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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 - Comments and drafting suggestions by Member States in relation to the Presidency text in 13203/22

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**DOCUMENT PARTIALLY ACCESSIBLE TO THE PUBLIC (31.05.2023)**

At the meeting of the COPEN Working Party on 19 October 2022, the Presidency presented a new draft text on Articles 5 - 29 (13203/22). The Presidency also referred to WK 14116/22.

Subsequently to the meeting, the Presidency invited Member States that so wished to provide written contributions / drafting suggestions on the open Articles (1, 5, 7, 14, 15, 22) and the accompanying recitals.

The input received has been set out in the Annex.

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

BELGIUM .....	3
BULGARIA .....	5
FINLAND .....	9
FRANCE .....	10
GERMANY .....	17
HUNGARY .....	19
NETHERLANDS.....	23
POLAND .....	25
SWEDEN.....	28

## **BELGIUM**

Belgium continues to welcome and strongly support the ambitious proposal by the European Commission to update and improve the efficiency of the European policy on the protection of the environment through criminal law. However, certain changes to the text necessitate certain remarks and/or questions.

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### **- Art. 7: sanctions for legal persons**

#### ***Possible (alternative) calculation systems:***

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 very much appreciate 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 worldwide turnover (a fixed amount or other alternatives). This criterion is considered to be too restrictive and limiting because of the practical concerns as voiced by BE during the last COPEN and explained in previous written contributions.

During the meeting, the European commission made reference to other EU-instruments, such as the GDPR and the consumers rights directive. While clarifying certain aspects, referencing to theses also raised some concerns. First of all, these instruments concern administrative procedures and sanctions, not criminal ones. Furthermore, the instruments apply a worldwide annual turnover criterion, indeed combined with fixed amounts, whichever is higher or when the information is not available. We wonder why only the criterion of worldwide annual turnover was maintained in the commission's proposal.

The discussion during the working party, including the intervention of the council legal service, has shown the need to further clarify the application of worldwide turnover, as well as the legal possibilities of member states when implementing the minimum sanctions in the directive in their national legislation.

Lastly, we would welcome the initiative by the PRE & COM to request more info on the experience of member states who already use a system based on WWT and especially in regards to the possible problems identified when using this system, as expressed in previous written comments and during the last COPEN.

***Inclusion of reference to article 6 §2 in paragraph 3:***

We can support the text as included in the last document. However, if need be, we do not oppose the (re-)inclusion of this reference in article 7 §3.

- **Art. 20: national strategies**

As regards the obligations for member states to establish, publish and implement national strategies, BE has several concerns:

- As discussed during the COPEN, it is indeed not feasible that national strategies would be established, published and implemented all within one year of transposition. We therefore would like all ambiguity in the text to be resolved so that it is clear that the implementation should indeed commence in the first year but not be finalized.
- Furthermore, BE, as other member states, is still concerned with the workload that comes with writing these extensive national strategies and is still not convinced of the necessity, especially seeing that similar obligations are included in the sectoral instruments referred to in this instrument at hand.
- Lastly, we would like to propose following adjustments to the text of recital 31 to meet our concern in the context of providing for national strategies as a federalized state, based on what was said by the EU Commission during the COPEN.

## **BULGARIA**

### **Comments concerning differentiated sanctioning regime under Article 7(3) (13203/22)**

The Bulgarian delegation would like to reiterate its concerns about the proposed differentiated approach in sanctioning legal persons depending on whether their liability is triggered under paragraph 1 (physical perpetrator is person in leading position) or under paragraph 2 (physical perpetrator is person under authority of the legal person) of Art.6 (*differentiated sanctioning regime*) (Art.7, paragraph 3 in document 13203/22).

In the written comments of 27 June 2022 we already mentioned the reasons why the member states should dispose of equally effective, proportionate and dissuasive corporate sanctions and measures both in the case of paragraph 1 and paragraph 2 of Art.6: these provisions do not establish different levels of “culpability” of the legal persons, but cover two different categories of physical perpetrators whose criminal conduct triggers corporate liability; in both cases the crimes are committed for the benefit of the legal person, i.e. the connection between the criminal offence and the legal person is the same in both cases; the damage caused by crimes committed by persons under authority in many cases could be more serious than in the cases of crimes committed by persons in leading position; the differentiated sanctioning regime is potential for forum shopping; the international criminal law conventions, including those in which the EU participates jointly with its member states, and most of EU instruments provide for equal sanctioning regime.

