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Delegations will find attached document SWD(2023) 416 final.

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COMMISSION STAFF WORKING DOCUMENT

Subsidiarity grid

Accompanying the proposal for a

Directive of the European Parliament and of the Council

on Soil Monitoring and Resilience (Soil Monitoring Law)

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SUBSIDIARITY GRID

1. Can the Union act? What is the legal basis and competence of the Unions' intended action?

1.1 Which article(s) of the Treaty are used to support the legislative proposal or policy initiative?

The legal basis for the EU to act on soil health lies in Article 191 and 192 of the Treaty on the Functioning of the European Union (TFEU). These articles empower the EU legislators to take measures aimed at:

- preserving, protecting and improving the quality of the environment,
- protecting human health,
- prudent and rational utilization of natural resources,
- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

EU policy on soil health should aim at a high level of protection while taking into account the diversity of situations in the various regions of the EU. It should be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

To prepare soil health policies, the EU should take account of the available scientific and technical data, environmental conditions in the various EU regions, the potential benefits and costs of action or lack of action, the economic and social development of the EU and the balanced development of its regions.

The European Parliament and the Council decide what action is to be taken by the EU on soil health, through the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions. For measures affecting town and country planning, quantitative management or availability of water resources, or land use with the exception of waste management, the Council should decide unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions. Without prejudice to certain measures adopted by the EU, Member States should finance and implement the soil health policy.

Without prejudice to the principle that the polluter should pay, if a measure involves disproportionate costs for the public authorities of a Member State, such measure should foresee temporary derogations and/or financial support from the Cohesion Fund.

1.2 Is the Union competence represented by this Treaty article exclusive, shared or supporting in nature?

The EU shares the competence in the area of environment and soil protection with the Member States.

Subsidiarity does not apply for policy areas where the Union has exclusive competence as defined in Article 3 TFEU[1]*. It is the specific legal basis which determines whether the proposal falls under the subsidiarity control mechanism. Article 4 TFEU*[2] *sets out the areas where*

[1] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E003&from=EN
[2] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E004&from=EN

competence is shared between the Union and the Member States. Article 6 TFEU[3] sets out the areas for which the Unions has competence only to support the actions of the Member States.

2. Subsidiarity Principle: Why should the EU act?

2.1 Does the proposal fulfil the procedural requirements of Protocol No. 2[4]:

- Has there been a wide consultation before proposing the act?
- Is there a detailed statement with qualitative and, where possible, quantitative indicators allowing an appraisal of whether the action can best be achieved at Union level?

The Commission organised a call for evidence on soil health between 16 February 2022 and 16 March 2022 that received 189 replies.[5]

An online public consultation on the possible Soil Health Law for protecting, sustainably managing and restoring soils, was organized between 1 August 2022 and 24 October 2022 on which 5.782 responses were received.[6]

The Commission maintained an open dialogue with Member States through the EU expert group on soil protection since 2015.[7] The group normally met twice a year, but has convened eight times only in 2022 to discuss several aspects of the Soil Health Law based on thematic working papers prepared by the Commission. As from October 2022 the expert group was enlarged with stakeholder groups other than Member States.[8]

The Commission also organised interviews and sent targeted questionnaires to gather additional views of experts on the costs, feasibility and impacts of certain measures. Answers were collected between 14 and 28 November 2022.

This impact assessment includes a specific chapter 3 'Why should the EU act' where the legal basis, subsidiarity, necessity and added value of EU action are addressed. Annex 2 presents the synopsis of the stakeholder consultation.

2.2 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the conformity with the principle of subsidiarity?

