

EU Soil Framework Directive

IPES-Food Report “Towards a Common Food Policy for the European Union” - ClientEarth’s legal analysis of the Proposal on “EU Soil Framework Directive”

In February 2019, the International Panel of Experts on Sustainable Food Systems (IPES-Food) issued its report “Towards a common food policy for the European Union. The policy reform and realignment that is required to build sustainable food systems in Europe”. The report presents 80 proposals to develop a European Food Policy able to support the shift towards sustainable agriculture. Underpinning such a new EU Food Policy is the idea that sectorial legislations on food production, processing, distribution and consumption should not be working in silos; on the contrary, positive synergies should be created among them.

The proposals that IPES-Food elaborated in its report are grouped into various categories, which correspond to key “objectives” for an EU Food Policy: (i) *Objective 1 – Ensuring access to land, water and healthy soils*; (ii) *Objective 2 - Rebuilding climate-resilient, healthy agro-ecosystems*; (iii) *Objective 3 - Promoting sufficient, healthy and sustainable diets for all*; (iii) *Objective 4 - Building fairer, shorter and cleaner supply chains*; (iv) *Objective 5 - Putting trade in the service of sustainable development*.

ClientEarth scrutinised a set of proposals and, within this context, presents its legal analysis of Proposal 11 on soil protection, under Objective 1. Strongly connecting policy demands to the EU legal framework, this analysis intends to provide for a toolbox with the potential to assist EU policy makers in the future development of a new EU Food Policy.

Proposal 11 advocates for the adoption of an **EU Soil Framework Directive to reconcile sustainable land development with healthy soils, and coordinate with the water framework directive; integrate new soil management requirements into CAP conditionalities.**

As we read at **page 47 of the IPES-Food Report: “Soil governance remains disconnected from the land policies on which it ultimately depends. The failure to adopt an EU Soil Directive has left soil governance highly fragmented and subject to low prioritization. In particular, land development and access policies – mostly decided at the national level – remain disconnected from soil management, despite healthy soil being contingent on sustainable land uses [...]. Where land has been subject to protections from unsustainable development, soils have not been explicitly protected, meaning that soil functionality can still be lost”.**

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State of Play

i. European Regulatory Framework

The 7th Environment Action Programme - guiding European environmental policy until 2020 - recognizes the issue of soil protection. However, for the time being, there is no specific EU legislation addressing soil protection. In the absence of such a legal framework, other provisions - in areas such as agriculture and water - indirectly contribute to the protection of soils in the EU.

Already in 2002, the European Commission ("the Commission") proposed - through the Communication "Thematic strategy for soil protection" - the adoption of a Directive on soil protection, with the objective of establishing a common strategy for the protection and sustainable use of soil:

"[T]he Commission proposes a Framework Directive [on soil] as the best means of ensuring a comprehensive approach to soil protection whilst fully respecting subsidiarity. Member States will be required to take specific measures to address soil threats, but the Directive will leave to them ample freedom on how to implement this requirement. This means that risk acceptability, the level of ambition regarding the targets to be achieved and the choice of measures to reach those targets are left to Member States¹."

In its Communication, the Commission identified the main eight threats to soil quality within the EU, namely erosion, organic matter decline, contamination, salinisation, compaction, soil biodiversity loss, sealing, landslides and flooding. Together with this initiative, the (back then) European Community also created networks with private stakeholders such as CLARINET², NICOLE³ and SNOWMAN⁴.

The strategy proposed by the Commission was delineated in a Proposal for a Soil Framework Directive⁵ (hereinafter, the Proposal). The Proposal required Member States to identify the risk

¹ Communication from the Commission to the council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. Thematic Strategy for Soil Protection; Brussels, 22.9.2006 COM(2006)231 final, p. 7. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006DC0231&from=EN> (last visited 12 November 2019).

