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NOTE

From:	General Secretariat of the Council
To:	Delegations
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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 - Comments and drafting suggestions by Member States in relation to the Presidency text in 11563/22

At the meeting of the COPEN Working Party on 7 and 8 September 2022, the Presidency presented a new draft text on Articles 5-9, as regards the issue of sanctions, as well as a new draft text on Articles 10-29, as regards the remaining provisions (11563/22).

At the end of the meeting, the Presidency invited Member States wished to submit written observations to do so by 15 September.

The input received is set out in the Annex.

Contents

BELGIUM

File: 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

Written comments by Belgium on articles 5 – 29.

Regarding document 11563.

Dear Presidency,

Thank you for giving member states the opportunity to further develop and clarify their point of view regarding this important file, following the COPEN meeting on the 7th and 8th of September.

Belgium continues to welcome and strongly support the proposal of the European Commission to update and improve the efficiency of the European policy on the protection of the environment through criminal law.

However, certain proposed changes to the text provide for certain remarks and or questions. Please fine the written comments on behalf of BE hereunder.

- **Art. 5**

No further comments in addition to what was proposed in the latest version of the text. We can thus agree with not including an article 5bis.

In light of the discussions during the last COPEN, we would like to reiterate that a sanctioning mechanism including a 3, 5 & 10 system and not 4, 6 & 10 remains crucial for BE. Furthermore, we support a system where point f, g & h fall within the scope the category of crimes that are punishable with 5 years of imprisonment and not the lighter category.

- **Art. 6**

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- **Art. 7**

Belgium very much appreciates the efforts made in the last version of the text, providing for an alternative calculation method as regards to minimum maximum financial penalties for legal persons. However, we are still scrutinizing the amounts as proposed in the last text and have welcomed the explanation by the PRE as to where these amounts come from and what the legal reasoning behind proposing these has been. Notwithstanding the above, we can agree with the majority of the member states that more thought and consideration needs to be put into setting these amounts.

Lastly, we would like to underline that Belgium adheres to the principle that financial sanctions should act as a dissuasive measure, while at the same time being effective and proportionate. Therefore, and as suggested by other MS, we remain ready to reflect on alternative options for flexibility that would implement these standards without fixing specific amounts.

- **Art. 8**

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BE written comments doc. 11563
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- **Art. 9**

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- **Art. 10**

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- **Art. 11**

We would like to welcome the rewritten version of the text as regards to article 11.

After careful consideration we would like to clearly underline that we are very much in favour of linking the start of the limitation period to the moment of discovery of the damage. This would be a very important step forward and very advantageous in regards to being able to investigate and pursue criminal offences, even when a long time has already elapsed since the committing of the offence. However, it should be underscored that certain aspects linked to this proposed system should still be carefully considered to guarantee a workable final text.

As regards the limitation periods as such, we can be flexible and support the proposed text by the PRE.

- **Art. 12**

For BE, it is evident that a Member State on who's territory environmental damage occurs resulting from an environmental crime must also have jurisdiction to prosecute the criminal offence. In light of the last COPEN, BE would therefore like to underline the great importance of maintaining point c in the first paragraph of this article referencing to situations where '*the damage occurred on its territory*'.

In practice, however, it can be found that it is not always easy to prosecute a perpetrator of an environmental offense when he/she resides in another Member State. Yet, BE supports the inclusion of this article in this instrument seeing it will strengthen the legal basis for issuing extradition requests.

- **Art. 13**

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- **Art. 14**

Under current Belgian criminal law, anyone who wishes to become party to a trial in the context of an environmental offense or any other, must be able to demonstrate that he/she has a legitimate interest. This implies that is could be difficult for NGO's to file a civil claim. Therefore, BE is of the opinion that the wording of art. 14 should build in the necessary flexibility for the participation of NGO's, without compromising legal certainty. Seeing that in the latest compromise proposal reference to the nationally applicable rules was added, we can support the current wording.

- **Art. 15, Art. 16, Art. 17, Art. 18, Art. 19**

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- **Art. 20**

As regards the obligation to provide national strategies on a recurring basis, BE understands the reasoning behind this proposal. Nevertheless, we do have some reservations regarding this provision

taking into account the Belgian defederated state structure. Therefore, we would like to request some openness towards certain exceptions providing for the possibility to transfer regional strategies instead of national strategies. This request is further substantiated with the information that during the negotiations in other EU fora in the related to environmental crimes, a more flexible approach is being scrutinized and considered.

BE welcomes the reaction by the EU Commission during the last COPEN stating that it heard our concern (and that of other member states) implying that states will have the liberty to determine the format of these strategies, taking into account state specific organization.

- **Art. 21 & Art. 22**

Several instruments in the context of environmental (criminal) law already require reporting from Member States (e.g. in the context of the European Action Plan against Wildlife Trafficking).

Belgium wishes to get a better understanding on how the reporting obligations in those different instruments will correspond and be aligned with the reporting mechanism as required under this Directive. In BE, several organizations and stakeholders expressed serious concern as to the workload that will be associated with complying with the proposed statistical obligations.

Furthermore, Belgium would like to know whether it would be feasible for the Commission to compile the generated information itself, deriving from the statistical obligations as included in the sectoral instruments, to avoid duplication of reporting and thus reducing the administrative burden for Member States. It should be emphasized that this is only a proposal, based on limited knowledge on processing and gathering data.

During the last COPEN, the EU Commission, unfortunately, did not react to these verbal remarks made by BE.

- **Art. 23**

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- **Art. 24**

The transposition period as proposed in the instrument is not sufficient. As member states already expressed concerns during the last COPEN, we can underwrite this concern. We would propose for an implementation period of 36 months as foreseen in other instruments facilitating criminal cooperation.

- **Art. 25**

This article read in accordance with previous articles obliging member states to provide for several reports and statistics is not feasible. We would therefore like to request for careful reconsideration of all obligations in this instrument relating to evaluations, reporting and statistics and other time-consuming obligatory formalities.

- **Art. 26, Art. 27, Art. 28, Art. 29**

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BE written comments doc. 11563
15 September 2022

CROATIA

Following the invitation of the Czech Presidency, the Republic of Croatia would like to submit the comments to the 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,

Regarding Article 5 we can support the Netherlands proposal which refers to deletion of paragraphs (2) and (3) under the condition that the proposal should also be reflected on Article 11 (Limitation periods for criminal offences) in a way that Article 11 paragraph 2 item (a), as well as paragraph 4 item (a) are also deleted. This, due to the fact that the provision on limitation period should follow the provision on sanctions**.**

Regarding Article 10, we are of the opinion that the results of the discussion in the relation to revised text of the Directive 2014/42/EU should be taken into account due to the fact that the proposed text encompasses the environmental crimes.

Regarding Article 12, we propose the deletion of paragraph 1 item c. This provision has not been contained in the existing EU legislation and it expends the scope of jurisdiction rules.

Regarding Article 14, non-governmental organization should be omitted from the provision due to the fact, they can not be understood as an injured person with the specific procedural rights if they are not affected by the criminal offense. However, if they have knowledge on criminal offence, they would be obliged to participate as a witness. However, non-governmental organisations could also exercise their rights to attend the trial as a member of the public.

In addition, the procedural rights belong to persons affected by the offence, but not to the persons which are likely to be affected by the offence.

