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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 particular on the provisions as from Article 5

At the meeting of the Working Party on Judicial Cooperation in Criminal Matters (COPEN) on 23 February 2022, the Presidency invited delegations that so wished to submit comments / drafting suggestions in writing on the proposal for a Directive, in particular as from Article 5. The input so received in set out in the Annex.[1]

To be noted that the comments / drafting suggestions in respect of Articles 1-4 of the proposal for a Directive have been set out in 5845/22 and 6984/22.

[1] When further written input will be submitted, it will be distributed in an appropriate way.

ANNEX

Contents

CROATIA

Following the invitation of the French Presidency, the Republic of Croatia would like to submit the additional comments to the 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, with emphasizes on retaining of scrutiny reservation as to the views presented are still in the procedure of consultations at national level.

Regarding Article 3 Paragraph 3, the proposed elements which should be taken into account when assessing whether the damage or likely damage is substantial for the purposes of investigation, prosecution and adjudication of the proposed offences, we are of the opinion that legal criteria proposed by Article 3 Paragraph 3 items (a) to (e) are not proposed in accordance with the principle of legal certainty, which determines the scope of the criminality. The proposed elements have not been unanimously determined, although they should constitute elements of new or amended criminal offences, understood as blanquet disposition. These elements must be clearly defined by law, and not be left as subject to interpretation and analogy (which is only exceptionally allowed in criminal law). Descriptive elements proposed by Paragraph 3 could bring into question the accomplishment of the intended harmonization at EU level.

Regarding Article 5, the severity of proposed sanctions is disproportionate with sanctions prescribed by other EU instruments, as it was clearly expressed by some delegations. Also, prescribed sanctions should reflect the differences between intentional commission and negligent commission of criminal offences, which is not the case with the current proposal of the Article 5 Paragraphs 2,3 and 4.

In relation to Paragraph 5, we are of the opinion that the wording of this Paragraph should imply facultative, rather than obligatory inclusion of the proposed additional sanctions or measures into national legal systems. In the light of this, we propose to replace the words „which shall include", with the words „which may include".

Additional sanctions or measures proposed by Paragraph 5 items (a) to (g) seem particularly problematic, due to the fact that their legal nature is not clear. Introducing some of them seems questionable from the constitutional perspective (e.g. item (f)), due to the fact that Croatian Constitution limits legal consequences of the conviction to severe criminal offences and if necessary to protect legal order. However, the balance between an active election right and protection of legal order should be taken into consideration. With this regard we would like to refer on legal standards adopted by the Venice Commission (Preliminary Report on Exclusion of Offenders from Parliament, No 807/2015) and accepted by the Croatian Constitution Court according to which the legal consequences of the conviction on exclusion offenders from running for office is limited by the principle of proportionality (including the nature of the criminal offence and its severity and/or duration of punishment)

In addition, further explanations are necessary in determination of the meaning of expression „elected or public office", e.g. whether this use of term refers only to governmental or regional level, or it should be understood even broader, e.g. principals of the state owned institutions.

Regarding Article 7, we are of the opinion that sanctions or measures proposed by Paragraph 2 should be prescribed in a facultative manner. Therefore we propose the Paragraph 1 and Paragraph 2 to be joined together and read, as follows:

„Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 6 Paragraph 1 is subject to effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and **may include other sanctions, such as:** (here enumerate sanctions prescribed by Paragraph 2, except item (a) which is already contained above)"

Based on our point of view, some of proposed sanctions in Paragraph 2 have the nature of security measures, which can only be prescribed by taking into consideration the proportionality principle and the degree of danger of the perpetrator. In this regard, the proposed measures, e.g. under (i) in a part which relates to permanent closure of establishments used for committing the offence, cannot be prescribed for all criminal offences proposed by Articles 3 and 4.

Regarding Article 8, we find the proposed approach in defining aggravating circumstances casuistic to a great extent. In the procedure of determination of punishment, the court should be entitled to asses all circumstances which affect the punishment to be more or less severe by its nature and measure (aggravating and mitigating circumstances).

Also, we consider the sanction prescribed under (i), which refers to the perpetrator's non-cooperation in enforcement of legislation qualified as aggravating circumstance (which is different from criminal offence of obstruction of justice) to be problematic from the aspect of defence rights.

Regarding Article 13 paragraph 1, we find the proposal of the provision in line with Directive (EU)2019/1937 and its recitals 107 which states as follows:

„Where future legislative acts relevant to the policy areas covered by this Directive are adopted, they should specify, where appropriate, that this Directive applies. Where necessary, the material scope of this Directive should be adapted and the Annex should be amended accordingly."

Since the material scope of Directive (EU) 2019/1937 and the whole whistleblower protection system, prescribed by it, also apply to Directive 2008/99/EC (Annex I, which specifies the material scope referred to in Article 2, contains point E, which reads: „Any criminal offence against the protection of the environment as regulated by Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law or any unlawful conduct infringing the legislation set out in the Annexes to Directive 2008/99/EC") which shall be replaced by the new Directive, subject to negotiations, we consider that the Article 13 Paragraph 1 of the Proposal literally and correctly follows the requirements of the above mentioned Recital of Directive (EU)2019/1937.

Regarding Article 14, having in mind that EC emphasized that participation concerns the criminal proceedings themselves and not the secret part of the investigation, and thus that the additional rights of public participation in proceedings are brought upon with the sole aim to give the public rights that already exist in national legislation, as safeguards, and not to oblige MS to prescribe additional rights of public participation in proceedings, having in mind the experience gained from citizen participation, and that such a right may, for example, be the right to apply or participate in the hearing itself, as the latter are already provided for by some MS in some other proceedings, we wish to point out that criminal proceedings in the RH are guided by principles such as the principle of publicity, by which our national law clearly prescribes public presence as well as possibilities to exclude it, having in mind the interests of the parties and the interest of the proceeding in general, as well as other principles such as the principle of immediacy and the principle of equality of arms, all related to the later, but also having in mind the roles and especially rights and obligations of the parties to the proceeding, based upon all the above.

At each stage of conduct of a criminal proceeding, it is necessary to strictly adhere to all norms and legislative principles that are interconnected and form the judicial system. All due to the fact that criminal proceedings as such are based on the protection of the rights and interests prescribed by law and the prosecution of the perpetrators of criminal offences. The parties to the proceeding, as well as the provisions governing the invitation of the parties to the hearing and their rights and obligations are determined having that in mind.

Thus, any possible forced amendments to the above should necessarily include consideration of severe deviations from the cited principles of criminal procedure and, among other things, as the most important to emphasize, review of the provisions governing the proceedings and roles of its participants.

Regarding Article 18, concerning special investigative techniques (or special evidentiary acts) in relation to criminal offenses against the environment, one must have in regard the reasons of enacting them with the insight into human rights being limited when applying them and thus the fact that the methods of their implementation are to be guided by the principles underlying their application, their time constraints and their limitation to the most severe offenses only, and even than the punctually prescribed decision-making process to their application and the control of such.

Special investigative techniques are to be introduced as a method in the fight against crime only as the latest mean due to the fact that they are deeply penetrating into the personal rights and freedoms, whose protection must be measured with the aim of preventing that crime and in order to protect human rights and freedoms prescribed by the law in general.

Having in mind all the above, the proposed Article 18 paragraph 2 would be directly in opposition with stated.

CZECH REPUBLIC

CZECH REPUBLIC

Following the kind invitation of the French Presidency expressed during the COPEN Working Party meeting on the 23rd of February 2022, the Czech delegation would like to present the following written comments on Articles 5 – 29 of the 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.

