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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 12222/22

At the meeting of the COPEN Working Party on 28 September 2022, the Presidency presented a new draft text on Articles 5 - 29 (12222/22). Subsequently to the meeting, the Presidency invited Member States to provide the following information:

- A) written contributions / drafting suggestions on the open Articles;
- B) answers to specific questions on Articles 5 and 7.

The input received has been set out in the Annex A (from page 3) and Annex B (from page 14), respectively.

Further, since several Member States asked for data on the current sanction levels in their written comments, the attention of delegations is drawn to these links:

The information on sanctions in other Member States:

The evaluation report of the original Environmental Crime Directive (2008/99/EC) is here:

https://ec.europa.eu/info/news/evaluation-environmental-crime-directive-2020-nov-05_en.

The table with sanction levels in Member States is here on page 206:

https://ec.europa.eu/info/sites/default/files/evaluation_-_swd2020259_-_part_2.pdf.

ANNEX A

written contributions / drafting suggestions by Member States on the open Articles

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AUSTRIA

AUSTRIA

Austria thanks the Presidency and the General Secretariat for the opportunity to provide written comments on the proposal for a Directive on the protection of the environment through criminal law and replacing Directive 2008/99/EC.

I. Ad Recital 14 and Art. 5 paras. 2 and 3:

Austria can **support para. 2 of Art. 5** as proposed by the Presidency.

We are, however, **not in favour of the proposed para. 3** for two reasons: Firstly, while we consider it important to harmonize the criminalization of grossly negligent acts in the field of environmental law (as foreseen by Art. 3 para. 3 of the partial general approach), we do not think that it is necessary to provide for minimum maximum sanctions with respect to such grossly negligent conduct. Secondly, we consider the proposed minimum maximum penalty of 5 years as too high (by way of comparison, in Austria, the penalty for grossly negligent manslaughter is three years imprisonment; Section 81 paras. 1 and 2 of the Austrian Criminal Code). Hence, our concerns regarding para. 3 are of a systematic nature and are not dispelled by the proposed changes to recital 14.

In summary, we propose to **keep para. 2 in the text and to delete para. 3**. As an alternative to such deletion, a minimum maximum penalty of 3 years imprisonment could be considered for para. 3.

II. Ad Recital 27 and Art. 15:

Recital 27:

To clarify that Member States are only required to grant special procedural rights to members of the public concerned when such procedural rights exist in equivalent situations concerning other criminal offenses, the last sentence should read as follows:

"However, when such procedural rights for members of the public concerned exist in a Member State in equivalent situations concerning other criminal offences, ..."

Art. 15:

It is doubtful whether the phrase "in accordance with their national legal system" in Art. 15 establishes a sufficient link to Recital 27 ("This Directive should not require Member States to introduce any specific procedural rights standing for the members of the public concerned."). Rather, according to the wording of the article, it is to be assumed that Art. 15 establishes a (unconditional) general obligation to create procedural participation opportunities for the public concerned and thus goes beyond the intention of EC 27 as well as the corresponding comment by the European Commission. In order to meet the stated objective, Article 15 could be worded as follows:

“Member States shall ensure that, ~~in accordance with their national legal system,~~ the 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 requirements under national law (public concerned) have appropriate rights to participate in proceedings concerning offences referred to in Articles 3 and 4, when such procedural rights for members of the public concerned exist in a Member State in equivalent situations concerning other criminal offences.”

BELGIUM

- Art. 11: limitation period

After careful consideration we would, once again, like to clearly underline that we are very much in favor 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 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.

In the spirit of compromise, taken into account the position of the other member states, we are willing to accept the revised text of article 11. However, we are very reluctant to any further weakening of this text.

- Art. 12: jurisdiction

Given the discussions during the last COPEN, BE would once again, like to underscore that it is evident that a Member State on whose territory environmental damage occurs resulting from an environmental crime must also have jurisdiction to prosecute the criminal offence. Therefore, BE wants 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*'. However, in the spirit of compromise and taking into account the recent discussions, we can be open to further exploring connecting this principle to the text in point a of the same paragraph.

FINLAND

Article 13 – Investigative tools

The reference to tools which are used in countering organized crime seems problematic as there are many sorts of offences which have to do with organized crime; not all of them require special investigative tools.

We suggest deleting the second sentence of the article or reformulating it as follows:

‘Where these offences are serious, special investigative tools such as those which are used in countering organized crime **may** be available.’

We also support adding the reference to the principle of proportionality to the article.

FRANCE

Article 12 :

FRENCH :

- Au (c) du paragraphe 1, les autorités françaises préfèrent la formulation rédactionnelle suivante : « *the damage, as required under the constituent elements of the offence, occurred on its territory* ».
- Par souci de compromis, les autorités françaises **abandonnent leur demande de suppression du paragraphe 3.**

ENGLISH:

- In (c) of paragraph 1, the French authorities prefer the following wording: “*the damage, as required under the constituent elements of the offence, occurred on its territory*”.
- In a spirit of compromise, the French authorities **abandon their request to delete paragraph 3.**

Article 14, anciennement 13 :

FRENCH :

- Il convient d'**exclure expressément les mis en cause** du champ d'application, la notion de « *in accordance with their procedural standing [...]* » étant insuffisante en termes de clarté de la norme pénale ; il est donc proposé d'ajouter, en fin d'article : « *[...] This article does not apply to defendants, suspects or accused persons of the offences referred to in Articles 3 and 4.* ».
- Un travail de rédaction doit être effectué s'agissant du considérant 26 afin de clarifier les mesures d'assistance et de soutien, sur le modèle des articles 14 et 15 de la directive 2011/36/UE.
- Il convient d'**exclure la phase de jugement (*adjudication*)**, compte tenu du principe d'indépendance des juridictions, ou à tout le moins de remplacer ce terme par un terme qui fait l'objet d'une acception commune, ce qui n'est pas le cas pour *adjudication*.

ENGLISH:

- **Suspects or accused persons should be expressly excluded** from the scope of application, as the notion of "*in accordance with their procedural standing [...]*" is insufficient in terms of clarity of criminal law; it is therefore proposed to add at the end of the article: “*[...] This article does not apply to defendants, suspects or accused persons of the offences referred to in Articles 3 and 4.*”.

- Drafting work should be done on Recital 26 in order to clarify the assistance and support measures, along the lines of Articles 14 and 15 of Directive 2011/36/EU.
- The **judgment phase (*adjudication*) should be excluded**, taking into account the principle of independence of the courts, or at least replaced by a word which is commonly understood, which is not the case for *adjudication*.

Article 15, anciennement 14 :

FRENCH :

- 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:

- 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 [...]”.

GERMANY

Article 12(1)(c)

The wording in Article 12 and recital 23 should be aligned to Article 8

Article 12

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

(23) [...] ***In accordance with national law, cases where the damage corresponding to forming part of the constituent elements of the offence occurred on Member State territory may be covered under jurisdiction established over offences committed in whole or in part on its territory.***

Article 13

Germany would welcome a reference to proportionality in Article 13.

Article 13

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

Article 14

Germany suggest the deletion of the wording „procedural standing or other role“. In our view, a reference to national law seems to be sufficient.

