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NOTE

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Subject:	Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC - Presidency compromise suggestion on the definition of sanctions, following the discussions in the JHA Council on 9 June 2022

(Courtesy translation)

Following the discussions in the Council of Ministers of Justice on 9 June 2022, and taking into account the replies given by the Member States to the questions contained in document 9374/22, the Presidency proposes the following compromise version on the "sanctions" part of the proposal for a Directive on the protection of the environment through criminal law, i.e. on Articles 5, 6, 7, 8 and 9 and the associated recitals (14, 15, 16, 18, 20, 21 and 22).

This compromise version takes into account the following parameters, which the Presidency hopes will be satisfactory to delegations:

- it is the text initially prepared and published ahead of the JHA Counsellors meeting on 20 May 2022 (9146/22), which could not be discussed at that time;

- with editorial corrections on the one hand, based on the written comments that several delegations had made on the morning of 20 May 2022;
- and additional amendments following the discussions at the Council of Ministers on 9 June 2022 on the other hand, in particular on the flexibility to be provided in view of the concerns expressed by several delegations.

For the sake of clarity, the Presidency has reproduced only the above-mentioned articles and recitals in an annex to this document.

Presidency compromise suggestion on the "sanctions" part of the proposal for a Directive on the protection of the environment through criminal law, i.e. on Articles 5, 6, 7, 8 and 9 and the associated recitals (14, 15, 16, 18, 20, 21 and 22)

[...]

- (14) Sanctions for the offences should be effective, dissuasive and proportionate. To this end, minimum levels for the maximum term of imprisonment should be set for natural persons. **The maximum terms of imprisonment provided for in this Directive for the offences referred to therein should apply at least to the most serious forms of such offences.** Accessory sanctions **or measures** are often seen as being more effective than financial sanctions especially for legal persons. Additional sanctions or measures should be therefore available in criminal proceedings. These should include the obligation to reinstate the environment, exclusion from access to public funding, including tender procedures, grants and concessions and withdrawal of permits and authorisations. This is without prejudice to the discretion of judges or courts in criminal proceedings to impose appropriate sanctions in the individual cases.
- (15) Where national law provides for it, legal persons should also be held criminally liable for environmental criminal offences according to this Directive. Member States whose national law does not provide for the criminal liability of legal persons should ensure that their administrative sanctioning systems provide for effective, dissuasive and proportionate sanctions types and levels as laid down in this Directive in order to achieve its objectives. **The seriousness of the conduct, and the economic and** financial situation of legal persons, should be taken into account to ensure the dissuasiveness of the sanction imposed.

- (16) A further approximation and effectiveness of sanction levels imposed in practice should be fostered through common aggravating circumstances that reflect the severity of the crime committed. **The notion of aggravating circumstances should be understood either as facts allowing the judge to pronounce a higher sentence for the same offence than the one ~~normally~~ incurred without these facts, or as the possibility of retaining several offences cumulatively in order to increase the level of sanction. Member States should provide for the possibility of at least one of these aggravating circumstances in their national law in accordance with the applicable rules established by their legal systems on aggravating circumstances. In any case, it remains within the discretion of the judge or the court to determine whether to increase the sentence, taking into account all the circumstances of the individual case. When an environmental criminal offence causes **destruction or** irreversible damage to an entire ecosystem, this should be an aggravating circumstance because of its severity, including in cases comparable to ecocide.**
- [(17) Where the crimes are of a continuing nature, they should be brought to an end as soon as possible. Where offenders have made financial gains, such gains should be confiscated.]
[The attention of the delegations is drawn to the fact that such a recital relating to confiscation should be moved after the set of recitals relating to sanctions, which would result in a renumbering of the recitals]

- (18) This Directive should apply without prejudice to the general rules and principles of national criminal law on the sentencing or the application and execution of sentences in accordance with the specific circumstances in each individual case. **With regard to additional sanctions or measures the Member States should decide which kind of sanctions or measures should be seen as appropriate.** In particular, concerning the obligation to reinstate the environment within a given period, provided that the damage is reversible, this Directive does not require that ~~a~~ the judicial authority, if entitled to ~~which has imposed~~ this obligation according to national law, should also be responsible for monitoring the execution of this obligation. Likewise, concerning the withdrawal of permits and authorisations to pursue activities which have resulted in committing the offence, Member States should ensure that national judicial authorities may either impose it themselves in their own proceedings, or request it from that another competent authority is informed and can act according to its national procedural rules. Additionally, the publication of the decision imposing the sanctions or measures upon a legal person shall be applied in accordance with the right to privacy and without prejudice to the national rules governing the anonymization of court decisions or the duration of publication.
- [(19) Member States should lay down rules concerning limitation periods necessary in order to enable them to counter environmental criminal offences effectively, without prejudice to national rules that do not set limitation periods for investigation, prosecution and enforcement.] **[The attention of the delegations is drawn to the fact that such a recital relating to limitation periods should be moved after the set of recitals relating to sanctions, which would result in a renumbering of the recitals]**
- (20) The obligations in this Directive to provide for criminal penalties should not exempt Member States from the obligation to provide for administrative sanctions and other measures in national law for breaches established in Union environmental legislation.

