

Proposal for a Directive on Soil Monitoring and Resilience (Soil Monitoring Law)

Preliminary analysis and first
recommendations

Introduction

Soil is a finite, non-renewable natural resource providing fundamental ecosystem services on which all life on Earth depends. As the foundation of almost 95% of the food we eat, healthy soils are crucial to ensuring the sustainability and resilience of our food system in the long-term.¹ Yet, 60-70% of soils in the EU are not healthy,² threatened by continued degradation through erosion, compaction, salinization, sealing, pollution, desertification, and loss of organic carbon, nutrients, water and biodiversity. Acting as both the largest terrestrial carbon sink and a source of greenhouse gas emissions, soil also plays a key role in climate change mitigation and adaptation.³ Nonetheless, there is currently no comprehensive legal instrument at the EU level dedicated to protecting our soil.

In 2006, the Commission communicated its Thematic Strategy for Soil Protection.⁴ It included a legislative proposal for a Soil Framework Directive, the first piece of EU legislation aimed at preserving soil functions, preventing soil degradation and mitigating its effects, restoring already degraded soils and integrating soil protection in other EU policies.⁵ This initial proposal was rejected in 2007 by five Member States (UK, Germany, France, Austria and the Netherlands) on the grounds of proportionality, subsidiarity and costs associated with implementation, and ultimately withdrawn by the Commission in 2014.

In 2021, the Commission presented its new **EU Soil Strategy for 2030**⁶ as part of the EU Biodiversity Strategy for 2030.⁷ The new Soil Strategy set a framework and objectives for the protection, restoration and sustainable use of soil, with a common vision for achieving healthy soils in the EU by 2050. It also announced a legislative proposal on soil health, a Soil Health Law (SHL), by 2023. The Commission's legislative proposal on soil was adopted on 5 July 2023 as the Directive on Soil Monitoring and Resilience,⁸ or the **Soil Monitoring Law** (SML). Among its key elements, the proposal provides a harmonised definition of soil health, puts in place a soil monitoring framework, and aims to foster sustainable soil management and remediation of contaminated sites.

The lack of a recognised legal status for soil – the kind that already exists for air and water under the Ambient Air Quality Directive,⁹ the National Emissions reduction Commitments (NEC) Directive¹⁰ and the Water Framework Directive¹¹ – represents a significant gap in EU environmental law that the new soil law would fill. An ambitious SML is also crucial to achieving the climate, biodiversity, water and zero pollution targets under the European Green Deal,¹² as well as the targets and objectives set out

¹ FAO, Food and Agriculture Organization (2015) *Healthy soils are the basis for healthy food production* (available [here](#)).

² European Commission, report of the Mission board for Soil health and food (2020) *Caring for soil is caring for life: Ensure 75% of soils are healthy by 2030 for food, people, nature and climate* (available [here](#)).

³ FAO, Food and Agriculture Organization (2015) *Soils help to combat and adapt to climate change by playing a key role in the carbon cycle* (available [here](#)).

⁴ Thematic Strategy for Soil Protection, COM(2006)231 final (available [here](#)).

⁵ 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 (available [here](#)).

⁶ EU Soil Strategy for 2030: Reaping the benefits of healthy soils for people, food, nature and climate, COM(2021) 699 final (available [here](#)).

⁷ EU Biodiversity Strategy for 2030: Bringing nature back into our lives, COM(2020) 380 final (available [here](#)).

⁸ Proposal for a Directive on Soil Monitoring and Resilience (Soil Monitoring Law), COM(2023) 416 final (available [here](#)).

⁹ Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe ("Ambient Air Quality Directive") (available [here](#)).

¹⁰ Directive (EU) 2016/2284 of the European Parliament and of the Council of 14 December 2016 on the reduction of national emissions of certain atmospheric pollutants, amending Directive 2003/35/EC and repealing Directive 2001/81/EC ("NEC Directive") (available [here](#)).

¹¹ 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 ("Water Framework Directive") (available [here](#)).

¹² The European Green Deal, COM(2019) 640, 11 December 2019 (available [here](#)).

in the EU's Farm to Fork Strategy¹³ and Biodiversity Strategy. We therefore provide the following analysis of the Commission's proposal and invite EU decision-makers to consider our recommendations to strengthen the SML in this next stage of the legislative process.

