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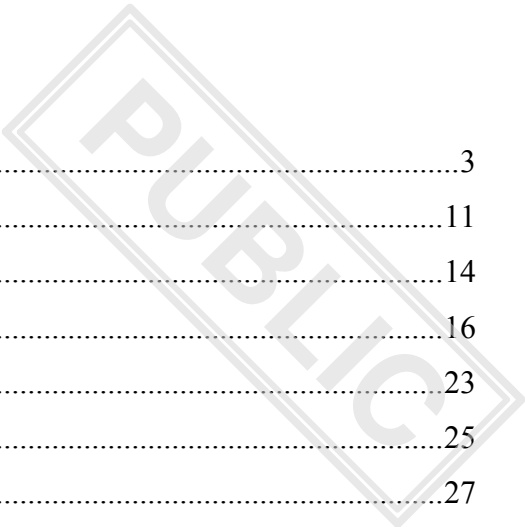
At the meeting of the COPEN Working Party on 16 June 2022, the Presidency presented a new draft text on Articles 5-9 of the draft Directive, as regards the issue of sanctions (10174/22).

Subsequently to the meeting, the Presidency invited Member States that so wished to submit written observations.

The input received is set out in the [Annex](#).

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BULGARIA

Written comments of the Bulgarian delegation on the issue of sanctions in the proposal for a new Directive on the protection of the environment through criminal law

(concerning the proposal for a differentiated sanctioning regime under Art.7 depending on whether corporate liability is triggered under paragraph 1 or under paragraph 2 of Art.6)

27 June 2022

Following the Bulgarian written proposal made before the JHA counsellors meeting held on 11.05.2022 and our interventions during several COPEN and counsellors meetings, the Bulgarian delegation would like to reiterate its concerns about the proposed differentiated approach in sanctioning legal persons depending on whether their liability is triggered under paragraph 1 (physical perpetrator is person in leading position) or under paragraph 2 (physical perpetrator is person under authority of the legal person) of Art.6 (*differentiated sanctioning regime*).

In particular, there should be no difference in sanctioning legal persons depending on whether corporate liability is triggered under paragraph 1 or under paragraph 2 of Art.6, because of the following reasons:

1. Paragraphs 1 and 2 of Art.6 do not establish different levels of “culpability” of the legal persons and therefore should not lead to different levels of sanctions (in principle the liability of legal persons is objective, but not based on the guilt as it is in the case of physical persons). In fact, paragraphs 1 and 2 of Art.6 are aimed at covering two different categories of physical perpetrators whose criminal conduct triggers corporate liability: persons in leading position in the legal person (paragraph 1) and other persons under the authority of the legal person (paragraph 2);
2. Both in the case of crime committed by a person in leading position and in the case of crime committed by a person under authority, the crimes are committed for the benefit of the legal person, i.e. the connection between the criminal offence and the legal person is the same in both cases;

3. Both in the case of crime committed by a person in leading position and in the case of crime committed by a person under authority, the consequences and damage caused could be equally serious; the damage caused by crimes committed by persons under authority in many cases could be more serious than in the cases of crimes committed by persons in leading position; the environmental crimes which cause serious damage to the health are often committed by persons who are not in leading position (e.g. workers, employees, technicians, engineers, etc.);

4. The differentiated sanctioning regime depending on the conditions for triggering the liability of legal persons is potential for forum shopping;

5. In view of the above, the EU instruments (EU criminal law conventions and directives) and international criminal law conventions do not provide for differentiated approach in sanctioning legal persons depending on whether their liability is triggered by a crime committed by a person in leading position or by a person under authority. Therefore, the member states are expected to foresee equally effective, proportionate and dissuasive sanctions in both cases (*equal sanctioning regime*).

For the above-mentioned reasons, the member states should dispose of equally effective, proportionate and dissuasive corporate sanctions and measures both in the case of crime committed by a person in leading position and in the case of crime committed by a person under authority.

