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CORRIGENDUM

This document corrects SWD(2021) 465 of 15.12.2021.

Removal of formatting issues.

The text shall read as follows:

COMMISSION STAFF WORKING DOCUMENT

IMPACT ASSESSMENT REPORT

Accompanying the document

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} - {SEC(2021) 428 final} - {SWD(2021) 466 final}

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Glossary

Term or acronym	Meaning or definition
ADR	European Agreement concerning the International Carriage of Dangerous Goods by Road
CEPOL	European Union Agency for Law Enforcement Training
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CPS	UK's Crown Prosecution Service
CZK	Czech koruna
DG	Directorate-General
DGT	Directorate-General for Translation
Duty holder	Person or entity bound by environmental legislation
EA	Enforcement Action
EC	European Community
ECJ	European Court of Justice
EEB	European Environmental Bureau
EESC	European Economic and Social Committee

EFFACE	European Union Action to Fight Environmental Crime
EIO	European Investigation Order
EJTN	European Judicial Training Network
ELD	Environmental Liability Directive
ENCA	European Nature Conservancy Agency
ENEC	European Network against Environmental Crime
ENPE	European Network of Prosecutors for the Environment
EnviCrimeNet	Environmental Crime Network
EMPACT	European Multidisciplinary Platform Against Criminal Threats
EPA Network	Network of Heads of Environment Protection Agencies
ESTAT	European Statistics
EU	European Union
EUFJE	European Union Forum of Judges for the Environment
EUR	Euro
Eurojust	European Union Agency for Criminal Justice Cooperation

Europol	European Union Agency for Law Enforcement Cooperation
EUTR	EU Timber Regulation
GENVAL	Working Party on General Matters including Evaluations
GNR/SEPNA	Nature and Environmental Protection Service of the Republican National Guard
IFJ	Judicial Training Institute
IMO	International Maritime Organisation
IMPEL	European Union Network for the Implementation and Enforcement of Environmental Law
Interpol	The International Criminal Police Organization
IPA	Croatia's Instrument for Pre-accession Assistance
IPEC	Intelligence Project Environmental Crime
ISF	Internal Security Fund
ISF-P	Internal Security Fund (Police)
IUU fishing	Illegal, unreported and unregulated fishing
JHA	Justice and Home Affairs
KPI	key performance indicator
Market Abuse	Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014

Directive	on criminal sanctions for market abuse (market abuse directive)
MARPOL	The International Convention for the Prevention of Pollution from Ships
Montreal Protocol	Montreal Protocol on Substances that Deplete the Ozone Layer
MS	Member States
NGO	Non-Governmental Organisation
N/A	not available or not applicable
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Union
OLAF	European Anti-Fraud Office
OPC	Open Public Consultation
OWiG	German Administrative Offences Act (Ordnungswidrigkeitengesetz)
Ozone Regulation	Regulation (EC) No 1005/2009 of the European Parliament and of the Council of 16 September 2009 on substances that deplete the ozone layer
PIF-Directive	Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law

PoPs Regulation	Regulation (EU) 2019/1021 of the European Parliament and of the Council of 20 June 2019 on persistent organic pollutants
PSP	Public Security Police
REACH	Registration, Evaluation, Authorisation and Restriction of Chemicals
REFIT	European Commission's regulatory fitness and performance programme
RIA	Regulatory Impact Assessment
RSB	Regulatory Scrutiny Board
SEO/BirdLife	Sociedad Española de Ornitología – BirdLife (Spanish Society of Ornithology – BirdLife)
Stockholm Convention	Stockholm Convention on Persistent Organic Pollutants
SWD	Staff Working Document
TECUM	Tackling Environmental Crime through Standardised Methodologies Project
TFEU	Treaty on the Functioning of the European Union
TFS	Transfrontier Shipment of Waste
UN	United Nations
UNEP	United Nations Environment Programme
UNODC	United Nations Office on Drugs and Crime

USD	United States Dollar
WEEE	Waste electrical and electronic equipment

1 INTRODUCTION: POLITICAL AND LEGAL CONTEXT

Environmental crime is a growing concern causing significant damage to the environment and to citizens' health within and beyond the Union.² Providing perpetrators with very high profits and relatively low risks of detection, organised crime groups operating across the Union's internal and external borders are increasingly attracted to environmental crime activities. Perpetrators often go unpunished despite the seriousness of the economic, social and environmental impacts environmental crime can have.

Over the past decade, the need of environmental protection has become a major concern for the EU, which gradually stepped up its efforts to combat offences that are harmful to the environment. The Commission has acknowledged that crimes like illegal deforestation, water, air and soil pollution, traffic in ozone-depleting substances, poaching, overfishing and other offences heavily damage biodiversity, harm human health and destroy whole ecosystems. Environmental crime often comes with corruption, money laundering, violence, organised crime and documents forgery.

Environmental crime also causes high economic costs including too low market prices and the loss of business of legal operators due to unfair competition from illegal operators (e.g. in the waste management sector). This further entails the loss of fiscal revenues.

According to estimates of UNEP and Interpol,³ published in June 2016, the annual loss related to environmental crime has been estimated to range between US\$ 91–258 billion. This makes environmental crime the fourth largest criminal activity in the world after drugs trafficking, human trafficking, and counterfeiting. It is growing at annual rates of between 5 and 7%. The top four environmental crimes are illegal trafficking in waste and in wildlife species, pollution crimes, and illegal trading in hazardous substances.⁴

Figures for the EU and the Member States are scattered and not collected according to comparable standards and are available only for certain sub-markets. A recently published

² According to Interpol and the United Nations Environment Programme, environmental crime is the fourth largest criminal activity in the world, growing at a rate between 5%-7% per year. UNEP-INTERPOL Rapid Response Assessment: The Rise of Environmental Crime, June 2016.

³ UNEP-INTERPOL Rapid Response Assessment: The Rise of Environmental Crime, June 2016.

⁴ European Union Agency for Criminal Justice Cooperation. (2021). Report on Eurojust's Casework on Environmental Crime. Criminal justice across borders.

study⁵ provides estimates on the most profitable criminal markets in the EU among which are illicit waste trafficking and illegal wildlife trade (glass eels only). According to the study, in 2019 annual revenues deriving from illicit non-hazardous waste trafficking (both within national boundaries and abroad) range between EUR 1.7 billion and EUR 12.9 billion. For hazardous waste trafficking, annual revenues range between EUR 2.1 billion and EUR 2.4 billion.⁶

A 2017 EUIPO study found that for the EU as a whole, the estimated total sales lost by legitimate manufacturers of pesticides due to counterfeiting amounted to 13.8% of sales or EUR 1.3 billion each year.⁷ As an indirect economic impact, i.e. resulting from lost sales in other sectors as well, the study estimated an additional annual loss of EUR 1.5 billion.⁸ Trade in illicit pesticides impacts government revenue as well (household income taxes, social security contributions and corporate income taxes), which were roughly estimated at EUR 238 million.⁹

1.1 1.1 1.1 The Environmental Crime Directive

The Environmental Crime Directive¹⁰ (hereafter ‘the Directive’) is the main horizontal EU instrument to protect the environment through criminal law. The Directive’s approach to defining a set of EU environmental crimes requires an infringement of relevant sectoral legislation as listed in two annexes to the Directive. Article 3 of the Directive describes additional constituent elements for various environmental crime categories that make infringing sectoral legislation an environmental crime.

The Directive obliges Member States to ensure effective, proportionate and dissuasive sanctions for environmental crime (Article 5). Determining the type and level of criminal penalties did not fall within EC competence at that time (pre-Lisbon). The Directive does not require criminal liability of legal persons (Arts. 6, 7).

⁵ Mapping the risk of serious and organised crime infiltrating legitimate businesses, final report, study commissioned by DG Home and Migration, March 2021.

⁶ When examining the **volume of hazardous waste disappearing as a proportion of waste generated**, the UK (64%), Slovakia (57%), Lithuania (54%) and Austria (54%) record the highest, whilst Bulgaria (1%), Estonia (1%) and Greece (3%) record the lowest.

⁷ European Union Intellectual Property Office (2017). The Economic Cost of IPR Infringement in the Pesticides Sector, p. 13 https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/resources/research-and-studies/ip_infringement/study10/pesticides_sector_en.pdf.

⁸ Ibid., p. 16.

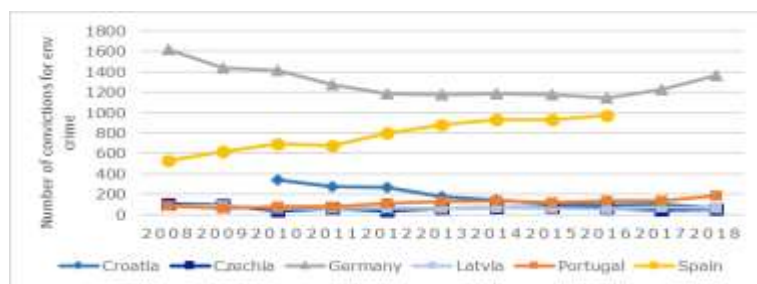
⁹ Ibid., p. 17.

¹⁰ Directive 2008/99/EC of the European Parliament and of the Council on the protection of the environment through criminal law (Environmental Crime Directive) of 19 November 2008, OJ L 328, 6.12.2008, pp. 28–37.

1.2 1.2 1.2 Evaluation of the Environmental Crime Directive

The Commission has evaluated the Directive in 2019/20 and published its results in October 2020.¹¹ It has found that the Directive had added value, as it defined for the first time a common legal framework for environmental criminal offences and required effective, dissuasive and proportionate sanctions. However, the Directive did not have much effect on the ground: the number of environmental crime cases successfully investigated and sentenced stayed at a very low level and generally did not show any significant upward trends over the past 10 years.

Figure: Number of convictions for environmental crime in HR, CZ, DE, LV, PT and ES¹² from 2008 to 2018.¹³



Moreover, the sanction levels imposed were too low to be dissuasive and cross-border cooperation did not take place in a systematic manner.

The Directive's lack of effectiveness in practice is partly due to the generic nature of its provisions. This can be explained by the EC-legislator's limited competences in the field of criminal law under pre-Lisbon conditions, which did not allow going into more detail, especially on sanctions.¹⁴

In addition, poor enforcement in the Member States contributes largely to the Directive not having much effect on the ground. The evaluation found considerable enforcement gaps in all Member States and at all levels of the enforcement chain (police, prosecution and criminal courts). Deficiencies in the Member States include a lack of resources, specialised knowledge, awareness and prioritisation, cooperation and information sharing and an absence of

¹¹ Commission staff working document, Evaluation of 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 of 28 October 2020 ([part I](#), [part II](#), [executive summary](#)).

¹² ES shows, however, a stable upwards trend. It must be noted that ES environmental criminal law criminalised every breach of sectoral relevant legislation. Moreover, ES has established functioning cross-border cooperation with PT and invested into specialisation of law enforcement authorities, the latter being regarded as most important measure for effective environmental crime measures.

¹³ Source: Member States data sheet, provided by national ministries for HR, CZ, DE, LV, PT, and, for ES: 8th Round of Mutual Evaluations - 'The practical implementation and operation of European policies on preventing and combating Environmental Crime'. Report on Spain, 2019, p. 24.

¹⁴ See: [Judgment of the Court \(Grand Chamber\) of 23 October 2007, Commission of the European Communities v Council of the European Union, Case C-440/05](#), para 70.

overarching national strategies to combat environmental crime involving all levels of the enforcement chain and a multi-disciplinary approach¹⁵. Moreover, the lack of coordination between the administrative and criminal law enforcement and sanctioning tracks often hinders effectiveness.

It was also found that the lack of reliable, accurate and complete statistical data on environmental crime proceedings in the Member States did not only hamper the Commission's evaluation but also prevents national policy-makers and practitioners from monitoring the effectiveness of their measures.

Based on the results of the evaluation, the Commission decided to review the Directive. The Commission Work Programme 2021 schedules a legislative proposal for the revision of the Directive¹⁶ in December 2021.

1.3 1.3 1.3 EU context

The current Commission adopted the Green Deal Communication along with a Biodiversity strategy. In July 2021, the Commission presented a package with concrete proposals for a Green New Deal, aimed at reducing emissions by 55% by 2030 and at making Europe climate neutral by 2050¹⁷. It states that 'the Commission will (...) promote action by the EU, its Member States and the international community to step up efforts against environmental crime'.

In 2016, the Commission adopted the EU Action Plan against Wildlife Trafficking¹⁸ to improve environmental compliance in the field of wildlife trafficking. This was followed in 2018 by an Action Plan to improve environmental compliance and governance.¹⁹ In this context, the Commission set up the Environmental Compliance and Governance Forum as a high-level expert group to steer the Action Plan's implementation and to serve as a platform for exchanges. Participants of the Forum are European networks of environmental inspectors (IMPEL),²⁰ specialised police (EnviCrimeNet), environmental prosecutors (ENPE),²¹ judges (EUFJE)²² focusing on national environmental crime strategies, specialised training of practitioners, sharing information and best practices, and cross-border cooperation.

¹⁵ Evaluation report, pp. 32-33. See p. 33 of the Evaluation report for further details on sources.

¹⁶ 2021 Commission Work Programme, https://ec.europa.eu/info/publications/2021-commission-work-programme-key-documents_en.

¹⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality COM/2021/550 final; <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021DC0550>.

¹⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions EU Action Plan against Wildlife Trafficking, COM/2016/087 final; <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2016%3A87%3AFIN>.

¹⁹ Commission Communication, [EU actions to improve environmental compliance and governance](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A10%3AFIN), COM (2018) 10 final of 18 January 2018.

²⁰ <https://www.impel.eu/>.

²¹ <https://www.environmentalprosecutors.eu/>.

²² <https://www.eufje.org/index.php?lang=en>.

The EU Serious and Organised Crime Threat Assessment (EU SOCTA) 2021 has identified “environmental crime” amongst the key crime threats facing the EU.²³ On this basis, environmental crime has been included in the EMPACT 2022 – 2025.²⁴

The new EU Strategy to tackle Organised Crime covering the period from 2021 to 2025 – presented by the Commission in April 2021 – keeps environmental crime as one of the future priorities of the EU’s fight against organised crime.²⁵

The EU Security Union Strategy²⁶ presented by the Commission in June 2020 also identifies environmental crime as an increasingly profitable business for organised crime, requiring further actions

1.4 1.4 1.4 International context

EU action in the area of environmental crime takes place in a wider context of international agreements and moves to combat crime, such as the UN Convention against Transnational Organised Crime (UNTOC)²⁷ and the UN Conventions against corruption²⁸ and money laundering²⁹. The UNTOC e.g. sets a framework for international cooperation to combat transnational organised crime groups. It applies to crimes that according to national law are punishable by a maximum sanction of at least four years.³⁰ However, most Member States do not provide for the required level of sanctions³¹ and thus the Convention is not applicable to most environmental crimes.

The Council of Europe (CoE) is currently reviewing³² its 1998 Environmental Crime Convention. The Convention has been the first international instrument to define environmental crime and require adequate sanctions.³³

²³ <https://www.europol.europa.eu/activities-services/main-reports/european-union-serious-and-organised-crime-threat-assessment>.

²⁴ Already the preceding EMPACT 2018–2021 contained environmental crime as a priority, but with a more limited scope.

²⁵ EU Strategy to tackle Organised Crime 2021–2025; https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12735-Fighting-organised-crime-EU-strategy-for-2021-25_en.

²⁶ Communication from the Commission on the EU Security Union Strategy. COM(2020) 605

²⁷ [United Nations Conventions against Transnational Organized Crime](#), General Assembly resolution 55/25 of 15 November 2000; the UN Security Council recognised that, as a transnational organized crime, environmental crime sometimes benefits non-state armed groups and terrorist organizations. More specifically: “the illicit trade in natural resources including gold and other precious metals and stones, minerals, wildlife, charcoal and oil”. [Resolution 2195\(2014\)](#), 19 December 2014.

²⁸ [United Nations Convention Against Corruption](#), UN General Assembly Resolution 58/4 of 31 October 2003.

²⁹ Financial Action Task Force (FATF), [International standards on combatting money laundering and the financing of terrorism & proliferation](#), 2012.

³⁰ United Nations Convention against Transnational Organized Crime, Art. 3.

³¹ EnviCrimeNet, Report on Environmental Crime, May 2016, p. 28.

³² A working group has been established on how to revise the Convention to make it acceptable to Member States. The study would include substantial criminal law (including the link between criminal law and administrative law), sanctions (including reinstatement of the environment), cross-border cooperation and investigative tools (including concrete implementation methods). Accordingly, there is a large overlap with the Environmental Crime Directive.

³³ Council of Europe, [Convention on the Protection of the Environment through Criminal Law](#), ETS n°172, 4 November 1998; R. Pereira, ‘[The External Dimensions of the EU Legislative Initiatives to Combat Environment Crime](#)’, *Spanish Yearbook of International Law*, 2015, p. 252.

More recently, the UN General Assembly has called on its Member States³⁴ to make illicit trafficking in protected species of wild fauna and flora a serious crime to ensure that effective international cooperation takes place under the UN Convention.

Further, the G7 countries recently committed to strengthening international and transboundary cooperation to tackle and address illegal wildlife trade as a serious crime.³⁵

The G20 countries recently reiterated their determination to step up efforts to end illicit threats to nature and crimes, including illegal logging and illegal wildlife trade, as well as to intensify cooperation to combat illicit financial flows deriving from crimes that affect the environment, by implementing, inter alia, the global standards and recommendations of the Financial Action Task Force (FATF).³⁶

A number of environmental sectors are regulated by international agreements and instruments notably the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),³⁷ the Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention)³⁸ or the Convention for Prevention of Pollution from Ships (MARPOL).³⁹ These international instruments have been transposed into EU sectoral legislation. Serious violations of these rules have been addressed by EU criminal law, including the Environmental Crime Directive and sanctions provisions in sectoral legislation.⁴⁰ In general, sectoral legislation leaves it to the Member States to decide whether the sanctioning regime for violations should be criminal or non-criminal.

2 PROBLEM DEFINITION AND DRIVERS

2.1 2.1 2.1 What are the problems and drivers that the review of the Directive seeks to address?

The review seeks to address six main problems inherent in the Directive's current limited scope and content that were identified during the evaluation of the Directive and which contribute to the Directive's ineffectiveness. These six main problem are described in more detail below, along with their regulatory and practical drivers. The order of presentation follows the structure of the current Directive and does not necessarily correspond to the importance of the problems in terms of their effects. Actually, the problems interact and have a cumulative impact on the Directive's (lack of) effectiveness.

³⁴ [UN General Assembly Resolution on Tackling illicit trafficking in wildlife](#), A/RES/75/311 (23 July 2021).

³⁵ [G7 UK Presidency 2021, Climate and Environment Ministers' Communique \(21 May 2021\)](#).

³⁶ [G20 Environment Communique \(July 2021\)](#). FATF Standards identify environmental crimes as one of the designated categories of crimes for money laundering. This means that countries should criminalise a sufficient range of environmental crimes for money laundering in line with their risk environment, see Report, [Money Laundering from Environmental Crime \(July 2021\)](#).

³⁷ [Convention on International Trade in Endangered Species of Wild Fauna and Flora](#), Washington, 3 March 1973.

³⁸ [Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal](#), 22 March 1989.

³⁹ [The International Convention for the Prevention of Pollution from Ships \(MARPOL\)](#), London, 2 November 1973.

⁴⁰ For example, CITES Regulation, Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements OJ L 255, 30.9.2005, pp. 11–21.

2.1.1 2.1.1 2.1.1 Problem 1: The Directive's scope is outdated and defined in a complex way, hindering effective investigations, prosecutions and cross-border cooperation.

Criminal offences as defined by the Directive presuppose 'unlawful' behaviour defined as a breach of EU sectoral legislation listed in two annexes to the Directive. The listed legislation is linked to nine categories of environmental criminal offences described under Article 3 of the Directive (including pollution, waste management, shipment of waste, operation of a plant involving dangerous activities or materials, the handling of hazardous materials, wildlife crime, the handling of ozone-depleting substances). Most of these crime categories require further material elements that make a breach of sectoral legislation a crime - such as substantial damage to the environment or serious injury to persons. Some crime categories criminalise the violation of relevant sectoral obligations without requiring any damage to be caused, e.g. Article 3 c) regarding the shipment of waste, or Article 3 i) regarding ozone-depleting substances, which both exclude negligible cases.

The corresponding environmental legislation in the annexes is largely outdated, as 46 out of the 72 pieces of listed legislation meanwhile have been repealed or replaced. New Union legislation, such as the Reach Regulation on chemical products or the Plant Protection Regulation on pesticides, and new crime categories, such as forestry crime, illegal logging and timber trade, ship-source pollution or trade in f-gases, have not been included since the Directive entered into force.

Independently of the Directive, Member States are generally required to have sanctions for infringements of EU sectoral legislation⁴¹, but they can choose to have administrative-law sanctions or criminal-law sanctions or a combination of these. EU environmental legislation does not, and cannot, set specific levels and types of criminal sanctions, only a criminal law directive can based on Article 83 TFEU.

In addition, where crime areas are not covered by the Directive, it is for the Member States to decide whether or not to provide for criminal liability in their national legal frameworks and how to define the crime.⁴² Where Member States do not at all criminalise a given environmental crime area, cross-border cooperation becomes difficult for lack of dual criminality. Thus, criminal investigations initiated in one Member State have to be discontinued or limited. The same issue occurs where Member States define differently an environmental crime category.

