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COVER NOTE

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
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To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union

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Subject:	Recommendation for a COUNCIL DECISION authorising the European Commission to participate, on behalf of the European Union, in negotiations on a Council of Europe Convention superseding and replacing the 1998 Convention on the Protection of the Environment through Criminal Law (ETS No. 172), as well as a draft Explanatory Report thereto

Delegations will find attached document COM(2023) 419 final.

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Brussels, 7.7.2023
COM(2023) 419 final

Recommendation for a

COUNCIL DECISION

authorising the European Commission to participate, on behalf of the European Union, in negotiations on a Council of Europe Convention superseding and replacing the 1998 Convention on the Protection of the Environment through Criminal Law (ETS No. 172), as well as a draft Explanatory Report thereto.

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

- **Reasons for and objectives of the proposal**

Environmental crime and the significant damage caused to the environment and to peoples' health has become a growing concern of the EU and worldwide. According to the latest available estimates¹ the annual loss related to environmental crime has been estimated to range between US-\$ 91-258 billion. This makes environmental crime the fourth largest criminal activity in the world after drugs trafficking, human trafficking, and counterfeiting. It is growing at annual rates of between 5 and 7%. Crimes like illegal deforestation, water-, air- and soil pollution, traffic in ozone-depleting substances, poaching and other offences heavily damage biodiversity, harm human health and destroy whole ecosystems. The global impact of the resulting damage and degradation, often involving organised crime on a transnational scale, requires decisive action, strong international cooperation based on a common understanding of environmental crime categories, sanctions, and cross-border cooperation.

- **The European Union's Environmental Crime Directive**

The EU over the past decades has gradually stepped up its efforts to regulate conduct that is harmful to the environment. Today, over 250 EU legislative instruments, mainly directives, lay down standards and limits for a variety of environmental sectors. To further enhance environmental protection, Directive 2008/99/EC on the protection of the environment through criminal law (hereafter 'the Environmental Crime Directive')² obliges Member States of the EU to criminalise the most serious infringements of environmental sectoral law. It provides inter alia for a common set of EU environmental crime categories and requires effective, dissuasive and proportionate sanctions for natural and legal person. The Environmental Crime Directive has been inspired and significantly influenced by the Councils of Europe's 1998 Convention on the Protection of the Environment through Criminal Law of the Council of Europa³.

The Commission has evaluated the effectiveness of the Environmental Crime Directive and published the results in October 2020⁴. Based on these results, the Commission has decided to improve the legal framework on combatting environmental crime and adopted on 15

¹ According to Interpol and the United Nations Environment Programme, environmental crime is the fourth largest criminal activity in the world, growing at a rate between 5%-7% per year. UNEP-INTERPOL Rapid Response Assessment: The Rise of Environmental Crime, June 2016

² Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, *OJ L 328*,

³ Council of Europe, Convention on the Protection of the Environment through Criminal Law, ETS n°172, 4 November 1998; <https://www.ecolex.org/details/treaty/convention-on-the-protection-of-the-environment-through-criminal-law-tre-001292/>

⁴ Commission staff working document, Evaluation of Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law (Environmental Crime Directive), SWD (2020) 259 final of 28 October 2020 (part I, part II, executive summary).

December 2021 a proposal for a new EU Environmental Crime Directive⁵. The proposal refines the definitions of environmental crime categories and adds new ones to its scope to ensure that serious offences committed intentionally or by serious negligence are appropriately punished. It introduces minimum maximum sanction levels for natural and legal persons that also take account of the financial capacity of corporations, aggravating circumstances and additional sanctions/measures to foster effective and dissuasive sanctioning. It aims to facilitate cross-border cooperation and contains a number of provisions to strengthen the law enforcement chain, including obligations for the Member States to transmit statistical data on environmental criminal proceedings. The proposal also contains provisions on rights and role of the public concerned and environmental defenders.

