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NOTE

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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 - Input by Member States following WK 12457/23

Through WK 12457/23, of Sunday 1 October 2023, the Presidency asked delegations whether, in view of the third trilogue on 2 October 2023, they would “*oppose allowing the Presidency to introduce in the trilogue the idea of authorising the technical meeting to discuss a more limited and restricted version of a self-standing offence, with full involvement of the COPEN Working Party.*” (point A).

Further, the Presidency provided a revised text for Article 17 on ‘resources’, stating that, unless delegations would indicate otherwise, the Presidency would assume that this text be acceptable to all delegations (point B).

Delegations will find attached, for information, the input provided by Member States.

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AUSTRIA

Austria regrets that Member States did not have sufficient time to carry out a serious inter-ministerial analysis of the Presidency's proposal.

Furthermore, the EP has neither explained why the catch-all provision is necessary, nor why the solution via a specific aggravating circumstance is not possible.

Austria therefore would prefer discussing this topic in detail within the COPEN Working Party.

BELGIUM

Belgium strongly supports the objective to adopt a new Directive on the Protection of the Environment through Criminal Law. We therefore fully support the continued efforts by the Spanish Presidency to find a compromise wording of the text in regards the discussions on a (self-standing) 'ecocidal' offence, pushing this file forward.

However, seeing that we could not conclude on a Belgian internal mandate within the requested timeframe, we continue to uphold a scrutiny reservation as to the proposed wording in document WK 12387/2023 & WK 12457/2023.

BULGARIA

With reference to document WK 12457/2023 INIT of 1 October 2023 I would like to confirm that Bulgaria keeps its concerns expressed during the COPEN meeting held on 29 September and opposes the possibility to introduce in the trilogue the idea of authorising the technical meeting to discuss a version of a self-standing offence.

CZECH REPUBLIC

A) The general, residual offence

- *We may agree to allow the Presidency to introduce in the trilogue the idea of authorising the technical meeting to discuss a more limited and restricted version of a self-standing offence, if such approach is necessary for maintaining Council positions on certain issues of more horizontal nature such as sanctioning, rules on jurisdiction or on limitation period. Our possible support for a self-standing general offence is conditional – we may agree with it only under the condition that provisions on sanctioning, rules on jurisdiction or on limitation period are maintained as according to the Council position. We consider this concession a package. Should those horizontal provisions deflect from the Council position, we won't be able to support the general offence.*
- *In our view, providing for a new criminal offence in national law is, in principle, feasible, while changing the system of sanctioning, rules on jurisdiction or on limitation period, which are all provided for in general part of the criminal code applicable usually to all criminal offences, would be extremely difficult. Therefore, as a rule, we are in favour of making concessions rather in issues of relatively less horizontal nature. We would strongly insist on maintaining the Council mandate on issues of more horizontal nature.*
- *Since all conducts covered by the general offence would have to be unlawful, as defined by the draft Directive, we would only see a very limited (or practically no) scope of applicability of such criminal offence, since most (or maybe all) unlawful conducts are already criminalized by other provisions of the draft Directive. Therefore, we would consider the general offence rather as a political statement than an amendment with large impact on the ground.*
- *We insist on maintaining the criterion of „unlawfulness“, not to create an autonomous criminal offence. In its latest proposal, the Commission uses both „unlawful“ and „in breach of a prohibition“. Mentioning „in breach of a prohibition“ besides „unlawful“ seems redundant and in contradiction with contents of the term „unlawful“, which is clearly defined (at least in the Council mandate, line 64a and following).*

- *If the general offence is to be provided for as a self-standing criminal offence (self-standing according to the Directive, not necessarily in national law, where Member States may, in principle, choose the form of transposition), it should be placed on the same level as all other criminal offences (as one the letters of Art 3 para 1/2, using the conditions „unlawful“ and „intentional“ in the same way as all other criminal offences).*
- *Following the aforementioned, we assume that in line with the CJEU case law, a self-standing offence according to a Directive does not have to mean a self-standing offence according to the national law, as Member States, where meeting other relevant conditions, „may choose the form and method for implementing this requirement, specific express legal provisions not always having to be adopted“. A recital confirming this principle exists in the draft Directive on violation of restrictive measures (general approach, recital 26a). That recital uses language of applicable case law and its wording was prepared in consultation with the Council Legal Service (Andrei). We would be in favour of implementing such or similar recital also in the environmental crime Directive.*

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

- *We may agree with the revised text.*

ESTONIA

In response to the question about introducing the proposed „general offence“ in the trilogue today, we are of opinion that it is unfortunately too early to present this text as a starting point of discussing the possible self-standing offence.

