

INCEPTION IMPACT ASSESSMENT

Inception Impact Assessments aim to inform citizens and stakeholders about the Commission's plans in order to allow them to provide feedback on the intended initiative and to participate effectively in future consultation activities. Citizens and stakeholders are in particular invited to provide views on the Commission's understanding of the problem and possible solutions and to make available any relevant information that they may have, including on possible impacts of the different options.

TITLE OF THE INITIATIVE	Improving environmental protection through criminal law
LEAD DG (RESPONSIBLE UNIT)	DG JUST B1
LIKELY TYPE OF INITIATIVE	Proposal for an amended Directive 99/2008/EC of the European Parliament and of the Council Directive on the protection of the Environment through criminal law
INDICATIVE PLANNING	Q4 2021
ADDITIONAL INFORMATION	https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/evaluation-environmental-crime-directive_en

The Inception Impact Assessment is provided for information purposes only. It does not prejudice the final decision of the Commission on whether this initiative will be pursued or on its final content. All elements of the initiative described by the Inception impact assessment, including its timing, are subject to change.

A. Context, Problem definition and Subsidiarity Check

Context

Environmental crime is a growing phenomenon causing serious harm to the environment, human health and law-abiding companies. The Directive on the protection of the environment through criminal law 2008/99/EC (the ECD) is the EU's main instrument to protect the environment through criminal law. The Commission has evaluated the ECD in 2019/20. The evaluation followed up on the European Agenda on Security (2015)¹ and the EU Action Plan against wildlife trafficking² (2016) which set out the need to review the effectiveness of the ECD. It was found that the ECD did not fully meet its objectives. The Commission published the results of the evaluation in October 2020³. As a consequence, the review of the ECD has been included in the Commission's Work Programme 2021.

A review of the ECD will have to consider and contribute to the implementation of the goals of the European Green Deal Communication⁴ and the Biodiversity Strategy⁵, which both stress the need to strengthen efforts to combat environment crime.

Problem the initiative aims to tackle

Overall, the ECD did not have much effect in practice. In particular, the ECD did not affect the number of convictions or the level of imposed sanctions in the Member States.

¹ Page 18 of the Agenda on Security (footnote 4): "The Commission will consider the need to strengthen compliance monitoring and enforcement, for instance by increasing training for enforcement staff, support for relevant networks of professionals, and by further approximating criminal sanctions throughout the EU". https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/basic-documents/docs/eu_agenda_on_security_en.pdf.

² EU-action plan against wildlife trafficking, http://ec.europa.eu/environment/cites/pdf/WAP_EN_WEB.PDF.

³ [Environmental crime - reviewing the EU rules](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/evaluation-environmental-crime-directive_en) and on https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/evaluation-environmental-crime-directive_en

⁴ COM(2019) 640 final.

⁵ COM(2020) 380 final.

Although ECD has created a common EU framework of key environmental crime, some elements of the definitions of environmental crimes in Article 3 of the ECD leave room for diverging legal interpretations that could hamper cross-border cooperation and lead to uncertainty as to whether or not an individual environmental crime has been committed.

Sanction types and levels differ greatly among Member States and their application in practice does not appear to be dissuasive. Sanction levels imposed are often very low and not proportionate to the harmfulness of environmental crime.

Significant and systematic improvement of cross-border cooperation because of the ECD could not be observed. The material scope of the ECD is currently defined by a reference to 72 EU legislative instruments on environmental law in its annexes, which today are largely outdated. A feasible mechanism to ensure that the annexes are being updated and that new relevant EU legislation comes under the scope of the ECD is missing.

Although transposed by all Member States, law enforcement with regard to environmental crime is insufficient in all Member States. There is a lack of skilled, specialised and coordinated practitioners to detect, investigate, prosecute and adjudicate on criminal offences, especially where organised and trans-frontier crime is involved and where in particular waste and wildlife trafficking is concerned. In addition, all Member States collect only very limited statistical data, in a non-systematic manner, which makes it difficult for policy-makers and practitioners to monitor effectiveness, target work, identify obstacles in the law enforcement chain and take informed decisions. In this context, the results and recommendations of the 8th Mutual Evaluation Round⁶ are very relevant.

Basis for EU intervention (legal basis and subsidiarity check)

Legal basis: Art. 83 (2) TFEU

Subsidiarity check: Environmental crime is not a problem that stops at national borders. The trafficking of waste, wildlife and chemicals, and the pollution of water including maritime pollution and air typically have cross-border effects, also beyond the EU. This requires a level playing field with regard to the definition of environmental crime and sanctions to facilitate judicial cooperation between relevant authorities of the Member States, which cannot be achieved with sufficient scope and effect by Member State action only. A common framework on environmental crime is also necessary, to avoid 'safe havens' in the EU and to prevent criminals from being able to choose Member States with low protection levels for their criminal activities.