In addition, we pointed out the serious negative consequences of the proposed differentiated approach in sanctioning legal persons: breach of the internationally recognized principle and further breach of the consistency and coherence of the EU legislation; conceptual, legislative and practical confusion in the member states which have already taken measures in conformity with the currently established international and European standards; the wrong message to the member states that they could adopt less effective, proportionate and dissuasive corporate sanctions for environmental crimes committed by persons under authority; potential for misuse by the legal persons which could easily organize the commission of environmental crimes in a way to avoid effective sanctioning; and the potential for forum shopping.

It should be noted that during the COPEN and JHA Counsellors meetings no convincing arguments have been presented to address the concerns of the delegations who call for the deletion of the unreasonable differentiated sanctioning regime.

In view of the above, we restate that, whatever would be the decision concerning the method of calculation of the amount of criminal or non-criminal fines, this method should be applied to the both cases of the corporate liability under Art.6. The “unique” and special status of the EU law or the existing legislative approach in some member states should not justify deviation from principles that are established for many years and proven at both international and European level, especially when such deviation could seriously affect the capacity of the national authorities for effective, proportionate and dissuasive sanctioning of environmental crime.

Therefore, the Bulgarian delegation proposes to remove the differentiated sanctioning regime provided in Art.7, paragraph 3, e.g. by adding also reference to paragraph 2 of Art.6. A proposal for respective amendments in Art.7 in track changes is attached to these comments (based on document 13203/22).

**Drafting suggestions of the Bulgarian delegation**  
**on recital 15, Article 7(3) and Article 21(2), letter b**  
**(ST 13203/22 + WK 14116/22)**

**Recital 15: the Bulgarian delegation supports the written proposal of the German delegation to delete the problematic wording which could be perceived as preference for corporate criminal liability.**

(15) Insofar as an environmental offence is committed by conduct attributable to legal persons, legal persons should be liable for environmental criminal offences as defined in this Directive. **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.** ~~Financial situation~~ **The seriousness of the conduct, and the individual, financial and other circumstances** 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.** **When implementing the criterion of the total worldwide turnover, Member States should provide for rules for the situations where the turnover of a legal person is non-existent or undetectable. Should these rules include the setting of minimum amounts of fines, then the minimum-maximum levels of these do not have to reach the levels established in this Directive. When transposing the provisions of this Directive regarding the calculation of minimum-maximum level of sanctions, Member States may choose one of the alternatives or both of them or combine the two, provided that the minimum standard of at least one of them is respected.**

**Article 7, para.3, first sentence**

3. Member States shall take the necessary measures to ensure that 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 of the legal person concerned, and the maximum limit of which incurred shall be not less than:.....

**Article 21, para.2, letter b)**

**(b) the number of natural and legal persons prosecuted for, convicted of or sanctioned for the offences referred to in Articles 3 and 4;**

## FINLAND

Finland thanks the Chair for the opportunity to provide written comments on the proposal. In addition to our previous comments during the COPEN meetings and in writing, we would like the following aspects to be taken notice of.

### **Article 7**

The Finnish position on art. 7 and the arguments behind it have been stated many times, and we refer to our earlier comments.

The fixed amounts of EUR 40 and 20 million suggested by the Presidency in the document distributed on the 18<sup>th</sup> of October (WK 14116/2022 INIT) are considered extremely high.

In the suggestion by the Presidency (WK 14116/2022 INIT) there is an added phrase in recital 15, according to which, “when implementing the criterion of the total worldwide turnover, Member States should provide for rules for the situations where the turnover of a legal person is non-existent or undetectable”. It is unclear, what is the purpose of the added phrase in terms of transposition. If the idea is to encourage Member States to provide rules for the situations referred to, the wording should be amended accordingly.

There is a reference in the suggestion by the Presidency (WK 14116/2022 INIT) in recital 15a to “financially strong” legal persons. The meaning of “financially strong” is ambiguous and should be clarified.

### **Article 14**

Referring to the discussions during the COPEN meeting on the 19<sup>th</sup> of October, there remains a need to clarify the wording of the article and/or the recitals. For example, some references were made during the COPEN meeting on the 19<sup>th</sup> of October to Directive 2011/36/EU on human trafficking. There are several provisions on the assistance, support and protection of victims of trafficking in human beings in the said Directive. As we have understood it, article 14 of the current proposal is not meant to correspond to the said provisions of the Directive on human trafficking nor to introduce similar obligations to the Member States. This should be made clear in the wording of art. 14 and the recitals linked to it.