Regarding Article 18 (investigative tools) we could support the German proposal of Article 18, contained in the document 11880/22. In addition, the compromise solution could be taken from EPPO Regulation (Article 30 paragraph 3) which states that the investigation measures may be subject to further conditions, including limitations, provided for in the applicable national law. In particular, Member States may limit the application of investigation mesers to specific serious offences.

FINLAND

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

COPEN 2022

Comments by the Finnish delegation

Finland thanks the Chair 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.

Article 5 – Penalties for natural persons

As regards the proposal by SE on article 5, we could support deleting paragraphs 2 and 3 from the article. The thresholds of 6 and 4 years in paragraphs 4 and 5 may not, however, be supported.

Article 7 – Sanctions for legal persons

As was brought up in the COPEN meeting on the 7th and 8th of September, it would seem appropriate to continue the discussions on article 7 based on version V2A (document 10867/22) which got the majority at the COPEN meeting in July. This model offers flexibility for Member States while still maintaining a new element in harmonizing the way the fines for legal persons may be set in the Member States. The harmonization in the current text goes too far and into too much detail as compared to other EU criminal law instruments, and the text may not be accepted in its current form.

As for art. 7, paragraph 3, point b, we consider the levels of 50 and 30 million extremely high. The Chair and the Commission referred to the statistics on the levels of fines for legal persons as the reasoning behind setting the limits in point b at 50 and 30 million euros. This justification seems quite limited as we do not have information on the characteristics, gravity and other details of the cases of environmental offences which have evidently been looked at during this scrutiny. As has been pointed out previously, the gravity and seriousness of the offences in article 3 vary a lot. If common limits would need to be set for all these different offences, they would have to be set at a significantly lower level than in the proposal. As has been pointed out previously, in the national systems of many Member States the provisions on determining the level of the fines for legal persons are general in nature so that they encompass all the offences. The obligations on the fines for legal persons for environmental offences would thus have a systemic effect on all the offences.

As regards the chapeau of article 7, we support the deletion of the reference to the illegal profits or benefits generated of expected.

Article 12 – Jurisdiction

As was pointed out in the COPEN meeting, the point of reference in point c is not one generally recognized in international criminal law. The reference to "damage" is vague, and it is unclear what sort of damage is meant by the reference. There is no connection to the essential elements of the offence, for example. As the proposed Directive is one of minimum harmonization, those Member States wishing to expand their jurisdiction in this manner may do so.

If the majority of the Member States supports maintaining point c in the text, it would in any case need to be specified as follows, for example: "damage, *constituting to the definitional elements of the offence*, occurred on its territory".

As regards point d in Art. 12, para 1, we would suggest adding a reference to the principle of double criminality, as in Art. 10 of the Directive 2014/57/EU ("*1. Member States shall take the necessary measures to establish their jurisdiction over the offences referred to in Articles 3 to 6 where the offence has been committed: (a) in whole or in part within their territory; or (b) by one of their nationals, <u>at least in cases where the act is an offence where it was committed</u>.*").

Article 14 – Rights for the public concerned to participate in proceedings

Recital 27 seems to clarify the objective of the article. There is, however, a need to specify the text of the article, as well. We suggest the following specification to the text: "Member States shall ensure that, in accordance with *the role of the members of the public* in their national legal system, the persons affected or…". This has to do with how the term "participate" may be understood in the national systems. We refer to Directive 2012/29/EU in which the formulation "in accordance with the role of the victim in the relevant criminal justice system" is used.

Article 18 – Investigative tools

Taking into account our previous comments on the matter and the discussion at the last COPEN meeting, the written proposal by FR may be acceptable.

As regards recital 24 (previously 29), we suggest removing the following sentence: "Tools such as the interception of communications, covert surveillance including electronic surveillance, controlled deliveries, the monitoring of bank accounts and other financial investigation tools should be included." Alternatively it could be reformulated as "'could' be included" (instead of "should"). There is no need nor sufficient reason to define (even) in the recital the tools which should be available when investigating environmental offences.

Article 21 – Data collection and statistics

The article on data collection and statistics is rather detailed as was pointed out be many delegations in the COPEN meeting. Some data categories seem to be irrelevant from the point of view of evaluating the effectiveness of the system. There are data categories listed in the text which may be included in the information systems but which are not used in practice. This increases the risk of unreliability of the data and uncertainty in what sort of conclusions can be made from the data.

The article ought to be looked at in terms of deleting references to such information the collection of which is not needed in order to monitor the effectiveness of the system. We support the proposal by AT at the COPEN meeting of adding a reference to "available" data in article 21.

FRANCE

NOTE DES AUTORITÉS FRANÇAISES

Objet : Commentaires écrits des autorités françaises concernant les articles 5 à 29 du projet de directive du Parlement européen et du Conseil relative à la protection de l'environnement par le droit pénal et remplaçant la directive 2008/99/CE faisant suite à la réunion du groupe COPEN criminalité environnementale des 7 et 8 septembre 2022

Réf. : SGAE/JPC/2022/422

La Présidence tchèque voudra bien trouver ci-joint les éléments de réponse écrits des autorités française concernant les articles 5 à 29 de la proposition de directive du Parlement européen et du Conseil relative à la protection de l'environnement par le droit pénal et remplaçant la directive 2008/99/CE, faisant suite à la réunion du groupe COPEN criminalité environnementale des 7 et 8 septembre 2022.

FRENCH :

Observations préliminaires :

Les autorités françaises formuleront des observations sur les dispositions des articles 10 et suivants de la proposition de directive relative à la protection de l'environnement par le droit pénal, considérant que les dispositions sur les sanctions feront l'objet de discussions lors du CATS du 21 septembre prochain.

ENGLISH:

Preliminary observations:

French authorities submit written comments on the provisions of Articles 10 et seq. of the proposal for a Directive on the protection of the environment through criminal law, considering that the provisions on penalties will be discussed at the CATS meeting on September, 21st.

FRENCH :

Article 11 :

- cet article est un point d'attention fort pour les autorités françaises ;
- les autorités françaises remercient la présidence de la modification du considérant 22 (anciennement 19) pour définir les actes interruptifs ou suspensifs de la prescription par référence au droit national ; toutefois, elles sollicitent, s'agissant d'un simple considérant, une formulation plus précise : « *[…] such acts* ~~***may be***~~ ***are*** *defined in accordance with the legal system of each Member State.* » ;
- les autorités françaises ne peuvent accepter le nouveau paragraphe 4 de l'article 11 qu'à condition que soit introduite une flexibilité pour le délai de dix ans ; sans l'introduction de cette flexibilité, la transposition est susceptible d'avoir des conséquences sur l'ensemble du droit de la prescription français, au-delà du droit environnemental :

« *Member States shall take the necessary measures to enable the enforcement of:*

(a)

(i) a penalty of more than five years of imprisonment; or alternatively

(ii) a penalty of imprisonment in the case of a criminal offence which is punishable by a maximum sanction of at least ten years of imprisonment,

imposed following a final conviction for a criminal offence referred to in Articles 3 and 4, for at least ten years from the date of the final conviction~~*:*~~***. By way of derogation, Member States may establish a limitation period that is shorter than ten years, but not shorter than four years, provided that the period may be interrupted or suspended in the event of specified acts;*** »