Article 14

In addition to situations where Member States shall take the necessary measures to ensure that protection granted under Directive (EU) 2019/1937² is applicable to persons in accordance with Article 4 of Directive (EU) 2019/1937 that are reporting criminal offences referred to in Articles 3 and 4 of this Directive., Member States shall take the necessary measures to ensure that any persons 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 be provided with assistance, support and protection in accordance with their procedural standing or other role in the national legal system, take advantage of the necessary support and assistance measures in the context of criminal proceedings.

(26) [...] The necessary support and assistance measures should be available to such persons in accordance with their procedural rights in the national legal system and shall include at least all support and assistance measures available to persons having corresponding procedural rights in criminal proceedings ~~on~~ concerning other criminal offences. These persons should, in accordance with their procedural rights standing in the national legal system, also be protected from being harassed or unduly prosecuted for reporting such offences or their cooperation in the criminal proceedings.

Article 15

It should be stated in Art. 15 itself that the rights of the public concerned need to be extended, only if a participation of the public concerned in criminal proceedings is already provided for under the national legal system. Germany maintains a scrutiny reservation on the scope of the definition of public concerned.

Article 15

Member States shall ensure that, in accordance with their national legal system, the 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 requirements under national law ~~members of the~~ (public concerned) have appropriate rights to participate in proceedings concerning offences referred to in Articles 3 and 4, for instance as a civil party, provided that participation of the public concerned in criminal proceedings is already provided for under their national legal system.

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:**

Article 21

Germany agrees that there is a need for an EU-wide review of the effectiveness of the directive and the collection of statistical data. Nevertheless, we would like to point out, that the level of detail with regard to the collection of statistical data will create difficulties. The provision should not focus on the obligation for Member States to collect certain statistical data, but more broadly, to have a system in place for the recording, production and provision of anonymised statistical data. The wording should be aligned with article 18 of the PIF Directive (EU) 2017/1371 and article 18 of the non-cash Directive (EU) 2019/713.

The text proposals for the recital take up the proposed changes to Art. 21. They also serve to clarify that criminal statistics can be used to analyse trends and developments in environmental criminal law. However, the criminal statistics do not record these trends themselves, but only count the reported, investigated and convicted cases.

Article 21

*1. Member States shall **ensure that a system is in place for the recording, production and provision of anonymised** ~~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.*

*(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** ~~the scale of and trends in environmental offences and the efforts to combat them and their results~~. **Member States should therefore be obliged to ensure that an adequate system is in place for the recording, production and provision of existing statistical data on the offences referred to in this Directive.** These **statistics** ~~data~~ should be used ~~for preparing statistics~~ 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. Member States should ~~collect and~~ report to the Commission relevant statistical data on environmental offences. The Commission should regularly assess and publish the results based on the data transmitted by the Member States.*

NETHERLANDS

Article 12 / Recital 23

During the last COPEN meeting, it was emphasized that the addition of article 12 (1)(c) was aimed at those Member States that cannot already establish this form of jurisdiction based on the territoriality principle. We think the relation between these two forms of jurisdiction should be clarified in the recitals. Since the current recital 23 mainly focuses on jurisdiction for offences committed on board of a ship or aircraft, this clarification should preferably be given in a separate recital. We propose the following text (new text is bold and underlined):

(23)

Given, in particular, the mobility of perpetrators of illegal conduct covered by this Directive, together with the cross-border nature of offences and the possibility of cross-border investigations, Member States should establish jurisdiction in order to counter such conduct effectively. Jurisdiction established over offences committed on board of a ship or an aircraft registered in it or flying its flag shall take account of related standards already existing under pertaining international conventions. This Directive does not oblige Member States to newly establish such jurisdiction over offences that, due to their nature, may not be committed on board of a ship or an aircraft. **In accordance with national law, cases where the damage corresponding to the constituent elements of the offence occurred on Member State territory may be covered under jurisdiction established over offences committed in whole or in part on its territory.**

(23a)

Member States are also obliged to establish jurisdiction over offences referred to in Articles 3 and 4 when damage that forms one of constituent elements of the offence occurred on its territory. In accordance with national law, this form of jurisdiction may be covered under jurisdiction established over offences committed in whole or in part on its territory, in line with the territoriality principle. If the national law of a Member State already provides for this, that Member State is not obliged to provide for additional measures to establish this form of jurisdiction.

In line with the foregoing, we propose a minor change to article 12 (1)(c):

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:

(...)

(c) the damage **corresponding to that forms a** ~~the~~ constituent elements of the offence occurred on its territory;

ANNEX B

Specific questions on Articles 5 and 7

The following questions were put:

Article 5 – sanctions for natural persons

While a clear majority of Member States has indicated that it can agree with paragraphs 4 and 5 as set out in 12222/22, there is no agreement yet on paragraphs 2 and 3.

It seems that a majority of Member States wants to keep paragraph 2 in the text. However, the situation seems less clear regarding paragraph 3.

In order to find a compromise between the two opposing views with approximately equal support, the Presidency suggests modifying recital 14, by making clear that Member States may rely on the criminal provisions of general application in their legal orders when transposing the provisions on sanctions for manslaughter in the Directive, either committed intentionally or by serious negligence.

The recital could read along the following lines:

‘(14) Sanctions for the offences should be effective, dissuasive and proportionate. To this end, minimum levels for the maximum term of imprisonment should be set for natural persons.

The maximum terms of imprisonment provided for in this Directive for the offences referred to therein should apply at least to the most serious forms of such offences committed intentionally, in particular where they cause death to any person.

All Member States have in place in their legal orders criminal provisions of general application on manslaughter, either committed intentionally or by serious negligence.

Member States should be able to rely on those general provisions when transposing the provisions in this Directive relating to offences that cause death to any person, whether committed intentionally or by serious negligence.’

Question A 1: Member States are kindly invited to indicate whether they could accept keeping paragraphs 2 and 3 in the text, in the light of this revised recital 14.

Question A 2: Member States are kindly invited to indicate whether they could accept keeping only paragraph 2 in the text, and deleting paragraph 3, in the light of this revised recital 14.

Article 7 – sanctions for legal persons

In its proposal for a Directive, the Commission has proposed to base sanctions for legal persons on the concept of worldwide turnover (WWT). In the COPEN meetings and in the CATS meeting on 21 September, the Commission underlined that this concept is already used in many other areas of law, and that it is ‘fair’, as it adapts itself to the size of the company. It can therefore be used both in respect of big companies, and in respect of small companies.

During the said meetings, it was also underlined by several delegations that having one common concept would also be adequate in order to prevent forum-shopping.

However, during the COPEN meetings and also during the CATS meeting on 21 September, some Member States indicated that they would prefer having an alternative to the concept of calculating fines on WWT.

In this light, the Presidency proposed the alternative of fixed financial amounts (proposal: 50 million and 30 million euros) as minimum-maximum sanctions. However, the discussions at the COPEN meetings show that many Member States have various concerns regarding this proposal. No real other alternative has been proposed either (apart from a very general clause, which however does not seem to bring any added value).

Therefore, the Presidency would like to ask those Member States, which have earlier indicated that they can **not** accept the calculation of fines on the basis of WWT as the only binding option, to consider once again their position in light of the Working Group discussions. In case these Member States really need to maintain their position, they are invited to confirm this.

Those Member States that could agree with the concept of WWT as the sole criterion do not need to reiterate their position (NB: the various parameters of the WWT concept, such as threshold – percentages –, the length of considered period, etc. could of course be discussed later on).

