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PROPOSAL

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	15 December 2021
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	SEC(2021) 428 final
Subject:	Regulatory Scrutiny Board Opinion Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law replacing Directive 2008/99/EC

Delegations will find attached document SEC(2021) 428 final.

Encl.: SEC(2021) 428 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.

Commission européenne, B-1049 Bruxelles - Belgium. Office: BERL 02/352. E-mail: regulatory-scrutiny-board@ec.europa.eu

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



EUROPEAN COMMISSION

Brussels, 1.10.2021
SEC(2021) 428 final

REGULATORY SCRUTINY BOARD OPINION

**Proposal for a Directive of the European Parliament and of the Council on
the protection of the environment through criminal law and replacing
Directive 2008/99/EC**

COM(2021) 851 final
SWD(2021) 465 final
SWD(2021) 466 final



EUROPEAN COMMISSION
Regulatory Scrutiny Board

Brussels,
RSB

Opinion

Title: Impact assessment / Directive on the protection of the environment through criminal law

Overall opinion: POSITIVE WITH RESERVATIONS

(A) Policy context

Environmental crime was the fourth largest reported criminal activity in the world in 2016, growing at annual rates of 5-7%. There are many kinds of environmental crime. 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 aims to reduce environmental crime. Since it entered into force, the EU has obtained additional competences in the field of criminal law. Added to this, the evaluation of the Directive identified shortcomings that will be addressed with this revision.

The revision aims to improve the implementation of the Directive. It aims to clarify its scope and definitions, improve cross-border cooperation and the enforcement chain, and gather better statistics for monitoring and evaluation.

(B) Summary of findings

The Board notes the useful additional information provided in advance of the meeting and commitments to make changes to the report.

However, the report still contains significant shortcomings. The Board gives a positive opinion with reservations because it expects the DG to rectify the following aspects:

- (1) The report is not sufficiently clear on the choices to be made on the essential elements of the revision of this Directive and if these choices are legal, technical or political in nature. It does not sufficiently explain how coherence between EU sectoral legislation and criminal law will be ensured.**
- (2) The report does not thoroughly justify the selection of the measures under the preferred package of options.**

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

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(3) The report does not assess the cumulative impact of the preferred package of options.

(C) What to improve

(1) The report should provide greater clarity and additional information on the choices to be made for the essential elements, such as the coverage of the Directive, the mechanism for updating the Directive, criminal sanctions to be proposed, and clarification of definitions. It should clearly indicate if these choices are merely legal or technical specifications leaving little discretion or require a genuine political judgement based on real alternatives. It should substantiate the impacts of these choices on the basis of the available evidence. On this basis, it should better explain how coherence between EU sectoral legislation and criminal law will be ensured.

(2) The report should better justify the selection of measures under the preferred option, in particular regarding the mechanism to keep the Directive and its coverage up-to-date. In the case of mandatory training and specialisation, it should be clear from the problem definition that this is expected to play an important role and that the available evidence supports the need for binding measures.

(3) The report should assess the cumulative impact of the best performing package and not only analyse the impact of the individual options. It should clarify whether alternative packages have been assessed.

(4) The Board notes the estimated costs and benefits of the preferred option in this initiative, as summarised in the attached quantification tables. However, the report should provide a more precise cost estimation. The report should also elaborate on the simplification and burden reduction in view of the REFIT potential of the preferred option.

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

(D) Conclusion

The DG must revise the report in accordance with the Board's findings before launching the interservice consultation.

If there are any changes in the choice or design of the preferred option in the final version of the report, the DG may need to further adjust the attached quantification tables to reflect this.

Full title	Directive on the protection of the environment through criminal law amending Directive 2008/99/EC
Reference number	PLAN/2020/8802
Submitted to RSB on	1 September 2021
Date of RSB meeting	29 September 2021

ANNEX: Quantification tables extracted from the draft impact assessment report

The following tables contain information on the costs and benefits of the initiative on which the Board has given its opinion, as presented above.

If the draft report has been revised in line with the Board's recommendations, the content of these tables may be different from those in the final version of the impact assessment report, as published by the Commission.

I. Overview of Benefits (total for all provisions) – Preferred Option		
<i>Description</i>	<i>Amount</i>	<i>Comments</i>
Direct benefits		
Reduction in all types of environmental crime in the EU due to increased enforcement activity	Indicatively, combined value of illegal revenue derived from environmental crime and losses for legal commerce and tax revenue at between USD 91-259 billion annually	Not possible to quantify the exact amount of environmental crime cases that would be tried and convicted or their distribution across the Member States.
Reduction in types of environmental not previously included in the Directive, such as illegal logging and timber trade and fishery crimes	Indicatively, the worldwide revenue from fishery crimes has been estimated at between USD 11 – 30 billion annually. The EU is responsible for almost EUR 3 billion of losses due to illegal logging, with an import of around 20 million cubic meters of illegal timber every year	As above, it is not directly quantifiable.
Indirect benefits		
Improved state of the environment due to reductions in activity that pollutes, harms species	Citizens and society benefit from a cleaner environment and a reduction in negative health impacts.	Criminal law is only one of many legislative tools aimed at environmental protection and enhancement and criminal law measures are a last resort when other measures are not sufficient.
Reputational and competition benefits for legally compliant businesses	Businesses that comply with environmental law will not face unfair competition from those that do not. The reputation of certain industries will recover if there is less criminal activity.	Not quantifiable, but point was raised by a majority of businesses consulted.

<i>II. Overview of costs – Preferred option (million EUR)</i>							
Policy objective		Citizens/Consumers		Businesses		Member State Administrations (EU27)	
		One-off	Recurrent	One-off	Recurrent	One-off	Recurrent (per year)
Objective 1 (transposition)	Direct costs	-	-	-	-	0.158 – 0.475	-
	Indirect costs	-	-	-	-	-	-
Objective 2 (transposition)	Direct costs	-	-	-	-	0.158 – 0.475	-
	Indirect costs	-	-	-	-	-	-
Objective 3 (transposition)	Direct costs	-	-	-	-	0.158 – 0.475	-
	Indirect costs	-	-	-	-	-	-
Objective 4 (national focal points and investigative tools)	Direct costs	-	-	-	-	-	0.475 -0.792 Non-quantifiable costs of using investigative tools
	Indirect costs	-	-	-	-	-	-
Objective 5 (harmonised data collection, option 2, MS costs)	Direct costs	-	-	-	-	0.428	0.255
	Indirect costs	-	-	-	-	-	-
Objective 6 (training and national strategies, MS costs)	Direct costs	-	-	-	-	0.864	8.302
	Indirect costs	-	-	-	-	-	-
All objectives (additional staff)	Direct costs	-	-	-	-	-	193.411
Total preferred option						1.766 – 2.717	202.760 – 202.443