6. Finally, we are concerned that the adoption of the proposed differentiated approach in sanctioning legal persons would have serious negative consequences, as follows:

- First, it will compromise the principle of “the equal sanctioning regime” for crimes committed for the benefit of the legal persons which has been applied for years and thus will affect the consistency and coherence of the EU legislation;

- Second, the existence of two parallel sanctioning regimes at EU level with respect to the legal persons will lead to conceptual, legislative and practical confusion at national level because the member states have already taken measures in conformity with the current European and international standard of “equal sanctioning regime”;

- Third, the “differentiated sanctioning regime” will be a step backwards from the current corporate sanctioning standard (what is difficult to explain in the light of the Commission's otherwise very ambitious approach to this important dossier);

- Fourth, in case of adoption of the “differentiated sanctioning regime” the message to the member states will be that less effective, proportionate and dissuasive corporate sanctions could be provided for environmental crimes committed by persons under authority. The transposition of such a message in the legislation and practice of the member states will be (mis)used by the legal persons which breach the rules for protection of environment and will also lead to forum shopping.

In view of the above considerations, **the Bulgarian delegation proposes to remove the differentiated sanctioning regime provided in Art.7 by deleting paragraph 5 and all references to paragraph 1 of Art. 6.** A proposal for respective amendments in Art.7 in track changes is attached to these comments (based on document 10174/22).

Proposal of the Bulgarian delegation to remove the differentiated sanctioning regime provided for in Article 7 by deleting paragraph 5 and all references to paragraph 1 of Article 6

(see amendments in Article 7 in track changes)

ANNEX

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)

[...]

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 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, 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:

(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 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, (c) (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, (c) (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), (e)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), (e)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.

~~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.~~

FINLAND

Finland thanks the Chair and the General Secretariat for the opportunity to provide written comments on the proposal. In addition to our previous comments during the COPEN meetings and in writing, we would like the following aspects to be taken notice of.

Recital 14

We would like to thank the Presidency for taking on board our suggestion which we naturally support. The recital is important for us from the point of view of the national system and the logic in how offences are technically described and criminalized in national legislation.

Art. 5, paragraphs 4 and 5

The 5 and 3 year thresholds are considered too high for the offences mentioned. 4 and 2 years would be appropriate.

Art. 5, paragraphs 4 and 5 ought be looked at in detail as regards which threshold would be justifiable for which offence. For example, the offence described in art. 3, paragraph 2, sub-point d includes acts which are likely to cause substantial damage. 5 years for an act which does not actually cause damage seems disproportionately high. Sub-point d should be moved to paragraph 5.

In any case, it is necessary to remove sub-point n from paragraph 4 and add it to paragraph 5. Sub-point n does not include the element of the act causing or being likely to cause any consequence or the risk thereof like the other sub-points referred to in the paragraph. The blameworthiness of these acts is also evidently lower than that of the acts in the other sub-points referred to in art. 5, para 4. The principle of proportionality should be respected; 5 years would be clearly disproportionate for these acts.

Art. 5, paragraph 6

We support the written comment by the AT delegation on the problems of including “permanent” exclusions from access to public funding among the additional sanctions or measures for natural persons in art. 5, paragraph 6.

Art. 7, paragraphs 2 and 3

First, as to the question by the Presidency on the deletion from paragraph 2 of the reference to illegal profits or benefits, we support this deletion. The illegal profits or benefits will be covered by article 10 of this directive as well as the specific directive on freezing and confiscation.

As has been indicated before, instead of the far-reaching harmonization as presented by the Commission, we suggest similar regulation as regards legal persons as in the latest previous directives of criminal law. Article 7 goes deep into details which is unexceptional compared to other EU instruments of criminal law and does not take into account the basic principles in the national systems of the MS.

As such it is positive that the current version of the text includes the possibility to determine the amount of fines in other methods than as a percentage of the world-wide annual turnover. However, the current wordings lead to problems which are caused by the fact that the fines for legal persons would be determined in relation to the annual worldwide turnover as the alternative method would compare to that method.

In addition to what we have commented before, we have significant concerns over the proposal for example for the reasons of calling for respect for the principle of proportionality.

The proposed system can lead to unreasonable situations in many ways. It could lead, for example, to situations in which disproportionately high fines could be issued for legal persons even for offences which are not particularly serious in nature. This issue has been stated as regards the system of daily fines for natural persons in the practice of the EU Court.

Thus, article 7 goes into too much details and does not take into account the basic structure and principles of the national systems. It also lacks regulation on the waiver of measures and does not include any limitations which are included in the corresponding systems for administrative fines.

For these reasons, art. 7, paragraphs 2 and 3 may not be accepted in their current form.

If art. 7, paragraphs 2 and 3 will need to be maintained in the text, they would need to be formulated in a way which would allow for flexibility and take the principle of proportionality appropriately into account, as well.