FRANCE



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Secrétariat général  
des affaires européennes

Paris, le 26 octobre 2022

**NOTE**

pour la Représentation permanente de la France auprès de l'Union européenne  
à l'attention de [redacted]

**Objet** : Commentaires écrits des autorités françaises concernant les articles de la proposition de directive du Parlement européen et du Conseil relative à la protection de l'environnement par le droit pénal et remplaçant la directive 2003/99/CE et les considérants les accompagnant n'ayant pas été provisoirement agréés au niveau technique lors de la réunion des Conseillers JAI criminalité environnementale du 19 octobre 2022

**Réf.**

Ce document est à diffusion limitée et n'a pas vocation à être partagé. Nous vous prions de le transmettre de façon sécurisée aux adresses suivantes : [redacted] adressé aux seuls destinataires concernés et de nous adresser une copie de cette transmission, notamment aux fins d'archivage par le SGAE.

La Cheffe du bureau Justice pénale et civile



Paris, le 26 octobre 2022

## NOTE DES AUTORITÉS FRANÇAISES

**Objet :** Commentaires écrits des autorités françaises concernant les articles de la proposition de directive du Parlement européen et du Conseil relative à la protection de l'environnement par le droit pénal et remplaçant la directive 2008/99/CE et les considérants les accompagnant n'ayant pas été provisoirement agréés au niveau technique lors de la réunion des Conseillers JAI criminalité environnementale du 19 octobre 2022

**Réf. :**

La Présidence tchèque voudra bien trouver ci-joint les éléments de réponse écrits des autorités françaises concernant les articles de la proposition de directive du Parlement européen et du Conseil relative à la protection de l'environnement par le droit pénal et remplaçant la directive 2008/99/CE et les considérants les accompagnant n'ayant pas fait l'objet d'un accord technique provisoire lors de la réunion des Conseillers JAI criminalité environnementale du 19 octobre 2022.

**Sur l'article 7 (3) :**

Les autorités françaises soutiennent : (i) l'introduction du critère du chiffre d'affaires annuel mondial ; (ii) l'introduction du critère de montants d'amendes définis en euros.

Les autorités françaises soutiennent également les seuils définis par la Présidence, à savoir les nombres de 3 % et de 5 % pour le chiffre d'affaires annuel mondial, et les chiffres de 20 millions et de 40 millions d'euros pour les montants exprimés en euros.

En revanche, les autorités françaises conditionnent leur soutien à la prise en compte des éléments suivants :

- le choix entre les deux branches de l'alternative doit être laissé au seul législateur national dans le cadre de la transposition de la directive, sans possibilité de procéder à une ventilation en fonction de l'infraction concernée ;
- le chiffre d'affaires mondial à prendre en considération est celui de l'année, ou des trois années (proposition allemande, sur laquelle les autorités françaises sont flexibles), précédant la commission des faits. En effet, le critère selon lequel le point de départ serait celui de l'année précédant la décision de condamnation pourrait permettre des

contournements tels que le fait, pour la société poursuivie, de mettre en œuvre des stratégies de restructuration pendant la durée de l'instruction de l'affaire qui viseraient à réduire son chiffre d'affaires (comme cela a déjà pu être observé en matière de lutte contre les pratiques anticoncurrentielles) ;

- il est en revanche proposé de renvoyer au droit national les hypothèses suivantes, compte tenu de : (i) la technicité de ces sujets ; (ii) le risque d'une réglementation imparfaite car non-exhaustive, et ce alors qu'il s'agit de la première fois qu'est envisagée, dans un instrument de droit pénal, l'harmonisation des niveaux de sanctions pour les personnes morales ; (iii) et la nécessité de préserver une marge d'autonomie suffisante pour les États membres lors de la transposition de la directive, pour la cohérence de leurs systèmes juridiques nationaux :
  - o les hypothèses de banqueroute, ou, de manière plus générale, de dissolutions frauduleuses de sociétés ;
  - o les hypothèses de fusion ou absorption d'une personne morale par une autre personne morale, et notamment sur le point de savoir si la société absorbante peut être condamnée comme si elle avait commis elle-même l'infraction pourtant commise par la société absorbée ; c'est le cas en France, mais peut-être pas dans les autres États membres ;
  - o les hypothèses de création trop récente d'une personne morale, ne disposant pas d'un chiffre d'affaires mondial encore établi, ou tout simplement les situations dans lesquelles le chiffre d'affaires mondial ne peut être établi, quelle qu'en soit la raison. Sauf erreur, il semble que dans ce cas le critère du chiffre d'affaires mondial ne pourra pas être déterminé, et donc que le quantum maximum encouru ne pourra pas réellement être déterminé.

