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From:	Presidency/General Secretariat of the Council
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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 - Preparation of the trilogue on 16 November 2023

Introductory remarks

Following the JHA Counsellors (+ Experts) meeting on 8 November 2023, the Presidency met with representatives of the European Parliament and of the Commission during a technical meeting on 9 November 2023.

During this meeting, the Presidency presented the proposals agreed at the meeting on 8 November on the issues of ‘authorisations’ and ‘qualified offence’, making clear that this is the last offer from the Council on these issues.

The EP delegation expressed a cautiously positive view on the texts presented, but stated that it would be up to their political masters to confirm whether this would be acceptable (a shadows meetings is planned for Wednesday 15 November, the day before the fourth and hopefully last trilogue on 16 November).

On the recitals, several lines could be greened, in view of the texts proposals that had been approved by the Working Party.

Reference is made to the 4 column table in ADD 1.

Some issues are still outstanding, which the Presidency submits below and which it aims to discuss at the meeting that is scheduled to take place on Monday 13 November 2023.

Outstanding issues

1. Waste offence, including drugs waste

This concerns the amendments set out in lines 17b, 19 and 27b.

The EP stated that it will drop the texts proposed in lines 27b and 19 (in the latter case thus agreeing to the Council text) if the text of the recital in line 17b is kept, subject to necessary refinements, with a clear link to the conduct referred to in line 77.

The co-legislators invited the Commission to present a text for a revised recital 17b, and the following was submitted:

“(17b) Unlawful collection, transport and treatment of waste, the lack of the supervision of such operations and the after-care of disposal sites, including action taken as a dealer or a broker (waste management) may cause devastating effects to the environment and human health. This includes situations when such unlawful conduct concerns harmful waste from pharmaceutical products or narcotics, chemicals, waste containing acids or bases or waste containing toxins, heavy metals, oil, grease, electrical and electronic waste, end-of-life vehicles or plastic waste. Therefore, Member States should ensure that unlawful waste management constitutes a criminal offence when such conduct concerns hazardous waste in a non-negligible quantity or other waste, and in such latter case when it causes or is likely to cause substantial damage to the environment or human health.”

The Presidency takes a positive view.

Q 1: Member States are invited to indicate if this revised recital is acceptable

2. Prevention measures

This concerns the amendments proposed in lines 24a, 35a and 35b.

The EP stated that it is open to a modification of the proposed text in lines 24a, 35a and 35b. In order to address the EP wishes, the Commission has again been invited to present a (new) recital on prevention with a clear link to Article 16 (lines 201-202), which would cater for the three points together.

The text presented is as follows:

“Member States should take appropriate action, such as information and awareness-raising campaigns targeting relevant stakeholders both from the public and private sector and research and education programmes, aimed at reducing overall environmental criminal offences, raising public awareness and reducing the risk of an environmental criminal offence. Where appropriate, Member States should act in cooperation with these stakeholders. In this context, actions aiming to improve prevention of environmental offences could include promoting compliance and due diligence schemes, encouraging operators to have compliance officers to help ensuring compliance with Union environmental law. Also, accessory sanctions to legal persons under this Directive [could]¹ include an obligation of companies to install due diligence schemes for enhancing compliance with environmental standards, which also contributes to prevention of further environmental offences. Moreover, Member States should consider establishing a fund to support prevention measures which effectively supports tackling environmental offences and devastating consequences caused by them.”

The Presidency considers that this text is rather flexible and takes a positive view.

Q 2: Member States are invited to indicate if this recital is acceptable

¹ Subject to agreement on the nature of accessory sanctions in the operative part.

3. Refinements to the qualified offence

During the discussions, it was proposed to make some refinements to the text-elements of the qualified offence, taking also into account the suggestions made by Member States in WK 14597/1/23 REV 1. The changes are indicated below, with ~~strike-through~~ and **bold/underline**:

Operative part:

New paragraph 2a in Article 3: (line 94c)

“2a. Member States shall take the necessary measures to ensure that offences referred to in Article 3(2), are considered a qualified offence if they cause destruction of, or widespread and substantial damage, which is either irreversible or long-lasting, to an ecosystem of considerable size or environmental value, or to a ~~natural~~ habitat within a protected site, or to the quality of air, the quality of soil, or the quality of water. ²

For the purposes of this paragraph 2a,

(i) a habitat within a protected site shall have the same meaning as defined in letter (o) of paragraph 2 of this Article;

(ii) an ecosystem means a dynamic complex of plant, animal, fungi and microorganism communities and their non-living environment, interacting as a functional unit, and includes habitat types, habitats of species and species populations.”