In December 2022, the EU Member States in the Council of the European Union reached a General Approach. The European Parliament has adopted its position in March 2023⁶. Negotiations with the European Parliament have started in May 2023 with a view to reach political agreement by the end of 2023.

- **The Council of Europe’s Convention on Environmental Crime**

In parallel to the ongoing work on a new Environmental Crime Directive by the European Union, the Council of Europe has decided to replace its 1998 Convention on the Protection of the Environment through Criminal Law⁷ (hereafter “1998 Convention”). The 1998 Convention is pioneer legislation being the first international instrument containing definitions of the most serious environmental offences committed intentionally or with negligence, provisions on jurisdiction, sanctions, confiscation measures, reinstatement of the environment, corporate liability, cooperation between the parties to the Convention and international cooperation, rights for groups, foundations or associations aiming at the protection of the environment to participate in criminal proceedings according to domestic law and rights for groups defining criminal offences and requiring effective and dissuasive sanctions. A number of these provisions provided flexibility for the parties, only demanding – at any time - a declaration addressed to the Secretary General of the Council of Europe of their will to transpose a provision. However, the Convention never entered into force as the necessary minimum number of ratifications or accessions was not attained.

On 23 November 2022, under the authority of the Committee of Ministers of the Council of Europe and the European Committee on Crime Problems (CDPC), the new Committee of Experts on the Protection of the Environment through Criminal Law (PC-ENV) was set up and entrusted with the formal negotiations for a new Council of Europe Convention on the Protection of the Environment through Criminal Law, replacing the 1998 Convention, based on terms of reference adopted by the PC-ENV.⁸ The new Convention will also take into

⁵ 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, COM(2021) 851 final 2021/0422 (COD)

⁶ www.europarl.europa.eu/doceo/document/A-9-2023-0087_EN.html

⁷ Convention on the Protection of the Environment through Criminal Law, ETS No. 172, adopted on 4 November 1998

⁸ CM(2022)148-add2-final, 23 November 2022.

account a Feasibility Study⁹ delivered in 2022, which underlined the appropriateness of a new Convention in this field.

With regard to the appropriateness of a new Convention, it was concluded that

‘The effectiveness of the fight against environmental crime, in all its dimensions and in particular across borders, depends also and amongst others on effective international co-operation between states. Such co-operation is essential to ensure that the relevant national authorities involved in the prevention and the fight against environmental crimes speak the same language. A new legal instrument would be an opportunity to lay down common rules for such enhanced international co-operation, drawing from existing international instruments of the Council of Europe. (...) Because of the large number of its member states (47 countries) that extend beyond Europe, its influence is such that the instruments it develops, may carry considerable weight across borders, in line with the transboundary nature of the environmental challenge that needs to be met. The adoption of a new convention in this field, in addition to its highly symbolic dimension on the international scene, in parallel with other (regional) initiatives, could have a knock-on effect at the national level and inspire other international instruments’

With regard to its relationship with the European Union, the Council of Europe in its feasibility study concluded that ‘given the activities carried out by the European Union in the field of environmental crime, and notably the (...) work on the proposal for a new EU Directive, it will be essential to maintain regular contacts between the two Organisations and coordinate their efforts, as far as possible, in order to avoid contradictions between the work of the European Union on the one hand and, on a pan-European scale, of the Council of Europe on the other. This should be facilitated by regular exchanges between the different groups of experts, Committees and Secretariats of the two Organisations.’

The first meeting to negotiate the text of the draft Convention will take place at the Council from 16 to 18 October 2023.

- **Consistency with existing provisions in the policy area**

The envisaged scope of the new Convention on Environmental Crime is covered to a large extent by Union law, notably by the Environmental Crime Directive currently in force and the Commission proposal for a new Environmental Crime Directive¹⁰. Their objectives and content overlap to a large extent with the envisaged new Council of Europe’s Convention on Environmental Crime¹¹. Both are driven and inspired by growing support and world-wide attention to the need to protect our environment.