B. Objectives and Policy options

The objective of the ECD is to contribute to the protection of the environment through criminal law that translates into effective detection, investigation, prosecution and sanctioning of environmental crime. Effective and credible law-enforcement is a corner stone also to prevent environmental crime. Therefore, specific objectives of the ECD are (1) a common set of environmental crimes, (2) a common and flexible set of criminal sanctions for environmental crimes, (3) the fostering of effective cross-border cooperation between law enforcement- and judicial authorities of the Member States.

Other initiatives, notably the 2016 Action Plan against wildlife trafficking and the 2018 Action Plan on environmental compliance assurance, are relevant to these objectives, too. The impact assessment will analyse how to strengthen the provisions in the ECD and to reinforce or interact with other initiatives that together create complementary action to ensure that their objectives are reached in practice.

The following topics will have to be addressed:

1. The legal technique used to define the scope of the Directive (options: (i) to maintain the current approach and to simply update the definitions in Article 3 and the annexes, including updated legislation adopted more recently (ii) to reference environmental legislation only in general terms, (iii) to define environmental crime as a self-standing concept, i.e., without reference to a breach of related environmental obligations.
2. The clarification of certain legal terms and qualifying elements used in Article 3 of the ECD (e.g. "substantial damage").
3. The availability and application of appropriate sanction types and levels to address environmental crimes defined in

⁶ <https://data.consilium.europa.eu/doc/document/ST-14065-2019-INIT/en/pdf>. Recommendations to Member States include the establishment of more strategic approaches, specialisation, training and coordination and the collection of statistical data.

the ECD, such as (i) minimum levels for maximum sanction, (ii) the definition of aggravating circumstances (for example for actions of the offender to obstruct administrative controls and inspection, environmental crimes committed in the context of organised crime, the severity of the damage caused),(iii) the availability of accessory sanctions (such as an obligation to restore environmental damage done, seizure and confiscation of illegal profits and material used for committing the crime, shutting down a production site used for environmental crime, exclusion from public procurement procedures),(iv) linking penalties to the profits expected or generated and to the financial situation of businesses involved in committing the crime.

4. Cross-border cooperation and coordination of law enforcement and judicial authorities - for example, by establishing focal points for environmental crime, by providing for a harmonised list of cross-border investigative tools that should be available in Member States for tackling environmental crime, obligations for Member State authorities to cooperate with each other and with EU-agencies mandated with facilitating cross-border cooperation such as Europol, OLAF and Eurojust; and rules on jurisdiction.
5. Collection, sharing and reporting statistical data on environmental crime (detection, investigations, prosecution, court sentences, dismissed cases, type and level of sanction imposed, involvement of businesses and organised crime).
6. The effective operation of the enforcement chain covering detection, investigation and prosecution, having regard to the findings and the recommendations from the 8th Mutual Evaluation Round and the role of European networks of inspectors, police, prosecutors and judges dealing with environmental crime.

For the topics listed above the following options are possible:

First Option	No further EU action: the existing provisions are sufficient.
Second Option	Repeal the ECD, leaving it to the Member States to decide on how best to address environmental crimes in their country,
Third Option	Amending the ECD to include specific provisions to improve the topics 1 to 5.
Fourth Option	<p>Third Option but combined with non-legislative measures to provide more detailed guidance on the topics 1 to 5 and to address topic 6, such as e.g.:</p> <ul style="list-style-type: none"> - Guidance on the legal terms used in Article 3 of the ECD. - Clarification of the relationship between the ECD and the Environmental Liability Directive and standard penalty clauses in sectorial EU environmental legislation; - The relationship between the ECD and administrative enforcement and sanctioning; - Coordination of law enforcement activities of several concerned Member State authorities and how to involve Union agencies such as Europol, OLAF, Eurojust, professional networks; - Collection, processing and sharing of statistical data on detection, investigation, prosecution and sanctioning of the different types of environmental crime committed in the Member States. - Benchmarking of sanction practices in the Member States. - Professional training and awareness-raising (e.g. development and promotion of training modules); - Promotion of the practical implementation of the ECD by encouraging Member States to take effective measures on detection, investigation, prosecution and punishment of environmental crime – for example, through establishment of national enforcement strategies, making available adequate resources at all levels of the enforcement chain, prioritisation, endorsing and facilitating the cooperation of law enforcement and judicial authorities (within and between Member States), clarifying the relationship between administrative and criminal sanction systems, and providing adequate training and specialisation for investigators, prosecutors, judges and other relevant professionals.

