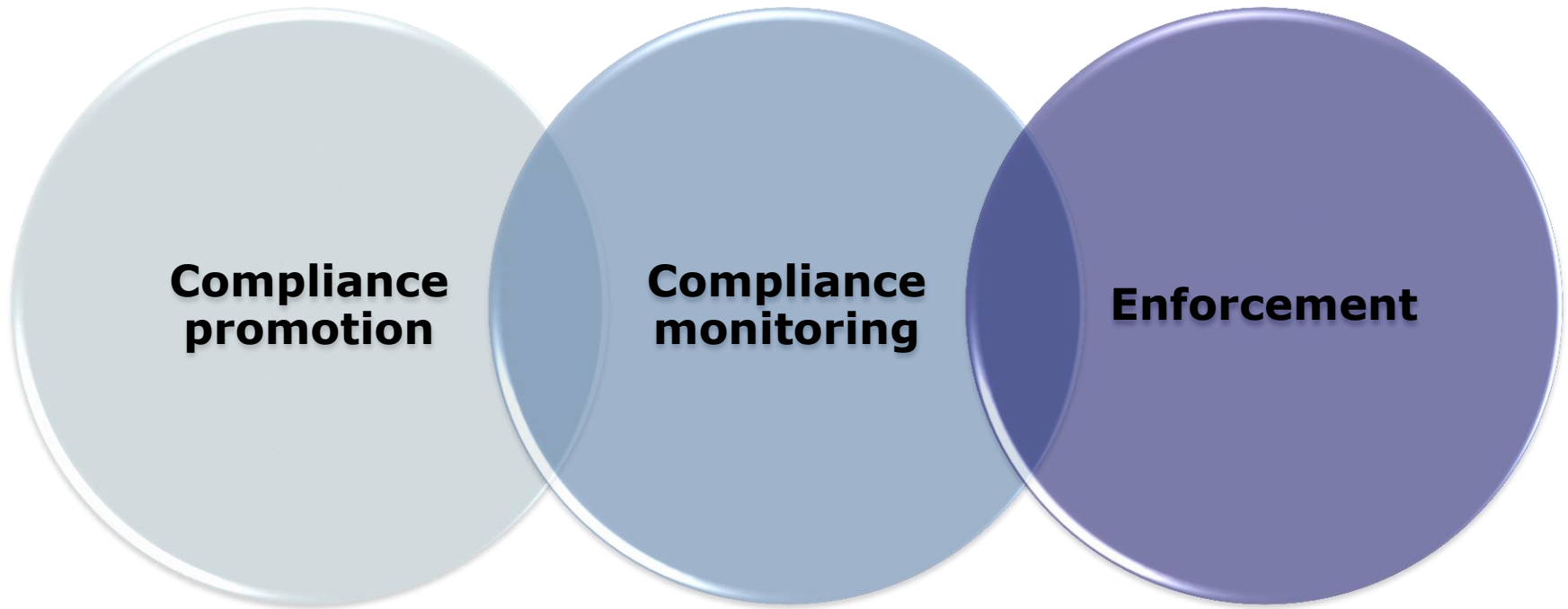
## **Should sanctions be harmonised?**

Will it have an effect on enforcement?

Will it improve cooperation between national authorities?

Will it prevent potential perpetrators from finding the jurisdiction with the lowest sanction?

# **Criminal enforcement and the concept of environmental compliance assurance**



# Environmental compliance assurance

Compliance promotion:

information and advice how to comply; relevance for SMEs

Compliance monitoring

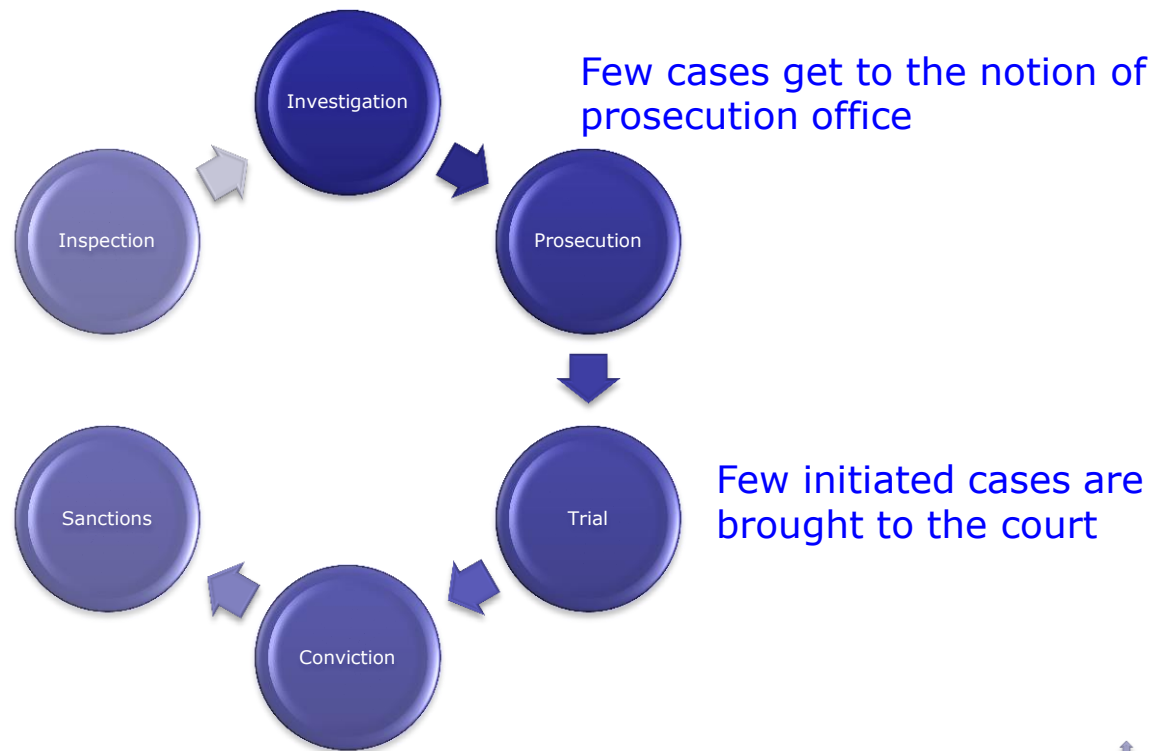
(inspections/surveillance/investigations)

detection and characterisation of non-compliance, identification of offenders, evidence basis for proper enforcement and compliance promotion

Enforcement

Criminal, administrative and civil

# Criminal law enforcement challenges



Most convictions only lead to lenient sanctions

Few cases end with convictions



## **Few cases known by prosecution**

Application of administrative law preferred

Weaknesses of cooperation between environmental inspectors, police and prosecutors

Lack of specialisation of enforcement officers

Lack of data and mechanisms for data exchange

## **...fewer cases are prosecuted**

Problems with evidence and identification of the perpetrators

Lack of specialisation of prosecutors

Low priority due to limited resources (time, money, expertise)

## **...even fewer convictions**

Problems with evidence

Lack of clearness of environmental criminal law

Dismission on grounds of opportunity

Insufficient specialisation of judges



## **Lenient sanctions for the convicted**

Environmental crime regarded as less serious than traditional crime areas

Insufficient sentencing experience of judges in environmental crime cases

Little case law published

# Compliance assurance issues for environmental crime provisions

Risk assessment to identify most serious problems

Use of the most appropriate monitoring tools, e.g. role of intelligence gathering

Managing the interaction between criminal, administrative and civil law enforcement

Good practice examples: Tunis Action Plan under the Convention on the Conservation of European Wildlife and Natural Habitats; VENENO Project in Spain ([www.venenono.org](http://www.venenono.org))



# Dynamic and robust compliance assurance chain

Interaction between compliance promotion, compliance monitoring and enforcement

Enhanced dialogue with the regulated community and involvement of the general public

Added value of cross-network cooperation: network coverage of the compliance assurance chain

Adequate cooperation and coordination mechanisms

Efficiency gains and economic benefits

## Future challenges

Review of ECD planned for 2016

What, if anything, needs to be amended?

Updating the annex defining the scope of the Directive?

More harmonisation on sanctions, including provisions on administrative sanctions?

Other ways to improve enforcement?

**Thank you for your attention!**