Une rédaction consolidée serait la suivante :

« 3. Member States shall take the necessary measures to ensure that, at least for legal persons held liable pursuant to Article 6(1), offences referred to in Article 3(2) are punishable by criminal or non-criminal fines, the amount of which shall be proportionate to the seriousness of the conduct and the individual, financial and other circumstances of the legal person concerned, and the maximum limit of which incurred shall be not less than:

(a) 5% of the total worldwide turnover of the legal person in the [OR last three] business year[s] preceding the one in which the offence was committed the fining decision for offences referred to in Article 3(2) points (a) to (j), (n), (q), (r), and 3% of the total worldwide turnover of the legal person in the [OR last three] business year[s] preceding the one in which the offence was committed the fining decision for offences referred to in Article 3(2) points (k), (l), (m), (o), (p);

or, alternatively, by decision of each Member State at the time of transposition

(b) an amount corresponding to EUR [40] million for offences referred to in Article 3(2) points (a) to (j), (n), (q), (r), and EUR [20] million for offences referred to in Article 3(2) points (k), (l), (m), (o), (p).

Member States shall choose between these two maximum limits at the time of transposition, not on an offence-by-offence basis, but as a whole.

In the following situations, the conditions of liability and the determination of the applicable maximum limits are left to the national rules of each Member State:

- where the legal person referred to in this paragraph is bankrupt or has been fraudulently dissolved since the commission of the offence;

- where the legal person referred to in this paragraph has been absorbed by or merged with another legal person since the commission of the offence;

**- where the total worldwide turnover in the [OR last three] business year[s] preceding the one in which the offence was committed cannot be determined. »**

Courtesy translation:

The French authorities support: (i) the introduction of the criterion of total annual worldwide turnover; (ii) the introduction of the criterion of fine amounts defined in euros.

The French authorities also support the thresholds defined by the Presidency, i.e. the figures of 3% and 5% for total annual worldwide turnover, and the figures of 20 million and 40 million euros for amounts defined in euros.

Nevertheless, the French authorities condition their support on the following elements being taken into account:

- the choice between the two alternatives must be left solely to the national legislator in transposing the directive, without the possibility of mixing both methods depending on the offence at stake;
- the total worldwide turnover to be taken into consideration is that of the business year, or three business years (German proposal, on which the French authorities are flexible), preceding the commission of the offence. Indeed, the criterion according to which the starting point is the year preceding the fining decision, could enable avoidance strategies, as in situations in which the prosecuted company implements restructuring strategies during the investigation of the case which aim to reduce its turnover (as has already been observed in the fight against anti-competitive practices);
- finally, it is proposed not to regulate the following hypotheses in the proposal for a directive, given the following reasons: (i) the technical nature of these subjects; (ii) the risk of imperfect regulation because it is not exhaustive, given that this is the first time that harmonisation of the levels of penalties for legal persons is envisaged in a EU criminal law instrument; (iii) and the need to preserve a sufficient margin of autonomy for the Member States when transposing the directive, in order to ensure the consistency of their national legal systems:
  - o cases of bankruptcy or, more generally, of fraudulent dissolution of companies;
  - o cases where a legal person is merged or absorbed by another legal person, and in particular whether the absorbing company can be prosecuted as if it had itself committed the offence committed by the absorbed company; this is the case in France, but perhaps not in the other Member States;
  - o cases where a legal person has been set up too recently and does not yet have an established total worldwide turnover, or simply cases in which the total worldwide turnover cannot be established, for whatever reason. The French authorities propose to refer to national law here because, unless mistaken, it seems that in this case the criterion of total worldwide turnover cannot be determined, and therefore the maximum quantum incurred cannot really be determined, so that it would be necessary to switch to a classic system of amounts in euros defined in the law.

A consolidated version would read as follows:

*"3. Member States shall take the necessary measures to ensure that, at least for legal persons held liable pursuant to Article 6(1), offences referred to in Article 3(2) are punishable by criminal or non-criminal fines, the amount of which shall be proportionate to the seriousness of the conduct and the individual, financial and other circumstances of the legal person concerned, and the maximum limit of which incurred shall be not less than:*

*(a) 5% of the total worldwide turnover of the legal person in the **[OR last three] business year[s] preceding the one in which the offence was committed the fining decision** for offences referred to in Article 3(2) points (a) to (j), (n), (q), (r), and 3% of the total worldwide turnover of the legal person in the **[OR last three] business year[s] preceding the one in which the offence was committed the fining decision** for offences referred to in Article 3(2) points (k), (l), (m), (o), (p);*

or, alternatively, **by decision of each Member State at the time of transposition**

(b) an amount corresponding to EUR [40] million for offences referred to in Article 3(2) points (a) to (j), (n), (q), (r), and EUR [20] million for offences referred to in Article 3(2) points (k), (l), (m), (o), (p).

