Council of the European Union

Brussels, 14 September 2023
(OR. en)

12768/23

Interinstitutional File:
2021/0422(COD)

LIMITE

COPEN 304
DROIPEN 129
JAI 1119
ENV 958
CODEC 1553

NOTE

From:	Presidency/General Secretariat of the Council
To:	Delegations
No. prev. doc.:	11962/23
No. Cion doc.:	14459/21 + COR 1
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 - Continuation of the examination of the amendments proposed by the European Parliament in view of the technical meeting on 21 September

Introductory remarks

Following the JHA Counsellors + Experts meeting on 26 July 2023, the Presidency held technical meetings with the European Parliament on 1 and 6 September 2023. During the meetings, various lines could be 'greened', either because the Member States had expressed their agreement on a compromise solution proposed on 26 July, or because the European Parliament had decided to accept the Council position.

In ADD 1, delegations will find for reference the 4 column table as prepared by the EP secretariat after the last technical meetings. Green = agreement reached, yellow = still under consideration, no colour = not yet discussed.

In the light of the last technical meetings, and with a view to preparing the next technical meeting on 21 September 2023, the Presidency would like to submit several questions to delegations. The questions concerned are set out in the Annex, together, where appropriate, with some explicative information. In order to enhance readability, the points are taken following the "lines" in the 4CT.

In all cases where Member States consider that a suggestion is not acceptable, they are kindly invited to briefly state the reasons therefore, so that the Presidency can use these in the negotiations with the EP.

The Presidency invites delegations to show flexibility where possible. This said, the Presidency understands that the text should remain balanced and of high quality, and that the Directive should fit in the national legal orders. The Presidency is also fully aware that on various points, the text of the general approach is already a huge step forward for Member States.

"Nothing is agreed until everything is agreed".

Questions and explicative information for delegations in view of the JHA Counsellors meeting on 18 September and the technical meeting on 21 September 2023 [1]

1) The horizontal issues: energy, harm, ecosystem – line 66

See also lines 67, 75, 76, 83, 83a, 84, 91 and 92.

a) Energy

Further to the JHA Counsellors meeting on 26 July, agreement was reached on the inclusion of "energy" in Article 3(1), point (a) and the corresponding provisions.

The text now reads as follows:

Article 3(1), point (a): *the discharge, emission or introduction of a quantity of materials or substances**, energy,** or ionising radiation into air, soil or water which causes or is likely to cause death or serious **injury** to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or an **ecosystem**, animals or plants;*

COM proposed the following accompanying recital:

[1] As regards the definition of unlawful (lines 64c, 59), the Presidency has suggested the following compromise to the European Parliament:

- Council accepts the paragraph on authorisations as set out in the original proposal of the Commission (line 59),
- Council accepts to replace the words "aims to pursue" with "contributes to" in line 64 c, so that it reads "*(a) Union law which contributes to one of the objectives of the Union's policy on the environment as set out in Article 191(1) TFEU;*"

  on the condition that

- the Parliament accepts the reference to Article 191(1) of TFEU in subpoint a) in the Council mandate (line 64 c), and
- the structure as proposed in the Council mandate, with 'unlawful' in the heading of Article 3.

While the EP negotiating team stated informally that it had a first positive impression, it indicated that, given the sensitivity of this topic, it preferred to have a political discussion within EP before formally expressing its views. This political discussion has not yet taken place.

"The introduction of different forms of energy, such as heat or other sources of thermal energy, noise (including underwater noise) and other sources of sound energy, vibrations, electromagnetic fields, electricity or light, into the environment can cause substantial damage to the quality of air, water or soil or substantial damage to an ecosystem, animals or plants, or death or serious injury to persons. Various instruments of Union environmental law regulate on the introduction of energy into the environment, for example in the area of protection of water, the marine environment, noise control, waste management and industrial emissions. Therefore, in such cases, unlawful introduction of energy into the environment should constitute an offence under this Directive if it causes or is likely to cause substantial damage to the environment or human health."

In essence, this recital was already accepted at the meeting on 26 July, but subsequently to the meeting, the Commission presented an improved version, which is set out above. [2]

The Presidency takes a positive view on this revised text of the recital.

Q 1a : Member States are invited to indicate whether this (revised) recital is acceptable.

[2] The changes compared to the text set out in 11962/23 are marked here:

"The introduction of different forms of energy, such as heat or *other sources of thermal energy,* *noise* *(including underwater noise) and other sources of sound energy,* ~~*or*~~ ~~*seismic*~~ *vibrations, electromagnetic fields, electricity or light, into the environment can cause substantial damage to the quality of air, water or soil or substantial damage to* *an ecosystem,* *animals or plants, or death or serious injury to persons. Various instruments of Union environmental law regulate on the introduction of energy into the environment, for example in the area of protection of* *water,* *the marine environment, noise control,* *waste management* ~~*or*~~ *and industrial emissions. Therefore, in such cases,* *unlawful* *introduction of energy into the environment should constitute an offence under this Directive if it causes or is likely to cause substantial damage to the environment or human health."*

b) Harm/injury

At the JHA Counsellors meeting on 26 July, Member States expressed a clear view to continue using "injury", as in the 2008 Directive, and not use "harm", as proposed by the EP. The Presidency therefore defended that view during the technical meetings.

After intense discussions, the Parliament stated that it could agree to using "injury" in line 66 (and "aimed at" in line 67), provided that the Council would make two concessions:

- dropping "for the (ship-)owner" in Article 3(1)(g) (line 81); and

- agreeing that in both Articles 5 and 7, the sanctions which were put in the Commission proposal in points (a) and (b)[3], thus fines and the obligation to restore the environment, are sanctions that Member States should obligatory have in their tool box.