² CLARINET (Contaminated land rehabilitation Network for Environmental Technologies) was a Concerted Action within the Environment & Climate Programme of the European Commission DG Research, and was co-ordinated by Umweltbundesamt, the Austrian Environment Agency. The project started on 1.7.1998 and finished on 30.6.2001. https://www.commonforum.eu/references_clarinet.asp (last visited 12 November 2019).

³ NICOLE (industrially co-ordinated sustainable land management in Europe) is a forum for co-operation between industry (such as Dow/DuPont and Solvay), academia and service providers. <http://www.nicole.org/> (last visited 12 November 2019).

⁴ SNOWMEN (Knowledge for Sustainable soils) started in 2003 as an ERA-Net funded by the European Commission under the 6th Framework Program. Since 2009, it has been transformed into a self-sustained network of research funding organisations and administrations in the field of sustainable management of soil in Europe. <https://snowmannetwork.com/> (last visited 12 November 2019).

⁵ European Commission Proposal for a Directive of the European Parliament and of the Council establishing a framework for the protection of soil and amending Directive 2004/35/EC, 22.9.2006 COM(2006) 232 final.

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areas in their national territory, where there was evidence or suspicion that one or more soil degradation processes had occurred or would have been likely to occur in the near future. Under each risk area, Member States were to draw up a programme of measures including risk reduction targets, the appropriate measures for reaching those targets, a timetable for implementation, and an estimate of the funding allocation (Article 8, Paragraph 1 of the Proposal for a Soil Framework Directive).

Programmes could have built on/combined with measures already implemented at national and EU level, such as cross-compliance and rural development under the Common Agricultural Policy (CAP), codes of good agricultural practice and action programmes under the Nitrates Directive⁶, future measures under the river basin management plans of the Water Framework Directive⁷, national forest programmes and sustainable forestry practices, and forest fire prevention activities.

However, the required majority in the Council on the draft Directive was not reached⁸, thus the Proposal for a Soil Framework Directive was withdrawn by the Commission at the end of 2014. Indeed, the Proposal was submitted on the basis of Article 175, Paragraph 1, of the EC Treaty according to which it was necessary to obtain a qualified majority within the Council. Concerned that the new directive would have imposed additional burdens on agricultural activities - such as economic burdens to address obligations related to soil contamination - some Member States did not support it⁹.

In 2018, the European Court of Auditors (hereinafter, ECA) issued a report on desertification within the EU¹⁰. ECA's report is relevant within this context as the phenomenon of desertification leads to problems such as diminished food production, soil infertility, decreases in the land's natural resilience, and reduced water quality. The conclusions of the report show that "EU's commitment to achieving land degradation neutrality in 2030 [...] is unlikely to be achieved"¹¹. Indeed, the

Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006PC0232&from=EN> (last visited 12 November 2019).

⁶ Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources. OJ L 375. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:01991L0676-20081211&from=EN> (last visited 24 October 2019). The Nitrates Directive aims to protect water quality across Europe by preventing nitrate from agricultural sources from polluting ground and surface waters and by promoting the use of good farming practices. Under the Nitrates Directive Member States were asked to designate Nitrate Vulnerable Zones and within them mandatory protected measures had to be adopted by farmers. Outside of non-vulnerable zones Member States had to propose a set of measures to be implemented on a voluntary basis, especially about fertiliser application.

⁷ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy. OJEC L 327/1. Available at https://eur-lex.europa.eu/resource.html?uri=cellar:5c835afb-2ec6-4577-bdf8-756d3d694eeb.0004.02/DOC_1&format=PDF (last visited 21 October 2019).

⁸ A minority of Member States opposed it, *i.e.* the UK, Germany, France, Austria, the NL.

⁹ Carole Hermon (2018), Ecosystem services and soil protection. Legal analyses and agronomic insights, Université Toulouse 1 Capitole, IEJUC (EA 1919), p. 29.