This situation adds to the complexity of environmental criminal law already driven by its dependency on administrative legislation. Law enforcement practitioners are confronted with a complex and scattered legal framework at both EU-and national level, which lacks an

⁴¹ See Case 68/88 *Commission v Hellenic Republic* [1989] ECR 2965, paras 23, 24 and 25.

⁴² EU Sectoral legislation contains requirements to sanction as well, but leaves typically to Member States whether the sanctions would be criminal or non-criminal.

internal logic. This leads to environmental crime proceedings rather not being initiated, as the applicable rules are confusing and thus the prospects of success of a criminal investigations – in particular with regard to cross-border implications – are hard to evaluate.

There are no statistics on how many environmental crime cases were not successfully investigated due to this issue. Statistics, however, evidence that the number of investigations and convictions has remained at a very low level across Member States over the past decade. A large majority of the practitioners and their networks confirmed, within the targeted stakeholder consultations that gaps in and uncertainties about the scope and the complexity of environmental crime as described above contribute to the ineffectiveness of the Directive.

The Directive has not been updated in line with the development of EU environmental law and it does not respond to current challenges and new trends in environmental crime. It does not cover categories of offences linked to EU environmental legislation adopted after 2008 (see examples below).

In particular, the Directive does not cover such activities harmful to the environment and to human health as illegal trade in timber, unlawful manufacture, importation or placement on the market of chemical substances, including those which are banned or restricted, placing on the market of products breaching standards, which as a result of the product's mass use cause damage to the environment or human health, illegal execution of development projects which cause substantial damage, illegal recycling of ships, illegal abstraction of water, intentional introduction or spread of invasive alien species of Union concern, illegal placing on the market of fluorinated greenhouse gases. The acceleration of climate change, biodiversity loss and environmental degradation, paired with tangible examples of their devastating effects, have led to the necessity to step up enforcement action against illegal harmful activities accelerating such harmful effects. In these areas, even if sectoral law is advanced, there is still an important gap in terms of enforcement (see examples below). Infringers often face low risks of detection, and even lower risks of prosecution and sanctioning, while financially gaining from the avoidance of environmental safeguards. This also gives rise to organised crime harming the environment.

Also, for some offences under the current Directive, the protection is of limited scope and thus do not have the desirable effect to protect the environment. For example, this concerns offences linked to the protection of wildlife. In the last four decades, global wildlife populations fell by 60% as a result of human activities⁴³. Globally, up to one million species are threatened with extinction. Biodiversity loss and ecosystem collapse are one of the biggest threats facing humanity in the next decade.

Example: Ship Recycling Regulation

⁴³ World Wildlife Fund (2018), Living Planet Report - 2018: Aiming Higher.

of losses due to illegal logging, with an import of around 20 million cubic meters of illegal timber every year. These undermine efforts to reduce emissions from the forest sector and support sustainable management of forests.⁵¹ An analysis of available statistics shows that especially illegal logging is a frequent offence in Member States like BG, RO, HU, LV, and LT.⁵² To combat illegal timber trade, the EU has adopted the Timber Regulation (EUTR),⁵³ which prohibits the placing of illegally harvested timber and products and includes a provision on sanctions. However, the EUTR is not included in the annexes of the Directive and there is no relevant offence in Article 3 ECD. Member States have put in place different types of sanctions, including criminal sanctions introduced in some Member States. However, there are large disparities⁵⁴ and too low sanctions are imposed in practice, which hinders the effectiveness and the credibility of the national enforcement systems⁵⁵ and undermines the effective implementation of EUTR.

Example: chemicals legislation

Numerous reports point out problems with the enforcement chemicals legislation, such as REACH⁵⁶, CLP⁵⁷ and POPs⁵⁸, and risks for human health and environmental which require a stronger legal framework.⁵⁹

Enforcement challenges and low sanctions imposed for breaches hamper the effectiveness of legislation and are an obstacle for a level playing field. For instance, regarding REACH and CLP, there are large disparities between national sanctioning systems and in several Member States the most serious infringements are addressed by relatively low administrative sanctions

⁵¹ WWF. (2019). WWF Enforcement Review of the EU Timber Regulation (EUTR). EU Synthesis Report. [wwf_eutr_implementation_eu_synthesis_report_2019.pdf \(panda.org\)](https://www.panda.org/downloads/wwf_eutr_implementation_eu_synthesis_report_2019.pdf), p. 3.

⁵² See also Council of the European Union, “HR and HU Replies to Questionnaire 10954/19 on the State of Environmental Law in the EU.”

⁵³ Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market, OJ L 295, 12.11.2010, pp. 23–34.

⁵⁴ For example, fines also vary from one country to another ‘ranging from €2,500 to €24,000,000, while in some cases there are no fixed fines’, see WWF. (2019). WWF Enforcement Review of the EU Timber Regulation (EUTR). EU Synthesis Report. [wwf_eutr_implementation_eu_synthesis_report_2019.pdf \(panda.org\)](https://www.panda.org/downloads/wwf_eutr_implementation_eu_synthesis_report_2019.pdf).

⁵⁵ European Commission. (2018). Report from the Commission to the European Parliament and the Council Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market (the EU Timber Regulation) Biennial report for the period March 2015 - February 2017. COM(2018) 668 fin. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0668&from=EN>.

⁵⁶ Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02006R1907-20211001>.

⁵⁷ Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC, and amending Regulation (EC) No 1907/2006, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02008R1272-20211001>.

⁵⁸ Regulation (EU) 2019/1021 of the European Parliament and of the Council of 20 June 2019 on persistent organic pollutants (recast), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02019R1021-20210315>.

⁵⁹ European Commission. (2020). Communication from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Chemicals Strategy for Sustainability Towards a Toxic-Free Environment. COM(2020) 667 final, [resource.html \(europa.eu\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02020C0667), p. 9.

only. A study from 2020 showed clear differences in the enforcement practices of the Member States, with two countries, namely Germany and Sweden, accounting for two thirds of the total referrals to the state prosecutor office, and one country imposing 40% of the administrative fines in the Union in the reporting period.⁶⁰

The enforcement shortcomings prompted the Commission to commit to a ‘zero tolerance approach to non-compliance’⁶¹ as outlined in the Chemicals Strategy for Sustainability. In this regard, extending the scope of chemicals offence under the Environmental Crime Directive is crucial as ‘currently almost 30% of the alerts on dangerous products on the market involve risks due to chemicals, with almost 90% of those products coming from outside the EU and imported articles and online sales representing a particular challenge.’⁶² Hence, EU action appear to be necessary to ensure harmonization of the national enforcement systems and to strengthen the enforcement of REACH at the EU’s borders.⁶³

Example: Invasive Alien Species Regulation

The illegal spread of Invasive Alien Species (IAS) can seriously harm the environment (e.g. extinction of indigenous species) and the economy (e.g. reducing yields from agriculture, forestry and fisheries). IAS cost the European economy 12 billion euros per year⁶⁴ and are risky for the human health (e.g. serious allergies and skin problems; burns caused by the giant hogweed). IAS is one of the five major causes of biodiversity loss in Europe and in the world. According to the IUCN Red List, among the 1872 species considered as threatened in Europe, 354 are directly affected by IAS.⁶⁵ The increase of IAS is linked to intentional introduction (e.g. pets, horticulture) and absence of effective control measures.

Article 15 of the IAS Regulation provides that Member States shall have in place fully functioning structures to carry out the official controls necessary to prevent the intentional introduction of IAS of Union concern but several challenges appear in practice.

Article 30 of the IAS Regulation requests MS to ensure that infringements of IAS related offences are punished by penalties,⁶⁶ including fines, seizure of the non-compliant invasive alien species of Union concern or immediate suspension or withdrawal of a permit. Some Member States have introduced criminal sanctions but there are serious discrepancies among them concerning the types and levels of criminal penalties. For example, the lowest maximum

⁶⁰ European Commission. (2020). Technical assistance to review the existing Member States reporting questionnaire under articles 117(1) of REACH and 46(2) of CLP Final report. [Final report REACH-CLP MS reporting 2020.pdf \(europa.eu\)](#), p. 104.

⁶¹ European Commission. (2020). Communication from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Chemicals Strategy for Sustainability Towards a Toxic-Free Environment. COM(2020) 667 final, [resource.html \(europa.eu\)](#), p. 17.

⁶² Ibid.

⁶³ Ibid, p. 18.

⁶⁴ Kettunen M. et al. (2009). Assessment of the impacts of IAS in Europe and the EU.

⁶⁵ Genovesi P, Carnevali L, Scalera R (2015). The impact of invasive alien species on native threatened species in Europe.

⁶⁶ Regulation (EU) No 1143/2014 of the European Parliament and of the Council of 22 October 2014 on the prevention and management of the introduction and spread of invasive alien species; <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1417443504720&uri=CELEX:32014R114>.

imprisonment penalty is one month (Luxembourg) while Italy and Belgium (Flanders) provide for the highest maximum imprisonment term of three years and five years, respectively.⁶⁷ Sanctions are not comparable and in many instances not dissuasive which can hamper tackling illegal IAS related activities and effective cross-border cooperation. Challenges exist also as regards detection of breaches and identification of offenders.

Drivers

There are two drivers to the problem of the Directive becoming outdated over time and not covering all relevant legislation.

- The approach of the Directive to define environmental law is based on the breach of sectoral legislation referred to in the annexes. Although this reference is a dynamic one and refers to the legislation in annexes in its up-to-date form, new relevant sectoral legislation is not automatically covered.
- There is no easy and functioning mechanism to update the Directive and its annexes and bring new legislation under its scope.

Currently, recital 15 of the Directive states “*Whenever subsequent legislation on environmental matters is adopted, it should specify where appropriate that this Directive will apply. Where necessary, Article 3 should be amended.*” In practice, although new legislation has been adopted since 2008, it does not refer to the Environmental Crime Directive nor has Article 3 ever been amended to include such new crime categories. Instead, sectoral environmental legislation includes its own rules on sanctioning and penalties that are often generic and leave the choice of whether and when criminal sanctions should apply to the Member States. Ultimately, this is an issue of incoherence between the Directive and sectoral legislation that is addressed below under section 6.3.5.

2.1.2 2.1.2 2.1.2 Problem 2: Unclear definitions of environmental crime which may hinder effective investigations, prosecutions and cross-border cooperation

Definitions in Article 3 contain flexible but unclear legal terms such as ‘substantial damage’, ‘non-negligible quantity’, ‘negligible quantity’, ‘dangerous activity’, and ‘significant deterioration’, and thus leave much room for interpretation. Their meaning also depends on the circumstances of the individual case and the environmental crime area concerned.. Differences in interpretation do not only occur between Member States, but even within Member States.⁶⁸ Uncertainty about the meaning of terms used to define environmental crime can lead to environmental crime investigations not be taken up⁶⁹. Different views of what is a crime can also lead to investigations coming to a halt, hampering cross-border cooperation,

⁶⁷ Viñuales J.E. 2019. Analysis of national provisions on penalties – Article 30. Technical note prepared by IUCN for the European Commission, p. 73.

⁶⁸ For a detailed overview of the Member States’ approach towards transposing the Directive on this point see SWD (2020) 259 final, section 5.1.1. (undefined legal terms) and section 6.1.1. (level playing field).

⁶⁹ Europol response to stakeholder consultation.

for example that a European Investigation Order or European Arrest Warrant is not executed.⁷⁰ This contributes to a situation in 2020 where environmental crime - although deemed the fourth most profitable criminal activity in the world - only accounted for 1% of the cases dealt with by Eurojust⁷¹, while only 2148 out of 1,2 million (0.2%) messages exchanged through Europol's SIENA platform⁷² were related to environmental crime. There are no statistics on environmental crime cases that were not investigated or were stopped due to uncertainty about the legal terms used to define environmental crime. Yet, practitioners and their networks in the targeted stakeholder consultations confirmed that this problem is real.

Drivers

Member States have mostly not defined these terms further in their transposing laws. For example, the term 'substantial damage' that is used under Article 3 a), b), d) and e) has been transposed by most Member States either literally or by using similar wording such as 'significant damage' or 'substantial harm', without further refining its meaning⁷³. Where Member States did define this term, they did so in different ways. Some defined it financially (e.g. with regard to profits lost or to money needed to restore the *status quo ante*), while others focused on the quality of the environmental loss (e.g. in terms of size of the geographic area polluted or destroyed, in terms of the time and effort needed to restore the damage, in terms of damage duration)⁷⁴.

2.1.3 2.1.3 2.1.3 Problem 3: Sanction levels are not sufficiently effective and dissuasive in all Member States

Although after the Directive entered into force, sanction levels went up significantly in the Member States, there are still Member States that do not provide for maximum sanction levels that ensure effectiveness, dissuasiveness and proportionality- as shown in more detail below.

Maximum sanction levels available in Member States national law vary largely and are often not dissuasive.

The following graph illustrates large differences in available maximum fines for e.g. Article 3(h) offenses.

⁷⁰ [Eurojust, Report on Eurojust's Casework on Environmental Crime - January 2021](#), p. 13.

⁷¹ Ibid., p. 7.

⁷² Secure Information Exchange Network Application (SIENA), a platform that enables the swift and user-friendly exchange of operational and strategic crime-related messages among law enforcement officers in Member States, Europol liaison officers and third parties with which Europol has agreements.

⁷³ See evaluation report for further details.

⁷⁴ CZ and SK define 'substantial damage' financially, with values ranging from €20,000 (CZ) to 26,660 (SK). CY, FI, LV, PT and RO use qualitative criteria, such as the damage being irreversible or long lasting. FR has issued detailed instructions in a Circulaire along the same lines.

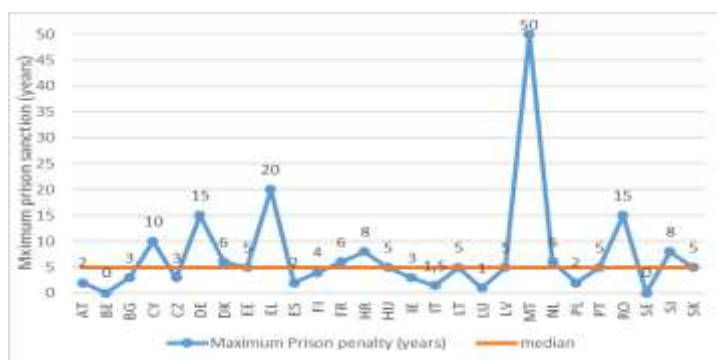
Figure: Maximum levels of criminal fines, applicable to natural persons (EUR) in EU Member States for Article 3(h) offense, and median fine⁷⁵



The levels of maximum prison penalties also vary significantly. The graph below illustrates large differences for crimes covered by Article 3(h). A common understanding of what are effective and dissuasive sanction levels has not emerged.

⁷⁵ A number of MS are not represented in the graph; this is the case for DE and BE, for technical reasons: they have very high maximum fines applicable to natural persons (MEUR 10.8 in DE, MEUR 0.8 in BE at Federal level, MEUR 4 in Flanders, MEUR 8 in Wallonia and in Brussels). Other Member States are not represented on the graph for the following reasons: in DK, no minimum or maximum fine levels are set by law; in HR, EE, FI and SI, the level of the fine is linked to the offender's income, and in IT, the law only provides for a minimum fine, not a maximum one.

Figure. Maximum criminal prison sentences available in national law for Article 3 (h) offenses. 50 years=life imprisonment (Source: Evaluation report)



Natural persons

FR, IT, LT provide for maximum levels of financial penalties for natural persons below EUR 100 000 for some Article 3 criminal offenses, while BG, NL, RO, and SE provide for maximum fines below this threshold for all Article 3 offenses. The evaluation found that this amount was well below the average of all Member States together and unlikely to be dissuasive in all circumstances, given that environmental crime causes enormous harm and illegal profits can amount to millions of euros.

Also with regard to prison penalties, a number of Member States only provide maximum penalties of 3 years or less in their national law for environmental crimes. These penalty levels are low compared to minimum levels for maximum sanctions in other Directives on serious crimes, such as the Anti-Money laundering Directive (4 years),⁷⁶ the Counterfeiting Directive (5 to 8 years, depending on the crime),⁷⁷ or serious drug trafficking offenses listed in the Council Framework Decision (5 to 10 years, depending on the crime).⁷⁸

Table 1, Number of article 3 offences per maximum prison sanction per Member States

Number of Article 3 offenses per maximum prison sanction per Member State																													
Maximum prison sanctions	A T	BE (fed)	B G	C Y	C Z	D E	D K	E E	E L	E S	F I	F R	H R	H U	I E	I T	L T	L U	L V	M T	N L	P L	P T	R O	S E	S I	S K	Total MS	
none	-	2 (+2 N/A)	-	-	-	-	g a p	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1	-	-	3	
0-1 years	2	1	-	-	2	-	-	-	-	1	-	-	-	-	1	1	-	5	-	-	-	-	1	-	-	-	-	8	
1.5-2 years	2	-	-	-	1	-	-	2	-	3	1	3	-	-	1	3	1	-	2	-	-	2	1	-	4	-	1	14	
3 years	-	1	1	-	5	-	-	-	-	1	-	3	1	1	5	-	1	1	-	-	-	1	1	-	1	1	27		
+3 years	5	3	8	9	1	9	8	7	9	4	8	3	8	8	2	5	7	3	7	9	9	7	6	8	4	8	7		

⁷⁶ Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law OJ L 284, 12.11.2018, pp. 22–30.

⁷⁷ Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA OJ L 151, 21.5.2014, pp. 1–8.

⁷⁸ Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking OJ L 335, 11.11.2004, pp. 8–11.

Legal persons

Legal persons typically have much more financial flexibility and capacity to compensate financial penalties than natural persons, as the potential risk of financial penalties can be calculated and passed on to consumers.

As with sanctions for natural persons, maximum levels of fines for legal persons diverge significantly across Member States. E.g. maximum fines for offenses under Article 3(c), range from around MEUR 0.2 in LU to MEUR 250 in SE. Overall, many Member States remain at or below MEUR 0.5 for a number of Article 3 offences (BE, BG, CY, EL, FR, IT, LU, RO).

Moreover, although linking the level of fines to the level of illegal profits or the financial situation of the legal person can be an effective way to define proportionate sanction levels, only a few Member States use this approach in their national laws: NL, PL and AT base the level of fines on the annual turnover or income of the legal person⁷⁹. HU takes into account the financial advantage gained from the offence or the financial situation of the legal persons.

Sanction levels imposed in practice are too low to be dissuasive.

Even where national criminal law provides for high maximum sanction levels, criminal judges do not make full use of the available sanction range, but rather stay in the lowest segment. Imprisonment sanctions are rare, and suspended in practice.⁸⁰

Example: Smuggling in Rotterdam

In 2019, in the NL, the prosecution required an unsuspended prison sentence of 20 months for the import of six containers of illegal and environmentally harmful crop protection products of an estimated value of MEUR 5 and an estimated potential illegal profit above MEUR 4. The judge imposed a suspended sentence of 6 months and a fine of EUR 400 000⁸¹, while the smuggling of small amounts of drugs in the NL is typically sanctioned by a year imprisonment.

Statistical data on the level of fines imposed are scarce (problem 5); notably some data exists for FR, IE and LV on average fines. For natural persons, in 2016, levels of fines for environmental crime were in the order of EUR 5500 in FR, EUR 3500 in IE, and EUR 2000 in LV.⁸² In IE, between 2004 and 2014, average fines of EUR 1400⁸³ were imposed. In FI and FR, average prison sentences of 5 months were given in 2016, whilst it was 21.5 months in LV.⁸⁴

⁷⁹ Evaluation report, p. 32.

⁸⁰ Europol in an interview highlighted that even if certain prison sentences are available in principle, their suspension might impact the effectiveness and dissuasiveness of the sanctions.

⁸¹ 'Rechtssysteem schrikt pleger milieudelict onvoldoende af', NRC Handelsblad, 8 July 2021, Interview with Rob de Rijck, national coordinating prosecutor for environmental crime in the Netherlands.

⁸² Evaluation report, p. 246.

⁸³ Michael J. Lynch, Paul B. Stretesky & Michael A. Long (2019) Environmental crime prosecutions in Ireland, 2004–2014, *International Journal of Comparative and Applied Criminal Justice*, 43:4, 277–293, p. 285.

⁸⁴ Evaluation report, p. 251.

For legal person, several studies (on DE⁸⁵ and other Member States⁸⁶) raised doubts on the sanction levels imposed in practice. In IE, for the period 2004-2014, average fines amounted to EUR 7000⁸⁷. In 2016, average fines were EUR 21 000 in FI, EUR 16 000 in FR and EUR 3500 in IE. In NL, the average criminal fine for companies was less than 1% of annual profit in 90% of cases⁸⁸. Given the high profits for environmental crimes that can amounting to millions of Euros, these levels are inappropriate.

Additional consequences for cross-border cooperation (objective 4)

Access to special investigative techniques such as surveillance of telecommunications and undercover investigations is normally conditional on the seriousness of the environmental crime defined by a certain minimum or maximum level of penalties that is available for the suspected crime. Member States that regard environmental offences as minor will only have the standard investigative tools at their disposal. This can prevent cross-border cooperation,⁸⁹ for example if surveillance measures, which are often linked to the penalty threshold, ordered in one Member State cannot be continued or complemented in another Member State involved.