The Presidency rejected the package proposed by the Parliament, and referred the debate to the individual points. The Presidency suggests discussing these points at the relevant lines.

The Presidency assumes that if "injury" is taken, Member States continue to agree to the following recital:

> *"The term injury used in the definition of certain offences in this Directive should be understood in a broad sense, covering any form of physical harm to a person, including a change in body function or cell structure, temporary, fatal or chronic disease, malfunction of the body, deterioration of human physical health, but excluding mental health."*

c) Ecosystem

Following the meeting on 26 July, agreement was reached to use (only) the term "ecosystem".

[3] Lines 120 and 121 in Article 5, lines 137 and 138 in Article 7.

At the meeting on 26 July, Member States had agreed to the accompanying recital in doc 11962/23[4], but requested to clarify the meaning of an 'ecosystem'. The Commission therefore presented the following revised version of the recital (see notably the last sentence, in bold):

> *"The environment should be protected in a wide sense, as set out under Article 3(3) TEU and Article 191 TFEU, covering all natural resources - air, water, soil, ecosystems, including ecosystem services and functions, wild fauna and flora including habitats, as well as services provided by natural resources. Some criminal offences in this Directive include a qualitative threshold requiring that the conduct causes death or serious injury to any person or substantial damage to air, water or soil quality, or to* ***an ecosystem****, animals or plants. In order to protect the environment to the fullest extent possible, this qualitative threshold should be understood in a wide sense including, where relevant, substantial damage to fauna and flora, habitats, to services provided by natural resources and by ecosystems as well as to ecosystem functions.* ***An ecosystem should be understood as a dynamic complex of plant, animal, fungi and microorganism communities and their non-living environment, interacting as a functional unit, and should cover habitat types, habitats of species and species populations, including ecosystem services, through which an ecosystem contributes directly or indirectly to human wellbeing, and ecosystem functions, which refer to natural processes in an ecosystem.****"*

The Presidency also takes a positive view on this revised recital.

Q 1c : Member States are invited to indicate whether this revised recital is acceptable.

---

[4] The text of the recital as originally proposed was the following:

"*(9) The environment should be protected in a wide sense, as set out under Article 3(3) TEU and Article 191 TFEU, covering all natural resources - air, water, soil, wild fauna and flora including habitats - as well as services provided by natural resources. Some criminal offences in this Directive include a qualitative threshold requiring that the conduct causes death or serious [harm][injury] to any person or substantial damage to air, water or soil quality, or to animals or plants and their non-living environment, interacting as a functional unit. Since such damage may result in harm to ecosystems, including ecosystem services and functions, the qualitative threshold should be understood in a wide sense including, where relevant, substantial damage to fauna and flora, habitats and services provided by natural resources and ecosystems, as well as ecosystem functions.*

2) Offence related to products – Article 3 (1)(b) – line 67

The text for this provision as provisionally agreed – subject to conditions put by EP, see under point 1 b) above – is identical to the text of the general approach, with the addition of "energy" and "ecosystem":

> *"(b) the placing on the market, in breach of a prohibition or another requirement aimed at protecting the environment, of a product, the use of which results in the discharge, emission or introduction of a quantity of materials or substances,* ***energy*** *or ionising radiation into air, soil or water, which causes or is likely to cause death or serious injury to any person or substantial damage to air, water or soil quality, or to an* ***ecosystem,*** *animals or plants as a result of the product's use on a larger scale;"*

The Presidency assumes that Member States can accept this text.

On request of the EP, the Commission drafted an accompanying recital to explain the words "aimed at":

> *"This Directive defines as an offence the placing on the market, in breach of a prohibition or another requirement aimed at protecting the environment, of a product, the use of which results in the discharge, emission or introduction of a quantity of materials or substances, energy or ionising radiation into air, soil or water, which causes or is likely to cause substantial damage to the environment or human health as a result of the product's use on a larger scale. In this context, a prohibition or another requirement aimed at protecting the environment should refer to EU law and national law transposing such EU law which has, among its objectives or aims the protection of environment, including preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilisation of natural resource or combating the climate change, or promoting measures at international level to deal with regional or worldwide environmental problems. Indeed, if the sole objective of EU law concerns another area of EU law, for example protection of workers' health and safety, that is not covered under definition of this offence."*

The Presidency takes a cautiously positive view on this recital, but would propose to make some changes in the light of the *nullum crimen sine lege* and *lex certa* principles, by adding "declared" (and some drafting clarifications are also proposed):

> *"This Directive defines as an offence the placing on the market, in breach of a prohibition or another requirement aimed at protecting the environment, of a product, the use of which results in the discharge, emission or introduction of a quantity of materials or substances, energy or ionising radiation into air, soil or water, which causes or is likely to cause substantial damage to the environment or human health as a result of the product's use on a larger scale. In this context, a prohibition or another requirement aimed at protecting the environment should refer to Union law and national law transposing such Union law which has, among its* ***declared*** *objectives or aims the protection of environment, including preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilisation of natural resource or combating the climate change, or promoting measures at international level to deal with regional or worldwide environmental problems.* ~~*Indeed*~~ ***On the contrary****, if the* ~~*sole*~~ *objective of Union law concerns* ***only one or more*** ~~*an*~~*other area****s*** *of Union law, for example protection of workers' health and safety,* ***but not an area which falls under a declared objective of Union policy on environment****,* ~~*that*~~ ***the conduct should*** ~~*is*~~ *not* ***be*** *covered under* ~~*definition of*~~ *this offence."*

Q 2: Member States are invited to indicate if they can accept this proposed recital, in the version as proposed by the Presidency.

