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Position paper on the Trinomics' study on the need for, added value and feasibility of criminalising all trade in illegal wildlife across the EU

The European Union (EU) continues to be one of the largest importers of animals or animal parts, destined primarily for the exotic pet trade and the fashion industry. The demand for rare species, particularly reptile and amphibian species, continues to grow, regardless of whether there are only small populations thereof in the wild and whether they are strictly protected by national protection measures in their country of origin. Only a very small fraction of the species in trade are actually covered by the existing EU legislation.

This is a significant loophole in the EU Wildlife Trade Regulations (EU WTR), since it renders it possible to legally trade into and within the EU in species that are protected in their country of origin, which have been taken in violation of the national legislation of their range country.

As animal protection and conservation NGOs, we have repeatedly highlighted the problem that non-CITES listed, but nationally protected species are routinely being smuggled by wildlife traffickers from their country of origin and sold on the EU market with impunity. This undermines the conservation efforts of range countries. It is imperative that the EU commits to adopting legislation that prohibits the importation, transshipment, purchase, and sale of wildlife taken illegally in the country of origin. Such legislation would not only bring a much-needed end to the legitimisation of an already unlawful trade, but also protect conservation, promote biodiversity, and preserve natural habitats.

We therefore warmly welcome the publication of the [*Study on the need for, added value and feasibility of criminalising all trade in illegal wildlife across the EU*](#). The study confirmed that this specific form of wildlife crime is extensive and expanding, and that addressing and closing this loophole is legally feasible and aligned with existing EU instruments and policies. This study was produced by Trinomics on request of the European Commission and stems from the commitment in the revised EU Action Plan against Wildlife Trafficking to explore legislative action to tackle the trade in illegally sourced wildlife.

In the following, we outline our analysis and recommendations with regard to the key policy options presented in the study and address a number of issues raised.

Preferred Policy Option

The study provided three possible legislative solutions to address the trade in illegally sourced wildlife. The first would require expanding the EU WTR, either by amending the annexes to list all nationally protected (non-CITES) species, or by adding a more general provision within the text that prohibits trade in illegally sourced species.

A second option would be a new Directive under Article 83(1) of the Treaty on the Functioning of the European Union (TFEU) that focuses only on organised crime. Lastly, the EU could adopt a new directive under Article 83(2) of the TFEU, which would prohibit trade of illegally sourced wildlife and include criminal elements.

Amending the WTR's annexes would be a slow and inherently reactive process. Such listing-based approach will always lag behind the trafficking trends, meaning that gaps will continue to exist. Given that it requires repeated regulatory updates, this approach would be associated with a high administrative burden whilst being unable to match the speed at which new species enter trade or become threatened, and the speed at which traffickers exploit loopholes. Moreover, the inclusion of a general provision under the WTR seems unlikely considering its existing structure, and would require a parallel amendment of the Environmental Crime Directive.

A new Directive under article 83(1) TFEU would limit the criminalisation of trade in illegally sourced wildlife to those qualifying as organised crimes, meaning that individual traders and collectors would slip through the cracks and go unpunished. This would defeat the core objective of closing the legal loophole. **We therefore consider that the last option, a new Directive under Article 83(2) TFEU, criminalising all trade in illegally sourced wildlife, is the most appropriate to address this illegal trade and most likely to achieve a real deterrent effect.** In contrast to a Directive under Article 83(1), a Directive under Article 83(2) would allow the EU to adopt minimum criminal law rules when necessary to ensure effective implementation of an EU policy, which is precisely the situation at hand.

Sanctions will only be considered dissuasive and effective when they present a sufficient risk to offenders across all EU Member States and deter criminal conduct. Access to investigative tools, in particular special investigative tools, is often contingent upon the level of penalty prescribed for the offence in the law. Therefore, only criminal penalties would be consistently high enough to enable enforcement and judicial authorities to access these tools.

Criminal law is a reflection of our society's moral standards and plays an important role in addressing serious harms by sanctioning unlawful conduct. As such, being convicted of a criminal offence is stronger than facing administrative penalties, as it carries both legal consequences and societal condemnation (and administrative penalties are often just seen as the cost of doing business).

Data collection and monitoring of wildlife trade flows

One of the key issues that the feasibility study laid bare is the sheer inadequacy of data collection for the trade flows of wildlife into and within the EU. Given that - in most cases - data are currently only collected at a higher taxonomic level for animal health certification purposes, it is often impossible to ascertain which species are actually entering/exiting the Union, let alone whether specimens have been legally acquired. This lack of data also jeopardises other countries' efforts to justify international protection to species through CITES listing, as data on the volume of the trade of individual species are not available.

We concur with this study that the most logical solution to this problem is to integrate the collection of species-level data on wildlife being traded into the existing TRACES system, which has been generating and validating online and real time veterinary certificates required for the import, export and intra-EU trade in live animals and animal products since 2004.

It is also noted that documentation of the (sub)species in trade would not only allow for more accurate data collection, but it could also be advantageous to the identification and prosecution of wildlife traffickers, the identification of new (or potential) invasive alien species and of the traceability of pathogens and animal diseases.

Policy changes and improved data monitoring: two complementary aspects of the same problem

It is crucial that the response to the feasibility study includes both improved data collection and a legislative solution. While improving the EU's database systems to properly monitor all trade of wildlife into and out of the Union is an important first step, it should not be used as a justification or reason to delay legislative action.