We call on EU decision-makers to:

- Ensure Article 192(1) TFEU remains the legal basis for the SML
- Uphold the Commission's positive subsidiarity check establishing the SML's compliance with the EU Treaties
- Set legally-binding and time-bound targets to track Member States' progress towards achieving the SML's objective for 2050
- Introduce mandatory district soil health plans or programmes of measures to monitor and improve soil health
- Strengthen the proposed provisions on access to justice and penalties to ensure proper implementation and enforcement of the law

Analysis of the proposal and recommendations

1. Maintain Article 192(1) TFEU as legal basis

As the SML is related to environmental protection, the proposal provides Article 192(1) of the Treaty on the Functioning of the European Union (TFEU)¹⁴ as its legal basis. Article 192 TFEU outlines how Article 191 TFEU, which specifies the objectives of EU environmental policy, should be implemented, whether through an ordinary legislative procedure (Article 192(1)) or a special one (Article 192(2)).

Recommendation

We support the Commission's choice of Article 192(1) as legal basis for the SML, as opposed to Article 192(2). Some stakeholders have proposed to make Article 192(2) the legal basis, a change that would give more control to Member States in the decision-making procedure. If the special legislative procedure under Article 192(2) is applied to the SML, the role of the European Parliament will be significantly restricted, enabling the Council to decide unanimously what action is to be taken at Union level. Therefore, it must be emphasised that the SML does not regulate land use, which is a measure covered under Article 192(2), but rather aims to protect and restore soil as a natural resource, thus falling under the remit of Article 192(1).¹⁵

¹³ A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system, COM(2020) 381 final (available [here](#)).

¹⁴ European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 26 October 2012, OJ L 326/47-326/390 (available [here](#)).

¹⁵ For comparison, the same legal basis of Article 192(1) has also been provided for related pieces of legislation, including the Regulation on land, land use change and forestry (LULUCF Regulation), the Ambient Air Quality Directives, the Water Framework Directive, and the National Emissions reduction Commitments (NEC) Directive.

2. Uphold a positive subsidiarity check

Environmental protection is a shared competence between the Union and the Member States under the EU Treaties. Whenever the EU does not have exclusive competence, the principle of subsidiarity¹⁶ is essential to regulating EU action and authorising it to exercise its powers when the objective of the intervention cannot be effectively achieved at Member State level. As such, the Commission recognises the SML as forming part of EU environmental policy and complying with the principle of subsidiarity.¹⁷

Recommendation

We support the Commission's positive subsidiarity check for the SML. In the past, the principle of subsidiarity was misapplied by a minority of Member States to block the 2006 Soil Framework Directive. However, claims that an EU soil law would be in breach of subsidiarity were exclusively political and without any clear legal reasoning. Should similar claims arise in relation to the SML, it is important they are discredited and the Commission's subsidiarity check is upheld.

As outlined in our ClientEarth [publication](#) from March 2022, the following applies:

a) The objectives of the proposed action cannot be sufficiently achieved at Member State's level

Addressing soil protection solely at the domestic level is inadequate considering that soil degradation is widespread across all Member States, most of which have not implemented nor adopted national legal frameworks to address the issue. The transboundary nature of soil degradation does not refer only to the effects occurring on both sides of a country's border but entails also looking at the broader consequences of inaction on climate, biodiversity and food system resilience.

b) The objectives of the proposed action [can] be better achieved at Union level

It is estimated that about 60-70% of soils in the EU are not healthy, which means that Member States have failed to protect soils on their own and action at EU level is urgently needed. Soil monitoring systems are present at Member State level, but they are fragmented, incomplete and not harmonised across the EU. The added value of EU action stems also from the need to define healthy soils and identify common monitoring methodologies that can be integrated into the activities carried out by Member States.

3. Set legally-binding and time-bound targets – Art. 1

The SML proposal sets an overarching objective to “*continuously improve soil health in the Union with the view to achieve healthy soils by 2050.*” However, it does not set any legally-binding and time-bound targets to ensure the achievement of this objective.

¹⁶ Article 5(3) of the Treaty on European Union (TEU) and [Protocol N. 2 on the application of the principles of subsidiarity and proportionality](#) (2004).

¹⁷ Article 5(3) of the Treaty on European Union (TEU): “*Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.*”

Recommendation

The law should set a long-term, legally-binding target of achieving 100% healthy soils in the EU by 2050, as well as setting interim targets for 2030 and 2040 that map out a clear trajectory towards achieving the 2050 target and help track Member States' progress. These interim targets should be set at appropriate levels to ensure consistent progress and to avoid meaningful action to address soil health being postponed until later years. Legally-binding targets should form the cornerstone of a broader governance framework designed to ensure that Member States stay on track to reach the ultimate 2050 objective. For example, failure to meet interim targets should be coupled with a legal obligation to review and update Member States' district soil health plans (see our recommendation in Section 4 below), allowing for corrective measures to ensure progress remains on course.