¹⁰ European Court of Auditors (2018), *Special Report "Combating desertification in the EU: a growing threat in need of more action"*. Available at: https://www.eca.europa.eu/Lists/ECADocuments/SR18_33/SR_DESERTIFICATION_EN.pdf (last visited 12 November 2019).

¹¹ European Court of Auditors (2018), *Special Report "Combating desertification in the EU: a growing threat in need of more action"*, p. 5.

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Commission has not taken coherent actions to combat desertification: an EU-level strategy on desertification and land degradation is still missing and the set of strategies and programmes in connected fields - such as agriculture¹² and forest - do not address specifically the issue¹³.

ii. International Regulatory Framework

In 1982, FAO adopted the World Soil Charter¹⁴ while UNEP published the World Soils Policy¹⁵. There is no assessment of the practical impact of these initiatives, nevertheless, “the principles and definitions provided useful guidance for national governments that pursued actions on sustainable soil management”¹⁶.

Some legal tools can indirectly protect soils. Among these:

- 2013 Minamata Convention on Mercury¹⁷, a global treaty to protect human health and the environment from the adverse effects of mercury;
- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal¹⁸, which can tackle, for instance, the concern of electronic waste. PP. 121 and 122
- UN Convention to Combat Desertification (UNCCD), addressing issues of desertification, land degradation and drought¹⁹;
- UN Framework to Combat Climate Change (UNFCCC)²⁰;
- Convention on Biological Diversity (CBD), dealing with the challenges of biodiversity conservation. The CBD promoted an ecosystem approach that has been further developed by Millennium Ecosystem Assessment of 2005²¹.

¹² On this regard, it can be added that, according to the European Environmental Agency, the system of direct payments under Pillar 1 of the EU Common Agricultural Policy (CAP) can contribute to the intensification of agriculture leading, in turn, to soil organic matter loss, reduction in soil water retention, and land use changes. Please, refer to European Environmental Agency (2016), *The direct and indirect impacts of EU policies on land*, Report N. 8/2016, p. 67. Available at: [file:///lon-fp01/home\\$/LFornabaio/Downloads/The%20direct%20and%20indirect%20impacts%20of%20EU%20policies%20on%20land.pdf](file:///lon-fp01/home$/LFornabaio/Downloads/The%20direct%20and%20indirect%20impacts%20of%20EU%20policies%20on%20land.pdf) (last visited 12 November 2019).

¹³ European Court of Auditors (2018), p. 31.

¹⁴ Adopted in 1982, in June 2015, at FAO Conference’s 39th session, a revised World Soil Charter has been issued. Available at: <http://www.fao.org/3/a-i4965e.pdf> (last visited 1 October 2019).

¹⁵ Available at: https://library.wur.nl/isric/fulltext/isricu_i34280_001.pdf (last visited 1 October 2019).

¹⁶ Intergovernmental Technical Panel on Soils (ITPS) (2015), *Status of the World’s Soil Resources*, FAO, Rome, p. 225. Available at: <http://www.fao.org/3/i5199e/I5199E.pdf> (last access 1st October 2019).

¹⁷ The Minamata Convention entered into force on 16 August 2017 and the first meeting of its Conference of the Parties was held in September 2017 in Geneva, Switzerland. The Conference of the Parties will meet yearly for the first three years. Further details available at: <http://www.mercuryconvention.org/> (last visited 12 November 2019).

¹⁸ Adopted in 1989, it came into force in 1992. More information available at: <http://www.basel.int/> (last visited 12 November 2019).

¹⁹ Established in 1994, the United Nations Convention to Combat Desertification (UNCCD) addresses specifically the drylands, where some of the most vulnerable ecosystems and peoples can be found. Please, refer to the following link for detailed information: <https://www.unccd.int/> (last visited 12 November 2019).

²⁰ Opened to signatories at the 1992 Earth Summit in Rio de Janeiro, it is in force since 1994. Please, refer to: <https://unfccc.int/> (last visited 12 November 2019).

