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

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Subject:	COMMISSION STAFF WORKING DOCUMENT EXECUTIVE SUMMARY OF THE 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)

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Delegations will find attached Commission document SWD(2020) 260 final.

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**COMMISSION STAFF WORKING DOCUMENT**  
**EXECUTIVE SUMMARY OF THE 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)**

{SEC(2020) 373 final} - {SWD(2020) 259 final}

## **I. Introduction**

Directive 2008/99/EC on the protection of the environment through criminal law is the EU's main instrument in the field of criminal law on the environment. It requires the criminalisation of unlawful conduct that causes or is likely to cause damage to the environment or to flora and fauna, or the death or serious injury of individuals. Conduct is defined as 'unlawful' when it infringes obligations set out in the 72 pieces of EU legislation listed in the two annexes to the Directive or in any act of the Member States giving effect to such legislation.

The evaluation found that the Directive has not fully met its objectives and that – despite some progress – significant divergence remains between Member States.

## **II. Methodology and challenges**

The lack of consistent and/or reliable statistical data on environmental crime (detection, investigations, prosecutions, convictions, levels of sanctions imposed, cases dismissed, and environmental crimes dealt with by administrative sanctioning systems) was one of the major challenges. This made it impossible to establish a full picture, based on statistical data, of trends in the practical implementation of the Directive in individual Member States. Instead, the evaluation relied on the screening, assessment and triangulation of existing studies, reports, articles and other documents in the area, the results of a public and a targeted consultation, and interviews with stakeholders to fill in the gaps.

It must be noted, that numerous external factors and neighbouring policies play a role in any strategy to reduce crime. Success cannot be reached through criminal law instruments alone. Therefore, criminal law measures must be viewed as one component of concerted action bringing together a series of measures and instruments designed to reinforce each other. Moreover, the way in which the Directive is implemented, on which the Directive itself has no influence, plays a major role in determining its effectiveness.

## **III. Effectiveness**

### *Level playing field - Creating an EU framework for tackling environmental crime*

There is evidence of some progress towards this objective of the Directive. The Directive provided a set of common definition of what can constitute environmental crime which facilitates cross-border cooperation. However, the Directive's definitions contain a number of legal terms (such as 'negligible quantity' and 'significant damage/deterioration') that have led to different interpretations in the Member States, which could hamper cross-border cooperation.

The Directive has ensured that legal persons<sup>1</sup> can be held liable for breaches of environmental law in the Member States. However, the decision as to whether liability should be criminal or non-criminal has been left to individual Member States' discretion. Non-criminalisation in some Member States with regard to offences committed by legal persons could impede cross-border cooperation.

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<sup>1</sup> As opposed to natural persons. A legal person is a corporate entity that is distinct from its members and has been granted certain rights by law.

### *Level playing field – deterrent sanctions*

The fact that the Directive requires effective, proportionate and deterrent sanctions has resulted in progress towards a level playing field by ensuring the existence of sanctions for the crimes concerned in all Member States. A number of Member States have raised their maximum sanction levels. Despite this progress, there is a significant degree of variation in the levels of sanctions provided for in national legislation. Some EU Member States still have particularly low levels of maximum sanctions in their national laws.

Independently of the Directive, the legal systems of most Member States provide for additional types of sanctions such accessory sanctions, administrative and civil sanctions. However, this set of available sanctions and its application varies across Member States. The availability of a broad range of sanction types and their application and combination in individual cases contributes to the overall deterrent effect of an environmental enforcement regime and may help develop a level playing field in a way that takes account of different national legal traditions.

### *Reduction of illegal trade*

With regard to the Directive's impact on illegal trade, stakeholders recognise the importance of the Directive in tackling illegal trade. However, there is insufficient data to establish whether trends in this area are positive. There are individual successful cases in this area, where the Directive – especially the common definition of environmental crime – might have facilitated the coordination of Member States action.

### *Judicial cooperation*

Although there is no statistical evidence of any significant increase in cross-border cooperation, cross-border platforms and initiatives (at both EU and Member State level) to encourage cooperation among Member States have emerged since the Directive was adopted. These initiatives and the Directive reinforce each other.