The written comments below are made with parliamentary reservation, as the parliamentary scrutiny is still ongoing.

Article 5

The Czech Republic decidedly agrees that serious illicit conducts against the environment must be punishable by effective, proportionate, and dissuasive criminal penalties.

- **Paragraphs (2), (3) and (4)**

Nevertheless, **thresholds of these penalties shall take into account the thresholds of penalties already established by existing EU criminal law directives**, on the one hand, as well as take into account and **respect the system of national regulation of criminal penalties**, on the other hand.

In the EU criminal law, as a rule, only sanctions in the areas of particularly serious crime with a cross-border dimension may be harmonised. Such particularly serious crimes contain inter alia terrorism or trafficking in human beings. Seriousness of such offences is, indeed, very high and the thresholds of penalties for such offences shall be among the highest in the system of sanctioning, no matter if talking about the system at EU level or at the national level.

In this regard it is worthwhile noting that the Directive 2011/36/EU of the European Parliament and Council on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, provides for maximum penalty of at least 5 years of imprisonment [Article 4(1), only in case of special aggravating circumstances the threshold reaches 10 years]. Directive (EU) 2017/541 of the European Parliament and of the Council and combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, provides for maximum penalty of at least 8 years of imprisonment for some exceptionally serious offences, such as participating in the activities of a terrorist group [Article 15(3) in connection with Article 4(b)].

Thresholds of penalties prescribed by other EU criminal law directives for other particularly serious crimes with a cross-border dimension are substantially lower or are not specifically determined at all.

With regard to the aforementioned, and while taking into account the seriousness of offences against the environment, the Czech Republic considers the thresholds of penalties as set up by Article 5(2), (3) and (4) of the draft to be disproportionally high and in contradiction with the system of sanctioning as set up by the EU criminal law instruments in place.

National criminal codes maintain a certain system of sanctioning which distinguishes thresholds of penalties for individual criminal offences with regard to their seriousness (social harmfulness etc.). These systems which are, as a rule, long-term established must respect requirements of

the already existing EU criminal law. Also with regard to these requirements, they provide for a certain classification of the criminal offences according to their seriousness (such as differentiation between felonies and misdemeanors, especially serious felonies, etc.). In the Czech system, this classification is also decisive for the possibility to impose certain sanctions other the imprisonment or to use deflections in the criminal proceedings - procedures that may contribute to reparation of the damage caused by the offence without imposing a criminal penalty on the perpetrator.

If the high thresholds of imprisonment provided for in Article 5(2), (3) and (4) of the draft are to be maintained, the respective offences against the environment will have to be classified in the national laws as similarly serious as e.g. terrorism or trafficking in human beings with all consequences following such classification.

We do not believe this shall be the case.

Such approach would not be in line with the system of sanctioning established by other EU instruments, would disrupt national systems of criminal law and would not take due account of the fact that as regards environmental crime, imprisonment alone does not always constitute the most effective or dissuasive penalty and that some specific procedures might, in certain cases, contribute to reinstatement of the environment or generally to reparation much more than an imprisonment conviction.

Therefore, the **Czech Republic is open to discussion on specific thresholds of imprisonment but may not agree with the proposed thresholds, which we consider disproportionally high**.

Notwithstanding the aforementioned, negligent and intentional conducts shall be distinguished as regards sanctioning. Thresholds of sanctions for negligent conducts shall, as a rule, be lower. This is not the case in current Article 5(2), which we consider a mistake.

Moreover, in line with our previous comments on definitions of criminal offences, we do not believe that causing or likely causing of death or serious injury to a person shall be included in the basic merits of criminal offences against the environment. In this regard, we suppose that if Article 5(2) aims at addressing certain specific criminal offences, where causing or likely causing of death or serious injury to a person shall constitute a special aggravating circumstance, an exhaustive list of such offences shall be included in Article 5(2).

- **Paragraph (5)**

We consider it important that national laws provide for the option to impose alternative or additional sanctions and measures on perpetrators of criminal offences against the environment, which may in some cases be more effective and dissuasive than imprisonment alone. The Czech Criminal Code allows for imposing multiple different criminal penalties, sanctions or measures of different character.

However, we strongly **oppose mandatory harmonisation of criminal sanctions (or measures) other than imprisonment at EU level**. Such mandatory harmonisation is not required by any of the existing EU criminal law directives and would bring serious problems for many Member States when transposing such provision.

It is common, and it is also the case of the Czech Republic, that criminal sanctions are regulated in a universal manner – specific sanctions do not pertain to specific criminal offences, but all criminal sanctions may be imposed for all criminal offences, if relevant. If mandatory harmonisation of additional sanctions (or measures) was required, it would have to lead to (in many member states) harmonisation of these types of sanctions not only in relation to criminal offences as provided for in this draft Directive, but in relation to all criminal offences in the national criminal law.

Therefore, **we suggest that, similarly to other EU criminal law directives, the list of additional sanctions (or measures) be included only as facultative, introduced by a "*may*" instead of a "*shall*"**, so that the Member States have the obligation to provide for certain additional sanctions (or measures) but do not have to provide for all of those mentioned in the list.

Regardless of the aforementioned, we have specific comments regarding letters (a), (c), e), (f) and (g).

- (a)

- We support the aim of this measure (or sanction), but we consider further discussion on its wording necessary. We are not convinced that the offender, even if willing to comply with this measure, would have the tools needed to reinstate the environment. It could seem more feasible to impose e.g. *"reimbursement of costs of the reinstatement";*

- (c)

- We do not consider sanctions lasting permanently to be proportionate. According to the case law of the Czech Constitutional court, it is not proportionate to impose a permanent criminal sanction, unless it is clearly ascertained that there is no chance that the offender mends his or her ways (corrects himself / herself, goes straight). Therefore we suggest the following wording:

  "temporary ~~or permanent~~ exclusions from access to public funding, including tender procedures, grants and concessions;"

- (e)

- It shall not be possible to impose this sanction in the criminal proceedings. If such permit or authorisation was issued by an administrative authority (which would most likely be the case), only such administrative authority may withdraw such permit or authorisation. In the criminal proceedings, it shall only be possible to ban pursuing certain activities. Therefore we suggest the following wording:

  "~~withdrawal of permits and authorisations to pursue~~ ***temporary bans on pursuing*** *activities which have resulted in committing the offence;"*

- (f)

- It is our view that it shall not be possible to ban running for a public office due to constitutional laws guaranteeing passive suffrage (right to be elected). It is not clear, which elected offices other than public offices shall be included. We suggest deleting this provision.

- (g)

- This sanction seems to be more appropriate for legal persons, we do not understand the purpose of this sanction when imposed on a natural person and would like to ask for clarifications. Possible defamation of such convicted natural person would be in contradiction with the non-public nature of criminal records.

Article 7

The reasoning used as regards Article 5(5) applies similarly to **Article 7(2). We suggest that also this list be introduced by a "*may*".**

Moreover, **we do have strong doubts whether it might even be legally possible to provide for a mandatory harmonisation of sanctions (or measures) for legal persons in situation where not all Member States provide for criminal liability of legal persons** (the Czech Republic does provide for criminal liability of legal persons).

The legal basis of the draft Directive, Article 83(2) TFEU, allows for harmonisation of criminal offences and (criminal) sanctions. It does not allow for harmonisation of administrative (or other) offences and administrative (or other) sanctions.