Low maximum sanction levels can also hamper the use of EU- or international cooperation instruments. For example, the UNTOC – that sets out a framework for international cooperation for serious crime – makes the use of investigative tools provided therein subject to a maximum penalty of at least 4 years of imprisonment, and the European Arrest Warrant to a maximum penalty of at least 1 year of imprisonment. Here also, effective criminal proceedings and cross-border cooperation can be hampered, if not made impossible.

Stakeholders

Stakeholders consider that fines and imprisonment sanction levels imposed in practice are not dissuasive: 65% of public consultation respondents did not find sanction levels sufficiently deterring and only 10% considered them satisfactory⁹⁰. Whilst law enforcement practitioners repeatedly pointed out the low, non-dissuasive sanction levels imposed in practice.⁹¹

Drivers

⁸⁵ OECD as cited by Sina, S., “Environmental criminal law in Germany”, in Farmer, A., Faure, M.G. & Vagliasindi, G.M. (eds.), *Environmental Crime in Europe*, Oxford, Hart Publishing, 2017, pp. 95-117.

⁸⁶ M. Faure, *Environmental Liability of Companies*, 2020, p. 84.

⁸⁷ Michael J. Lynch, Paul B. Stretesky & Michael A. Long (2019) Environmental crime prosecutions in Ireland, 2004–2014, *International Journal of Comparative and Applied Criminal Justice*, 43:4, 277-293, p. 285.

⁸⁸ Netherlands Court of Auditors, *Enforcing in the Dark: Combating to environmental crime and violations*, part 2, 2021, p. 56.

⁸⁹ Report on Eurojust’s Casework on Environmental Crime – January 2021, p. 13.

⁹⁰ Results of the open public consultation, Question 4, point c, 68% of respondents considered this the case to a large extent. The answers of businesses only are similar (50% agree, and 16% consider sanction levels to be sufficient).

⁹¹ Evaluation report, p. 40, interview with Europol.

The main problem driver is the lack of specificity of the Directive, which only requires sanctions to be ‘effective, proportionate and dissuasive’. Pre-Lisbon,⁹² the EC legislator did not have the competence to regulate on sanction types and levels. This is now possible under the new Article 83 (2) TFEU. Hence, EU criminal law instruments adopted after the entry into force of the Lisbon Treaty contain minimum maximum levels of fines and prison sentences. For legal persons, there is often a catalogue of possible accessory sanction that Member States should make available, such as exclusion from public procurement procedures and grants.

In addition, lack of awareness of the harmfulness of environmental crime contributes to criminal judges imposing non-dissuasive sanctions (see below problem 6), as confirmed by the police and judiciary. Thus, many cases are dismissed in court, or only very lenient sanctions imposed.⁹³

2.1.4 2.1.4 2.1.4 Problem 4: Insufficient cross-border cooperation.

The Directive did not prove to be a decisive element for fostering cross-border cooperation in practice. Environmental crime cases currently amount to only 1% of total Eurojust cases,⁹⁴ although environmental crime is the fourth most profitable criminal activity globally, and important environmental crime categories, such as waste trafficking and wildlife trafficking, frequently involve criminal activity in several Member States.⁹⁵ Europol and Eurojust reported small improvements in cooperation in recent years, but these remain overall insufficient. For example, while in 2020 Eurojust reported 1264 new cases on swindling and fraud, 595 on money laundering and 562 on drug trafficking, only 20 new cases on environmental crime were opened. In the same year, only 3 out of 74 newly signed Joint Investigation Teams and 6 out of 260 existing Joint Investigation Teams related to environmental crime.⁹⁶

Cooperation and coordination are also necessary within Member States, since detection, investigation and prosecution may all involve different authorities. Weak domestic cooperation and coordination are also an issue mentioned under problem 6 below.

Drivers

The lack of a more harmonized approach to fight environmental crime creates legal and operational obstacles to Member State authorities to effectively cooperate and jointly investigate transnational, cross-border environmental crime. In particular, intrusive

⁹² The Commission had, in case C 176/03 (2005) been given the power to propose legislation in the area of community law (“first pillar”) requiring Member States to impose effective, proportionate and dissuasive criminal penalties for environmental offenses, although the MS retained the choice to determine the precise quantum and nature of penalties (para. 49).

⁹³ IPEC (Intelligence Project on Environmental Crime), based mainly on a questionnaire sent to EU countries, non-EU countries, and international organisations.

⁹⁴ Note that environmental crime cases may be hidden in other crime cases dealt with by Europol, e.g. under the crime categories ‘organised crime’.

⁹⁵ Eurojust, Report on Eurojust’s Casework on Environmental Crime, January 2021, p. 7.

⁹⁶ Eurojust, Annual Report 2020, p. 27.

investigative tools are not available in all Member States. Further, as demonstrated above the limited scope of the Directive and vague terms used in the Directive to define environmental crime can result in dual criminality issues during cross-border investigations. The Directive does not contain provisions directly fostering cross-border cooperation such as harmonised rules on jurisdiction, investigative tools or the set-up of national contact points.⁹⁷

The Directive does not include any provision obliging Member States to work better together, e.g. through Europol, Eurojust, OLAF and the professional networks during investigations. These agencies and bodies play a key role in facilitating cross-border cooperation on crime, including environmental crime. However, Eurojust as the main operational body to foster cross-border judicial cooperation depends on Member States requesting their support. Stakeholders confirm a lack of knowledge of practitioners of the role of Eurojust and Europol and of how to use the existing tools, such as Joint Investigations Teams.

Only few environmental crime cases lead to few cross-border cooperation. As shown further below, the lack of implementation contributes largely to this situation.

2.1.5 2.1.5 2.1.5 Problem 5: lack of statistical data

In all Member States, there is a lack of statistical data on investigations, prosecutions, convictions, dismissed cases, number of legal persons involved, and the level and type of sanctions imposed. This was shown in the evaluation of the Directive and in the results of the 8th Mutual Evaluations on the effectiveness of EU policies on environmental crime. At EU level, Eurostat has a mandate to develop comparable statistics on crime and criminal justice, but the national authorities are responsible for the official figures sent to Eurostat according to their own methodologies and documentation systems.

A lack of statistical data results in limited information on the entire flow of cases over the whole law enforcement chain, from administrative inspections and police and prosecution services to the criminal courts. Against this backdrop, Member States' performance cannot be compared. Such lack of data also makes it difficult for policymakers and practitioners to monitor the effectiveness of their policies, to identify obstacles in the law enforcement chain and to take targeted and informed decisions⁹⁸. The evaluation found this lack of statistical data to drive other problems, notably the general public's lack of awareness of the scale and impacts of environmental crime, the lack of political prioritisation of environmental crime and the lack of the necessary budget, human and financial resources for law enforcement authorities.⁹⁹

⁹⁷ Such provisions are present in other EU-criminal law instruments, see annex 6.

⁹⁸ See for example, the Netherlands Court of Auditors, *Handhaven in het Duister: De aanpak van milieucriminaliteit en overtredingen* (2021), p.4; the lack of statistical data leads to a lack of insight into the problem and to inadequate policy interventions.

⁹⁹ SWD Evaluation of 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), p. 32.

Drivers

Also this problem has several drivers. Firstly, in most Member States, relevant statistics are fragmented and based on multiple individual statistical sources, as they are collected separately by each individual authority involved in preventing and combating environmental crime, without coordination or integration.¹⁰⁰

Secondly, each Member State establishes its own criminal laws, crimes, legal proceedings and justice responses, as well as specifications for official crime statistics. Such methodological differences make it very difficult to compare statistical data. The crime and criminal justice related metadata and quality reports¹⁰¹ detail these key methodological differences:

- different stages of data collection (input, process or output statistics for offences recorded by the police; or before and after appeal for court statistics);
- different accounting units (offence, case, incident for police statistics, or number of people charged or proceedings for court statistics);
- counting rules for multiple (serial) offences of the same type;
- counting rules when an offence is committed by more than one person;
- use of principal offence rule, and others.

Thirdly, perpetrators are often prosecuted under other crime categories,¹⁰² such as organised crime, fraud, falsification of documents, trafficking of goods or economic crime. Serious environmental wrongdoing is thus often hidden in existing statistics and its impact on the environment is seldom the focus of prosecutions.¹⁰³

The Directive does not include any provision to address collection and reporting of statistical data, or provide a framework to collect data in a comparable manner across Member States.

2.1.6 2.1.6 2.1.6 Problem 6: ineffective enforcement chain

Effective crime detection, investigation, prosecution and adjudication (“the enforcement chain”) are essential for the Directive to be effective in practice. The evaluation found that offences under the Directive are not sufficiently investigated, prosecuted and tried in practice. Numerous studies (see evaluation report, section 5.1.4. – ‘practical implementation’) have identified the need for improvement at all levels of the enforcement chain (detection, investigation, prosecution, conviction) and in all Member States. Recently, the European Parliament in a 2021 Resolution on the liability of legal person for environmental damage stressed the need to ensure the effective enforcement of existing legislation on environmental crime (Recommendation 11).¹⁰⁴

¹⁰⁰ See the findings on statistical data in the final report of the 8th Mutual Evaluations, see Footnote 10.

¹⁰¹ Crime and criminal justice ESMS (reference metadata in Euro SDMX metadata structure), compiled by Eurostat, available at: https://ec.europa.eu/eurostat/cache/metadata/en/crim_esms.htm#relatedmd1594302694764.

¹⁰² Council of the European Union, Report on Belgium (8th Mutual Evaluations Round).

¹⁰³ Giovanni F. Perilongo and Emanuele Corn, ‘The Ecocrime Directive and Its Translation into Legal Practice’, 2017.

¹⁰⁴ European Parliament resolution of 20 May 2021 on the liability of companies for environmental damage (2020/2027(INI)).

According to the results of the 2019 Council 8th Mutual Evaluations, all Member States have shortcomings in one or more points of the criminal law enforcement chain.¹⁰⁵ Every single point is important for the functioning of the enforcement chain as a whole. An overview on the situation in the individual Member States is provided in annex 4.¹⁰⁶

Specific issues important for effective implementation such as cross-border cooperation, the collection of statistical data, the availability of appropriate investigate tools and adequate sanctioning in practice are addressed separately above under problems 3, 4 and 5.

Drivers

The reasons driving the problems concerning detection, investigation and prosecution of environmental crime in the Member States stem from weaknesses of enforcement efforts, lack of awareness and political prioritisation.

First, as described under problem 5, the lack of statistics on environmental crime and a lack of specialised knowledge of many law enforcement authorities on the harmfulness of environmental crime leads to a lack of awareness of the harmfulness and size of environmental crime with decision makers on both political and implementation level. This in turn leads to a lack of prioritisation. Necessary resources and efforts are allocated to other crime areas.

Enforcement authorities do not have the necessary financial and human resources, there is a lack of training and specialisation, data – and information collection and sharing. Integrated strategies tying together all levels of the enforcement chain (detection, investigation, prosecution, sanctioning) are missing in most Member States.

Eurojust reports a the lack of specialised knowledge and experience, along with a lack of resources and the existence of other priorities.¹⁰⁷ The evaluation of the Directive also confirmed that also judges lack specialised knowledge and awareness of the harmful effects of environmental crime. This leads to judges unduly dismissing cases or imposing very lenient sanctions even where more severe sanctions are available.¹⁰⁸

Training and specialisation have been mentioned by all practitioners and their EU-wide networks as being of paramount importance for successful investigations, especially as in the field of environmental crime often potentially large-scale, complex and international investigations are necessary and specialised knowledge is required. Training activities at national level are seen by practitioners as far from being sufficient, tailored and well-

¹⁰⁵ Council of the European Union (2019), Final report of the Eighth round of mutual evaluations on environmental Crime.

¹⁰⁶ The overview takes account of changes made or announced by Member States in reaction to the recommendations to them in the framework of the 8th Mutual Evaluations Round.

¹⁰⁷ Report on Eurojust's Casework on Environmental Crime, January 2021, p. 13.

¹⁰⁸ SWD Evaluation of 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), p. 45, based on stakeholder interviews and a questionnaire by IPEC (Intelligence Project on Environmental Crime).

organised. The EU support to training, e.g. via the European Judicial Training Network, the relevant practitioners' networks and some LIFE and ISF-Police projects, is considered in general useful, in particular concerning establishing common understanding, identification of good practices and preparation of training materials, but not sufficient to compensate for the shortcomings at national level.

Although Member States have already today an obligation not only to transpose EU law by letter but also to ensure implementation in practice, the described problems have been long lasting. Therefore, the need for binding provisions on strengthening the enforcement chain was particularly stressed during the consultations by enforcement practitioners and other stakeholders, in particular as regards ensuring adequate resources and specialisation/training, cooperation, coordination, data collection and strategic approaches.

2.2 2.2 2.2 How will the problems evolve without intervention (baseline)?

As further described below, in recent years have efforts were made at EU level to improve environmental criminal law enforcement. Hence, improvements are likely in some areas. In others, in particular on problems deriving due to the Directive being outdated, the issues will worsen over time.

- a) *Relevant emerging crime areas remain unregulated at EU level, while legal uncertainty persists regarding certain crime definitions (**problems 1 and 2**)*

The issues of the Directive's scope being out of date and not containing all environmentally relevant areas and the vagueness of some of its crime definitions will continue to hamper its effectiveness and thus the effective enforcement against environmental crime on the ground. New environmental crime areas under the Article 3 and the annexes of the Directive can only be introduced through legislative action. As legislation in the environmental area is fast evolving, the problem of the Directive becoming outdated would further accelerate in the future.

Guidelines at Member State level on undefined legal terms, as recommended by the Council's 8th mutual evaluation report, may lead to a certain extent to a greater common understanding between Member States and help facilitate the work of law enforcement authorities.¹⁰⁹ However, national guidelines on interpretation would – in any event – not be binding for others and would also not solve the problem of differing interpretations of the Directive in national law.

- b) *Insufficient sanctioning would persist resulting in limited deterrence (**problem 3**)*

There are large differences between the criminal sanctions provided for environmental crimes in Member States. The existing criminal sanctions are not sufficiently stringent to ensure a high level of environmental protection throughout the Union. As a result, sanctioning practice

¹⁰⁹ Such guidelines on the term 'substantive damage' exist already for the Environmental Liability Directive.

will continue to diverge across the EU in the absence of further intervention at Union level. The Commission issued ‘Guidance’¹¹⁰ on combating environmental crimes and related infringements’ (endorsed by the Environmental Compliance and Governance Forum in 2021) describes inter alia good practices in sentencing. The publication and promotion of this document may contribute to raise awareness on the importance of dissuasive penalties and more harmonised sanctioning in practice. So may the work of the Forum and its sub-group on sanctioning, created in 2022, and the work of the European environmental enforcement networks, such as IMPEL, EnviCrimeNet, ENPE and EUFJE.

c) Legal and operational obstacles for effective cross-border cooperation among Member States would remain (problem 4)

Several initiatives helped to step up cross-border cooperation over the past few years.

Environmental crime became an EU Crime Priority within the current EMPACT 2018-2021.¹¹¹ In that context, Europol has set up a focal point and developed a multi-annual strategic plan and an operational action plan to facilitate cooperation in the area of environmental crime. Due to the increasing need for cooperation, Europol’s environmental cases and messages exchanged through SIENA¹¹² increased sharply since the first operational year under the EU policy cycle (2018). Environmental crime remains also a priority also in the subsequent EMPACT 2022 – 2026.

Eurojust has issued a report on its environmental crime cases with the aim to highlight obstacles of judicial cooperation in this area and to share the best practices to overcome them.

The ‘Guidance on combating environmental crimes and related infringements’ mentioned above under b) devotes a chapter to cooperation and coordination mechanisms, including at European and international levels. Promotion of this Guidance can contribute to better awareness of existing tools and mechanisms. However, this cannot completely address the difficulties related to divergences between national legislation.

Digitalisation of communication and data exchange in judicial cooperation including criminal law proceedings should further facilitate cross-border cooperation. The Commission is working on a regulation, which will make the digital channel the default means of communication in cross-border judicial cooperation.¹¹³

Cross-border judicial cooperation is increasingly required by national authorities to address the complex and international set up of organized crime groups behind environmental

¹¹⁰ [European Commission, Environmental Compliance Assurance Guidance Document Combating environmental crimes and related infringements.](#)

¹¹¹ EMPACT - European multidisciplinary platform against criminal threats.

¹¹² Secure Information Exchange Network Application (SIENA), a platform that enables the swift and user-friendly exchange of operational and strategic crime-related messages among law enforcement officers in Member States, Europol liaison officers and third parties with which Europol has agreements.

¹¹³ Roadmap for Digitalisation of cross-border judicial cooperation initiative: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12547-Digitalisation-of-justice-in-the-EU_en.

crime.¹¹⁴ But without further intervention at the Union level, legal and operational obstacles will however persist in cross-border cooperation among Member States' administrative, law enforcement and judicial authorities across Member States particularly regarding the increasing phenomenon on organised, transnational environmental crime.

d) *The lack of deterrent law enforcement and the impunity of criminals may persist (problems 5 and 6)*

The Council's 8th round of mutual evaluations addressed the issue of proper implementation of European policies on prevention and combating environmental crime. It found that law enforcement was deficient in various areas under scrutiny (such as statistical data collection, financial resources, national strategies to combat environmental crime, cross-border cooperation etc.). In its 2019 final report, it recommended that Member States improve implementation. At the point of finalising this Impact Assessment, 13 Member States have replied so far to inform on measures.

The Commission has also taken steps to improve the effectiveness of Member States' efforts to combat environmental crime. In 2018, the Commission set up a high-level expert group on environmental compliance, the Environmental Compliance and Governance Forum. It also adopted an Action Plan, which supports the work of the European environmental enforcement networks mentioned above. In this context, the 'Guidance on combating environmental crimes and related infringements' mentioned above under b) and c) was issued. It describes in detail good practices relevant to all parts of the enforcement chain from detection to sentencing and its intended publication and dissemination should help strengthen the operation of the enforcement chain. The LIFE Regulation and the Internal Security Fund-Police also provide financial support to the European enforcement networks and national authorities, as they can raise awareness, share good practices and develop practical tools.

e) *Conclusion*

Overall, independent of this review, a range of non-binding measures and guidance already in place could be further developed to support effective criminal law enforcement. However, without further legislative intervention at EU level, the lack of a deterring enforcement system and impunity for environmental crime are likely to persist in EU Member States (see also below: section 5.1.2 –discarded options – non-binding measures).

¹¹⁴ Eurojust, tasked with facilitating and fostering cross-border judicial cooperation, has issued a report on its environmental crime cases with the aim to highlight obstacles of judicial cooperation in the area of environmental crime, including best practices to address the identified issues, see <https://www.eurojust.europa.eu/report-environmental-crime-stresses-need-further-cooperation>. Among others, joint investigation teams (JITs) are an efficient instrument that, according to Eurojust, has not been used to its full potential (see above under chapter 2- problem description cross-border cooperation). JITs can assure the needed multidisciplinary approach to the investigations and ensure the exchange of information and evidence across borders and thus a broader and stronger prosecution in the affected Member States.

3 WHY SHOULD THE EU ACT?

3.1 3.1 3.1 Legal basis

The legal bases for the proposed Directive are Articles 82(2) and 83(2) TFEU. Article 83(2) sets out the Union's competence to establish minimum rules with regard to the definition of criminal offences and sanctions in Union policy areas, which have been subject to harmonization measures, if this is necessary for the effective enforcement. Article 82(2) TFEU sets out the Union's competence to establish minimum rules necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension. It is relevant for provisions on rights of individuals in criminal procedure.

The current Directive is as a pre-Lisbon instrument adopted on the basis Article 175 TEC (now Article 192 TFEU) which had been a legal basis for EU policy on environment protection. According to an ECJ judgment this article comprised also the competence to ensure full compliance with Community legislation through criminal law (judgment of 13 September 2005, C-176/03, paragraph 48). In a second judgment, the ECJ clarified that the definition of types and levels of criminal penalties does not fall within the Community's sphere of competence (judgment of 23 October 2007, C-440/05, paragraph 70). But with the Lisbon Treaty, the Union has received a genuine competence for criminal law measures in EU policy areas, including the definition of sanction types and levels. (Article 83(2)).

3.2 3.2 3.2 Subsidiarity: Necessity of EU action and added value of EU action

Necessity of EU action

Criminal activities related to the environment very often have a cross-border dimension, as an environmental crime can impact several countries (for example the illicit trafficking of waste, wildlife or chemicals or the pollution of air, water and soil, see above section 1 – introduction) or have cross-border effects (e.g. in case of cross-border pollution).¹¹⁵ Cross-border cooperation between law enforcement and judicial authorities is therefore essential.

The existing Directive aimed to provide such harmonised framework to facilitate cross-border cooperation. However, as detailed in the evaluation report, despite the progress in creating an EU-wide common set of definitions of environmental crimes and requiring more dissuasive sanction levels, Member States on their own have not been able to reconcile their respective understandings of environmental crime within the room for maneuver the Directive has left. Similarly, the insufficient sanction levels in a number of Member States prevent a level playing field across the EU and mutual recognition instruments from applying (such as the EAW and the EIO).