²¹ The Millennium Ecosystem Assessment (MA) was created in 2000 with the aim to assess the consequences of ecosystem change for human well-being. The working group also evaluates, through

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However, “compared to other topics, soil-related matters were not prominent in policy or programmes”, at least until the food crisis in 2008²². In order to tackle the issue of food insecurity, within the framework of UNCCD “Zero Net Land Degradation”²³, discussions were initiated about the need for quantitative targets and indicators to measure soil degradation. In 2012, the document “The Future We Want”²⁴, resulted from the UN Conference on Sustainable Development (Rio+20), showed how the international community agreed on the need to achieve a land degradation neutral world in the context of sustainable development.

The broader issue of climate change²⁵ also played a crucial role to boost the debate around soil protection. In particular, the 1997 UNFCCC Kyoto Protocol recognized that soil management can help to achieve climate goals, thanks to, for instance, development of carbon sequestration tools in forestry and agriculture. Due to the connection between climate systems and soil, in recent years, soil related issues have attracted increasing attention.

In 2011, FAO and the EU created the “Global Soil Partnership”²⁶, to promote sustainable soil management and soil protection. This is in line with recent trends in literature that stress the connection between soils and societal issues - such as food security, sustainability, climate change, carbon sequestration, greenhouse gas emissions – leading to the development of the concept of soil security²⁷. In this context, soil security has been defined as “the maintenance or improvement of the world’s soil resources so that they can provide sufficient food, fibre, and fresh water, contribute to energy sustainability and climate stability, maintain biodiversity, and deliver overall environmental protection and ecosystem services”²⁸.

Technical and scientific guidance on soil sustainable management and protection is provided by the Intergovernmental Technical Panel on Soils (ITPS). The ITPS complements the Intergovernmental Panel on Climate Change (IPCC), the Intergovernmental Panel on Biodiversity

scientific research, what actions are needed to enhance the conservation and sustainable use of ecosystems and their contribution to human well-being. <https://www.millenniumassessment.org/en/index.html> (last visited 12 November 2019).

²² Intergovernmental Technical Panel on Soils (ITPS) (2015), *Status of the World’s Soil Resources*, FAO, Rome, p. 225-226. Available at: <http://www.fao.org/global-soil-partnership/intergovernmental-technical-panel-soils/en/> (last visited 12 November 2019).

²³ UNCCD Secretariat (2012), Zero Net Land Degradation. A Sustainable Development Goal for Rio+20. To secure the contribution of our planet’s land and soil to sustainable development, including food security and poverty eradication. Available at: http://www.droughtmanagement.info/literature/UNCCD_zero_net_land_degradation_2012.pdf (last visited 12 November 2019).

²⁴ United Nations Conference on Sustainable Development, *The Future We Want*, Rio de Janeiro, Brazil, 20–22 June 2012. Available at: <https://sustainabledevelopment.un.org/content/documents/733FutureWeWant.pdf> (last visited 12 November 2019).

²⁵ Addressed, *inter alia*, by the Intergovernmental Panel on Climate Change (IPCC), created in 1988 by the UN Environment Programme (UNEP) and the World Meteorological Organization (WMO). The Kyoto Protocol in 1997 by the UNFCCC.

²⁶ Please, for additional information on this initiative refer to: www.fao.org/globalsoilpartnership (last visited 12 November 2019).

²⁷ McBratney, Field and Koch (2014), The dimensions of soil security, in *Geoderma*, Vol. 213, pp. 204-205.

²⁸ Intergovernmental Technical Panel on Soils (ITPS) (2015), *Status of the World’s Soil Resources*, FAO, Rome, p. 8.

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and Ecosystem Services (IPBES), and the UNCCD's Science-Policy Interface (SPI). The ITPS has been key to the development of the Plans of Action for the five pillars of the Global Soil Partnership. It has also been engaged in the development of the Sustainable Development Goals and the initiation of formal reporting mechanisms.