If Article 7 provided for any mandatory sanctions in situation where not all Member States provide for criminal liability of legal persons, it would either mean that also administrative (or other) sanctions are harmonised (Member States that do not provide for criminal liability of legal persons may clearly not provide for criminal sanctions for legal persons) or that only sanctions in those Member States that provide for criminal liability of legal persons are harmonised.

We are convinced that both possibilities are inacceptable.

The former goes clearly beyond the legal basis of the draft Directive, and it exceeds its subject matter as provided for in its Article 1. The latter would mean that mandatory parts of Article 7 would only apply to certain Member States while they do not apply to others, which we may not support.

For the same reasons, **we may not support Article 7(2), (4), (5) and (6) as they stand**.

Additionally, as regards the amounts of fines, we consider that turnover of the legal person is an important factor, but rather than only turnover, its general assets situation shall be considered. If there are any illicit proceeds, these shall be subjected to confiscation. We do not see any direct link between the amount of illicit proceeds and the amount of the fine imposed. While the Directive may state that certain factors shall be considered when deciding on the amount of the fine to be imposed, a specific minimum threshold of the fine may not be determined (not even expressed as percentage).

The comments vis-à-vis certain specific sanctions as presented on Article 5 apply similarly to Article 7(2)(b), (e), (f) and (i).

Last but not least, we would like to ask for the reasoning behind the proposed differentiation based on whether the legal person is liable according to Article 6(1) or Article 6(2). The proposed list of sanctions (or measures) in Article 7(2) only applies to liability based on Article 6(1).

Article 8

The Czech Republic suggests amending the introductory paragraph to make it clear, that not only constituent elements of criminal offences as referred to in the draft Directive but also constituent elements of other criminal offences according to the national law shall not be considered aggravating circumstances. Moreover, we suggest specifying that these circumstances shall be considered aggravating only where relevant [e.g. letter (b) may hardly ever be relevant for criminal offence in Article 3(1)(n) as placing or making available on the Union market itself does not cause any change to an ecosystem, letter (a) may hardly ever be relevant for multiple criminal offences in Article 3(1), such as letters (k), (m) or (o)] and in case they increase the harmfulness of the criminal offence, taking into account concrete circumstances of the particular case.

The introductory phrase could then read:

"In so far as the following circumstances do not already form part of the constituent elements of the criminal offences referred to in Article 3 ***or other criminal offences as laid down in national law****, Member States shall take the necessary measures to ensure that, in relation to the relevant offences referred to in Articles 3 and 4, the following circumstances,* ***where relevant for the specific criminal offence and where contributing to increasing harmfulness of such criminal offence,*** *may be regarded as aggravating circumstances:*

(...)"

Additionally, we would like to comment on some letters of this article specifically:

- (d)
  - We consider use of false or forged documents as one of the possible ways of committing a criminal offence, rather than as a general aggravating circumstance. If not clarified, we suggest deleting this aggravating circumstance.
- (g)
  - We would like to ask for clarifications what shall be understood under "indirectly generated or was (still indirectly) expected to generate".
- (h), (i) and (j)
  - We believe that these circumstances shall not be relevant for determining a criminal sanction. These circumstances consist in breaches of certain administrative obligations and shall be addressed by administrative law only. Moreover, we consider the circumstance in letter (i) to possibly be in contradiction with the criminal law principle *nemo tenetur edere instrumenta contra se.*

Article 9

Due to similar reasons like in Article 8(h), (i) and (j), assisting the administrative authorities shall be regarded mitigating from the administrative law perspective, not from the criminal law perspective. From the criminal law perspective, contributing to clarifying circumstances of a criminal offence shall be relevant. Therefore, we suggest the following wording of Article 3(b) (introductory phrase):

"the offender provides ~~the administrative or~~ judicial authorities with information which they would not otherwise have been able to obtain, helping them to:"

Article 11

The Czech Republic agrees that sufficiently long limitation periods are important for the possibility to counter environmental crime effectively, since the detrimental effect or impact of such crimes may often be found out with a delay.

However, **we consider it of utmost importance to maintain the contents of the draft Directive within its subject matter (scope) according to its Article 1 and particularly within its legal basis.**

Article 83(2) TFEU provides legal basis for harmonisation of criminal offences and (criminal) sanctions in a policy area which has been subject to harmonisation measures – in this case the environment. It does not provide legal basis for harmonisation of other institutes of substantive criminal law [aspects of criminal procedure may be harmonised only insofar as Article 82(2) TFEU allows; this article, however, is not used as legal basis of this draft Directive as the Directive is mainly of substantive character]. On the same note, Article 1 of the draft Directive stipulates that "*This Directive establishes minimum rules concerning the definition of criminal offences and sanctions in order to protect the environment more effectively.*"

We are concerned that **if the final contents of the Directive exceed its legal basis too broadly, the legality of the Directive could be contested in the Court of Justice of the EU in line with Article 263 TFEU.**

Therefore, we consider it crucial that the Directive respects its legal basis and subject matter (scope).

With respect to the aforementioned, **we believe the provision on limitation periods for criminal offences shall not be included in the Directive.**

Limitation periods relate to general conditions of criminal liability, similarly like age of the perpetrator, his or her sanity, or the definition of fault (negligence, intention). Their regulation (harmonisation) goes beyond harmonisation of definitions of criminal offences and sanctions, it is beyond the subject matter of the draft, beyond its legal basis and beyond the Union competence.

If, despite the aforementioned, this provision remains in the draft, we suggest not regulating specific minimum terms of the limitation periods.

Moreover, from the criminal law perspective, regardless of the question of the EU competence, we consider it incorrect that in paragraph (4) the term of the limitation period is again bound to the threshold of imprisonment. The limitation period in relation to enforcement of the penalty shall be bound to the penalty actually imposed in the specific case (which reflects seriousness of the specific individual offence committed) rather than to the penalty threshold as set up by the law.

Article 12

The Czech Republic may support the provision in general.

We may not support the current wording of Article 12(1)(d), though. The Czech jurisdiction may not be based on the mere fact that the offender is a habitual resident in the Czech Republic. As the rules on jurisdiction are of a universal nature, providing for jurisdiction based on the mere fact that the offender is a habitual resident would not be possible in relation to criminal offences against the environment only, but such jurisdiction would have to be established in

relation to all criminal offences committed by persons who are habitually resident in the Czech Republic anywhere.

We consider such amendment excessive and, therefore**, we may support the criterion of habitual residence only if moved to the facultative paragraph (2)** [similarly like in recent Directive in the field of judicial cooperation in criminal matters – see Directive (EU) 2019/713, Article 12(3)(a), Directive (EU) 2018/1673, Article 10(2)(a), or Directive (EU) 2017/1371, Article 11(3)(a)]**.**

Article 13

We have doubts regarding the added value of this provision which seems to only refer to rules already established by the Directive (EU) 2019/1937 (which already covers breaches against the environment), assuming that the support and assistance mentioned in paragraph (2) of this provision refers to the whistleblowers protection as set out in Directive (EU) 2019/1937 (as referred to in recital 24 of the draft Directive). If a different scope of support and assistance is intended, it shall be specified what support and assistance is in question and under which circumstances the whistleblowers shall be provided with such support and assistance, so that the Member States may understand the contents of their proposed obligation and may take a position vis-à-vis this provision.

Article 14

We do not believe there exists a legal basis for any harmonisation of parties to the criminal proceedings at EU level (for a more in-depth reasoning on issues related to the legal basis, please see the comments on Article 11 above).