**Member States shall choose between these two maximum limits at the time of transposition, not on an offence-by-offence basis, but as a whole.**

**In the following situations, the conditions of liability and the determination of the applicable maximum limits are left to the national rules of each Member State:**

**- where the legal person referred to in this paragraph is bankrupt or has been fraudulently dissolved since the commission of the offence;**

**- where the legal person referred to in this paragraph has been absorbed by or merged with another legal person since the commission of the offence;**

**- where the total worldwide turnover in the [OR last three] business year[s] preceding the one in which the offence was committed cannot be determined."**

#### **Sur le considérant 15 :**

Les autorités françaises peuvent accepter ce considérant tel que rédigé dans le document WK 14116/2022 INIT, sous réserve de supprimer sa dernière phrase, compte tenu des propositions qui ont été formulées *supra*.

#### **Courtesy translation:**

The French authorities can accept this recital as drafted in WK 14116/2022 INIT, subject to the deletion of its last sentence, taking into account the proposals that have been made above.

#### **Sur le considérant 15(a) :**

Les autorités françaises estiment que ce considérant, tel que rédigé dans le document WK 14116/2022 INIT, pourrait être amendé de façon à renforcer sa cohérence avec la rédaction de l'article 7 (3). A ce sujet, il peut être relevé que :

- en premier lieu, la deuxième phrase semble indiquer que les montants figurant à l'article 7 (3) pourraient être limités à certaines des infractions visées dans la proposition de directive seulement, ce qui contredit l'objectif d'une harmonisation minimale et uniforme ;
- en second lieu, la notion de : « *financially strong legal persons* » est de nature elle aussi à limiter le champ d'application de l'article 7 (3).

#### **Courtesy translation:**

The French authorities consider that this recital, as drafted in WK 14116/2022 INIT, could benefit from a few amendments in order to reinforce its consistency with the wording of Article 7 (3). In that perspective, it could be outlined that:

- firstly, the second sentence seems to indicate that the amounts in Article 7 (3) could be limited to only some of the offences referred to in the proposal for a Directive, which contradicts the objective of minimum and uniform harmonisation;
- secondly, the concept of: "*financially strong legal persons*" is also likely to limit the scope of Article 7(3).

#### **Sur l'article 14 et le considérant 26 :**

Dans un esprit de compromis, et parce qu'elles considèrent que, en l'état, les États membres ne peuvent avoir connaissance de l'étendue de leurs obligations positives de transposition, les autorités françaises proposent les amendements suivants au considérant 26 :

« (26) Other persons may also possess valuable information concerning potential environmental criminal offences. They may be members of the community affected or members of society at large taking an active part in protecting the environment. Such persons – either natural or legal persons – who report environmental crimes as well as persons who cooperate with the enforcement of such offences should be provided the necessary support and assistance in the context of criminal proceedings, so that they are not disadvantaged for their cooperation but supported and assisted. The necessary support and assistance measures should be available to such persons in accordance with their procedural rights in the national legal system and should shall include at least all support and assistance measures available to persons having identical corresponding procedural rights in criminal proceedings ~~on~~ concerning other criminal offences. This Directive is not intended to harmonise support and assistance measures. 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. Member States should not be required to make available the support and assistance measures to persons who are suspected or accused in the context of the criminal proceedings concerned. A person's refusal of assistance or support measures should not entail obligations for the competent authorities of the Member State concerned to provide the person with alternative measures. »

L'article 14 est acceptable en l'état du document 13203/22.

Courtesy translation:

In a spirit of compromise, and because they consider that, as things stand, the Member States cannot be aware of the extent of their positive obligations of transposition, the French authorities suggest the following amendments in recital 26:

“(26) Other persons may also possess valuable information concerning potential environmental criminal offences. They may be members of the community affected or members of society at large taking an active part in protecting the environment. Such persons – either natural or legal persons – who report environmental crimes as well as persons who cooperate with the enforcement of such offences should be provided the necessary support and assistance in the context of criminal proceedings, so that they are not disadvantaged for their cooperation but supported and assisted. The necessary support and assistance measures should be available to such persons in accordance with their procedural rights in the national legal system and should shall include at least all support and assistance measures available to persons having identical corresponding procedural rights in criminal proceedings ~~on~~ concerning other criminal offences. This Directive is not intended to harmonise support and assistance measures. 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. Member States should not be required to make available the support and assistance measures to persons who are suspected or accused in the context of the criminal proceedings concerned. A person's refusal of assistance or support measures should not entail obligations for the competent authorities of the Member State concerned to provide the person with alternative measures.”

Article 14 is acceptable as it stands in document 13203/22.

Sur l'article 21 :

Les autorités françaises soutiennent le retour à la précédente rédaction de cette disposition.

Courtesy translation:

The French authorities support the previous wording of this provision.



## GERMANY

Germany thanks the Presidency for the renewed opportunity to provide written comments on the proposal for a Directive on the protection of the environment through criminal law. Further comments remain reserved.