¹¹⁵ [Report on Eurojust's Casework on Environmental Crime](#) - January 2021, p. 8. See a UNEP and Interpol Rapid Response Assessment, 'The rise of environmental crime. A growing threat to natural resources, peace, development and security', 2016, p. 7.

Despite the Directive, the number of cross-border investigations and convictions in the EU of environmental crime did not grow substantially. In the meantime, in contrast, environmental crime is growing at annual rates of 5 to 7% globally¹¹⁶, creating lasting damage for habitats, species, health of citizens and revenues of governments and businesses.

Added value of EU action

With a more effective Directive, the EU can provide the harmonised framework for a common understanding of definitions of environmental crimes and for effective access to cross-border investigative tools. By providing more clarity on legal definitions and by approximating sanction levels, as well as by providing tools and obligations for cross-border cooperation among Member States, the revised Directive will create a more even level playing field with equivalent criminal law protection for the environment across the EU and facilitate cross-border cooperation on investigations and prosecutions. By facilitating cross-border investigations, prosecutions and convictions, EU action will provide for clear added value on countering environmental crimes which typically have transnational dimensions compared to what Member States acting alone can achieve.

As environmental crime often undermines legal and tax paying businesses, who share an unknown but likely large share of the estimated annual global loss related to environmental crime of between USD 91 and 259 billion¹¹⁷, an effective EU legislative framework on environmental crime will have an effect on the functioning of the EU single market as well. Without such EU wide legislation, companies operating in Member States with limited definitions of environmental crimes or lenient enforcement regimes can have a competitive advantage over the companies established in Member States with stricter legal frameworks.

An effective EU wide policy on environmental crime may also benefit other EU policy objectives. Environmental crimes are often linked to other forms of crime such as money laundering, terrorism, tax fraud, forgery or other forms of organised crime¹¹⁸ against which the EU has adopted a range of legislation in recent years. A more effective EU legislation on environmental crime would contribute to effective criminal law enforcement strategies, at EU- and national level that address all relevant aspects of criminal interaction.

4 OBJECTIVES: WHAT IS TO BE ACHIEVED?

The methodological challenges encountered during the evaluation of the Directive, which also was subject to a Regulatory Scrutiny Board's opinion, provided valuable lessons for this impact assessment: Ultimately, the policy ambition is to better protect the environment. This fundamental ambition objective drives all EU legislation in the area of environmental

¹¹⁶ UNEP and Interpol Rapid Response Assessment, 'The rise of environmental crime. A growing threat to natural resources, peace, development and security', 2016, p. 7.

¹¹⁷ UNEP and Interpol Rapid Response Assessment, 'The rise of environmental crime. A growing threat to natural resources, peace, development and security', 2016, p. 17.

¹¹⁸ UNEP and Interpol Rapid Response Assessment, 'The rise of environmental crime. A growing threat to natural resources, peace, development and security', 2016, p. 30.

legislation and it applies to criminal law measures as well. The concrete objectives, however, must be goals that can be achieved through criminal law and which allow to measure progress through appropriate indicators. This led us to drop the original general objective of reducing environmental crime and the specific objectives of reducing illegal trade, protecting fair competition and preventing ‘safe havens’ in the EU for criminals. Success of these objectives could not be measured against a baseline, as the amount of undetected environmental crime or illegal trade before and after the Directive is unknown. For the same reason, the extent of progress towards the former objectives of protecting fair playing businesses and preventing ‘safe havens’ was difficult to assess. Moreover, as explained in detail in the evaluation report, these objectives are influenced by many factors other than criminal law. The numbers of environmental crime and illegal trade and the prevention of ‘safe havens’ depend on the development of global trade (with steep upwards trends), on new opportunities through digitalisation and the interplay of criminal sanctioning systems with civil- and administrative sanctioning systems in the Member States.

Therefore, the focus of this review will be narrowed to what could be achieved by means of criminal law in the first place. As there is consensus that environmental crime is driven by high profits combined with a low detection risk, the objectives of this review must be to foster effective investigations, prosecutions and sanctioning.

Success will be measured through the numbers of environmental law cases successfully investigated and prosecuted, the numbers of convictions, and the type and levels of sanctions imposed that must become more effective, dissuasive and proportionate in practice. Developments have to be interpreted in context: today, in the Member States, there are only few environmental crime cases completed successfully and sanction levels are systematically too low. There have been no upward-trends in the past decade (see above, section 1.2 – ‘evaluation of the Directive ‘and the evaluation final report). In this situation, stable upwards trends in environmental cases in all Member States would point to the Directive’s effectiveness. As environmental crime is growing globally at percentage between 5 and 7 % globally,¹¹⁹ a matching growth rate of successful investigations and convictions would be considered a success. By contrast, if - at a later stage - environmental cases were to decrease, this might indicate that the Directive was successful in deterring criminals.

The evaluation has, however, also shown that statistical data on the numbers of investigations, prosecutions, convictions, dismissed cases and sanctions imposed needed as indicators to evaluate and monitor success of EU-environmental crime policies either do not exist, or are fragmented, not collected according to uniform standards or inaccurate. Improving statistical data collection must therefore also be an objective of the Directive (see also section 8 on monitoring the success of the Directive). The table below shows existing EU objectives as

¹¹⁹ See section 1 – introduction.

defined for the current version of the Directive versus the objectives proposed for the review of the Directive:

Table 2, EU objectives in the current version of the Directive versus the objectives proposed for the review of the Directive

Current		Reviewed	
General Objective current Directive	Reduce environmental crime	Protect the environmental through criminal law by effective investigation, prosecution and convictions	General Objective proposed Directive
First specific objective current Directive	To create a level playing field with respect to the offences criminalised and the relevant sanctioning systems, and to prevent safe havens	To improve the effectiveness of investigations and prosecutions by updating the scope of the Directive and by inserting a feasible mechanism to keep the Directive up-to-date	First specific objective proposed Directive
		To improve the effectiveness of investigations and prosecutions by defining more precisely or eliminating vague terms used in the definitions of environmental crime in Article 3	Second specific objective proposed Directive
Second specific objective current Directive	To ensure a system that is a deterrent, through criminal penalties that are effective, dissuasive and proportionate	To ensure that environmental crimes are sanctioned by effective, dissuasive and proportionate sanction types and -levels	Third specific objective proposed Directive
Third specific objective current Directive	To protect fair-playing businesses and reduce illegal trade in environmentally harmful products (such as illegal waste shipments) and wildlife trafficking	-	-
Fourth specific objective current Directive	To improve judicial cooperation	Improve the effectiveness of cross-border law enforcement cooperation and coordination on environmental crime	Fourth specific objective proposed Directive
-	-	Improve informed decision-making on environmental crime through improved collection and dissemination of statistical data	Fifth specific objective proposed Directive
-	-	Improve the operational effectiveness of national enforcement chains	Sixth specific objective proposed Directive

4.1 4.1 4.1 General objectives

The general objective of Directive is to contribute to the protection of the environment through criminal law by way of effective detection, investigation, prosecution and sanctioning of environmental crime. By this, it should ultimately contribute to the reduction of environmental crime, as effective law enforcement increases the risks of detection and punishment for criminals and reduces the chance to get away with the profits. Less environmental crime will help to preserve or restore a healthy and intact environment (see chapter 7 - impacts). Thus, the Directive will ultimately contribute to the overall goals set out in Article 191 TFEU and the Green Deal and the Biodiversity Strategy to improve the state of nature and the environment and to protect human health.

The general objective is supported by a number of specific objectives that aim at more effective investigation, prosecution and sanctioning at different levels:

4.2 4.2 4.2 Specific objectives

The following specific objectives have been identified:

1. Improve the effectiveness of investigations and prosecutions by updating the scope of the Directive and by inserting a feasible mechanism to keep the Directive up-to-date in the light of the European Green Deal.
2. Improve the effectiveness of investigations and prosecutions by clarifying or eliminating vague terms used in the definitions of environmental crime
3. Ensure effective, dissuasive and proportionate sanction types and -levels for environmental crime
4. Foster cross-border investigation and prosecution
5. Improve informed decision-making on environmental crime through improved collection and dissemination of statistical data
6. Improve the operational effectiveness of national enforcement chains to foster investigations, prosecutions, sanctioning

5 WHAT ARE THE AVAILABLE POLICY OPTIONS?

In addition to the baseline of taking no further EU action on environmental crime (section 2.2), three possible main options have been considered. Two of them have been discarded (see below).

5.1 5.1 5.1 Options discarded at an early stage

5.1.1 5.1.1 5.1.1 *Repeal the Directive*

This option is a "roll-back" option repealing the criminal law measures of the Environmental Crime Directive. The sanctioning of breaches of legislation designed to protect the environment would be left to EU sectoral legislation and to national law. Sectoral legislation contains mostly only generic provisions on penalties, only requiring that sanctions be effective, proportionate and dissuasive (standard penalty clause).¹²⁰ Moreover, sectoral law leaves it to the Member States whether these penalties are criminal or administrative.

Compared to only administrative sanctioning systems, complementary criminal law enforcement systems would provide for more effective tools. Firstly, criminal sanctions are more dissuasive as they include imprisonment penalties, which are not available under administrative law. With regard to legal persons, as they can better neutralise potential fines by passing on these costs to their customers and the costs of fines are often offset by the potential profits accrued through the violation,¹²¹ the social stigma of criminalisation is

¹²⁰ Examples include the penalty clause in article 19 of the timber regulation, the penalty clause in article 50 of the waste shipment regulation, or article 79 of the directive on industrial emissions.

¹²¹ Michael G. Faure (2020), Environmental liability of companies, p. 88 (external study requested by the JURI Committee), targeted business stakeholder consultation.

important to enhance the deterrent effect as it brings about reputational damage that companies want to avoid. Secondly, criminal law also provides for more effective investigative tools such as controlled deliveries, wiretapping, surveillance and the confiscation of proceeds of crime, all this under judicial control. As environmental offences are often committed in the context of organised crime, corruption, fraud or money laundering¹²² these tools must also be available for environmental crime as well to ensure effective investigations covering all aspects.

It is the unanimous position of all Member States and stakeholders that criminal law is indispensable to protect the environment. Repealing the Directive would send the wrong signal. It would deny the seriousness of this crime form, which causes enormous harm and globally generates illegal profits of an amount that equals organised crime. It would also counteract the growing awareness and prioritisation of the need to protect the environment and undermine the effectiveness of environmental protection which that can be strengthened only through concerted action and a holistic approach that includes criminal law.

Similarly, maintaining the Directive as such, i.e. without any change, would not address the shortcomings identified nor achieve any improvements at Union level, although guidance may help with its interpretation from the Union's perspective. Neither can one put into sectoral environmental legislation the substance of the Directive as the sectoral legislation is not based on Article 83(2) TFEU and hence would not be appropriate for criminal law measures, e.g. to define the level and type of criminal sanctions.

5.1.2 5.1.2 5.1.2 Address the identified problems only through non-binding measures

The second option would be to maintain the status quo or introduce only non-legislative measures such as EU guidance on interpreting definitions and sanction levels. This option corresponds largely to the baseline as detailed above under section 2.2. A number of non-binding measures have already been taken as detailed above under section 2.2. - 'baseline'. Additional guidance on interpreting vague terms in crime definitions and on data collection could further complement such measures.

However, the effectiveness of soft-law alone is uncertain and gaps in Member States' implementation are likely to remain. Moreover, legal clarity in the field of criminal law is fundamental and especially the definitions of environmental crime cannot be left to non-binding instruments. But also in the other problem areas, the effectiveness of non-binding measures is limited, precisely because they are non-binding. For example, on the individual recommendation to Member States during the Council's 8th Mutual Evaluations (see above under section 2.2.) so far only 13 Member States have reacted with different levels of ambition. Therefore, given the serious problems in the area, which have lasted for years, non-

¹²² FATF Report [Money Laundering from Environmental Crimes](#), July 2021, p. 11; [UNODC Global Programme for Combating Wildlife and Forest Crime | Annual Report 2020](#), p. 10.

binding measures cannot be the appropriate response to the shortcomings of a Directive that includes mostly very generic provisions.

This is also the stance of the large majority of stakeholder, which consider non-binding measure useful or very useful but only in combination with anchoring binding provisions in the Directive. All groups and especially practitioners and NGOs have urged the Commission to be ambitious and improve the Directive revising the annexes.

Non-binding measures and guidance are, however, an important element for effective law enforcement. In the following, they are considered as an intrinsic part of any legislative option.

5.2 5.2 5.2 Relevant policy option: replacing the Directive

The only realistic option is to adopt a new Directive. An overview of the sub-options and cumulative measures under each specific objective can be found in the annex 10 (option table). The intervention logic is attached as annex 9.

6 DESCRIPTION, ASSESSMENT AND COMPARISON OF THE SUB-OPTIONS UNDER THE OPTION TO AMEND THE DIRECTIVE

Hereunder, the sub-options will be referred to as 'options'.

Approach to the structure of section 6:

Under each objective, several options to achieve them have been identified. Their detailed description is provided under section 6 along with the assessment of the options. This approach provides the reader with a description of the option in close connection with the respective assessment. The options are assessed against the following criteria:

- **Effectiveness:** To what extent is the option likely to contribute to the objective? Are the options sufficiently clear to lead to harmonised transposition and implementation in the Member States and to comply with the principle of legal clarity?
- **Coherence:** To what extent the different options interact with other relevant areas and instruments of EU and international policy?
- **Efficiency:** What are the costs of each option and are they justified by the benefits?

It should be noted, that these criteria are not equally relevant for each of the options, so that not all of them will be assessed to the same extent under each option.

Approach to efficiency

To assess efficiency, cost are expected in relation to:

1. Measures proposed for each objective to lead to higher effectiveness and thus more environmental crime investigations, requiring additional staff in the Member States;
2. Broadening the scope of the Directive to include new environmental crime areas under the Directive which may lead to an increase in the number of environmental crime cases, also requiring additional staff;

3. The implementation of options such as enhanced training, improved cross-border cooperation, statistical data collection, strategy development and awareness raising measures which may cause some implementation costs but the expected mid- and long-term benefits would clearly prevail.

The presentation of the efficiency assessment is organised as follows:

- Transposition costs will not be presented for the individual options per objective. They are similar for all options and will therefore not play a role for the comparison of the options. Under section 6 for **objectives 1, 2 and 3** efficiency is not assessed, as these objectives are considered not to incur costs further than for transposition costs. (see, however, costs of additional staff, bullet point below).
- **For objectives 4, 5 and 6**, direct costs related to implementation of the proposed measures are presented (i.e. those linked to cost category 3 above).
- **The costs of additional staff** (category 1 and 2 above) are presented under **objective 6**. However, these costs are to be understood as stemming from a more effective Directive based on the concerted effects of all measures taken under all objectives. Also the cost of additional staff required to handle the additional workload from the broadening of the scope of the Directive (objective 1) will be calculated under objective 6, as these costs cannot realistically be separated from costs for the additional staff needed for more cases due to improved effectiveness of the Directive.¹²³ As it is not possible to attribute shared costs of additional staff needed to individual options or objectives or to specific new legislation that will be included under the Directive these costs will not play a role for the comparison of the options.
- Benefits under efficiency are understood in terms of positive environmental, social and economic impacts and are discussed in section 7, as there will be no measureable differences between the options that could influence their comparison.
- The economic impact on businesses and SME is generally addressed in section 7, and more specifically under those options that have a specific impact on businesses.

A more detailed analysis of the methodology and results of the costs calculation can be found in Annex 2B for each of the options considered in the following part.

¹²³ The calculation of labour costs is based on the following assumptions:

- EU official daily labour cost of EUR 534 for 2020¹²³), based on average monthly salary for grade AD8 with 25% overhead cost;
- Member State daily rate of EUR 294 for 2020, based on 2016 Eurostat Labour Cost Survey 'public administration and defense', adjusted for inflation and including 25% overhead.

6.1 6.1 6.1 Objective 1: Updating the scope of the Directive; introduce a simple mechanism to keep the Directive up-to-date also in the future

The options under the first objective seek to ensure that the Directive covers all relevant sectors of EU-legislation and to provide for a simple and flexible mechanism to update the Directive in the light of the European Green Deal.

6.1.1 6.1.1 6.1.1 Option 1 a): Update the existing list of legislation in the annexes, add new relevant crime categories to Article 3

Description

This option would maintain the current approach of Directive to define the scope of the Directive through sectoral legislation listed in annexes. Accordingly, the annexes would need to be updated by considering changes in legislation already included therein and new sectoral legislation that came into force after the adoption of the Directive.

In addition, corresponding new crime categories would have to be added to Article 3 where serious breaches of obligations deriving from new sectoral legislation do not fall under the crime categories in the current Directive. To illustrate, the EU Timber Regulation¹²⁴ prohibiting illegal timber trade is currently not listed in the annexes. Article 3 does not contain a crime category addressing this type of crime, either. It would therefore not be sufficient to add the Timber Regulation to the annexes. A corresponding new crime definition would have to be added in Article 3.

In the future, if new relevant EU sectoral legislation is adopted, it must be added to the Directive's annexes through legislative procedure. In the same legislative procedure, a corresponding new crime category may have to be added under Article 3, if the sectoral act is not covered by one of the existing crime categories under Article 3.¹²⁵

Introducing comitology procedure would be possible only for non-essential elements in the Directive. However, it would be essential to enlarge the scope of a criminal law legislative instrument and add new environmental offences. According to Articles 290 and 83(2) TFEU, it is for the Union legislator to take such a decision

Similarly, where an amendment (or replacement) of legislation already listed in the annexes would amount to a substantial change of obligations and related infringements¹²⁶, the Union

¹²⁴ Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market, OJ L 295, 12.11.2010, pp. 23–34.

¹²⁵ The current approach in recital 15 of the Directive, whereby the Union legislator could “specify” in an act of sectoral EU law (e.g. legislation based on Article 192 TFEU) that Directive 2008/99 will apply, is now legally excluded. Only before the Treaty of Lisbon came into force, the Union legislator could take such a decision in the same act by which it sets out the relevant administrative rules. Since the Treaties now provide a separate legal basis for the approximation of criminal law, Article 83(2) TFEU must be considered a *lex specialis* to the relevant “sectoral” legal basis.

¹²⁶ For instance, if the approach taken by Union law on certain polluting activities moves from a “permission subject to a prohibiting decision” (i.e. a certain degree of pollution is permitted unless certain thresholds are exceeded or there is an

legislator will have to re-assess whether an effective implementation of the “new” obligation requires that infringements are to be considered a criminal offence, i.e. it will have to adapt and/or amend the relevant references in the Annexes (or possibly adopt a new act based on Article 83(2) TFEU.

Effectiveness

This option would therefore not be more effective than the current Directive with regard to future updates of the annexes and Article 3 definitions.

The Commission will have to become more pro-active in proposing to co-legislators amendments to keep the Directive up-to-date through legislative procedure (the status quo) and to ensure coherence with fast evolving sectoral legislation. The Commission would need to propose with sectoral legislative proposals also changes to the Directive, which would be based on a different legal base.

6.1.2 6.1.2 6.1.2 Option 1 b) Change the approach to define ‘unlawfulness’ and define more precisely which breaches of sectoral legislation are criminally relevant.

Description

Under this option, a generic reference to the relevant EU and national transposing legislation would be combined with a more precise offence definition without using annexes. The conducts that constitute the criminal offences would be described in specific provisions which, to ensure legal clarity, would entail both refinement of existing offence definitions and introduction of new offences (e.g. illegal timber trade) mirroring trends in environmental crime and legislative developments. The annexes would be replaced by a ‘general reference’ to relevant sectoral legislation.¹²⁷

Effectiveness – Legal clarity

This approach would avoid the shortcomings of using a legal technique with annexes that become more and more outdated over time and not suitable to ensure legal certainty.¹²⁸

Experience showed that references to legislation listed in an extensive annex (even without specifying the relevant deriving obligations) cannot guarantee the legal clarity principle. It is unclear which of the obligations and prohibitions have to be enforced by criminal sanctions

administrative decision prohibiting the relevant activity) to an overall “ban with permit reservation” (i.e. the activity is prohibited unless there is a permit), the nature and extent of the unlawfulness in the sense of criminal law would change.

¹²⁷ Regulation 1367/2006 (Aarhus Regulation) provides an example how ‘environmental legislation’ could be defined. According to its Article 2 (1) f ‘environmental law’ means Community legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Community policy on the environment as set out in the Treaty: preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems;

¹²⁸ However, some stakeholders and Member States consider that such an approach would undermine the principle of legality (Article 49 of the Charter), as in criminal matters clarity and foreseeability were of fundamental importance. Although it is in the first place the definition of the criminal offences and penalties set out in national legislation that has to comply with the principle of legality, this principle is also relevant for Union legislation approximating criminal law.

and which ones are sufficiently protected through administrative sanctioning systems. In line with the principles of the proportionality of sanctions and the use of criminal law as ‘ultima ratio’ not every infringement of an administrative rule can and should be considered a criminal offence. Therefore, the unspecified reference to a list of EU-sectoral legislation does not add to legal clarity.

Instead, it should be defined more precisely under Article 3 which of the breaches of obligations deriving from relevant sectoral EU legislation could constitute environmental crime.

An approach for defining the scope of the Directive by a refined definition of “unlawfulness” and more precise description of the offences would ensure the necessary clarity, including for the Member States when transposing the Directive and for practitioners.