Both the explanatory memorandum and the accompanying impact assessment contain a justification regarding the conformity with the principle of subsidiarity. The objectives of this initiative cannot be sufficiently achieved at Member State level alone. EU intervention on soil is justified due to:

1) the significant cross-border effects and impacts of soil degradation and the loss or reduction of ecosystem services at EU level;

2) the absence of a level playing field for economic operators, who are subject to very different national soil protection regimes, leading to a distortion of the internal market, unfair competition and lack of legal certainty;

3) the risk that if soil is not properly protected, the EU and its Member States will fail to fulfil

[3] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E006:EN:HTML
[4] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016E/PRO/02&from=EN
[5] Call for evidence for an impact assessment on soil health – protecting, sustainably managing and restoring EU soils
[6] Public consultation on soil health – protecting, sustainably managing and restoring EU soils
[7] Register of Commission expert groups and other similar entities: expert group on soil protection
[8] Register of Commission expert groups and other similar entities: expert group on the Soil Strategy

international and European Green Deal commitments on the environment, sustainable development and climate;

4) the fact that soil degradation is persisting and even aggravating, despite that the EU and the Member States are sharing competence on the matter.

Collective action is necessary and more effective. An important natural resource and key part of the environment is left currently without dedicated legal protection at EU level which constitutes an important legal gap in the EU acquis. The nature and scale of the problem requires that soil health is addressed at EU level.

2.3 Based on the answers to the questions below, can the objectives of the proposed action be achieved sufficiently by the Member States acting alone (necessity for EU action)?

The objectives of the proposed action cannot be achieved sufficiently by the Member States acting alone. National action has proven to be insufficient and has led to divergent levels of protection of the environment and human health. As stated by the European Environment Agency, the lack of a comprehensive and coherent policy framework for protecting Europe's land and soil resources is a key gap that reduces the effectiveness of the existing incentives and measures and may limit Europe's ability to achieve its objectives. Europe is not on track to protect its soil resources based on the existing strategies. There is a lack of binding policy targets and there is a high risk that the EU will fail some of its own and international commitments such as land degradation neutrality. Therefore, coordinated measures by the EU and Member States are necessary to bring EU soil ecosystems back to healthy condition.

a. Are there significant/appreciable transnational/cross-border aspects to the problems being tackled? Have these been quantified?

Soil degradation and its drivers and impacts, know no borders. Soil particles are physically transported inside or across borders by water, wind and human transport (e.g. excavated soils). Contaminants can become mobile via the air, surface water and groundwater and in the end contaminate the soil in another country. Soil contamination can also pose risks for EU food safety in the internal market. Soils play a key role in the nutrient, carbon and water cycles and these processes are not constrained by physical and political borders. Healthy soils are essential to tackle global societal challenges such as climate change mitigation and adaptation, food security, protection of human health, contamination, loss of nature and biodiversity. The scale and nature of the problem requires EU-wide action to ensure that all Member States take measures to reduce the risks for human health and the environment in each Member State. The transnational aspects are described more in detail with examples in section 3.2 of the impact assessment.

b. Would national action or the absence of the EU level action conflict with core objectives of the Treaty[9] or significantly damage the interests of other Member States?

According to the Treaty, the EU should aim for a high level of environmental protection and take measures to preserve, protect and improve the quality of the environment. An important natural resource and key part of the environment is left currently without legal protection at EU level which constitutes an important legal gap. The absence of EU action to regulate soil health and the differences between national soil protection rules result in transboundary impacts, an uneven playing field between Member States, a distortion of the internal market, unfair competition and a lack of legal certainty. Objectives and measures for soil health established at EU level ensure that citizens and businesses in all Member States experience a similar level of

[9] https://europa.eu/european-union/about-eu/eu-in-brief_en

environmental protection, fairness and an effective pursuit of the objectives of the Treaty.

c. To what extent do Member States have the ability or possibility to enact appropriate measures?