In the light of the results of this consultation, the revised proposal for the next COPEN meeting (19 October) will either contain only one binding concept based on WWT, or it will also contain an alternative consisting in the fixed amounts.

In the case that the necessity of an alternative to the WWT is confirmed, Member States are kindly invited to be prepared to suggest and discuss specific thresholds of such sanction levels at the next meeting.

*Question B: Those Member States that can **not** accept the criterion of WWT as the only binding option for calculating fines for legal persons, are kindly invited to confirm this opinion.*

Answers by the Member States

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BELGIUM

- Art. 5: sanctions for natural persons

Question A 1: Member States are kindly invited to indicate whether they could accept keeping paragraphs 2 and 3 in the text, in the light of this revised recital 14.

BE strongly supports the preservation of both paragraphs 2 and 3 in article 5.

Furthermore, and in the spirit of compromise, BE can support the changes to recital 14 with the exception of the following: **committed intentionally, in particular where they cause death to any person.** Maintaining this part in the text of recital 14, would result in contradictory information and incoherence throughout the instrument and implies legal uncertainty. Therefore, we would urge for deleting this part in recital 14.

Question A 2: Member States are kindly invited to indicate whether they could accept keeping only paragraph 2 in the text, and deleting paragraph 3, in the light of this revised recital 14.

As mentioned above, we strongly support the maintaining of both paragraphs. Only by doing so, a high level of ambition can be safeguarded when it comes to tackling environmental crimes within the EU.

In light of the discussions during the last COPEN, we would like to underline that we are glad that it was concluded that a sanctioning mechanism based on a 3, 5 & 10 system will be implemented. Idem for the conclusion in regards to the discussion on points f, g, h & n falling within the scope of paragraph 4 of article 5.

- Art. 7: sanctions for legal persons

*Question B: Those Member States that can **not** accept the criterion of WWT as the only binding option for calculating fines for legal persons, are kindly invited to confirm this opinion.*

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. Indeed, we insist on the need to foresee alternatives to the criterion of WWT. This criterium is considered to be too restrictive and limiting because of the following practical concerns:

- How is global turnover determined/defined? What about the relation between ‘mother- and daughter’ companies?
- Moreover, this is determined based on the financial year preceding the decision to impose a fine, which poses a problem for start-ups seeing these will not be able to provide for an annual report for the first year or could have a very low yearly turnover.
- In addition, certain companies, i.e. smaller companies, are not required to prepare or publish annual accounts implying that a WWT is not available.
- Lastly, what about illegal profits, do these have to be taken into account and if so, how?

We would like to underline once again 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, we remain ready to reflect on alternative options for flexibility that would implement these standards and thus continue to support the idea of providing for an alternative to the system based on the WWT. Whether or not this alternative system is based on a fixed amount or not, can still be discussed, meaning that we continue to be flexible as regards to alternative calculation methods.

BULGARIA

On Article 5 – sanctions for natural persons:

Question A 1: Member States are kindly invited to indicate whether they could accept keeping paragraphs 2 and 3 in the text, in the light of this revised recital 14.

Question A 2: Member States are kindly invited to indicate whether they could accept keeping only paragraph 2 in the text, and deleting paragraph 3, in the light of this revised recital 14.

Answer to questions A, 1 and 2:

Bulgaria reiterates its position that we would rather keep only paragraph 2 in the text, and deleting paragraph 3, in the light of this revised recital 14. We are of the opinion that Member States should be given more flexibility for providing sanctions for offences committed negligently.

On Article 7 – sanctions for legal persons:

*Question B: Those Member States that can **not** accept the criterion of WWT as the only binding option for calculating fines for legal persons, are kindly invited to confirm this opinion.*

Answer to question B:

Bulgaria maintains its position that we cannot accept the criterion of WWT to be provided in Art. 7 as the only binding option for calculating fines for legal persons. We are of the opinion that this way we will create a precedent in the EU legal acts in substantive criminal law which will require a significant reform in the national systems and will not be necessarily more effective than the current sanctions for legal persons.

CROATIA

A 1: Regarding the revised text of the recital 14, we are of the opinion that the proposed recital does not contain an added value. Recital 11 bis already allows MS to prescribe either the intention or serious negligence (left at disposition of MS legal system) in relation to the consequence of the criminal offence in question.

A 2: Following further consideration at national level, we could accept keeping only paragraph 2 in the text while deleting paragraph 3.

B: Although the Republic of Croatia prescribes a system of punishing legal persons for all criminal offences in such a way that criminal sanctions are laid down in the monetary amounts of fines, which we have stated at COPEN meetings so far, we are in general willing to accept the calculation of fines on the basis of WWT, but would like to point out our concerns regarding the proposed model, which should be addressed before taking the final decision, as follows:

1. The meaning of the expression of the total worldwide turnover in the business year preceding the fining decision should be contained in the recitals for the purpose of this Directive.

From the Proposal and the corresponding recitals, it is not clear what the meaning of this term is. It is necessary to clear out whether the aforesaid term would cover the total worldwide turnover generated by the related companies (the parent company and the subsidiary) or only the turnover of the one of the related companies that has performed the elements of the criminal offence. Also, it should be clear that the meaning of the stated term refers to profits (income) of the legal person in question i.e., the difference between revenue and expenses.

2. The question arises as to how, according to the proposed model, a legal person should be punished if it operates with a loss in the year preceding the decision, or if, for example, it falsifies the financial statements for the year preceding the decision, which at the same time encompasses the elements of another criminal offence or does not submit the financial statement at all.

3. In this regard, we consider it opportune to consider the proposal to prescribe average worldwide turnover (which would be determined on the basis of the company's financial statements) over a longer period of time.

4. If, even with the application of the methods described above, a legal person could not be penalised, it would also be necessary to consider, by way of exception from calculation of fines on the basis of WWT, the imposition of a framework of penalties for legal persons in monetary amounts, which provision would only be applicable subsidiary, meaning if the percentage method could not come into application because of the above stated.

CYPRUS

1. For the first questions (A1 and A2), our preference still remains the deletion of both paragraphs 2 and 3. Between the 2 alternatives prepared by Presidency we would prefer the second option, ie deletion of the 3rd paragraph.
2. For the second question (B) the imposition of penalties based on WWT concept raises difficulties and we are in favour of exploring further the alternative solution of the fixed fines.

ESTONIA

Question A 1: Member States are kindly invited to indicate whether they could accept keeping paragraphs 2 and 3 in the text, in the light of this revised recital 14.

Question A 2: Member States are kindly invited to indicate whether they could accept keeping only paragraph 2 in the text, and deleting paragraph 3, in the light of this revised recital 14.

Estonia does not support harmonizing sanctions for intentional manslaughter as this would go beyond the minimum requirements for the protection of the environment through criminal law. We agree with other Member States who have stated that it is unnecessary to regulate manslaughter in this directive as manslaughter is already punishable with high penalties in the Member States. We would like art 5(2) and art 5(3) to be deleted as there is no added value to those paragraphs. Therefore, in our opinion changing recital 14 nor deleting only paragraph 3 changes the situation that regulating sanctions for manslaughter has no additional value to this directive.

We would also like to point out that regulating manslaughter in this directive has a wider effect on the fundamental aspects of our criminal justice system as the sanctions of art 5(2) and art 5(3) are connected to limitation periods regulated in art 11, where we find the limitation periods for the enforcement of penalties in art 11(3)(a) problematic. In our opinion limitation period for enabling the enforcement of the penalties should be shorter than the limitation periods for enabling the investigation, prosecution, trial and judicial decision. If art 5(2) stays in the directive then we cannot accept the limitation periods in art 11(3)(a).