- (21) Member States should define the scope of administrative and criminal law enforcement clearly with regard to environmental offences according to their national law. In the application of national law transposing this Directive, Member States should ensure that the imposition of criminal sanctions and of administrative sanctions respects the principles of the Charter of Fundamental Rights of the European Union, including the prohibition of *ne bis in idem*.
- (22) Furthermore, judicial and administrative authorities in the Member States should have at their disposal a range of criminal sanctions and other measures to address different types of criminal behaviour in a tailored and effective manner.

[...]

Article 5
Penalties for natural persons

1. Member States shall take the necessary measures to ensure that the offences referred to in Articles 3 and 4 are punishable by effective, proportionate and dissuasive criminal penalties.
2. Member States shall take the necessary measures to ensure that offences referred to in Article 3(2) points (a), (b), (c) (i), (ii), (iii), (iv), (v) and (vi), (c)bis, (e) (i) and (ii), (i), (i)bis, (j), and p (i) **and (ii)** are punishable by a maximum term of imprisonment of at least ten years if they cause or are likely to cause death or serious injury to any person. Where these offences cause serious injury, such a maximum term of imprisonment incurred shall not be less than five years.
3. Member States shall take the necessary measures to ensure that offences referred to in Article 3(3), as it refers to Article 3(2) points (a), (b), (c) (i), (ii), (iii), (iv), (v) and (vi), (c)bis, (e) (i) and (ii), (i), (i)bis, and (j), and p (i) and (ii), are punishable by a maximum term of imprisonment of at least five years if they cause death to any person. Where these offences cause serious injury, such a maximum term of imprisonment incurred shall not be less than two years and six months.
- 3.bis** When defining effective, proportionate and dissuasive criminal penalties sentences of imprisonment for the offences referred to in Article 3(2) points (a), (b), (c) (i), (ii), (iii), (iv), (v) and (vi), (c)bis, (e) (i) and (ii), (i), (i)bis, (j), and p (i) and (ii), Member States shall take into account when such offences cause serious injury to any person.
4. ~~3.~~ Member States shall take the necessary measures to ensure that the offences referred to in Article 3(2)~~(4)~~ points (a) to (e) ~~(j)~~, **(h) to (j)**, (n), (q), (r) are punishable by a maximum term of imprisonment of at least ~~six~~ five years. [The attention of the delegations is drawn to the fact that several Member States have requested that sub-point (n) be introduced in paragraph 5 and thus be less severely sanctioned. Delegations are specifically invited to take a position on this issue. Same for Article 7(2), point (a).]

5. 4. Member States shall take the necessary measures to ensure that the offences referred to in Article 3(2)(1) points (f), (g), (k), (l), (m), (o), (p) are punishable by a maximum term of imprisonment of at least ~~four~~ **three** years.

5.bis For offences referred to in Article 3(2) points (g) and (h), and in Article 3(3), as it refers to Article 3(2) points (g) and (h), paragraphs 1 to 5 of the present Article may not apply provided that the Member States justify administrative penalties whose result is similarly effective, proportionate and dissuasive. [Presidency's proposal in light of the declarations made by several Member States. Delegations will be asked to take a position on this paragraph for the Presidency to assess if a majority can support it]

6. 5. Member States shall take the necessary measures to ensure that natural persons who have committed the offences referred to in Articles 3 and 4 may be subject to additional **criminal or non-criminal** sanctions or measures which ~~shall~~ **may** include:

(a) obligation to reinstate the environment within a given time period, **provided that the damage is reversible, or, where the damage is irreversible, the obligation to compensate costs linked to the damage to the environment;**

(b) fines;

(c) temporary or permanent exclusions from access to public funding, including tender procedures, grants and concessions;

(d) disqualification from directing establishments of the type used for committing the offence;

(e) withdrawal of permits and authorisations to pursue activities which have resulted in committing the offence;

~~(f) temporary bans on running for elected or public office;~~

~~(g) national or Union wide publication of the judicial decision relating to the conviction or any sanctions or measures applied.~~

Article 6
Liability of legal persons

1. Member States shall ensure that legal persons can be held liable for offences referred to in Articles 3 and 4 where such offences have been committed for their benefit by any person who has a leading position within the legal person, acting either individually or as part of an organ of the legal person, based on:

- (a) a power of representation of the legal person;
- (b) an authority to take decisions on behalf of the legal person;
- (c) an authority to exercise control within the legal person.