ENGLISH:

Article 11:

- this article is a major point of attention for French authorities;
- French authorities thank the Presidency for amending recital 22 (formerly 19) to define acts interrupting or suspending the limitation period by reference to national law; however, as this is just foreseen in a recital, they request a more precise wording: "*[...] such acts* ~~***may be***~~ ***are*** *defined in accordance with the legal system of each Member State.* ";
- French authorities can only accept the new paragraph 4 of Article 11 on condition that flexibility is introduced for the ten-year period; without the introduction of this flexibility, the transposition is likely to have consequences for the whole system of French law on limitation periods, beyond environmental law:

"*Member States shall take the necessary measures to enable the enforcement of:*

(a)

(i) a penalty of more than five years of imprisonment; or alternatively

(ii) a penalty of imprisonment in the case of a criminal offence which is punishable by a maximum sanction of at least ten years of imprisonment,

imposed following a final conviction for a criminal offence referred to in Articles 3 and 4, for at least ten years from the date of the final conviction~~*.*~~ ***. By way of derogation, Member States may establish a limitation period that is shorter than ten years, but not shorter than four years, provided that the period may be interrupted or suspended in the event of specified acts;*** "

FRENCH :

Article 12 :

- **tous les critères de compétence juridictionnelle listés au (b) du paragraphe 1 n'ont pas de sens pour toutes les infractions**. Ainsi, le (b) ne semble pas d'intérêt pour les infractions visées à l'article 3, paragraphes 2 et 3, sous-points (b), (d), (i), (i)bis et (n) ;

- au (c) du paragraphe 1, les autorités françaises peuvent soutenir la précision rédactionnelle suivante : « *the damage**, as required under the constituent elements of the offence,** occurred on its territory* » ;

- les autorités françaises maintiennent leur **demande de suppression du paragraphe 3**. Il n'est pas justifié de manière suffisamment détaillée en quoi ce paragraphe 3 est nécessaire et en quoi les dénonciations officielles sont trop complexes à obtenir. En effet, compte tenu du champ très large des 20 infractions harmonisées, à l'inverse de la directive PIF, la transposition du paragraphe 3 est susceptible d'induire des modifications très nombreuses.

ENGLISH:

Article 12:

- **not all the jurisdiction criteria listed in (b) of paragraph 1 are relevant for all offences**. Thus, (b) does not seem to be relevant for the offences referred to in Article 3(2) and (3) (b), (d), (i), (i)bis and (n);

- in (c) of paragraph 1, French authorities can support the following editorial clarification: "*the damage**, as required under the constituent elements of the offence,** occurred on its territory*";

- French authorities maintain their **request to delete paragraph 3**. The necessity of this paragraph is not sufficiently justified and it is not clear why official denunciations are too complex to obtain. Indeed, given the very broad scope of the 20 harmonised offences, in contrast to the PIF Directive, the transposition of paragraph 3 is likely to lead to a large number of amendments into national law.

FRENCH :

Article 13, paragraphe 2 :

- il convient de clarifier que les personnes susceptibles de bénéficier du paragraphe 2 sont distinctes de celles couvertes par la directive sur les lanceurs d'alerte du paragraphe 1, et d'exclure les mis en cause du champ d'application ;

- les mesures d'assistance et de soutien ne sont pas claires, contrairement à ce qui peut figurer aux articles 14 et 15 de la directive 2011/36/UE ; le considérant 26 ne donne à cet égard aucune précision ; les autorités françaises proposent dont de reformuler ainsi la fin du paragraphe 2 ;

- enfin, il faut exclure la phase de jugement (*adjudication*) de ce paragraphe, compte tenu de l'indépendance des juridictions ;

- le paragraphe serait ainsi libellé : « *2. Member States shall take the necessary measures to ensure that* ***~~all~~*** *persons* ***other than those mentioned in paragraph 1, who*** *report****~~ing~~*** *offences referred to in Articles 3 and 4 of this Directive and provid****~~ing~~*** *evidence or otherwise cooperat****~~ing~~*** *with the investigation****~~,~~*** ***or*** *prosecution* ***~~or adjudication~~*** *of such offences****, except for suspects and accused persons,*** *may* ***be provided with assistance, support and protection~~,~~*** *in accordance with their* ***~~procedural standing in the~~*** *national legal system****~~, take advantage of are provided the necessary support and assistance measures in the context of criminal proceedings~~***. ».

ENGLISH:

Article 13:

- it should be clarified that the persons who may benefit from paragraph 2 are distinct from those covered by the whistle-blowers directive in paragraph 1, and suspects and accused persons should be excluded from the scope of this paragraph;

– the assistance and support measures are not clear, contrary to what may be contained in Articles 14 and 15 of Directive 2011/36/EU; recital 26 does not provide any clarification in this regard; thus, French authorities propose to reword the end of paragraph 2 as follows;

– finally, the judgment phase (*adjudication*) should be excluded from this paragraph, given the independence of the courts;

– thus, paragraph 2 would read: "*2. Member States shall take the necessary measures to ensure that* ***~~all~~*** *persons* ***other than those mentioned in paragraph 1, who*** *report****~~ing~~*** *offences referred to in Articles 3 and 4 of this Directive and provid****~~eing~~*** *evidence or otherwise cooperat****~~eing~~*** *with the investigation****~~,~~*** ***or*** *prosecution* ***~~or adjudication~~*** *of such offences****, except for suspects and accused persons,*** *may* ***be provided with assistance, support and protection~~,~~*** *in accordance with their* ***~~procedural standing in the~~*** *national legal system****~~, take advantage of are provided the necessary support and assistance measures in the context of criminal proceedings~~***."

FRENCH :

Article 14 :

– les autorités françaises maintiennent leur proposition d'amendement s'agissant des organisations non-gouvernementales, la formule actuelle étant trop restrictive par rapport à des associations ou d'autres formes juridiques, exclues *de jure* : « ***~~non-governmental organisations~~*** ***legal entities*** *promoting environmental protection […]* » ;

– de même, par souci de coordination avec le nouveau considérant 27 qui introduit une distinction entre les États membres dotés de systèmes de partie civile et ceux qui n'en ont pas, elles proposent : « *and meeting* ***the procedural conditions set out*** ***~~any proportionate requirements~~*** *under national law […]* ».

ENGLISH:

Article 14:

– French authorities maintain their proposed amendment concerning non-governmental organisations, as the current wording is too restrictive in relation to associations or other legal entities, which are here excluded *de jure*: "***~~non-governmental organisations~~*** ***legal entities*** *promoting environmental protection […]*";

– similarly, in order to coordinate with the new recital 27 which introduces a distinction between Member States with and without civil party systems, French authorities propose: "*and meeting* ***the procedural conditions set out*** ***~~any proportionate requirements~~*** *under national law […]*".