Question B: Those Member States that can not accept the criterion of WWT as the only binding option for calculating fines for legal persons, are kindly invited to confirm this opinion.

We do not support harmonizing sanctions for legal persons at all as this goes beyond minimum harmonization. If sanctions for legal persons are harmonized in this directive then we would like to stress how important it is to take into account that this can not affect fundamental aspects of criminal justice system of a Member State. This is the reason why a number of Member States have said that calculating fines for legal persons on the basis of worldwide turnover is problematic for them. Therefore, in the light of TFEU art 83(3) it is important to find a solution for those Member States, who have said that proposed alternative is not a solution to their problem as the proposed fixed fines are unproportionate and too high. Estonia is one of the Member States that considers the proposed alternative fixed fines too high and we haven't heard any thorough analysis supporting the proposed fixed fines of 50 and 30 million euros. That is why we would prefer going back to having a more general clause for providing flexibility.

FINLAND

Article 5 – Penalties for natural persons

Question A 1: Member States are kindly invited to indicate whether they could accept keeping paragraphs 2 and 3 in the text, in the light of this revised recital 14.

Question A 2: Member States are kindly invited to indicate whether they could accept keeping only paragraph 2 in the text, and deleting paragraph 3, in the light of this revised recital 14.

Finland can in principle support making clearer in the recital that Member States may rely on the criminal provisions of general application in their legal orders when transposing the provisions on sanctions for manslaughter in the Directive, either committed intentionally or by serious negligence. This has from our understanding been the general view during the discussions on this article. There seem to be, however, some ambiguities with the proposed new wording of the recital.

Firstly, the Presidency has proposed to modify the third sentence in recital 14. It seems somewhat unclear what would be the meaning of the sentence in its modified form. From our understanding this would leave unclear the point and purpose of art. 5, paragraph 3. If the maximum terms of imprisonment would apply “at least to the most serious forms of such offences committed intentionally”, what would be the point of having paragraph 3 in the text?

In any case, this sentence of the recital (in its current form: “The maximum terms of imprisonment provided for in this Directive for the offences referred to therein should apply at least to the most serious forms of such offences.”) has been accepted as such in the previous negotiations. The proposed formulation would narrow down the meaning of the sentence so that it would cover only offences committed intentionally. Thus, if paragraph 3 is kept in the text, Finland cannot accept the revised text of the third sentence in recital 14 and it should be left to its current form.

In addition, the first new complete sentence in the recital needs to be formulated so that also the provisions on murder are mentioned as they are also covered by paragraph 2: “All Member States have in place in their legal orders criminal provisions of general application on **murder and** manslaughter, either committed intentionally or by serious negligence.” This is important for the point of view of the systemic structure of the national penal code.

The wording of the last part of the proposed addition of the recital (“should be able to rely”) is also unspecific and would need to be formulated clearly (for example “may rely”).

As has been indicated before, Finland understands the need for flexibility regarding art. 5, paragraphs 2 and 3. In this respect, Finland can also accept deleting paragraphs 2 and 3 or only paragraph 3 from the text. The revised recital 14 can only be accepted with the modifications stated above.

Article 7 – Sanctions for legal persons

Question B: Those Member States that cannot accept the criterion of WWT as the only binding option for calculating fines for legal persons, are kindly invited to confirm this opinion.

Finland considers it very important to include in the Directive an alternative to the WWT method. Finland cannot accept the criterion of WWT as described in the proposal as the only binding option for calculating fines for legal persons.

When article 7 was discussed at the CATS meeting in September, many Member States were in favor of including an alternative to the WWT method to the text or were flexible about the matter. Taking into account these discussions and also the views expressed by many Member States in the Council in June, the reasonable way forward would seem to be to look for a flexible solution with an alternative to the WWT model. Going back to a text with no alternative to the WWT method would seem to be in contradiction with the conclusions made on the discussions in the Council in June and at the CATS meeting in September.

Finland has in its previous comments suggested that the discussions on the appropriate level of fines as defined in fixed amounts would start from a realistic scrutiny of the current levels in the national legislation of the Member States. It would also be reasonable to distinguish between the levels of fines on the administrative vs. the criminal law system and to concentrate on the criminal law side. It should be noted that suggesting to begin the discussions from the current levels does not mean that we would not be ready to consider lifting the levels set in the current national legislation.

It should also be noted that setting the fixed amount at 10 million EUR, for example, would as such mean multiple increase and thus a very significant change as to the maximum amounts provided for in the legislation of some Member States. LT has suggested the limits to be set 5 and 3 million EUR which would seem to be a more realistic level than the amounts in the proposal by the Presidency which are considered too high by Finland.

The Commission and the Presidency have during the discussions referred to data on the levels of fines for legal persons in the Member States. During the COPEN meeting on the 28th of September, some Member States have specifically asked for the discussions to be based on empirical data. In order to continue the discussions on the appropriate level, it would seem reasonable to distribute this data for the Member States and continue this way the discussions on the appropriate level of the fixed amounts. This would also be important from the point of view of openness. It should also be noted that the data on the levels of fines actually imposed by the courts is equally or even more relevant than the data on the levels of fines in the legislation. In some cases the legislation may allow for a high maximum which is in practice never used; the relevance of high maximum limit for the fines is low if the fines imposed in practice are low or, even more so, if the prosecution does not demand fines for legal persons in the first place.

One of the key arguments in favor of the turnover-based method by the Commission and some Member States seems to be that this method would provide for a means to determine a level of fines, which would be deterrent from the point of view of large companies with high turnovers. In practice, legal persons committing environmental offences are often small companies with low turnovers. If the main concern has to do with the most severe offences committed by the largest companies, it could perhaps be reasonable to consider a solution, which would be fit for this specific problem without disrupting entire elements of the national legal systems.

It should be noted, that it is a general principle in criminal policy to avoid making sudden radical amendments. The changes in matters of criminal policy are generally step-by-step and radical changes are seldom reasonable as they may have unexpected consequences. As regards criminal sanctions, sudden leaps from one level of fines to another, multiple times more severe level, may also have implications from the point of view of the principle of proportionality and legal certainty.

As such, the method of determining the fines for legal persons seems to have been introduced to the proposal from the systems of administrative sanctioning in the field of competition law, for example. One of the arguments in favor of using the method based on WWT has been that it is already in use in some EU legislative instruments, such as competition law. As has been pointed out, there are fundamental differences between competition law and criminal law, and also between the systems of administrative and criminal sanctions. As regards the administrative fines for legal persons in the field of competition law, for example, the levels of fines are generally high which has to do with the fine including the function of confiscating the presumed proceeds of the infringement. In criminal law, confiscation is dealt with separately from the actual penalty.

It has been mentioned in the discussions many times that the proposed directive would introduce the method based on the worldwide turnover of the legal person into an EU instrument of criminal law for the first time. This is a very significant issue in principle, which is now being dealt with as a side matter of a legislative proposal covering one category of crime. In our view, the necessity of further harmonization of the regulation of sanctioning of judicial entities in the first place, fundamental questions concerning such sanctioning as well as the way the fines for legal persons and the levels of these fines are determined, which has wide-ranging effects from the point of view of the national systems, would have needed a thorough discussion and careful consideration on a general level.