Finally, an indication of the emerging priority accorded to soils was, on the one hand, the declaration in the 2015 United Nations General Assembly, that launched the International Year of Soils; on the other hand, the last IPCC Report on Climate Change and Land. This latter IPCC Report underlines that soil erosion from agricultural fields is higher than the soil formation rate. In addition, climate change exacerbates land degradation, particularly in low-lying coastal areas, river deltas, drylands and in permafrost areas²⁹.

Legal basis for amendments

i. New EU Soil Framework Directive

An EU Soil Framework Directive could be based on the 2006 EU soil thematic strategy, even though updated data is needed to assess the current situation of soil in the EU (new impact assessment on soil).

The legal basis for a Soil Framework Directive can be identified in Article 191 TFEU or alternatively in Article 192, Paragraph 1, TFEU, falling under Title XX of the TFEU dedicated to the environment. Therefore, the protection of soil can be interpreted as an area of shared competences, pursuant to Article 4, Paragraph 2, Letter (e), TFEU.

As an area covered by shared competences, a new EU Soil Framework Directive would be compliant with the principle of subsidiarity, as embodied in Article 5, Paragraph 3, of the Treaty of the European Union (TEU)³⁰. This means that to ensure that the objective of enhanced soil protection is achieved in the whole of the EU, the Union would set the basic policy parameters - clearly specifying the objectives of the new regulatory framework and the indicators to measure actions at national level - while Member States would bear greater responsibility as to how they ensure soil protection within their own territory.

²⁹Intergovernmental Panel on Climate Change (2019), Climate Change and Land. An IPCC Special Report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems. Here reference to the version "Summary for Policymakers", p. 3. Available at: https://www.ipcc.ch/site/assets/uploads/2019/08/Edited-SPM_Approved_Microsite_FINAL.pdf (last visited 12 November 2019).

³⁰ The use of competence by the EU and the Member States is determined not only by the principle of subsidiarity but also by the principle of proportionality (Article 5, Paragraph 4, TEU). According to the TEU "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. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality".

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This would be in line with established case law of the Court of Justice of the European Union regarding the application of subsidiarity. Among others³¹, in case C-547/14³², Paragraph 215, the Court explains that, in areas that do not fall within the EU exclusive competence, the principle of subsidiarity ensures that the Union acts “only and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved at EU level.”

Moreover, as specified in the abovementioned Paragraph 215, case C-547/14, in the application of the principle of subsidiarity by the EU, specific conditions must be met. Indeed, the Lisbon Treaty contains a Protocol on the Application of the Principle of Subsidiarity and Proportionality³³ (hereinafter, Subsidiarity Protocol), to be read in conjunction with the Protocol on the Role of National parliaments in the EU. Compliance with the Subsidiarity Protocol requires that “[B]efore proposing European legislative acts, the Commission shall consult widely. Such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged³⁴. The reasons to act at Union level should be justified as well as “substantiated by qualitative and, wherever possible, quantitative indicators”³⁵. In the specific case of a European framework law, there should be an assessment of “its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation”³⁶.

It should also be borne in mind that the Subsidiarity Protocol recognises an enhanced role for national parliaments, under Articles 4 and 6. Indeed, firstly, the Commission has to forward all its draft European legislative acts to national Parliaments at the same time as to the Union legislator³⁷. Secondly, national parliaments may³⁸ send to the Presidents of the European Parliament, the Council and the Commission “a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity”³⁹. In line with this, pursuant to Article 7, Paragraph 1, of the Subsidiarity Protocol, the European Parliament, the Council and the Commission, are obliged to take into account such a reasoned opinion. When non-compliance is stated by national parliaments that represent at least one third of all the votes allocated to such parliaments, the Commission has to review its proposal⁴⁰. After this review, the Commission can opt to maintain, amend or withdraw its proposal, giving appropriate reasons⁴¹.

