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**40 Years of EU measures to fight wildlife crime,**

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**Abstract:** This contribution presents the European Union measures to address wildlife crime within the EU. In a first section, the EU environmental legislation is presented which directly or indirectly affects wildlife. This is followed by a description of the provisions concerning the enforcement of wildlife legislation and in particular the act to protect the environment through criminal law. In a third section, the measures are critically assessed and some possibilities are discussed to improve the fight against wildlife crime. A short concluding remarks ends the presentation.

**Key words:** wildlife crime, enforcement of EU law, effectiveness of provisions

## **I. Introduction: the EU constitutional context**

The European Union (EU) is not a State. It consists of 27 (28) sovereign Member States. This means that it may only act, where it is expressly so empowered by the Treaties setting up the European Union<sup>1</sup>. As regards the protection of the environment, the responsibility is shared between the EU and its Member States, so that the principles of subsidiarity and proportionality apply<sup>2</sup>. This repartition of power has significant consequences for the question of identifying and regulating environmental crime, which might be illustrated by an example. The fencing of an apple orchard helps marking the ownership of the orchard. It also prevents the theft of apples and could, in this regard, be seen as a measure to prevent (environmental) crimes. Yet, under the subsidiarity principle, the EU has no competence to organize the fencing of apple orchards which remains under the complete competence of the Member States.

These principles also apply to questions of sanctions. For example, the air polluting emissions of an individual car are regulated by legislative acts of the EU which determine, from which moment such emissions become non-legal. Sanctions for non-compliance with the EU emission limit values are not fixed by the EU, but by the different EU Member States, and these measures to enforce compliance are of administrative, penal or - exceptionally - civil law, according to the different legal traditions and policies of the EU Member States. The EU adopted criminal sanctions for air pollution; however, the definition of the crime of polluting air is shaped in a way that the emissions of a specific car are not covered by it. Also, even when the air emissions of a specific car comply with the legal emission

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<sup>1</sup> Treaty on European Union (TEU), Article 5(2): "Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States".

<sup>2</sup> TEU, Article 5(3): "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or the effects of the proposed action, be better achieved at Union level...".

Article 5(4): " Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties..".

requirements, they may, together with emissions from other sources, - other cars, industrial installations, household heating - cause air pollution which is considered to be a significant environmental harm<sup>3</sup>.

The air pollution example shows that environmental harm caused by a specific car, is not associated, in EU law and policy, to environmental crime; the apple orchard example also shows that the repartition of competences for preventing or regulating environmental crime plays an important role in the understanding of the EU's approach to environmental crime.

In clear words: the term "environmental crime" under EU law, is reserved to criminal law, i.e. to acts or omissions which are committed contrary to EU laws and regulations intended to protect natural resources and to administer their management and use. "Environmental harm" which also includes acts that are legal under EU legislation, are not included in the EU understanding of environmental crime. The difference to the terminology, in particular the one which is used in green criminology, is obvious.

In the following, only environmental acts which are *illegal* under EU law, will be discussed, also because a discussion of *legal* acts which cause environmental harm, would go far beyond the space that is available for this contribution. Following this introduction the second section will shortly describe the EU environmental legislation and its real or potential impact on wildlife; this legislation goes beyond the "wildlife" legislation, as issues such as water pollution, climate change or soil conservation are, be it in an indirect way, linked to wildlife. This section is followed by the presentation of the system of sanctions and its practical application within the EU (section III). The fourth section will discuss aspects of the EU fight against wildlife crime and suggest some ways ahead. A short concluding remark (section V) will end the presentation.

## **II. The frame - EU environmental legislation with relevance to wildlife**

### *Animals and plants*

There is no general EU legislation on wildlife, nature conservation or biodiversity protection. The EU adopted legislation on all wild birds in Europe and their habitats<sup>4</sup> and on natural habitats and wild fauna and flora species<sup>5</sup> which are listed in positive lists. The deliberate killing, taking from the wild or trading of species and the use of non-selective or inhumane killing or capturing means is prohibited under both Directives. Very limited derogations are allowed, when no alternative solutions are available. The hunting of birds is regulated by the establishment of positive lists; the hunting of other species than birds which are on the positive lists comes under the general derogation provisions. The hunting, killing and the general protection of species which are not on the positive lists - the Birds Directive covers, though, all wild birds in Europe - is regulated by national legislation.

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<sup>3</sup> See Directive 2008/99 on the protection the environment through criminal law, OJ 2008, L 328 p.28, Article3(a): "[Constitutes a criminal offence] the discharge, emission or introduction of a quantity of materials or ionising radiation into air, soil or water, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants".

<sup>4</sup> Directive 2009/147 on the conservation of wild birds, OJ 2010, L 20 p.7 (Birds Directive). This Directive replaced an earlier Directive on birds from 1979.

<sup>5</sup> Directive 92/43 on the conservation of natural habitats and of wild fauna and flora, OJ 1992, L 206 p.7 (Habitats Directive).

The EU adhered to the CITES Convention on trade in endangered species<sup>6</sup>, adopted implementing legislation<sup>7</sup>, thereby going partly beyond the provisions of CITES. The relevant legislation to comply with the CITES requirements were long adopted before the EU was allowed, in 2013, when the Gaborone amendment to the CITES Convention entered into force, to adhere to the Convention. The renewed regulation on trade in endangered species of 1997 was, until the end of 2018, eighteen times amended, in particular in order to align it to the decisions of the meeting of the Parties to the Convention.

This general legislation is completed by some specific pieces of legislation which concern whales and whale products<sup>8</sup>, seals<sup>9</sup>, the ban of leghold traps and the import ban of products from 13 animal species<sup>10</sup>, the use of animals for scientific purposes<sup>11</sup>, animals in zoos<sup>12</sup> and the fight against invasive alien species<sup>13</sup>.

As regards flora species, apart from the provisions of the Habitats Directive, of the trade-related Regulation 338/97 and the Regulation on invasive species which covers some invasive plants, also the legislation on timber is to be mentioned. An EU regulation of 2005 provided for a voluntary licensing scheme to be set up by developing countries which intended to import (tropical) wood into the EU, and which concluded a corresponding agreement with the EU<sup>14</sup>; by early 2019, only one country - Indonesia - had set up such a scheme and concluded an agreement. A further EU regulation of 2010 prohibited the placing on the EU market of illegally harvested timber and timber products, including timber from EU producers<sup>15</sup>.

The legal technique used in the wildlife legislation is the classical one: prohibitions are established, with narrow derogation possibilities which are overseen by the public authorities and normally even require a derogation permit.

#### *Air, water and noise*

The EU "constitution" - the TFEU Treaty - provides that environmental damage should, as a priority, be combated at source and that the polluter should pay for environmental impairment<sup>16</sup>. EU

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<sup>6</sup> Decision 2015/451, OJ 2015, L 75 p.1.

<sup>7</sup> Regulation 338/97 on the protection of species of wild fauna and flora by regulating trade therein, OJ 1997, L 61 p.1. This Regulation replaced Regulation 3626/82 of 1982 on the same subject

<sup>8</sup> Regulation 348/81 on common rules for imports of whales or other cetacean products, OJ1981, L 39 p.1.

<sup>9</sup> Directive 83/129 concerning the importation into Member States of skins of certain seal pups and products derived there from, OJ 1983, L 91 p.30; Regulation 1007/2009 on trade in seal products, OJ2009, L 286 p.36.