The time frame has been too short to come up with a solid proposal that could be a good point for further discussion with the aim of reaching a compromise. As I pointed out at the meeting on Friday, we also need more information about the actual aim of European Parliament and the reasons why super-aggravating circumstance is not suitable. The proposed wording for a new general offence raises concerns about respecting fundamental principles of criminal law like ultima ratio and legal certainty and it is hard to understand what kind of situations would be covered by the proposal that are not already covered by art 3.

FINLAND

Thank you for your hard work on the issue. As regards point A) (The general, residual offence), in document WK 12457/2023 INIT, we would have the following comments (in addition to those made earlier):

The idea of a self-standing offence continues to raise serious concerns over the principle of legality, predictability and legal certainty.

This sort of an addition to the Directive at this point would be very significant and should not be included in the Directive with such a timetable and without the possibility of thorough national consultations.

There was no mention on the document on the penalties which is an essential part of the discussion. As you well know, we do not see it as possible to make amendments to the provisions on penalties (thresholds) as they stand in the General Approach.

We are not sure whether the idea is that the Directive would include both a provision on the general offence and a provision on the aggravating circumstance. This would mean including two major new elements into the Directive on the same issue. We do not see this as justified.

A few comments on the revised proposal by the Commission: The definition of “ecosystem” is unclear and thus problematic in a criminal law instrument, especially in a wide, autonomous offence such as this. The element of “partial” destruction is vague. “Partial” may refer to a significant part or to a lesser one. The first part of the definition of destruction is somewhat empty as destruction is defined as “total or partial destruction”.

Due to these reasons, we must oppose giving the Presidency the proposed mandate on this issue.

As regards point B, we support the proposal.

FRANCE

En réponse à votre interrogation relative à notre position sur les réflexions concernant la création d'une infraction générale en matière environnementale je vous prie de trouver ci-dessous la réponse des autorités françaises :

- Les autorités françaises regrettent la méthode qui a été suivie qui n'a pas permis aux Etats membres de disposer de délais suffisamment longs afin d'aboutir à une analyse interministérielle sérieuse sur la proposition de la présidence

- Dans ces conditions, à ce stade, à défaut d'avoir eu le temps de réunir les avis de tous les ministères intéressés sur une question aussi cruciale que celle de l'introduction d'une éventuelle infraction autonome au domaine très large, elles ne peuvent que renouveler leur souhait, déjà exprimé, de suivre la direction d'une circonstance aggravante et, bien qu'elle puisse apparaître au premier abord séduisante, elles ne peuvent soutenir la proposition de rédaction de la présidence tendant à introduire à la fois une circonstance aggravante et une infraction autonome

- Ainsi, elles considèrent que, lors de la réunion en trilogue du 2 octobre, la présidence ne pourra pas engager des discussions sur la question de l'infraction générale (« catch-all clause »).

Courtesy translation

In response to your question about our position on the discussions concerning the creation of a general environmental offence, please find below the response of the French authorities:

- The French authorities regret the method used, which did not allow Member States sufficient time to carry out a serious interministerial analysis of the Presidency's proposal.

- In these circumstances, at this stage, as they had no time to obtain the opinions of all the ministries involved on an issue as crucial as that of the introduction of a possible autonomous offence with a very broad scope, the French authorities can only reiterate their wish, already expressed, to move in the direction of an aggravating circumstance and, although it may appear attractive at first sight, they cannot support the Presidency's drafting proposal to introduce both an aggravating circumstance and an autonomous offence.

- They therefore consider that, at the trialogue meeting on 2 October, the Presidency will not be able to enter into discussions on the issue of the catch-all clause/general offence.

GERMANY

Thank you for the opportunity to comment on the issue of a „general (residual) offence“.

After consulting our Federal Ministries of the Environment as well as of Food and Agriculture and our Minister, I can provide you with the following answer on behalf of the German Federal Ministry of Justice:

We thank the Presidency and the Commission for their thoughts and efforts in order to advance the negotiations in this important file. However, in the very short time given to analyse the proposal we are still of the opinion that the approach of a „general (residual) offence“ appears to be systematically flawed.

Article 3 (1) of the Directive already covers almost all conceivable damage, both with regard to air, soil and water (and ecosystem) as well as with regard to violations of specific EU environmental legislation, which are listed individually. Natural habitats and ecosystems are already explicitly protected there. A catch-all offence is therefore either superfluous or inadmissible because it could criminalize actions that are explicitly not the subject of the Environmental Criminal Law Directive (e.g. violations of fishing regulations). In doing so, it still encounters serious concerns about legal certainty and predictability.