FRENCH :

Article 18, devenant l'article 13 :

– les dispositions sur les techniques d'enquête sont un point d'attention très fort des autorités françaises, en raison de l'intérêt opérationnel, mais aussi et surtout des contraintes constitutionnelles qui ont été communiquées à la présidence le 29 juillet 2022 ;

– les autorités françaises peuvent donc accepter le considérant 24 (anciennement 29), avec un **remplacement du terme « *commensurate* » par « *proportionate* » et, dans la deuxième phrase, un remplacement de « *should* » par « *could* »** ;

– en revanche, les autorités françaises insistent pour la reprise de leur amendement rédactionnel au sein de l'article 18, soutenu par de très nombreuses délégations lors du dernier groupe COPEN : « *Member States shall take the necessary measures to ensure that effective investigative tools****~~, such as those which are used in organised crime or other serious crime cases,~~*** *are* ***~~also~~*** *available for investigating or prosecuting offences referred to in Articles 3 and 4.* ***Where these offences are particularly serious and complex, special investigative techniques such as those which are used to fight against organised crime shall be made available.*** » ;

– les autorités françaises sont totalement opposées à une rédaction qui viendrait définir la notion de criminalité grave, qui relève de l'autonomie procédurale des États membres ; par ailleurs, les autorités françaises partent du principe que les infractions commises en bande organisée sont nécessairement intentionnelles.

ENGLISH:

Article 18, now Article 13:

– the provisions on investigative tools are a very strong point of attention for French authorities, because of the operational added value, but also and above all because of the constitutional constraints which were communicated to the Presidency on July, 29th 2022 ;

– French authorities can therefore accept recital 24 (formerly 29), **but with the term "*commensurate*" replaced by "*proportionate*" and, in the second sentence, "*should*" replaced by "*could*"**;

– however, French authorities insist on the inclusion of their proposed editorial amendment in Article 18, supported by a large number of delegations during the last COPEN group: "*Member States shall take the necessary measures to ensure that effective investigative tools****, such as those which are used in organised crime or other serious crime cases,*** *are* ***also*** *available for investigating or prosecuting offences referred to in Articles 3 and 4.* ***Where these offences are particularly serious and complex, special investigative techniques such as those which are used to fight against organised crime shall be made available.***";

– French authorities are totally opposed to a wording that would define the concept of serious crime, which is a matter for the procedural autonomy of the Member States; furthermore, French authorities assume that organised crimes are necessarily intentional.

FRENCH :

Article 21 : au paragraphe 2, le sous-point (c) devrait être supprimé car cette donnée n'est pas collectée en France ; par ailleurs, si elle devait l'être, la question se pose de son point de départ qui doit être précisé dans le texte : commission de l'infraction, découverte de l'infraction, à compter du dépôt de la plainte, ou à compter de la saisine effective du procureur ou du juge d'instruction, etc.

ENGLISH:

Article 21: in paragraph 2, sub-point (c) should be deleted because this data is not collected in France; moreover, if it were to be collected, the question arises as to its starting point, what should be clarified in the text: commission of the offence, discovery of the offence, from the filing of the complaint, or from the actual referral to the public prosecutor or investigating judge, etc.

FRENCH :

Article 27 :

Les autorités françaises proposent la reprise des formulations suivantes, rédigées en lien avec le service juridique du Conseil sous présidence française.

"*Article 27*

Application of Directive 2005/35/EC

Directive 2009/123/EC shall ~~cease to apply~~ **be replaced with regard** to the Member States ~~participating in~~ **bound by** this Directive ~~from the date of its transposition~~**, without prejudice to the obligations of those Member States with regard to the date for transposition of that Directive into national law. With regard to the Member States bound by this Directive, references to Directive 2009/123/EC shall be construed as references to this Directive. As regards Member States not bound by this Directive, they shall remain bound by Directive 2009/123/EC amending Directive 2005/35/EC**."

ENGLISH:

Article 27:

French authorities propose that the following wording, drafted in conjunction with the Council's Legal Service under the French Presidency, be adopted.

"*Article 27*

Application of Directive 2005/35/EC

Directive 2009/123/EC shall ~~cease to apply~~ **be replaced with regard** to the Member States ~~participating in~~ **bound by** this Directive ~~from the date of its transposition~~**, without prejudice to the obligations of those Member States with regard to the date for transposition of that Directive into national law. With regard to the Member States bound by this Directive, references to Directive 2009/123/EC shall be construed as references to this Directive. As regards Member States not bound by this Directive, they shall remain bound by Directive 2009/123/EC amending Directive 2005/35/EC**."

GERMANY

Directive on the protection of the environment through criminal law

DE text proposals in follow-up to the COPEN meeting on 7/8 September 2022 – part 1

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

Articles 5(2) and 5(3)

Germany maintains that Article 5(3) should be deleted. We do not see a need to specify minimum maximum penalties for negligent conduct. In our opinion, Article 5(3) describes negligent homicide, which should already be punishable in all Member States by effective, proportionate and dissuasive criminal penalties.

So far, Germany has supported the current drafting of Article 5(2). A combination of intentional conduct and negligently caused consequences is a well-known concept in German law. However, as the discussions in the past COPEN meetings have shown, these provisions might cause serious frictions in criminal law systems of other Member States. Therefore, Germany does not oppose the deletion of Article 5(2) as requested by a number of Member States.

Article 5(4) and 5(5)

Germany would like to reiterate that lit. f), g) and n) should be moved from paragraph 4 to paragraph 5 as they are similar in scope and gravity to lit. l), m) and p).

Article 7(2)

Germany welcomes the deletion in Article 7(2) of the reference to Article 6(2) as suggested in the Presidency's latest proposal. As pointed out in the last COPEN meeting, the application of paragraph 2 only to situations covered by Article 6(1) would not constitute a deviation from the approach in previous criminal law directives. So far, no directive has ever established a minimum maximum sanction for legal persons and Member States could foresee different maximum penalties for the two different scenarios according to Article 6(1) and Article 6(2).

We support the approach in the Commission's proposal that the requirements of paragraph 2 should apply only to cases covered by Article 6(1). In the case of Article 6(2) the liability of the legal persons is triggered by the breach of supervisory duty (resulting in the commission of an environmental offence by non-management personnel) which is a less severe wrongdoing compared to the commission of an environmental offences by management. It can therefore be left to Member States to provide for appropriate maximum sanctions for the cases of Article 6(2).

Article 7(3)

So far, Germany has supported suggestions for a more flexible approach. In principle, Germany could support the introduction of a maximum penalty defined by a fixed sum which would be in line with our current legal framework. The adequate sum needs to be discussed further. In German law, the maximum administrative penalty for the commission of a criminal offence committed by management personnel is 10 Million EUR.

Article 10

In line with the scope of Directive 2014/42/EU Germany suggests the following addition to Article 10:

> *Article 10*
>
> *Member States shall take the necessary measures to enable the freezing and confiscation, **either in whole or in part,** of instrumentalities and proceeds from the criminal offences referred to in Articles 3 and 4. Member States bound by Directive 2014/42/EU of the European Parliament and of the Council shall do so in accordance with that Directive.*

Article 11

"When offences are punishable" seems redundant and should be deleted. The limitation period in paragraph 3 should be aligned to the other paragraphs.

Article 11

1. Member States shall take the necessary measures to provide for a limitation period that enables the investigation, prosecution, trial and judicial adjudication of criminal offences referred to in Articles 3 and 4 for a sufficient period of time after the commission of those criminal offences, in order for those criminal offences to be tackled effectively.