<sup>10</sup> Regulation 3254/91 prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards, OJ 1991, L 308 p.1.

<sup>11</sup> Directive 2010/63 on the protection of animals used for scientific purposes, OJ 2010, L 276 p.33. This Directive replaced Directive 86/609 of 1986.

<sup>12</sup> Directive 1999/22 relative to the keeping of wild animals in zoos, OJ 1999, L94 p.24.

<sup>13</sup> Regulation 1143/2014 on invasive alien species, OJ 2014, L 317 p.35.

<sup>14</sup> Regulation 2173/2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community, OJ 2005, L 347 p.1.

<sup>15</sup> Regulation 995/2010 laying down the obligations of operators which place timber and timber products on the market, OJ 2010, L 295 p.23.

<sup>16</sup> Treaty on the Functioning of the European Union (TFEU), Article 191(2): "Union policy on the environment...shall be based.. on the principles that... environmental damage should as a priority be rectified at source and that the polluter should pay".

legislation on air and water pollution does not really follow these principles. There are mainly three approaches which the EU legislature chose, in order to fight pollution of these two media. On the one hand, limits for emissions were fixed which were not allowed to be exceeded<sup>17</sup>. On the other hand, the concentration of pollutants in the air<sup>18</sup> or the water<sup>19</sup> was fixed at a certain level. Finally, the content of pollutants in products - such as lead in petrol<sup>20</sup>, sulphur in ships' fuels<sup>21</sup>, or heavy metals in electronic products<sup>22</sup> - was limited.

Larger industrial installation shall, as regards emissions into the environment, apply the best available techniques which is a rather vague term and leaves the public authorities which have to grant permits to these installations, considerable discretion on how to fix emission limits<sup>23</sup>. For other installations, it was at the discretion of the law of the Member States to fix such emission limits. Even fewer emission limits were fixed for new machinery<sup>24</sup>, but no such limits exist for airplanes and ships.

Generally, air pollution measures by the EU put the emphasis on fixing binding concentration limits for pollutants in the air, which were not to be exceeded. With regard to the subject-matter of the present contribution, this had the consequence that no responsibility of an individual polluter was determined, as numerous sources might contribute to the bad quality of the air at a given place.

The limitation of air pollutants in products concentrated on pollutants in fuels which, over the years, eliminated lead as an additive in petrol and reduced the sulphur content of fuels. Other pollutants - additives or components of the fuel- were not systematically addressed by the legislature, all the more as each legislative measure was subject to long and protracted bargaining with vested interest representatives and the EU legislation was not sufficiently transparent, in order to lead to environmentally sustainable results.

EU legislation in the water sector started by regulating the pollutant discharges into waters<sup>25</sup>, but met, right from its beginnings with heavy objections from the United Kingdom. That Member State argued that it was surrounded by oceans, that its rivers were short and had a strong current, so that any pollution would quickly be washed away. Fixing EU-wide emission limits would constitute an attempt to take away this geographical advantage from the United Kingdom. While in the beginning, the other Member States maintained their preference for emission limit values, the unanimity requirement for decision-making which existed at that time<sup>26</sup>, and the pressure from vested interest operators progressively led to the abandonment of the emission limit approach for water discharges

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<sup>17</sup> Examples are Regulation 715/2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (euro 5 and euro 6) and on access to vehicle repair and maintenance information, OJ 2007, L 171 p.1; Directive 2010/75 on industrial emissions (integrated pollution prevention and control) OJ 2010, L 334 p.17 (for waste incinerators); Directive 2015/2193 on the limitation of emissions from certain pollutants into the air from medium combustion plants, OJ 2015, L 313 p.1.

<sup>18</sup> Directive 2008/50 on ambient air quality and cleaner air for Europe, OJ 2008, L 152 p.1.

<sup>19</sup> Directive 2008/105 on environmental quality standards in the field of water policy, OJ 2008, L 348 p.84.

<sup>20</sup> Directive 98/70 relating to the quality of petrol and diesel fuels, OJ1998, L 350 p.58.

<sup>21</sup> Directive 1999/32 relating to the reduction in the sulphur content of certain fuels, OJ 1999, L 121 p.13.

<sup>22</sup> Directive 2011/65 on the restriction of the use of certain dangerous substances in electrical and electronic equipment, OJ 2011, L 174 p.88.

<sup>23</sup> Directive 2010/75 (fn.17).

<sup>24</sup> Directive 1997/68 relating to measures against the emissions of gaseous and particulate pollutants from internal combustion engines to be installed in non-road mobile machinery, OJ 1997, L 59 p.1.

<sup>25</sup> Directive 76/464 on the discharge of pollutants into water, OJ 1976, L129 p.23.

<sup>26</sup> EU majority decisions in the environmental sector were introduced in 1999.

and to the adoption of concentration limits<sup>27</sup>. An attempt from the European Parliament to stop this approach at least for the biggest pollutants<sup>28</sup>, failed. EU water legislation is therefore now based on concentration limits. At present, it does not contain limit values for pollutant discharges into water, though some water-specific restrictions exist, such as the prohibition to discharge sewage sludge into water<sup>29</sup> or to discharge liquid waste on landfills<sup>30</sup>. Some limitations of pollutants in products that are likely to come in contact with water, such as anti-fouling paint<sup>31</sup>, round up the picture.

No specific EU provisions exist for marine waters. The EU as such is not allowed to adhere to the International Maritime Organisation (IMO), so that numerous international conventions are not or not fully applicable in European marine waters. In particular, the EU has not adhered to the Ballast Water Management Convention of 2004 which is one of the main instruments to combat invasive alien marine species.

As regards noise, EU law asked Member States to identify and map areas of high concentrations of traffic noise, basing itself on the traffic intensity, not on noise levels; Member States then had to develop action plans in order to reduce noise<sup>32</sup>. No concentration limits of noise levels exist at EU level.

Noise emission limits were fixed for (new) motor vehicles<sup>33</sup>, for tyres<sup>34</sup> and new construction machines<sup>35</sup>, but not for airplanes. Instead, measures which limited the possibilities for airports to restrict noise levels were adopted.

### *Greenhouse gas emissions*

As regards measures to restrict greenhouse gas emissions, the EU did not even try to find responsible persons for such emissions. Its principal measure<sup>36</sup> consisted in introducing an emission allowance trading system: each company which came under the system obtained a specific amount of emission allowances which it had to return regularly in function of its actual emissions of greenhouse gases (GHG). When it emitted less GHG, it could sell the remaining allowances; when it emitted more GHG than it had been attributed allowances, it had to buy allowances on the market. This market instrument thus took away any individual responsibility from companies.

For economic activities which did not come under the emission trading system, Member States were asked to reduce GHG emission by certain quantities, increase the use of renewable energies,

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<sup>27</sup> Directive 2008/105 (fn.19).

<sup>28</sup> Directive 2000/60 establishing a framework for Community action in the field of water policy, OJ 2000, L 327 p.1, Article 18, which was inserted on request of the European Parliament.

<sup>29</sup> Directive 91/271 on urban waste water, OJ 1991, L 135 p.40, Article 14.

<sup>30</sup> Directive 1999/31 on landfills, OJ 1999, L 182 p.1, Article 5(3). EU law does not prohibit the use of tailing ponds for the extracting industry, though, despite the fact that a tailing pond is nothing else than a liquid waste landfill.

<sup>31</sup> Regulation 782/2003 on the prohibition of organotin compounds on ships, OJ 2003, L 115 p.1.

