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NOTE

From:	Presidency
To:	Coordinating Committee in the area of police and judicial cooperation in criminal matters (CATS)
No. prev. doc.:	11563/22
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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 - Selected questions on the issue of sanctions

Introduction

On 15 December 2021, the Commission submitted a proposal for a Directive on the protection of the environment through criminal law and replacing Directive 2008/99/EC.¹

Immediately after its submission, the Working Party on Judicial Cooperation in Criminal Matters (COPEN) started examining the proposal. In June 2022, working under the French Presidency, the Council agreed a partial general approach on the text, relating to Article 2 (with the exception of the definitions of ‘public concerned’ and ‘victim’), Articles 3 and 4, and the associated recitals.²

¹ 14459/22 + COR 1 + ADD 1 + ADD 2 REV 1 + ADD 3.

² 9374/22 (public document).

From 1 July 2022, the COPEN Working Party continued the examination of the remaining part of the proposal under the Czech Presidency. To that end, the COPEN Working Party came together over four days: on 13/14 July and 7/8 September 2022. Further meetings are provisionally planned for 28 September and 19 October.

While substantial progress has been achieved, with a view to establishing a text that is supported by a qualified majority of Member States, several issues are still outstanding.

The Presidency invites CATS to assist the Working Party in making progress on this file, by providing guidance on the issue of sanctions, which is a key part of the proposal.

Sanctions: background

Directive 2008/99/EC, which the proposed Directive is meant to replace, provides in its Articles 5 and 7 that Member States are to take the necessary measures to ensure that the offences referred to in that Directive are punishable by effective, proportionate and dissuasive criminal penalties.

The Commission evaluated Directive 2008/99/EC in 2019 and 2020, and published its findings in October 2020³. It found that the Directive did not have much effect on the ground, i.a. because the sanction levels imposed by the Member States were too low to be dissuasive.

In the proposal for a Directive, the Commission therefore proposed to set concrete sanctions, and to approximate the levels thereof: for example, in relation to natural persons, and in line with other instruments based on Article 83 TFEU, the Commission proposed to provide a minimum number of years that should be set as a maximum term of imprisonment. Of course, it will always be for the judge to decide what is the appropriate sanction in each case.

The proposed provisions relating to sanctions for natural persons are set out in Article 5 of the proposal; the proposed provisions relating to sanctions for legal persons are set out in Article 7. In relation to both provisions, the Presidency would like to consult CATS for advice.

³ 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](#)).

Sanctions, question I: sanctions for natural persons

NB: Article 5 as it stands in the latest document for COPEN (11563/22) has been reproduced in the Annex, together with the associated recitals.

Article 5 makes reference to Article 3(2) and Article 3(3): while Article 3(2) concerns offences that are committed intentionally, Article 3(3) concerns offences that are a result of serious negligence.⁴

In relation to intentional crimes, there are three levels of sanctions: ten years if the offence causes death to any person [Article 5(2)], five years for other serious offences [Article 5(4)], and three years for less serious offences [Article 5(5)]. In relation to serious negligence, the specific sanction level (five years) is laid down only for offences that cause death to any person [Article 5(3)].

The Presidency would like to submit to CATS a question related to Article 5(2) on offences that have been committed intentionally and which cause death of a person, to Article 5(3) concerning serious negligence, and to Articles 5(4) and 5(5) concerning the sanction levels for serious and less serious offences.

Some Member States consider that Articles 5(2) and 5(3) should be deleted, since they would have little relevance as currently drafted. According to the Member States concerned, environmental crime does not lead to death in such close connection in time to the offence that it could be part of a prosecution. It was also observed that it would be difficult to implement Article 5(3) on serious negligence in the national legal orders. However, it seems that a majority of Member States prefers to keep both provisions in the text.

As regards the sanction levels for serious and less serious intentional offences (five years and three years, respectively) the Presidency observes that they are the result of intense discussions in the Working Party. It therefore seems advisable to keep the levels as they currently are.

⁴ See also the partial general approach (9474/22).

The COPEN meeting on 8 September discussed a proposal to delete Articles 5(2) and 5(3), while raising the sanction levels in Articles 5(4) and 5(5) (to six and four years respectively, as in the Commission proposal).⁵ Although there was some support for this proposal, it seemed that a majority of Member States would prefer to keep both Article 5(2) on intentionally committed offences causing death, Article 5(3) on serious negligence, and the sanction levels as currently set out in Articles 5(4) and 5(5).

In order to make progress on Article 5, the following question I is submitted to CATS:

Q I : CATS is invited to confirm that Article 5(2) on offences that have been committed intentionally and which cause death, as well as Article 5(3) on serious negligence, should be kept in the text, and that the sanction levels for serious and less serious offences should be kept as they are currently set out in Articles 5(4) and 5(5) (five years and three years, respectively).

Sanctions, question II: sanctions for legal persons

NB: Article 7 as it stands in the latest document for COPEN (11563/22) has been reproduced in the Annex, together with the associated recitals.

With a view to setting higher levels of protection than those set out in Directive 2008/99/EC, the Commission proposed that in relation to legal persons, the requirement to provide for effective, proportionate and dissuasive criminal penalties should be replaced by sanctions that are more concrete.