We would suggest the following wording which would ensure better respect for the national systems and allow for more flexibility while still maintaining the basic approach of the proposal by the Commission:

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 the fines for legal persons shall be determined as a percentage of the total worldwide turnover of the legal person in the business year preceding the fining decision or another method securing that the fine is proportionate to the seriousness of the conduct and the economic and financial situation of the legal person.**

Art. 8 and 9

We support the added references to the relevant provisions of national law in the chapeaus of articles 8 and 9.

GERMANY

Directive on the protection of the environment through criminal law DE text proposals in follow-up to the COPEN meeting on 16 June 2022

Germany thanks the Presidency for the opportunity once again to provide written comments on the proposal on the Directive on the protection of the environment through criminal law. Please find below the drafting suggestions presented by Germany in the last COPEN meeting.

Recital 14

We suggest the following wording taking into consideration the changes in Art. 5 to an optional list of additional sanctions.

*“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 **considered available in criminal proceedings**. These **should could** 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.”*

Recital 14 and recital 18 both deal with additional sanctions. They could be grouped together and recital 18 could be inserted after recital 14.

Recital 15

We suggest the following wording taking into consideration the changes in Art. 7. The seriousness of the conduct and the economic and financial situation should not only be taken into account to ensure dissuasiveness but also the proportionality of the sanction imposed.

*“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 **proportionality and dissuasiveness of the sanction imposed**.”*

Recital 22

We suggest the deletion of this recital. It remains unclear what the recital intends to clarify. Recitals 14 - 16 and 18 deal exhaustively with criminal sanctions and other measures available to judicial authorities. What is meant by the fact that a range of criminal sanctions should be available “furthermore”? Where does the assumption relate to that criminal sanctions should also be available to administrative authorities? This does not follow from the directive.

Article 5 para. 2

We would like to reiterate, that lit. p should be deleted from paragraph 2 altogether. The maximum penalty of 10 years for the aggravating circumstance that the offence caused

death is not proportionate in relation to the offence defined in Art. 3(2)(p), which shall only be punished with up to three years.

Article 5 para. 3

DE doesn't see a need to specify minimum maximum penalties for negligent acts. In our opinion, article 5(3) describes negligent homicide, which should be punishable in all member states by an effective, proportionate and dissuasive criminal penalty.

Article 5 para. 3bis

DE suggests the deletion of this paragraph. It remains unclear what the paragraph is intended to regulate. All the offenses listed in paragraph 3bis – with the exception of lit. p – have to be punished by a penalty of five years according to Article 5(4). The condition, that the offence causes serious injury to any person is part of all the listed offences.

Article 5 para. 4

Lit. n (placing on the Union market of illegally harvested timber) should be changed from paragraph 4 to paragraph 5 as it is similar in scope and gravity to lit. l), m), g) and p).

Article 5 para. 6 lit. c

Exclusion from access to public funding should be limited to "temporary exclusion". Permanent exclusion raises considerable concern with regard to the principle of proportionality.

Article 7 para. 2

"*illegal profits or benefits generated or expected*" should be deleted. Using the total annual worldwide turnover as the reference for calculating the maximum possible fine guarantees that a very high maximum threshold for the fine is reached. We should avoid duplications with Art. 10, which stipulates, that illegal profits and benefits are to be confiscated.

Even if paragraph 3 might give MS the flexibility for different methods to calculate the maximum fine, we would like to repeat our proposal, to refer in paragraph 2 to "*the average total worldwide turnover of the legal person in the last three business years*" as the basis for calculating the maximum fine. This would provide a somewhat broader, more objective basis of assessment and would make the relevant business year less dependent from the date of the judgment.

Article 7 para 3

DE supports the suggestions for a more flexible approach.

HUNGARY

HU position on sanctions

Article 5

Draft text / proposal of HU on Article 5

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 are punishable by a maximum term of imprisonment of at least five years if they cause death to any person.

3. Member States shall take the necessary measures to ensure that the offences referred to in Article 3(2) points (a) to (e) and (h) to (j) are punishable by a maximum term of imprisonment of at least five years.

4. Member States shall take the necessary measures to ensure that the offences referred to in Article 3(2) points (f), (g), and (k) to (r) are punishable by a maximum term of imprisonment of at least three years.

5. 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 4 of the present Article may not apply provided that the Member States justify administrative penalties whose result is similarly effective, proportionate and dissuasive.

6. 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 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;.