2. Member States shall also ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of an offence referred to in Articles 3 and 4 for the benefit of the legal person by a person under its authority.

3. Liability of legal persons under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, inciters or accessories in the offences referred to in Articles 3 and 4.

Article 7
Sanctions for legal persons

1. Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 6(1) is punishable by effective, proportionate and dissuasive **criminal or non-criminal sanctions or measures**.

2. Member States shall take the necessary measures to ensure that, for legal persons held liable pursuant to Article 6(1), offences referred to in Article 3(2) are punishable by criminal or non-criminal fines, the amount of which shall be proportionate to the seriousness of the conduct, the economic and financial situation of the legal person concerned and the illegal profits or benefits generated or expected, and the maximum limit of which incurred shall be not less than:

/The attention of the delegations is drawn to the fact that it has been requested to delete the reference to illegal profits or benefits. Delegations are specifically invited to take a position on this issue/

(a) 5% of the total worldwide turnover of the legal person in the business year preceding the fining decision for offences referred to in Article 3(2) points (a) to (e), (h) to (j), (n), (q), (r);

(b) 3% of the total worldwide turnover of the legal person in the business year preceding the fining decision for offences referred to in Article 3(2) points (f), (g), (k), (l), (m), (o), (p).

3. Member States may, regarding criminal or non-criminal fines referred to in Article 7(2), use other methods to provide a maximum limit and level of fines, provided that the result is similarly effective, proportionate and dissuasive to those listed in Article 7(2).

4. 2. Member States shall take the necessary measures to ensure that sanctions or measures for legal persons liable pursuant to Article 6(1) for the offences referred to in Articles 3 and 4 shall include **criminal or non-criminal fines and may include other criminal or non-criminal sanctions or measures, such as:**

~~(a) criminal or non-criminal fines;~~

(a) ~~(b)~~ the obligation to reinstate the environment within a given period, provided that the damage is reversible, or, where the damage is irreversible, the obligation to compensate costs linked to the damage to the environment;

(b) ~~(c)~~ exclusion from entitlement to public benefits or aid;

(c) ~~(d)~~ temporary exclusion from access to public funding, including tender procedures, grants and concessions;

(d) ~~(e)~~ temporary or permanent disqualification from the practice of business activities;

(e) ~~(f)~~ withdrawal of permits and authorisations to pursue activities which have resulted in committing the offence;

(f) ~~(g)~~ placing under judicial supervision;

(g) ~~(h)~~ judicial winding-up;

(h) ~~(i)~~ temporary or permanent closure of establishments used for committing the offence;

~~(j) obligation of companies to install due diligence schemes for enhancing compliance with environmental standards;~~

(i) ~~(k)~~ publication of all or part of the judicial decision imposing the relating to the conviction or any sanctions or measures applied.

3. 4. Member States shall take the necessary measures to ensure that, for legal persons liable pursuant to Article 6(1), offences referred to in Article 3(2)(1) are punishable by criminal or non-criminal fines, the amount of which shall be proportionate to the seriousness of the conduct, the economic and financial situation of the legal person concerned, and the illegal profits or benefits generated or expected, and the maximum limit of which incurred shall be not less than :

(a) X% of the total worldwide turnover of the legal person in the business year preceding the fining decision for offences referred to in Article 3(2) points (a), (b), (c), (c)bis, (e) (i) and (ii), (i), (i)bis, (j), and p (i) and (ii) having caused death to any person ;

(b) Y% of the total worldwide turnover of the legal person in the business year preceding the fining decision for offences referred to in Article 3(3), as it refers to Article 3(2) points (a), (b), (c), (c)bis, (e) (i) and (ii), (i), (i)bis, (j) and (p) (ii), having caused death to any person ;

(c) 5% of the total worldwide turnover of the legal person in the business year preceding the fining decision for offences referred to in Article 3(2) points (a) to (c), (h) to (j), (n), (q), (r) ;

(d) 3% of the total worldwide turnover of the legal person in the business year preceding the fining decision for offences referred to in Article 3(2) points (f), (g), (k), (l), (m), (o), (p).

4. Member States may, regarding criminal or non-criminal fines incurred in accordance with paragraph 3, use other methods to provide for an equivalent amount of fines to the ones prescribed in paragraph 3.

points (a) to (j), (n), (q), (r) are punishable by criminal or non-criminal fines, the maximum limit of which shall be not less than 5% of the total worldwide turnover of the legal person [/undertaking] in the business year preceding the fining decision and the amount of which shall be proportionate to the seriousness of the conduct and the situation of the legal person concerned.

