

# 8th Environment Action Programme proposal - Public consultation

## Feedback from ClientEarth

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ClientEarth is a non-profit European environmental law organisation with offices in Brussels, London, Madrid, Berlin, Warsaw and Luxembourg (as well as Beijing and Los Angeles). In total, ClientEarth has currently over 200 staff working on projects in more than 50 countries. Using the power of the law, we develop legal strategies and tools to address major environmental issues, we provide legal expertise and information to most of the environmental NGOs in Brussels (and beyond) and use the courts where necessary to enforce environmental law. The organisation is composed of programmes on Climate, Energy, Fossil Fuels Infrastructure, Trade, Oceans, Harmful chemicals, Plastics, Clean air, Wildlife, Forest, Agriculture and Environmental Democracy.

We welcome the Commission's proposal for an 8<sup>th</sup> Environment Action Programme. This programme is adopted in a different context than the previous ones. First, the situation has never been so critical in terms of environmental degradation and destruction and the need for strong, systemic and consistent action has never been so urgent. Second, the adoption of the programme follows the previous important policy and legislative initiatives undertaken by the EU in response to these environmental challenges and therefore comes as a support to the EU's commitments already undertaken including within the European Green Deal (EGD) and the UN 2030 Agenda and its Sustainable Development Goals (SDGs). The 8<sup>th</sup> Environment Action Programme will be central to ensure the correct implementation and efficient monitoring of these commitments.

We welcome several components of the proposal including: the aim to accelerate the transition to a climate-neutral, resource efficient, clean and circular economy in a just and inclusive way that helps achieve

the SDGs; The broad 6 thematic objectives; The commitment to the novel objective of “regenerative growth”; Making the “do no harm” oath a legal commitment and adapting the “better regulation” guidelines and tools to reflect that oath; The focus on implementation of EU legislation and policy.

We also welcome the objective to increase coherence and synergies between actions across all level of governance. In particular, that the proposal seeks to strengthen the integrated approach to policy development and implementation by mainstreaming the priority objectives in all relevant legislative and non-legislative initiatives as well as programmes and investments at Union, national, regional and local levels. Consistency between the several initiatives undertaken at EU level is key to the EU’s success in addressing the environmental, climate and sustainability challenges.

We, however, have some concerns in relation to the discrepancy between the level of ambition stated in the programme proposal as well as in the EGD and the decisions already adopted in certain fields. These concerns include the CAP (that is not consistent with the action programme’s goals on agriculture) the European Maritime and Fisheries Fund for 2021-2027 (not compliant with goals on fisheries) and the revision of the Aarhus Regulation (that does not respond to goals on access to justice).

The lack of translation of the ambition stated on paper into the relevant pieces of legislation not only makes these decisions at odd with the consistency principle as enshrined in EU Treaties but also undermines the credibility of the EU in genuinely holding the leadership in adopting a strong response to the climate and biodiversity crises.

This paper outlines, in a first part, general remarks and asks that address crosscutting concerns concerning several sectors covered by the proposal. It makes, in a second part, area-specific observations and suggestions.

## General remarks

### Ending Harmful Subsidies

ClientEarth welcomes that the 8<sup>th</sup> EAP aims at accelerating the transition to a climate-neutral, resource efficient, clean and circular economy in a just and inclusive way, while endorsing the environmental and climate objectives of the EGD and its initiatives. To be achieved this objective requires the development of more systemic long-term policy frameworks, innovation for societal change, the reorientation of investment and financing and the management of a socially fair and just transition (as recognised in draft 1.4.2. of the Supplementary Legislative Financial Statement ‘Agencies’).

However, as a matter of coherence, and in order to be in line with the EGD and Sustainable Europe Investment Plan, as well as with the 2020 State of the Energy Union report, fossil fuel subsidies must end. Additionally, subsidies to all other activities should be granted only under specific conditions that ensure a minimum level of environmental protection, consistent with the goals of the Zero Pollution Action Plan. Not only this requires a systematic check of compliance of activities with EU environmental laws within state aid control, but also a broader assessment of the harmful impacts of activities when subsidies are allocated, in line with Article 11 TFEU and Article 37 Charter of Fundamental Rights. Subsidies or state aid supporting the production of substances that are known to be prohibited by a certain date should not be allowed. An activity should also not be eligible to subsidies or state aid when there are less harmful alternatives. When that is not the case, the beneficiary shall at least guarantee sufficient safeguards to minimise its negative environmental impact to the minimum.