1. General comments on Article 5

The directive should define sanctions in accordance with the proportionality principle: the sanctions should be adapted to the seriousness of the offence.

We have previously indicated that it would be important to define the elements of the offence with clarity and to carefully select cases which should trigger criminal prosecution.

On the basis of the partial general approach, crimes listed in Article 3 can be divided into three categories.

a) Crimes referring to results (crimes having an injurious result)

In these cases, the result is the prerequisite of establishing criminal liability / prosecuting. These crimes are consummated when all the elements necessary for their execution and accomplishment are present, including the injurious result. If the criminal conduct does not lead to the result foreseen, then the conduct may only qualify as an attempt. However, attempts can be prosecuted only in case of deliberate intent. *(Explained by way of an example, if the offender stores a mercury compound in breach of the requirements laid down in Regulation (EU) 2017/852, it is not in itself a criminal offence only if it causes, for example, significant damage to the quality of soil.)*

Examples from the draft directive:

- death, serious injury — points (a), (b), (c), (c)(bis), (e)(ii), (i), (bis), (j), (p)
- air, soil, water quality, significant damage to animals or plants — points (a), (b), (c), (c), (d), (e)(ii), (i), (bis), (j), (p)
- deterioration of water quality — *point (h)*
- significant damage to the ecological status or potential of surface water bodies or to the quantitative status of groundwater bodies — *point (k)*
- significant deterioration of habitat, significant disturbance of animal species — *point (o)*

B) Offences containing a reference to quantity

There are offences which refer to non-negligible quantity. In contrast, when the conduct impacts only on ‘negligible quantity’, not all the elements necessary for the execution and accomplishment of the crime are present, in other words, one of the elements is missing. In this case, at most, non-criminal liability may be imposed under sectoral EU legislation.

The following points in the Directive include a reference to the non-negligible quantity:

- point (e)(i) (acts related to hazardous waste)
- point (f) (shipment of waste)
- point (L) (acts related to wild animal or plant species)
- point (m) (trade in wild animal or plant species)
- point (n) (placing on the market of illegally harvested timber)

C) When neither injurious result nor quantity is included in the offence

In these cases, the mere breach of the EU sectoral rule entails criminal consequences, without the directive providing for any qualification which would illustrate /justify *ultima ratio*.

- Examples from the draft directive:
- point (g) (recycling of a ship)
- point (q) (acts related to ozone-depleting substances)
- point (r) (acts related to fluorinating substances)

2. Specific comments on certain provisions of Article 5

Article 5(2) and (3)

According to the document dated of 14 June, pursuant to Article 5(2), causing death is punishable by a maximum term of imprisonment of at least 10 years. The first paragraph covers preterintentional offences. “*Praeter intentionem*” is defined as having an injurious result that is greater than that intended: the intention of the offender covered the accomplishment of the elements of the crime, excluding the injurious result (death).

Under paragraph 3 of Article 5, in the case of *acts committed by negligence*, causing death is punishable by a maximum term of imprisonment of at least five years.

In our view, in the event of causing death by negligence, the 10-year maximum imprisonment is exaggerated, even if the basic act itself is committed with intent.

We insist that causing death in this particular directive should always be understood as a non-intended result (or an injurious result that is greater than that intended). When the offender also aims at causing death, this is no longer an environmental crime, but a homicide / murder. Therefore, in the event of death as an unintended result of the conduct, a penalty of up to 5 years is considered acceptable, regardless of whether the basic act itself is intentional or negligent.

In the light of the above explanation, we would like to invite delegations to consider whether they consider the 10-year penalty for these (pre-*intentional*) offences as proportionate under their national legal system, also having regard to the relevant [Council conclusions](#) on the approximation of penalties (9141/02). According to this, there are the following levels of criminal sanctions:

Level 1: Penalties of a maximum of at least between 1 and 3 years of imprisonment

Level 2: Penalties of a maximum of at least between 2 and 5 years of imprisonment

Level 3: Penalties of a maximum of at least between 5 and 10 years of imprisonment

Level 4: Penalties of a maximum of at least 10 years of imprisonment (cases where very serious penalties are required)

Other EU acts on criminal law provide for a 10-year imprisonment only for the most serious intentional offences. One example is Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography, where sexual violence against a child below the age of sexual consent or the coercion of a child below the age of sexual consent by force into child prostitution is punishable by similar level of penalties.

If our proposal to lower the level of sanctions is not supported and the reference to certain points of Article 3 in Article 5 remains, we recall that Article 3(2)(e)(i) does not include death as a result, so that point should in any event be deleted.