Public concerned is a term used in the administrative law and rather unknown to the criminal law and criminal proceedings, in which the public interest shall be duly represented by the public prosecutor (unlike in administrative proceedings). Moreover, the pre-trial criminal proceedings is not public, and any participation of members of the public concerned would be in breach of this principle. The Aarhus Convention (which is being referred to e.g. in recital 26 of the draft) provides for rights (to information, to review, etc.) of the public concerned in the environmental decision-making procedure. The Aarhus convention does not contain any provision on or reference to rights of members of the public concerned in relation to the criminal proceedings.

The Czech Republic suggests deleting this provision. In case this provision remains in the draft, we prefer that it is only facultative and that it is clearly stipulated that this provision does not oblige the Member States to anyhow amend the definitions of parties to the criminal proceedings as stipulated by their national law.

Articles 15 - 17

The Czech Republic considers preventive activities, sufficiency of resources and adequate training to be of great importance for countering illicit conducts against the environment.

However, in line with the aforementioned, we have doubts whether such provisions belong in such criminal law directive (for a more in-depth reasoning on issues related to the legal basis, please see the comments on Article 11 above).

In case these provisions remain in the draft, we suggest the following amendments:

- **Article 15**

*"Member States shall take appropriate action, such as information and awareness-raising campaigns and research and education programmes, to reduce overall environmental criminal offences, raise public awareness and ~~reduce the risk of population of becoming a victim of an environmental~~ **protect the people against the possible consequences of the respective** criminal offence. Where appropriate, Member States shall act in cooperation with the relevant stakeholders."*

The reason for this suggestion is that population / the people may, typically, not *stricto sensu* become a victim of an environmental criminal offence, which is directed against the environment, not directly against life, health, or property. They, however, face the negative consequences of damage caused to the environment.

- **Article 17**

"*Without prejudice to judicial independence and differences in the organisation of the judiciary across the Union, Member States shall request those responsible for the training of judges, prosecutors~~,~~ **and** police~~, judicial staff and competent authorities' staff~~ involved in criminal proceedings and investigations to provide ~~at regular intervals~~ **repetitive** specialised training with respect to the objectives of this Directive and appropriate to the functions of the involved ~~staff and~~ authorities.*"

We consider it unreasonably broad to appeal for training not only of judges, prosecutors and police, but also of judicial and other staff. In our view, it is more important that specialized trainings are repetitive (not one-time), rather than that they take place at regular intervals.

Article 18

The Czech Republic suggests the following clarification in the wording of this provision to make sure that effective investigative tools must be available for investigating and prosecuting offences according to the draft Directive, but these tools do not have to include, in all cases, all tools that are available when investigating or prosecuting organised crime and other similarly serious criminal offences (as regards certain less serious criminal offences, the use of interception or other similarly invasive tools would be in contradiction with the European Court of Human Rights case law on proportionality).

The suggested wording aims at reflecting principles of subsidiarity and proportionality (principle of proportionality is also mentioned in related recital 29) and corresponds to the wording of Article 13(1) of the Directive (EU) 2019/713.

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

At the same time, we suggest following amendment to the related recital 29 [inspired by recital 22 of the Directive (EU) 2019/713]:

*"To ensure successful enforcement, Member States should make available effective investigative tools for environmental offences ~~such as~~ **which may include** those ~~which exist~~ **existing** in their national law for combating organised crime or other serious crimes, **if and to the extent that the use of those tools is appropriate and commensurate with the nature and gravity of the offences as defined in national law**. These tools ~~should~~ **may** include among others the interception of communications, covert surveillance including electronic*

surveillance, controlled deliveries, the monitoring of bank accounts and other financial investigation tools. These tools should be applied in line with the principle of proportionality and in full respect of the Charter of Fundamental Rights of the European Union. In accordance with national law, the nature and gravity of the offences under investigation should justify the use of these investigative tools. The right to the protection of personal data must be respected."

Articles 19 - 21

In line with the aforementioned, we have doubts whether there is legal basis for these provisions (for a more in-depth reasoning on issues related to the legal basis, please see the comments on Article 11 above).

We are of the view that coordination and cooperation between competent authorities within a Member State, as well as possible establishing of national strategies is in the competence of the Member States. We do not believe that additional administrative burdening of the Member States would constitute an effective tool for improving criminal law protection of the environment.

More specifically, as regards Article 19(b) and (c) it shall be noted that it is not possible to consult such information during ongoing investigations. The authorities involved in the criminal proceedings are bound by confidentiality.

Article 24

The Czech Republic considers it necessary that the transposition period is extended to at least 3 years, since the draft Directive is very complex, and its transposition will likely require substantial legislative amendments in the national laws.

Article 25

We do not support creating additional administrative burden for the Member States and therefore oppose the reporting obligation imposed on the Member States by Article 25(2). Moreover, it is not clear what would be the purpose of such additional regular reporting, when the proposed reporting cycle does not relate to any obligation of the Commission to evaluate impact of the Directive or to submit its reports.

In Prague, 14th March 2022

FINLAND

Finland thanks the Chair and the General Secretariat for the opportunity to provide written comments on the proposal. There is still a scrutiny reservation as to the views presented as the Finnish Parliament has not dealt with the proposal. The comments are thus preliminary comments by the expert level.

Article 5 (Penalties for natural persons)

Article 5, subparagraphs 2-4

The levels of the minimums of 10, 6 and 4 years of the maximum terms of imprisonment according to article 5, paragraphs 2-4 seem quite high. It ought to be noted that according to article 49, paragraph 3 of the Charter of Fundamental Rights of the European Union the severity of penalties must not be disproportionate to the criminal offence. It seems that article 5 ought to be scrutinized critically as a whole from the point of view of the principle of proportionality.

Article 5 is of course essentially linked to article 3 on offences. Article 3 includes acts of various kind and the harmfulness of these acts seems to vary greatly. For example, it should be ensured that imprisonment of at least six years could be sentenced for the act defined in **article 3, paragraph 1, subparagraph n**. This seems to be clearly disproportionate to the act defined in the subparagraph referred to.

It should be noted that the essential elements of offences together with the scales of punishments for each offence form a system in the national legislation. Punishments to be ordered for certain offences and categories of offences are also to be proportionate in relation to the punishments to be ordered for other offences and offence categories. This system is the result of long-term national weighting and evaluation and consequently this is a matter of respecting the fundamentals of national criminal law systems, as well.

It would seem reasonable to set down the obligation to ensure a specific minimum level of maximum punishment for such offences which cause damage or danger to the health of persons or the environment. The blameworthiness of those offences which do not cause such damage or danger is clearly lower and thus the punishments to follow for such offences should also be milder. The proposal presupposes ensuring a maximum term of imprisonment of at least four years for some offences which do not cause damage or danger to the health of persons or the environment which may be considered as contradicting the principle of proportionality. This is the case for example on the act defined in **article 3, paragraph 1, subparagraph p**.

In addition, a maximum term of imprisonment of the most severe level could only be justified for acts which *intentionally* cause the death of a person or serious injury to person. **Article 5, paragraph 2** should thus include the notion of limiting its obligation to Member States to intentional acts. Neither is it justified that acts which are only *likely* to cause a specific consequence (a kind of a crime of endangerment), should be treated similarly as acts which do cause the consequence in question. The lesser harmfulness of these endangerment acts is obvious which, according to the principle of proportionality, needs also to be mirrored in the demands on setting the limit on the minimum level of maximum punishments.

Article 5, subparagraph 5 (additional sanctions or measures)

It is not clear from the wording of the paragraph whether all of the sanctions or measures should be available for all of the acts defined in articles 3 and 4 despite the fact that some of the sanctions or measures may not have any factual link to the act.