³¹ For instance, Judgment of the Court (Second Chamber) of 18 June 2015, Republic of Estonia v European Parliament and Council of the European Union, Case C-508/13, Paragraph 44. Available at: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-508/13#> (last visited 26 November 2019).

³² Judgment of the Court (Second Chamber) of 4 May 2016, Philip Morris Brands SARL and Others v Secretary of State for Health, C-547/14. Available at: <http://curia.europa.eu/juris/liste.jsf?num=C-547/14> (last visited 26 November 2019).

³³ Protocol N. 2 on the Application of the Principle of Subsidiarity and Proportionality. It should be reminded that, according to Article 3 of the Protocol, it applies only to “draft legislative acts” and not to delegated or implementing acts. Available at: https://ec.europa.eu/info/sites/info/files/protocol_no_2_on_the_application_of_the_principles_of_subsidarity_and_proportionality_dec2004_en.pdf (last visited 26 November 2019).

³⁴ Article 2, Protocol N. 2 on the Application of the Principle of Subsidiarity and Proportionality.

³⁵ Article 5, Ibid.

³⁶ Article 5, Ibid.

³⁷ Article 4, Ibid.

³⁸ Within six weeks from the date of transmission of a draft European legislative act, as established under Article 6 of the Subsidiarity Protocol.

³⁹ Article 6, Paragraph 1, Ibid.

⁴⁰ Article 7, Paragraph 3, Ibid.

⁴¹ Article 7, Paragraph 4, Ibid.

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These procedural requirements ensure that the exercise of power by European institutions is not too intrusive in Member States values related to the objective pursued by the new EU act. In the case under scrutiny, an EU Soil Framework Directive would be consistent with the application of subsidiarity as it would guarantee that the objective of soil protection is achieved across the Union, while leaving Member States the power to tailor their specific interventions.

As the adoption of a specific directive for the protection of soil will take long time, for the time being the following actions might be helpful.

ii. Inclusion on sustainable soil management within the EU 8th Environment Action Programme

Including sustainable soil management within the 8th Environment Action Programme would make the topic of soil protection high in the political agenda.

iii. Stronger connection between an EU soil strategy and the Common Agricultural Policy

The Common Agricultural Policy (CAP) can play a crucial role in the protection of soil. Specific requirements for soil are set in Pillar 1 (see GAECs) and, most importantly, the soil standards could be strengthened to ensure more effective protection under Pillar 2. Indeed, as for the moment there is no comprehensive legislative framework on soil, the way and the extent of soil protection depends on how soil issues are integrated in other policy instruments.

iv. Soil protection as a target within the EU Biodiversity Strategy⁴²

Reflecting needs of sustainable soil management within the EU position on biodiversity.

v. Coordination between ongoing REFIT on environmental legislation and soil protection need

Following the ongoing REFIT of Water Framework Directive and of the Nitrates Directive, to ensure proper coordination among them on the issue of soil protection.

vi. Implementation of the EU Environmental Liability Directive

Implementing the Environmental Liability Directive⁴³ (hereinafter, ELD), whose objective, under Article 1, is to “establish a framework of environmental liability based on the ‘polluter-pays’

⁴² The EU Biodiversity Strategy is part of the new European Green Deal, announced by the new President of the EU Commission Ms von der Leyen. Please, refer to the mission letter from to the Executive Vice-President for the European Green Deal, Mr Timmermans: https://ec.europa.eu/commission/sites/beta-political/files/mission-letter-frans-timmermans-2019_en.pdf (last visited 8 November 2019).

⁴³ Directive 2004/35/CE of the European Parliament and of the council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage. OJEC L 143. Available at:

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principle, to prevent and remedy environmental damage”. The ELD requires the operators of installations to repair ecological damage, identifying the proper remedial actions among those listed in Annex II to the ELD⁴⁴. “Land damage” is expressively covered by Article 2, Paragraph 1, Letter (c) of the ELD, however, the definition given is very limited, referring only to “land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms”⁴⁵. As a consequence, the remediation measure indicated in Annex II, Paragraph 2, is actually restricted to address risks of adverse effects to human health. As a general remark, it can be said that, to date, the directive has not been applied⁴⁶.