~~4. Member States shall take the necessary measures to ensure that, for legal persons liable pursuant to Article 6(1) for offences referred to in Article 3(2) points (a), (b), (c), (c)bis, (e) (i) and (ii), (i), (i)bis, (j), and p (i) and (ii) having caused death to any person, such maximum limit shall be not less than X% of the total worldwide turnover of the legal person in the business year preceding the fining decision. Such maximum limit is reduced to Y% for offences referred to in Article 3(3), as it refers to Article 3(2) points (a), (b), (c), (c)bis, (e) (i) and (ii), (i), (i)bis, (j), and p (i) and (ii), having caused death to any person. In any case, the amount of these fines shall be proportionate to the seriousness of the conduct and the situation of the legal person concerned.~~

~~5. Member States shall take the necessary measures to ensure that, for legal persons liable pursuant to Article 6(1), offences referred to in Article 3(2)(1) points (k), (l), (m), (o), (p) are punishable by criminal or non-criminal fines, the maximum limit of which shall be not less than 3% of the total worldwide turnover of the legal person [/undertaking] in the business year preceding the fining decision and the amount of which shall be proportionate to the seriousness of the conduct and the situation of the legal person concerned.~~

~~5. 6. 3.~~ Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 6(2) is punishable by **criminal or non-criminal** sanctions or measures, which are effective, proportionate and dissuasive.

~~4. Member States shall take the necessary measures to ensure that offences referred to in Article 3(1) points (a) to (j), (n), (q), (r) are punishable by fines, the maximum limit of which shall be not less than 5% of the total worldwide turnover of the legal person [/undertaking] in the business year preceding the fining decision.~~

~~5. Member States shall take the necessary measures to ensure that offences referred to in Article 3(1) points (k), (l), (m), (o), (p) are punishable by fines, the maximum limit of which shall be not less than 3% of the total worldwide turnover of the legal person [/undertaking] in the business year preceding the fining decision.~~

6. Member States shall take measures to ensure that the illegal profits generated from the offence and the annual turnover of the legal person are taken into account when a decision is made on the appropriate level of a fine pursuant to paragraph 1.

Article 8

Aggravating circumstances

In so far as the following circumstances do not already form part of the constituent elements of the criminal offences referred to in Article 3, Member States shall take the necessary measures to ensure that, in relation to the relevant offences referred to in Articles 3 and 4, **one or several of the following circumstances may, in accordance with the relevant provisions of national law**, be regarded as aggravating circumstances:

- ~~(a)~~ — ~~the offence caused the death of, or serious injury to, a person;~~
- (a) (b)** the offence caused destruction or irreversible or long-lasting substantial damage to an ecosystem **as defined under X Article 2(13) of Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020¹**;
- (b) (e)** the offence was committed in the framework of a criminal organisation within the meaning of Council Framework Decision 2008/841/JHA²;
- (c) (d)** the offence involved the use of false or forged documents **by the offender**;
- (d) (e)** the offence was committed by a public official when performing his/her duties;

¹ **Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (OJ L 198, 22.6.2020, p. 13–43)**

² Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, OJ L 300/42.

- (e) ~~(f)~~ the offender ~~committed~~ **has previously already been definitively convicted of offences of the same nature** sentenced for a similar previous infringements of environmental law under Article 3 or 4 within a period that cannot exceed the limitation periods of Article 11.;
- ~~(g) the offence generated or was expected to generate substantial financial benefits, or avoided substantial expenses, directly or indirectly;~~
- ~~(h) the offender's conduct gives rise to liability for environmental damage but the offender does not fulfil their obligations to take remedial action under Article 6 of Directive 2004/35/EC³;~~
- ~~(i) the offender does not provide assistance to inspection and other enforcement authorities when legally required;~~
- ~~(j) the offender actively obstructs inspection, custom controls or investigation activities, or intimidates or interferes with witnesses or complainants.~~

³ 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 (OJ L 143, 30.4.2004, p. 56–75).

Article 9
Mitigating circumstances

Member States shall take the necessary measures to ensure that, in relation to the relevant offences referred to in Articles 3 and 4, **one or several of** the following circumstances may, **in accordance with the relevant provisions of national law,** be regarded as mitigating circumstances:

- (a) the offender restores nature to its previous condition, **when this is not an obligation under Directive 2004/35/EC**;
- (b) the offender provides the administrative or judicial authorities with information which they would not otherwise have been able to obtain, helping them to:
 - (i) identify or bring to justice the other offenders;
 - (ii) find evidence.

[...]