### Recital 15

We would like to reiterate our position, that 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. The last two sentences should be deleted or refined to better express what is intended.

- (15) ***Insofar as an environmental offence is committed by conduct attributable to legal persons, ~~Where possibel according to national,~~ legal persons should also be held ~~eriminally~~ liable for environmental criminal offences ~~aeording 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 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. The seriousness of the conduct, and the individual, financial and other circumstances 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~~ ***When transposing the provisions of this Directive regarding the calculation of minimum-maximum level of sanctions, 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. When implementing the criterion of the total worldwide turnover, Member States should can specify further details in their national law, for example for the situations where the turnover of a legal person isdoes notn-existent or undetectable cannot be determined. Should these rules include the setting of minimum amounts of fines, then the minimum-maximum levels of these do not have to reach the levels established in this Directive. When transposing the provisions of this Directive regarding the calculation of minimum-maximum level of sanctions, Member States may choose one of the alternatives or both of them or combine the two, provided that the minimum standard of at least one of them is respected.******

## Article 22 and 23

Under the proposed Article 22 the Commission may adopt implementing acts to establish the standard format for data transmission referred to in Article 21(4). Germany does not see the added value of detailed rules on the standard format for data transmission taking into consideration the considerable effort that first has to be put in the work of the committee assisting the Commission and second the potentially considerable bureaucratic effort in implementing the standard format. Also, it remains unclear what the difference is between the standard format, which shall be established, and the reporting format, which shall be part of the standard format. The details on the statistics to be kept should be regulated conclusively in the directive and Articles 22 and 23 should be deleted.

## HUNGARY

### **Drafting suggestions submitted by Hungary for amending Recitals 14, 15 and (27a) of the draft Directive on environmental crime**

Hungary makes the following three proposals to clarify the current text of Articles 5, 7 and 15.

(Our proposals are marked by **highlight, as well as bold and underlined.**)

1. Hungary suggests inserting the following sentence in Recital 14:

*„Serious negligence describes a particularly grave breach of the duties of care.”*

- (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 in particular where they cause death to any person. The criminal law systems of all Member States include provisions on manslaughter, either committed intentionally or with 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 with serious negligence. Serious negligence in this context describes a particularly grave breach of the duties of care.**

Explanation: We refer to the jurisprudence of the Court (CJEU), which already explained the core meaning of serious negligence. This concept is slightly different from our national criminal law, and we assume that some other national laws interpret negligence, thus serious negligence in a different manner. In order to clarify that this concept may have a slightly different meaning for the purposes of this directive, we see it essential to explain this in the recital.

To recap, the Court interpreted this term in its judgment C-308/06:

„72. It is true that Article 4 of Directive 2005/35, read in conjunction with Article 8 thereof, obliges the Member States to punish ship-source discharges of polluting substances if committed ‘with intent, recklessly or by serious negligence’, without defining those concepts. 73. It is, however, to be pointed out, first of all, that those various concepts, in particular that of ‘serious negligence’ referred to by the national court’s questions, correspond to tests for the incurring of liability which are to apply to an indeterminate number of situations that it is impossible to envisage in advance and not to specific conduct capable of being set out in detail in a legislative measure, of Community or of national law. 74. Next, those concepts are fully integrated into, and used in, the Member States’ respective legal systems. 75. In particular, all those systems have recourse to the concept of negligence which refers to an unintentional act or omission by which the person responsible breaches his duty of care. 76. Also, as provided by many national legal systems, the concept of ‘serious’ negligence can only refer to a patent breach of such a duty of care. 77. Accordingly, ‘serious negligence’ within the meaning of Article 4 of Directive 2005/35 must be understood as entailing an unintentional act or omission by which the person responsible commits a patent breach of the duty of care which he should have and could have complied with in view of his attributes, knowledge, abilities and individual situation.”

In addition, as discussed during the last expert meeting, the Commission explained that they understood serious negligence as a grave/serious breach of duties of care. This should be reflected in the recitals.

2. Hungary suggests amending Recital 15 as follows:

(15) Where **possible according to** national law ~~provides for it~~, legal persons should also be held criminally liable for environmental criminal offences according to this Directive. Member States whose national law does not provide for the criminal liability of legal persons should ensure that their administrative sanctioning systems provide for effective, dissuasive and proportionate sanctions types and levels as laid down in this Directive in order to achieve its objectives. **The 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.** ~~Financial situation~~ **The seriousness of the conduct, and the individual, financial and other circumstances** 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, whether they refer to 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, **they remain free to apply the criteria set out by national law to calculate the fines. Setting common standards for the maximum levels of fines is without prejudice to the principles of national criminal law and the application of criminal sanctions under national law . 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.**

Explanation: in the spirit of compromise, we would like to make sure that the directive does not harmonise the criteria for determining criminal fines for legal persons, but rather provides for a minimum harmonisation by setting the minimum of maximum levels of fines.