Article 5(4) and (5)

We consider it important that the offences which do not require any qualifying elements in relation to the breach of the sectoral rule should be included in the 3-year group referred to in paragraph 5. The production, placing on the market, import, export or use of ozone-depleting substances or fluorinated greenhouse gases shall not justify imprisonment for up to 5 years without an injurious result or without quantitative reference. In view of this, points (q) and (r) should be moved from paragraph 4 to paragraph 5.

We also propose that point (n) be moved to paragraph 5. The current EUTR Regulation and the DEFOR Regulation are typically breached by companies/legal persons, the percentage being even higher when committing such crimes to a not negligible amount, so the 3 years' imprisonment against natural persons is sufficiently deterrent. In addition, although illegal logging harms the environment, the placing on the market of illegally harvested timber does not cause direct environmental damage, so it is sufficient if it is subject to a maximum of up to three-year penalty. In order to adopt a coherent sanctioning system in the directive, it would be disproportionate to have the same penalty as defined for criminal offences which cause significant damage to the quality of air, water, soil, animals or plants.

Article 5(6)

The use of the word “may” makes the text sufficiently flexible and is acceptable.

Article 7

General comment:

We support any wording that makes it clear that the sanctions listed can be set by criminal law, but also by other areas of law. In our view, it would be necessary, in the case of sanctions applicable to legal persons, to apply the usual regulatory regime in the field of criminal law and to include standard provisions.

Article 7(2) to (3)

In our view, when setting the criteria for establishing the amount of the fine, national law should prevail. By way of an example the criteria which may be taken into account could be defined, but not as a mandatory requirement. Paragraph 2 in principle continues to link the amount of the fine to the turnover of the legal person, but under paragraph 3, Member States are allowed to 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). We consider this wording to be sufficiently flexible.

Article 7(4)

The text “*may include other criminal or non-criminal sanctions or measures, such as*” is flexible enough.

Articles 8 to 9

The role of aggravating circumstances under Article 8 is unclear for the purposes of transposing the Directive, and it is necessary to clarify to what extent they bind the Member States in their transposition. Some of those factors may be taken into account rather in the context of the application of the law, which falls within the judicial discretion.

We consider it necessary to provide for a more flexible wording of Articles 8 and 9 as follows:

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~~ may provide 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:

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:

LITHUANIA

**WRITTEN COMMENTS OF THE REPUBLIC OF LITHUANIA FOR THE REVISED
PROPOSAL FOR A DIRECTIVE REVISING DIRECTIVE 99/2008/EC ON THE
PROTECTION OF THE ENVIRONMENT THROUGH CRIMINAL LAW 14459/21 (After
2022-06-16 COPEN)**

We appreciate the work done by the Presidency and broadly support the proposed updates, but we still have some remarks regarding the level of sanctions

Article 5, Paragraph 4 and 5

LT reiterates its proposal to lower the threshold in paragraph 4 to 4 and in paragraph 5 to 2 years, but if this proposal is not accepted, we consider it appropriate to assess the list of offenses in Article 5 (4) and (5), balancing them according to the seriousness and nature of the offenses. Against this background, we propose to move from Article 5 (4) to (5) the offenses provided for in points (n), (f), (g), (h), (q) and (r), as they are significantly milder in nature and nature than other offenses. the risk of relevant dangerous effects. It is considered that all formal offenses which do not have serious consequences should be covered by Article 5 (5) instead of Article 5 (4). In response to a specific Mon. We support the transfer of point (n) to Article 5 (5), as this is in line with our approach, which has been consistently given at COPEN meetings.

With regards to the proposed new paragraph 5bis, there are reasonable doubts as to whether it is possible to achieve similar objectives by administrative means as in the application of criminal law, especially given that administrative measures do not even create the conditions for imprisoning such offenders. If we follow the logic of the proposal and the offense provided for in point (h), for which a minimum sentence of up to 5 years' imprisonment is proposed (as currently provided for in the text of the Proposal), it would be considered an administrative offense to, as a criminal offense, Article 5 (5) should be regarded as an administrative offense by analogy. In view of this, LT does not consider it expedient to include administrative offenses separately in the Proposal, which is intended to regulate environmental offences.

Article 5, Paragraph 6

We welcome the proposed option, which guarantees MS the freedom to decide on additional sanctions or sanctions in accordance with their national law.