3) The offence in Article 3.1 g (3.2 g in the Council mandate) – shipowner – line 81

At the meeting on 26 July, the Presidency had raised the issue of the reference to 'shipowner' in Article 3(1) under g) in the light of opposition by the Commission and the EP against that reference. They had argued that such deletion would be appropriate i.a. to ensure consistency in the overall architecture of the Directive.

In 11962/23, the Presidency had defended to keep the reference 'for the (ship-)owner' and had provided several legal arguments. On that basis, delegations at the meeting on 26 July had agreed to maintain the said reference in the text.

Consequently, at the technical meeting on 6 September, the Presidency strongly defended the inclusion of the reference to 'shipowner' in Article 3(1) under g). EP and the Commission, however, continued to advocate that the reference should be deleted, while the Commission showed readiness for a compromise. The EP not only repeated the argument of the consistency in the architecture of the Directive, but also stated that the Directive should be made future proof.

As to the latter, while EP acknowledged that the obligations set out in Regulation 1257/2013 *currently* only lay on the shipowner – in the broad sense of Article 3(1), point 14, thereof[5] – it argued that in the future, the obligation could be made wider, through a revision of Regulation 1257/2013 aimed at closing the current loopholes, provided that the obligation in substance remains the same.[6]

In order to allow such later widening of the scope of the obligation, the EP proposed to stick with the text of the Commission proposal (possibly with an extra explicative addition, see between brackets, which comes from the Council general approach):

> *(g) the recycling of ships falling within the scope of Regulation (EU) No 1257/2013 of the European Parliament and of the Council[1], without complying with the requirements referred to in [7] Article 6(2), point (a) of that Regulation [, which impose recycling at ship recycling facilities which are included in the European List established under Article 16 of that Regulation;]*

The EP has said that if such a text is accepted, they can be flexible on other points, see above point 1 b) (at page 5).

---

5 Art. 3(1), point 14 of Regulation 1257/2013 reads as follows:
"'ship owner' means the natural or legal person registered as the owner of the ship, including the natural or legal person owning the ship for a limited period pending its sale or handover to a ship recycling facility, or, in the absence of registration, the natural or legal person owning the ship or any other organisation or person, such as the manager or the bareboat charterer, who has assumed the responsibility for operation of the ship from the owner of the ship, and the legal person operating a state-owned ship;"

6 See also recital 10 of the Council general approach.

7 In the Commission text the word "of" is used instead of "referred to in".

While the Presidency still considers that it would be clearer to mention that the offence set out in point (g) refers to the "ship owner", the Presidency also observes that the scope *ratione personae* of the obligations set out in Regulation (EU) No 1257/2013 is limited to the ship owner (see Article 6 of the Regulation). That would not be changed with the text of point g) as proposed by EP and the Commission. That text, which is indeed consistent with the architecture of the Directive, might therefore also be acceptable.

In order to make the situation clearer, it could be considered to insert text in the recitals along the following line:

> *"Concerning the offence on recycling of ships falling within the scope of Regulation (EU) 1257/2013 of the European Parliament and of the Council, it should be noted that in the current state of Union law, the obligations set out in that Regulation only lay on ship owners, as defined in Article 3(1), point 14, of that Regulation."*

Q 3: Member States are invited to indicate if they could accept the text as proposed by the Commission, where appropriate combined with the recital-text as proposed above.

4) The offence of deforestation – Article 3(1)(n) – line 88

The text of Article 3(1)(n) currently stands as follows:

> *(n) the placing or making available on the Union market or the export from the Union market of relevant commodities and relevant products in breach of the prohibition set out in Article 3 of Regulation (EU) 2023/1115 of the European Parliament and of the Council1 of 31 May 2023, except for cases where the conduct concerns a negligible quantity;*

It is assumed between the negotiating parties that this text is commonly agreeable.

The text of the accompanying recital, however, still has to be agreed upon. Following the meeting on 26 July, the Presidency received suggestions from some Member States, and also the Commission made a proposal, which it further refined in the light of the proposals from the Member States.

The text of the recital as the Commission currently proposes it, which EP can accept, reads as follows:

> *"With regard to the determination of whether the quantity of a relevant product or relevant commodity associated with deforestation or forest degradation is negligible or non-negligible, Member States could take into account for example the quantity in net mass, or, where applicable, volume or number of items. Such assessment should also take into account, where relevant, other criteria listed in this Directive, including the conservation status of the species concerned or the cost of restoration of environmental damage."*

Q 4: Member States are invited to indicate if this text for the recital accompanying Article 3(1)(n), as proposed by the Commission, is acceptable.

5) Catch-all provision – Article 3(1a) – Line 94c

In line with the discussions at the JHA Counsellors meeting on 27 June and 26 July, the Presidency proposed to the EP to deal with the suggestion for a catch-all provision under the aggravating circumstances (line 153 and further). The Presidency proposed a text, see 11962/23. The EP is still considering the matter.

6) Additional criminal or non-criminal sanctions or measures – Article 5(5) – Lines 119-126 and 136-147

The issue in this point concerns the nature of the additional criminal or non-criminal sanctions or measures: should they all be available in the Member States on an obligatory basis ("shall"), or should they be available on an optional basis ("may").

As a compromise, the EP suggested making the first two sanctions or measures [(a) obligation to reinstate the environment and b) fines] obligatory, and the others optional, both in lines 119 and 136.[8] The EP sees this issue in the context of a trade-off, mentioned under point 1 b) above.