6.1.3 6.1.3 6.1.3 Option 1 c): Define environmental crime in the Directive without the requirement of a breach of relevant EU sectoral legislation

Description

This option would define environmental crime without the element ‘unlawful’ or ‘illegal’, thus without a reference to sectoral legislation. Instead, the damage caused to the environment or human health would be constituent for a criminal offence. Precedents at supranational level are the (repealed) 2003 Council Framework Decision that did not require unlawful behaviour in its Article 2 (a)¹²⁹ in case of serious harm for a person or death. The Council of Europe Convention on the Protection of the Environment through Criminal Law (1998) defines environmental crime as a stand-alone offence independent of a breach of sectoral law¹³⁰ for the most serious forms of crime.¹³¹ The concept of ‘ecocide’ that is currently debated can also be understood as an approach to define serious environmental crime independently from breaches of sectoral legislation.

Effectiveness

This option would be effective in preventing the Directive from becoming outdated, as non-compliance with sectoral legislation would not be a crime-constituting element.

Proportionality

¹²⁹ Text: Each Member State shall take the necessary measures to establish as criminal offences under its domestic law:(a) the discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water which causes death or serious injury to any person.

¹³⁰ The Convention was not ratified by a sufficient number of states and therefore did not enter into force. Recently, a Working Group (CDPC-EC) was set up to assess possible ways for the Council of Europe to move forward in the area of environmental protection through criminal law. The Working Group is currently exploring whether a new Convention should be drafted or if the original Convention should be amended. A first meeting was held on 20 and 21 April 2021, where it was agreed that the reasons for the failure of the existing Convention should be analysed in each Member State.

¹³¹ Namely; the discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water which causes death or significant injury or creates a significant risk of causing death or serious injury to any person. See article 2 (a) of the Convention on the Protection of the Environment through Criminal Law.

However, option 1 c) would have impacts that go further than ensuring that the Directive does not become outdated in the future. It could increase the level of environmental protection, but would mean a paradigm shift in loosening the administrative dependence of environmental crime, which has been the predominant approach in the EU. Thus, additional cases would be criminalised that are currently not covered by the Directive. However, some businesses, in particular SMEs, would not have the capacity to carry out extensive risk assessments or take other mitigation measures.

Economic impacts on businesses

Criminalising environmental impacts independently from sectoral law could increase the business risks for enterprises and result in higher costs for due diligence and legal capacity, issues currently driven only by administrative legislation. This risk could be elevated for SMEs as described above. Businesses also claim that issues with administrative permissions being issued too easily and administrative law favouring the interest of an industry over the health of the citizens must be solved by stricter rules at the administrative level and not compensated for by criminal law at the expense of the businesses.

6.1.4 6.1.4 6.1.4 Comparison of the options/preferred option

Option 1 a) is effective only in updating the Directive in the course of this review. It does not spare the EU legislator future updates of the annexes and Article 3 to include new crime legislation and corresponding crime categories.

Option 1 c) would change the approach to define environmental crime by eliminating the link to sectoral legislation and thus remove the cause for the Directive becoming outdated. However, it would come at higher costs for legal businesses, although this option could probably help reduce negative social and environmental impacts (see also section 7 below). However, this option could only be justifiable and proportionate; in cases where very serious harm was caused that goes beyond what could be justifiable by permits or other administrative authorisations. It could therefore not replace, but only complement offences linked to breaches of sectoral legislation. Thus, it cannot be generally effective in preventing the Directive from becoming outdated.

Option 1 b) would remove the annexes and thus the need to update them. Legal clarity would be ensured by adding more precision to the crime definitions under the Directive, in particular with regard to the element ‘unlawful’ that must describe in more detail which types of obligations in sectoral are essential to be enforced by criminal law (see below under objective 2).

Also Option 1 b) does not provide for a simple mechanism to apply if new crime categories under Article 3 should be added, e.g. following the adoption of new sectoral legislation. The definition of new environmental crime categories must be done, as under the current Directive, by the European legislator.

Conclusion

Option 1 b) is the preferred option.

6.2 6.2 6.2 Objective 2: Clearer definitions of environmental crime

The definitions of environmental crime categories under Article 3 use terms such as ‘substantial damage’, or ‘negligible or non-negligible quantity’ that make the existence of environmental crime dependent of the severity of the damage caused. As there is no common understanding how to delineate e.g. substantial damage from non-substantial damage, these terms leave much room for different interpretations (see above section 2.1.2)

Less ambiguous crime definitions would also have positive impact on other specific objectives. They would facilitate cross-border cooperation (objective 4), but also cooperation between different authorities along the law enforcement chain within a Member State (objective 6). A similar understanding of the scope of an environmental crime definition would also foster the collection of comparable statistical data in the Member States and thus contribute to objective 5.

The options assessed below are mutually exclusive, insofar as only one option can apply per crime category under Article 3. However, as Article 3 comprises several crime categories, the options can exist in parallel as different approaches to define environmental crime might be chosen for different crime categories.

6.2.1 6.2.1 6.2.1 Option 2 a): Define unclear terms more precisely in the Directive

Description

The option to define environmental crime more clearly in the Directive would foster a common understanding of how to determine the amount of damage that constitutes environmental crime. It would be necessary to explain in more detail the meaning of vague terms such as ‘substantial damage’, and ‘non-negligible quantities’.

Under this option, the Directive could include general criteria to better determine notions, such as ‘substantial damage’, ‘negligible quantity’ or ‘non-negligible quantity’. The following criteria are an indication of what would be relevant:

- baseline condition of the affected environment;
- severity and spread of the damage;
- amount of material losses (in terms of tax losses, or legal profits, or restoration costs)
- non-material value of natural objects, rareness of the natural objects impacted or destroyed,
- degree and duration of the negative impact on the environment,
- reversibility of the damage and costs of restoration;
- extent to which relevant regulatory thresholds are exceeded;
- conservation status of species concerned.

In addition, under this option, it should be carefully considered whether all terms used in the crime definitions of Article 3 must be defined or whether some of them could be eliminated.

Effectiveness

This option would improve the clarity of the Directive. However, it is not possible – nor would it be desirable – to come up with too detailed definitions that would produce unambiguous results in any given set of circumstances. Such definitions would lack flexibility and thus be prone to creating loopholes. For example: defining a precise threshold for financial losses (in terms of lost taxes, legal profits, or costs to restore the financial damage) that would constitute ‘substantial damage’ would not take into account the economic situation in the Member States and would not adapt to fluctuations of currencies over time. Eventually, in practice it is not always possible to attribute a value to the environmental harm or loss.

6.2.2 6.2.2 6.2.2 Option 2 b): Eliminate undefined terms, including by criminalising risky behaviour (endangerment crime)

Description

Environmental criminal offences could be defined without the constituent element of a damage or the risk of such damage. This approach would be relevant in cases where an activity is considered per se as dangerous and harmful so that it would be justified to criminalise it as a risky behaviour. The offence description would then be based on relevant prohibitions, binding requirements and other obligations defined in sectoral law. For example, sending big ships for recycling in unauthorized facilities (or the illegal recycling activity) could be seen as such a generally prohibited dangerous and risky activity which could be criminalized without a requirement of causing damage or likelihood of causing damage.

Effectiveness

Article 3 c), f), g) and i) of the current Directive already include variations of endangerment crimes that address certain actions considered per se risky for the environment. It could not be observed that these crime forms are successfully investigated more often than other crime forms. It must, however, be noted that changes of just one element - such as the definition of environmental crime – are not expected to measurably translate into higher numbers of prosecutions and convictions. As could be demonstrated in the evaluation, the effectiveness of environmental crime investigations depends on many factors (reflected by the six objectives in this review) and a multipolar approach is needed to improve the situation.

This option would also alleviate the burden of proof. In practice, it has always been difficult to establish whether a substantial damage has occurred and whether the offender acted with the intention to cause serious damage. Moreover, proving the causal link between action and damage is often problematic in practice, for example if a company releases dangerous substances into a nearby river already polluted or where the damage becomes manifest only over time. In practice, these obstacles have led to environmental crime not being investigated. Under this option it would also be possible to prosecute cases of pollution that do not have an

immediate effect but which might lead to damage in the long term. Endangerment crimes are therefore the preferred option of practitioners. Especially, Europol advocates for this option.

However, this approach has its limits, because defining all environmental crime as endangerment crime would not fit all situations and objectives, this approach would therefore not be suitable for all possible scenarios and crime categories under Article 3 of the Directive.

Economic impacts on businesses

Businesses have reservations on the definition of endangerment crimes that criminalize violations of administrative provisions or the breach of conditions of an authorization. They claim that overstepping rules can happen accidentally and without the purpose of gaining illegal profits at the expense of the environment. It would mean a disproportionate burden for otherwise legally operating businesses – especially for SMEs – as being the subject of criminal proceedings. This would be the case already today, as e.g. in the field of illegal shipment of waste mistakes in accompanying documents and certificates are criminalized. Businesses suggest that only those companies disrespecting administrative rules systematically, repeatedly and with the intention to gain illegal profits, should be held criminally liable. For other companies, administrative sanctions would be sufficient.

6.2.3 6.2.3 6.2.3 Option 2 c): a combination of option 2a) and 2b)

This option is a combination of option 2 a) (clarification of undefined notions in the Directive) and 2 b) (eliminating or reducing the use of undefined terms) for the various crime categories under Article 3.

Option 2a) appears to be indispensable for cases in which great harm is produced that can be proven in environmental crime proceedings. Endangerment crimes would catch cases where the legislator has decided that the infringement of sectoral rules would put the environment at an intolerable risk even without damage or likelihood of damage occurring from each individual infringement.

Both types of description of criminal offences are used in the current Directive, and thus option 2c would maintain the current architecture. It would have to be carefully analysed which approach should be used for any new criminal offences to be possibly introduced in a revised Directive.

6.2.4 6.2.4 6.2.4 Stakeholder opinions

Overall, the vast majority of stakeholders supported clarifying undefined terms in the Directive itself. At the same time, a large majority also favoured providing (complementary) non-binding guidance. A significant number of the industry stakeholders (about one-third) considered the option of providing non-binding guidance not useful.

Most Member States endorsed legally binding definitions in the Directive itself but also acknowledged that it might be difficult to strike a balance between sufficiently clear

definitions and the need to maintain a necessary degree of flexibility to cover all possible scenarios. A large majority of the Member States welcomed (additional) soft law measures.

Europol advised to clarify or even remove undetermined concepts and stressed that it may not be realistic to require that the Directive contains all possible definitions. NGOs agreed that the revised Directive should provide clear definitions on key terms and opted for additional non-binding guidance documents. According to many academic stakeholders, it would need detailed and clear definitions to enable national legislators to formulate clear offences.

6.2.5 6.2.5 6.2.5 Comparison of the options/Preferred option

The preferred option is option 2c), as the combination of different techniques for the definition of criminal offences allows a tailored approach to different type of environmentally harmful activities and risky behaviour.

As indicated above, a refined definition of “unlawfulness” would continue to represent part of the legal technique used for the definition of criminal offence and the scope of the Directive. It would clarify that criminal offences under the Directive are serious breaches of EU legislation related to the protection of the environment as well as relevant national law or administrative regulation or decision giving effect to this legislation. The combination of a refined definition of “unlawfulness” and the more precise definition of criminal offences would ensure fulfilment the requirements of the principle of legal certainty.

6.3 6.3 6.3 Objective 3: Improving the proportionality and dissuasiveness of sanction types and levels

The current Directive requires ‘effective, dissuasive and proportionate sanctions’ without further specification. This generic approach has not led to sufficient harmonisation of sanction levels in the Member States. Sanction levels available at national level are not in all cases effective and dissuasive. Therefore, maintaining the Directive as such, i.e. without any change in the area of approximation of sanctions, would not address the shortcomings identified nor achieve any improvements at EI level.

The following options are not mutually exclusive but could reinforce each other:

6.3.1 6.3.1 6.3.1 Option 3 a): Introduce minimum maximum sanctions levels

Description

Minimum maximum sanctions define maximum sanctions that Member States must at least provide for in their national law concerning a specified offence. They must be distinguished from minimum sanction levels that oblige criminal judges to not hand down sanctions below that threshold. The latter are more effective in ensuring an appropriate level of sanctions imposed in practice and are part of a number of Member States legislations. However, in other Member States such minimum threshold would meet constitutional problems as they do not allow the judge to remain below that level even if that would be justified a given case.

Member States have therefore strongly resisted attempts to introduce such minimum sanction levels into their national law. As Article 82 para. 2 TFEU requires respect for the Member States legal traditions and systems in the field of criminal law, a possible option to propose minimum sanction levels was dismissed from the start.

By contrast, minimum maximum sanctions in criminal law instruments are an established practice for harmonising sanctions in EU criminal law (see PIF Directive, Market Abuse Directive, Euro counterfeiting Directive).

More specifically, the proposed minimum-maximum level of sanctions will be graduated according to the severity of the criminal offences referred to in Article 3, so that the Directive will provide for more severe penalties where the conduct has caused or is likely to cause death or serious injury to persons. Furthermore, the Commission will take into account the sanction thresholds in other criminal law Directives adopted on the basis of Article 83(1) and (2) TFEU and the significance of the legal interests protected to ensure coherence.

Coherence

Minimum maximum sanction thresholds would ensure coherence of the Directive with other instruments in the criminal area. These instruments often apply only to serious crime defined by the level of maximum sanctions available according to national law.¹³²

- The European Arrest Warrant does not currently apply to environmental crimes if national law does not provide for a maximum level of at least 1 year imprisonment sanction (or if a sentence has been handed down of less than 4 months). Maximum penalties in BE, IT, LU, and SE are lower than 1 year for some Article 3 offences.¹³³
- The Directive on the European Investigation Order (EIO) does not set any penalty level for the issuing of an order. Nevertheless, Article 6(2) provides that “the investigative measure(s) indicated in the EIO could have been ordered under the same conditions in a similar domestic case”; therefore if the issuing Member State provides in its national law for a maximum penalty level to be met in order for an investigative measure to be carried out, this applies also in the case of the EIO.
- The 2000 UN Convention against Transnational Organised Crime (UNTOC) that promotes effective investigations including confiscation and seizure as well as international cooperation to combat serious crime that is transnational in nature and involves an organised criminal group. The UNTOC would only apply to environmental crime where it is punishable by a maximum of at least 4 years of imprisonment. This threshold is not reached in a number of Member States and for a number of environmental crime areas under Article 3 (see annex 4 - baseline).

¹³² The 6th Anti Money Laundering Directive (AML Directive) came into effect in December 2020. It now explicitly applies to environmental crime irrespective of minimum or maximum thresholds of penalties in the Member States.

¹³³ Evaluation Report, p. 31.

Effectiveness

Experience with other EU criminal law instruments is that minimum maximum – although sending a strong signal that the respective crime category is considered as serious - have limited effect on sanction levels imposed in practice. Also with regard to environmental crime, even in Member States, which provide for high maximum sanction levels, sanction levels imposed remain too often in the lowest segment of the available scale.¹³⁴

Therefore, this option would not be effective, if not supported by other measures.

6.3.2 6.3.2 6.3.2 Option 3 b): Option 3a) plus aggravating circumstances and accessory sanctions

Description

Therefore, in addition to option 3a), defining aggravating circumstances and accessory sanctions could contribute to harmonising sanction levels also in practice and thus ensure their effectiveness.

Examples of aggravating circumstances in other criminal and non-criminal instruments include the severity of the damage done,¹³⁵ the amount of illegal profits generated or expected, the involvement of organised crime groups¹³⁶ or corruption, action taken by the offender to obstruct administrative controls, the use of false or forged documents, intentional or reckless action, committing the crime with the intention to generate illegal profit, or repeated illegal action of the same nature.¹³⁷

Article 19(2)(a) of the Timber Regulation (EUTR) gives some indication of the criteria that Member States can take into account in determining the type and level of financial penalties to apply to EUTR breaches. The list includes environmental damage, value of the timber products placed on the market, tax losses, economic detriment and economic benefits resulting from the infringement.

¹³⁴ See also evaluation report, page 46: “Stakeholders from the police and judiciary in particular said that sanction levels in theory were sufficient, but the problem was practical application by the judicial authorities, due to a lack of knowledge of the harmfulness of environmental crime and to specialisation. The deterrent effect is undermined if many cases are dismissed or only very lenient sanctions are imposed even if more severe sanctions are available under national law or where sentences handed down are suspended. In an interview, Europol highlighted the importance of ensuring that offenders actually serve their sentence”.

¹³⁵ Chapter 29 section 1 paragraph 2 of the Swedish Environmental Code regulates “severe environmental crime” (as opposed to “environmental crime” in paragraph 1) and reads as follows: “If the offence is severe, the sentence shall be ‘severe environmental crime’ and the penalty shall be a term of imprisonment for at least six months and at most six years. When considering whether the offence is severe, special attention shall be paid to the fact if it has caused, or might have caused, lasting damages on a large scale, if the act otherwise was of a particularly dangerous nature or if it included a deliberate risk-taking of a serious kind or if the offender, when particular attention or ability was needed, committed a neglect of a serious kind.”.

¹³⁶ To make the Directive coherent with The Each Member State shall take the necessary measures to ensure that the fact that offences referred to in Article 2, as determined by this Member State, have been committed within the framework of a criminal organisation, may be regarded as an aggravating circumstance.

¹³⁷ The Netherlands Court of Auditors remarks in its report ‘Handhaven in het Duister’, p. 34, that a small number of companies (6%) is responsible for most environmental crimes (56%).

Examples of accessory sanctions are also found in other EU criminal law instruments that entered into force post-Lisbon. Accessory sanctions can include temporary or permanent closure of sites used to commit a crime, the winding up of a legal entity involved in the crime, confiscation of proceeds and seizure of instruments used to commit the crime, exclusion from public procurement procedures and grants, publication of a criminal conviction, withdrawal of permits and authorisations, the disqualification of directors, compensation of victims, the obligation of companies to install due diligence schemes, placing under surveillance of legal entities involved in the crime. Especially with regard to environmental crime, the obligation to restore damaged nature could play a decisive role. In the following, two accessory sanctions are presented in more detail:

The restoration of nature as accessory sanction – coherence with the ELD

The obligation to restore nature has no precedence in other EU criminal legislation and would be a sanction typically connected to environmental crime. The 4 Networks (IMPEL, EnviCrimeNet, ENPE, and EUFJE) in a common statement on 21 May 2021 have strongly recommended that in all Members States, criminal judges should be entitled to impose, apart from financial penalties and imprisonment sanctions, also remedial sanctions such as the restoration of nature¹³⁸. This would imply an integrated approach of both administrative and criminal sanction types creating systemic coherence. Such an integrated approach including especially the restoration of nature has also been called for in a 2021 resolution of the European Parliament¹³⁹, as well as by NGOs.¹⁴⁰

Such an approach exists in some jurisdictions:

Australia has adopted a model of ‘reparative justice’ through the New South Wales Land and Environment Court Act, which provides a combination of punitive and reparative sanctions, the latter including the obligation for the offending company to publicise the offence and its consequences, to carry out specified projects for restoration or the enhancement of the environment, to pay a specified amount to the Environmental Trust, or to organise a training course for its employees. Source: UNEP¹⁴¹

Under current EU legislation, the restoration of environmental damage is provided for in the Environmental Liability Directive (ELD).¹⁴² The ELD establishes a framework of environmental liability, based on the "polluter-pays" principle, to prevent and remedy environmental damage by obliging the operator to restore nature to its previous condition.

¹³⁸ Also EU environmental law has regulated on restoration of environmental damage in the Environmental Liability Directive that is not a criminal law instrument.

¹³⁹ https://www.europarl.europa.eu/doceo/document/A-9-2021-0112_EN.html; Report on the Environmental Liability of Companies.

¹⁴⁰ In particular the NGO European Forum for Restorative Justice, in response to our targeted stakeholder consultation.

¹⁴¹ United Nations Environment Programme (2018), The State of Knowledge of Crimes that have Serious Impacts on the Environment, p. 58.

¹⁴² <https://ec.europa.eu/environment/legal/liability/> for more information on the ELD.

An obligation to restore damage under the Environmental Crime Directive could overlap with the ELD. It is therefore important to ensure coherence between the two instruments. The conditions under which the obligation to restore nature are different under the two instruments, the latter requiring a criminal conviction. In addition, the environmental scope of application of the two instruments overlap but are not identical. However, there is a high potential for synergies: the ELD includes procedural rules and the obligation for Member States to appoint a competent authority to enforce the ELD. It also contains a definition of the concept ‘restoration of the environment’ and how to achieve it.¹⁴³ These definitions and structures could also be used, if the obligation to restore damage were to be imposed during criminal proceedings/by a criminal judge. The Environmental Crime Directive could make reference to the ELD in this regard.

The confiscation of proceeds coherence with the Freezing and Confiscation Directive

Practitioners but also other stakeholders have particularly emphasised that effective and dissuasive sanctioning would require that the enormous illegal profits and other benefits are removed in full. This can be achieved by ensuring that the Directive is coherent with Directive 2014/42 EU (the Freezing and Confiscation Directive). Currently, the scope of the Freezing and Confiscation Directive’s scope does not include environmental crimes. However, it does apply to legal instruments that reference the Freezing and Confiscation Directive. It would therefore be sufficient to include a simple reference in the Environmental Crime Directive to make it coherent with the Freezing and Confiscation Directive and improve its effectiveness with regard to sanctioning.