Article 7

In the opinion of LT, it is expedient to harmonize the fine for legal persons. We support the principle of providing for the calculation of the amount of a fine for legal persons, taking into account their turnover, but we propose to leave the MS free to decide on the rules and specific amounts of such a fine for a legal person. Against this background, we do not consider it appropriate and /or reasonable to fully harmonize the specific level of fines and the rules for calculating them in all MS, as this may make it very difficult to transpose these provisions into the respective MS and in practice. implementation.

However, in the event that it is decided to provide for specific percentages which are linked to turnover, it is necessary to provide a starting point for the level of turnover, the provisions in question should apply. In this context, it should be emphasized that not all companies that commit environmental offences generate significant annual revenue (turnover) according to official data. For example, if the turnover of a legal entity in the respective year, according to the submitted financial statements, was only 100 thousand. Eur, there is reasonable doubt as to whether a fine of 3 per cent or even 5 per cent would have a significant effect on a legal person and deter it from committing such offenses.

NETHERLANDS

Written comments following the COPEN meeting of 16 June 2022

The Netherlands would like to thank the French Presidency for the opportunity to provide written comments on article 5 of the proposal for a Directive on the protection of the environment through criminal law and replacing Directive 2008/99/EC, in the light of the discussion during the last COPEN and Presidency note 10174/22. As the term of the French Presidency is ending, we would like to take the opportunity to express our gratitude to the French Presidency for all the work they put in the environmental crime directive so far. We wish the Czech Presidency the best of luck in leading the discussions on this topic in the coming time.

Presidency note 10174/22

While we welcome the efforts to look for a compromise regarding the harmonization of sanctions, we are very still concerned about the proposed harmonization of sanctions for offences committed with serious negligence. As mentioned during the COPEN-meetings, the scope of ‘serious negligence’ in the various legal systems of member states varies greatly. We think that differences in the criminal law traditions of Member States regarding this mental element should be respected and that article 5, paragraph 3 of the proposed Directive should be changed in a way that makes transposition possible for all member states. It should also be possible to fit in this concept in legal systems which do not know the concept of “serious negligence” in their statutory definitions of crimes.

The Netherlands wants to emphasize that our concerns regarding the harmonization the sanctions for ‘serious negligence-offences’ do not mean that in such cases only less severe sanctions should be imposed. On the contrary: because the Dutch substantive criminal law does not know the concept of “serious negligence”, we implemented the original 2008-Directive by criminalizing all the environmental offences in cases where there is only ‘normal’ negligence (culpa). By doing this, we went further than the 2008 Directive required to do. Besides this, The Netherlands has a relatively low threshold for ‘intentional conduct’. Intent may be present in the form of a dolus eventualis, which is the case where the offender willingly and knowingly accepts a considerable chance that a certain result may ensue. This form of culpability – acting in the awareness of a high degree of probability - could mean that conduct that in other legal systems would be qualified as committed with “serious negligence”, could in many cases under Dutch criminal law be qualified as “intentional” conduct. This makes it possible to impose an even higher sentence than what is proposed in the current article 5, paragraph 3, in ‘serious negligence-cases’.

However, since our substantive criminal law does not distinguish the concept of ‘serious negligence’ as an autonomous mental element, the introduction of this concept would be a fundamental change to our criminal law system. The consequence of this would go far beyond the field of environmental crime. We consider this not proportionate in the light of the goals that the new environmental crime directive aims to achieve.

We therefore propose that the minimum maximum-penalty in article 5, paragraph 3 be decreased to a prison sentence of at least two years. This makes it possible for us to implement this minimum maximum-penalty for all environmental crimes that have been committed with ‘normal’ negligence (culpa) and that have resulted in the death of another person, without the need to make fundamental changes to our substantive criminal law system in general.

POLAND

1. In recital 16, in the fourth sentence, we propose to add "should" before the word "remains". Below is our proposal:

*“In any case, it **should** remain 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.”*

In our view, this addition will eliminate any doubts as to whose discretion it is to decide whether to increase the sentence - and it should always be within the discretion of the court/judge.

2. We propose that the maximum sentence of at least 10 years' imprisonment for offences of causing death set out in Article 5 (2) should also cover causing serious injury to multiple persons. Below is our proposal.

*“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 death **or serious injury to multiple persons.**”*

3. As regards the sanctions for legal persons set out in Article 6(2), Poland proposes that the sanction of *"not less than 5% of the total worldwide turnover of the legal person in the business year preceding the fining decision for offences"* should apply to all cases of environmental offences set out in the proposed directive.