3. “Public concerned”:

In Recital (27a), we suggest inserting the following explanation to the public concerned:

**(27a)** This Directive should not require Member States to introduce any specific procedural rights ~~standing~~ for the members of the public concerned. However, when such procedural rights for members of the public concerned ~~standing~~ exists in a Member State in equivalent situations concerning other criminal offences, for example, where such persons may be called to act as a witness or an expert and provide evidence, or where they have the right to participate as a civil party, such procedural rights ~~standing~~ should also be granted to the members of the public concerned in the proceedings concerning environmental offences defined in this Directive. Rights of the members of the public concerned are without prejudice to the rights of victims as defined in Article 2(1) point (a) of Directive 2012/29/EU of the European Parliament and of the Council<sup>1</sup>. This Directive acknowledges that members of the public concerned and victims remain two distinct concepts and does not require Member States to apply victims' rights to members of the public concerned. **When certain procedural rights are granted by national law to anyone beyond the category of the public concerned in the context of investigating or prosecuting certain criminal offences, such rights are not required to be extended to environmental offences defined in this Directive.**

**Alternative 2: When certain procedural rights are given to persons other than the public concerned for the purposes of a criminal procedure concerning certain specific criminal offences, such rights are not required to be extended to environmental offences defined in this Directive.**

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<sup>1</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, (OJ L 315, 14.11.2012, p. 57–73).

## NETHERLANDS

The Netherlands would like to thank the Czech Presidency for the opportunity to provide written contributions / drafting suggestions on the open Articles (1, 5, 7, 14, 15, 22) and the accompanying recitals in the light of the discussion during the last COPEN at 19 October 2022.

### **Article 1**

No comments.

### **Article 5 / recital 14**

The addition to recital 14 is somewhat unclear. It says that MS can 'rely on' general provisions on intentional and serious negligent manslaughter (or homicide). It is however unclear whether the sanctions for these offences in general need to be raised. Therefore it needs to be made clear that MS can rely on the existing maximum penalties when relying on those provisions: the maximum penalties for 'manslaughter/negligent death by environmental offence' should not be treated differently than 'manslaughter/negligent death by any other offence'.

### **Article 7 / recital 15**

Regarding the new text proposed for recital 15, it seems that the wording 'should provide for rules' result in a new obligation and we cannot support that. So we welcome the suggestion of the presidency to look at the text on recital 15 and wait for a revised text.

### **Article 15 / recitals 27 and 27a**

Regarding recital 27: during the last COPEN meeting, we spoke about persons who are not yet affected by environmental crimes but who are likely to be affected, because the negative impact of environmental offences occur with a delay.

In the new Presidency text persons who are likely to be affected **should** also be considered 'members of the public concerned'. We think however, that this is a matter of national law. The directive should not impose an obligation to treat persons who are 'likely to be affected' in the same way as 'members of the public concerned' who in face have been affected by environmental offences.

This can be achieved by replacing the word “should” in recital 27 with “could”.

(27) ~~(26)~~ Since nature cannot represent itself as a victim in criminal proceedings, for the purpose of effective enforcement members of the public concerned, as defined in this Directive ~~taking into account Articles 2(5) and 9(3) of the Aarhus Convention<sup>9</sup>~~, should have the possibility to act on behalf of the environment as a public good, within the scope of the Member States’ legal framework and subject to the relevant procedural rules. **Among others, the negative impact of environmental offences may occur with a substantial delay and may not be apparent already during the course of the criminal proceedings.**

**Therefore, persons likely to be affected by the offences defined in this Directive ~~should~~ could also be considered members of the public concerned. For example, where the results of a committed offence pose an imminent threat to health of persons in an area where damage to the environment was caused, such persons ~~should~~ could be considered as persons likely to be affected by the offence.**

## POLAND

### **Poland's written comments on Articles 7 and 15 of the proposal for a Directive on the protection of the environment through criminal law, replacing Directive 2008/99/EC (13203/22)**

#### Draft Article 7:

Following national consultations, Poland can confirm that financial penalties of €40/20 million are acceptable.

However, Poland recognises that if the worldwide turnover criterion cannot be applied due to, for example, a lack of company turnover, then the size of the penalty may be difficult to determine. Therefore, while the second alternative method remains under discussion, the provisions of the directive should aim to create a system which does not limit judges or courts in the choice of penalty and where one of the criteria cannot be applied, the other should be available.