It is also unclear from the wording of the article through which sort of process the sanctions or measures ought to be issues or ordered. Recital 14 refers to the criminal process, and it has been indicated by the Commission at the COPEN meeting on the 23rd of February that the sanctions or measure would indeed need to be able to be ordered in a criminal law process. We consider it important to allow for the Member States to define the measures or sanctions as administrative and issue or order the said sanctions or measures in the administrative process if this is required by their national system.

It should be noted that national legal systems differ in which sort of sanctions are available in the criminal law process in the first place. Many of the sanctions or measures defined in the article seem to be rather far from what are traditionally considered as penalties for offences. In Finland, for example, the criminal punishments which may be ordered in the criminal law process are described in the criminal code. A variety of administrative measures or sanctions are available in the administrative process by administrative authorities according to the environmental legislation.

We would like to take notice that a sentence for an offence may have legal effects when decisions on many of the issues mentioned in article 5, paragraph 5, such as public funding, are made. This is, however, a different matter than ordering such a sanction or measure in a criminal law process.

It should also be noted that in some cases a measure or a sanction ordered in the administrative process has been seen as a particularly more effective means to prevent environmental crime than a criminal penalty. In Finland, this has been seen to be the case regarding, for example, the acts defined in **article 3, paragraph 1, subparagraph h**.

The national systems of the Member States may include functional systems which include both administrative and criminal sanctions. There is a serious need to avoid breaking up these systems as well as creating over-lapping systems of both sanctions which would make the overall system too complicated and question the possibility to fully respect the principle of ne bis in idem.

As regards **article 5, paragraph 5, subparagraph a** (obligation to reinstate the environment within a given time period), it should be noted that in those legal systems in which reinstatement of the environment is in use in the administrative process, the expertise on this issue lies with the administrative authorities and courts.

It is important to respect the principle of proportionality also when considering additional sanctions or measures, including administrative sanctions. In this respect, we have worries on, for example, **article 5, paragraph 5, subparagraph c** which involves *permanent* exclusions from access to public funding, including tender procedures, grants and concessions.

As regards **article 5, paragraph 5, subparagraph c**, it is unclear what is the relation with the subparagraph to the directives on public procurement. We would need thorough clarification from the Commission on the said relation and on the possible needs to amend the directives on public procurement.

Special attention needs to be drawn to **article 5, paragraph 5, subparagraph f** which involves sanctions or measures to temporarily ban running for elected or public office. The proposed sanction or measure is problematic from the point of view of the Constitution of Finland and it should not be included in the directive.

No convincing arguments have been presented as to why the list in article 5, paragraph 5 has been formulated as obligatory. For example, in the PIF directive the list of additional/other sanctions to legal persons is formulated as optional. We support the views expressed by some delegations that article 5, paragraph 5 should be worded similarly (PIF directive (EU) 2017/1371 art. 9: "Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 6 is subject to effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and *may include* other sanctions, such as…").

Article 7 (Sanctions for legal persons)

Our comments on article 5, paragraph 5 mainly apply also to article 7.

We firmly support the idea of formulating the list of sanctions for legal persons as optional.

Article 7, subparagraphs 4-5 define how the fine to be ordered to a legal person is to be determined. National legal systems differ in how the amount of a fine to be ordered to a legal person is determined and which factors are to be taken into consideration when determining the amount of money of a fine. The proposition according to which the maximum limit of fines shall be not less than 5% or 3% of the total worldwide turnover of the legal person [/undertaking] in the business year preceding the fining decision seems questionable taking into consideration the differences in the legal systems of the Member States and the principle of proportionality. In this regard the proposition goes quite deep into details which may be based on different national solutions.

Articles 8 and 9 (Aggravating and mitigating circumstances)

The transposition of the obligations of article 8 and 9 should be considered thoroughly. In Finland, the aggravating and mitigating circumstances are defined in the general part of the Criminal Code and they apply to all crimes. There are no aggravating or mitigating circumstances which would be offence-specific so that they would only apply to a certain category of offences, such as environmental offences. There is clearly a need to accept the transposition of articles 8 and 9 in other ways than by specifically naming the listed circumstances in the penal codes. As for the aggravating circumstances, this may be done for example by accepting that the punishment is aggravated in practice as a joint punishment is ordered for more than one offence or that certain elements qualify the criminal act as an aggravated offence with more severe punishments.

The common understanding in Finland is that aggravating and mitigating circumstances are generally those that take place before or during the criminal act, such as premeditation. As regards **article 8, paragraph h**, it must be noted that the proposed aggravating circumstance has to do with something which may have happened after the criminal act has been committed.

Similar doubts apply to **article 8, paragraph i**. It is unclear whether the subparagraph refers to the acts or omissions of the offender before the environmental offence is committed or during or after the commission of the offence. This is relevant as to how the activities of the offender would be evaluated legally. It is also questionable how the paragraph relates to the right not to incriminate oneself.

In addition, **article 8, paragraph j** should also be clarified by explaining whether it deals with the acts of the offender when committing the environmental offence in question or distinct acts committed separately of the environmental offence.

As regards **article 9, paragraph b, subparagraph i**, we have in the Finnish legal system adopted as a mitigating circumstance the conduct of the offender in which he/she attempts to prevent or remove the effects of the offence or to further the clearing up of the offence. The punishment may thus be reduced but the point is to justify the reduction by the fact that by giving information on his/her offences the offender alleviates the harmful consequences of his/her actions. The reduction is, however, not based solely on the offender giving information on possible other offenders so the Finnish system does not include the possibility of plea-bargaining as such.

Article 10 (Freezing and confiscation)

We have understood from the comments by the Commission in the COPEN meeting on the 23rd of February that there is no material need to include the reference to the word "contribution" in the wording of the article. We would thus suggest deleting the reference to "contribution" from the text ("…the proceeds derived from and instrumentalities used or intended to be used in the commission ~~or contribution to the commission~~ of the offences.."). It is reasonable to use the exact wordings of the confiscation directive in the article.

Article 14 (Rights for the public concerned to participate in proceedings)

We have understood from the answers by the Commission in the COPEN meeting on the 23rd of February that those Member States whose legal system does not include the right for the public to participate in proceedings as defined in article 14 would not be obligated to adopt such a right into their system. This would be, according to the Commission, indicated by the wording of the article of "in accordance with their national legal system". This should, however, be uttered clearly in the recitals as well.

The Finnish legal system does not include the right for the public concerned to participate in criminal proceedings. If the article would oblige Member States to introduce such a system, it would be considered problematic from the point of view of the Finnish legal system. Advocating for the general interest has been taken care of in other means. It is important to allow for national solutions in this field. For example, the right of the environmental NGOs to participate has been guaranteed in the administrative environmental legislation. Advocating general interests in a criminal matter is the sort of activity which demands resources, for example, and is best suitable for an official subject. In Finland, the prosecutor is the one in charge of advocating general interests and the environmental authority may also be in the position of complainant in certain situations prescribed by law.

Article 18 (Investigative tools)

Harmonizing the use of investigative tools in the proposed manner does not seem justified. There are differences in the systems on investigative tools between the Member States. It is essential that the investigative tools available for each offence are used when investigating cases. For example, if the legislation allows for the use of certain investigative tools for cases which involve organized crime groups, this naturally covers also those environmental offences which have to do with organized crime. There doesn't seem to be a need to expand the use of these tools to such environmental offences which might not have anything to do with organized crime and for which it is justified to use other tools. It is important to respect and highlight the principle of proportionality and the fact that using investigative tools should depend on the seriousness of the offence in question.