[8] This line of thinking had earlier been proposed within the Council by the SE Presidency.

The Commission also refined the wording of these two (obligatory) paragraphs, and proposed a refined text for the optional point g (= new point f) with – at the request of the Member States – an accompanying recital to explain the concept of "public interest".

To be noted also that during the discussions on this issue, it was pointed out that while it is true that the most important thing is that the measures are imposed, whatever their nature (criminal or non-criminal), the idea – in line with the legal basis of the Directive – is that they are imposed in criminal proceedings or as a result thereof.

The text in lines 119-126 could then read as follows: [9]

> *"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. [Line 119]*
>
> *The sanctions and measures* ***which must be available [in criminal proceedings] shall*** *include:*
>
> *(a) obligation to reinstate the environment within a given period, provided that the damage is reversible, or, the obligation to compensate for the damage to the environment if the damage is irreversible or if the perpetrator is not in a capacity to carry out such a reinstatement. [Line 120]*
>
> *(b) fines, which shall be proportionate to the seriousness of the conduct and to the financial and other individual circumstances of the natural person concerned. Where relevant, due account shall also be taken of the gravity and duration of the damage caused to the environment and of the financial benefits generated from the offence. [Line 121]*
>
> *The sanctions and measures* ***which may be available [in criminal proceedings] can include****:*
>
> *(c) exclusions from access to public funding, including tender procedures, grants, concessions and licences;*[10] *[Line 122]*

[9] The text in line 137 should be slightly adapted.

[10] Agreed text.

(d) disqualification from exercising a leading position within a legal person of the type used for committing the offence; [11] *[Line 123]*

(e)(ex f) temporary bans on running for public office; [12] *[Line 125]*

(f) (ex g) where there is a public interest, publication of all or part of the judicial decision that relates to the criminal offence committed and the sanctions or measures imposed following a case-by-case assessment. The personal data of convicted persons may be published only in duly justified exceptional cases. [Line 126] [13]

[11] Agreed text.

[12] Agreed text.

[13] In line with this paragraph f) (ex g), a similar but slightly modified text is being considered for line 147 with respect to legal entities.

The proposed accompanying recital for point f, to explain "public interest", would read as follows:

> *"The publication of personal data of convicted persons contained in judicial decisions should only occur in duly justified exceptional cases following a case-by-case assessment, weighing the public interest against the rights to privacy and protection of the personal data of the convicted person as provided for in Articles 7 and 8 of the Charter respectively. Therefore, the publication of personal data should only be considered in cases of serious offences and where strong dissuasive effects are needed. The case-by-case assessment could take into account elements such as the seriousness of the damage caused to the environment and/or the harm suffered by natural persons, whether the offence has been committed repeatedly in a specific environmental sector, whether the offence was committed by or for the benefit of a large corporation active in several Member States or an important market player in the specific sector. Any processing of personal data in the context of this Directive should comply with the applicable Union and Member States data protection legislation, in particular Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and Directive (EU) 2016/680. on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data. This includes an obligation for Member States to provide for appropriate safeguards for the rights and freedoms of data subjects when publishing all or part of the judicial decision that relates to the criminal offence committed and the sanctions or measures imposed."*
> *[Line 126]*

The assessment of the Presidency is that the proposals could be acceptable, since it is likely that most, if not all Member States, have already the "reinstatement of the environment" and "fines" as possible sanctions or measures in their legal orders. The "reinstatement of the environment" is also an obligation according to the Environmental Liability Directive 2004/35/EC.

The Presidency reminds delegations that, as said before (see point 1 b, page 5 above), the Parliament offered to accept the using "injury" in line 66 (and "aimed at" in line 67) in exchange of two concessions of the Council: accepting the mandatory introduction of fines and the obligation to restore the environment, and dropping "for the (ship-) owner" in Article 3(1)(g) (line 81). The Presidency considers however that the package proposed by the EP is not balanced, since the Council is expected to give more than it gets.

In this respect, the Presidency recalls that it has already suggested to delegations (see point 3), page 8 above) to accept the Parliament's proposal on the ship-owner, with the addition of a recital, concession which balances the acceptance offered by the Parliament on "injury".

The Presidency suggests, in order to compensate the possible Council's concession as regards fines and reinstatement of the environment, to request the EP to accept the Council's text on the issue of penalties in Articles 5(2)-5(4)and in 7(3a)-7(3b), recalling that the framework of penalties is one of the most important political issues for the Council, where the room for manoeuvre is practically non-existent.

Q 6: Member States are invited to indicate if the above proposals for lines 119-126 and 136-147, including the accompanying recital for point f) (ex g) [line 126], are acceptable.

7) Civil liability – Article 6(1) point ca) (included by EP) – Line 131a

As said at the meeting on 26 July, the EP agreed to delete the text in the legislative part and to find a solution through a recital.

The text as agreed at the meeting on 26 July was proposed to the EP and the Commission. Following suggestions by the latter, slight changes were made to the text, which now reads as follows:

> *"This Directive should not preclude the civil liability of a legal person in accordance with national law or the obligation of a legal person to compensate for harm or damage caused as a result of a specific offence referred to in this Directive in accordance with Union or national law."*

Q 7: Member States are invited to indicate if this revised text for a recital, replacing the operative part proposed by Parliament, is acceptable.