For this reason, it is necessary that the Union in the negotiations is put in a position to contribute to these objectives avoiding any discrepancies regarding the legal definitions, terminology and obligations defined in the Convention and the new Environmental Crime Directive, respectively. It is important that the Union, during negotiations at the Council of Europe, takes account of the progress and developments concerning the proposed new

⁹ Feasibility Study on the Protection of the Environment through Criminal Law ‘CDPC(2021)9-Fin’

¹⁰ See footnote 4

¹¹ See in more detail under Section 2 – Legal Basis

Environmental Crime Directive and stays in close contact with the responsible EU Council Working Group.

The successful outcome of the negotiations should lead to coherent provisions on environmental crime categories including offence description, sanctions, strengthening the enforcement chain, recognition of the role of citizens and of civil society, procedural and investigative tools of EU Member States and Member States of the Council of Europe that ratify the new Convention and on this basis facilitate transnational cooperation.

- **Consistency with other Union policies**

Title V of Part Three of the Treaty on the Functioning of the European Union confers upon the European Union competences in the area of freedom, security and justice. In addition to the Environmental Crime Directive, the European Union has adopted a comprehensive set of legal instruments to fight environmental crime among other crimes. The following legal instruments or proposals form part of this legal framework:

- Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law¹²
- Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches¹³
- Commission proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation¹⁴
- Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA¹⁵
- Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA¹⁶
- Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA¹⁷
- EU Council Regulation on Illegal, Unreported and Unregulated Fishing Regulation (IUU) (EC) No 1005/2008¹⁸, which is currently being revised¹⁹.

¹² OJ L 284, 12.11.2018, p. 22–30

¹³ OJ L 305, 26.11.2019, p.17 - 56

¹⁴ COM (2022)245 final

¹⁵ OJ L 295 21.11.2018, p. 138)

¹⁶ OJ L 135, 24.5.2016, p. 53–114

¹⁷ OJ L 315, 14.11.2012

¹⁸ OJ L 286, 29.10.2008, p. 1–32

¹⁹ Commission Proposal for a Regulation of the Council and the European Parliament amending Council Regulation (EC) No 1224/2009, and amending Council Regulations (EC) No 768/2005, (EC) No

In addition, there is a comprehensive body of Union environmental law in force or currently under revision that is covered by the new Environmental Crime Directive as a horizontal instrument²⁰. Union environmental law and the Environmental Crime Directive interact with each other, insofar as the definition of a criminal offence under the Environmental Crime Directive requires unlawful conduct, i.e., a breach of obligations as defined in Union environmental law. Moreover, non-criminal sanctions defined in Union environmental law and criminal sanctions together form an integrated EU sanctioning system that contributes to pursuing the effective implementation of EU policies to protect the environment; non-criminal and criminal sanctions should complement and reinforce each other in a graduated and coherent approach that provides for EU-wide sanctioning rules according to harmonised criteria and standards.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

This recommendation is submitted to the Council pursuant to Article 218(3) and (4) TFEU to receive authorisation to negotiate the revision of the Council of Europe’s Convention on Environmental Crime on behalf of the European Union, to provide negotiating directives, and to appoint the Commission as negotiator.

Article 3(2) of the Treaty on the Functioning of the European Union (TFEU) provides that the Union has exclusive competence ‘for the conclusion of an international agreement (...) in so far as its conclusion may affect common rules or alter their scope.’ In particular, the European Court of Justice has clarified that a “finding that there is such a risk [of affectation or alteration of EU rules by international commitments] does not presuppose that the areas covered by the international commitments and those covered by the EU rules coincide fully”

1967/2006, (EC) No 1005/2008, and Regulation (EU) No 2016/1139 of the European Parliament and of the Council as regards fisheries control; COM/2018/368 final.