Detailed comments on recital 15 and 15 a

There is a reference in the last sentence of recital 15 to the maximum level of fines determined in absolute amounts and to the fact that these amounts should apply to “at least the most serious forms of offences provided for by this Directive”. The reference to “at least the most serious forms of offences” should also apply to the method of worldwide turnover and the recital should thus be amended to have the same idea as is in the third sentence of recital 14. For example: *The maximum levels of fines provided for in this Directive for the offences referred to therein should apply at least to the most serious forms of such offences.*

As to recital 15a, the text includes references to what the judges or courts “should” do or what the Directive does not compel judges or courts to do. The purpose of these sentences is unclear generally and also from the point of view of the transposition of the article. It is, however, important to maintain the references to the principle of proportionality in the text.

FRANCE

Question A 1: Member States are kindly invited to indicate whether they could accept keeping paragraphs 2 and 3 in the text, in the light of this revised recital 14.

FRENCH

Oui.

Il est nécessaire de maintenir, sur ce texte, un haut niveau d'ambition, et ce pour deux raisons : d'une part, les attentes des praticiens d'un cadre harmonisé et modernisé ; d'autre part, les attentes des citoyens compte tenu du changement climatique observé par tous.

Sur ce point, les trilogues à venir avec le Parlement européen seront décisifs ; les positions du Parlement européen seront éloignées de celles du Conseil, et nous ne pourrions parvenir à un accord que si nous démontrons que nous avons aussi fait des choix ambitieux. Lors du CATS du 08 février 2022, un consensus s'est dégagé sur la nécessité de refonder la directive de 2008 ; il faut le mettre en œuvre.

Or à ce jour, sur les peines encourues par les personnes physiques, beaucoup a été fait pour trouver un compromis acceptable : (i) abaissement des seuils de quatre et six ans d'emprisonnement ; (ii) restriction du champ d'application de la peine de dix ans d'emprisonnement ; (iii) disparition de toute harmonisation des niveaux de peines pour les infractions qui causent des blessures graves, ou qui exposent à de telles blessures, ou encore qui exposent à la mort ; (iv) caractère facultatif des sanctions complémentaires.

Dans ces conditions, les autorités françaises soutiennent pleinement la proposition de compromis de la Présidence tchèque : les peines d'emprisonnement pour les infractions ayant causé la mort, soit intentionnellement, soit par négligence au moins grave, doivent faire l'objet d'une harmonisation selon les seuils figurant dans la proposition de compromis.

A cet égard, les autorités françaises rappellent que la notion de négligence au moins grave est une notion qui figure dans la directive de 2008, que tous les États membres doivent donc déjà avoir transposée ; **les considérants 11bis et 11ter agréés sous Présidence française donnent à cet égard toute flexibilité pour l'interprétation des notions d'intention et de négligence au moins grave conformément aux droits nationaux, de sorte que le considérant 14 proposé par la Présidence tchèque introduit désormais une confusion.**

ENGLISH

Yes.

It is necessary to maintain a high level of ambition on this text, for two reasons: on the one hand, the expectations of practitioners for a harmonised and modernised directive; on the other hand, the expectations of citizens in view of the climate change observed by all.

On this point, the forthcoming trilogues with the European Parliament will be decisive; the positions of the European Parliament will be far removed from those of the Council, and we will only be able to reach an agreement if we demonstrate that we too have made ambitious choices. At the CATS meeting on February, 08th 2022, a consensus emerged on the need to recast the 2008 directive; this must be demonstrated.

However, to date, on the penalties incurred by natural persons, it should be noted that much has been done to find an acceptable compromise: (i) lowering the thresholds of four and six years' imprisonment; (ii) restricting the scope of the ten-year prison sentence; (iii) eliminating any harmonisation of penalty levels for offences that cause serious injury, or that expose to such injury, or that expose to death; (iv) additional penalties are now optional.

In these circumstances, French authorities fully support the Czech Presidency's compromise proposal: prison sentences for offences causing death, either intentionally or through at least serious negligence, should be harmonised according to the thresholds set out in the Presidency's compromise proposal.

In this respect, **French authorities** recall that the notion of at least serious negligence is a notion that appears in the 2008 Directive, which all Member States must therefore have already transposed; **recitals 11bis and 11ter agreed under the French Presidency in the partial general approach give in this respect all flexibility for the interpretation of the notions of intention and at least serious negligence according to the national systems, so that recital 14 proposed by the Czech Presidency now introduces confusion.**

Question A 2: Member States are kindly invited to indicate whether they could accept keeping only paragraph 2 in the text, and deleting paragraph 3, in the light of this revised recital 14.

FRENCH

Non.

Compte tenu du niveau d'ambition rappelé précédemment, et des arguments juridiques exposés précédemment, cette option n'est pas envisageable actuellement.

ENGLISH

No.

Given the level of ambition outlined above, and the legal arguments outlined above, this option is not currently acceptable.

Question B: Those Member States that cannot accept the criterion of WWT as the only binding option for calculating fines for legal persons, are kindly invited to confirm this opinion.

FRENCH

Les autorités françaises souhaitent l'inclusion de ce critère dans la directive.

En fonction des réponses des autres États membres et de la version révisée du texte à venir, les autorités françaises feront parvenir leurs commentaires sur les méthodes de calcul à prendre en compte pour ce critère, de même qu'en cas d'alternative portant sur des montants d'amendes fixes.

ENGLISH

The French authorities would like to see this criterion included in the Directive.

Depending on the responses from other Member States and the forthcoming revised text, the French authorities will send their comments on the calculation methods to be taken into account for this criterion, as well as in the case of alternative fixed amounts of fines.

GERMANY

Articles 5(2) and 5(3), question A

Germany maintains that Article 5(3) should be deleted. We do not see a need to specify minimum maximum penalties for negligent conduct. Germany can accept to keep Article 5(2) in the text.

Article 7(2), question B

Germany can accept the criterion of worldwide turnover as the only binding option for calculating the minimum maximum fine for legal persons.

Recital 15

Recital 15 should be aligned with recital 14 PIF directive (EU) 2017/1371 to avoid the impression that there is a preference between criminal and non-criminal sanctions.

- (15) ***Insofar as an environmental offence is committed by conduct attributable to legal persons, Where national law provides for it, legal persons should also be held criminally liable for environmental criminal offences according to as defined in this Directive. Member States whose national law does not provide for the criminal liability of legal persons should ensure that their administrative sanctioning systems provide for effective, dissuasive and proportionate sanctions types and levels as laid down in this Directive in order to achieve its objectives. The seriousness of the conduct, and the individual, financial and other circumstances economic and financial situation of legal persons, should be taken into account to ensure the effectiveness, dissuasiveness and proportionality of the sanction imposed. With regard to maximum levels of fines in national law, Member States may either use a percentage of the total worldwide turnover of the legal person concerned, or they may determine the maximum level of fines in absolute amounts. The maximum level of fines determined in absolute amounts should be provided for in national law, which may decide on the method of their calculation, and should apply proportionally with regard to individual, financial and other circumstances economic and financial situation of the legal person at least to the most serious forms of offences provided for in this Directive.***

GREECE

Question A1: The retention of paragraphs 2 and 3 of Article 5 of the proposed Directive could be accepted from our side, in a spirit of compromise.