Since soil protection is a shared competence between the EU and its Member States, national authorities have the freedom and the power to develop their own national soil-protecting policies. In absence of dedicated EU legislation, soil protection policies started to vary more and more from one Member State to another. Some Member States have more sophisticated soil protection policies and rules compared to others. Member States with less soil-protecting policy instruments in place are often those suffering from high pressures on soil, e.g. Southern countries where depletion of soil organic carbon, soil erosion and the risk of desertification are the highest. In some Member States soil remediation costs are almost fully covered by the public sector, while in others the costs are mostly borne by the private sector. Differences between national soil contamination rules can lead to very different obligations for economic operators, and different cost bases from one Member State to another. Despite the fragmented national efforts, soil health in the EU is bad and continues to deteriorate, with a negative future outlook in the business as usual scenario. Therefore, EU action is needed to complement the gaps in the action performed by Member States. Taking ambitious coordinated action on soil health, would provide the EU the necessary credibility to 'lead by example' also at international level. A framework of general principles provides a consistent level of protection from the risks related to soil degradation. This framework enables Member States to ensure the consistent application of minimum requirements. Member States can go further and set more stringent objectives or take more protective measures. The proposal would increase legal certainty for European companies and provide clarity on the joint principles and targets for soil health across Member States.

d. How does the problem and its causes (e.g. negative externalities, spill-over effects) vary across the national, regional and local levels of the EU?

With regards to the problem description (cfr. chapter 2 of the impact assessment), differences have been identified across Member States and regions of the EU. The problem, its causes and drivers are present at local, regional, national and transnational level throughout the EU, but often in different forms and variations. Northern European countries are for example less affected by soil erosion. Water security issues linked to soil health impacts are relatively more prevalent in Southern and Central Europe. Issues stemming from the mineralisation of organic soils are especially relevant for the Scandinavian and Baltic countries, Ireland, Germany and Poland. Land take and sealing is strongly correlated with population density, with the highest values relative to the country's surface observed in Malta and the Netherlands. Industrial contamination is a greater problem in regions with a long industrial history (e.g. Belgium, Netherlands, Germany, France), where legacy sites of former polluting plants are concentrated.

e. Is the problem widespread across the EU or limited to a few Member States?

60-70% of soils in the EU are unhealthy. The problem is widespread across the EU and present in every Member State, although certain soil degradation processes might be more relevant or occur more frequent in some Member States or regions than others (cfr. chapter 2 of the impact assessment).

f. Are Member States overstretched in achieving the objectives of the planned measure?

As addressed above, some Member States have adopted legislation, policies or guidelines to improve soil health. However, these remain scattered and have not solved the problem since

soil health continues to decline. The proposal aims to build on the experience of Member States and their lessons learnt. The process of regulating soil health is complex and requires scientific expertise. This could partly explain why some Member States have not yet taken action. A significant advantage of this proposal is that it partly eliminates the need for Member States to carry out their own scientific analyses, stakeholder consultations and impact assessments, with likely substantial savings on administrative costs.

g. How do the views/preferred courses of action of national, regional and local authorities differ across the EU?

Member States support the Commission in stepping up efforts to better protect soils and stay committed to reaching land degradation neutrality. All Member States welcomed the new EU Soil Thematic Strategy and are prepared to make progress towards the objective of 'zero net land take' by 2050.[10] The Council remains determined to work with the Parliament and the Commission on soil protection and on any emerging initiatives that would be proposed in this regard.[11] In general, Member States ask for sufficient flexibility to adapt the EU framework to the national conditions and to respect the subsidiarity and proportionality principles.

Regional and local authorities have called the Commission through the European Committee of the Regions to propose a European Directive specifically for agricultural soils and have also welcomed the new Soil Strategy and the announcement of the Soil Health Law.[12] [13] They are of the view that supporting soil protection through a European framework is crucial to move towards climate neutrality, biodiversity restoration, zero pollution and a sustainable food system. At the same time regional and local authorities ask for flexibility in the implementation because of the regional differences in terms of spatial planning, landscape, soil composition and soil use.

2.4 Based on the answer to the questions below, can the objectives of the proposed action be better achieved at Union level by reason of scale or effects of that action (EU added value)?

The objectives of the proposed action can be better achieved at Union level by reason of scale and effects of that action.

a. Are there clear benefits from EU level action?

The impact of declining soil health is enormous and comes with a huge cost. Investing in prevention and restoration of soil degradation makes sound economic sense. As the EU's largest terrestrial ecosystem, healthy soils sustain many sectors of the economy while soil degradation is costing the EU an estimated 74 billion euro per year. The cost of inaction is two times higher than the cost of action through the Soil Health Law.