In conclusion, the lack of a common strategic policy on soil protection represents a gap: with no common policy framework, soils are addressed in various policy instruments without an EU level obligation to integrate them in order to reach a set of objectives⁴⁷.

Legal procedures to be implemented

i. Adoption of a new EU Soil Framework Directive

A Soil Framework Directive can be adopted through the ordinary legislative procedure. Therefore, a proposal by the Commission should be submitted, followed by positive majority votes within the EU Parliament and the Council⁴⁸.

As for the other suggested options, the following are the legal procedure:

ii. Inclusion on sustainable soil management within the EU 8th Environment Action Programme

The 7th EU Environmental Action Plan has been adopted in the form of a decision from the European Parliament and the Council, therefore we can expect that also the 8th will be adopted in the form of a decision⁴⁹, following the ordinary legislative procedure.

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02004L0035-20190626&qid=1568193390794&from=EN> (last visited 22 October 2019).

⁴⁴ Article 7, Paragraph 1, ELD.

⁴⁵ Article 2, Paragraph 2, Letter (c), ELD.

⁴⁶ Carole Hermon (ed.), *Ecosystem services and soil protection. Legal analyses and agronomic insights*, p. 25.

⁴⁷ At p. 12 of https://ec.europa.eu/environment/soil/pdf/Soil_inventory_report.pdf For instance, reversing soil degradation is included in the Sustainable Development Goals so we can wonder why this goal can be achieved without a EU level policy.

⁴⁸ We are of the view that such an initiative would not fall under the concept of « land use » as provided for under Article 192, para 2 (b) TFEU requiring unanimity at the Council level.

⁴⁹ Definition under Article 288 TFEU.

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iii. Stronger connection between an EU soil strategy and the Common Agricultural Policy

In order to strengthen the protection of soil through the CAP, it is necessary to intervene directly on the text of the CAP regulation. This means:

- amending the current Proposal from the European Commission for a Strategic Plans Regulation (hereinafter, CAP SP Regulation), whose negotiations are still ongoing within the European Parliament and the Council⁵⁰; or
- Including strict requirements for soil protection in the CAP post-2027, following, for its adoption, the ordinary legislative procedure.

In case amendments to the current Proposal are suggested, stricter requirements for soil protection might be introduced either through good agriculture and environmental conditions (GAECs) - within the system of conditionality, under Annex III of the CAP SP Regulation - or through a specific provision establishing targets for soil quality.

Besides the possibility to table amendments to the current CAP SP Regulation during the ongoing negotiations at the EU Parliament and the Council, it should be recalled that on GAECs the Commission also has delegated powers (coordination of Article 12(4) and Article 138 of CAP SP Regulation)⁵¹.

⁵⁰ Regarding the ongoing negotiations, the following elements should be taken into account: (a) on the Parliament side, the CAP text will be opened to reach new compromise amendments. It is unlikely, though, that the suggested major changes (*i.e.* removal of direct payments) will be adopted in AGRI Committee and then voted in Plenary. Within AGRI, coordinators, rapporteurs and shadow rapporteurs identify which provisions should be re-opened for discussion, so that the new MEPs are given the opportunity to co-shape the CAP. For the provisions on which ENVI Committee has shared competence, also shadow rapporteurs from ENVI will take part to the discussions regarding which articles should be amended. While the optimum would be to have discussion between ENVI and AGRI on all provisions – not only those covered by shared competence – at the moment, it is still unclear how the Committee will proceed. In general, the cooperation between ENVI and AGRI Committees will continue, with the general idea to bring the positions of the two closer; (b) On the Council side, negotiations are ongoing; (c) As the adoption of the CAP SP Regulation follows the ordinary legislative procedure, once the position of both the Parliament and the Council are formalised, interinstitutional negotiations (known as “trilogue”) among the Parliament, the Council and the Commission will take place. The purpose of these tripartite meetings is to reach an agreement on a package of amendments acceptable for the Parliament and the Council. The Commission plays a crucial role as, if it opposes an amendment, which the European Parliament wants to adopt, the Council will have to reach *consensus* to accept that amendment. Any agreement in trilogues is informal; therefore, it will have to be approved by the formal procedures applicable within each of the three institutions; (d) There is the chance to influence the Commission to obtain a withdrawal of the Proposal but this option seems unlikely; (e) The Commission can amend its Proposal until the Council has adopted its first position pursuant to Article 293, Paragraph 2, Treaty on the Functioning of the European Union (TFEU), which guarantees the right of the Commission to alter its proposal at any time during the procedure, as long as the Council has not yet acted. This is confirmed also by the case law of the European Court of Justice in its case C-409/13.

