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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

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The Working Party on Substantive Criminal Law met on 26 November 2007 to continue examination of the proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law, on the basis of document 15339/07 DROIPEN 109 ENV 633 CODEC 1286 and working documents tabled during the meeting.

The text of the proposed Directive, as it emerged from the discussions in the Working Party is set out in the Annex. Modifications with respect to the previous document are in **bold**. Comments by delegations are included in footnotes.

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on the protection of the environment through criminal law**

**Article 1**

**Subject matter**

This Directive establishes measures relating to criminal law in order to protect the environment more effectively.

**Article 2**

**Definitions<sup>1</sup>**

For the purpose of this Directive:

- (a) "unlawful" means infringing Community legislation set out in the Annex, or a law, an administrative regulation or a decision taken by a competent authority in a Member State that gives effect to this Community legislation.

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<sup>1</sup> All delegations lodged scrutiny reservations on this Article wishing a more in depth examination of it by the environment experts in their capitals.

(b) "protected wild fauna and flora species" are

1) for the purposes of Article 3 (f) those listed in

- Annex IV of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and wild fauna and flora;
- Annex 1<sup>1</sup> and referred to in Article 4(2) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds and

2) for the purposes of Article 3 (g) those listed in

- Annexes A or B<sup>2</sup> to Council Regulation 338/97/EC of 9 December 1996 on the protection of species of wild fauna and flora, by regulating trade therein.

(c) "protected habitat" means **any habitat or species for which an area is classified as a special protection area pursuant to Article 4(1) or (2) of Directive 79/409 of 2 April 1979 and any natural habitat or species for which a site is designated as a special area of conservation pursuant to Article 4(4) of Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora**<sup>3</sup>.

(d) "legal person" means any legal entity having such status under the applicable national law, except for States or public bodies in the exercise of State authority and for public international organisations.

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<sup>1</sup> **DELETED** supported by **DELETED** consider that a reference to Article 1 of Directive 79/409/EEC would be more appropriate. The majority of delegations opposed such a broadening of the scope of the Directive .

<sup>2</sup> **DELETED** supported by **DELETED** wished deletion of reference to Annex B. The majority of delegations opposed this deletion and entered scrutiny reservations on the **DELETED** proposal.

<sup>3</sup> Redrafting of the definition along the lines of a **DELETED** proposal . This delegation supported by **DELETED** would prefer deletion of this definition as well as of the offence in Article 3 h), because these provisions go beyond the obligations of the "Habitats " Directive and fall outside the community competence. Delegations entered scrutiny reservations on this new drafting. The **DELETED** delegation wished to replace the "protected habitat" by "protected area " and proposed alternative drafting supposing that the aim of the protection is an area which can involve more habitats. The majority of delegations opposed the **DELETED** drafting suggestions.

## Article 3<sup>1</sup>

### Offences

Member States shall ensure that the following conduct constitute a criminal offence, when unlawful and committed intentionally or with at least serious negligence [...]<sup>2</sup>

(a) the discharge, emission or introduction of a quantity of materials or ionising<sup>3</sup> radiation into air, soil or water, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil, the quality of water or to animals or plants;

(b<sup>4</sup>) the management of waste or the abandonment, dumping or uncontrolled management of waste, including hazardous waste<sup>5</sup>, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil, the quality of water, or to animals or plants;

(c) the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used and which, outside the plant<sup>6</sup> causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil, the quality of water, or to animals or plants;

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<sup>1</sup> All delegations lodged scrutiny reservations on this Article.

<sup>2</sup> **DELETED** wished that the sentence "as defined by national law" remain in the text.

<sup>3</sup> **DELETED** supported by **DELETED** lodged a scrutiny reservation for the inclusion of ionising radiation in the legal basis. However, aiming at achieving consensus in the Working Party, **DELETED** proposed the addition of a new recital in the Preamble providing that environmental crimes connected to nuclear activities should exclusively be defined by reference to EURATOM Treaty, a new definition of "unlawful" to be included in Article 2 and the inclusion in an Annex B, to be attached to the Directive, of the legislation referring to activities involving nuclear substances. This suggestion could be accepted by **DELETED**. The majority of delegations and the Commission representative entered scrutiny reservations.

<sup>4</sup> **DELETED** entered a scrutiny reservation on this sub-paragraph.

<sup>5</sup> **DELETED** wished to put instead of the initial phrase of this sub-paragraph, the phrase "the collection, transport, recovery and disposal of waste".

<sup>6</sup> **DELETED** supported by **DELETED** wished deletion of this part of the phrase.

- (d) The shipment of waste, where this activity falls within the scope of Article 2 (35) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council, for profit<sup>1</sup> and in a non-negligible quantity<sup>2</sup>, whether the shipment is executed in a single operation or in several operations which appear to be linked;
- (e) the manufacture, treatment, storage, use, transport, export or import of nuclear<sup>3</sup> materials, other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil, the quality of water, or to animals or plants;
- (f) The possession or taking of specimens of protected wild fauna and flora species or parts or derivatives thereof and the killing or destruction of specimens of protected wild fauna and flora species<sup>4</sup>.
- (g) Trading in specimens of protected wild fauna and flora species or parts or derivatives thereof<sup>5</sup>;

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<sup>1</sup> **DELETED** wished deletion of the phrase, “for profit”.