Therefore, as of today, we see no basis to enter into negotiations with the European Parliament based on any version of the presented proposals for an autonomous offence, neither on a political nor on a technical level. We don't see a need to rush hastily into discussions with the EP, which might send a wrong signal despite the remaining fundamental concerns and might endanger the legal quality of the result. In our view, the negotiations should concentrate on a compromise solution based on a (super) aggravating circumstance. We are of course committed to actively participate in the discussions about possible compromises within the COPEN working party. In this respect, we consider it important to give Member States the opportunity to properly analyse further proposals within a reasonable amount of time.

HUNGARY

We would like to express our sincere appreciation for your efforts and commitment to resolving the issues at hand, namely the catch-all provision. It is indeed a testament to your dedication to finding a mutually beneficial solution.

After careful consideration and internal discussions, we believe that the timing of our current negotiations might not be ideal to make progress on this issue. We hold your perspective and goals in high regard, and we want to ensure that we engage in these discussions when we are fully prepared to contribute positively to the process.

We kindly request to hold on and allow us the necessary time to conduct a more comprehensive assessment and gather the information required to make informed decisions. This will enable everyone to better understand the complexities of the issue and provide more meaningful input during the negotiations.

Please understand that our intention is not to disrupt or delay the process unnecessarily. Rather, we want to ensure that our contributions are well-informed and constructive, ultimately leading to a more successful resolution for all parties involved.

Your understanding and flexibility in this matter are greatly appreciated, and I know that the file is in good hands in your hands.

LATVIA

The Presidency asks delegations whether they can accept that the Presidency, during the trilogue, offers the possibility of exploring at technical level a very limited and restricted version of Friday evening Commission's compromise proposal for an autonomous offence, which would only apply where the more specific offences contained in the Directive – for which a super-aggravating circumstance would still be foreseen – do not apply.

Latvia cannot support the inclusion of such a general, residual offence in the text of the Directive, taking into account that according to Article 90 of the Constitution of the Republic of Latvia legal norms, in particular criminal law norms, must be predictable, clear and understandable. This means that the content of the norm must be such that an individual knows what legal consequences arise from certain legal facts or certain conduct, so that he can make an informed choice and, if necessary, adapt his conduct to the requirements of the norm. Consequently, a rule expressed in apparently vague and unspecific terms cannot be applied to the detriment of the individual by imposing obligations, restrictions on rights or penalties.

From the above it can be concluded that Article 90 of the Constitution of the Republic of Latvia specifically guarantees the right to clarity and predictability of criminal law norms. This applies in particular to the criminal offences contained in the Criminal Law. The Constitutional Court of the Republic of Latvia has also emphasised that criminal liability is the most serious form of legal liability and its consequences may have a significant impact on a person's life even after serving a criminal sentence; therefore, norms providing for criminal liability must be more certain in content than norms in other branches of law.

Taking into account all of the above, as well as the position previously expressed by other Member States at the meeting on 29 September, Latvia cannot support making a general offence an autonomous criminal offence within the framework of the Directive. In this respect, Latvia would like to invite the Presidency to emphasize the inclusion of this general offence in Article 8 of the Directive as one of the aggravating circumstances.

MALTA

A) The ‘general offence’ (Line 94c)

The Maltese authorities regret that the method and process of the negotiations did not allow the Member States to carry out a proper and in-depth technical analysis of the proposal within a reasonable time especially on a matter of such high significance. The technical discussions have shown the strong reluctance by some Member States towards a self-standing offence, which we preliminarily share as we also do not consider it necessary to introduce any new offences and would only prefer to move in the direction of an aggravating circumstance (if any and in the spirit of compromise). The proposals presented to date do not provide the necessary legal guarantees and, for the reasons referred to above, in the absence of a consolidated national position, the Maltese authorities strongly wish that the Presidency does not enter into discussions with the European Parliament on the issue of the catch-all provision / general offence during the upcoming trilogue on 2 October.

B) Article 17 on ‘resources’ (Line 204)

Although the text is still being scrutinised, the Maltese authorities welcome the efforts of the Presidency to address our national concerns and express a positive preliminary view on this important aspect of the proposal including the additional explanations in the recitals.

NETHERLANDS

Hereby I would like to send you the answers from the side of The Netherlands regarding the two questions mentioned in the document 12457/2023 from 1 October 2023.

A) The discussions on drafting the catch all-provision as either an aggravating circumstance or an autonomous offence are complex and require extensive analysis, both by the various national ministries and criminal law organizations involved. Given the timeframe, we have not been able to timely coordinate our position on this matter. Therefore we propose to first extensively discuss the various proposals during the upcoming COPEN meeting on Thursday October 5th before the Presidency would explore further options on a catch all-provision during the dialogue.

B) The Netherlands can support the Presidency on the revised text on line 204 and on the revised text on recital 28.

PORTUGAL

In preparation of this evening's trilogue, we would like to clarify that in Portugal's view the only technically sound solutions discussed so far to respond to the Parliament's proposal for a catch-all provision seem to be the super-aggravating circumstance or some sort of qualification of the various conducts listed in Article 3.