Effectiveness

Accessory sanction and aggravating circumstances will directly impact the sanctioning in practice. The existence of aggravating circumstances can contribute to judges imposing higher and more dissuasive sanction, using the full range up to the maximum sanction threshold, where appropriate. In the same way, aggravating circumstances could also lead to a more harmonised sanction practice across the EU.

Accessory sanction will also contribute to more effective and dissuasive and proportionate sanctions, as they provide the criminal judge with a toolbox from which he could choose the most appropriate and dissuasive ones adapted to the individual case. Accessory sanctions could be even more dissuasive than financial penalties, in particular with regard to legal persons. For example: confiscation or forfeiture can serve as a very dissuasive tool, as the value of property and assets confiscated can reach amounts surpassing the benefits of a crime.

¹⁴³ Remedying of environmental damage, in relation to water or protected species or natural habitats, is achieved through the restoration of the environment to its baseline condition. The ELD aims at ensuring that the environment be physically reinstated. This is achieved through the replacement of the damaged natural resources by identical or, where appropriate, equivalent or similar natural components, or, as appropriate, by the acquisition/creation of new natural components. If measures taken on the affected site do not allow achieving the return to the baseline condition, complementary measures may be taken elsewhere (for instance, an adjacent site).

Case study – glass eels

The Regional High Court of Nantes, in a decision of 7 February 2019, sentenced the traffickers to 2 years imprisonment and to fines. The Court also sentenced certain offenders to a 5-year ban on carrying out a professional activity related to fishing glass eels. Property, assets and bank accounts of an amount of EUR 700 000 were confiscated, including a boat, a motorbike, a car, a luxury watch and more than EUR 300 000¹⁴⁴. The imposed financial penalty only amounted to EUR 30 000.

6.3.3 6.3.3 6.3.3 *Option 3 c): Option 3 b) plus an obligation to link the level of fines to the financial situation of legal person and/or illegal profits*

Description

A provision could be included into the Directive obliging Member States to take into account the annual turnover of a company and illegal profits generated or expected when determining the appropriate level of a financial penalty.¹⁴⁴

Effectiveness

The financial situation of legal persons generally differs considerably from that of natural persons. Legal persons/companies to a higher degree than natural persons are able to outbalance financial fines, e.g. by off-setting them against the illegal profits generated/expected or as counting them as part of operating expenses.¹⁴⁵ The ECJ has held on several occasions that a dissuasive sanctioning system must take account of the financial situation of the offender¹⁴⁶. Similar arrangements exist for example in EU (non-criminal) competition law¹⁴⁷ or in sectoral legislation, but also in national environmental criminal law.¹⁴⁸

Council Regulation (EC) No. 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing lists certain behaviours as serious infringements. For this category of infringements, Article 44(2) of the Regulation provides for an approximation of the maximum levels of administrative fines foreseen in relation to serious infringements, requiring Member States to impose a maximum sanction of at least five times the value of the fishery products obtained by committing the serious infringement.

¹⁴⁴ Cefic cautioned that there must not be a duplication of the competition law situation, which also connects fine levels to annual turnovers. Here is the purpose of the fines also to prompt cartel members to leave the cartel.

¹⁴⁵ M. Faure, *Environmental Liability of Companies*, 2020, p. 88

¹⁴⁶ See for example Judgment of 27 March 2014, LCL Le Crédit Lyonnais, C-565/12, EU:C:2014:190, para 50 and 51. In this case the ECJ stated that to assess if a penalty is dissuasive it is necessary to compare: (a) the situation of a person behaving in compliance with the law, with (b) the same person's situation after acting against the law and then receiving a penalty. If, under this comparison, the offender is at an advantage when not complying with legal obligations and when penalties are applied, the penalty system is not dissuasive enough.

¹⁴⁷ Cartel law.

¹⁴⁸ Namely in HU, NL, PL, AT, Evaluation report p. 38-39.

For environmental offenses covered by the Directive committed by legal persons, some Member States already link criminal fines to the financial situation of the offender. In HU, the maximum level of fine for all Article 3 offenses is three times the financial benefit gained or expected. If the benefit gained or expected through the criminal act is not a financial advantage, the court imposes the fine considering the financial situation of the legal entity. In NL a fine may be imposed up to a maximum of 10 % of the annual turnover of the legal person in the business year preceding the judgment or decision¹⁴⁹.

In PL and AT, maximum fines are limited by the income or profit of the legal entity. PL sets a maximum fine of 1,250,000, but this fine should not exceed 3% of the yearly income of the entity for all Article 3 offenses. AT makes a distinction between fines for for-profit (between EUR 50 and 10,000 per day) and non-profit (between EUR 2 and 500 per day) legal persons for all Article 3 offenses, with maximum fines of 7,200,000 (or 720 daily units) for all Article 3 offenses except for 3(g) offenses (which have a maximum fine of 3,600,000).¹⁴⁹

Impact on businesses

Sanction systems linked to economic parameters (such as the financial situation of a company) can result in higher fines for large companies. This represents a risk for legitimate businesses that accidentally cause damage through their operations. However, such sanction systems are already in place in several Member States for environmental criminal or administrative law.¹⁵⁰ Additionally, more harmonisation between administrative and criminal sanction systems contributes to creating a more even playing field for legitimate businesses across Europe. In the public consultation, businesses said that a blanket approach based on the financial situation of companies, independent of the type of conduct involved would not be appropriate. Instead, the nature, degree of culpability, frequency, harm caused, any previous warnings from a regulator and seriousness of non-compliance should all be considered to define the appropriate sanction.

6.3.4 6.3.4 6.3.4 All options: non-binding guidance e.g. on determining of illegal benefits, calculation of illegal profits, financial situation of legal persons etc.

The option to harmonise sanction levels only through non-binding measures was discarded above under section 5.1.2. Guidelines and benchmarking could, however, complement binding anchor provisions in the Directive and contribute to further harmonising sanctioning of environmental crime and its effectiveness in practice.

Sanctioning principles have been formulated in the context of the Commission's Action Plan to foster environmental compliance and governance.¹⁵¹ These could be further developed.

¹⁴⁹ Evaluation report, p. 38-39.

¹⁵⁰ As illustrated in section 2.1.3.

¹⁵¹ [Communication](#) from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU actions to improve environmental compliance and governance {SWD (2018) 10 final}.

Special guidance could also be necessary to harmonise sanction levels of financial penalties through e.g. adopting a methodology how to take into account illegal profits and the financial situation of a legal person. For example, if not already regulated in the legislative text (see example above), such guidelines could determine the minimum- or average percentage of the product value or of the economic benefit resulting from the infringement and/or of the annual turnover of a company. Guidance could also be necessary to help determine the value of a benefit or profit obtained from the criminal activity. As such guidelines already exist or are planned for, e.g. in the context of the Environmental Liability Directive, this could lead to synergies. Stakeholders in general have expressed great support for a combination of binding and non-binding measures to improve and harmonise sanctions.

6.3.5 6.3.5 6.3.5 Coherence with EU sectoral legislation - relationship between criminal and administrative sanctioning systems

As illustrated above, the provisions on sanctions in the Directive can overlap with penalty clauses used in sectoral legislations listed in the Directive's annexes or other administrative national or EU-legislation. These instruments do not contain any provisions on the relationship of parallel administrative and criminal sanctioning tracks that would ensure their coherence and the *ne-bis-in-idem* principle¹⁵²:

The Commission is currently reviewing a number of these sectoral instruments.¹⁵³ This gives the opportunity to ensure their mutual coherence and coherence with the Environmental Crime Directive. To prevent overlaps and diverging rules with regard to sanctioning, EU sectoral legislation should only regulate administrative sanctioning systems.¹⁵⁴ Administrative sanctioning systems would continue to apply according to the sectoral legislation or according to the national law of the Member States. The combination of administrative and criminal sanctions should not breach the *ne-bis-in idem* principle (see for this issue also under section 6 – heading overarching national strategies).

The Environmental Crime Directive and EU sectoral legislation should provide for corresponding accessory sanctions types. This would ensure that under both sanctioning tracks there is sufficient flexibility to react appropriately to the individual case.

¹⁵² The application of the *ne bis in idem* principle laid down in Article 50 of the Charter presupposes that the measures which have already been adopted against the accused by means of a decision that has become final are of a criminal nature. The CJEU has held that Article 50 of the Charter covers also cases where the double punishment stems from a combination of criminal and administrative penalties provided that the administrative penalty is criminal in nature (CJEU, judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105). In this respect, the CJEU – aligned itself with the ‘*Engel* criteria’ developed by the ECtHR – has identified criteria, which alternatively and not cumulatively, are relevant for determining whether an administrative sanction is criminal in nature.

¹⁵³ See annex 10.

¹⁵⁴ Notwithstanding the right of Member States to criminalise breaches of sectoral legislation in their national law.

6.3.6 6.3.6 6.3.6 Stakeholder opinions

All measures are supported by a large majority of the stakeholders. A large majority sees a need for provisions on minimum maximum sanction level, aggravating circumstances and accessory sanctions. The usefulness guidance material, compilation of best practices and enhanced and better tailored training was also largely confirmed.

Almost all Member States could endorse the introduction in the Directive of minimum levels for maximum sanctions for environmental crimes. Some Member States have reservations against the definitions of aggravating circumstances and accessory sanctions as well as linking the level of imposed penalties to the profits or turnover of a company.

For one third of the practitioners responding to the public consultation the minimum maximum sanction levels are not useful. One third of the industry stakeholder considers the minimum maximum sanction levels to be not useful. The four networks in a joint statement highlight the need of minimum maximum sanction levels. In Eurojust's view, cross-border investigations and prosecutions of environmental crime in the EU would benefit from the application of more uniform and dissuasive penalties for such crimes across the EU. According to Eurojust, it is essential to remove/confiscate the proceeds of environmental crime more systematically.

A large majority of the Member States, the practitioners and of NGOs advocate for linking the level of imposed penalties to the profits or turnover expected or the profits generated and to the financial situation of business involved in committing the crime. A minority of the industry stakeholders favours this option. One third of the industry stakeholders does not consider this option or the definition of aggravating circumstances and accessory sanctions, to be helpful.

The academic stakeholders strongly support new forms of sanctions for companies, such as the obligation to repair the damage to the environment. Academia have long advocated that a toolkit of administrative and traditionally criminal sanctions be made available to criminal judges. The Fundamental Rights Agency emphasises that sanctions against legal entities must be sufficiently dissuasive, stipulated in national law and effectively implemented.

6.3.7 6.3.7 6.3.7 Comparison of the options/preferred option

The preferred option is option 3 c), which includes the other two options. Each individual option can only develop its full potential with regard to effectiveness, if flanked and complemented by the other options. While minimum maximum sanction levels ensure that a common sanction level is available in the Member States that appropriately reflects the harmfulness of environmental crime, aggravating circumstances aim at imposing appropriate sanction levels also in practice. Accessory sanctions introduce sanction types other than the fines and imprisonment and target in particular legal persons, which often find accessory sanctions more dissuasive than criminal or administrative fines. They can be of different nature and designed to remove the illegal profits from the offender, or to stop future activities

e.g. by seizing the means, which were used to commit the crime. To increase also the dissuasiveness of fines, the level of fines imposed will have to take account of the financial situation of legal person, at least where this appears appropriate. Finally, as it is particularly important to remove illegal profits, which can be enormous and are a key incentive to commit environmental crime, fines must at least reach the level of the profits generated. In this way, a full EU criminal sanction system can be created that has all tools at its disposal to come to the most effective and suitable sanction or mix of sanction in the individual case.

6.4 6.4 6.4 Objective 4: Improving the effective cooperation and coordination between Member States

Practitioners highlighted that effective cross-border cooperation is essential for investigations of environmental crime¹⁵⁵ to succeed. The current Directive does not contain provisions targeting cross-border cooperation.

In the following, a package of measures that support each other will be assessed. We have chosen not to discuss each of these measures as an individual option as each measure tackles different aspects of the problem area and therefore cannot be regarded as alternative options. They are different elements of the same bundle, parts of a package, to address properly all facets of the objective.

We could not identify additional options or alternative packages of options. All conceivable measures as suggested by stakeholders and have been included in the package below. Also in other criminal law instruments there were no other solutions with regard to the problem at hand.

6.4.1 6.4.1 6.4.1 Option – introducing a package of provisions directly fostering cross-border cooperation

The Directive could contain additional provisions directly fostering cross-border cooperation. Examples of such measures exist in other criminal law instruments¹⁵⁶ and oblige Member States to

- a. provide for investigative tools for organised crime and other serious crime forms (such as telephone interceptions, video surveillance, tracking, undercover agents and controlled deliveries); Member States which currently do not allow to use these investigative tools for environmental crime investigations would be obliged to do so.
- b. cooperate through EU-agencies and other bodies mandated to facilitate cross-border cooperation such as Europol, OLAF, Eurojust and professional networks such as ENPE, IMPEL and EnviCrimeNet.
- c. install national contact points for cross-border cooperation. National contacts points could facilitate coordination, information sharing and joint planning at national level as well as contact and cooperation through Europol and Eurojust.

¹⁵⁵ See Annex 8.

¹⁵⁶ See Annex 6.

6.4.2 6.4.2 6.4.2 *Effectiveness, legal feasibility and coherence*

Investigative tools

Access to the most effective investigative tools in all Member States would facilitate effective cross-border cooperation, such investigative tools are normally conditional on the seriousness of the crime and in some Member States conditional on whether the environmental crime is linked to organised crime. Under this option, there would be no further conditions to apply investigative tools also to environmental crime. Effectiveness is limited insofar, as this provision does not harmonise the investigative tools available for environmental crime overall. Member States would therefore only be obliged to make available tools that exist already in their national law. This is justified for proportionality considerations and the principle to respect Member States' legal traditions and systems when harmonising rules to facilitate judicial cross-border cooperation (Art. 82 (2) TFEU).

Cooperation through EU-agencies like Eurojust, Europol and OLAF

An obligation to involve EU-agencies that are mandated with facilitating cross-border cooperation could help increasing the frequency of cross-border cooperation and thus contribute to investigations that are more effective. These agencies may only act when requested by the Member States.

National contact points

The creation of national contact points could help further foster intense and regular EU-wide contacts on the operational level and tear down barriers that existed to so far in tackling cross-border environmental crime cases. This measure could build on the existing professional networks of environmental law enforcement practitioners and prosecutors whose work has already paved the way for better cross-border contacts at national level.¹⁵⁷

Stakeholder opinions

All measures are supported by a large majority of most stakeholder groups. However, the large majority of businesses that replied to the public consultation do not consider harmonisation measures necessary. The joint statement of the four networks emphasises the need for cross-border cooperation within the EU. NGOs support the use of existing mechanisms of cooperation with European Agencies (Eurojust, Europol).

6.4.3 6.4.3 6.4.3 *Efficiency*

Investigative tools

Should the specialised investigative tools be used more widely also due to the broader scope of environmental crime, or due to an overall increase in awareness about environmental crime

¹⁵⁷ See for more details: Smith, L. and K. Klaas. (2015). Networks and NGOs Relevant to Fighting Environmental Crime. Study in the framework of the Efface research project, Berlin: Ecologic Institute. Available at: www.efface.eu.

and prioritisation of such investigations, additional costs for the use of these tools are likely. There is no quantitative data available on the costs of using investigative tools available in the Member States. However, prosecution officers from two Member States noted in interviews that these techniques can be costly, particularly for translation and telecommunication services. Media reports have also noted the relatively high cost of wiretapping efforts, mostly linked to telecommunication services. The benefits in terms of improvements in the efficiency of investigations and prosecution and the further social and environmental impacts (see section 7) would nevertheless be very high, hence this measure is deemed efficient.

Cooperation through EU-agencies and bodies mandated to facilitating cross-border cooperation such as Europol, OLAF and Eurojust; install national contact points for cross-border cooperation;

Using reference data from previous impact assessments, a range of 12 – 20 days per contact point annually was estimated. Contact points are assumed to be required in five different areas (administrative authorities, police, customs, prosecution and courts) per Member State. Costs are presented in the table below.

Table 3, estimated annual costs of establishing and maintaining focal points in the Member States

Annual costs	Low		High	
Per focal point	12 days	€ 3 523	20 days	€ 5 872
Per Member State (5 focal points)	60 days	€ 17 615	100 days	€ 29 358
All Member States (EU27)	620 days	€ 475 594	700 days	€ 792 656

Many Member States have representatives in professional networks of law enforcement practitioners specialised in environmental crime (i.e. IMPEL, ENPE, EUFJE and EnviCrimeNet). These representatives could formally take on the role of national contact points, so that synergies could be used and cost reduced.

6.4.4 6.4.4 6.4.4 Conclusion

The measures proposed under this option are each effective on their own merits, but combined they support and reinforce each other. As shown above under section 2.2 - baseline, mandatory provisions in the Directive are necessary to support the effectiveness of already numerous existing non-binding measures and trainings that support cross-border cooperation.¹⁵⁸

¹⁵⁸ Support offered by existing agencies such as Europol and Eurojust, but also from EU-wide operation professional networks in the field of environmental crime, EU- action plans to foster practical implementation of environmental law

6.5 6.5 6.5 Objective 5: Improving data collection, statistics and reporting on environmental crime

The options to improve data collection and dissemination and statistics in the Member States are:

Legislative options:

Option 5 a): Oblige Member States to collect data, prepare statistics and actively disseminate them, and regularly report to the Commission statistical data related to environmental crime.

Option 5 b): Oblige Member States to collect and report statistical data according to harmonised common standards

Further measures to support both options:

- Provide for EU-guidelines on the collection, sharing and reporting of statistical data on environmental crime.
- Provide for non-binding EU guidelines on developing common standards for collecting, sharing and reporting of statistical data.
- Professional training for national law enforcement authorities on the collection, sharing and reporting of statistical data. based on EU-training modules
- Provide for a common EU platform to be used by Member States for sharing and reporting of statistical data/use of the existing e-justice portal.

6.5.1 6.5.1 6.5.1 Option 5 a): Oblige Member States to collect and regularly report to the Commission statistical data on environmental crime proceedings combined with further supporting measures

Description

Under this option, Member States would be obliged to collect and process relevant data, compile statistics, and report such statistical data themselves to the European Commission, but they can choose how they will do it.

Efficiency

Provisions obliging Member States to collect data on scale of environmental crime and efforts to combat it, prepare statistics and report to the Commission specific statistical data on criminal proceedings exist in other Directives.¹⁵⁹ The legal concepts, criminal justice systems, data and methods of crime statistics vary greatly between European countries, as well as the efforts to collect accurate and complete statistical data at all. The lack of standardised instruments and methodology limit the comparability of crime statistics.

including cross-border cooperation and measures taken under the EMPACT policy cycle have not been sufficient to make a real difference.

¹⁵⁹ Specifically: Directive 2019/713/EU Article 18 on counterfeiting of non-cash means of payment; Directive 2013/40/EU Article 14 on attacks against information systems; and Directive 2014/42/EU Article 11 on the confiscation and freezing of assets.

Supporting measures

The option could therefore be supported by non-binding measures such as guidelines and training. Such measures already exist today and could be stepped up. E.g. the ‘Guidance on combating environmental crime and related infringements’¹⁶⁰ provides guidance on data collection and information sharing. Although this helps Member States to get understand techniques and best practices, it does not ensure that all Member States comply.

An EU-format or platform at EU level to share and report to the EU the statistical material collected could make it easier for Member States to share and report their statistical data. A platform would use standard IT tools and a common reporting format. Especially, combined with an obligation of the EU to publish annual reports on the developments of law enforcement proceedings in the Member States based on the statistical data reported could lead Member States to see the benefits of reliable, accurate and comparable data in the field of environmental crime. Synergies with existing EU-portals disseminating crime statistics could be used. Such portals exist for example at: Eurojust, Europol, Eurostat (section on [Crime and Criminal Justice statistics](#)), EMCDDA (European Monitoring Centre for Drugs and Drug Addiction).

However, without a standardised format, it will be difficult to compile comparable statistical data on a European level given the language differences, the different procedural rules at each stages of criminal proceedings and the variations e.g. on the conditions for dismissing a case across Member States. Although 19 Member States already publish data on environmental crime in various national publications¹⁶¹, this data collection is fragmented across different authorities in each country, without much central national coordination. The Directive would therefore have to go further and be more specific in its demands, to be really effective.¹⁶²

6.5.2 6.5.2 6.5.2 Option 5 b): Option 5 a) plus an obligation of the Member States to collect and report statistical data according to harmonised common standards

Under this option, Member States would be obliged to collect and process relevant information and data, compile statistics and transmit statistical data according to minimum common standards¹⁶³ for the annual collection, compilation and transmission to a national coordinating office. The exact definition of minimum standards as opposed to fully

¹⁶⁰ <https://circabc.europa.eu/ui/group/cafdbfbb-a3b9-42d8-b3c9-05e8f2c6a6fe/library/4936f98d-ace0-438b-8bd7-0afc9946dbfa/details>.

¹⁶¹ According to baseline research: Final Report on the Evaluation of Directive 2008/99/EC – study by Milieu 2020; DG HOME: Overview of the availability, comparability and consistency of administrative statistical data on recorded crime and on the stages of the criminal justice process in the EU; and stakeholder consultation by DG Justice.