8) Aggravating circumstances – Article 8 – line 153 and further

a) addressing the catch-all provision through a super aggravating circumstance – line 153

See above: following the meeting on 26 July, the Presidency has proposed to the Parliament to find a compromise solution on the catch-all provision through an aggravating circumstance. The Presidency has proposed the text as set out in 11962/23. [14]

Before considering whether it is possible to improve the drafting of this text (e.g., by putting the text in a separate article or by making clearer what difference it would make in the level of penalty), the Presidency suggests awaiting the reaction of the EP on the text as proposed.

On the other hand, should the Parliament accept the suggested approach, in addition to adjusting the text, various provisions of the proposal will have to be revised to ensure that the text is consistent with the Directive and does not duplicate any of its current provisions.

---

[14] Article 8, first paragraph (new text in **bold**) :

*"**In so far as the following circumstances do not already form part of the constituent elements of the criminal offences referred to in Article 3, Member States shall take the necessary measures to ensure that, in relation to the offences referred to in Articles 3 and 4, the fact that the offence concerned caused severe and widespread, severe and long-term or severe and irreversible damage to the quality of air, soil or water, biodiversity, ecosystems, or to animals or plants may be regarded as aggravating circumstance when determining the appropriate level of sanction.***

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

b) lines 160 – 163

The EP position on these lines is as follows:

"- EP agrees to the Council wording on line 159;

- EP insists on line 160 (COM proposal);

- EP insists on line 161 (COM proposal) but, if the Council agrees, is ready to agree to the deletion of line 162;

- EP awaits a new Council proposal on line 163 (which the EP understands that it would be kept as the EP proposed with a recital as suggested by the Presidency)."

So, basically, EP accepts the deletion of line 162, it insists on lines 160, 161 and 163, and proposes that Council makes a proposal for a recital on line 163.

Before examining these proposals from the EP, the Presidency observes that according to line 153 as in the Council text – to which the Presidency will stick – Member States retain flexibility concerning the aggravating circumstances. In fact, line 153 reads as follows:

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

This could be strengthened by a recital along the following lines (which is inspired by texts from other current proposals, and which also aims at addressing the quest by EP for a recital accompanying line 163):

> *"(xx) Member States should provide for the possibility of at least one of the aggravating circumstances provided for in this Directive in accordance with applicable rules established by their legal system on aggravating circumstances. In any case, it should remain within the discretion of the judge or the court to determine whether to increase the sentence, taking into account all the circumstances of the individual case."*

On another hand, the Presidency draws delegations' attention to the fact that lines 156 and 163 raise an issue which is of a horizontal nature in EU criminal law instruments: facts that are considered as an aggravating circumstance of a specific offence but which, at the same time, can be constitutive of a separate offence other than the latter. The traditional case is that of participation in a criminal organisation – line 156 – but the same applies to the aggravating circumstance in line 163. Logically, the principle of *ne bis in idem* prevents the same facts from being taken into account twice, once to aggravate an offence and once to punish them as a different offence from the previous one.

This situation has already been addressed in a number of existing instruments, and in recent proposals, e.g. the PIF Directive (recital 19), the non-cash fraud Directive (recital 19), and the proposal for a Directive criminalising the violation of Union restrictive measures (recital 12). If the proposed aggravating circumstances are maintained, the above situation would have to be addressed by a recital along the lines of those mentioned before, which could read as follows:

> *"(yy) The notion of aggravating circumstances should be understood either as facts allowing the national judge or court to pronounce a higher sentence for the same offence than the one incurred without these facts, or as the possibility of retaining several offences cumulatively in order to increase the level of the penalty. Therefore, Member States should not be obliged to provide for specific aggravating circumstances where national law provides for separate criminal offences and this may lead to more severe sanctions. When an offence referred to in this Directive has been committed in conjunction with another offence referred to in this Directive by the same person, and one of those offences de facto constitutes a necessary element of the other, a Member State may, in accordance with general principles of national law, provide that such conduct is regarded as an aggravating circumstance to the main offence."*

Q 8 a: Member States are invited to indicate if they could accept these recitals.

Looking in this light at the proposals from the EP, the Presidency further observes as follows:

As to line 160, generating profits, the Commission proposal reads as follows:

> *"(g) the offence generated or was expected to generate substantial financial benefits, or avoided substantial expenses, directly or indirectly;"*

At the meeting on 26 July, the Presidency stated already that it sees some merits in reinstating the text in the Directive. The Presidency is still of that opinion, also since it remains within the discretion of the judge or the court to determine whether to increase the sentence because of this aggravating circumstance, taking into account all the circumstances of the individual case.

Only a few Member States reacted on this point at the meeting on 26 July.

Q 8 b: Member States are invited to indicate if reinserting this text in the Directive would be acceptable.

As to line 161, obligations not fulfilled, this line reads as follows in the Commission proposal:

> *"(h) the offender's conduct gives rise to liability for environmental damage but the offender does not fulfil their obligations to take remedial action under Article 6 of Directive 2004/35/EC[1];"*

Also on this point, only a few Member States reacted on this point at the meeting on 26 July.

As a result of the discussions, it was pointed out that the crucial issue is to promote environmental restoration and that the most appropriate way to do so is the mitigating circumstance provided for in line 166. However, the Parliament insisted on the need for the aggravating circumstance referred to above.

Q 8 c: In the light of the above, Member States are invited to indicate whether they insist on maintaining the deletion of this aggravating circumstance or could agree to reintroduce it

As to line 163, active obstruction, this line reads as follows in the Parliament's proposal:

> "(j) the offender actively obstructs inspection, custom controls or investigation activities, **destroys evidence**, or intimidates or interferes with witnesses or complainants;

Also on this point, the Presidency would appreciate hearing from more Member States whether reinserting this text would be acceptable. In the Presidency's view, the recital proposed above (see recital yy, point 8 b), p. 17) would accommodate the concerns of those Member States that have indicated that obstruction of justice is an autonomous offence under their national law.