<sup>32</sup> Directive 2002/49 relating to the assessment and management of environmental noise, OJ 2002, L 189 p.2.

<sup>33</sup> Regulation 540/2014 on the sound level of motor vehicles and of replacement silencing systems, OJ 2014, L 158 p.131; this Regulation replaced legislation which existed since 1970.

<sup>34</sup> Regulation 661/2009, OJ 2009, L 200 p.1.

<sup>35</sup> Directive 2000/14 relating to the noise emission in the environment by equipment for use outdoors, OJ 2000, L 162 p.1.

<sup>36</sup> Directive 2003/87 establishing a scheme for greenhouse gas emission allowances trading within the Community, OJ 2003, L 275 p.32.

promote energy efficiency and take other measures to combat climate change. For cars<sup>37</sup> - though not for trucks<sup>38</sup> -, emission limit values for CO<sup>2</sup> were fixed, however, not for every individual car, but for the whole car fleet of a car manufacturer. Where these CO<sup>2</sup> levels were exceeded for a car fleet, the manufacturer had to pay an "excess emission premium" - which, de facto, eliminated any other criminal or administrative sanction for him.

Ozone-depleting substances which also are greenhouse gases, are regulated separately<sup>39</sup>. The production and use of the different substances was progressively restricted or altogether prohibited. The measures led to a significant reduction of emissions from ozone-depleting substances in the EU.

### *Soil and waste*

There is no general EU legislation on the protection of soil; a proposal for such legislation of 2006<sup>40</sup> was never adopted. Soil protection measures come thus under the responsibility of EU Member States. EU waste legislation refers to waste installations (landfills, incineration plants, facilities for ship waste)<sup>41</sup>, general provisions on waste and hazardous waste (permits, trade, recovery and recycling, disposal)<sup>42</sup> and on individual waste streams (end of life-vehicles, packaging, electrical and electronic waste etc)<sup>43</sup>. The legislation works with classical instruments such as restrictions and prohibitions. Recently, efforts were increased to promote waste prevention and the recycling/recovery of waste by setting recovery and recycling targets to be reached by Member States.

### **III. Enforcement of legislation; sanctions for wildlife crime**

The consequences of the shared competence between the EU and its Member States become obvious when the questions of enforcement and sanctions are considered. On the one hand, the TEU provides that the "Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from the acts of the institutions of the Union"<sup>44</sup>. This provision is mirrored in Article 192 TFEU which states that "without prejudice to certain measures adopted by the Union, the Member States shall finance and implement the environmental policy" which includes, as a matter of fact, the implementation of legislative measures. On the other hand, Article 17 TEU provides: "The Commission .. shall ensure the application of the Treaties and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union".

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<sup>37</sup> Regulation 443/2009 setting emission performance standards for new passenger cars as part of the Community's integrated approach to reduce CO<sup>2</sup> emissions from light duty vehicles, OJ 2009, L 140 p.1.

<sup>38</sup> Regulation 2018/956 on the monitoring and reporting CO<sup>2</sup> emissions from and fuel consumption of new heavy-duty vehicles, OJ 2018, L 173 p.1.

<sup>39</sup> Regulation 1005/2009 on substances that deplete the ozone layer, OJ 2009, L 286 p.1. This Regulation replaced legislation existing since 1988.

<sup>40</sup> Commission, COM (2006) 232.

<sup>41</sup> Directive 1999/31 (fn.30), Directive 2010/75 (fn.17), Directive 2000/59 on port reception facilities for ship-generated waste and cargo residues, OJ 2000, L 332 p.81.

<sup>42</sup> Directive 2008/98 on waste, OJ 2008, L 312 p.3.

<sup>43</sup> Directive 2000/53 on end of life-vehicles, OJ 2000, L 269 p.34; Directive 94/62 on packaging and packaging waste, OJ 1994, L 365 p.10; Directive 2012/19 on waste electrical and electronic equipment, OJ 2012, L 197 p.38.

<sup>44</sup> TEU, Article 4(3).

EU environmental directives and regulations follow these provisions. They systematically provide that Member States shall adopt the necessary measures, in order to comply with the different provisions of the legislative act. Normally, another specific provision requires that Member States shall adopt sanctions<sup>45</sup> for cases of non-compliance. The kind of sanctions is not further specified. The different legislative acts rather indicate that the sanctions shall be "effective, proportionate and dissuasive", following in this a formula which was developed by the Court of Justice.

Member States have thus a very large discretion to follow their traditional line in law to provide for criminal, administrative or civil law sanctions. Member States such as the United Kingdom, Ireland or Malta have a long tradition to recur to criminal sanctions, whereas Member States such as Netherlands, Germany or Sweden rather fix first of all administrative sanctions.

Normally, Member States are obliged to inform the Commission on the kind of sanctions which they adopted, as well as on modifications in this regard. However, at least in environmental matters, the Commission does not insist in the transmission of such information. It does not either compare the different types of sanctions that were adopted in the different Member States or examine, whether indeed the sanctions are effective, proportionate and dissuasive. The Commission does not either monitor the practical application of sanctions in the different Member State, but satisfies itself at best with the existence of provisions on sanctions.

Legislative acts in the environmental sector occasionally contain some further instructions for the application of sanctions in Member States. For example, Regulation 338/97 on trade in endangered species<sup>46</sup> provides in Article 16: "(1) Member States shall take appropriate measures to ensure the imposition of sanctions for at least the following infringements of this Regulation: [follows a list of 13 infringements]. (2) The measures.. shall be appropriate to the nature and gravity of the infringement and shall include provisions relating to the seizure and, where appropriate, confiscation of specimens". The Timber Regulation<sup>47</sup> stipulates<sup>48</sup>: "(1) the Member States shall lay down the rules on penalties applicable to infringements of the Regulation... (2)The penalties provided for must be effective, proportionate and dissuasive and may include (a) fines proportionate to the environmental damage.. (b) seizure of the timber and timber product concerned: (c) immediate suspension of authorisation to trade". The Habitats<sup>49</sup> and the Birds<sup>50</sup> Directives do not contain any provision on sanctions. Some environmental legislative acts contain the standard formula on sanctions which is, however, not monitored by the Commission<sup>51</sup>.

The competence of the EU in criminal law matters is rather limited. According to Article 83 TFEU the EU may adopt minimum rules on the definition of criminal offences. For particularly serious crimes with a cross-border dimension it also may fix itself sanctions. Particularly serious crimes are

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<sup>45</sup> Sometimes, EU legislation uses the term "penalty", which is, though, also neutral and does not point to criminal sanctions, see Article 260 TFEU.

<sup>46</sup> Regulation 338/97 (fn. 7).

<sup>47</sup> Regulation 995/2010 (fn.15).

<sup>48</sup> Regulation 995/2010 (fn.15), Article 19.

<sup>49</sup> Directive 92/43 (fn. 5).

<sup>50</sup> Directive 2009/147 (fn.4).

<sup>51</sup> See, for example, Directive 2000/60, Article 23: "Member States shall determine penalties applicable to breaches of the national provisions adopted pursuant to this Directive. The penalties thus provided shall be effective, proportionate and dissuasive". Almost word by word the same provision is found in Article 30 of Directive 2008/50 on air quality (fn.18) , Article 30 of Directive 2008/98 on waste (fn.42) and Article 50(1) of Regulation 1013/2006 on the shipment of waste, OJ 2006, L 190 p.1.

terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime. Wildlife crime is not mentioned in this list. The Council may, by unanimous decision, identify other areas of crime which shall be considered as particularly serious, but has not yet done so<sup>52</sup>.