However, and in order to allow for sufficient margin of negotiation, we will not oppose the Presidency's proposal to introduce in the trilogue the idea of authorising the technical meeting to discuss a more limited and restricted version of a self-standing offence. This possibility in no way prejudices our position, which at this stage remains negative.

ROMANIA

We would like to thank the PRES ES and GSC for their efforts in providing the aforementioned document.

As already expressed during the last meeting, it is our view that the issue of the catch all provision/general offence needs further in depth analysis. A legally sound criminal law provision is required not only in order to comply with the basic principles of criminal law but also to have it correctly transposed into national legislation and applied in practice.

Having regard to the aforementioned, we are not able at this moment to raise this issue before the EP since, in our view, the problems still persist and need further discussion in COPEN:

- overlap with the aggravating circumstance in art. 8 (line 155);
- overlap with the criminal offence in art. 3 let. o);
- the scope of the new criminal offence is not clear;
- the text is difficult to transpose and implement.

SLOVENIA

With regards to the question raised by the Presidency in **WK 12457/2023** on the general offence proposed by the Commission (point A) please note that Slovenia regrets the rush in finding fast solutions for such a complex and sensitive issue. We are still scrutinizing the proposal, however we can present some preliminary observations as outlined below.

We fear that the self-standing offence as proposed by the Commission is too broad and does not provide enough legal certainty. The proposal aims to limit the scope of the offence by criminalizing only “intentional” and “unlawful” conduct that breaches a “prohibition” however in our view these limitations are not sufficient enough.

Notwithstanding that the notion of “unlawful” is rightfully included in the so called “catch all provision” but the definition of “unlawful” conduct in Article 3 is nevertheless broad. It is unclear at this moment in time how the EU environmental legislation based on Article 191(1) TFEU will evolve in the future and this makes criminal response subject to uncertainty.

Furthermore, we are not supportive of the definition of “destruction” in the second paragraph of the proposal as it contains unclear and non-defined notions such as “habitat” and “ecosystem.” It might very well be that case that these terms are sufficiently clear in the environmental acquis but from the substantial criminal law they are too vague. Currently only the notion of “habitat within a protected site” is well defined in the directive. In addition, the scope of the second paragraph is too broad as partial destruction and severe deterioration are also covered.

With regards to the consequences the proposal lacks additional limitations that would criminalise only most severe and cross - border or long – lasting damage to the environment.

Currently, the gravity of the offence is not clearly defined. If the intention is to categorize it as a more serious offence when compared to others listed in the Directive then we should add an element of substantial consequence, e-g- extinction of certain species, to the text. Conversely, if the intent is to include also less serious forms of crimes within this provision then this should be made clear by incorporating proportionate sanctions into the Directive's text. Without this clarity, it is quite challenging to hold a meaningful discussion regarding this article.

In view of the above, Slovenia is not in favour of the Commission's compromise proposal for an autonomous offence and would prefer if the Council would retain its previous position in addressing the issue through aggravating circumstance.

SWEDEN

Comments following COPEN 29 September 2023

Sweden would like to thank the Spanish Presidency for the opportunity to comment on doc 12457/2023. We appreciate the hard work you put in.

We are now facing the most difficult parts of the negotiation and for us to be able to agree to changes require coordination. A general remark is therefor that it is quite difficult for us to manage to answer questions when given such short deadlines.

A) The general, residual offence

As indicated previously Sweden could be supportive of an approach where a possible compromise is explored on the basis of the “catch all clause”, on the condition that articles 5 and 7 of the general approach remain unchanged.

However, we would like to point out that this is a Parliament proposal and they have not yet been able to put forward a coherent and technically sound text. Furthermore, the compromise proposals by the Commission and the Presidency were tabled last week and have not been thoroughly discussed by the Member States. We believe the Council should take the time it needs to discuss this issue fully at technical level and clarify to the Parliament that further in depth discussions would have to take place at later trilogues.

This being said, Sweden doesn't oppose allowing the Presidency to introduce in the trilogue the idea of authorising the technical meeting to discuss a more limited and restricted version of a self-standing offence. However, we want to be clear that we agree only to explore such a solution through a discussion at technical level, not including agreeing to finally find a solution in that direction. We would also like to indicate that we are hesitant regarding the proposals put forward so far.

For the time being we would prefer an aggravating circumstance or, possibly, a solution in line with Article 5(2), line 116. This could possibly be combined with an addition in Article 25 on evaluation and reporting, suggesting that the effect of such a solution is evaluated (see for reference Article 18 Directive on the fight against fraud to the Union's financial interests by means of criminal law).

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

The revised text is an improvement as it allows for more flexibility and therefor agreeable to us.