C. Preliminary Assessment of Expected Impacts
Likely economic impacts
<p>Substantial economic impacts on industry and businesses through an effective protection of the environment through criminal law are not expected. Environmental obligations do not stem from the Directive, but from the existing environmental legislation to which the current Directive only refers. However, individuals and industries/businesses will probably face higher financial penalties, if sanction levels imposed are linked to the environmental damage caused or the financial situation of businesses/industries involved in environmental crime.</p> <p>On the other hand, more effective law enforcement, the widening of the material scope of the Directive also including environmental areas currently not covered and more dissuasive sanctions (including the seizure and confiscation of illegal profits and assets) will strengthen the competitiveness of legitimate businesses, which will lose less business to illegal competitors and will be less pressed by unfair pricing from businesses not respecting environmental obligations. Especially, SMEs will benefit from fairer competition because illegal business will be pushed out of the market thanks to effective sanctions.</p>
Likely social impacts
<p>A better protection of the environment through criminal law contributes to beneficial social impacts, especially with regard to protection against environmental crime and its negative impacts on security and human health. Effective law enforcement and dissuasive penalties contribute to preventing crime and strengthening the common values that unite a society, including the trust in its institutions.</p>
Likely environmental impacts
<p>Improving the effectiveness of the Directive as the main EU instrument to protect the environment through criminal law will have direct positive impacts on all environmental areas covered by the Directive, contributing to the goals of the European Green Deal and the Biodiversity Strategy for 2030.</p>
Likely impacts on fundamental rights
<p>Particular attention shall be paid to the following fundamental rights to ensure that the proposed Directive fully respects and contributes to the preservation of the rights and principles set out in the EU Charter of Fundamental Rights⁷: the rights enshrined in its Article 17 (right to property), Article 16 (freedom to conduct a business), as well as Article 8 (protection of personal data) and the ne-bis-in-idem (the principle not to be punished for the same facts constituting a criminal offence twice) principle must be ensured. Positive impacts are in particular expected for the fundamental right enshrined in Article 37 on environmental protection in accordance with the principle of sustainable development.</p>
Likely impacts on simplification and/or administrative burden
<p>Obligations and precautions to be taken to avoid environmental crime for individuals and businesses/industries stem from the already existing underlying environmental legislation on which the current Directive is built as well as from related civil liability. The criminal liability itself will not add significant additional burden to law-abiding businesses and individuals.</p> <p>There will be an impact on Member States and public administrations, law enforcement authorities and judiciary to ensure the effective implementation of the Directive. The current insufficient performance of the Directive is to a large degree due to an insufficient practical implementation. Better implementation would enable a more effective detection, law enforcement, prosecution and sentencing of environmental crimes and thus could also act as a deterrent. This would require appropriate training, specialisation, data collection and sharing, the development of an overarching national strategy to combat environmental crime. Especially the collection of accurate and sound statistical data (see above under B.5) could produce substantial administrative burden and costs for the Member States.</p> <p>The Commission has committed to quantify the costs and benefits of the major proposals made in the context of its Regulatory Fitness Programme, including identifying possibilities to reduce costs and administrative burden.</p>
D. Evidence Base, Data collection and Better Regulation Instruments
Impact assessment

⁷ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>

An Impact Assessment will explore the different options and compare them after assessing their likely impact including in terms of effectiveness, coherence and efficiency and calculating their expected costs/benefits for Member States. An external contractor will be commissioned to assist and inform the Impact Assessment.

Evidence base and data collection

The Commission will build on the results of the recent evaluation of the Environmental Crime Directive. In this context numerous studies, documents and reports were assessed and evaluated, a public consultation and targeted stakeholder consultations were conducted, both in writing and through interviews.

Consultation of citizens and stakeholders

The consultations envisaged for the Impact Assessment aim to have the stakeholders opinions on the different options envisaged, especially their possible impacts.

The following consultation activities are planned:

- Exchanges in the framework of the Environmental Compliance and Governance Forum, in particular with the networks of environmental enforcement professionals, notably: the European Union Forum of Judges for the Environment (EUFJE), European Network of Prosecutors for the Environment (ENPE), EnviCrimeNet, European Union Network for Implementation and Enforcement of Environmental Law (IMPEL)
- Further targeted stakeholder meetings, hearings and interviews will take place with representatives of networks of environmental enforcement professionals at EU level, such as those mentioned above, as well as environmental NGOs, industry and business associations, MS authorities and bodies like Europol and Eurojust, These stakeholders were already consulted during the evaluation of the Directive.
- The recent public consultation which helped to evaluate the Directive included a number of forward-looking questions: it asked (in a multiple choice manner) for preferred options to improve the Directive - for example with regard to its effectiveness, to its scope, to undefined legal terms in the Directive, to cooperation between relevant Member State authorities, to links with organised crime and to sanction levels. The 417 contributions received (from individuals, businesses, NGO, practitioners, professional networks, MS authorities) will feed into the Impact Assessment,
- A public consultation on the options. This consultation will take 12 weeks and will be available in all languages. It will be published on <https://ec.europa.eu/info/law/better-regulation/have-your-say>.
- The synopsis report (summarising the results of all consultation activities) will also be published on that website and on the DG JUST webpage on the review of the Directive. https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/evaluation-environmental-crime-directive_en

Will an Implementation plan be established?

A focus of the review will be on ensuring effective implementation in practice. Depending on the option finally chosen, the ECD proposal will be accompanied by complementing action (possible actions: guidance papers, communications, action plans) that will aim at fostering practical implementation (see under B. fourth option).