The objectives of the proposed action can be better achieved at EU level because of the scale and effects of that action. Coordinated action is needed at sufficiently large scale to monitor and restore soil health and to apply sustainable soil management in order to benefit from synergies, effectiveness and efficiency gains, e.g. through increased innovation or reduced costs of monitoring or soil restoration techniques. The European and international commitments,

[10] Council Conclusions of 16 October 2020 on Biodiversity – the need for urgent action
[11] Question for oral answer O-000024/2021 from the Parliament to the Council on soil protection
[12] Opinion NAT-VII/010 of the plenary session of 3, 4 and 5 February 2021 on Agro-ecology
[13] Opinion ENVE-VII/019 of the plenary session of 26-27 January 2022 on the EU Action Plan: 'Towards zero pollution for air, water and soil'

adopted by the EU and its Member States in the context of the UNCCD, UNFCCC, CBD and SDGs are currently not matched by a corresponding level of action. The proposal would allow for increased certainty for meeting objectives, to address transboundary impacts and to increase cost efficiency.

b. Are there economies of scale? Can the objectives be met more efficiently at EU level (larger benefits per unit cost)? Will the functioning of the internal market be improved?

The absence of EU action to regulate soil and the differences between national soil protection rules currently result in an uneven playing field between Member States and a distortion of the internal market, unfair competition and a lack of legal certainty. The substantial cross-border impact of soil degradation and differences in national approaches requires collective pan-European action and improvement of soil health in the most economically efficient manner. All Member States should make environmental information on soil health as much as possible available to their citizens and the EU. Regulating soil health is complex and requires scientific expertise. A significant advantage of this proposal is that it partly eliminates the need for Member States to carry out their own scientific analysis and impact assessment, with likely substantial savings on administrative costs.

c. What are the benefits in replacing different national policies and rules with a more homogenous policy approach?

This proposal does not aim to replace national policies and rules. By defining soil health, its descriptors, and the obligation to have all soils healthy by 2050, the proposed Directive will impose the same objectives to all Member States with the freedom to go further. Setting minimum requirements will ensure a similar minimum level of protection across the EU while helping to level the playing field for businesses and improving the functioning of the internal market. Soil health improvement requires long-term action which means constant investment and policy stability. Less subject to short-term political perturbation, the EU can provide the long-term objectives and vision to national governments. Unified environmental norms at EU level bring clarity and certainty for the single market.

d. Do the benefits of EU-level action outweigh the loss of competence of the Member States and the local and regional authorities (beyond the costs and benefits of acting at national, regional and local levels)?

Action at EU-level is necessary to enhance soil health cost-efficiently, with a view to reducing negative impacts on health and environment across the Union. The administrative costs and benefits of the preferred option are assessed in chapter 7.

e. Will there be improved legal clarity for those having to implement the legislation?

The introduction of a dedicated proposal on soil health will improve legal certainty as to the definition of a healthy soil, the environmental objectives and the required measures. Currently, at EU level, there is no binding overarching framework that strategically defines policy priorities or parameters for soil protection. Soil protection outcomes in the other laws are mostly derived as a consequence of delivering environmental objectives that are not explicitly soil focused. This proposal will help to steer these policies in a coherent and coordinated way towards enhanced soil health.

3. Proportionality: How the EU should act

3.1 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the proportionality of the proposal and a statement allowing appraisal of the compliance of the proposal with the principle of proportionality?

Since the objectives of this legal proposal cannot be sufficiently achieved by Member States but can be better achieved at EU level, the Union can adopt measures. The proposal complies with the proportionality principle because it does not go beyond what is necessary for achieving the objective to have all soils in the EU healthy by 2050. The proposed instrument is a Directive that leaves much flexibility to the Member States to identify the most appropriate measures and to adapt the approach to local conditions. This is crucial to ensure that the regional and local specificities as regards soil variability, land use, climatological conditions and socio-economic aspects can be properly taken into account. Setting legally binding targets and obligations for soil health at EU level brings consistency to the action needed across the EU to reach the overall objective. At the same time Member States can allow derogations in some cases if the application of the soil health objectives is not desirable or would lead to disproportionate costs that exceed the expected environmental benefits. To ensure the EU reaches these objectives, the proposal lays down obligations to monitor and assess soil health, and to sustainably use and restore soil. The impact assessment evaluated the impacts of all policy options and showed that the proposals are proportionate.