4. Introduce mandatory district soil health plans – Art. 4, 6 & 10

The SML requires Member States to establish soil districts within their territory for the monitoring of soil health and land take and to take measures to foster sustainable soil management. However, Member States are not required to draw up more detailed plans or programmes of measures, whether at national or district level, to monitor and improve soil health. Instead, they *“shall take into account”* and *“identify synergies with the programmes, plans, targets and measures listed in Annex IV.”* Furthermore, *“[t]he soil health monitoring data, the results of the soil health assessment, the analysis referred to in Article 9 and the sustainable soil management measures shall inform the development of the programmes, plans and measures set out in Annex IV.”* While coherence with the programmes, plans and measures under Annex IV is vital, these stem from other pieces of legislation and lack a direct focus on achieving healthy soils.¹⁸

Recommendation

The SML should require Member States to prepare, consult on, and implement soil-specific plans (referred to as 'district soil health plans') in order to achieve the SML's objective and potential targets (if included, as proposed in Section 3).¹⁹ By setting out concrete, targeted measures to improve soil health, such mandatory plans would considerably increase the likelihood of achieving the SML's overarching objective, creating greater transparency and advancing accountability, public participation and access to justice (see Section 5). The SML should also require the review of these plans at specified intervals to retain flexibility. Review should also be required in the event that interim legal targets are not met to try to ensure that Member States remain on course to achieve the 2050 objective.²⁰

Furthermore, the public participation procedure should be open to allow anyone affected by or with an interest in the decision to participate. In particular, the proposal should be amended to expand the scope of the public participation process described in Article 10, as well as any other public

¹⁸ The programmes, plans, targets and measures listed in Annex IV include, inter alia, the national restoration plans under the forthcoming Nature Restoration Law, the strategic plans drawn up by Member States under the Common Agricultural Policy and conservation measures established for Natura 2000 sites.

¹⁹ For comparison, we refer to the mandatory programmes of measures and River Basin Management Plans that Member States have to prepare for river basin districts under the Water Framework Directive. See Articles 11, 13, and 14 of the Water Framework Directive 2000/60/EC.

²⁰ For example, a similar governance mechanism exists under the National Emission reduction Commitments Directive (EU) 2016/2284: Member States' must review their National Air Pollution Control Programmes under certain circumstances, including where emission reduction commitments are not complied with (Article 6(4)).

participation procedure envisaged under the Directive, to expressly exclude any prioritisation of certain categories of the public to be consulted over others and ensure that NGOs and other individuals interested in the decision-making process are involved in an equitable way.²¹

5. Strengthen provisions on access to justice and penalties – Art. 22 & 23

The SML proposal includes clear provisions on access to justice and penalties, but there is still room for improvement. Article 22 contains requirements governing access to justice, ensuring that members of the public that have a sufficient interest or that maintain the impairment of a right, as well as environmental NGOs, have access to justice to challenge the assessment of soil health, the measures taken pursuant to the Directive and any failures to act of the competent authorities. In addition, Article 23 sets out common rules on penalties applicable to breaches of the SML, including the requirement to be "*effective, proportionate and dissuasive*". In particular, the penalty must be proportionate to the turnover or income of the person responsible, and take into account the population or the environment affected by the violation. Nonetheless, the proposal does not include any new mandatory programme of measures, such as national or district soil health plans, requiring Member States to set clear measures that could be enforced and potentially challenged by such provisions.

Recommendation

While it is positive that the SML proposal includes provisions on access to justice and penalties, these must be strengthened. The inclusion of mandatory programmes of measures (in the form of district soil health plans, as described in Section 4) clearly setting the measures to be taken to comply with the SML is essential for the provisions on access to justice and penalties to be operative, effectively enabling citizens and NGOs to support the proper implementation and enforcement of the law.

²¹ See Article 10(1) on sustainable soil management as well as the impact assessment on p. 13 of the SML proposal. Such prioritisation is not in line with Articles 6 and 7 of the Aarhus Convention (read together with the fourteenth preambular paragraph of the Convention) and with the Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters (p. 16).

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