Question A2: Keeping only paragraph 2 (and **deleting 3**) of Article 5 **is clearly preferable**, especially in the light of the revised recital no. 14, while also being consistent with our previous positions.

Question B: We believe that there may be difficulty in applying the WWT criterion in practice, at least in some cases. Therefore, it would be appropriate to additionally provide for an alternative method of calculating the fines, which, when applied, will take into account the size and financial capabilities of each legal entity.

HUNGARY

Article 5 – sanctions for natural persons

Question A 1: Member States are kindly invited to indicate whether they could accept keeping paragraphs 2 and 3 in the text, in the light of this revised recital 14.

We continue to believe that both paragraphs should be deleted.

Question A 2: Member States are kindly invited to indicate whether they could accept keeping only paragraph 2 in the text, and deleting paragraph 3, in the light of this revised recital 14.

This is only a fallback position for us.

Article 7 – sanctions for legal persons

*Question B: Those Member States that can **not** accept the criterion of WWT as the only binding option for calculating fines for legal persons, are kindly invited to confirm this opinion.*

We cannot accept the criterion of WWT as the only binding option for calculating fines for legal persons. We believe that another and flexible criteria should also be defined in the text. Specific levels of sanctions referring to a particular amount should be defined only as points of reference rather than compulsory levels of fines.

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.”

ITALY

Article 5 – sanctions for natural persons

We reiterate, as sustained during all COPEN meetings and during the CATS meeting on 21 September, our strong opposition to the deleting of paragraph 3 which would lead to the exclusion of all offences committed by serious negligence which, in the field of environmental crimes, are definitely the majority. The reference to manslaughter in recital 14 seems completely superfluous and does not change our position, since paragraph 3 provides for an increase in the sanction for the environmental crime that causes death, thus regardless of the provision of manslaughter in national law. The elimination of paragraph 3 would make the text much less ambitious than the one presented by the Commission, given that, with our opposition, the reference to the crime of injury has already been eliminated.

Article 7 – sanctions for legal persons

No comment from us as we agree with the WWT mechanism as the **only** option and **we exclude any other options**.

LATVIA

Latvia thanks the Presidency for the proposed compromise solution in the context of Section 5(2) and (3) and supports the clarified wording of Recital 14 of the Directive. Subject to these clarifications, Latvia has no conceptual objections to the retention of Section 5(2) in the body of the Directive. However, with regard to Section 5(3) of the Directive, Latvia continues to point out that the wording of this provision should be more flexible, given that the European Commission, in its initial discussions on the text of the Directive, repeatedly stressed that Member States should have a wide margin of discretion in matters relating to the transposition of the concept of "gross negligence", in order to ensure that it is consistent with the national legal traditions of the Member States. Accordingly, in Latvia's view, Section 5(3) of the Directive should be deleted and Member States should be left to determine the most appropriate level of penalties for offences committed with at least gross negligence according to Recital 14 of the Directive.

LITHUANIA

Article 5 – sanctions for natural persons

As in previous discussions, LT does not see the benefit provided by paragraphs 2 and 3 of Article 5. The clarifications proposed by the presiding state in point 14 of the preamble only confirm this once again. Given the fact that the provisions of national laws establishing the general offences of the crime of murder (both intentional or negligent) would apply, LT could support both the retention of these provisions in the text and their deletion. In the event that at least one member state has problems with the provisions of Article 5(3), then we would support its deletion from the text of the proposal.

Article 7 – sanctions for legal persons

As mentioned earlier, LT does not object to alternative ways of calculating fines for legal persons, but the specific amounts fines have yet to be discussed in detail.

LUXEMBOURG

Regarding Question A 1: In order to set out the most ambitious text possible, we strongly believe that both paragraphs 2 and 3 of article 5 should be kept in the text. We agree with the comments made by the Commission, especially regarding article 5(3) and the concept of serious negligence. This being said and in view of reaching a compromise, Luxembourg can in principle support the changes proposed to recital 14. However, we still need some time to assess the possible consequences that these changes might entail. We will provide our comments on this matter at the next meeting and we are very interested in hearing the arguments of other delegations.

Regarding Question A 2: Luxembourg can under no circumstances accept or support the deletion of paragraph 3.

Regarding Question B: As already stated on previous occasions, we would be **in favor of keeping the criterion of WWT as the only binding option** for calculating fines for legal persons.

MALTA

Proposal for a Directive on the protection of the environment through criminal law

Questions to Member States following COPEN on 28 September 2022

Deadline for replies: Thursday 6 October 2022

MT REPLIES

Article 5 – sanctions for natural persons

While a clear majority of Member States has indicated that it can agree with paragraphs 4 and 5 as set out in 12222/22, there is no agreement yet on paragraphs 2 and 3.

It seems that a majority of Member States wants to keep paragraph 2 in the text. However, the situation seems less clear regarding paragraph 3.

In order to find a compromise between the two opposing views with approximately equal support, the Presidency suggests modifying recital 14, by making clear that Member States may rely on the criminal provisions of general application in their legal orders when transposing the provisions on sanctions for manslaughter in the Directive, either committed intentionally or by serious negligence.

The recital could read along the following lines:

“(14) Sanctions for the offences should be effective, dissuasive and proportionate. To this end, minimum levels for the maximum term of imprisonment should be set for natural persons.

The maximum terms of imprisonment provided for in this Directive for the offences referred to therein should apply at least to the most serious forms of such offences committed intentionally, in particular where they cause death to any person.

All Member States have in place in their legal orders criminal provisions of general application on manslaughter, either committed intentionally or by serious negligence.

Member States should be able to rely on those general provisions when transposing the provisions in this Directive relating to offences that cause death to any person, whether committed intentionally or by serious negligence.”

Question A 1: Member States are kindly invited to indicate whether they could accept keeping paragraphs 2 and 3 in the text, in the light of this revised recital 14.

Question A 2: Member States are kindly invited to indicate whether they could accept keeping only paragraph 2 in the text, and deleting paragraph 3, in the light of this revised recital 14.

Malta confirms its support to maintain both paragraphs 2 and 3. However, Malta can take a flexible approach with a view to reaching a compromise.

Article 7 – sanctions for legal persons

In its proposal for a Directive, the Commission has proposed to base sanctions for legal persons on the concept of worldwide turnover (WWT). In the COPEN meetings and in the CATS meeting on 21 September, the Commission underlined that this concept is already used in many other areas of law, and that it is 'fair', as it adapts itself to the size of the company. It can therefore be used both in respect of big companies, and in respect of small companies.

During the said meetings, it was also underlined by several delegations that having one common concept would also be adequate in order to prevent forum-shopping.

However, during the COPEN meetings and also during the CATS meeting on 21 September, some Member States indicated that they would prefer having an alternative to the concept of calculating fines on WWT.

In this light, the Presidency proposed the alternative of fixed financial amounts (proposal: 50 million and 30 million euros) as minimum-maximum sanctions. However, the discussions at the COPEN meetings show that many Member States have various concerns regarding this proposal. No real other alternative has been proposed either (apart from a very general clause, which however does not seem to bring any added value).

Therefore, the Presidency would like to ask those Member States, which have earlier indicated that they can **not** accept the calculation of fines on the basis of WWT as the only binding option, to consider once again their position in light of the Working Group discussions. In case these Member States really need to maintain their position, they are invited to confirm this.