¹⁶³ Issues requiring a common understanding would be e.g. common counting units and rules (e.g. offences rather than investigations or cases; persons suspected for several offences be counted for each type separately or not), use of a common classification of environmental crime (or sub-categories) for statistical and reporting purposes to be prepared by the EU working group, common indicators according to common reporting standards (e.g. persons convicted for waste crime; number of custodial sentences for pollution offences; number of fines for pollution offences exceeding threshold of X Euro, etc.).

harmonised standards could be determined at EU level with participation of Member States using comitology procedure.

Feasibility and effectiveness

This option would be feasible, given that current crime and criminal justice statistics systems in most Member States already have experience in reporting crime and criminal justice data to Eurostat. Thus, the majority of Member States have achieved already some level of data standardisation. Data following minimum common standards would still provide limited comparability among countries.¹⁶⁴ However, if data on persons suspected and convicted for trafficking in species referred to the same counting units, the same category of crime and the same reporting standards across countries, trends in conviction rates for trafficking in species would be reliable and comparable.¹⁶⁵

Effectiveness could be fostered further through transparency resulting from the dissemination of statistical data. Thus, it would be public which Member States are not providing comparable statistical data. Moreover, regular Commission reports on the results and interpretation of the statistical data on environmental crime proceedings in the Member States provide valuable information and could be an incentive for Member States to step up their efforts in collecting comparable statistical data.

Political support

As Member States will have to invest in adjusting their data collection systems and workflows, and will have to participate actively in setting up and defining common standards, this option is, however, dependent on the political will in the Member States to do so. As the lack of statistical data in the area of environmental crime has been a well-known challenge in the past decade and addressing these shortcomings was also recommended by the 8th Mutual Evaluation, there is a momentum to take steps towards more effective data collection. But Member States were in the past very reluctant to accept obligations to harmonise criminal statistics.

Stakeholder opinions

All improvement options are supported by a large majority of stakeholders; almost all of the respondents to the public consultation are in favour of obliging Member States to collect and regularly report statistical data, of developing common standards at EU-level, establishing a common platform to collect and exchange statistical data and of boosting professional training and awareness raising. A large majority is also in favour of non-binding guidelines on data

¹⁶⁴ Full effectiveness would require a fully harmonised environmental criminal law and -procedural law and fully harmonised statistical and reporting standards, which is unrealistic.

¹⁶⁵ Absolute numbers should not be compared between Member States when reporting, recording and substantive criminal law are not fully harmonized – for example, a lower number of convictions for trafficking in species in one country may simply be the result of most perpetrators of this crime being fined under civil law judgements, or under criminal law sanctions under a different crime category (such as smuggling in goods).

collection as well as of developing common EU standards on the collection of statistical data. But the majority of the Member States is not in favour of any legal obligation for Member States, although one third of the Member States supports the establishment of a common platform to collect statistical data.

For half of the practitioners non-binding guidelines as well as the combination of binding and non-binding measures are not useful. The majority of the practitioners thinks a legal obligation is necessary. The four networks stressed the need for consistent reliable data. Europol agrees with obliging Member States to collect and share data and to establish a common platform, for instance that it would host. The NGOs favour setting up a centralised system for data sharing purposes.

6.5.3 6.5.3 6.5.3 Efficiency

Option 5 a): Oblige Member States to collect and regularly report to the Commission statistical data related to environmental crime.

To establish a baseline for effort required from Member States to centralise the collection of their existing statistical data on environmental crime, Member States have been grouped into six categories based on the number of agencies currently involved with statistical data on environmental crime. To account for differences among the Member States, the number of days estimated to implement this option is based on the number of agencies within the Member State that would need to provide data. The definition of implementation activities and approximate effort in person days has been developed based on expert judgement by practitioners with experience in crime statistics and are detailed in the supporting study.

The overall costs would be approximately 909 person days or EUR 312 338 of one-off costs for the set-up and annual costs of 588 person days and EUR 198 610, as broken down in the following tables by Member State and at EU-level.

Table 4, Member State cost for Option 5a)

MS	Baseline # agencies	Set-up/one off				Annual / continuous			
		Central reporting system	Round tables*	Total set- up / one- off days	Total set-up / one-off costs	Reporting **	Compilation ***	Total annual / continuous days	Total annual / continuous costs
AT	4	8	16	24	€ 7,046	4	12	16	€ 4,697
BE	7	14	28	42	€ 12,330	7	21	28	€ 8,220
BG	4	8	16	24	€ 7,046	4	12	16	€ 4,697
CY	3	6	12	18	€ 5,284	3	9	12	€ 3,523
CZ	3	6	12	18	€ 5,284	3	9	12	€ 3,523
DE	3	6	12	18	€ 5,284	3	9	12	€ 3,523
DK	4	8	16	24	€ 7,046	4	12	16	€ 4,697
EE	4	8	16	24	€ 7,046	4	12	16	€ 4,697
EL	7	14	28	42	€ 12,330	7	21	28	€ 8,220
ES	7	14	28	42	€ 12,330	7	21	28	€ 8,220
FI	4	8	16	24	€ 7,046	4	12	16	€ 4,697
FR	6	12	24	36	€ 10,569	6	18	24	€ 7,046
HR	3	6	12	18	€ 5,284	3	9	12	€ 3,523
HU	2	4	8	12	€ 3,523	2	6	8	€ 2,349
IE	5	10	20	30	€ 8,807	5	15	20	€ 5,872
IT	7	14	28	42	€ 12,330	7	21	28	€ 8,220
LT	4	8	16	24	€ 7,046	4	12	16	€ 4,697
LV	2	4	8	12	€ 3,523	2	6	8	€ 2,349
LU	2	4	8	12	€ 3,523	2	6	8	€ 2,349
MT	3	6	12	18	€ 5,284	3	9	12	€ 3,523
NL	7	14	28	42	€ 12,330	7	21	28	€ 8,220
PL	6	12	24	36	€ 10,569	6	18	24	€ 7,046
PT	4	8	16	24	€ 7,046	4	12	16	€ 4,697
RO	6	12	24	36	€ 10,569	6	18	24	€ 7,046
SE	5	10	20	30	€ 8,807	5	15	20	€ 5,872
SI	5	10	20	30	€ 8,807	5	15	20	€ 5,872
SK	3	6	12	18	€ 5,284	3	9	12	€ 3,523
Total		240	480	720	€ 211,375	120	360	480	€ 140,917

* 2 persons for 2 round tables (1 day each) per agency

** 1 day per agency

*** 3 days per agency

Option 5 b): Oblige Member States to collect and report statistical data according to harmonised common standards to be defined by the Commission.

This option differs from the previous by emphasising the application of minimum common standards for the collection, compilation and reporting of statistics on environmental crime. It assumes the setting up of an EU Task Force of independent and EU experts to define and maintain the common standards, and work directly with Member States to ensure implementation, as well as a Member State working group to handle national specificities. The same baseline used in Option 5 a) is also used to distinguish between efforts required in different Member States. The overall costs would be approximately 1 948 person days or EUR 689 789 of one-off costs for the set-up and continuous costs of 1 165 person days or EUR 412 999 per year, as broken down in the following table.

Table 5, Member State costs for Option 5 b)

MS	Baseline # agencies	Set-up / one-off					Annual / continuous				
		Set-up national coordination procedure	MS working Group*	Setting up standards**	Total set-up / one-off days	Total set-up / one-off costs	Coordination	Maintenance of standards	Collection and reporting***	Total annual / continuous days	Total annual / continuous costs
AT	4	5	13	32	50	€ 14,678.82	10	4	16	30	€ 8,807.29
BE	7	5	16	56	77	€ 22,605.38	10	7	28	45	€ 13,210.94
BG	4	5	13	32	50	€ 14,678.82	10	4	16	30	€ 8,807.29
CY	3	5	12	24	41	€ 12,036.63	10	3	12	25	€ 7,339.41
CZ	3	5	12	24	41	€ 12,036.63	10	3	12	25	€ 7,339.41
DE	3	5	12	24	41	€ 12,036.63	10	3	12	25	€ 7,339.41
DK	4	5	13	32	50	€ 14,678.82	10	4	16	30	€ 8,807.29
EE	4	5	13	32	50	€ 14,678.82	10	4	16	30	€ 8,807.29
EL	7	5	16	56	77	€ 22,605.38	10	7	28	45	€ 13,210.94
ES	7	5	16	56	77	€ 22,605.38	10	7	28	45	€ 13,210.94
FI	4	5	13	32	50	€ 14,678.82	10	4	16	30	€ 8,807.29
FR	6	5	15	48	68	€ 19,963.20	10	6	24	40	€ 11,743.06
HR	3	5	12	24	41	€ 12,036.63	10	3	12	25	€ 7,339.41
HU	2	5	11	16	32	€ 9,394.44	10	2	8	20	€ 5,871.53
IE	5	5	14	40	59	€ 17,321.01	10	5	20	35	€ 10,275.17
IT	7	5	16	56	77	€ 22,605.38	10	7	28	45	€ 13,210.94
LT	4	5	13	32	50	€ 14,678.82	10	4	16	30	€ 8,807.29
LV	2	5	11	16	32	€ 9,394.44	10	2	8	20	€ 5,871.53
LU	2	5	11	16	32	€ 9,394.44	10	2	8	20	€ 5,871.53
MT	3	5	12	24	41	€ 12,036.63	10	3	12	25	€ 7,339.41
NL	7	5	16	56	77	€ 22,605.38	10	7	28	45	€ 13,210.94
PL	6	5	15	48	68	€ 19,963.20	10	6	24	40	€ 11,743.06
PT	4	5	13	32	50	€ 14,678.82	10	4	16	30	€ 8,807.29
RO	6	5	15	48	68	€ 19,963.20	10	6	24	40	€ 11,743.06
SE	5	5	14	40	59	€ 17,321.01	10	5	20	35	€ 10,275.17
SI	5	5	14	40	59	€ 17,321.01	10	5	20	35	€ 10,275.17
SK	3	5	12	24	41	€ 12,036.63	10	3	12	25	€ 7,339.41
Total	120	135	363	960	1458	€ 428,034.39	270	120	480	870	€ 255,411.47

* Round tables: 1 person for 2 round tables (1 day each) per MS + Reviewing results by task force: 4 days per MS + Translating/ transposing standards: 3 days per MS + Round table for feedback: 1 day per agency

** Preparation: 3 days per agency + Minor changes in current statistics: 3 days per agency + Round table before start of reporting: 2 persons for 1 day each per agency

*** Reporting: 1 day per agency + collection: 1 day per agency + validation: 2 days per agency

Costs are estimated for the Commission to determine minimum standards for data collection via preparation of an implementing act and assisted by a Commission consisting of representatives of the Member States. The following activities would be required over a 9-month period:

1. Preparation of a draft design or proposal for statistical standards, building on the existing study prepared by the contractor for the impact assessment
2. Three meetings of the MS working group to review drafts
3. Bi-lateral meetings with those Member States (approximately 10) who would require additional input / negotiation to harmonise their current statistical data collection activity
4. Review and revision of the draft and preparation of an interim (draft final) version of the standards
5. EU level inter-service review of the standards and expected results
6. Finalising the document

There are two possibilities for the Commission to carry out these activities. The Commission could choose to have the work carried out by an external Intra-muros, Full-time costs are

estimated using the average monthly salary for AD8 plus an overhead cost. The total estimated cost is **EUR 86 508**.

The Commission could also engage a contractor via an ongoing framework contract. Costs are estimated using the average typical framework contract rates proposed by contractors for the current DG JUST Lot 1 contract and include all overheads and associated costs. The total estimated set-up cost are **EUR 138 771**.

Recurrent costs would stem from maintaining the standards and the production of regular reports based on the statistical data transmitted by Member States, estimated at **EUR 12 861** (24 days) and **EUR 21 238** (40 days) = **EUR 34 188. (64 days)**.

6.5.4 6.5.4 6.5.4 Comparison of the options/preferred option

The preferred option is option 5 b). This option is more costly and demands more engagement of the Member States and the Commission, but it is more effective than option 5 a). The problem of incomplete, inaccurate and incomparable data has persisted for a long time and hindered the evaluation, monitoring and informed decision-making with regard to environmental crime. The simple obligation to collect and report statistical data on crime as present in other EU-legislation has not lead to a sufficient improvement of the situation, even if combined with some guidelines and training. Therefore, more efforts are required at EU-level to binding common standards for the data collection in Member States.

6.6 6.6 6.6 Objective 6: Improving the effective operation of the enforcement chain

As outlined in the 2020 evaluation report, there are large deficits in detection, investigation, prosecution and adjudication of environmental crimes covered by the Directive in all Member States. Generally, it is primarily a Member States responsibility to take the necessary action to implement EU law effectively.¹⁶⁶ However, the problem has long been persisting and existing non-binding guidance and other supportive measures have so far not led to tangible results (see above section 2.2. - baseline).

The effective enforcement at national level is crucial for successfully combating environmental crime whereas the evaluation of the Directive has identified the lack of effective enforcement at national level as a serious obstacle to combating environmental crime and a reason for the Directive to be not effective on the ground. The 8th round of the Council Mutual Evaluations also came to this result, as well as numerous studies and reports in the field over the past years. Recently, the EP has called for better practical implementation in the field of environmental crime.

¹⁶⁶ Article 4(3) TEU, Articles 288(3) and 291(1) TFEU.

6.6.1 6.6.1 6.6.1 *Insert in the Directive obligations that directly strengthen the effectiveness of the law enforcement chain*

Description

As under objective 4 (see above 6.4.), a set of provisions aimed at ensuring effectiveness of the enforcement chain is assessed. As under objective 4, the individual measures are not treated as separate options because they address different aspects of the objective and are to be seen as mutually supportive. The measures are inspired by input from enforcement practitioners and similar provisions in other EU-criminal law instruments (see annex 6). The Directive would include provisions to oblige Member States to

- a. support specialisation among the enforcement chain, including the setting up of specialised units in police and prosecution services; establish specialised court chambers
- b. provide regular and appropriate training along the enforcement chain,
- c. ensure effective cooperation and coordination between relevant authorities within and between MS, including exchange of information
- d. take measures to raise public awareness of the harmfulness of environmental crime,
- e. set-up a national strategy¹⁶⁷ to combat environmental crime which help, inter alia, to ensure coherence between administrative and criminal enforcement and sanctioning.

This does not exclude developing guidance material on issues related to detection, investigation, prosecution and sanctioning of environmental crime and develop training materials for specialised training and specialisation of law enforcement officials, judges and prosecutors. In this regard, the existing European environmental enforcement networks, such as IMPEL, EnviCrimeNet, ENPE and EUFJE, can play an important role. Already existing guidelines could be further developed (see above section 2.2. - baseline).

Specialisation

In particular, the creation of specialised units in police and prosecution as well as specialised chambers at criminal courts would be most effective for improving environmental crime law enforcement. This has unanimously been emphasised by practitioners, their networks and – EU-agencies in stakeholder consultations. In ES, the specialisation of the police and prosecution is considered as one of the determining factors in achieving successful convictions of environmental crime¹⁶⁸ (see table under section 1.1) However, it is a core Member States competence to decide how to structure their respective law enforcement systems. Therefore, only recommendations to the Member States would be possible.

Training

¹⁶⁷ Guidance already exists on strategic approaches; see Guidance on Combating Environmental Crimes and Related Infringements, Chapter 14 under the Action Plan on Compliance and Governance.

¹⁶⁸ Fajardo, T., Fuentes, J., Ramos, I., and Verdu, J. (2015). Fighting Environmental Crime in Spain: A Country Report. Study in the framework of the EFFACE research project. Granada: University of Granada, p. 10.

The widespread lack of appropriate regular training and specialisation along the enforcement chain calls for strengthening training activities. Although some Member States currently provide some form of training in relation to combating environmental crime, (see more information in annex 4), practitioners in consultations had emphasised the strong need for more and better targeted training for all practitioners along the enforcement chain as well as the need to ensure that this is priority. They stressed that the current level of training does not ensure sufficient expertise in the highly technical and complex field of environmental crime. It is therefore assumed that all Member States, will need to provide additional training on environmental crime for all practitioner groups.

Effective training must be targeted, regular, practice oriented and follow high quality standards across professions and Member States. Ideally, national training for law enforcement and the judiciary would be complemented by sessions bringing together cross-professional audience from different Member States. Training would have to cover all the above mentioned objectives of the Directive. Training in the Member States could be supported by the EU through further development of existing and creation of new training modules on combating environmental crime, with involvement of the European environmental enforcement networks. Examples of existing obligations to provide training in EU-criminal law instruments can be found in annex 6. An overview of the baseline on training provided by each Member State is given in annex 4.

Awareness raising

The range of awareness raising activities is wide. It includes public information campaigns in media, schools and businesses, creating channels for citizens to report environmental crime to the public authorities the organisation of events, seminars and the fostering of research projects.

Today, according to the country reports of the 8th mutual evaluations, AT, CZ, IE, IT, NL and SE provide information to both the general public and private businesses. DE, FI, LV, PT and SK take actions targeting private enterprises or public, including the installation of communication channels to report environmental crime. BE, BG, DK, FR, LT, LU, PL take some action to educate children. CY, EE, EL, ES, HR, HU, MT, RO, SI carry out little or no awareness raising activities.

Overarching crime strategies – coherence between administrative and criminal sanctioning systems

A national strategy on combating environmental crime would set out clear priorities and a framework for cooperation between different actors involved in fighting environmental crime. It would also assign responsibilities and structured mechanisms for cooperation and coordination. It would also define targets for furthering expertise through training and establishment of specialised units and running of awareness raising activities, ensuring sufficient resources and developments of supporting tools for practitioners.

Such a strategy would also have to ensure administrative and criminal sanctioning tracks as part of an overall approach to combat environmental offences.¹⁶⁹ Member States must provide for clear rules on communication, information sharing and delineation of tasks between administrative and judicial authorities.

Effectiveness of the measures

Each of the individual measures is effective towards reaching objective 6. They are closely interconnected and the implementation of one measure may significantly facilitate and reinforce the effect of other measures. E.g., awareness raising of the harmfulness of environmental crime can foster the developing national strategies on environmental crime and vice versa. Creating specialised units can be spurred by an obligation to develop overarching crime strategies. As a package, these measures support each other and amplify mutually their impacts.

Binding provisions on better implementation are most likely to be accepted by Member States, as there are precedents in other recent EU criminal law- and other legislative instruments.¹⁷⁰ Additional EU guidance could provide Member States with best practices and thus step up the effectiveness of this option. Existing guidelines such as the ones developed under the Environmental Compliance and Governance Forum, and practical tools, such as the ones developed by the European professional networks (see above under baseline), could be further developed.

6.6.2 6.6.2 6.6.2 Stakeholder opinions

All proposed measures are supported by a large majority of the stakeholders, which in the public consultation requested and welcomed legal obligations in the Directive to take specific enforcement related measures strengthening the role of the enforcement chain.¹⁷¹ In addition, a large majority supports also non-binding EU guidance, e.g. training and specialisation along the enforcement chain. Almost all practitioners (Europol, Eurojust, joint statement of the four networks) recommended the specialisation at every stage of the enforcement chain and enhanced regular training as the most important measure. As environmental crimes are often not in the focus and hidden as part of other crime categories such as organised crime there would be a need for establishing dedicated teams to detect and investigate them. The NGOs

¹⁶⁹ The offences created by the Directive and the sanction provisions deriving from it coexist with sanction provisions in national law that are legally required by standard penalty clauses listed in the annexes to the ECD. It should be ensured that these are coherent with the criminal sanctions introduced at national level as transposition of the Directive as well as with administrative sanctions for legal persons introduced as transposition of the Directive. Moreover, it is possible that an infringement of a piece of sectorial EU legislation (and relevant transposing legislation) could be addressed by both administrative sanctions (pursuant to a standard penalty clause) and criminal sanctions (pursuant to the Directive). The choice of which sanction to use may be a matter of the severity of the harm but also of the different burden of proof between use of administrative law and use of criminal law.

¹⁷⁰ See Annex 6.

¹⁷¹ Member States have not been particularly consulted on this issue. They are in any event obliged to implement the Directive in an effective way, even if not explicitly mentioned in the Directive.

and academic stakeholder almost anonymously agree to further specialisation in the field and exchange of best practice.

6.6.3 6.6.3 6.6.3 Efficiency

In the following the costs for Member States and where relevant for the EU are assessed for measures that could be envisaged under option 6 b). For details, see the annex 2B and the supporting study.

Training

Most Member States already provide training on environmental crime to some or all of the targeted practitioners, as detailed in the annex 4. This existing training would need to be stepped up and offered to a larger group of practitioners. Based on the level of training already provided in the Member States, additional training between 1 to 3 days per year is assumed to be necessary. The cost estimates provided here represent an ambitious form of in-person training, with full annual updates of the content. Costs are expected to decrease through the provision of online training courses/e-learning modules and over time as less new content needs to be developed. It is expected that initial investments will lead to greater benefits over time.

