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COVER NOTE

From: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 28 October 2020

To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of
the European Union

Subject: REGULATORY STRUTINY BOARD OPINION
Evaluation of the Directive 2008/99/EC of the European Parliament and of
the Council of 19 November 2008 on the protection of the environment
through criminal law
(ENVIRONMENTAL CRIME DIRECTIVE)

Delegations will find attached Commission document SEC(2020) 373 final.

Encl.: SEC(2020) 373 final



EUROPEAN COMMISSION

Brussels, 24.4.2020
SEC(2020) 373 final

REGULATORY SCRUTINY BOARD OPINION

**Evaluation of the Directive 2008/99/EC of the European Parliament and of the Council
of 19 November 2008 on the protection of the environment through criminal law
(ENVIRONMENTAL CRIME DIRECTIVE)**

{SWD(2020) 259 final}
{SWD(2020) 260 final}



EUROPEAN COMMISSION
Regulatory Scrutiny Board

Brussels,
RSB/

Opinion

Title: Evaluation of the Directive on the protection of the environment through criminal law

Overall opinion: POSITIVE

(A) Policy context

Environmental crime was reportedly the fourth largest criminal activity in the world in 2016. At that time, it had an estimated value in the range of \$91-259 bn, rising by 5-7 per cent annually. There are many kinds of environmental crimes. These include illegal emissions into the air, discharge of substances into water or soil, illegal trade in wildlife or in ozone-depleting substances, and illegal shipment or dumping of waste. Serious crimes often have a cross-border dimension and may involve organised groups.

Directive 2008/99/EC on the protection of the environment through criminal law (ECD) aims to reduce environmental crime. It establishes a European framework to avoid 'safe havens' for environmental crime inside the EU. The EU adopted the ECD in 2008. Since then, the EU has obtained additional competences in the field of criminal law. Perceived problems with the current ECD and evolving trends in environmental crime have made it relevant to evaluate the Directive in view of a possible revision.

(B) Summary of findings

The Board notes additional information provided in advance of and during the meeting and DG JUST's commitment to adapt and improve the report.

The Board gives a positive opinion. The Board nonetheless considers that the report should further improve with respect to the following aspects:

- (1) The report does not explain what level playing field the Directive intended to achieve and why it is important to achieve it. The extent to which safe havens are a problem in the EU is unclear.**
- (2) The report does not adequately discuss the relevance of the Directive. It does not establish the Directive's value added to other environmental or criminal offence legislation.**
- (3) The report does not sufficiently present the reasons for the limited evidence base, and its consequences for understanding how the Directive affected environmental crime. It does not sufficiently distinguish between stakeholder views from crucial**

This opinion concerns a draft evaluation which may differ from the final version.

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groups such as prosecutors, law enforcers, NGOs and businesses.

- (4) Some conclusions are not consistent across the report and recommendations are not always based on the analysis.**

(C) What to improve

(1) The report should better explain the background of the evaluation and why it is undertaken now, 10 years after the Directive's implementation. The intervention logic should better account for how the Directive works to deliver better outcomes, and what sort of evidence would signal success. The report should clarify what should have been achieved at this point in time. The report should explain, in particular, the objective of achieving a level playing field, including why it is important and what a level playing field would look like in practice. Given that the Directive allows quite some leeway for Member States' implementation, the report should explain what degree of harmonisation was to be expected and whether this has been achieved. The report should also present actions and formal procedures undertaken by the Commission to ensure Member States' compliance, including with requirements on deterrent sanctions.

(2) The analysis should clarify the notion of safe havens and present any available evidence that they do or do not exist and have resulted in unfair competition. The report should present business views, if necessary drawing on other sources than the consultation and interviews undertaken. The report should detail why the failure to meet minimum sanction levels has not resulted in safe havens. It should explain what role civil and administrative law played in this respect.

(3) The report should assess the Directive's relevance comprehensively and objectively, taking into account the lack of evidence that it has had and any direct effect on the level of environmental crime. In particular, the analysis should expand on the added value of this Directive to sectoral legislation. Similarly, the report should elaborate on the extent to which environmental crime cases are currently dealt with under the Directive, or rather tend to fall under other criminal offences (as demonstrated in some of the case studies).

(4) The report could better explain how and to what extent the Directive has contributed to reducing environmental crime. It should better explain its deterrent role and how it can strengthen investigation and enforcement by police and prosecutors. The Directive may have an indirect impact, which the report so far neglects.

(5) The report should clearly present the gaps in the evidence base. It should better explain what steps it took to try to collect data and why they were only partially successful. It should explain the consequences for understanding how the Directive affected environmental crime. The report could include conclusions on the lack of evidence and, possibly, how to overcome it.

(6) The report should, as much as possible, present stakeholder views differentiated by groups, such as businesses, law enforcers and prosecutors, NGOs, citizens, etc. As one of the objectives is to protect compliant companies from unfair competition from safe havens, it is important to include business views on this. Similarly, for national and EU law enforcers and prosecutors (including Europol/Eurojust), it is important to have their separate expert views on the effectiveness of the Directive. The report should take care to interpret correctly the results of some questions in the public consultation.

(7) Some conclusions are not presented in the same way across the report. All conclusions

and recommendations must build directly on the analysis and findings. In areas where insufficient evidence is available, the report needs to draw cautious conclusions.

Some more technical comments have been sent directly to the author DG.

(D) Conclusion

The DG must take these recommendations into account before launching the interservice consultation.

Full title	Evaluation of the Directive on the protection of the environment through criminal law
Reference number	PLAN/2018/3394
Submitted to RSB on	25 March 2020
Date of RSB meeting	22 April 2020