2. Member State shall the take necessary measures to enable the investigation, prosecution, trial and judicial decision:

(a) of offences referred to in Articles 3 and 4 which are punishable by a maximum sanction of at least ten years of imprisonment, for a period of at least ten years from the time when the offence was com-mitted~~, when offences are punishable~~;

(b) of offences referred to in Articles 3 and 4 which are punishable by a maximum sanction of at least five years of imprisonment, for a period of at least five years from the time when the offence was committed~~, when offences are punishable~~;

(c) of offences referred to in Articles 3 and 4 which are punishable by a maximum sanction of at least three years of imprisonment, for a period of at least three years from the time when the offence was committed~~, when offences are punishable~~.

*3. By way of derogation from paragraph 2, Member States may establish a limitation period that is shorter than ten years, but not shorter than ~~four~~ **five** years, provided that the period may be interrupted or suspended in the event of specified acts.*

Article 12

Article 12(1)(c) should be deleted. This is not a generally recognised point of reference in international criminal law, insofar the provision would also apply to cases where the damage is not part of the elements of the offence. If a deletion is not acceptable, it should be clarified at least, that lit. (c) only applies to cases, in which the damage is a constituent element of the offence.

Article 12

1. Each Member State shall take the necessary measures to establish its jurisdiction over the offences referred to in Articles 3 and 4 where:

(a) the offence was committed in whole or in part on its territory;

(b) the offence was committed on board a ship or an aircraft registered in it or flying its flag;

~~*(c) the damage occurred on its territory;*~~

Alternatively:

*(c) the damage**, if it is a constituent element of the offence,** occurred on its territory;*

(d) the offender is one of its nationals.

Article 13 (formerly article 18)

Germany supports the French text proposal but suggests to limit Article 18 to crimes committed with intend. The obligation to make special investigative techniques available should be limited to serious crime cases, which do not include crimes committed through gross negligence.

Article 13

*Member States shall take the necessary measures to ensure that effective investigative tools, **~~such as those which are used in organised crime or other serious crime cases,~~** are **~~also~~** available for investigating or prosecuting offences referred to in Articles 3**(2)** and 4. **Where these offences are particularly serious and complex, special investigative techniques such as those which are used ~~to fight against~~ in countering organised crime shall be made available.***

Recital 29

*To ensure successful enforcement, Member States should make available effective investigative tools for environmental offences such as those which exist in their national law for combating organised crime or other serious crimes, **if and to the extent that the use of those tools is appropriate and commensurate with the nature and gravity of the offences as defined in national law.** ~~These tools should include among others the interception of communications, covert surveillance including electronic surveillance, controlled deliveries, the monitoring of bank accounts and other financial investigation tools.~~*

Alternatively:

*These tools ~~should~~ **could** include among others the interception of communications, covert surveillance including electronic surveillance, controlled deliveries, the monitoring of bank accounts and other financial investigation tools.*

These tools should be applied in line with the principle of proportionality and in full respect of the Charter of Fundamental Rights of the European Union. The right to the protection of personal data must be respected.

Article 13bis paragraph 2 (formerly article 13)

It is not clear what exactly is meant by "necessary support and assistance in the context of criminal proceedings" (the related recital 25 does not clarify this either). An extension of the existing and sufficient criminal procedural safeguards should be avoided, what should be clarified by adding "in accordance with the national legal system".

Article 13bis

2. Member States shall take the necessary measures to ensure that ***any*** *person~~s~~ reporting offences referred to in Articles 3 and 4 of this Directive and providing evidence or otherwise cooperating with the investigation, prosecution or adjudication of such offences may, in accordance with* ~~***their procedural standing in***~~ *the national legal system, take advantage of the necessary support and assistance measures in the context of criminal proceedings.*

Article 19

Germany agrees that strengthening the coordination and cooperation between the competent authorities within a Member State is an important element to improve the enforcement chain. However, sufficient flexibility should remain for the Member States to ensure the functioning of the national judiciary, law enforcement and administrative authorities. Therefore, Germany suggest an indicative list of possible mechanism to enhance coordination and cooperation among the national competent authorities.

Article 19

Member States shall take the necessary measures to establish appropriate mechanisms for coordination and cooperation ~~*at strategic and operational levels*~~ *among all their competent authorities involved in the prevention of and the fight against environmental criminal offences. Such mechanisms* ~~*shall be aimed at least at*~~ ***could include****:*

(a)…

Article 20

The specifications for the national strategy are very detailed. The added value of a national strategy as well as of further monitoring mechanisms should be carefully examined and unnecessary administrative burdens avoided. In this context, it should also be noted that a strategic approach can only be taken to a limited extent in criminal law. Prioritisation can only refer to carrying out inspectations and controls. When the public prosecutor's office becomes aware of a criminal offense, the principle of legality dictates that an investigation is initiated. It is also not clear to what extent Member States can take a strategic approach to civil law. The assertion of claims is at the free discretion of the plaintiff. Therefore, the mention of civil law as a means to address infringements does not seem appropriate.

Article 20

1. By [OP – please insert the date – within one year after the the end of the transposition period], Member States shall ***consider*** *establish****ing*** ~~*, publish and implement*~~ *a national strategy on combating environmental criminal offences which* ***shall be published and implemented and updated at regular intervals no longer than 5 years and*** ~~*as a minimum*~~ *shall address the following:*

(a) the objectives and priorities of national policy in this area of offence;

(b) the roles and responsibilities of all the competent authorities involved in countering this type of offence;

(c) the modes of coordination and cooperation between the competent authorities;

(d) the use of administrative ~~*and civil*~~ *law to address infringements related to the offences within the scope of this Directive;*

(e) ~~*the resources needed and*~~ *how specialisation of enforcement professionals will be supported;*

~~*(f) the procedures and mechanisms for regular monitoring and evaluation of the results achieved;*~~

(g) assistance of European networks working on matters directly relevant to combating environmental offences and related infringements.

~~2. Member States shall ensure that the strategy is reviewed and updated at regular intervals no longer than 5 years, on a risk-analysis-based approach, in order to take account of relevant developments and trends and related threats regarding environmental crime.~~

HUNGARY

Article 5 – Penalties for natural persons

1. We fully support the Dutch proposal, ie. the deletion of paragraphs (2)-(3) [causing death] and setting the levels of sanctions as referred to in paragraphs (4) and (5) [3 and 5 years]. This is our most favoured option so far.

2. We insist that points q) and r) should be moved to paragraph (5), unless further criteria, such as causing serious injury / substantial damage or a reference to non-negligibly quantity are included in those points in Article 3. The Commission proposal is based on the (correct) assumption that these substances are extremely dangerous. However, other substances (such as mercury, radioactive substances) included in this directive are also extremely dangerous, and yet, the relevant points include further criteria for their criminalisation. So is the case for hazardous waste.

Therefore, a maximum term of at least 5 years of imprisonment would be justified only if those further criteria were included in the definition of the offence; otherwise we support a 3 year maximum term.

3. Points f), g), h) and n) should be moved back to the group of offences which are punishable by a maximum term of at least 3 years of imprisonment. During the last COPEN meeting, several delegations supported this position. We propose therefore the following:

*„(4) 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."*

*(5) 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."*

Article 7 – Sanctions for legal persons

In Article 7, there is no need to distinguish between paragraphs (1) and (2) of Article 6. Sanctions should be applied to legal persons in a uniform manner.