Table 6, Member States cost estimates for additional training along the enforcement chain¹⁷²

	<i>Police and prosecutors</i>	<i>Criminal judges</i>	<i>Custom officers</i>	<i>Inspectors</i>	<i>Total</i>
<i>All MS/EUR</i>	<i>2,861,964</i>	<i>64,668</i>	<i>2,271,670</i>	<i>2,780,145</i>	<i>7 979 446</i>

A reduction of these costs for the Member States can be expected, as training is organised by organisations e.g. CEPOL or professional national networks such as ENPE and EJTN as well as Eurojust which cover the bulk of their costs from supranational funds such as the LIFE Programme, the Internal Security Fund (ISF) Police and the Justice Programme. Some Member States currently directly use EU funds, including technical assistance funds from the European Structural and Investing Funds (ESIF) and grants from the LIFE programme. Training material developed at EU level could be adapted and used at national level which would also save costs.

Further reduction of the costs for Member States can be achieved by greater focus on virtual training and the development of online training modules¹⁷³. Moreover, synergies could further reduce costs, if the numerous, but isolated and fragmented training activities along the law enforcement chain would be better coordinated at national level.

Specialisation/ improving cooperation and information exchange within Member States

¹⁷² Details per Member State could be found in the study in annex.

¹⁷³ It is estimated that setting up and developing one e-learning module, which can be used multiple times by multiple users, costs between EUR 5 000 and EUR 60 000.

Several Member States already have specialised units dealing with environmental crimes in police and prosecution.¹⁷⁴ The cost of setting up specialised units would stem from staffing them with either existing personal or with newly recruited ones, who would have to be trained regularly. Specialisation would already per se foster better cooperation and information exchange between the different levels of the enforcement chain in Member States. The costs of additional staff and training have been taken into account below (additional staff) and above (training).

Awareness raising measures

For targeted awareness raising measures, it is assumed that Member States will carry out information campaigns addressing businesses whose activity may have a strong impact on the environment and the public. 11 Member States report that they already carry out awareness raising activities on environmental crime, including educational activities; cooperation and collaboration with external bodies or organisations; creating channels for the public to report environmental crime; information aimed at the public and businesses; organisation of events – more details are provided in the annex 4. It can be assumed that all Member States would make additional effort. Indicative costs for individual activities based on the experience of the ENPE and reference data from other impact assessments in the area of criminal law are provided in the table below.

Table 7, Reference data about the costs of awareness raising activities

Activity	Cost	Source
Animation (3-minute video including voice over and subtitles for one language)	€9 000	ENPE
Video (2-minute video, single language, no animation)	€1 000	ENPE
Electronic magazine ('E-zine' comprising videos, interviews, key figures from	€5 000 per publication	ENPE
Awareness raising among generalist professionals of criminal law for relevant provisions + preparation of practitioners' guidelines compiling the best practices (EU level cost including meeting organisation, travel expenses, working time of officials)	€3 080 000	Impact Assessment of the Directive on the protection of the financial interests of the EU ¹⁷⁵
Education measures, awareness raising campaigns at the Member State level	100 person days per MS	Impact Assessment of the Directive on combating fraud and counterfeiting of non-

National strategies on combating environmental crime

¹⁷⁴ This is based on information available in the 8th Round of Mutual Evaluation country reports as well as information obtained through additional consultations with stakeholders.

¹⁷⁵ IMPACT ASSESSMENT (Part I) Accompanying the document Proposal for a Directive of the European Parliament and of the Council on the protection of the financial interests of the European Union by criminal law, SWD(2012) 195 final, p.31-40.

¹⁷⁶ Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and the Council on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA, SWD(2017) 298 final, Annex 4.2, p.185-191.

According to the 8th Round of Mutual Evaluations country reports, a national strategy on combating environmental crime is a very useful tool but well developed strategies exist currently only in a few Member States, such as Finland, the Netherlands, CZ and SK. . Costs for developing an environmental crime strategy would be limited because the relevant activities, such as consultations, preparation of documents, organisation of workshops to get input from experts, are not costly.

Table 8, estimated cost of developing national strategies in the Member States

An example is provided below for Finland but the costs but could be significantly lower for several Member States ¹⁷⁷ .	€864 289	€324 108
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Costs of an increase in staff in Member State police and prosecution offices

As explained at the beginning of section 6, costs stemming from more effective investigations and from a broader scope of the ECD would mainly be the need for additional staff in the Member States to carry out the investigation and prosecution of additional environmental crime cases. To calculate costs, it is assumed that a higher volume of cases would primarily impact the practitioners along the enforcement chain dealing with investigation, prosecution and conviction. Using the lowest percentages of the total police and prosecutors in the Member States (0,02% respectively 0,17%) as a proxy for the amount of additional capacity that each Member State would be likely to add, based on the current numbers of police and prosecutors in each country, annual costs have been estimated at EUR 4,069, 175 in total for all Member States.¹⁷⁸

6.6.4 6.6.4 6.6.4 Conclusion

All measures assessed are effective and in a package of measures support each other to achieve the objective. We have chosen not to discuss each of these measures as an individual option. The reason is that each measure tackles different aspects of the problem area and therefore cannot be seen as alternative options. They are different elements of the same bundle to address properly all facets of the objective.

7 INDIRECT IMPACTS OF A MORE EFFECTIVE ENVIRONMENTAL CRIME DIRECTIVE

As outlined above, the options above are effective and efficient with regard to improving the Directive’s overall effectiveness on environmental protection through criminal law. More and more effective investigations, prosecutions and convictions are supposed to contribute to reducing environmental crime. The impact of a more effective Directive on the environment, economy and social life will be overall positive. The impacts as described in this chapter were

¹⁷⁷ Based on interviews with representatives of the Finnish government regarding the elaboration of Finland’s national strategy and action plan on environmental crime, costs are estimated to 3 months of full time equivalent for 2 staff plus two one-day meetings of a 10-person working group. Costs for updating are estimated as one month of work for 2 staff plus a one-day annual meeting of the working group.

¹⁷⁸ More information can be found in the supporting study.

taken into account for the efficiency assessment (cost/benefit analyses) in section 6.6.5, as the positive impacts of reduced environmental crime can be regarded as benefits.

Criminal law is only a part in a comprehensive EU strategy to protect and improve the status of the environment, which is a priority for the current Commission. The Green Deal Communication and the Biodiversity Strategy set out a whole range of measures of environmental protection that will pull together in a holistic approach, reinforce and influence each other. Criminal law measures will come in as a last resort when other measures have not been sufficient to ensure compliance. Therefore, environmental indicators on e.g. the degree of air pollution or biodiversity would rather measure the effectiveness of the overall strategy to improve the environmental status, not just of the approach on environmental crime.

Therefore, in this impact assessment there will be no quantification of the impacts of an isolated instrument such as this Directive. Instead, hereunder there will be a qualitative description of the impacts and benefits of an improved environmental protection to which the reviewed Directive will contribute. Positive impacts and benefits on life on earth are immeasurable and beyond quantification. A more detailed outlook is presented in annex 5.

Environmental impacts

A more effective Directive that leads to better law enforcement by criminal law will contribute to an improved environment through its preventive effects of high rates of detection and effective sanctioning of environmental crime. Where there is an effective criminal law system in place, environmental crime does not pay out.

Social Impacts

The positive environmental impacts of better environmental crime law enforcement would have immediate positive social impacts on human life, health and well-being.¹⁷⁹ Moreover, e.g. the reduction of wildlife crimes can have positive consequences for specific countries, where organised crime and terrorist groups use illegal wildlife trafficking to finance illegal arm trade and terrorism. Their activities destabilise whole societies. Moreover, in source countries, residents and rangers protecting biodiversity often suffer threats of violence.¹⁸⁰

Economic impacts on society and businesses

¹⁷⁹ WHO, 2014. 7 million premature deaths annually linked to air pollution. Available at: <http://www.who.int/mediacentre/news/releases/2014/air-pollution/en/>; the latest available figures (updated 2018) from the WHO website indicate 4.3 million annual deaths due to ambient air pollution and 3.8 million deaths due to household air pollution; https://www.who.int/health-topics/air-pollution#tab=tab_3.

¹⁸⁰ Maher J., Sollund R, 2016. Wildlife Trafficking: Harms and Victimization. In: Sollund R., Stefes C., Germani A. (eds) Fighting Environmental Crime in Europe and Beyond. Palgrave Studies in Green Criminology. Palgrave Macmillan, London. https://doi-org.ezproxy.its.uu.se/10.1057/978-1-349-95085-0_5

Overall, the estimated profits of between USD 91 and 259 billion globally from environmental crimes are losses to societies through losses of tax revenue, revenue loss for fair playing businesses and undermining of governance.¹⁸¹

Businesses confirmed that stepping up criminal liability for companies would not produce additional compliance costs further to the costs necessary for investments to receive certifications or authorisations according to sectoral legislation and requirements from the strict liability regime set out in the Environmental Liability Directive. Businesses have confirmed that effective criminal law enforcement would protect them against unfair competition from illegal business whose activities affect negatively prices and profits in the whole sector.

Fundamental Rights impacts

The Directive is likely to have a positive impact on the level of environmental protection, which is the subject of Article 37 of the Charter of Fundamental Rights of the European Union. Improving the environment will contribute to the improvement of physical well-being (health) of citizens, that is comprised by Article 1 of the Charter¹⁸² on human dignity. Therefore, it will also positively influence the right to life (Article 2 of the Charter), the right to physical integrity (Article 3), the children care and well-being (Article 24), the right to healthy working conditions (Article 31) and the right to preventive and other health care (Article 35).¹⁸³

This Directive – being a criminal law instrument – will have to be transposed into national law respecting the fundamental rights and observing the principles in the Charter of Fundamental Rights of the European Union (the Charter) as recognised in the TEU. Specifically, it should be transposed and applied with due respect for the right to protection of personal data (Article 8), the freedom to conduct a business (Article 16), the presumption of innocence and right of defence (Article 48), the principles of legality and proportionality of criminal offences and penalties (Article 49), and the right not to be tried or punished twice in criminal proceedings for the same offence (Article 50). In implementing this Directive, Member States should ensure procedural rights of suspected or accused persons in criminal proceedings. Their obligations under this Directive are without prejudice to their obligations under Union law on procedural rights in criminal proceedings

8 PREFERRED PACKAGE

Which options can best achieve the specific and general objectives?

¹⁸¹ UNEP and Interpol Rapid Response Assessment, ‘The rise of environmental crime. A growing threat to natural resources, peace, development and security’, 2016, p. 17.

¹⁸² This impact of environmental protection on human dignity has been highlighted by the 1972 Stockholm Declaration and Conference; ‘The Environment and Human Rights’; Introductory Report to the High-Level Conference: Environmental Protection and Human Rights, Strasbourg, 27 February 2020.

¹⁸³ Fundamental Rights Agency (FRA) input into the review of the Environmental Crime Directive (Directive 2008/99/EC on the protection of the environment through criminal law, Vienna 27 April 2021.

Under **Objective 1**, option 1 a) is the preferred option. It proposes to amend the Directive by updating its annexes and adding new relevant legislation. New crime categories under Article 3 of the Directive will have to be created under Article 3 that correspond to the new legislation in the annexes. However, it is not possible to ensure further updates in the future through comitology. The Commission will have to optimise its internal process to ensure parallel updates of the Directive following relevant developments of sectoral legislation.

Under **Objective 2**, both assessed options will be combined. Thus, there are no changes to current architecture of Article 3. However, more precision on the definitions of environmental crime (option 2 a)), such as ‘*substantial damage*’ and ‘*negligible or non-negligible quantity*’, will improve the clarity of the Directive. The criminalization of risky behaviours (endangerment crimes – option 2 b)) will have the further beneficial effect to alleviate the burden of proof in cases whether it is difficult to establish the actual damage. It will have to be considered with the relevant sectoral units of the Commission which new endangerment crime categories could be added that would correspond to new legislation to be added under the annexes. Hence, both options combined will increase the effectiveness of investigations and prosecutions of environmental crime.

Under **Objective 3**, the package of measures on sanctions (option 3 c)) – minimum maximum sanctions, aggravating circumstances, accessory sanctions, dependency of the level of fines of illegal profits and financial situation of the offender) will lead to more effective and more uniform sanction levels in national penal codes and in practice. In addition, the minimum maximum levels of imprisonment sanctions will allow for access to investigative tools, which only are available for crime that is punishable by a certain minimum maximum level of penalties. This leads to more effective investigations and facilitates cross-border cooperation.

Under **Objective 4**, the package of measures under option 4 b) (approximation of investigative tools, obligation to cooperate through EU-agencies, installation of national contact points) will complement and reinforce each other and lead to more effective investigations as many environmental crime cases have transnational aspects and can only be successfully conducted cross-border.

Under **Objective 5**, option 5 b) will lead to a commonly defined minimum standard for the collection of data on environmental crime procedures and thus facilitate the collection of accurate, complete and data that is comparable across the EU.

Under **Objective 6**, the package of implementing measures proposed (option 6 b) – training/specialization, awareness raising, overarching national strategies) are likely to have positive effects on the effectiveness at all levels (inspectors, police, prosecution, criminal judges) of the enforcement chain.

As the Directive needs improvement in all six problem areas, it is considered that the combined preferred options under each objective results in the best overall package. We therefore decided to assess the options for each problem area individually and did not assess different combinations of packages.

In combination, the preferred options can reach cumulative impacts that go beyond what could be achieved by the individual preferred options

Cross-border cooperation will be fostered not only by the measures under objective 4 but also through the broader scope of the Directive that allows such cooperation in more environmental areas. More precise definitions of what constitutes environmental crime under objective 2 will reduce different perceptions in the Member States that so far hampered or even ended cooperation. The definition of maximum sanction levels does not only ensure more dissuasive sanctioning but also opens the door for effective cross-border investigative tools provided for in legislative instruments that require a certain sanction level for a crime category to be applicable. Under objective 6, better training and specialisation according to the same standards in the Member States also directly facilitate cross-border cooperation.

The ability of law enforcement practitioners to better anticipate a case's chances for success, leading to more cases being picked up, is strengthened by more precise definitions of environmental crime (objective 2) and better training and specialisation under objective 6. Improved cross-border cooperation (objective 4) and the availability of more dissuasive sanction types and –levels (objective 3) are further factors that could facilitate the decision to invest the considerable resources needed to tackle environmental crime cases.

The effectiveness and dissuasiveness of environmental criminal investigations will not only be achieved through more appropriate sanctioning through the preferred option under objective 3. Also, more and more effectiveness investigations through the combined effects of the preferred options under objectives 1, 2, 4 and 6 as described above will contribute to a deterrent criminal system with regard to environmental crime.

In this way the preferred options do not only serve best the respective objectives but cumulated strengthen also the other specific objectives thus strengthening the overall effectiveness of the Directive beyond each individual specific objective.

Cost Impact of the preferred package

Table 9, Cost for the Commission implied by the Directive

Table of the costs for the Commission				
Objective	Preferred option	Implementing measures for the Commission	One-off / Set-up / Recurring costs	Costs for the Commission in euros
5: Improving statistical data collection and reporting on environmental crime	/MS to collect, and transmit statistical data /Development of minimum standards to compare comparable data /Biennial report by the Commission on data received by MS	Provide reporting format to the MS / Definition of minimum standards	One-off costs	111 297
		Maintenance of standards	Recurring costs	16 582
		Biennial EU report on the data received by MS	Recurring costs	27 636
Reporting	Reporting obligations which rely on the Commission	Report on the transposition by MS 2 years after the entry in force of the Directive	One-off costs	404 581
		Evaluation Report 5 years after transposition	One-off costs	422 720

Table 10, Costs for Member States implied by the Directive

Table of the costs for Member States				
Costs of transposition objective 1 to 6	Total cost for all MS in €	475 594		
Objective	Preferred option	Implementing measures	One-off / Set-up / Recurring costs	Total costs for all MS (if different figures in the same cell = means there are low-medium or high option)
4: Improving the effective cooperation and coordination between Member States	Introducing a package of provisions directly fostering cross-border cooperation	Investigative tools	Recurring	Data not available
		Set up of national contact points at all level of the enforcement chain and cooperation through EU agencies	Recurring	475 594 / 752 656
5: Improving statistical data collection and reporting on environmental crime	IMS to collect, and transmit statistical data Development of minimum standards to compare comparable data Two-annual reporting by the Commission on data received by MS	Set up national coordination procedure	One-off	146 201
		Definition of minimum standards	One-off	281 833
		Maintenance of standards	Recurring	35 229
		Coordination, collection and reporting	Recurring	220 182
6: Improving the effective operation of the enforcement chain	Insert in the Directive obligations that directly strengthen the effectiveness of the law enforcement chain	Training	Recurring	7 978 446
		Raise public awareness (depends on the choice made by the MS)	3 min video	9 000
			2 min video	1000
			per electronic message	5 000
		National strategy	Set up	864 289
			Recurring	324 108
		Increase of staff	Recurring	4 063 175

REFIT potential

This impact assessment did not identify any potential to simplify the Directive or to reduce unnecessary costs.

The Directive – being a criminal law instrument – does not produce any additional costs for citizens, business and SME. That has been confirmed during the stakeholder consultations.

The proposal will contain a number of additional provisions aimed to add precision to the currently only very generic Directive, clarify its scope, crime definitions and ensure the effectiveness, proportionality and dissuasiveness of penalties. This will simplify and facilitate practical implementation by Member State authorities and thus ensure the Directive will reach its objectives.

The proposal also contains new provisions obliging Member States to take specific measures to ensure the Directive's effective implementation in practice (especially to provide training, awareness raising measures and strengthen cross-border cooperation, provide the necessary resources etc.). Although this appears to be new obligations that produce costs for the Member States, these provisions actually only explicitly requires what is in any event a Member State obligation: Member States are not only obliged to transpose the Directive into national law. They also have to take the necessary practical implementation measures. The evaluation has shown that practical implementation is deficient in all Member States and along the whole enforcement chain. The obligations in the Directive are therefore necessary to ensure Member States compliance. The implementation measures required in the proposal are measures, which practitioners have identified as most pertinent to enable them to enforce the

Directive. Especially training has been mentioned as essential need to improve law enforcement with regard to environmental crime

9 MONITORING MEASURES

The general objective of the Directive – to which all specific objectives contribute - is to protect the environment through criminal law by effective investigations, prosecutions and convictions. The effectiveness of the Directive must thus be measured against the number of investigations, prosecutions, convictions and sanction levels in each Member State. Objective 5 – ‘collection of complete, accurate and EU-wide comparable data’ aims at fostering effectiveness of law enforcement through the transparency resulting from the dissemination of statistical data which at the same time serve to measure the success of the Directive. The table below provides suggestions of monitoring indicators:

Specific objective	Indicator	baseline	success
1.broadening the scope of the Directive	Number of: - Investigations - Prosecutions - Convictions - Dismissed cases.	Where information is available, there have been no upward trends in the Member States ¹ .	Stable upward trends in each Member State. Ideally an increase of between 5 and 7 %, i.e. the rate at which environmental crime is estimated to grow each year (UNEP-report ²) ³
2. define more precisely environmental crime types under Article 3	As above	As above	As above
3.foster effective, dissuasive and proportionate types and levels of sanctions	- Levels of financial fines imposed on natural persons - Levels of imprisonment sanctions - Levels of financial fines imposed on businesses - Types and numbers of accessory sanctions imposed on natural persons and on natural persons	There is currently no or only very few and scattered statistical data on sanctions imposed on environmental crime. The available data and interviews with practitioners show that sanctions are too low to be dissuasive.	Given the current situation in which sanctions imposed are generally taken, from the lowest segment of available sanction levels. Success implementation would show that sanctions imposed use the full range of available sanction types and levels. Accessory sanctions imposed should show that all sanctions types are used. We would like to see that restoration of damage and the removal of profits are applied systematically.
4.More cross border cooperation	- Number of environmental crime cases at Eurojust and OLAF, - Number of JITS at Eurojust - Number of SIENA cases/messages at Europol - Number of contacts with national contact points, to be installed e.g. at professional networks	Current level of Eurojust, OLAF, SIENA, professional networks. Numbers are generally low, e.g. environmental crime at Eurojust only accounts for 1% of the total. New JITS per year have been 2 since 2017 ⁴ .	Success would be an increase of cross-border cooperation manifested in the figures at Eurojust, OLAF and Europol. Environmental crime is the fourth largest crime category globally. The number of environmental crime cases at Europol and Eurojust should thus account for higher portion of the total of cases handled by these agencies.
5.More effective enforcement chain	Same as for the 1 st objective In addition - number of MS that have overarching crime strategies - number of MS that have specialised units/court chambers - number of MS that have increased their law enforcement personnel - Number of police, prosecutors, judges, customs officers, administrative inspectors that have received training	Same as for the 1 st objective Current situation: see under section 6 and the baseline annex.	Same as for the 1 st objective - All MS implement the measures in column 2 - Increase of law enforcement personnel for environmental crime (police and prosecutors) each by at least 0.2% respectively 0, 17%. ⁵

The Directive should contain a provision obliging Member States to regularly report to the Commission the statistics they will be obliged to collect under objective 5. The Commission would then be able to provide regular reports to the European Parliament and the Council highlighting trends. After a sufficient period of time, an evaluation support study could be commissioned to evaluate success based on the indicators above. The professional networks

could assist in monitoring the application and the success of the Directive and be encouraged to produce regular reports.

Given that the process of producing comparable statistical data in the Member States could take some time, Member States should be encouraged to introduce internal processes to gather information to monitor and evaluate progress. This could be done in the framework of the obligation under objective 6 to produce national overarching strategies to combat environmental crime.