3.2 Based on the answers to the questions below and information available from any impact assessment, the explanatory memorandum or other sources, is the proposed action an appropriate way to achieve the intended objectives?

The proposed action constitutes an appropriate way to achieve the intended objectives. The Soil Strategy announced the Soil Health Law as a key tool to achieve Green Deal objectives and the vision to get all soils healthy by 2050.

a. Is the initiative limited to those aspects that Member States cannot achieve satisfactorily on their own, and where the Union can do better?

The initiative is limited to those aspects that Member States cannot achieve satisfactorily on their own, and where the EU can have added value. In order to ensure an effort-sharing approach in line with the ambition of the Soil Strategy, an EU-wide approach is needed with clear result-oriented targets and definitions.

b. Is the form of Union action (choice of instrument) justified, as simple as possible, and coherent with the satisfactory achievement of, and ensuring compliance with the objectives pursued (e.g. choice between regulation, (framework) directive, recommendation, or alternative regulatory methods such as co-legislation, etc.)?

The Soil Health Law will provide a coherent framework for monitoring, sustainable management and restoration, and will indicate the goals and targets to be achieved by Member States in 2050. These objectives can be best pursued in the form of a Directive, which gives the Member States more freedom when implementing an EU measure than a Regulation. The variability of soil condition and uses across the EU, as well as the need for flexibility and subsidiarity better fit a Directive as a legal instrument. The transposition step is absolutely needed to determine the correct adaptation of the frame to the national specificities, despite the urgency necessary for action.

c. Does the Union action leave as much scope for national decision as possible while achieving satisfactorily the objectives set? (e.g. is it possible to limit the European

action to minimum standards or use a less stringent policy instrument or approach?)
In line with article 193 TFEU, the EU objectives and measures to protect soil health should not prevent Member States from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties and should be notified to the Commission. The Directive leaves as much scope for national decision and flexibility as possible while achieving satisfactorily the objectives set.
d. Does the initiative create financial or administrative cost for the Union, national governments, regional or local authorities, economic operators or citizens? Are these costs commensurate with the objective to be achieved?
The implementation of the preferred option will come with significant direct adjustment and administrative costs for businesses and authorities, mostly related to the application of sustainable soil management and restoration practices, and the investigation and remediation of contaminated sites. At the same time, these measures to improve soil health will deliver substantial environmental, social and economic benefits. Monitoring, sustainable soil management and restoration will improve soil fertility, food security and safety, climate change mitigation and adaptation, the state of natural resources, nature and biodiversity, public health and well-being. Since soils in general respond slowly to management actions, it may take a while before the benefits materialize and the provision of ecosystem services starts to increase. The estimated costs of continued soil degradation are substantial up to EUR 74 billion annually for the EU.
e. While respecting the Union law, have special circumstances applying in individual Member States been taken into account?
The Directive allows derogations, enabling under certain conditions taking into account special circumstances applying in individual Member States, while respecting the Union law. The ranges and objectives for some descriptors of soil health, the sustainable soil management and restoration practices can also be set and tailored by Member States based on local conditions. In respect of penalties for infringements of the Directive, Member States are free in their choice of national measures as long as they are, overall, dissuasive, effective and proportionate. The different legislative regimes in Member States have been taken into account. The proposal tries to avoid as much as possible interference with existing legislation at national and EU level. The soil-related instruments at national and EU have been inventoried and assessed through a wiki[14] that contains information about 35 EU policies and 671 national policy initiatives.[15]

[14] https://webgate.ec.europa.eu/fpfis/wikis/pages/viewpage.action?spaceKey=SOIL&title=Home
[15] Ecologic (2017), Updated inventory and assessment of soil protection policy instruments in EU Member States