Q 8 d: In the light of the proposed recital, Member States are invited to indicate if they could accept reinsert the text in line 163.

9) Freezing and confiscation – Article 10 – Line 171

At the meeting on 26 July, the Member States accepted adding "trace, identify" in line 171, in view of the forthcoming Directive on asset recovery and confiscation, which includes tracing and identifying of assets. They stated however that they could not accept the new sentence added by EP.

The EP indicated the following position:

"On line 171 the Parliament agrees to use the Council wording with the words "tracing, identifying" added (see in the 4CT), drop the word "all" and turn the last sentence of its position into a recital

- in exchange for

keeping the concept of "specialisation" of bodies in a revised version of line 204 (which the Commission committed to work on) in the Article."

So basically, agreement on line 171 is very close. As for the trade-off suggested by the EP, the Presidency refers to the texts in line 204 (Article 17/16, "resources"). In addition, the Presidency notes that the new freezing and confiscation directive includes asset tracing activities, so that the concession offered by the Parliament is not such thing.

10) Jurisdiction – Article 12 – Lines 188, 189, 189a

a) Damage – Line 188

Line 188 currently reads as follows in the general approach:

> *(c) the damage **forming part of the constituent elements of the offence** occurred on its territory;*

The **words** in bold were added by the Council.

The Parliament has asked for further explanation from the Council, including possible examples of what changes are brought about by the additional words introduced by the Council.

The Presidency proposes to give the following explanation:

> *"The words 'forming part of the constituent elements of the offence' have been inserted in order to ensure that there is a sufficient link between the damage at hand and the alleged environmental crime. Such link is crucial in order to allow Member States to have jurisdiction."*

Q 10: Member States are invited to indicate if they can accept the explanation given by the Presidency.

b) Swap – lines 189, 189a

The EP took note of the fact that the Council is not in favour of swapping the Council position on line 189 for the EP position on line 189a.

11) Protecting persons who report environmental offences or assist the investigation ('Whistle-blowers') – ex Article 13/now Article 14 – Lines 197, 198a

a) Article 13(1) – Line 197

After (provisional) agreement was reached on paragraph 1, the Commission asked to remove 'any' before 'person reporting offences' in line 197 of the 4 column table (Article 13(1)). The reasoning is the following:

'Apart from the fact that in this phrase it may be redundant to say "any person", in the context of the negotiations of other instruments, some Member States have voiced concerns as regards this type of wording since it could enlarge the personal scope of the Whistleblowing Directive (from whistle-blowers as defined in the Directive to any persons). While we have repeatedly explained that these additional measures of assistance are in addition and outside the scope of the Whistleblowing Directive, deleting the word "any" would help to clarify their doubts.'

Q 11a: Member States are invited to indicate if they can accept deleting "any" before "persons" in line 197.

b*) Article 13(2a) – Line 198a*

As regards the proposed text in line 198a, the EP accepts turning the text into a recital (25a).

The Commission proposed the following text (Option 1), which the EP can accept :

"(25a) Directive (EU) 2019/1937 of the European Parliament and of the Council on the protection of persons who report breaches of Union law obliges Member to establish internal and external reporting channels and to diligently follow up on such reports and provide protection against retaliation, if the conditions established therein are met. These obligations are without prejudice to the power of Member States to accept and follow-up also on anonymous reports through these channels. Given the public interest in ensuring an effective investigation, prosecution and adjudication of environmental criminal offences, Member States should consider to enable persons to report environmental offences anonymously under the conditions of Directive (EU) 2019/1937, if this possibility does not yet exist in the Member States."

The Commission explained that the recital should not create a parallel reporting channel outside of what is regulated under the Whistle-blowers (WB) Directive. The WB Directive already allows for anonymous reporting, also for persons that are not WB in the strict sense. However, persons, who are not WB and who would report anonymously through the same channel would not enjoy the protection rights, according to the WB Directives, as they do not have to fear retaliation from employers.[15]

If Member States cannot accept the text proposed by the Commission, they are invited to indicate if they can accept the Presidency proposal (Option 2), consisting of the EP text in line 198a, but with "shall" replaced by "should":

> *"(25a) Member States should assess the need to create instruments in accordance with their national legal system to enable persons to report environmental offences anonymously, where such instruments do not yet exist."*

Q 11b : Member States are invited to indicate if they can accept the recital in the form of Option 1 or, alternatively, Option 2.

[15] The Commission underlined that the WB Directive already allows Member States to consider assessing the need to accept and follow-up on anonymous reports, including as regards environmental offenses. The Commission referred in this context to Article 6(2) of the WB Directive, which provides as follows:

2. Without prejudice to existing obligations to provide for anonymous reporting by virtue of Union law, this Directive does not affect the power of Member States to decide whether legal entities in the private or public sector and competent authorities are required to accept and follow up on anonymous reports of breaches.

According to the Commission, if Member States decide to accept anonymous reports, all the requirements as regards the handling of this reports should apply. See also Art. 6(3) of the WB Directive:

3. Persons who reported or publicly disclosed information on breaches anonymously, but who are subsequently identified and suffer retaliation, shall nonetheless qualify for the protection provided for under Chapter VI, provided that they meet the conditions laid down in paragraph 1.