<sup>2</sup> **DELETED** wished inclusion of the following sentence: "which could cause death, serious injury or material damage".

<sup>3</sup> See above, footnote 5 on page 3.

<sup>4</sup> **DELETED** entered scrutiny reservations. **DELETED** considered with **DELETED** that this text tries to combine too many offences from several Articles of Birds and Habitats Directives. Furthermore, **DELETED** supported by other delegations and considering that minor cases should be excluded from the scope of Article 3 (f) suggested the division of Article 3 (f) into two separate categories providing on one hand for violations of Articles 12 and 13 of the Council Directive 92/43/EEC and on the other for violations of Article 5 of Council Directive 79/409/EEC, respectively, under exclusion of minor cases. The Working Party did not examine this proposal in depth. Delegations entered scrutiny reservations.

<sup>5</sup> **DELETED** proposal to address concerns expressed in particular by **DELETED**. **DELETED** entered scrutiny reservations. **DELETED** wished exclusion of minor cases.

- (h) Any conduct which causes the significant deterioration of a protected habitat<sup>1</sup>;
- (i) Trading in or production, marketing or use of ozone-depleting substances<sup>2</sup>.

#### Article 4

##### Inciting, aiding and abetting

Member States shall ensure that inciting, aiding and abetting the intentional conduct referred to in Article 3, is punishable as a criminal offence.

#### Article 5

##### Penalties

Each Member State shall take the necessary measures to ensure that the offences referred to in Articles 3 and 4 are punishable by effective, proportionate and dissuasive criminal penalties.

(2. deleted)<sup>3</sup>

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<sup>1</sup> **DELETED** considering that this sub-paragraph falls outside the community competence wished its deletion. **DELETED** supported the deletion. In case Article 3 h) would be maintained, **DELETED** proposed an alternative drafting of this sub-paragraph which has not been examined in depth by the Working Party, bearing in mind also that it is closely connected to the definition of "protected habitat" (Article 2 (c)). Delegations entered scrutiny reservations on the new drafting suggestions.

<sup>2</sup> **DELETED** wishing extension of the scope of the proposed instrument suggested the insertion of following sub-paragraph: "The manufacture, treatment, storage, use, transport, export or import of genetically modified organisms, explosives for civil use, pyrotechnical materials, chemical substances, biocides and plant protection products, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil, the quality of water, or to animals or plants".

<sup>3</sup> The Commission's representative entered a reservation on the deletion of this paragraph, referring to the ECJ judgement C-176/03, which had indicated Article 175 TEC as the correct legal basis for identical wording.

**DELETED** indicating that the proposed instrument should make absolutely clear that Member States could apply other sanctions than criminal ones in order to combat environmental crime effectively, proposed the addition of the following paragraph: "2. The obligation mentioned in paragraph 1 [does not preclude the use of other effective, proportionate and dissuasive penalties and measures with regard to the conduct referred to in Articles 3 and 4][is without prejudice to the possibility of applying other penalties and measures in appropriate cases]. The majority of delegations opposed this addition and some Member States requested a written opinion by the Council Legal Service. The Council Legal Service representative explained his view orally.

## Article 6<sup>1</sup>

### Liability of legal persons

1. Member States shall ensure that legal persons can be held liable for offences referred to in Articles 3 and 4 where such offences have been committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on
  - (a) a power of representation of the legal person, or
  - (b) an authority to take decisions on behalf of the legal person, or
  - (c) an authority to exercise control within the legal person.
2. Member States shall also ensure that a legal person can be held liable where the lack of supervision or control, by a person referred to in paragraph 1, has made possible the commission of an offence referred to in Articles 3 and 4 for the benefit of that legal person by a person under its authority.
3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in the offences referred to in Article 3.

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<sup>1</sup> **DELETED** entered scrutiny reservation on this Article.

## Article 7<sup>1</sup>

### Penalties for legal persons

Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 6 is punishable by effective, proportionate and dissuasive penalties.

(rest of Article deleted)<sup>2</sup>

## Article 8<sup>3</sup>

### Reporting

[...] deleted

## Article 9<sup>4</sup>

### Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by at the latest[...] [...]<sup>5</sup>

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

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<sup>1</sup> **DELETED** entered scrutiny reservations on this Article.

<sup>2</sup> See above first sentence of footnote 4 on page 6.

<sup>3</sup> COM opposed this deletion.

<sup>4</sup> **DELETED** entered scrutiny reservation on this Article.

<sup>5</sup> Part of paragraph transferred to the Preamble as a new recital, drafted as follows: "In accordance with point 34 of the Interinstitutional agreement on better law-making (OJ C 321, 31.12.2003, p1.) Member States should draw-up, for themselves and in the interest of the Community, their own tables, illustrating, as far as possible, the correlation between this Directive and the transposition measures and to make them public".



2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

### **Article 10**

#### **Entry into force**

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

### **Article 11**

#### **Addressees**

This Directive is addressed to the Member States.

Done at Brussels,

*For the European Parliament*

*The President*

*For the Council*

*The President*

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