In particular, while the enabling conditions to achieve the programme's priority objectives in Article 3 (1) (b-e) are going in the right direction, the draft EAP lacks of a clear statement that fossil fuels – including fossil gas – should be avoided from financing by public funds.

The lack of such a statement in the EAP may lead to increase of (already existing) inconsistencies between different initiatives. The agreement<sup>1</sup> on the Just Transition Fund that it will not support any investment related to fossil fuel shows that fossil gas has no place in a just transition. However, the draft European Development and Cohesion Funds still allow exceptions regarding fossil gas. Moreover, investments under the Recovery and Resilience Facility do not exclude explicitly gas related investments.<sup>2</sup>

The EU is legally required to make sure its policies and regulations are consistent with one another. Member States are also obliged to act consistently with, and in support of, the EU's commitments. We welcome the reference to GHG emissions reductions and climate targets as a thematic priority in Article 2 of the programme. However, such targets cannot be reached without phasing out fossil fuels and this should be mentioned as a specific priority in Article 2(2)(a). New fossil gas projects would clearly be inconsistent with the climate and emission reduction targets required by the Paris Agreement, the EGD and the upcoming European Climate Law.<sup>3</sup> Investments in such projects would also contradict the EU's promise to leave no-one behind: It would leave vulnerable regions at a disadvantage environmentally, technologically and financially.

The proposed EAP does not provide clear and sufficient safeguards to avoid fossil fuel developments. It has to be ensured that the use of the public funds may not lead to a new gas lock-in leaving people and communities in transition behind. Stronger commitments are needed in the programme to be translated in policy and legislative initiatives but also in planning and programming of plans required by the Funds.

### **Best available scientific knowledge and stronger monitoring**

Progress should be assessed at a more regular pace and in a way to ensure lessons are learnt. The proposed 2029 evaluation (Article 5) should be complemented with a mid-term evaluation in 2024 to be able to assess progress on the EGD and inform the programme of the next Commission and an eventual EGD-2.

The programme should ensure that monitoring of “systemic transformation” is a priority and include the duty to identify and respond to cases of system lock-in that block progress with the European Green

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<sup>1</sup> Council of the European Union, Progress report on the Just Transition Fund, 11 December 2020, available at <https://data.consilium.europa.eu/doc/document/ST-13719-2020-INIT/en/pdf>.

<sup>2</sup> According to the political agreement, investments under the Recovery and Resilience Facility must respect the “do no significant harm” (DNSH) principle, see European Commission, Press Release, 18 December 2020, available at [Commission welcomes political agreement on RRF \(europa.eu\)](https://ec.europa.eu/commission/press-room/detail/2020/12/18-commission-welcomes-political-agreement-on-rrf). If this refers to the DNSH of the Taxonomy Regulation, it is still unclear if fossil gas investments may be included or not. Its current draft delegated act does not explicitly exclude fossil gas from the list of economic activities that can opt to qualify as environmentally sustainable, see European Commission, Draft delegated regulation - Ares(2020)6979284, 20 November 2020, available at <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12302-Sustainable-finance-EU-classification-system-for-green-investments>.

<sup>3</sup> See also legal analysis by ClientEarth, Letter to BUDG –ECON Joint Committee, Recovery and Resilience Facility funding for gas projects, 8 November 2020, available at <https://www.clientearth.org/latest/documents/letter-to-budg-econ-joint-committee-recovery-and-resilience-facility-funding-for-gas-projects/>.

Deal as well as the duty to identify solutions, including anti-system lock-in strategies to overcome barriers.

Moreover, Article 3(1)(f) of the proposal provides that it should be ensured that environmental policies are based on best available scientific knowledge. We welcome this proposal and use this opportunity to mention the existing problems that need to be addressed. First, it is still not the case in all areas in which progress is monitored by checking compliance with EU legislation, rather than environmental status based on science (eg the World Health Organization recommendations) such as in clean air related matters. Second, all decisions affecting the environment should be based on best available scientific knowledge and on the precautionary principle. To have any hope of meeting the EUs climate and biodiversity commitments, this requirement needs to be applied across the board to all policies of the EU.

### **Clear and concrete targets**

The proposal fails to mention the concrete objectives set in some of the different strategies adopted under the EGD such as the Biodiversity Strategy. Additionally, concerning clean air, the proposal simply refers to the upcoming Zero Pollution Action Plan. Given the legislative value of the EAP, and to avoid that the programme becomes just an empty container that merely refers to other policy initiatives, it should set out concrete and meaningful objectives. Similarly, the “do no harm” oath should be made operationalised.