Another possibility was opened by Article 83(1) second subparagraph TFEU which allows the adoption of EU directives also on sanctions "in an area which has been subject to harmonisation measures". As such harmonization measures were adopted by the EU in the area of environmental policy which will be discussed in a moment, it would thus be possible to fix also criminal sanctions for wildlife crime at EU level. However, this has not yet been done.

For environmental crimes, the Council adopted, in 2008, a directive which defined environmental criminal offences<sup>53</sup>. These definitions are the following:

- the discharge, emission or introduction of a quantity of materials or ionising radiation into air, soil or water which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of the air, the quality of soil or the quality of water, or animals or plants;
- the collection, transport, recovery or disposal of waste, including the supervision of such operations and the after-care of disposal sites, and including action taken as a dealer or a broker (waste management), which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants;
- the shipment of waste, where this activity falls within the scope of Article 2(35) of Regulation (EC) No 1013/2006 of the European Parliament and the Council of 14 June 2006 on shipments of waste and is undertaken in a non-negligible quantity, whether executed in a single shipment or in several shipments which appear to be linked;
- the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used and which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants;
- the production, possession, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants;
- the killing, destruction, possession or taking of specimens of protected wild fauna and flora species, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species;

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<sup>52</sup> The European Parliament in its Resolution on wildlife crime of 15 January 2014, OJ 2014, C 482 p.83, no.23, and the European Economic and Social Committee, Opinion of 5 June 2014, OJ 2014, C 424 p.52, section 3.9.2 requested to treat wildlife crime as a serious crime, punishable with at least four years of prison. However, the Commission has not yet made a corresponding legislative proposal. According to Article 76 TFEU, also a quarter of the Member States could initiate such legislation.

<sup>53</sup> Directive 2003/100/EC on the protection of the environment through criminal law. OJ 2003, L 329 p.28.

- trading in specimens of protected wild fauna and flora species or parts or derivatives thereof, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species;
- any conduct which causes the significant deterioration of a habitat within a protected area".

The offences mentioned must, at the same time, be infringing one of the some 70 legislative acts which are mentioned in the annexes to the Directive. These annexes have never been updated<sup>54</sup> which leaves a considerable part of EU environmental legislation falling outside the field of application of Directive 2008/99. Examples are the Regulation on chemicals<sup>55</sup>, the Directive on flood risks<sup>56</sup>, the Regulation on illegal fishing<sup>57</sup>, provisions which deal with marketing and trading of mercury<sup>58</sup>, the Directive on the protection of marine waters<sup>59</sup>, the Regulation on CO<sup>2</sup>-emissions from passenger cars<sup>60</sup>, the Regulation on emissions from heavy-duty vehicles<sup>61</sup>, a Regulation on trade in seal products<sup>62</sup>, a Regulation on the authorization of pesticides<sup>63</sup>, a Directive on the sustainable use of pesticides<sup>64</sup>, a Directive on radioactive waste<sup>65</sup>, a Directive on offshore gas and oil activities<sup>66</sup> or a Directive on medium combustion plants<sup>67</sup>.

It should also be noted that the contamination of waters, the discharge of pollutants into the air or the operation of an illegal landfill is not a criminal offence *per se*, but only when there is serious damage to humans or to wildlife. Any burden of proof would be on the police or the prosecuting authorities - which considerably reduces the effects of the provisions of the Directive.

The articles of Directive 2008/99 are the only criminal law provisions on environmental matters which exist at EU level. As Directive 2008/99 was adopted on the basis of Article 192 TFEU, Member States are, under Article 193 TFEU, entitled to maintain or introduce more stringent protective measures. Such measures may, of course, also include sanctions, and these sanctions may be of criminal, administrative or civil law. Member States should inform the Commission of any more stringent measures which they adopted. However, there is no sanction, if they do not. And nothing is known with regard to extended definitions of wildlife crime at national level.

It may be argued that EU legislation with regard to environmental crime is available and that this is an effective means of combating environmental crime. The European Economic and Social

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<sup>54</sup> Directive 2008/99, Recital 15 stated: " 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".

<sup>55</sup> Regulation 1907/2006 on chemicals (REACH), OJ 2006, L 396 p.1.

<sup>56</sup> Directive 2007/60 on flood risks, OJ 2007, L 288 p.7.

<sup>57</sup> Regulation 1005/2008 to prevent, deter and eliminate illegal, unreported and unregulated fishing, OJ 2008, L 286 p.1.

<sup>58</sup> Regulation 1102/2008 OJ 2008, L 304 p.74; Regulation 2017852, OJ 2017, L 137 p.1.

<sup>59</sup> Directive 2008/56 on the protection of marine waters, OJ 2008, L 164 p.19.

<sup>60</sup> Regulation 443/2009 (fn.37).

<sup>61</sup> Regulation 595/2009, OJ 2009, L 188 p.1.

<sup>62</sup> Regulation 1007/2009 (fn.9).

<sup>63</sup> Regulation 1107/2009, OJ 2009, L 309 p.1.

<sup>64</sup> Directive 2009/128, OJ 2009, L 309 p.71.

<sup>65</sup> Directive 2011/70 Euratom, OJ 2011, L 199 p.48.

<sup>66</sup> Directive 2013/30, OJ 2013, L 178 p.66.

<sup>67</sup> Directive 2015/2193 (fn.17).

Committee held<sup>68</sup>, though, "that the current legislative framework in the EU Member States is not yet capable of effectively tackling environmental crime, in part due to the laxity of existing penalties", though this comment more refers to national than to EU legislation. The decisive question is thus, how the EU filled the legislative frame of Directive 2008/99 to address wildlife crime.

#### *Action plan on wildlife trafficking*

Following initiatives at international level, the Commission adopted, in 2016, an action plan on wildlife trafficking 2016 to 2020<sup>69</sup> which was based on three priorities:

- preventing wildlife trafficking and addressing its root causes;
- implementing and enforcing existing rules and combating organized wildlife crime more effectively;
- strengthening the global partnership of source, consumer and transit countries against wildlife trafficking.

The plan contained 11 objectives and 32 specific actions to be undertaken<sup>70</sup>, including a timeline for their implementation. As already the title indicated, it did not address environmental crime, but environmental trafficking, a subtle difference which allowed to concentrate on trade-related problems and omitting to address non-compliance with wildlife provisions within the EU. The action plan was welcomed by a Council Resolution<sup>71</sup> and a Resolution by the European Parliament<sup>72</sup>. Several of the actions suggested in the plan, such as "better enforcement", "adoption of resolutions under the CITES Convention", "strengthen the involvement of rural communities in wildlife conservation", were of rather general nature.

In December 2018, the Commission reported on progress with the implementation of the action plan<sup>73</sup>. Overall, it considered that the plan had generated political attention and support at both EU and Member State level and that good progress had been made in implementing most of the different actions<sup>74</sup>. The Commission underlined that in spite of that, wildlife trafficking remained an issue of concern and that the implementation of the plan would continue.

With regard to some of the priority items, the Commission mentioned that it had issued a guidance document on ivory trade (action no.2)<sup>75</sup>. However, its conclusion - "In practical terms, this means that EU Member States have stopped all export of raw ivory, except for very specific situations, such as for scientific, enforcement and educational purpose" - is more than keen: how can the

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<sup>68</sup> European Economic and Social Committee (fn.52), section 3.1.1.