When defining the level of sanctions, it is necessary to apply the usual regulatory framwork of criminal law and the standard provisions under national law. Differences among national legal systems should be taken into account. Specific levels of sanctions referring to a particular amount should be defined only as points of reference rather than compulsory levels of fines.

We do not agree with sanctions based on worldwide turnover or corresponding to a fixed amount. We would accept a flexible approach based on one of the two alternatives already presented:

V1 option

„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).”

OR

V2A option

“3. Where their national law does not allow for establishing the level of fines using a percentage of total worldwide turnover of the legal person in similar cases, 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 the result is proportionate to the seriousness of the conduct and the individual, financial and other circumstances of the legal person concerned.”

Article 10 – Freezing and confiscation

As already explained during the COPEN meeting, **the scope of Article 5 of directive 2014/42/EU should be limited to serious offences.** It is not appropriate to apply this provision to lesser offences, or to those offences which are committed without an intent for profit. This point should be raised in the context of the revision of the confiscation directive.

In addition, we also see the merit in the explanation provided by the Legal Service on a similar point (whistleblower protection) and support a similar approach in this case. In other words, if we intend to modify the confiscation directive, this provision should explicitly say so. If this is not our objective, then we propose deleting Article 10 and moving it to the preamble of the directive.

Article 12 – Jurisdiction

We agree with the idea that habitual residence was moved to paragraph (2). **We would also like to propose that point c) ("the damage occurred on its territory") be moved to paragraph (2) as well.**

Article 13 – Protection of persons who report offences

Article 13 of the directive would amend Directive (EU) 2019/1937. However, **this directive on whistleblowers is not, and should not be applicable to criminal procedures**. We agree on this point with the analysis of the Legal Service. This article should be removed and placed in the preamble.

Under paragraph (2) it is unclear what kind of support and assistance is meant. There does not seem to be any added value in this provision and it is impossible to implement it. We understand that the position of the Legal Service also supports this point.

Article 14 – Rights for the public concerned

It is important to clarify the objective of this article, namely what rights would be covered by it. If this provision implies an obligation to grant a specific standing in the criminal procedure including representation, access to documents or a right for submitting motions, we do not support this article. Such rights should remain governed by national laws of the Member States. We do not accept that victims and NGOs should be treated on an equal footing in the criminal procedure.

Articles 15, 16, 19, 20

These articles should be deleted – there is no legal basis for these provisions. If the articles remain in the text, the word „shall" needs to be replaced by „may". As an alternative, move it to the preamble, along the lines as suggested by the Legal Service.

Article 18 – Investigative tools

We support both versions. However, further specific provisions / a definition of serious offences should not be added to the text.

Article 21 – Data collection and statistics

The directive should refer to the already available statistical data. Therefore we would support a more flexible approach in this article. We would also like **to delete points b), c), f) in paragraph (2).**

Article 24 - Transposition

We support the extended implementation deadline (30 months)

Article 25 – Evaluation and reporting

This provision will need to be adjusted if certain provisions – due to the lack of legal basis – are removed from the directive. We also support deleting the biannual reporting obligation (paragraph 2).

LITHUANIA

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

Article 5, Paragraph 4 and 5

LT accepts the proposal to lower the threshold in paragraph 4 to 5 and in paragraph 5 to 3 years, but 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.

Regarding the written proposal from Netherlands

LT supports the version of the text proposed by NL, since it is obvious that the provisions proposed to be consolidated in paragraphs 2 and 3 of Article 5 do not have any added value. At the same time, we are happy that NL maintains the reduced limits of imprisonment sanctions and adequately moves the corresponding criminal acts established in points f, g, h to a lower level of sanctions, since they are of a lower degree and nature of danger.

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. As during the initial statements, the V2A option presented in the previous version of the Proposal would be most suitable for LT.

Regarding Article 7 point b, LT believes that the chosen static fine amounts are inadequately excessive, although the Presidency stated that the chosen amounts were based on the assessment of the current provisions of the criminal law of the member states, but during the discussions at COPEN it became clear that the currently highest sanction for legal entities is applied by DE (maximum amount of 15 million euros). Taking this into account, it is suggested to reassess the size of the fine to be imposed on legal entities, adapting it at least to the average of the criminal laws of the member states (for example, a fine of 5 and 3 million euros).

Article 12

LT draws attention to the fact that the basis of jurisdiction established in point c of Article 12 is not universally recognized. It can be assumed that this ground must be linked to the element of damage only if the damage is a necessary element of the criminal act. In this context, we draw attention to the fact that not all criminal acts established in Article 3 require a mandatory element of damage, therefore the introduction of this kind of universally unrecognized rule of jurisdiction, intended exclusively for environmental crimes, would undoubtedly cause problems not only in LT, but also in the criminal codes systems of other member states. For this reason, we propose to refine the provisions established in point c, providing that damage is a necessary element of the composition of the crime against the environment or to remove point c from paragraph 1 of Article 12 in general.

Article 13, Paragraph 2

LT thinks that the content of the proposed legal norm and the added value created is not clear. Not only is it not clear whether member states must establish special and exclusive protection guarantees for persons who report environmental crimes, it is also not clear to which group of entities those guarantees should apply. The current version of the text essentially assumes that we should apply vague safeguards and guarantees even to suspects who have reported criminal acts committed by accomplices. We believe that the norm in question is so vague that in reality it does not even create any additional obligations for member states.

Article 14

It is still not clear whether member states must establish a new procedural entity in the criminal process. In the event that the member states do not need to establish any additional entities in the criminal process, as mentioned by the COM in its explanations, this norm has no added value in general, since the member states will not have to take any additional measures, but simply follow the existing legal regulations of the criminal process. Of course, repeating the older position of LT, we are completely opposed to establishing a new, extremely undefined and non-specific subject of criminal proceedings, because in this way immeasurable damage can be done to ongoing and future criminal proceedings. It is a reasonable question whether, in general, a norm of this kind should not be enshrined in the normative part of the text, but in the recital.

Article 18

Given that Article 18 (13) of the Proposal states that law enforcement authorities must have the right to use such investigative tools as in the case of the investigation of serious and the most serious crimes (for example, organized crime, murder, terrorist crimes, etc.), it can be assumed that it is appropriate to clarify this article by providing that this type of measures can be used to investigate only the most dangerous crimes against the environment, the commission of which is proposed to impose a maximum prison sentence of at least 10 years, which corresponds to the degree of dangerousness of the acts defined in this article. As a result, Lithuania supports the written proposal submitted by FR.

Article 20

LT supports the idea of adopting a national strategy for combating environmental crimes. Currently, LT is preparing an updated national strategy. However, it is doubtful whether the mandatory preparation of such a national strategy is compatible with the purpose of the Proposal, which basically focuses only on criminal law measures and the harmonization of definitions of criminal acts and determining the amounts of sanctions. Therefore, such obligations of VN, which go beyond criminal law, according to their essence and content, cannot be indicated in this Proposal, especially as imperative provisions. It can be assumed that the preparation of national strategies is the exclusive right of the Member states, therefore we propose to provide that the content elements of the national strategy are of an exemplary nature using the wording not "shall" but "may".