4. Finally, we would like to stress that, having analysed the Bulgarian proposal and their written commentary, Poland supports their position regarding the differentiated system of sanctions provided for in Article 7. Appropriate amendments to the provisions in this respect may be made in accordance with the Bulgarian proposal.

SWEDEN

Please find some comments and suggestions from SE on the proposal for a revised Environmental Crime Directive.

Article 5.2, 5.3 and 5.3bis

The current wording of Article 5.2 requires Member States to set a minimum maximum term of imprisonment of ten years for offences that have caused death. As we have previously commented, we cannot see that this article will have any practical effects since it is extremely rare that environmental crimes cause death in such close connection to the offence that it can be considered in the prosecution. In addition, if an environmental crime causes immediate death, it would be considered murder or manslaughter in most Member States and there are already severe penalties in place for such offences.

Another problem with this article is that it indicates that offences that have caused death in close connection to the offence are more serious than offences that cause death 10 years or more after the offence. We do not agree with that. Environmental crimes can indeed cause death, but death may occur many years after the offence and typically be caused by serious cancer diseases such as leukaemia, kidney cancer or breast cancer. Exposure to some chemicals can even cause negative health effects in the next generation. For example, we know now that health problems linked to the long-banned insecticide DDT have persisted across at least three generations and that granddaughters of women exposed to the chemical in the 1960s have an increased risk of developing breast cancer today. This is just as serious as immediate death. Offences that can cause death many years after the offence can be equally or even more severe.

Similarly, serious injury to a person may manifest itself many years after exposure but can still be severe. Serious diseases likely caused by environmental offences are different forms of cancer, Parkinson disease, miscarriages or developmental disorders in children. This can cause immense human suffering and is severe enough.

We believe that the focus on deadly effects that have been caused by environmental offences is misleading and that we need to return to the Commission's proposal which relates to the likelihood of causing death or serious injury to persons. If the maximum imprisonment terms are considered to be too high in such case, it is better to set a lower maximum penalty, for example eight years or six years of imprisonment. Going back to the Commission proposal means that we do not have to include an article such as the proposed Article 5(3)bis which we find problematic and unclear.

Article 5(5)bis

The proposed article de facto removes subpoints g) and h) from article 3. With respect to subpoint g) the result is a decriminalisation of offences which are currently criminalised in directive 2005/35/EG and directive 2009/123/EG. This is unacceptable to us.

It is a challenge to enforce Regulation No 1257/2013 on ship recycling. We fail to see how imposing only administrative sanctions could make enforcement more efficient. On the contrary, we believe that it is important that failure to comply with this regulation is criminalised in the same manner in all Member States in order to prevent forum shopping and to improve cross border cooperation.

Article 6 and the link to Article 7

Article 6 distinguishes between offences committed by a person who has a leading position within a legal person and offences made possible by the lack of supervision or control by such person. The sanctions for legal persons in Article 7 differ between these situations. We do not see the reason for treating these offences differently. Making criminal activities possible within a legal person by neglecting to impose safety measures or routines or by turning a blind eye to criminal activities are just as serious as if a person with a leading position within a company committed such activities directly. Corporations have a responsibility to make sure that environmental legislation is complied with within its business activities and to prevent criminal activities within the legal entity. The minimum maximum sanctions should therefore be the same regardless of whether an offence fall within Article 6.1 and Article 6.2.

Article 7 Sanctions for legal persons

Regarding Article 7 there seems to be a misunderstanding that it would not be possible to demand or expect a fine of a certain level if the exact calculation model for the fine is not regulated. The fines must be effective, proportionate and dissuasive, which means that there is already a requirement for a fine at a certain level.

Considering this, our preference would be to delete the detailed provision proposed. If there isn't support for deletion, the drafting would need to respect that Member States' criminal law systems are based on partly different traditions and principles. A detailed provision could only be acceptable if it allows for other methods to provide a maximum limit and level of fines. The current draft requires that an alternate method provide a result similar to what follows from the detailed provision. This wording is acceptable to us and we welcome the efforts of the Presidency to provide flexibility in this respect. The word "similar" is crucial here, as for obvious reasons, different methods of calculating the fine will not yield exactly the same result in individual cases. This is not to say, however, that they will not result in equally severe penalties in general. The proposed wording reflects this well.