<sup>69</sup> Commission, COM (2016) 87; see also Commission, SWD (2016) 38.

<sup>70</sup> For example that Member States should not issue export or re-export documents for pre-Convention(CITES) ivory; the Commission should issue a guidance note on that (action no.2); a strategy should be developed "to improve compliance with EU wildlife legislation at national level" (action no.9); Member States should establish priorities, such as for eels, ivory, rhino horns, live reptiles or birds (action n.12); the effectiveness of Directive 2008/99 should be reviewed (action no.14); ambitious commitments should be made in future Free Trade agreements (action no.29).

<sup>71</sup> Council, Resolution of 20 June 2016, doc.10512/16.

<sup>72</sup> European Parliament, Resolution of 24 November 2016, OJ 2018, C 224 p.17; amongst many other aspects, Parliament was concerned that aquatic species had not been addressed in the action plan.

<sup>73</sup> Commission, COM (2018) 711; ; see also Commission SWD (2018) 452.

<sup>74</sup> Commission, SWD (2018) 452 indicated in detail progress in the implementation of the 32 actions.

<sup>75</sup> Commission, guidance document: EU regime governing intra-EU trade and re-export of ivory, OJ 2017, C 154 p.4.

Commission know, if and to what extent the Member States were following the non-binding guidance document?

As regards a strategy to improve compliance with EU wildlife legislation (action no.9), the Commission reported in general terms on some national plans and, furthermore, informed of its regular monitoring or the provisions of the CITES Convention and the corresponding EU regulation. It is not clear, how and to what extent compliance will be improved by these measures.

The establishment of priorities for specific species (action n. 12) was reported as follows: "Defining and addressing priority risks forms part of the enforcement strategies of some Member States (Latvia, Slovenia, United Kingdom)..". Some Member States reported on cooperation and acknowledged the increased role of Europol. "EU Member States, the Commission and Europol agreed, within the Enforcement Group, on a few priority target species and trade routes", and set up dedicated working groups on this.

On action 14, the Commission informed that it was "currently reviewing" Member States policies and legislation on environmental crime and that it would review and identify the merits of Directive 2008/99. On action no.29, the Commission reported that it was using various trade-related instruments to press for actions against wildlife trafficking. The future Free Trade Agreement with Vietnam was mentioned, but not the Free Trade Agreement with Canada which was concluded in 2018. This Agreement with Canada does not appear to refer in any way to wildlife crime or wildlife trafficking.

Overall, it is difficult to see the added value of the actions that were announced and undertaken under the action plan.

#### *Biodiversity strategy*

In 1998, the EU adopted a strategy on biological diversity, with the aim to stop the loss of biological diversity by 2010<sup>76</sup>. When it became clear that this objective would not be reached, it adopted a new strategy, in order to stop the loss of biological diversity by 2020<sup>77</sup>. The progress report of 2015<sup>78</sup> makes it very likely that this objective will not be reached either.

The different strategies did not contain specific measures to fight environmental crime, but remained, in this regard, rather general.

#### *Other EU measures*

There are a number of legislative acts or other measures undertaken by the EU, in order to address wildlife crime. The EU is carefully implementing the decisions by the CITES institutions and rather frequently goes beyond the CITES frame. The spirit of the EU's attitude towards international trade in endangered species appears well in the Commission proposal on the EU's attitude to adopt during

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<sup>76</sup> Commission, COM (98) 42. The objective was repeated in Decision 1600/2002 on the 6th EU environmental action programme, OJ 2002,L 242 p.1, Article 6.

<sup>77</sup> Commission, COM (2010) 244.

<sup>78</sup> Commission, COM (2015) 487; Commission, SWD (2015)187.

the 17th Conference of the Parties to CITES<sup>79</sup> and the different implementing acts which followed that 17th Conference<sup>80</sup>.

As regards the protection of elephants (trade in ivory), the EU adopted, in 1989, a regulation on the prohibition of importing raw and worked ivory derived from the African elephant<sup>81</sup> but repealed that regulation soon afterwards. At present it limits itself to issue non-binding guidance documents<sup>82</sup>.

In 2009, the Commission adopted an EU action plan for the conservation and management of sharks<sup>83</sup>. However, the plan was elaborated and structured under the Common Fisheries Policy and was oriented to ensure the continued fishing of sharks. A report of 2016, limited to the removal of fins of sharks on board of vessels<sup>84</sup>, showed incomplete reporting by the Member States<sup>85</sup>, very incomplete inspection activities by the Member States that mainly caught sharks (Spain and France)<sup>86</sup> and, overall, not any significant success of the action plan<sup>87</sup>. No Commission action was mentioned against lack of reporting or lack of inspections.

In 2007, the EU adopted a regulation establishing measures for the recovery of stocks of European eel<sup>88</sup>, asking Member States to elaborate eel management plans. Again, the Regulation, based on the provision of the present Article 43 TFEU on the Common Fisheries Policy, had in mind the maintaining of fishing opportunities for eels rather than the conservation of the species. No implementation report was published.

Seals are not an endangered species. However, as the public opinion within the EU was concerned about reported inhumane killing methods of seals in Canada, the EU adopted, in 1983 already, legislation to stop the import of skins of seal pups<sup>89</sup>. In 2009, it adopted legislation to stop the import of skins and other products from seals altogether<sup>90</sup>. Attempts to have the measures declared against free trade, failed before the EU Court of Justice<sup>91</sup> and before the World Trade Organisation<sup>92</sup>.

The Habitats Directive<sup>93</sup> protects natural habitats as well as some 1200 species of fauna and flora and their habitats. Member States have to report on the implementation of the Directive and the Commission is to publish a report every six years, but both sides do not fully comply with this requirement. The establishment of a European list of designated habitats ("Natura 2000")

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<sup>79</sup> Commission, COM (2016) 437.

<sup>80</sup> Commission Regulation 2017/128, OJ 2017, L 21 p.1; Commission Regulation 2017/160, OJ 2017, L 27 p.1; Commission Regulation 2019/220, OJ 2019, L 35, p.3.

<sup>81</sup> Commission Regulation 2496/89, OJ 1989, L 240 p.5.

<sup>82</sup> Commission, Guidance document on worked specimens under EU wildlife trade regulations, OJ 2017, C 154 p.15; see also Guidance document fn.75.

<sup>83</sup> Commission, COM (2009) 40; see also SEC (2009) 106, shark assessment report.

<sup>84</sup> See Regulation 1185/2003 on the removal of fins of sharks on board of vessels, OJ 2003, L 167 p.1.

<sup>85</sup> Italy, Croatia and Romania did not comply with their reporting obligations at all, six other Member States reported incompletely.

<sup>86</sup> Spain (60.000 tons of sharks caught per year) reported 0.8 inspections per 100 landings, France (15.000 tons) 0.2 inspections.

<sup>87</sup> Commission, COM (2016) 207.

<sup>88</sup> Regulation 1100/2007, OJ 2007, L 248 p.17.

<sup>89</sup> Directive 83/129, OJ 1983, L 91 p.30; Directive 89/370, OJ 1989, L 163 p.37.

<sup>90</sup> Regulation 1007/2009 (fn.9).

<sup>91</sup> Court of Justice, case C-583/11P, Inuit Kanatami a.o. v. European Parliament and Council, ECLI:EU:C:2013:625.