### **Increase capacity within DG ENVI**

We take this opportunity to repeat our concern over the discrepancy between the ambition of the flagship EGD and of this programme proposal and the lack of resources within key Directorates-General (DGs) of the Commission—in particular, DG Environment—to deliver them, and to request the situation to be rectified.

Under the previous Commission, which spanned the implementation of Biodiversity Strategy to 2020, the ability of the Commission services to deliver on the Strategy, and other environmental policy areas, was significantly undermined by lack of adequate staffing and resources within DG Environment, which even underwent disproportionate cuts in previous years. We believe that lessons must be learned, and that the allocation of staff, resources, and competencies must be commensurate with the priority this Commission gives to addressing the environmental crisis.

Therefore, we call on the Commission to review the current allocation of resources across the Commission DGs from the perspective of implementing the European Green Deal and the future programme which share its objectives.

## *Area-specific feedback*

### **Agriculture**

We welcome the inclusion of soil protection and restoration within the thematic priority objectives under Article 2(2) letters (d) and (e). To ensure an adequate level of soil protection, consistency and complementarity between ongoing initiatives - from the EU Biodiversity Strategy to the New Soil Strategy and the Zero Pollution Action Plan – are essential. The 8<sup>th</sup> EAP will “contribute to an integrated, coherent, multidisciplinary monitoring and reporting framework for environment and climate policies”. For

this purpose, we underline the need for EU-wide binding targets on soil health. Otherwise, the lack of clear, specific and time-bound targets will create uncertainty about how these objectives can be monitored and achieved, with the risk to fall far from the ambition of the European Green Deal.

Among the conditions that enable the 8<sup>th</sup> EAP to achieve its priority objectives, Article 3(e) mentions phasing out harmful subsidies at EU and national level. While agreeing on this principle, we stress that the post-2020 Common Agricultural Policy (CAP), currently under negotiations, goes towards the opposite direction. The text agreed by co-legislators weakens key provisions on conditionality and eco-schemes, making the CAP “green architecture” a tool to continue business-as-usual and not the policy transformation tool needed to shift towards an environmental positive agricultural model.

### **Wildlife and Habitats**

We welcome the commitment made in Article 3(1)(k) to better implementation in the context of the Convention on Biological Diversity.

However, we are concerned at the fact that the commitments made in the biodiversity strategy, in particular the commitment to achieve 30% protected areas in both the marine and terrestrial environments, are not explicitly reflected in the proposal.

Article 3(1)(h) enshrines the commitment to make full use of nature based solutions but does not provide for a definition of these – one assumes nature based solutions to climate change, but this lacks clarity. The definition of nature based solutions is quite sensitive as they should not be invoked as greenwash. A careful definition would therefore be useful.

### **Trade**

Trade affects the environment in many significant ways and the current COVID-19 crisis has revealed the extent to which we cannot continue business as usual. Trade can no longer be an end in itself, but a means to achieve social and environmental objectives which keep us within our planetary boundaries.

Article 3(1)(b) of the proposal provides that achieving the priority objectives of the 8<sup>th</sup> EAP will require strengthening the integrated approach to policy development and implementation. However, as noted by a number of stakeholders, the EU trade policy has so far failed not only to positively contribute to sustainable development,<sup>4</sup> but also to effectively address the growing pressure of increased international trade flows on the environment. This means the EU trade policy is at odds with the principles of consistency and environmental integration enshrined in the EU Treaties.<sup>5</sup> There is thus an urgent need to stop taking trade decisions in an isolated manner from other policies, including environment and public health.

In order to achieve the ambitions set out in the EGD and the proposal on Europe’s post-coronavirus recovery, the EU must operate a fundamental shift to sustainable practices and develop a trade agenda that actively supports high environmental standards and dramatically reduces the EU’s global environmental footprint. At a minimum, global trade and investment rules cannot undercut society’s

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<sup>4</sup> See notably IEEP, ‘An EU Green Deal for trade policy and the environment: Aligning trade with climate and sustainable development objectives’, <https://ieep.eu/publications/an-eu-green-deal-for-trade-policy-and-the-environment> ; Veblen Institut, ‘Making trade serve the ecological and social transition’, <https://www.veblen-institute.org/Making-trade-serve-the-ecological-and-social-transition.html>; Ciaran Cross, ‘Anchoring climate and environmental protection in EU trade agreements’, PowerShift, <https://power-shift.de/wp-content/uploads/2020/05/Anchoring-climate-and-environmental-protection-in-EU-trade-agreements-web.pdf>

<sup>5</sup> Articles 11 TFEU and Article 7 TFEU and Article 21 TEU.

capacity to secure climate and environmental goals. The “do no harm” oath takes all its relevance in this realm.