Those Member States that could agree with the concept of WWT as the sole criterion do not need to reiterate their position (NB: the various parameters of the WWT concept, such as threshold – percentages –, the length of considered period, etc. could of course be discussed later on).

In the light of the results of this consultation, the revised proposal for the next COPEN meeting (19 October) will either contain only one binding concept based on WWT, or it will also contain an alternative consisting in the fixed amounts.

In the case that the necessity of an alternative to the WWT is confirmed, Member States are kindly invited to be prepared to suggest and discuss specific thresholds of such sanction levels at the next meeting.

*Question B: Those Member States that can **not** accept the criterion of WWT as the only binding option for calculating fines for legal persons, are kindly invited to confirm this opinion.*

Malta confirms its position in favour of an alternative to the WWT. That said, following the completion of the internal consultation on the amount of fines, Malta can now confirm that the amounts referred to in Article 7(3)(b) (Document 12222/22), that is, EUR 50 million and EUR 30 million, are acceptable.

NETHERLANDS

Question A 1: Member States are kindly invited to indicate whether they could accept keeping paragraphs 2 and 3 in the text, in the light of this revised recital 14.

Question A 2: Member States are kindly invited to indicate whether they could accept keeping only paragraph 2 in the text, and deleting paragraph 3, in the light of this revised recital 14.

The Dutch position regarding article 5(3) has been made clear in several previous COPEN meetings. We are not convinced of the added value of this paragraph in the light of the existing criminal offences for 'negligent death' in the various Member States. In addition to this, the current article 5(3) raises significant transposition problems for a number of Member States, including The Netherlands. Therefore, we primarily are in favour of deleting paragraph 5(3).

If a majority of Member States does not support the deletion of paragraph 5(3), we would welcome the proposed new recital that gives room to Member States to transpose this paragraph by means of the existing 'negligent death' offences in various Member States. In the current wording of the recital however, it is not clear whether this form of transposition would require Member States to raise the maximum imprisonment terms for negligent death in general to the level of five years as mentioned in article 5(3). Therefore, we would like to suggest the following clarification in the proposed recital (added in **bold and underlined**)

The maximum terms of imprisonment provided for in this Directive for the offences referred to therein should apply at least to the most serious forms of such offences committed intentionally, in particular where they cause death to any person.

*All Member States have in place in their legal orders criminal provisions of general application on manslaughter, either committed intentionally or by serious negligence. Member States should **also** be able to rely on **those the maximum terms of imprisonment provided for in these** general provisions when transposing the provisions in this Directive relating to offences that cause death to any person, whether committed intentionally or by serious negligence.*

*Question B: Those Member States that can **not** accept the criterion of WWT as the only binding option for calculating fines for legal persons, are kindly invited to confirm this opinion.*

The Netherlands can accept the criterion of the worldwide turnover as a method of calculating fines for legal persons. However, since a number of Member States has made clear that this method is problematic in their national legal system, we support flexible alternatives to this method that would meet the objections that were put forward by these Member States.

POLAND

Question A 1: Member States are kindly invited to indicate whether they could accept keeping paragraphs 2 and 3 in the text, in the light of this revised recital 14.

Polish position regarding QA1: The new wording of recital 14 seems acceptable, as well as the maintaining of paragraphs 2 and 3 in the proposed Article 5 of the Directive.

Question A 2: Member States are kindly invited to indicate whether they could accept keeping only paragraph 2 in the text, and deleting paragraph 3, in the light of this revised recital 14.

Polish position regarding QA2: 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 legislation across EU Member States), it is necessary to tighten up criminal policy in this area, in particular by increasing the criminal penalties provided for the individual offences described in Article 3 of the draft Directive.

Therefore, in Poland's view, paragraphs 2 and 3 of Article 5 of the proposed directive should be retained.

However, while retaining the paragraphs in Article 5 would lead to disagreement and stall the adoption of a general approach to the Directive, Poland sees the possibility of agreeing to the deletion of both paragraphs 2 and 3 of Article 5.

Question B: Those Member States that can not accept the criterion of WWT as the only binding option for calculating fines for legal persons, are kindly invited to confirm this opinion.

Polish position regarding QB: Poland maintains its previous position. We support the use of the 'total worldwide turnover' criterion as the appropriate way to impose a penalty.

However, Poland supports the use of an alternative criterion for countries that do not have such solutions.

PORTUGAL

Proposal for a Directive on the protection of the environment through criminal law

*Portuguese replies to the questions put forward to Member States
following COPEN meeting of 28 September 2022*

Article 5 – sanctions for natural persons

Questions A 1 and A2

As indicated at several occasions, Portugal regrets that the scope of paragraphs 2 and 3 has been narrowed down in the current draft in comparison with the original proposal of the Commission, which explicitly included the criminalisation of serious injury along with death.

Notwithstanding, we maintain that it is still relevant to keep both paragraphs and strongly oppose a possible deletion of paragraph 3. Contrary to delegations that have argued for the deletion of paragraphs 2 and 3, we believe that although limited in scope, these provisions are not redundant and add value to the entire article, namely, by improving its systematic consistency, by avoiding *a contrario* interpretations (if only paragraph 2 were to be kept, the possibility that the future interpreter would read this as excluding the punishment of negligence cannot be discarded) and by unequivocally stating that both the intentional and the negligent commission of environmental crimes must be punished.

Article 7 – sanctions for legal persons

Portugal integrates the group of Member States that could agree to the concept of WWT as the sole criterion for calculating financial sanctions for legal persons.

ROMANIA

Proposal for a Directive on the protection of the environment through criminal law

Questions to Member States following COPEN on 28 September 2022

Deadline for replies: Thursday 6 October 2022

Article 5 – sanctions for natural persons

While a clear majority of Member States has indicated that it can agree with paragraphs 4 and 5 as set out in 12222/22, there is no agreement yet on paragraphs 2 and 3.

It seems that a majority of Member States wants to keep paragraph 2 in the text. However, the situation seems less clear regarding paragraph 3.

In order to find a compromise between the two opposing views with approximately equal support, the Presidency suggests modifying recital 14, by making clear that Member States may rely on the criminal provisions of general application in their legal orders when transposing the provisions on sanctions for manslaughter in the Directive, either committed intentionally or by serious negligence.

The recital could read along the following lines:

“(14) Sanctions for the offences should be effective, dissuasive and proportionate. To this end, minimum levels for the maximum term of imprisonment should be set for natural persons.

The maximum terms of imprisonment provided for in this Directive for the offences referred to therein should apply at least to the most serious forms of such offences committed intentionally, in particular where they cause death to any person.

All Member States have in place in their legal orders criminal provisions of general application on manslaughter, either committed intentionally or by serious negligence.

Member States should be able to rely on those general provisions when transposing the provisions in this Directive relating to offences that cause death to any person, whether committed intentionally or by serious negligence.”

RO supports the clarifications in the recital, nevertheless a rewording is required in the phrase: **“orders criminal provisions of general application on manslaughter, either committed intentionally or by serious negligence”** since manslaughter cannot be committed intentionally.

Question A 1: Member States are kindly invited to indicate whether they could accept keeping paragraphs 2 and 3 in the text, in the light of this revised recital 14.

Question A 2: Member States are kindly invited to indicate whether they could accept keeping only paragraph 2 in the text, and deleting paragraph 3, in the light of this revised recital 14.