Article 21

LT supports member states that believe that the list of statistics that must be collected is too broad and does not provide enough flexibility. Also, we believe that only available statistical data at the central level should be collected. Otherwise, we risk not only creating an excessive administrative burden for the member states, but at the same time we may unreasonably unbalance the existing statistical data collection systems in the member states, which are extremely insensitive to changes.

NETHERLANDS

Written comments following the COPEN meeting of 7 and 8 September 2022

The Netherlands would like to thank the Czech Presidency for the opportunity to provide written comments on the draft Directive on environmental crime 7 and 8 September on Articles 5-29, in the light of the discussion during the last COPEN and in addition to our recent compromise proposal on article 5.

Article 12: We agree with the written comments made by Germany about this article, in line with the discussions about this article during the COPEN at 7 September 2022. Article 12 (1)(c) should be deleted, since this is not a generally recognized point of reference in international criminal law. The various other subpoints in article 12(1) should be sufficient to provide for effective investigation possibilities in cross border cases. In line with the deletion of article 12 (1)(c), the reference to this subpoint in article 12(3) should be deleted accordingly.

Article 14: can the EC explain on how we should interpret *to participate in proceedings* and *for instance as a civil party*? In Dutch criminal proceedings *the public concerned* is represented by de public prosecutor. Besides the public prosecutor (for example) a person can report a criminal offence, can be a witness or an expert.

Article 18: the Netherlands can support the changes to this article that were proposed by France (*Member States shall take the necessary measures to ensure that effective investigative tools, are available for investigating or prosecuting offences referred to in Articles 3 and 4. Where these offences are particularly serious and complex, special investigative techniques such as those which are used to fight against organised crime shall be made available.)*

In addition to this, we suggest the following change to recital 24 (former recital 29, as laid down in document 11563/22): Tools such as the interception of communications, covert surveillance including electronic surveillance, controlled deliveries, the monitoring of bank accounts and other financial investigation tools ~~**should**~~ **could** be included

Since article 18 doesn't mention any specific investigation tools, the corresponding recital should also not provide an obligation to make available specific investigation tools.

Article 21: the Netherlands does not agree with adding the text in paragraph 1, since paragraph 2 of article 21 already provides a very detailed list of statistical data that should be included. The proposed additions in the first paragraph demands that a distinction be made between various phases of criminal procedure, which would cause a great administrative burden for the various organizations that are involved in combating environmental crime.

Article 24: the Netherlands welcomes that the transposition period has been extended to 30 months.

Article 25: the Netherlands supports the deletion of paragraph 2 and has no objections regarding the added text in paragraph 3 (old).

POLAND

Below is our written commentary on some of the provisions and associated recitals of the proposed directive:

Draft Article 5:

– In Poland's view, in order to achieve the main objectives of the directive (increasing the effectiveness of the prosecution of offenders against the environment and harmonisation of national provisions in EU Member States), it is necessary to tighten up criminal policy in this area, in particular by increasing the criminal sanctions provided for the individual offences as described in Article 3 of the draft directive.

– Poland supports the provision of Article 5 as set out in document 11563/22 submitted by the Czech Presidency, including the inclusion of the offences referred to in Article 3(2)(f), (h), (n).

– The separation of the basic and aggravated types of offences in Article 5 of the Directive will allow the judge to decide on the penalty in a way that takes full account of the constituent elements of the subject and object sides of the offence. Therefore, Poland does not support the Swedish delegation's proposal to amend Article 5.

– Poland also cannot support the Article 5 proposal made by the Netherlands. In our view, the proposal there will result in the criminal sanctions provisions not being sufficiently dissuasive. As indicated above, for the new directive to be effective, we need to tighten the criminal policy against environmental perpetrators.

– In conclusion, Poland supports the proposals contained in Article 5(2) and (3) for a minimum maximum term of imprisonment for the offences indicated in these provisions where they have resulted in the death of a human being (i.e. 10 years' imprisonment and 5 years' imprisonment for unintentional offences), considering that such harmonisation will provide added value in the fight against environmental crime.

– Finally, we ask the Presidency to consider the possibility of supplementing these provisions with the offence of causing grievous bodily harm to multiple persons. Relevant argumentation in this regard was sent earlier (COPEN meeting in July and written comment sent afterwards).

Draft Article 7:

With regard to the issue of sanctions involving legal persons (article 7), Poland maintains its previous position. We support the use of the 'total worldwide turnover' criterion as an appropriate way to impose a penalty. Poland does not oppose the use of a different criterion in the case of countries which do not have such solutions. However, the EUR 50 million and EUR 30 million penalties proposed by the Czech Presidency appear to breach the principle of proportionality and the reasoning presented for their calculation is not convincing. Therefore, in Poland's opinion, we should work out a different mechanism for setting the minimum maximum penalty for legal persons, if it is to be of a financial nature.

Draft Article 14 and the Polish proposal to amend this provision and the corresponding recital:

Recital (27) ~~**(26)**~~ Since nature cannot represent itself as a victim in criminal proceedings, for the purposes of effective enforcement, members of the public concerned, as defined in this Directive ~~**taking into account Articles 2(5) and 9(3) of the Aarhus Convention**~~, should be able to act on behalf of the environment as a public good, within the legal framework of the Member States and subject to the relevant procedural rules. **This Directive should not require Member States to introduce any particular procedural position for members of the public concerned.** ~~**However, when such procedural standing exists in a Member State in equivalent situations concerning other criminal offences, for example, the right to participate as a witness or an expert and provide evidence, or as a civil party, such procedural standing should also be granted to the members of the public concerned in the proceedings concerning environmental offences defined in this Directive.**~~ **However, this Directive should ensure that members of the public concerned are able to participate in pre-trial and court proceedings, to be heard and to make statements in writing.**

Article 14:

1. Member States shall ensure, in accordance with their national legal system, **that persons affected or likely to be affected by the offences referred to in Articles 3 or 4 and non-governmental organisations promoting environmental protection and meeting any ~~proportionate~~ requirements under national law ~~members of the~~** (public concerned), **in particular relating to the demonstration of a relevant legal interest and the exercise of statutory activities in the field of environmental protection for a certain period of time prior to the initiation of criminal proceedings**, have appropriate rights to participate in proceedings relating to the offences referred to in Articles 3 and 4**~~, for instance as a civil party~~**.

2. Member States shall ensure, in accordance with their national legal system, that the persons and non-governmental organisations referred to in paragraph 1 are allowed to participate in pre-trial and court proceedings, to be heard and to make statements in writing.

– Poland proposes deleting the word 'proportionate' from Article 14, referring to requirements under national law, as this may lead to different interpretations and legal disputes.

– The next comment relates to the general purpose of this provision, as it should be noted that if this provision comes into force, in its current wording, similar doubts may arise when applying this provision as in the case of Article 9 of the Aarhus Convention. The two provisions are very similar in content. These doubts will relate in particular to the question of the circle of entities that will be able to participate in the proceedings, but also to what role *public concerned* has in criminal proceedings. In Poland's view, the new wording of Article 14 and the corresponding recital must eliminate these doubts.