Article 24 (Transposition)

The proposed deadline for the transposition of the directive seems quite challenging. It would be best to set the deadline at 24 months minimum after the entry into force of the Directive.

ROMANIA

RO comments on articles 5-24

Directive	*Comments*
GENERAL COMMENTS	
Article 5 ***Penalties for natural persons*** 1. Member States 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. Member States shall take the necessary measures to ensure that offences referred to in Article 3 are punishable by a maximum term of imprisonment of at least ten years **if they cause or are likely to cause death or serious injury to any person**.	The wording is deficient since not any of the offences in Article 3 should be punishable by a term of imprisonment of at least ten years. The derogations below should also be considered to this end. Such punishment should also be considered only for those provisions of Article 3 which provide for in the constituent part of the offence the causing or likelihood of causing the death or serious injury of the person (conduct referred to in points (a), (b) and (c), (e) point (ii), (i), (c) (j), (p) (ii)). We believe that this would ensure the coherence of the proposal. In our opinion, this point should be reconsidered. It should be considered whether these situations ("cause" and "are likely to cause") should be treated together, from the point of view of the limits of punishment, all the more so as it concerns the most important social value, namely the life of the person. It does not seem justified that in the case of the loss of one or more human lives the punishment should be the same as in the case of only a theoretical danger of death, for example. Also, from the point of view of the maximum sentence there should be a distinction between the result of death (harm to the ultimate social value, the person's life) and the result of serious bodily harm (harm to bodily integrity as a protected social value). In support of the above is the fact that, in Article 8, the occurrence of the death of the person is treated as an aggravating circumstance, so we do not see how these two situations could be provided in point 2 with a similar punishment.

5. Member States shall take the necessary measures to ensure that natural persons who have committed the offences referred to in Articles 3 and 4 may be subject to additional sanctions or measures which shall include:	
(a) obligation to reinstate the environment within a given time period;	RO considers it is necessary to detail this aspect in the recitals. Some environmental damage is long-lasting and perhaps permanent, which is why this letter should be circumscribed to *if possible*. If the damage occurred as a result of a crime committed with negligence and the cost of returning to the previous situation is very high, the punishment may no longer be proportionate to the act, so from this perspective too, the text should be nuanced, including, for example, a reference to the form of guilt.
(b) fines;	RO considers that further discussions are needed since, as a matter of principle, in criminal law the fine is reserved for less serious offences, so as not to deprive the person of liberty, it is considered a less intrusive sanction. For serious acts, the sanction is imprisonment, and the damage caused is recovered by civil means, by compensation/restoration to the previous situation, etc., not by a fine (which is made income to the state budget, it is not used to repair the damage caused). Perhaps a special fund from environmental fines could be considered, which would also be used for environmental regeneration purposes, and in that case such a provision would be more justified. If this main sanction is maintained, then the text of the law should be supplemented so that these fines are used only for environmental protection ("*fines which should be channeled to a special environmental fund*").
(c) temporary or permanent exclusions from access to public funding, including tender procedures, grants and concessions;	The purpose of this provision needs clarification. As a criminal sanction (complementary punishment), it is specific to legal persons. Also, not all situations allow natural persons to participate in such procedures (it is possible in the case of European funds, for example), which is why a mention is needed: "where such benefits are accessible to natural persons".
(d) disqualification from directing establishments of the type used for committing the offence;	RO considers it necessary for the COM to clarify the intention of this provision.

(e) withdrawal of permits and authorisations to pursue activities which have resulted in committing the offence;	idem
(f) temporary bans on running for elected or public office;	RO is in the process of analyzing the text from the ECHR perspective if it is justified, especially in the case of committing crimes with negligence and for what period. After rehabilitation? It is necessary to clarify the term "elected", as it is followed by "or public office". "Elected" functions may also exist in private entities, the text should refer only to public functions, given that it is in any case supplemented by the text of letters d) and e).
(g) national or Union-wide publication of the judicial decision relating to the conviction or any sanctions or measures applied.	The purpose of this provision needs clarification as well as what is meant by "publication". In RO, the court portal is available, where files and the solutions thereof can be accessed. We consider it necessary for the COM to clarify whether this database, which can be accessed by anyone, is sufficient or that the text is intended for another type of publication. "Displaying or publishing the conviction sentence" is, under Romanian legislation, a complementary punishment specific to legal persons. It is also necessary to clarify whether it is intended to publish the entire judgment, or only part of it, and in the latter case, which part. We do not believe that the publication of the full judgment is possible and therefore the text should be more explicit. RO continues to analyze the impact of such regulation also from the perspective of personal data protection.
Article 7 ***Sanctions for legal persons*** 1. Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 6(1) is punishable by effective, proportionate and dissuasive sanctions. 2. Member States shall take the necessary measures to ensure that sanctions or measures for legal persons liable pursuant to Article 6(1) for the offences referred to in Articles 3 and 4 shall include:	

(a) criminal or non-criminal fines;	RO considers that there is a need to clearly differentiate between criminal and non-criminal sanctions. In addition, the two are not mutually exclusive if they cover separate activities. The MS option for one of them should be clarified. It follows from recital 15 that they concern both the MS that have the criminal liability of legal persons as well as, alternatively, those which do not have that institution. The text does not reflect this idea.
(b) the obligation to reinstate the environment within a given period;	We consider it necessary to complete the text with the phrase *whenever possible.*
(d) temporary exclusion from access to public funding, including tender procedures, grants and concessions;	There is an apparent overlap between let. c) and d) due to the terms of public benefits and public funding. We propose merging let. c) and d) in a wording such as: "exclusion from public benefits or funding".
(e) temporary or permanent disqualification from the practice of business activities;	We consider that the permanent sanction is excessive.
(h) judicial winding-up;	We consider it necessary to clarify the term "winding-up", possibly in the preamble or even in the operative part of the text.
(i) temporary or permanent closure of establishments used for committing the offence;	In order to be effective, the sanction should be doubled by the ban of opening a new establishment covering even part of the scope of work performed at the closed establishment. This is because the legal person can open other places of business after the closure of those indicated in the conviction, without disregarding its provisions.
(j) obligation of companies to install due diligence schemes for enhancing compliance with environmental standards;	There are no explanations in the proposal recitals on this subject. There is already an obligation to do so in Regulation 995/2010, which applies to operators when the product is first placed on the market and which is independent of any offence. There is also a recommendation for a proposal for a directive (https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html) on the establishment of a due diligence obligation, including to ensure compliance with environmental standards, which targets certain types of companies (large, small and medium-sized listed companies or small and medium-sized high-risk companies).