²⁰ Examples of such instruments are: Regulation (EU) No 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling and amending Regulation (EC) No 1013/2006 and Directive 2009/16/EC (OJ L 330, 10.12.2013, p. 1) Regulation (EC) No 1005/2009 of the European Parliament and of the Council of 16 September 2009 on substances that deplete the ozone layer (OJ L 286, 31.10.2009, p. 1–30; negotiations are ongoing and a new Regulation on Ozone Depleting Substances (ODS) is expected soon); Regulation (EU) No 517/2014 on fluorinated greenhouse gases and repealing Regulation (EC) No 842/2006 (OJ L 150, 20.5.2014, p. 195–230; negotiations are ongoing and a new Regulation on fluorinated greenhouse gases (f-gases) is expected soon); Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ L 396, 30.12.2006, p. 1–849); Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein (OJ L 61, 3.3.1997, p. 1–69); Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (OJ L 312 22.11.2008, p. 3); Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (OJ L 190, 12.7.2006, p. 1–98).

but that “the scope of common EU rules may be affected or altered by such commitments also where those commitments fall within an area which is already largely covered by such rule”²¹.

The analysis of Union’s competence must take into account the areas covered by the EU rules and by the provisions of the agreement envisaged, their foreseeable future development and the nature and content of those rules and those provisions, in order to determine whether the envisaged agreement is capable of undermining the uniform and consistent application of the EU rules and the proper functioning of the system which they establish.

The EU legal instruments mentioned above, especially the Environmental Crime Directive in connection with the referenced legislation therein, amount to an area covered by a large extent by Union law, which risks being affected or altered in scope by the new Convention on Environmental Crime and for which, therefore the Union has exclusive external competence based on Article 3(2) TFEU, as interpreted by the European Court of Justice.

First, there will be an overlap between the new Convention and the new Environmental Crime Directive. The new Convention would closely reflect the structure and scope of a new Environmental Crime Directive. Both will contain provisions on purpose and scope, terminology and definitions, substantial criminal law offences, persons’ liability and sanctions, procedural rights and cooperation, preventive measures and civil society participation.

Secondly, should the Member States become parties to the envisaged Convention there would be a risk of undermining the uniform and consistent application of EU common rules.

For example, the Union has to ensure that the definitions of environmental crime categories in the Convention are as much as possible compatible with the Environmental Crime Directive, as Member States’ penal law must not include contradictory definitions regarding a specific crime category. It must also be ensured that in the Convention the legal technique used to define environmental offences does not conflict with the technique used in the Environmental Crime Directive. Any new approach in the Convention to define criminal offences differently than in EU law could prejudice or limit the further development of EU-law in this regard. Where the Environmental Crime Directive would not include a crime category that is defined under the Convention, this can, nevertheless, affect Union law. For example, illegal fishing and its sanctions are regulated under the EU fisheries policies²². Thus, the altering of the scope of the environmental crimes or the definition of new criminal offences, would be capable of affecting, in a horizontal manner, the scope of the common EU rules in the area concerned.

There is also a risk that terms used in the Convention would have a different meaning, thus affecting the application of similar terms in EU law. This may concern for instance established standard legal concepts such as on legal persons, legal persons’ liability, and criminal jurisdiction.

From a systematic point of view, provisions on sanctions and accessory sanctions and measures in the new Environmental Crime Directive are complementary to existing sanction provisions in Union environmental law. Thus, they contribute to a coherent EU sanctioning system with regard to environmental infringements. Provisions on sanctions in the new

²¹ Case C-114/12, *Commission v. Council*, ECLI: ECLI:EU:C:2014:2151, paragraph 69-70.

²² see footnote 18 and 19

Convention and the EU sanctioning system should be compatible, in order not to hinder further developments.

The Union should also ensure that rules on prevention and the strengthening of the criminal law enforcement chain in the Convention are not contradictory to similar obligations in the Environmental Crime Directive, which could undermine the effectiveness and implementation of EU rules in this regard.

Different requirements in the Convention and the Environmental Crime Directive on the collection of statistical data regarding environmental criminal proceedings could complicate the technical and administrative workflow in the EU and undermine the effectiveness of the relevant rules of the Environmental Crime Directive.