RO is in favour of option A2, i.e. keeping paragraph 2 and deleting paragraph 3 preserving, at the same time, recital 14 with the aforementioned clarifications.

Article 7 – sanctions for legal persons

In its proposal for a Directive, the Commission has proposed to base sanctions for legal persons on the concept of worldwide turnover (WWT). In the COPEN meetings and in the CATS meeting on 21 September, the Commission underlined that this concept is already used in many other areas of law, and that it is 'fair', as it adapts itself to the size of the company. It can therefore be used both in respect of big companies, and in respect of small companies.

During the said meetings, it was also underlined by several delegations that having one common concept would also be adequate in order to prevent forum-shopping.

However, during the COPEN meetings and also during the CATS meeting on 21 September, some Member States indicated that they would prefer having an alternative to the concept of calculating fines on WWT.

In this light, the Presidency proposed the alternative of fixed financial amounts (proposal: 50 million and 30 million euros) as minimum-maximum sanctions. However, the discussions at the COPEN meetings show that many Member States have various concerns regarding this proposal. No real other alternative has been proposed either (apart from a very general clause, which however does not seem to bring any added value).

Therefore, the Presidency would like to ask those Member States, which have earlier indicated that they can **not** accept the calculation of fines on the basis of WWT as the only binding option, to consider once again their position in light of the Working Group discussions. In case these Member States really need to maintain their position, they are invited to confirm this.

Those Member States that could agree with the concept of WWT as the sole criterion do not need to reiterate their position (NB: the various parameters of the WWT concept, such as threshold – percentages –, the length of considered period, etc. could of course be discussed later on).

In the light of the results of this consultation, the revised proposal for the next COPEN meeting (19 October) will either contain only one binding concept based on WWT, or it will also contain an alternative consisting in the fixed amounts.

In the case that the necessity of an alternative to the WWT is confirmed, Member States are kindly invited to be prepared to suggest and discuss specific thresholds of such sanction levels at the next meeting.

*Question B: Those Member States that can **not** accept the criterion of WWT as the only binding option for calculating fines for legal persons, are kindly invited to confirm this opinion.*

RO cannot accept the WWT as the only binding option for calculating fines for legal persons for the reasons already mentioned, including in the written comments sent to the PCY and COM.

Nevertheless, it is premature for RO to provide specific thresholds for sanctions at this moment. It is our opinion that further information would be useful in order to be able to set such thresholds. Such information refers to empirical data and an assessment of the maximum thresholds in all MS (not only in the five MS mentioned during the meetings).

SLOVAKIA

Slovakia thanks for the opportunity to provide answers to the questionnaire in order to find out which of the discussed options of Articles 5 and 7 has majority support.

As for Article 5, we maintain our previous position and support option A2 – keeping paragraph 2 in the text while deleting paragraph 3.

Regarding Article 7, we can accept worldwide turnover as the sole criterion. However, we are not opposed to setting an alternative if the majority of Member States prefer this solution. In such case, we support the alternative proposed by the Presidency as opposed to a very general clause.

SLOVENIA

Article 5 – sanctions for natural persons

As indicated in the COPEN meeting we do see an added value in keeping paragraphs 2 and 3 in the text and would like to retain this position. With regards to the wording of the recital 14, as proposed by the Presidency in the “questions document”, we do not have general problem with the changes made, however we see some room for improvement of the text and would also appreciate some explanations with regards to the accessory sanctions or measures – namely, is the intention of the Presidency to delete the last part of the current wording (“Accessory sanctions or measures are often seen as....appropriate sanctions in the individual cases.”)?

Article 7 – sanctions for legal persons

We fully support the overall objective of having effective sanctions in place for environmental crimes committed by legal persons however our overall position is that the harmonization of the criteria used for determining those fines should provide some flexibility for Member States' national systems. Therefore, we primarily supported the more general wording which was on the table in the previous round of negotiations, which was however not followed.

As currently drafted, Slovenia can not support the alternative criteria in place under point a and b of Article 7 (WWT criteria and fixed amount criteria). We are of the view that this issue should be further discussed. We should remain open for other alternatives.

As already indicated, Slovenia places greater importance to the criteria of “illegal profits” generated by the offence and “damage” caused by the offence and would propose it as the alternative to the original proposal made by the Commission or as the sole criteria to be used for determining the level of fines for legal persons. We see this option as less abstract and more fair as the punishment is directly connected to the specific criminal offence committed. The level of fine would depend on the benefits obtained or on the damage caused by the offence.

Article 7

Sanctions for legal persons

1. Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 6(1) **or (2)** is punishable by effective, proportionate and dissuasive **criminal or non-criminal sanctions or measures**.
- 3.-2.** Member States shall take the necessary measures to ensure that, at least for legal persons held liable pursuant to Article 6(1) ~~or (2)~~, offences referred to in Article 3(2) are punishable by criminal or non-criminal fines, the amount of which shall be proportionate to the seriousness of the conduct and the individual, financial and other circumstances, ~~the economic and financial situation~~ of the legal person concerned ~~and the illegal profits or benefits generated or expected~~, and the maximum limit of which incurred shall be not less than:
 - (a) **5% of the total worldwide turnover of the legal person in the business year preceding the fining decision for offences referred to in Article 3(2) points (a) to (e), (i), (i)bis, (h) to (j), (n), (q), (r), and 3% of the total worldwide turnover of the legal person in the business year preceding the fining decision for offences referred to in Article 3(2) points (k), (l), (m), (o), (p);**
or, alternatively
 - (b) **an amount corresponding to EUR 50 million 200 (two hundred) times the amount of damage caused or illegal benefits generated by the offence for offences referred to in Article 3(2) points (a) to (j), (n), (q), (r), and 100 (one hundred) times the amount of damage caused or illegal benefits generated by the offence EUR 30 million for offences referred to in Article 3(2) points (k), (l), (m), (o), (p). 3% of the total worldwide turnover of the legal person in the business year preceding the fining decision for offences referred to in Article 3(2) points (f), (g), (h), (k) to, (l), (m), (o), (p).**

SWEDEN

Article 5

Question A1 and A2. Both alternatives in question A1 and A2 are acceptable to Sweden in light of the revised recital 14. Sweden can thus accept keeping paragraphs 2 and 3 and can also accept deleting paragraph 3.

Article 7

Question B: Sweden cannot accept the criterion of WWT as the only binding option for calculating fines for legal persons.

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 proposal with fixed amounts as the required maximum level of fines the amounts needs to be at a 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.

Since the criterion of WWT is based on a legal persons global turnover, high sanctions will apply only to large companies. In our opinion, the same should apply according to the second alternative. It is not meaningful or reasonable that the Directive would require such high levels of fines as is proposed to apply even to minor infringements committed by small businesses. Therefor we suggest some kind of delimitation in the article.

For example, it could be formulated as follows:

“an amount corresponding to EUR XX million for offences referred to in Article 3(2) points (a) to (j), (n), (q), (r), and EUR XX million for offences referred to in Article 3(2) points (k), (l), (m), (o), (p). **This requirement shall apply at least to serious offences by large companies.**”

or

“an amount corresponding to EUR XX million for offences referred to in Article 3(2) points (a) to (j), (n), (q), (r), and EUR XX million for offences referred to in Article 3(2) points (k), (l), (m), (o), (p). **The highest fines may be reserved for the most serious offences committed by large companies.**”