The Commission therefore proposed to use the criterion of ‘total worldwide turnover’, which is also used in other fields of law, e.g. in competition law. As regards serious and less serious offences, the maximum financial penalty that could be imposed on a legal person should not be less than 5 % or 3 % of total worldwide turnover.

⁵ WK 11613/2022.

During the discussions in the COPEN Working Party, however, various Member States indicated that they had problems with the concept of total worldwide turnover, because it was unknown in criminal law in their legal orders, or because they expected problems to arise in applying it, e.g. as regards the calculation of the turnover.

In order to address the concerns of these Member States, and after having explored multiple less concrete alternative options, the Presidency suggested that as an alternative to the concept of total worldwide turnover, the Member States could also implement the provision by providing (high) levels of fixed financial penalties (fines) in their legal orders.⁶ In search of amounts that could be considered to have deterrent effects equivalent to those of the mentioned 5 % and 3 % of total worldwide turnover in most cases, the Presidency proposed for the purpose 50 million and 30 million euros; but these amounts could be discussed further. These amounts would constitute a minimum maximum threshold of financial penalties (fines) that the Member States would have to lay down in national law, but the imposition in practice would have to take into account the proportionality principle: this means that the available maximum fine should only apply to the most serious forms of offences committed by financially powerful legal persons (see recital 15 and footnote 6), taking into account the individualisation of sanctions imposed. In any event, it will always be for the judge or court to decide what the appropriate sanction is in an individual case.

It would be appreciated if CATS could give guidance on this point, by replying to the following question II:

⁶ These maximum limits would have to be laid down in national law and should apply proportionally with regard to the economic and financial situation of the legal person concerned, and at least to the most serious forms of offences. The national law would decide on the method of their calculation. The Member States would be invited to adapt the amounts in the light of inflation etc.; see recital 15.

Q II: CATS is invited

(a) to confirm that it is advisable to provide an alternative to the concept of total worldwide turnover;

in case of confirmation under (a):

(b) to confirm that such an alternative should consist in setting (high) levels of fixed financial penalties (fines), the amounts of which could be discussed at a later stage;

in case confirmation is not given under (b):

(c) to indicate what other alternative to the concept of total worldwide turnover should be used.

Concluding remarks

In the light of the guidance to be given by CATS, the COPEN Working Party will continue its examination of the proposed Directive, with a view to reaching a general approach on the entire text at the JHA Council in December 2022.

Articles 5 and 7, as they stand in the latest document for COPEN (11563/22):

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), (c)bis, (e), (i), (i)bis, (j), and (p) are punishable by a maximum term of imprisonment of at least ten years if they cause death to any person.
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), (c)bis, (e), (i), (i)bis and (j), are punishable by a maximum term of imprisonment of at least five years if they cause death to any person.
4. Member States shall take the necessary measures to ensure that the offences referred to in Article 3(2) points (a) to (j), (n), (q), (r) are punishable by a maximum term of imprisonment of at least five years.
5. Member States shall take the necessary measures to ensure that the offences referred to in Article 3(2) points (k), (l), (m), (o), (p) are punishable by a maximum term of imprisonment of at least three years.
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) 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.

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) or (2) 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 sanctions or measures for legal persons liable pursuant to Article 6(1) or (2) 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) 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) exclusion from entitlement to public benefits or aid;
 - (c) exclusion from access to public funding, including tender procedures, grants and concessions;
 - (d) disqualification from the practice of business activities;
 - (e) withdrawal of permits and authorisations to pursue activities which have resulted in committing the offence;
 - (f) placing under judicial supervision;
 - (g) judicial winding-up;
 - (h) closure of establishments used for committing the offence;
 - (i) publication of all or part of the decision imposing the sanctions or measures.

3. Member States shall take the necessary measures to ensure that, at least 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 and the individual, financial and other circumstances of the legal person concerned, 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 (j), (n), (q), (r), and 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 (k), (l), (m), (o), (p);
- or:⁷
- (b) an amount corresponding to EUR 50 million for offences referred to in Article 3(2) points (a) to (j), (n), (q), (r), and EUR 30 million for offences referred to in Article 3(2) points (k), (l), (m), (o), (p).

⁷ The word ‘or’ has been put separately to better mark that there are two alternative ways by which Member States can implement this provision. The order of the paragraphs is as proposed in the latest document for COPEN (11563/22).

Recitals accompanying Articles 5 and 7, as they stand in the latest document for COPEN (11563/22):

- (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 the proceedings. These may include the obligation to reinstate the environment, temporary or permanent 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 effectiveness, dissuasiveness and proportionality of the sanction imposed. The maximum limits of fines laid down in absolute numbers should be provided for in national law, which may decide on the method of their calculation, and should apply proportionally with regard to economic and financial situation of the legal person at least to the most serious forms of offences provided for in this Directive. Member States are invited to regularly review the limits of fines laid down in absolute numbers with regard to inflation and other changes in value of money, in line with procedures set out in their national law.

- (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 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) ~~(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 judicial authority, if entitled to impose 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, if such a sanction can be imposed under national law, Member States should ensure that national judicial authorities may either impose it themselves in their own proceedings, or 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.

- (18) 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.
- (19) 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*.
- (20) 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.
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