Building resilient and sustainable supply chains will be crucial in the post-COVID19 context. The time has come for the EU to rebuild an economy that takes responsibility for its global environmental footprint. Mandatory due diligence, including to avoid and address deforestation and human rights violations, will be key to ensure EU businesses and companies operating on the internal market take greater heed of social or environmental concerns, identify and prevent the negative impact of their operations and supply chains, and thereby are better equipped for future challenges.

### **Ocean, Plastics, and Chemicals**

In relation to Article 3(e) (harmful subsidies), as with the CAP, the European Maritime and Fisheries Fund for 2021-2027 is set to reintroduce harmful subsidies (i.e. which increase fishing capacity). This is hardly compatible with this commitment or the larger commitment to give back to the planet more than we take and the European Commission should consider withdrawing its proposal for the EMFF to ensure consistency across all its policies. The upcoming revision of the Energy Taxation Directive should also be the opportunity for the EU to finally get rid of one of the most harmful fisheries subsidies – the fuel tax exemption for fishing vessels.

It is particularly unfortunate that the 8<sup>th</sup> EAP does not refer at all to the need to ensure healthy fish stocks. This featured prominently in the annex to the 7<sup>th</sup> EAP. It is all the more relevant now given the Union’s failure to achieve the requirement set out in Article 2(2) of Regulation 1380/2013 (CFP Base Regulation) to achieve the maximum sustainable yield exploitation rate by 2020. Fisheries is one of the areas where the interplay between what we take from the planet and what we give to it is most obvious. It is also (unlike most matters of environmental policy) an area of exclusive Union competence. It is therefore surprising not to see it mentioned explicitly in the 8<sup>th</sup> EAP.

We welcome the recognition in the 8th EAP of the key role of ECHA in the monitoring, measuring, and recording framework. We also welcome the importance the 8th EAP places on protecting, preserving, and monitoring air, water, and soil. It would be helpful to clarify the need to include indoor air as well, given its serious effects on human health.

### **Clean Air**

We welcome the inclusion in article 3 of a thematic priority objective on “a zero-pollution ambition for a toxic free-environment, including for air”. However, we note that the EU Action Plan Towards a Zero Pollution Ambition for air, water and soil will not be adopted until the second quarter of 2021 – therefore, references to such document, at the moment, do not provide any concrete indication as to the level of ambition.

Given the importance of the 8<sup>th</sup> EAP, we believe that it should also lay out expressly objectives for air quality. We suggest to introduce a new recital to confirm the commitment already made (and not yet achieved) under the 7<sup>th</sup> EAP: “The Union has agreed to achieve levels of air quality that do not give rise to significant negative impacts on, and risks to, human health and the environment” (see Recital (15) of the 7<sup>th</sup> EAP). We suggest to include also an explicit reference to the Union’s commitment in the communication on the EU Green Deal to align air quality standards more closely with the World Health Organization recommendations.

Regarding monitoring, in Article 4(2) we suggest to clarify that the assessment will also reflect “the best scientific evidence”. For instance, for air quality, beyond tracking compliance with EU air quality

standards, progress should also be monitored with reference to population exposure to levels of pollution exceeding World Health Organizations recommendations.

### **State aid**

We welcome the ambition to “increase coherence and synergies between actions “and to “mainstreaming sustainability in all relevant initiatives and projects at national and EU level” (Articles 1 and 3(1)(b)) and the recognition that action is required at all levels of governance (Article 2). We also welcome the requirements in Article 3(1), point (b): trade-off between economic and sustainability or social considerations shall no longer play systematically to the advantage of the former. This third item shall also include special attention to citizens’ need for energy. We also strongly support in principle Article 3(1) points (c) (d) and (e) (to the extent it relates to phasing out fossil fuel subsidies).

The 6th priority objective (Article 2(2)(f)) supports the urgency to align the Member States’ granting of subsidies or State aid, and the Commission’s control thereof, with the Green Deal objectives, the “do no harm” principle and the 8th EAP priority objectives. Besides EU funding and market-based instruments, State aid policy and control have a particular role to play under items (c), (d) and (e) of Article 3(1). Whilst on the one hand, public support to activities that are on the right track should be enhanced, a correlative immediate stop to aid that sustain environmentally harmful activities is absolutely required.