### *Practical enforcement*

The Directive's effectiveness depends largely on how effectively it is implemented at Member State level. A number of factors play a significant role in effective law enforcement on the ground such as: the level of prioritisation, training and specialisation, the allocation of resources; cooperation and the exchange of relevant information, the existence of an overarching national strategy to combat environmental crime involving all levels of the enforcement chain; the interplay of administrative and criminal sanctioning systems as well as cross-border cooperation.

The statistical data available on enforcement and the imposition of penalties for environmental crimes are very limited. However, implementation in practice is deficient across the whole chain of enforcement levels, as many studies and reports in this field have demonstrated.

### **Efficiency**

Overall, there has not been any noteworthy increase in costs (budget, training, staffing levels) across the EU or in particular Member States that might be attributable to the Directive. Member States that have set up specialised units or recruited specialist staff have done so not in response to the Directive, but rather because of a generally greater awareness of the need for better environmental protection. The currently inadequate level of practical implementation suggests that investment and the resources allocated could be levelled up.

## **Relevance**

Before the adoption of the Directive, there was a need to combat growing environmental crime and its adverse effects on water, air, soil, habitats, people, flora and fauna, which extend beyond the borders of individual Member States and the EU. Existing sectoral administrative law to protect the environment was deemed inadequate, as environmental crime was still on the increase. Criminal law adds a large measure of social disapproval and therefore acts as a more effective deterrent than administrative law alone. This need and the corresponding objectives of the Directive remain relevant.

The Directive lacks provisions to support its specific objectives. Currently, there are no provisions to foster cross-border cooperation. Nor are there any provisions to address organised crime. Equally, a functioning mechanism for including emerging types of environmental crime or areas of crime which have become a source of greater concern (such as man-made forest fires, illegal logging or the illegal timber trade), is missing.

## **Coherence**

The annexes defining the material scope are largely outdated and a feasible mechanism to ensure that new relevant legislation comes under the scope of the Directive is missing; the Directive does not cover instruments such as the EU Timber Regulation, the Invasive Species Regulation and the REACH Regulation. Such inconsistencies might grow over time, as environmental legislation is constantly changing. Inconsistencies also occur where substantive ecological damage goes unpunished because it did not violate any environmental legislation.

The Directive is generally consistent with other EU criminal law legislation. However, as a pre-Lisbon instrument, it could benefit from the possibilities the Lisbon Treaty offers for introducing more and more detailed rules, to achieve its objectives. Such rules might apply, for instance, to types and levels of sanctions, investigative tools, and jurisdiction.

The Framework Decision on organised crime, the Anti-Money Laundering Directive and the Confiscation Directive, e.g., cover environmental crime only under certain conditions, which are not met in all Member States.

## **EU added value**

The Directive has provided added value beyond what could have been achieved at national level. It has created a basic level playing field as regards definitions of environmental crime, to tackle breaches of environmental legislation. This is a prerequisite for cross-border cooperation, which is essential for successfully combating environmental crime. EU action remains necessary, as – given the different national traditions of criminal law and constant changes in EU environmental legislation – a joint EU framework on environmental crime cannot be expected to endure without action at EU level. The finding that the Directive has not fully met its objectives and that – despite some progress – significant divergence remains between the Member States suggests that continued EU action is necessary and that it should be based on the EU's new competences in the field of criminal law under the Lisbon Treaty.

## **IV. Room for improvement**

- 1 Measures could be considered to gather statistics and data on environmental crime in a consistent manner throughout the European Union and reported to the Commission.

- 2 The interpretation of some legal terms needing further definition in practice could be facilitated.
- 3 More could be done to standardise the level of sanctions across the Member States, in respect of the Member States' national legal traditions and criminal law systems.
- 4 Additional sanctions and sanctions linked to the financial situation of legal persons could be considered.
- 5 The Directive's scope is linked to the environmental instruments in its annexes. This approach could be reconsidered.
- 6 The scope of the Directive could be extended to cover more or new areas of environmental crime.
- 7 The Directive could do more to address cross-border cooperation and organised crime.
- 8 It could be considered to clarify the relationship between criminal and administrative sanctions.
- 9 Measures to improve practical implementation could be considered (e.g. specialisation of practitioners).
- 10 More measures to heighten public awareness of environmental crime could be considered.