– To sum up, Poland indicates that the introduction of requirements such as those presented in the drafted version of Article 14 above will make it possible to introduce in national law procedural regulations imposing certain formal requirements on entities participating in a given type of proceedings for non-governmental organisations, such as the obligation for a participant of the proceedings to demonstrate at a certain stage of the proceedings that it has a real legal interest, and not only abstract and hypothetical legal problems, and the obligation to have a certain length of experience in conducting statutory activity in the field of environmental protection. The above will not deviate from the standard regulations ensuring efficiency of proceedings in force in the legal systems of other EU Member States.

– At the same time, paragraph 2 of the proposal prepared by Poland sets out the minimum rights for the public concerned.

SWEDEN

Comments following COPEN 7-8 September

Sweden thanks the Presidency and the General Secretariat for the opportunity to provide written comments on the proposed Environmental Crime Directive.

Recital 24

Sweden can support the proposed changes in recital 24 but suggest that "should be included" is replaced by "could be included".

Article 5

Sweden supports the proposal submitted by the Netherlands to delete articles 5.2 and 5.3.

As regards articles 5.4 and 5.5 Sweden can accept the text proposed by the Presidency in doc 11563/22. However, with respect to thresholds, our preferred option is six and four years of imprisonment in line with the Commission original proposal.

Article 7

Sweden favours the more flexible alternatives that have previously been presented regarding the wording in Article 7.

In order for Sweden to be able to accept the new proposal with fixed amounts as the required maximum level of fines the amounts needs to be at a significantly lower level than what is proposed. Furthermore, it must be evident from the writing of Article 7 that the requirement of a highest level of fines is applied only in relation to the most serious crimes committed by large companies. There is no reason to why the highest level of fines should apply to minor crimes or crimes committed by small businesses.

In Sweden legal persons may be held criminally liable for crimes in the legal persons operations committed by someone with a leading position within the legal person. Criminal liability can also be imposed against a legal person in situations where a crime within its operations was possible due to lack of supervision or control. Corporate fines can also be imposed on a legal person if it did not do what could reasonably be required to prevent the crime.

The sanction imposed on a legal person is called a corporate fine. Corporate fines are determined to an amount between SEK 5 000 and 10 000 000 (approximately between EURO 500 and 1 000 000). This is called the sanction value of the crime and is based on the seriousness of the crime. Circumstances that are relevant for this assessment include the damage, financial or otherwise, caused by the crime and the intentions behind it.

If the sanction value is at least SEK 500 000 and the crime has been committed within a **large company** an increased corporate fine is imposed. An increased corporate fine is determined to an amount that is reasonable with consideration to the legal persons financial situation. The maximum amount of an increased corporate fine is set to 50 times the sanction value, which means at most SEK 500 000 000 (approximately EURO 50 000 000).

A large company is defined as a company:

a) whose transferable securities are admitted to trading on a regulated market or an equivalent market outside the European Economic Area, or

b) that meet more than one of the following conditions:

- the average number of employees in the company has in each of the last two financial years amounted to more than 50,

- the company's reported total assets have for each of the last two financial years amounted to more than SEK 40 000 000,

- the company's reported net turnover has for each of the last two financial years amounted to more than SEK 80 000 000.

Article 20

Sweden can support the article as such. A national strategy can be a valuable tool for effectively combating environmental crime. However, as pointed out by many Member States during COPEN 7-8 September Article 20 needs to be less detailed. In any event, subpoints d) and e) should be deleted.

Article 21-22

As pointed out by several Member States the obligation to collect statistical data should be restricted to data that is already available.

In addition, we suggest that the definitions and standards already developed and applied to the European statistics in the field of Crime and Criminal Justice collected by Eurostat are used, as this would reduce the administrative burden and allow comparisons to be made between different areas of crime.

EXTRA:

Please see below an explanation and suggestions from our experts regarding article 21 and 22 and the common standards of Eurostat.

"In accordance with the Regulation (EC) No 223/2009 of the European Parliament and of the Council of 11th March 2009 and the Commission Decision of 17 September 2012 on Eurostat (2012/504/EU) Eurostat is the statistical office of the European Union with the main task of providing qualitative statistics for Europe. Eurostat collects and aggregates the statistical information necessary to compile European statistics and works actively to further develop and harmonize European statistics. One important task for Eurostat is therefore to develop and promote statistical standards, methods and procedures. Among the major development efforts in recent years is the implementation of the international classification system for crime ICCS (International classification of crime for statistical purposes).

If common standards should be used of transmission of statistical data in the area of environmental crime, SE suggest that the development of definitions and standards for the statistics on Environmental Crime as far as possible corresponds to the standards already developed and applied by Eurostat for the European statistics in the field of Crime and Criminal Justice. Examples of statistical data where uniform standards could be applicable is reported offences and convicted persons. Such an approach would reduce the reporting burden for data providers who otherwise would need to develop and maintain several separate systems for the reporting of crime statistics to the Commission. It will also allow for better comparisons on the European level as well as the national level between environmental crimes and other areas of crime.

Alternative 1

Article 22 Implementing powers

1. The Commission shall be empowered to adopt implementing acts establishing the standard format for data transmission referred to in Article 21(4). Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 23(2).

2. **The standard format shall be based on the definitions and standards that have been developed and applied to European statistics in the field of Crime and Criminal Justice that is collected by Eurostat.**

~~2. For the purposes of the transmission of statistical data, the standard format shall contain the following elements:~~

~~(a) a common classification of environmental crimes;~~

~~(b) a common understanding of counting units;~~

~~(c) a common understanding of procedural stages (investigation, prosecution, trial) in environmental crime proceedings;~~

~~(d) a common reporting format.~~

Alternative 2

Article 21 Data collection and statistics

1. Member States shall collect statistical data measuring the reporting, investigative and judicial phases involving the offences referred to in Articles 3 and 4 in order to monitor the effectiveness of their systems to combat environmental criminal offences.

2. The statistical data referred to in paragraph 1 shall include at least the following:

(a) the number of environmental crime cases reported;

(b) the number of environmental crime cases investigated and/or submitted to judicial authority;

~~(c) the average length of the criminal investigations of environmental crimes;~~

~~(d) the number of convictions for environmental crime;~~

(e) the number of natural persons convicted and sanctioned for environmental crime;

~~(f) the number of legal persons sanctioned for environmental crime or equivalent offences;~~

~~(g) the number of dismissed or discontinued court cases for environmental crime;~~

(h) the types and levels of **criminal** sanctions imposed for environmental crime, including per categories of environmental offences according to Article 3.

3. Member States shall ensure that a consolidated review of their statistics is regularly published.

4. States shall annually transmit to the Commission the statistical data referred to in paragraph 2 ~~in a standard format established in accordance with Article 22.~~ **and use the standard format that has been developed and applied to European statistics in the field of Crime and Criminal Justice that is collected by Eurostat.**

5. The Commission shall regularly publish a report based on the statistical data transmitted by the Member States. ~~The report shall be published for the first time three years after the standard format referred to in Article 22 has been determined.~~

~~Article 22 Implementing powers~~

~~1. The Commission shall be empowered to adopt implementing acts establishing the standard format for data transmission referred to in Article 21(4). Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 23(2).~~

~~2. For the purposes of the transmission of statistical data, the standard format shall contain the following elements: (a) a common classification of environmental crimes;~~

~~(b) a common understanding of counting units;~~

~~(c) a common understanding of procedural stages (investigation, prosecution, trial) in environmental crime proceedings;~~

~~(d) a common reporting format.~~