<sup>92</sup> World Trade Organisation, Document WT/DS 400 and DS 401/AB/R of 29 April 2014.

<sup>93</sup> Directive 92/43 (fn.5).

progressed well, but the actual protection measures within the designated habitats are still largely incomplete. In 2010, the European Environment Agency informed that of the species listed in Directive 92/43, other than birds, 17 per cent had a favourable conservation status as required by the Directive; 52 per cent had an unfavourable conservation status and for 31 per cent, the status was unknown<sup>94</sup>. This balance has not significantly changed until 2018, 25 years after the adoption of Directive 92/43.

Monitoring of the Directive by the Commission is limited<sup>95</sup>. The Commission concentrated on the transposition of the legal provisions into the national legal order, but only exceptionally addressed actual infringements of the wildlife provisions. And the majority of the few cases which the Commission brought before the Court of Justice, concerned the problems of a specific species in a specific habitat<sup>96</sup>. There are no specific actions or programmes by the Commission to fight environmental crime with regard to certain species.

Insects are considered by the Commission to the extent that they are listed in the protected species of the Habitats Directive. The Commission has undertaken no specific action for their conservation<sup>97</sup>.

With regard to birds, the Commission monitors the implementation and application of Directive 2009/147<sup>98</sup>. Member States had to report on the implementation and application of the Directive every three years. In practice, though, Member States reported more or less every six years. This led the Commission not to enforce the regular reporting, but to propose, in 2018, that the reports be submitted every six years<sup>99</sup>. Member States furthermore almost entirely reported on transposition and administrative measures (regulatory reporting), but not on the application of the Directive in practice (environmental monitoring). This might be illustrated by the far-spread practice of the illegal killing and taking of wild birds. BirdLife International, the most renowned and recognized bird protection organization in Europe, reported in 2015 on the illegal killing and taking of birds<sup>100</sup>, where it estimated the annual number of illegal killing and taking of birds to be (averaged figures): Italy 5.6 million, Cyprus 2.3 million; Greece 704.000; France 522.000, Croatia 510.000; Spain 254.000; Malta 108.000; Romania 100.000; Germany 100.000; Belgium 60.000. The Commission quoted the study

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<sup>94</sup> European Environmental Agency, EU 2010 Biodiversity Baseline. Technical Report 12/2010, Copenhagen 2010, p.21. Later figures by the Commission, such as in Commission, COM (2015) 219, are adaptations of this 2010 baseline report.

<sup>95</sup> See also L.Krämer, Implementation and enforcement of the Habitats Directive, in: C.Born a.o.(eds): The Habitats Directive in its EU environmental law context. London-New York 2015, p.229.

<sup>96</sup> Court of Justice, cases C- 103/00, Commission v. Greece, ECLI:EU:C:2002:60 (sea turtle), C-518/04, Commission v. Greece, ECLI:EU:C:2006:183 (Viper at Milos); C-340/10 Commission v. Cyprus, ECLI:EU:C:2012:143 (Cypriot grass snake); C-504/14, Commission v. Greece, ECLI:EU:C:2016:847 (sea turtle) (specific habitats). Cases C-342/05, Commission v. Finland, ECLI:EU:C:2007:341 (wolf); C-383/09, Commission v. France, ECLI:EU:C:2011:369 (European hamster); C-669/16, Commission v. United Kingdom, ECLI:EU:C:2018:844 (harbour porpoise).

<sup>97</sup> See in particular answer by the Commission to Written Question 508/11 (Davies), OJ 2011, C 286E.

<sup>98</sup> Directive 2009/147 (fn.4).

<sup>99</sup> Commission, Proposal for a Regulation, COM (2018) 381, Article 5.

<sup>100</sup> See A.Brochet a.o., Preliminary assessment of the scope and scale of illegal killing and taking of birds in the Mediterranean, Bird Conservation International 2016, p.1; A.Brochet a.o., Illegal killing and taking of birds in Europe outside the Mediterranean; assessing the scope and scale of a complex issue. Bird Conservation International (online publication), December 2017, p.1.

with approval<sup>101</sup>; however, apparently it has no action taken until now to stop or at least significantly reduce this practice.

The Commission did take action against Member States when the national legislation on the conservation of bird or with the Habitats Directive was not in compliance with EU law. Overall, about 100 cases were decided by the Court of Justice on request from the Commission, regarding the Birds and the Habitats Directives. Of the last two decades, two cases are to be mentioned: Poland had been too generous in allowing derogations, and legislation of Malta had allowed the capturing of seven species of finches, without respecting the provisions of Directive 2009/147<sup>102</sup>. These two judgments rather confirm the impression, though, that during the last years, the Commission monitors the legal transposition of Directives 2009/147 and 92/43 into the national legal order, but much less the practical application of the Directive<sup>103</sup>.

The last Commission report on birds<sup>104</sup> indicated that some 35 years after the adoption of EU legislation to protect birds, about 52 per cent of the some 450 bird species in Europe have a secure status, 15 per cent are "near threatened, declining or depleted", 17 per cent are threatened and the status of 16 per cent is unknown.

In 2012, the Commission developed an action plan to reduce the incidental catches of seabirds in fishing gears which were estimated to be, in EU waters, of some 200.000 per year<sup>105</sup>. The actions proposed dealt with the identification of the problem, the collection of data, the implementation of mitigating measures, education and training and research. Nothing is known on the results of the action plan.

#### **IV. Criticism and ways ahead**

##### *General considerations*

In its publication of 2018 on "Life & Wildlife Crime"<sup>106</sup>, the Commission identified five main areas where it could assist Member States in combating wildlife crime. The statement referred to birds, but maybe generalized to all forms of wildlife:

- (1) Raising awareness of the competent authorities and civil society;
- (2) funding projects;
- (3) coordinating efforts at EU level;
- (4) processing data provided by Member States in the context of their reporting obligations or Commission enquiries;
- (5) initiating legal procedures.

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<sup>101</sup> Commission, COM (2016) 87; Commission, LIFE & Wildlife Crime. Luxemburg 2018, p.4.

<sup>102</sup> Court of Justice, case C-192/11 Commission v. Poland, ECLI:EU:C:2012:44; case C-557/15, Commission v. Malta, ECLI:EU:C:2018:477.

<sup>103</sup> See generally L.Krämer, Monitoring the application of the birds and the habitats directives. Journal for European Environmental & Planning Law 2013, 567.

<sup>104</sup> Commission, The state of nature in Europe, COM (2015) 219, p.6.

<sup>105</sup> Commission, COM (2012) 665.

<sup>106</sup> See fn.101.

It is clear, under the general structure of the division of responsibilities between the EU and the EU Member States that the Member States have a large responsibility in combating wildlife crime, as it is at their level that the wildlife legislation is made operational and - at least theoretically - applied in daily practice. The Commission has neither a green police nor environmental inspectors in order to be able to more or less systematically control the application of EU legislation within the 27(28) Member States. Its only real enforcement instrument is the infringement action under Article 258 TFEU with the possibility to obtain a financial sanction pronounced by the Court of Justice, in cases, where the first judgment of the Court was not complied with (Article 260 TFEU). However, a procedure from the beginning under Article 258 TFEU till the final judgment under Article 260 TFEU takes, in environmental matters, on average eleven years - which is not very dissuasive.