#### Draft Article 15 and accompanying recitals:

##### *Article 15 14*

##### *Rights for the public concerned to participate in proceedings*

Member States shall ensure that, ~~in accordance with their national legal system, the persons affected or likely to be affected by the~~ **in proceedings concerning** offences referred to in Articles 3 or 4, ~~and non-governmental organisations promoting environmental protection and meeting all requirements under national law~~ members of the (public concerned) have appropriate **procedural** rights ~~to participate~~ in proceedings concerning offences referred to in Articles 3 and 4, for instance as a civil party, **where such procedural rights for the public concerned exist in a Member State in proceedings concerning other criminal offences.**

(27) (26) Since nature cannot represent itself as a victim in criminal proceedings, for the purpose of effective enforcement members of the public concerned, as defined in this Directive, **in the absence of the presence in the Member State of state organisations or other national offices established to protect the environment or to act on its behalf** taking into account Articles 2(5) and 9(3) of the Aarhus Convention<sup>2</sup>, should have the possibility to act on behalf of the environment as a public good, within the scope of the Member States' legal framework and subject to the relevant procedural rules. **Among others, the negative impact of environmental offences may occur with a substantial delay and may not be apparent already during the course of the criminal proceedings. Therefore, persons likely to be affected by the offences defined in this Directive should also be considered members of the public concerned. For example, where the results of a committed offence pose an imminent threat to health of persons in an area where damage to the environment was caused, such persons should be considered as persons likely to be affected by the offence.**

**(27a)** This Directive should not require Member States to introduce any specific procedural rights **standing** for the members of the public concerned. However, when such procedural rights **for members of the public concerned** **standing** exists in a Member State in equivalent situations concerning other criminal offences, for example, where such persons may be called to act as a witness or an expert and provide evidence, or where they have the right to participate as a civil party, such procedural rights **standing** should also be granted to the members of the public concerned in the proceedings concerning environmental offences defined in this Directive. **The public concerned willing to exercise procedural rights in proceedings relating to the offences referred to in Art. 3 and 4 must meet all the requirements under national law, in particular regarding the demonstration of an appropriate legal interest and the performance of statutory activities in the field of environmental protection prior to the initiation of the proceedings. This is without prejudice to the discretion of judges or courts in criminal proceedings to admit in individual cases, members of the public concerned to participate in proceedings concerning criminal offences referred to in Articles 3 or 4.**

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<sup>2</sup> — United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

**(27b) Rights of the members of the public concerned are without prejudice to the rights of victims as defined in Article 2(1) point (a) of Directive 2012/29/EU of the European Parliament and of the Council<sup>3</sup>. This Directive acknowledges that members of the public concerned and victims remain two distinct concepts and does not require Member States to apply victims' rights to members of the public concerned.**

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<sup>3</sup> **Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, (OJ L 315, 14.11.2012, p. 57–73).**

## SWEDEN

Sweden appreciates the work done by the Presidency to find a compromise solution with respect to Article 7. Sweden maintains its position that Article 7 needs to be drafted in such a way as to give Member States some flexibility when implementing the requirements in that article. SE can accept the wording proposed by the Presidency in doc 12222/22 and the proposed fixed levels. SE can also accept that the lower level of the fixed amounts is raised so that the ratio between the thresholds equals that of subpoint a).

Sweden suggests a minor amendment in recital 15 a, see below. The aim of this amendment is to clarify that Member States are allowed to set thresholds for the highest fines based on, *i.a.*, the size of the company.

### Recital 15 a

Where Member States opt for minimum-maximum level of fines determined in absolute amounts, these should be laid down in national law. The highest levels of such fines should apply to the most serious forms of offences provided for in this Directive, which are committed by financially strong legal persons. The Member States may decide on the method of the calculation of these levels of fines **including thresholds regarding the highest levels of such fines**. The definition of the maximum level of fines is without prejudice to the discretion of judges or courts in criminal proceedings to impose appropriate sanctions in the individual cases. As this Directive does not set out any minimum levels of fines, the judges or courts should, in any case, impose appropriate sanction with respect to the individual, financial and other circumstances of the legal person concerned and the seriousness of the conduct. The actual fine imposed in an individual case is left to the discretion of the judge or court and while the maximum level of fine provided for the respective criminal offence by this Directive should be taken into account, the actual fine imposed in an individual case does not have to reach the maximum level of fine determined by this Directive. Member States are invited to regularly review the levels of fines determined in absolute amounts with regard to inflation and other changes in the value of money, in line with procedures set out in their national law. Member States not using EUR as their national currency should provide for minimum maximum levels of fines in their national currency that corresponds to the levels determined in this Directive in EUR on the date of adoption of this Directive. These Member States are invited to regularly review the levels also with regard to development of the exchange rate.