12) Prevention – ex Article 15/now Article 16 – Line 202

During the technical meetings on 1 and 6 September, a fusion was made of the texts of the EP and of the Council in line 202. The text as proposed now reads as follows:

> *"Member States shall take appropriate action, such as information and awareness-raising campaigns targeting relevant stakeholders both from the public and private sector and research and education programmes, aimed at reducing overall environmental criminal offences, raising public awareness and reducing the risk of an environmental criminal offence. Where appropriate, Member States shall act in cooperation with relevant stakeholders."*

The Presidency takes a positive view on this text, but would proposes modifying in the last sentence "relevant stakeholders" by "these stakeholders", so that the text reads as follows:

> *"Member States shall take appropriate action, such as information and awareness-raising campaigns targeting relevant stakeholders both from the public and private sector and research and education programmes, aimed at reducing overall environmental criminal offences, raising public awareness and reducing the risk of an environmental criminal offence. Where appropriate, Member States shall act in cooperation with* ***these*** *stakeholders."*

Q 12 : Member States are invited to indicate if they can accept the text in line 202 as slightly refined by the Presidency.

13) Resources – Article 17 (ex Article 16) – Line 204

The Parliament is keen on keeping a reference to specialisation (see above point 9, "freezing and specialisation"). In that light, the Commission has reformulated the text in line 204 (see notably the last sentence in bold), which – with a small refinement of EP – reads as follows:

"Member States shall ensure that national authorities which detect, investigate, prosecute or adjudicate environmental offences have a sufficient number of qualified staff and sufficient financial, technical and technological resources necessary for the effective performance of their functions related to the implementation of this Directive. ***Member States shall, in accordance with national law, assess the need to strengthen specialisation of these authorities in the area of environmental criminal law.****"*

The Commission suggests the following accompanying recitals 27 and 28, largely based on the text of the Council general approach:

"(27) Lack of resources and enforcement powers for national authorities which detect, investigate, prosecute or adjudicate environmental criminal offences creates obstacles for the effective prevention and punishment of environmental crimes. In particular, the shortage of resources is capable of preventing authorities from taking any action at all or limiting their enforcement actions, allowing offenders to escape liability or to receive punishment does not correspond to the gravity of the offence. Therefore, minimum criteria concerning resources and enforcement powers should be established."

"(28) The effective functioning of the enforcement chain depends on a range of specialist skills. As the complexity of the challenges posed by environmental offences and the technical nature of such crime require a multidisciplinary approach, a high level of legal knowledge, technical expertise and financial support as well as a high level of training and specialisation within all relevant competent authorities are necessary. Member States should provide training appropriate to the function of those who detect, investigate, prosecute or adjudicate environmental crime. Member States should, in accordance with national law, assess the need to strengthen specialisation of these authorities in the area of environmental offences. In particular, to maximise the professionalism and effectiveness of enforcement chain, Member States should also consider assigning specialised investigation units, prosecutors and criminal judges to deal with environmental criminal cases. General criminal courts could provide for specialised chambers of judges. Technical expertise should be made available to all relevant enforcement authorities."

The Presidency takes a positive view, given the fact that for the potentially more intrusive aspects in this text, more flexible words such as "should consider" or "could provide" have been used.

Q 13 : Member States are invited to indicate if they can accept the text in line 204, accompanied by recitals 27 and 28 as proposed by the Commission.

14) Article 19a(1) – Cooperation by Union bodies – Line 216b

At the technical meetings on 1 and 6 September, the Presidency expressed the position of the Council in line with the indications given by delegations at the meeting on 26 July.

The EP accepted to make the text more flexible, and the following text emerged for line 216b:

> *"Where the environmental offences are suspected to be of a cross-border nature, the competent authorities of the Member States shall consider referring the information related to these cases to appropriate competent bodies. Without prejudice to the rules on cross-border cooperation and mutual legal assistance in criminal matters, the Member States, Eurojust, Europol, the European Public Prosecutor's Office, the European Anti-Fraud Office (OLAF) and the Commission shall, within their respective competences, cooperate with each other in the fight against the criminal offences referred to in Articles 3 and 4. To that end Eurojust shall, where appropriate, provide such technical and operational assistance as the competent national authorities need to facilitate coordination of their investigations. The Commission may, where appropriate, provide assistance."*

Accompanying recital as proposed by the Commission:

> *"Without prejudice to the rules on cross-border cooperation and mutual legal assistance in criminal matters, there is a need for appropriate provision to be made for cooperation to ensure effective action against the criminal offences defined in this Directive, including technical and operational assistance provided, where appropriate, by Eurojust to the competent national authorities as they may need to coordinate their investigations. The Commission could, where appropriate, provide assistance. Such assistance should not entail the participation of the Commission in the investigation or prosecution procedures of individual criminal cases conducted by the national authorities and should not be understood as including financial support or any other budgetary commitment by the Commission."*

The Presidency takes a positive view on these new texts, which seem to correctly reflect the competences of the relevant institutions/bodies, notably Eurojust and the Commission.

Q 14 : Member States are invited to indicate if they can accept the text in line 216b, accompanied by the recital as proposed by the Commission.

15) Article 20 – National strategy – Lines 217-226

At the technical meetings on 1 and 6 September, Article 20 on a national strategy was discussed at length. The Presidency defended the general approach. While the EP and the Commission could understand that the Council was unable to accept a very detailed provision, they considered that some common objectives should be set out in order to give the national strategies added value.