However, it is also clear that the Commission has a specific responsibility to ensure that EU legislation on wildlife is not only transposed into the national legal order of the Member States, but that it is actually applied and complied with. In the product-related area - industrial products, but also food, feed, pesticides etc - the problem of ensuring the application of EU law, has largely been solved by the adoption of regulations instead of directives, which are directly applicable in the whole EU. While the use of regulations is *politically*<sup>107</sup> not accepted by the Member States in the area of wildlife, there should at least be a sort of systematic and coordinated effort to ensure similar and appropriate protection of wildlife within the EU.

The presentation of EU legislation related directly or indirectly to wildlife (section II) and its implementation and enforcement (section III) has demonstrated that there is no coherent and consistent EU strategy to protect wildlife. The EU legislation on biodiversity and nature conservation is limited; it covers in particular threatened species and their habitats. A general legislation on biodiversity or on wildlife lacks. Different strategies which were developed in order to protect biodiversity and implement EU legislation are addressed to wildlife trafficking, biodiversity in general or other aspects, but are not comprehensive.

The action plan on wildlife trafficking appears, overall, to be relatively successful. It is to be noted, though, that on the one hand, it is closely linked to the determined and courageous activities of the CITES Convention institutions which address global problems of wildlife trade in endangered species, but not issues such as, for example, wild animal welfare. On the other hand, the EU action plan mainly addressed international trade-related problems, but avoided discussing in detail issues and problems of wildlife within the EU which are not trade-related.

There is thus at present no coherent EU strategy or policy to address wildlife crime.

#### *Elements of a strategy on wildlife crime*

Such a strategy could be built on the five above-mentioned aspects where the EU could play a useful role.

##### (1) Legal aspects

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<sup>107</sup> *Legally*, there is no difference between the provisions on product law and those of nature protection law, as in both areas the competence is shared between the EU and its Member States. The difference lies in the fact that industry needs and therefore pushes for a level playing field within the EU, in order to avoid competitive inequalities. Wildlife has no voice to request the same level of protection everywhere in the EU.

The core of such a strategy is the legal aspect. The Commission will have to ensure that EU wildlife legislation is applied in and by the Member States. In this regard, the Commission should ensure that EU legislation is completely and correctly transposed by the Member States. This is not always the case. The Commission regularly elaborates so-called conformity studies, in order to compare the national implementing legislation with EU environmental legislation. However, it is more than reluctant to make these studies publicly available, using all sorts of pretexts, in order to keep them confidential. A judgment by the Court of Justice which called it to order and allowed it to withhold such studies only, when it is running an infringement procedure under Article 258 TFEU against a Member State<sup>108</sup>, is very restrictively interpreted and executed by the Commission. Article 4 of Regulation 1367/2006<sup>109</sup> which stipulates that the Commission should actively and systematically disseminate environmental information, is largely ignored by the Commission. The Commission does not either systematically make available national reports on the implementation and application of EU environmental legislation, including that on wildlife. The lack of transparency with regard to national legislation and implementation measures is a particular negative example of undermining the leading EU principle of an open and transparent EU society<sup>110</sup>.

Regional legislation in Member States on wildlife is frequently not in compliance with EU law. There appears to be no systematic control of such derogating provisions.

As regards the application of wildlife legislation within the Member States, the Commission has no inspection and audit control functions, contrary to competition law and to food law<sup>111</sup>. It does, however, have the possibility to make enquiries in Member States, in order to find out about the facts of a case. Of course, it also may launch studies on the situation of this or that species in Member States; in most cases, the Member States would likely to be grateful for such initiatives, as they have limited knowledge of this kind of problems themselves, in particular, when a species has a range in several Member States. At present, though, the Commission has neither a plan for enquiring about species in Member States, nor a study programme to increase its knowledge on specific species.

The Commission's attitude vis-à-vis environmental organizations is marked by ambiguity. On the one hand, environmental organizations are seen and accepted as provider of information which is even recognized by the EU Court of Justice<sup>112</sup>. They inform on the practical application of the law, on environmental impairment in specific cases, of general data and of deficiencies in local, regional or national wildlife governance. As regards wildlife protection, the Commission would be unaware of numerous deficiencies, lack of implementation, arbitrary derogations etc, if it were not informed by environmental organizations. On the other hand, the Commission discourages complaints by individuals or environmental organizations on environmental (wildlife) impairment, by reducing the

<sup>108</sup> Court of Justice, case C-612/13P, ClientEarth v. Commission, ECLI:EU:C:2015:486.

<sup>109</sup> Regulation 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental matters to Community institutions and bodies, OJ 2006, L 264 p.13.

<sup>110</sup> See TEU, Article 1: "This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen". The term "open" is repeated in four other provisions of the European Treaties.

<sup>111</sup> Regulation 1/2003 on the implementation of the rules on competition, OJ 2003, L 1 p.1; Regulation 2017/625 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products, OJ 2017, L 95 p.1.

<sup>112</sup> See the landmark decision of the Court of Justice in case C-3/96, Commission v. Netherlands, ECLI:EU:C:1998:238.

role and the rights of complainants and keeping the procedure largely confidential<sup>113</sup>. It does not either grant environmental organizations access rights to courts, neither at national nor at EU level, but jealously keeps the monopoly for bringing actions before the EU Court of Justice (Article 258 TFEU) to itself. That this ambiguity cannot but increase the frustration with EU institutions appears obvious.

It cannot either be confirmed that the Commission has a clear strategy, which cases of wildlife impairment it brings before the Court of Justice. Sometimes, it reacts to complaints from civil society, but other concerns, such as the example of the illegal killing of birds shows, the use of poison or the legalized impairment of sharks, are largely ignored by it. Though wildlife crime is, preceded only by habitat loss, the most important cause of biodiversity decline in the EU, there appears to be no political will to take serious, efficient, consistent and coherent measures to reduce it. A policy of zero tolerance with regard to Member States' reporting and acting obligations, a strict commitment to scrupulously respecting itself the obligations under EU wildlife law, is not part of the Commission's governance of wildlife law.

The Commission makes only limited efforts to promote biological agriculture, reduce the use of pesticides and other chemicals in agriculture, avoid monocultures, make operational and improve the directive on the sustainable use of pesticides in agriculture<sup>114</sup> and take other measures to avoid the negative impact of modern agriculture on wildlife. Other factors such as urban sprawl, traffic intensity, infrastructure project which dissect the landscape, also contribute to wildlife decline. These last examples show that the limitation of wildlife crime to *illegal* activities is too narrow, if one wishes to avoid or reduce serious environmental harm.

## (2) Collecting data and coordinate data at EU level.

As the environment knows no frontiers, the collection of data and coordination measures at European level and their active and systematic dissemination are of particular importance in the area of wildlife. However, the EU still has an enormous capacity of improving in this regard<sup>115</sup>. To begin with, the national legislation which transposes EU provisions on wildlife, is not made actively and systematically accessible to the public, though this would be relatively easy in times of electronic technology. National reports on the implementation of EU legislation are not either systematically requested; and access to them is in many cases impossible. Commission implementation reports are not systematically drawn up and, in particular, do not denounce those Member States which do not comply with their legal obligations.

All these omissions and attempts to keep the monitoring of wildlife legislation non-transparent makes it difficult for civil society representatives, academics, journalists, students and other persons to develop and maintain an interest in the European aspects of wildlife and wildlife crime. The whole non-transparent system is more serving the European and national administrations than the public; it thus adds to the reservation of large parts of the EU population vis-à-vis the EU as such.

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<sup>113</sup> This is in marked difference to the complaint handling in competition cases, see Regulation 1/2003 (fn.111).