Minimum procedural rules regarding victims' rights, the rights of witnesses and collaborators of justice as well as the procedural rights of non-governmental organisations and the civil society in criminal proceedings are covered by EU law that reflects the current state of consensus of the EU Member States. Rules in the Conventions could prejudge and hinder the future development of EU law in this regard.

Based on this analysis, it is concluded that the envisaged new Convention may affect or alter the scope of EU common rules.

- **Subsidiarity (for non-exclusive competence)**

Not applicable

- **Proportionality**

This initiative does not go beyond what is necessary to achieve the policy objectives at stake. As the Union has already exercised internal competence in this area through the adoption of Directive 2008/99/EC on combatting environmental crime and its proposal for a new Directive replacing Directive 2008/99/EC. Therefore, a common EU approach should be taken in the negotiations to avoid discrepancies between the respective Convention at Council of Europe level with EU law.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

Not applicable

- **Stakeholder consultations**

Not applicable

- **Collection and use of expertise**

The Commission took into account views expressed by Member State experts during discussions in the relevant Council working groups in the preparation of the negotiations.

- **Impact assessment**

Not applicable

- **Regulatory fitness and simplification**

Not applicable

- **Regulatory fitness and simplification**

Not applicable

- **Fundamental rights**

A number of fundamental rights and freedoms enshrined in the Charter of Fundamental Rights of the European Union (“Charter”) have to be taken into account during the negotiations on the revision of the Convention, including the right to a high level of environmental protection and the improvement of the quality of the environment (Article 37 of the Charter), protection of personal data, the freedom of expression and information, the freedom to conduct a business, the right to an effective remedy and to a fair trial (Article 47 of the Charter), the presumption of innocence and right of defence (Article 48 of the Charter), the principles of legality and proportionality of criminal offences and penalties (Article 49 of the Charter), and the right not to be tried or punished twice in criminal proceedings for the same offence (Article 50 of the Charter – ne bis in idem). As the participation in the negotiations on behalf of the European Union should not compromise the level of protection of fundamental rights in the Union, this initiative proposes to pursue a high level of protection of fundamental rights.

4. BUDGETARY IMPLICATIONS

There are no budgetary implications for the Union budget.

Recommendation for a

COUNCIL DECISION

authorising the European Commission to participate, on behalf of the European Union, in negotiations on a Council of Europe Convention superseding and replacing the 1998 Convention on the Protection of the Environment through Criminal Law (ETS No. 172), as well as a draft Explanatory Report thereto.

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 218(3) and (4) thereof,

Having regard to the Recommendation from the European Commission,

Whereas:

- (1) On 23 November 2022, the Committee of Ministers of the Council of Europe has mandated the Committee of experts for the protection of the environment through Criminal law to draft a new Convention superseding and replacing the 1998 Convention on the protection of the environment through criminal law (ETS No. 172) by 30 June 2024.
- (2) The envisaged Convention is likely to provide for common rules on purpose and scope, terminology and definitions, substantial criminal law offences, persons liable and sanctions, procedural rights and cooperation, preventive measures and civil society participation. The content and scope of the envisioned Convention fall in an area covered to a large extent by Union law²³, which thus risks being affected or altered in scope by the new Convention, according to Article 3 (2) TFEU.
- (3) The Union should therefore participate in the negotiations for a new Council of Europe's Convention on the protection of the environment through criminal law.

HAS ADOPTED THIS DECISION:

Article 1

The Commission is hereby authorised to negotiate on behalf of the Union, the new Convention on the protection of the environment through criminal law superseding and replacing the 1998 Council of Europe Convention on the protection of the environment through criminal law.

²³ In particular by Directive 2008/99/EC on the protection of the environment through criminal law and the proposal for a new Directive which would replace it COM(2021) 851 final, 2021/0422 (COD).

Article 2

The negotiating directives are set out in the Annex.

Article 3

The negotiations shall be conducted in consultation with the [*name of the special committee to be inserted by the Council*].

Article 4

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*