⁵¹ The conditions for the exercise of delegated powers by the European Commission are set in Article 138 CAP SP Regulation. This means that, before adopting a delegated act, the Commission has to consult experts designated by each Member State (Paragraph 4) and also notify the delegated act simultaneously to the European Parliament and to the Council, immediately after the adoption of the delegated act (Paragraph 5). In addition, pursuant to Article 138, Paragraph 6, CAP SP Regulation, the delegated act enters into force only if the European Parliament or the Council do not object “within a period of two months

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iv. Reflecting needs of sustainable soil management within the EU Biodiversity Strategy

This means endeavours to influence the EU Biodiversity Strategy - recently presented by the European Commission as part of the wider European Green Deal - in order to include a target on soil protection.

v. Coordination between ongoing REFIT on environmental legislation and soil protection need

The ongoing REFIT on the Water Framework Directive and of the Nitrates Directive will be relevant not only to measure the implementation of the directives per se, but also as both the Water Framework Directive and the Nitrates Directive are included in the CAP's conditionality.

Despite the results of the REFIT have not been made public yet, it is likely that it will assess the lack of proper implementation of both the Nitrates Directive and the Water Framework Directive. From this perspective, the outcome of the REFIT can inform future policies or legislative initiatives by the Commission, in order to strengthen the application of the two mentioned directives.

vi. Implementation of the EU Environmental Liability Directive

In order to assess how and to what extent the Environmental Liability Directive (ELD) has been applied, the European Commission could launch a public consultation and a REFIT exercise regarding the ELD. As data shows that the Environmental Liability Directive has not been properly implemented so far⁵², a REFIT would likely conclude on the need to strengthen the system. Within this scenario, a properly implemented ELD would ensure that the polluter pays principle is applied to remediate to land damage with the potential to create adverse effects to human health.

of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object". Finally, the delegated powers can be revoked at any time by the European Parliament or by the Council.

⁵² Please, refer to Footnote N. 46 of this analysis.

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Marc Pittie
Senior Lawyer/Juriste
Agriculture Project Lead
60 Rue du Trône (Box 11)
Brussels, 1050
+ 32 (0)2 808 4319
MPittie@clientearth.org
www.clientearth.org

Lara Fornabaio
Lawyer/Juriste - Agriculture
60 Rue du Trône (Box 11)
Brussels, 1050
+ 32 (0)2 808 88 99
LFornabaio@clientearth.org
www.clientearth.org

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Beijing

1950 Sunflower Tower
No. 37 Maizidianjie
Chaoyang District
Beijing 100026
China

Berlin

Albrechtstraße 22
10117 Berlin
Germany

Brussels

3ème étage
1050 Bruxelles
Belgique

London

274 Richmond Road
London
E8 3QW
UK

Madrid

García de Paredes,
76 duplicado,
1º Dcha.
28010 Madrid
Spain

Warsaw

ul. Żurawia 45
00-680 Warszawa
Polska

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