4. Member States shall take the necessary measures to ensure that offences referred to in Article 3(1) points (a) to (j), (n), (q), (r) are punishable by fines, the maximum limit of which shall be not less than 5% of the total worldwide turnover of the legal person [/undertaking] in the business year preceding the fining decision.	The phrase "total worldwide turnover" needs to be defined in order to comply primarily with the principle of clarity of the criminal law.
5. Member States shall take the necessary measures to ensure that offences referred to in Article 3(1) points (k), (l), (m), (o), (p) are punishable by fines, the maximum limit of which shall be not less than 3% of the total worldwide turnover of the legal person [/undertaking] in the business year preceding the fining decision.	Idem
Article 8 ***Aggravating circumstances*** In so far as the following circumstances do not already form part of the constituent elements of the criminal offences referred to in Article 3, Member States shall take the necessary measures to ensure that, in relation to the relevant offences referred to in Articles 3 and 4, the following circumstances may be regarded as aggravating circumstances:	The relationship between aggravating circumstances and concurrent offences needs to be clarified. We refer to the cases in which the aggravating circumstance is an independent crime under national law (murder, manslaughter, organized criminal group, etc. - all MS have such incriminations), and by applying the rules for the concurrent offences, a heavier punishment will result. In this case, the intention of the norm should be clarified. Hence, it should be decided if the double use of this aspect is intended: both as an aggravating circumstance in the environmental crime, and as well as a distinct offence which will constitute concurrent offences together with the environmental offence or it is sufficient to increase the penalty, regardless of which mechanism. We believe that the latter interpretation would be the logical one, in which case it would be necessary to reword the text and use a phrase such as "cause of aggravation of punishment" instead of "aggravating circumstance", to allow adaptation to different systems of law of the MS.
(b) the offence caused destruction or irreversible or long-lasting substantial damage to an ecosystem;	Recital 16 refers to the whole ecosystem, cases comparable to ecocide in terms of the destruction of the natural environment and significant damage resulting from the destruction or loss of ecosystems, major environmental disasters. However, these aspects are not reflected in the text. A clear definition is needed for the term "substantial", the indefinite term is quite subjective and may be subject to several interpretations, depending on the interest in question.

(f) the offender committed similar previous infringements of environmental law;	The relationship with repeated offences (recidivism) requires clarification. For example, recidivism has limited effects in time. Is it intended that this ban be a permanent one, without the possibility of rehabilitation? We believe that the text should be supplemented by these clarifications in order to facilitate the transposition process. For the incidence of this aggravating circumstance, is it necessary to have a conviction for a similar offence or is it sufficient to commit an act provided by criminal law? Does „*similar previous infringement*" only consider offences or misdemeanors, too?
(g) the offence generated or was expected to generate substantial financial benefits, or avoided substantial expenses, directly or indirectly;	What is meant by the term *substantial*? The vast majority of the offences covered by this Directive, other than those committed with negligence, are committed in order to generate financial benefits or to avoid costs. Also, why would committing an offence for financial gain be more serious than for other purposes, such as revenge? If acts leading to the destruction of one species were committed in order to allow the reproduction of another species, which could then be hunted in larger quantities for recreational purposes, is this less serious than if the act was committed for material gain? What would be the purpose for which these crimes could be committed so that they would be less serious than those committed out of material interest? If the central word is "substantial", then it should be defined, because it is known that such terms generate difficulties in transposition, evaluation of transposition and can pose problems in terms of predictability of criminal law. Therefore, from our point of view, such expressions should be avoided when possible. The value of the gain itself, however, will be closely related to the gravity of the act itself and the magnitude of the effects produced. The "*substantial*" criterion should also be related to turnover, because it refers to "*total worldwide turnover*". We consider it necessary for the COM to provide a set of criteria for the purpose of defining this term, precisely for the purpose of foreseeability of the criminal law.

(i) the offender does not provide assistance to inspection and other enforcement authorities when legally required;	The text needs to be clarified since the wording is too vague and may create difficulties in transposition: what kind of inspection and authorities are considered under this provision? If it is a question of allowing environmental inspectors access to ascertain the damage, for example, this circumstance can be accepted but RO would still have a scrutiny reservation. If it is a question of cooperation with the judicial authorities, then the principle of art. 6 of the ECHR - the right of the person not to incriminate himself – should be considered and observed.
(j) the offender actively obstructs inspection, custom controls or investigation activities, or intimidates or interferes with witnesses or complainants.	This letter partially overlaps with the previous one.
Article 9 ***Mitigating circumstances*** Member States shall take the necessary measures to ensure that, in relation to the relevant offences referred to in Articles 3 and 4, the following circumstances may be regarded as mitigating circumstances:	
(a) the offender restores nature to its previous condition;	We consider that in this case a time limit should be set by which the defendant can make the restoration to the previous condition, where possible, in order for a mitigating circumstance to be incurred. The text should also be supplemented with "where possible" and a deadline for restoring the status quo.
Article 11 ***Limitation periods for criminal offences*** 1. Member States shall take the necessary measures to provide for a limitation period that enables the investigation, prosecution, trial and judicial adjudication of criminal offences referred to in Articles 3 and 4 for a sufficient period of time after the commission of those criminal offences, in order for those criminal offences to be tackled effectively.	
4. Member States shall take the necessary measures to enable the enforcement of:	

(a) a penalty of imprisonment in the case of a criminal offence which is punishable by a maximum sanction of at least ten years of imprisonment, imposed following a final conviction for a criminal offence referred to in Articles 3 and 4, for at least ten years from the date of the final conviction;	
(b) a penalty of imprisonment in the case of a criminal offence which is punishable by a maximum sanction of at least six years of imprisonment, imposed following a final conviction for a criminal offence referred to in Articles 3 and 4, for at least six years from the date of the final conviction;	
(c) a penalty of imprisonment in the case of a criminal offence which is punishable by a maximum sanction of at least four years of imprisonment, imposed following a final conviction for a criminal offence referred to in Articles 3 and 4, for at least four years from the date of the final conviction.	
These periods may include extensions of the limitation period arising from interruption or suspension.	RO cannot support such provision. Both the Criminal Code and clear Constitutional Court decisions validate the statute of limitations no matter how many interruptions / suspensions occur. If the text were to be kept as intended, it would be particularly difficult to transpose. We find it useful to clarify the COM's intention to regulate.
Article 12 ***Jurisdiction*** 1. Each Member State shall take the necessary measures to establish its jurisdiction over the offences referred to in Articles 3 and 4 where:	
(d) the offender is one of its nationals or habitual residents.	The above-mentioned text imposes an obligation on MS to assume jurisdiction over environmental offences committed by their nationals, without any nuance as to the conditionality of the incrimination, the territory where the act was committed, the complexity of the case or the fact that the national of one MS, a member of the crew, for example, is one of the 20 suspects, each triggering a different jurisdiction.

Where an offence referred to in Articles 3 and 4 falls within the jurisdiction of more than one Member State, these Member States shall cooperate to determine which Member State shall conduct criminal proceedings. The matter shall, where appropriate and in accordance with Article 12 of Council Framework Decision 2009/948/JHA[1], be referred to Eurojust.	The rule should be supplemented by a reference to Regulation 2018/1727 on the European Union Agency for Cooperation in Criminal Justice (Eurojust) and on the replacement and repeal of Council Decision 2002/187 / JHA. Crimes against the environment, including pollution caused by ships, are part of Eurojust's jurisdiction related to the subject matter. In addition, Articles 4 (2) (b) and (c), 4 (4) and Article 21 (6) (a) set out responsibilities for Eurojust from the perspective of conflicts of jurisdiction / jurisdiction in general.
Article 13 ***Protection of persons who report environmental offences or assist the investigation*** 1. Member States shall take the necessary measures to ensure that protection granted under Directive (EU) 2019/1937, is applicable to persons reporting criminal offences referred to in Articles 3 and 4 of this Directive.	RO can support the simple reference to the Whistleblowers Directive, but it is debatable since Directive 2019/1937 exempts from the application the notifications formulated according to the national rules of criminal procedure, and art. 3 and 4 regulate offences. Therefore, a wording which would show that Directive 2019/1937 applies, not just the safeguards it regulates, would be more comprehensive. It involves more than whistleblowers. See also Recital 25 to this end.
2. Member States shall take the necessary measures to ensure that persons reporting offences referred to in Articles 3 and 4 of this Directive and providing evidence or otherwise cooperating with the investigation, prosecution or adjudication of such offences are provided the **necessary support and assistance** in the context of criminal proceedings.	A clear wording of the text should be considered from the perspective of ***necessary support and assistance*** by explicitly state the actions envisaged.
Article 14 ***Rights for the public concerned to participate in proceedings*** Member States shall ensure that, in accordance with their national legal system, members of the public concerned have appropriate rights to participate in proceedings concerning offences referred to in Articles 3 and 4, for instance as a civil party.	RO is currently analyzing the text. Moreover, we consider it appropriate for the COM to submit a written note on the obligation to provide for such provisions under domestic law of the MS in the event that they do not recognize such a quality in the criminal proceedings for the *public concerned*.