We refer to our general remark made above in relation to the need to put an end to harmful subsidies and state aids.

As the 8th EAP focuses on reporting and monitoring, we stress that measurement of progress towards the priority objectives shall also be coherent with policies other than purely environmental and climate policy (recital 14), such as subsidies and State aid policy. On the one hand, amounts of aid granted by Member States to economic sectors should be reported for assessing progress towards the 8th EAP priority objectives. On the other hand, reporting and monitoring of State aid (but not only those pursuing an environmental protection or decarbonisation objective) shall integrate the 8th EAP priority objectives. It would help to better track Member States’ and market progress.

Likewise, reporting on harmful subsidies at national level would be useful to identify and phase them out. To the extent these subsidies also constitute State aid, we suggest that the Commission opens a sector inquiry in the fossil fuel sector as per Article 25 of Procedural Regulation 2015/1589. This is justified in light of the number and variety of direct and indirect aid to the fossil fuel sector in Member States, many of which are unlawful, distortive of competition and breach EU law on the environment and in light of the incompatibility of aid to fossil fuels with the EGD and the pathway to reach the 2030 and 2050 energy and climate targets.

### **Energy systems**

We note and welcome the fact that the climate neutrality and adaption to climate change are listed among the six thematic priority objectives of the 8th EAP. However, we would like to remind that such objectives cannot be reached without phasing out of fossil fuels and this should be mentioned as a specific priority in Article 2(2)(a).

We take this opportunity to stress the important role of the energy sector for the achievement of climate goals. Therefore, we urge the Commission to ensure strong synergies and consistency between climate and energy policies.

We welcome the Commission's commitment to conduct regular monitoring in order to ensure that the Union is on track to meet its environmental objectives. We find it positive that the Commission wishes to ensure coherence of these activities with other existing governance and monitoring exercises, e.g. Climate and Energy Governance, the European Semester etc. The exact practical modalities of this exercise (except from the fact that the Commission will be supported by the European Environment Agency and the European Chemicals Agency) do not seem to be established yet, while they will be key for the implementation. We hope that the Commission will build on the existing experience of similar tools, e.g. climate and energy governance, but also use this opportunity to address any weaknesses of these existing instruments, mechanisms and tools, incl. enforcement mechanisms.

We support the Commission's will to increase coherence and synergies between actions across all levels of governance. We see for example an important role that regional and local authorities have in implementation of EU and national policies. In addition, local non-governmental actors, e.g. energy communities, may have an important role in achieving environmental goals, in particular these related to climate change.

Aware of the difficulty to ensure mainstreaming of the priority objectives in all relevant strategies, legislative and non-legislative initiatives, programmes, investments and projects at different governance levels, we would like the Commission to develop mechanisms and tools ensuring that such a mainstreaming is indeed conducted on a regular basis and in a transparent way. That would also help to ensure coherence between climate and energy policies.

Setting-up effective implementation and enforcement mechanisms of the 8th EAP and the Green Deal at all governance levels is key to enable the Commission to show tangible and measurable progress in 2029 (and at mid-term).

### **Environmental Democracy**

The priorities listed in Article 2 can only be achieved in Member States with a strong commitment to the rule of law and where environmental defenders operate in a secure space, free from persecution, intimidation or reprisals. Therefore, a specific reference to strengthening the rule of law and the EU rule of law toolbox should be included in Article 3(1) as a requirement for achieving 8th EAP's priorities.

We agree that the effective and efficient implementation of EU legislation is key to enabling the achievement of the priorities listed in Article 2. We believe that civil society organisations and the public are crucial to ensuring implementation and enforcement of EU law, particularly through access to justice, and their role should be referred to explicitly in Article 3(1)(a), as well as the need to strengthen capacity in this respect.

Article 3(1)(i) refers to the effective application of the Aarhus Convention. While we welcome a reference to the Aarhus Convention, which is crucial to achieving the 8<sup>th</sup> EAP's priorities, this article should refer to effective implementation and enforcement, given the problems faced by the Union, both at EU and Member State levels, in this domain. It is particularly important to make reference to the Commission's commitment to insert specific access to justice provisions in sectoral environmental legislation, to ensure that it extends to the co-legislators.

In recital 16, Regulation 1367/2006 and Regulation 1049/2001 should be mentioned explicitly.

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