In the end, the following text emerged:

National strategy [Line 217]

"1. Member States shall establish and publish a national strategy on combating environmental criminal offences by [one year after the transposition period of this Directive is over]. Member States shall take measures to implement such strategy without undue delay. The national strategy shall as a minimum address the following: [Line 218]

(a) the objectives and priorities of national policy in this area of offences, including in cross-border cases, and arrangements for regular evaluation of their attainment; [Line 219]

(b) the roles and responsibilities of all the competent authorities involved in countering this type of offence, including in terms of coordination and cooperation between the competent authorities, competent EU bodies and of assistance of European networks working on matters directly relevant to combating environmental offences, including in cross-border cases; [Line 220]

(c) the resources allocated and how specialisation of enforcement professionals will be supported, and evaluation of needs. [Line 223]

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." [Line 226]*

The Presidency considers that this could be acceptable, provided that the EP shows flexibility on the issue of penalties in Articles 5(2)-5(4) and in 7(3a)-7(3b), see also point 6 above (page 5): the text of the general approach on these points should be maintained.

Q 15 : Member States are invited to indicate if they can accept the text for Article 20 on "National strategy", as set out in lines 217-226.

16) Article 21 – Data collection and statistics – Lines 227-240

This Article was discussed intensively at the technical meetings on 1 and 6 September 2023. The Presidency underlined that excessive administrative burden for Member States should be avoided, while EP and the Commission insisted that the collection of data and statistics should be good enough to help the Commission (and the Member States) in the proper application of the Directive.

In the end, the following text was put on the table, which EP can accept:

"Article 21

Data collection and statistics

1. *Member States shall ensure that a system is in place for the recording, production and provision of anonymised statistical data measuring the reporting, investigative and judicial phases concerning the offences referred to in Articles 3 and 4 in order to monitor the effectiveness of their systems to combat environmental criminal offences. [Line 228]*

2. *The statistical data referred to in paragraph 1 shall, as a minimum, include existing data on: [Line 229]*

   (a) the number of offences registered and adjudicated by the Member States; [Line 229a]

(aa) the number of dismissed court cases, including due to the expiry of the limitation period; [Line 229b]

(b) the number of natural persons that are [Line 229c]

(i) prosecuted,

(ii) convicted;

(c) the number of legal persons that are [Line 229d]

(i) prosecuted,

(ii) convicted or fined;

(d) the types and levels of sanctions imposed.

3. *Member States shall ensure that a consolidated review of their statistics is published at least every three years. [Line 238]*

4. *Member States shall annually transmit to the Commission the statistical data referred to in paragraph 2 in a standard, easily accessible and comparable format established in accordance with Article 22 within 36 months of the entry into force of this Directive. [Line 239]*

5. *The Commission shall at least every three years 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. [Line 240]"*[16]

[16] The Commission has a scrutiny reservation on this paragraph.

Accompanying recital linked to line 229 (existing data) as proposed by the Commission (recital 32):

> *"(32) To effectively tackle the criminal offences referred to in this Directive, it is necessary that competent authorities in the Member States collect accurate, consistent and comparable statistical data on environmental offences. Member States should therefore be obliged to ensure that an adequate system is in place for the recording, production and transmission of existing statistical data on the offences referred to in this Directive. Those statistics should be used to serve the operational and strategic planning of enforcement activities, to analyse the scale of and trends in environmental offences, as well as for providing information to citizens. Statistical data on criminal proceedings on environmental offences can exist at a centralised or decentralised level and be in possession of different authorities, such as police, prosecution offices, courts, specialised agencies, ministries or national statistical offices. Member States should transmit to the Commission relevant statistical data on environmental crime proceedings. The Commission should regularly assess and publish the results based on the data transmitted by the Member States."*

Proposal for a recital from COM linked to line 229c on types and levels of sanctions:

> *"The level of detail of statistical data on types and levels of sanctions – including the level of detail of the related crime categories – that should be transmitted to the Commission should be determined under the Committee procedure provided for in this Directive."*

The Presidency takes a cautiously positive approach on the provisions of the Article as revised. It is good and important that the "existing data" remain in the text. As to the new point 2 (aa), "the number of dismissed court cases, including due to the expiry of the limitation period;" [Line 229b], which was a strong request of the EP, the Presidency assumes that it should not constitute an extra burden, considering that the information could probably largely be derived from point (a) "the number of offences registered and adjudicated by the Member States;" [Line 229a] *a contrario*.

The Presidency considers however that in the proposed recital 32 it could be made clearer that relevant statistical data (on environmental crime proceedings) <u>from existing data</u> should be transmitted.

Proposal for additional words in the final but last sentence of recital 32:

> *"Member States should transmit to the Commission relevant statistical data on environmental crime proceedings* ***from existing data****."*

As to the other recital, on types and levels of sanctions, the Presidency hopes to hear the opinion from the Member States.

Q 16 : Member States are invited to indicate if they can accept the text for Article 21 on "Data collection and statistics", as set out in lines 227-240, and the accompanying recitals.

17) Article 22 – Implementing powers – Lines 246 and 247

There is agreement on Article 22, apart from point 2 c) on the "common understanding of procedural stages". The Presidency objected the point, but EP and COM would like to maintain it in some format. In this light, the EP proposed the following compromise text under Article 22 (2) letter d) - line 247:

> *"a common reporting format enabling comparison of procedural stages".*

Q 17 : Member States are invited to indicate if they can accept the text proposed by the EP for line 247.

18) Article 24 – Transposition – Line 253

The Commission proposed 18 months as transposition period, the Council had put 30 months. During the debate, a 24-month period was mentioned as an intermediate solution.

Concluding remarks

The Presidency intends discussing the above issues during the JHA Counsellors + Experts meeting on 18 September 2023.

The Presidency thanks Member States in advance for their cooperation and for any flexibility they can show during the meeting.