[1] Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (OJ L 328, 15.12.2009, p. 42).

Article 16 ***Resources*** Member States shall ensure that national authorities which detect, investigate, prosecute or adjudicate environmental offences have a sufficient number of qualified staff and sufficient financial, technical and technological resources necessary for the effective performance of their functions related to the implementation of this Directive.	Recital 27 refers to minimum resource criteria. Should the term *sufficient* be considered as such minimum criterion?
Article 17 ***Training*** Without prejudice to judicial independence and differences in the organisation of the judiciary across the Union, Member States shall request those responsible for the training of judges, prosecutors, police, judicial staff and competent authorities' staff involved in criminal proceedings and investigations to provide at regular intervals specialised training with respect to the objectives of this Directive and appropriate to the functions of the involved staff and authorities.	Recital 28 refers to specialized investigation teams, but also to the possibility of setting up specialized panels of judges. It is our view that it would be more appropriate to refer to the specialization of judges rather than specialized panels of judges.
Article 18 ***Investigative tools*** Member States shall take the necessary measures to ensure that effective investigative tools, such as those which are used in organised crime or other serious crime cases, are also available for investigating or prosecuting offences referred to in Articles 3 and 4.	Recital 12 does not refer to the use of the instruments in all cases of environmental crime, but only in the serious ones, which is not reflected, however, in the text, although it should be, otherwise problems may arise from the perspective of relevant ECHR standards. The general approach does not follow from recital 29 either, but, as it is natural, by resorting to specific instruments when the seriousness of the act justifies it. This should be reflected in the text.

Article 19 ***Coordination and cooperation between competent authorities within a Member State*** Member States shall take the necessary measures to establish appropriate mechanisms for coordination and cooperation at strategic and operational levels among all their competent authorities involved in the prevention of and the fight against environmental criminal offences. Such mechanisms shall be aimed at least at:	From an operational perspective, the approach must be multidisciplinary and subject to certain rules.
(c) consultation in individual investigations;	In our view, the text is debatable.
(e) assistance to European networks of practitioners working on matters relevant to combating environmental offences and related infringements,	The category of environmental EU Networks is extremely broad, some of them operating as mere NGOs / subjects under private law. The concept of *related infringements* needs further clarification.
and may take the form of specialised coordination bodies, memoranda of understanding between competent authorities, national enforcement networks and joint training activities.	
Article 20 ***National strategy*** 1. By [*OP – please insert the date – within one year after the entry into force of this Directive*], Member States shall establish, publish and implement a national strategy on combating environmental criminal offences which as a minimum shall address the following:	
(d) the use of administrative and civil law to address infringements related to the offences within the scope of this Directive;	We consider it necessary for the COM to clarify this approach, even more as the concept of infringement is associated with environmental offences.
(g) assistance of European networks working on matters directly relevant to combating environmental offences and related infringements.	We propose to supplement the text with Eurojust and Europol. It should be considered whether OLAF could also be included.

Article 24 ***Transposition*** 1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [*OP – please insert the date – within 18 months after entry into force of the Directive*]. They shall immediately inform the Commission thereof. The methods of making such reference shall be laid down by Member States.	In our opinion, the deadline of 18 months is too short.

SWEDEN

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

Please find below comments relating to Articles 5, 7, 8 and 9.

Article 5

General point of view

Common rules on penalties and sanctions can constitute a very effective mean to achieve a high and equal level of environmental protection within the Union. Sweden can therefore support the inclusion of a more detailed regulation on penalties in the Directive.

Article 5.2, 5.3 and 5.4

Article 5 cover a wide range of offenses. Sweden questions whether a maximum term of imprisonment of ten years is adequate for all the offenses that could be relevant, especially when considering other crimes of equal seriousness.

Furthermore, offences committed with intent or gross negligence, and which have caused death or serious injury to a person, already carry a high maximum level of imprisonment in all member states. Sweden therefore questions whether there is a need to include a provision in the Directive which specifically addresses such offences and propose that article 5.2 is deleted.

The maximum terms of imprisonment in articles 5.3 and 5.4 seem to be adequate. However, in our view these articles should apply also to offences which have been committed with serious negligence (provided of course that serious negligence is criminalised according to article 3.2). The impact of such offences in the conduct of activities which are inherently dangerous, could be devastating. In addition, most serious environmental crimes are not committed intentionally, but with a reckless disregard of legal duties and of the consequences to human health and the environment. If we are to step up the fight against environmental crime, in particular cross border environmental crime, we believe that the harmonised sanction levels ought to apply also to offences committed with serious negligence.

Article 5.5

Sweden's position is that Article 5.5 should be drafted in a way that corresponds with similar articles in other criminal law directives, as for example Article 5.3 in Directive 2018/1673 on combating money laundering by criminal law. The additional measures should be optional and not mandatory for the member states. As pointed out previously, temporary bans on running for elected or public office would constitute a revocation of a civil right and is not compatible with the Swedish Constitution.

We suggest that the chapeau of article 5.5 is drafted as follows.

"Member States shall take the necessary measures to ensure that natural persons who have committed the offences referred to in Articles 3 and 4 ~~*may*~~ ***are, where necessary,*** *subject to additional sanctions or measures, which* ~~*shall*~~ ***may*** *include."*

Article 7

Sweden's overall position is that Article 7 should be drafted in a way that corresponds with similar articles in other criminal law directives. Thus, Sweden has no objection to Article 7(1). However, the scope of the article should be widened and include measures to ensure that a legal person is held liable pursuant to Article 6(1) as well as Article 6(2).

In consequence with the overall position, Sweden considers that the measures listed in Article 7(2) should be optional and believes that Article 7(3)-7(6) should be deleted.

Article 8

It is important that Article 8 is flexible enough to make it feasible in the varying criminal laws of the member states.

We suggest that the chapeau of this article is drafted as follows.

*"In so far as the following circumstances do not already form part of the constituent elements of the criminal offences referred to in Article 2, Member States ~~shall~~ **may** take the necessary measures to ensure that, in relation to the relevant offences referred to in Articles 3 and 4, the following circumstances ~~may be~~ **are** regarded as aggravating circumstances."*

Article 9

It's important that the draft is flexible enough to make it feasible in the varying criminal laws of the member states.

We would also like to point out that restoring nature to its previous condition can constitute an obligation according to the Directive 2004/35/EC on Environmental liability with regard to the prevention and remedying of environmental damage (ELD). We believe that restoring nature to its previous condition should only be a mitigating circumstance when it is not an obligation according to ELD.

We suggest that the chapeau of this article is drafted as follows.

*"Member States ~~shall~~ **may** take the necessary measures to ensure that, in relation to the relevant offences referred to in Articles 3 and 4, the following circumstances ~~may be~~ **are** regarded as mitigating circumstances,*

*a) the offender restores nature to its previous condition**, when this is not an obligation under Directive 2004/35/EC;***

b) the offender provides the administrative or judicial authorities with the information which they would not otherwise have been able to obtain, helping them to

i) identify or bring to justice the other offenders;

ii) find evidence"