<sup>114</sup> Directive 2009/128 (fn.64).

<sup>115</sup> The Commission Communication: "Actions to streamline environmental reporting", COM (2017) 312 is only partly helpful.

The picture is not very different, if one looks at species themselves. The EU has adhered to the Convention on Migratory Species<sup>116</sup>, but has developed no instrument of its own to monitor migratory species within the EU. There is no red list of threatened or endangered species in the EU either, or a list of the evolution of the populations of the species that are protected under the Birds and the Habitats Directives. The Regulation on invasive alien species established priority lists for combating such species<sup>117</sup>. These lists, however, are established also according to practical (economic) considerations. An overview of (main) existing invasive alien species does not exist. The Commission announced in 2018 that it was developing a database on illegal activities against birds of prey in five European countries<sup>118</sup>, though birds of prey are threatened by wildlife crime almost everywhere.

The "name and shame"-approach does not play a significant role at EU level. The Commission keeps jealously confidential information on cases of non-compliance by Member States. When it receives and examines complaints, that examination remains almost entirely confidential. When it begins infringement procedures against a Member State under Article 258 TFEU, no information to the public is disclosed, though the pre-judicial procedure takes, on average, about four years<sup>119</sup>. Submissions of the parties of a case to the Court of Justice are confidential. Overall, the EU institutions are far from actively and systematically disseminating information on the state of wildlife crime in the EU or systematically coordinating activities in this regard.

### (3) Funding initiatives.

There is no doubt that the EU finances or co-finances numerous initiatives to protect species and habitats within the EU from wildlife crime, mainly, but not exclusively through the funds of LIFE<sup>120</sup>. A general overview does not appear to exist. The Commission's brochure on LIFE & Wildlife Crime of 2018<sup>121</sup> lists 42 projects "on the illegal killing of wildlife" which were financed or co-financed by LIFE. 28 of these projects concern birds, which is evidence of the important role played by the bird protection associations at EU and national level. The initiative on LIFE projects is taken by Member States which, in turn, are open to proposals from civil society. There is no targeted, strategic orientation from the Commission to stimulate projects on wildlife crime prevention concerning projects of EU-wide interests or setting priorities, though, of course, informal contacts on such initiatives are numerous.

### (4) Awareness raising.

Officials in Member States at national, regional or local level, civil society representative, academics, journalists, scientists and other persons will only be interested in details of wildlife crime and the ways to combat it, when hard data are disseminated and publicly available which show the facts, the

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<sup>116</sup> Decision 82/461 to adhere to the Bonn Convention on the Conservation of Migratory Species, OJ 1982, L 210 p.10.

<sup>117</sup> See Commission Implementing Regulation 2016/1141 adopting a list of invasive alien species of Union concern, OJ 2016, L 189 p.4.

<sup>118</sup> Commission, LIFE & Wildlife Crime (fn.101) p.14; see also the quotation on p.15: "This project is for five countries, but theoretically it will be possible to collect data from all over Europe in future".

<sup>119</sup> When the Commission issues a reasoned opinion against a Member State, it frequently publishes a press release. That press release, though, carefully avoids disclosing the details of the case in question.

<sup>120</sup> Regulation 1293/2013 on the establishment of a programme for the environment and climate action (LIFE), OJ 2013, L 347 p.185. LIFE existed since 1992.

<sup>121</sup> See fn.101.

dimension of the problem, and the evolution and the consequences of wildlife crime. Biodiversity and nature conservation is popular within Europe, even among farmers, hunters and fishermen which form perhaps a more conservative part of society. However, awareness raising requires of openly addressing successful interventions as well as failures, passivity from public authorities as well as examples of wildlife crime prevention. The publications by the EU Commission often enough appear to be part of a publicity machinery, which only attempts to present the advantages of EU activities, without addressing the shadow side. This is far away from a democratic, open and transparent discussion on the role and function of wildlife in Europe, of the need to prevent wildlife crime and of the necessity to effectively sanction such crimes.

## V. Concluding remarks

1. The European balance of trends in wildlife is not impressive. Publications show the trend in populations of animal species (in percentage)<sup>122</sup>

<i>Populations</i>	<i>Declining</i>	<i>Stable</i>	<i>Increasing</i>	<i>Unknown</i>
Amphibians	59	36	2	13
Bees	7.7	12.6	0.7	79
Mammals	27	32	8	33
Butterflies	31	55	4	10
Dragonflies	25	50	10	15
Freshwater fish	17	6	1	76
Marine fish	8.4	21.5	1.7	68.4
Molluscs	10.6	6.5	1	83
Grashoppers,Cricket	30.2	7.6	3.2	59
Reptiles	42	42	3	13
Saprosific beetles	12.9	33.3	3.6	51.2

The low figures for populations in increase and the high figures for unknown trends are particularly remarkable.

As regards the wildlife of "European interest" - wildlife (without birds) protected by the Habitats Directive - the European Environment Agency indicated that in 2019, only in Ireland, Bulgaria, Estonia and Cyprus, more than 50 percent of those species have a favourable conservation status required by the Directive, 25 years after its adoption<sup>123</sup>.

<sup>122</sup> European Commission, European Redlist of species. Data collected over different years, expressed in percentage. [ec.europa.eu/environment/nature/conservation/species/redlist](https://ec.europa.eu/environment/nature/conservation/species/redlist) (30.4.2019)

<sup>123</sup> European Environment Agency, Species of European interest, <https://www.eea.europa.eu/data-and-map/indicators/species-of-european-interest-2/assessment> (2-5-2019)

2. As wildlife in Europe is threatened not only by wildlife crime, but also of other activities, such as, intensive agricultural practices, the use of chemicals, monocultures, pollution, urbanization, traffic and energy infrastructure projects, and as these activities are in their majority perfectly legal - often enough they are subject to an explicit authorization procedure - it appears obvious that attempts to protect wildlife cannot be limited to combating *illegal* activities. Rather, there is a need to develop a more comprehensive concept of addressing EU wildlife protection against illegal as well as legal harm that is generated in an economically unfavourable neighbourhood. Reflection on this broader approach is urgently needed, but is still in its infancies at EU level. The EU considers that its present approach - Birds and Habitats Directives, trade in endangered species, fight against wildlife trafficking (mostly at international level), and financing LIFE projects on wildlife - is, overall, sufficient to constitute a valid basis for ensuring the sustainable evolution of European wildlife in the 21st century. This opinion is not shared here.

The EU measures on combating wildlife crime are capable of being improved. The present way of half-heartedly enforcing wildlife protection provisions lacks transparency, consistence and the determination to keep the tolerance of illegal practices as low as possible. The measures give the overall impression of monitoring wildlife crime, not combating it.

However, it would be incorrect to attribute the limited success of the fight against wildlife crime to the European Union alone. Indeed, nature conservation and the protection of biodiversity are the responsibilities of the EU *and* of the 28 EU Member States. The description given above for the European Union would therefore have to be completed by a description of the activities - and the passivity - of the 28 EU Member States in fighting wildlife crime. And this description would not have to be limited to species of European interest, but to all forms of wildlife. Such a description cannot be given here, for obvious reasons. Generally, though, it is a poor consolation and of no help to wildlife that the fight against wildlife crime at the level of the EU Member States is often enough also unsuccessful and that too many Member States hide their own passivity behind EU measures.

The answer to the question, whether wildlife crime in the European Union has significantly decreased in the last 40 years - if that question can be answered at all - is negative.