² For information, lawyer-linguists proposed clarifying the wording as follows:

*“2a. Member States shall take the necessary measures to ensure that offences referred to in Article 3(2) are considered a qualified offence **if they cause the following** to an ecosystem of considerable size or environmental value, ~~or~~ to a natural habitat within a protected site, or to the quality of air, ~~the quality~~ soil or ~~the quality~~ water:*

a) destruction;

b) irreversible, widespread and substantial damage; or

c) long-lasting, widespread and substantial damage.”

It is suggested to examine lawyer-linguist proposals for changes only after the text has been agreed at the trilogue.

New paragraph (2a) in Article 5: (line 116 b)

“2a. Member States shall take the necessary measures to ensure that the offence referred to in Article 3(2a) is punishable by a maximum term of imprisonment of at least eight years”.

New paragraph (5a) in Article 7: (line 150a)

“5a. Member States shall take the necessary measures to ensure that legal persons held liable pursuant to Article 6 for the offence referred to in Article 3(2a), are punishable by more severe criminal or non-criminal sanctions or measures.”

Article 8 is left as it is, but a new paragraph is added in line 163b, worded as follows:

“The aggravating circumstance referred to in letter (b) of this Article does not apply to the criminal conduct referred to in Article 3(2a).”

Recitals

The text of recital 11a and of new recitals xx and yy was slightly refined: (line 94c)

“(11a) Where an unlawful conduct provided for in this Directive, committed intentionally, causes the death to any person, the intention should be interpreted in accordance with national laws, with due regard to relevant case law of the Court of Justice of the European Union. Therefore, it could be understood, for the purposes of this Directive, as the intention to cause death, or it could also cover the situation in which the perpetrator has acted, or refrained from acting, voluntarily and in violation of a particular obligation, but without wanting or accepting the death of any person that nevertheless occurred. The same logic applies where an unlawful conduct provided for in this Directive, committed intentionally, causes serious injury to any person, or the destruction of, or widespread and substantial damage, which is either irreversible or long-lasting, to an ecosystem of considerable size or environmental value, or to a ~~natural~~ habitat within a protected site, or to the quality of air, the quality of soil, or the quality of water”.

“(xx) Criminal conduct defined under Article 3(2) of this Directive³ may lead to catastrophic results. Where an environmental offence referred to in this Directive causes the destruction of, or widespread and substantial damage, which is either irreversible or long-lasting, to an ecosystem of considerable size or environmental value, or to a ~~natural~~ habitat within a protected site, or to the quality of air, the quality of soil, or the quality of water, the causation of this catastrophic result should be considered as a qualified offence and, consequently, punished with more severe penalties. This qualified offence includes cases comparable to ecocide, which is already covered by the legal systems of certain Member States.”

*“(yy) Member States should take the necessary measures to ensure that legal persons held liable for the qualified offence referred to in this Directive, are punishable by more severe criminal or non-criminal sanctions or measures. For the purpose of this provision, Member States ~~may~~ **should**, in accordance with their national law, provide for a higher level of **criminal or non-criminal** fines than the **maximum** level of fines set out in this Directive or provide for more severe sanctions or measures otherwise, including ~~by~~ criminal or non-criminal sanctions or measures, or a combination thereof.”*

Q 3 : Member States are invited to indicate if the texts as refined above are acceptable.

4. Dynamic nature of the Directive

On Friday evening, the rapporteur of the Parliament, Mr Toine Manders, communicated that he feels that the existing elements relating to the dynamic nature of the Directive – such as the revision clause in Article 25 and recital 10 – are not yet fully satisfactory. The rapporteur indicated that he considers that (too) much responsibility remains in the hands of the Member States.

³ Recitals normally do not refer to specific Articles. The lawyer-linguists will be invited to find alternative drafting in this respect.

Given the fact that this is a ‘minimum harmonisation Directive’, the Rapporteur would like to stress that Member States can do more than the Directive requires them to do. Therefore, he proposes that the following text is added in Article 3(2a):

“In addition to the offences defined in paragraph 2 of this Article, Member States may, in accordance with their national law, define additional criminal offences in order to protect the environment.”

The Presidency considers that this text is not necessary but also that it does not harm, since the Directive indeed sets minimum rules. It could be offered as a last sweet to the Parliament, if it is necessary to reach an agreement.

The Presidency considers though that the text should not be inserted in Article 3(2a) but in a new, separate paragraph (e.g., Article 3(2b)).

Q 4 : Member States are invited to indicate if they can accept this additional text in a spirit of compromise.

Concluding remarks

The Presidency intends discussing the above issues during the JHA Counsellors meeting on 13 November 2023.

The Presidency thanks Member States in advance for their cooperation and for their flexibility in processing this document, which arrives late before the meeting.