It is clear that the trade in non-CITES species is comparatively far higher than trade in CITES species. Indeed, in the US it has been found to be 3.6-11 times higher¹, a trade discrepancy that offers a valid comparison for the expected numbers in EU trade. With Europol warning that the trade in non-CITES species is increasing due to the clear regulatory gaps that exist², a prohibition of trade in illegally sourced species cannot wait. As indicated in the study, the principle of precaution and preventative action can allow and indeed motivate the Union to immediately tackle this growing issue.

Amending TRACES would also offer the opportunity to introduce an obligation for importers to declare that all wildlife being imported in the EU has been legally sourced, including vis-à-vis foreign laws (due care obligation). The burden of proof should indeed reside with the traders/importers. Once new legislation to criminalise the trade in illegally sourced wildlife is introduced in the EU, this declaration could then be used to evaluate the fulfilment of the duty of care and due diligence, requiring traders to not be negligent when conducting their business.

Such a declaration could be used to compare it with the export declaration in instances where those are required. This enforcement system, similar to the US Lacey Act, sanctions the import of illegally sourced species, when the import declaration is lacking or fraudulent, indicating that the trader knew or should have known that they were violating foreign law, thus failing to exercise due care.

While the European Commission is currently assessing also the feasibility of an EU Positive List for exotic pets, we wish to emphasise that the two approaches are complementary and equally necessary. A Positive List would regulate the exotic pet trade on the basis of animal welfare, conservation, health, and invasiveness considerations, whereas legislation criminalising the trade in illegally sourced wildlife would provide the legal tools needed to prosecute traffickers of wildlife species whilst assisting range countries in their efforts.

Clarification on the legal framework

There are three main challenges that the authors identify as main obstacles to the adoption of a new directive under Article 83(2) of the TFEU, which would prohibit trade of illegally sourced wildlife and include criminal elements:

¹ [The Society for Conservation Biology](#)

² [Environmental Crime in the Age of Climate Change threat assessment 2022.pdf](#)

Burden

The study highlights concerns that this could create an unreasonably higher burden for operators and enforcement agencies. While this should by itself not be a reason to not address this growing criminal activity that continues to undermine the Union's effort to address wildlife crime, as laid out in the Revised Action Plan, there are several mechanisms that can help to keep the impact limited.

The duty of care and the requirement of an import declaration assign responsibility to traders to demonstrate, and bear responsibility, that a specimen was legally sourced. As a result, the additional workload for customs and enforcement authorities remains minimal.

Measures such as restricting the number of designated ports of entry could contribute to more consistent and harmonised enforcement by specialised customs authorities, while limiting the extent of training required on wildlife trade for customs officers across Member States.

Assigning countries to different risk categories could help authorities prioritise enforcement on imports from high-risk countries, ensuring that shipments from these locations are subject to enhanced scrutiny by default.

It is also crucial to note that these nationally protected species are in fact illegal to take and trade. If operators are conducting legitimate trade in wildlife, then not only should this additional burden not be a concern to them, but it cannot be considered an 'additional' burden. In fact, operators exporting protected species from third countries are already required to obtain valid permits from source countries. All EU regulation would do is require a showing of documentation they should already have. The burden of proof, and duty of care, must reside with the traders/importers. The current system has no such duty of care.

Legal feasibility of criminalising at EU level and MS concerns

It seems from the consultation phase of this study that there continues to be a fundamental misunderstanding of how individuals can be criminally charged for importing illegally sourced wildlife.

Concerns expressed by some Member States that criminalisation may violate the constitutional principles of legality or legal certainty are unfounded. The principle of **legality** requires that an offence is clearly defined, foreseeable, and accessible.

In an Article 83(2) Directive, the offence would be defined as: trading in wildlife taken, harvested or exported in violation of the applicable law of the country of origin.

The offence is fully defined in EU law and the foreign rule functions as an objectively verifiable element. The principle of legality does not require listing every prohibited species, only that the prohibited conduct be clear, and it is: wildlife taken in violation of origin-country law may not be traded.

Legal certainty

Legal certainty is also ensured through the duty of due care (due diligence). Criminal liability would only arise where a person acts intentionally or recklessly – meaning they knew, or clearly should have known, that the specimen was illegally sourced.

Accidental or unaware conduct, such as a traveller unknowingly carrying a protected specimen, may not meet this threshold. Individuals do not need to know every foreign wildlife law, this criminalisation requires that one takes reasonable steps to verify legality of origin, just as is already required under the EU's CITES, timber, fisheries, and cultural goods, regimes.

The EU Deforestation Regulation (EUDR), which replaces the current Timber Regulation and will be fully in effect by June 2026, is a particularly good example of how the due diligence duty applies in EU legislation.

Conclusion

The lack of EU legislation prohibiting imports of illegally sourced wildlife undermines range States' and global conservation efforts, and seriously harms the credibility of the EU and its Member States. The feasibility study commissioned by the European Commission, indicates that addressing this loophole is legally feasible and aligned with existing EU instruments and policies. We believe that the EU should promptly adopt a new Directive under Article 83(2) TFEU that criminalises the importation, transshipment, purchase, and sale of wildlife taken illegally in the country of origin.

The undersigned organisations are fully committed to supporting this process and stand ready to provide any additional information or engage in further consultation as needed.

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