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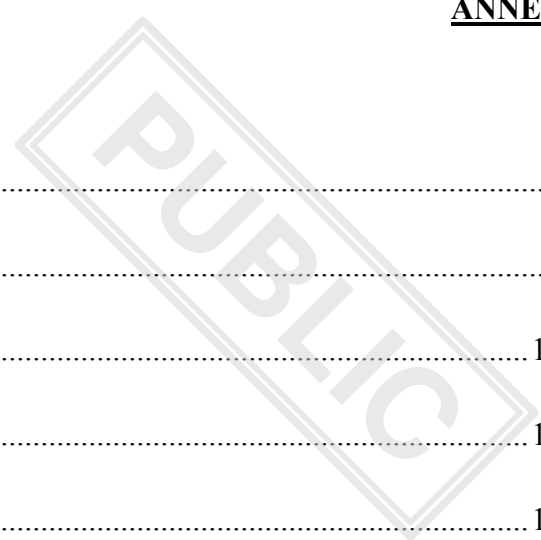
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Subject:	Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC - Written comments from Member States

Following the COPEN meeting on 19 and 20 January 2022, the Presidency invited Member States that so wished to submit written comments and drafting suggestions on Articles 1-4 of the proposal for a Directive (and the accompanying recitals), on the basis of 14459/21. The input thus received from delegations is set out in 5845/22.

At the meeting on 23 February 2022, the COPEN Working Party discussed *inter alia* Article 3 (3-5) and Article 4 of the proposal for a Directive. At that occasion, the Presidency indicated that Member States, which so wished, could submit additional written comments and drafting suggestions on the said provisions. The input thus received is set out in the [Annex](#).

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CROATIA

Following the invitation of the French Presidency, the Republic of Croatia would like to submit comments to Article 3 and 4 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, as follows.

Firstly, **regarding Article 3 Paragraph 1**, we would like to emphasize, as a general remark, that, since criminal offences are *blanquette* dispositions, all prohibited actions should be contained in specific EU legislation. Otherwise, the *blanquette* nature of the criminal provision could not be applicable.

Regarding **Article 3 Paragraph 1 under a)** we emphasize that this provision does not contain reference to specific EU legislation. We consider this relevant due to the fact that the use of term „unlawful”, defined by Article 2 Paragraph 1, refers to infringement of EU legislation. Due to different legal approach, provided by the Proposal, which includes omitting the list of EU legislation contained in the Annex, we are of the opinion that the definition of the offence should be linked to relevant EU legislation, in order to be in accordance with the principle of legal certainty.

Furthermore, the additional explanations are necessary in order to differentiate between „material” and „substances”, as means of commission of criminal offence.

Regarding **Article 3 Paragraph 1 under b)**, the remark regarding necessary reference to specific EU legislation given under a) applies *mutatis mutandis*. In addition, the link between Article 2 Paragraph 1 under a), which refers to EU legislation aimed at objectives of Union policy of protecting the environment, and the action of the criminal offence referred to Article 3 Paragraph 1 under b), which encompasses the „breach of prohibition or another requirement”, is unclear.

Regarding Article 3 Paragraph 1 under d), the reference to substantial damage to factors defined in Article 3 paragraph 1 of Directive 2011(92/EU, further explanations of reasons why factors such as material assets and cultural heritage are included in the definition of criminal offence are necessary. This specifically due to the fact that the term „unlawful” refers to conduct infringing EU legislation which refers to Union policy of protecting the environment.

Regarding Article 3 Paragraph 1 under g), further explanations are needed on the reasons why the proposed offence is considered to fulfil the requirement of *ultima ratio*, specially bearing in mind that the definition of the offence does not require the occurrence of consequence. For the time being, this infringement is prescribed as administrative offence in Croatian legislation implementing the Regulation 1257/2013/EU.

Regarding **Article 3 Paragraph 1 under k)**, the remark regarding necessary reference to specific EU legislation given under a) applies *mutatis mutandis*.

Regarding **Article 3 Paragraph 1 under p) i.)**, we are of the opinion that the legal description of the proposed criminal offence should also require the occurrence of consequence (as under p) ii.) For example, Article 7 Paragraph 1 of the Regulation 1143/2014/EU prescribes the prohibition of keeping mongooses, as invasive alien species of Union concern, hence bringing („escape”) one of the mongoose which is kept despite prohibition, which does not lead to serious consequences, would be more appropriate as administrative offence, as oppose to criminal offence.

Regarding **Article 3 Paragraphs 4 and 5**, the proposed elements which should be taken into account when assessing whether the activity is likely to cause damage to the quality of air, the quality of soil or the quality of water, or to animals or plants and the proposed elements which should be taken into account when assessing whether the quantity is negligible or non-negligible, are not proposed in accordance with the principle of legal certainty, which determines the scope of the criminality. By proposing such vague elements the harmonization at EU level will not be accomplished. In addition, it is unclear whether the elements proposed by Paragraphs 4 and 5 should be prescribed in alternative manner or in cumulative manner.

Regarding Article 4, which prescribes criminal liability for inciting, aiding and abetting and attempt of criminal offences referred to in Article 3 Paragraph (1) (criminal offences committed intentionally), we are of the opinion that the same legislative technique should be applied when drafting both Paragraphs of the Article 4.

CZECH REPUBLIC

The following written comments are made with parliamentary reservation.

Regarding Article 3(1)

In general:

The Czech Republic is of the opinion that acts that cause or are likely to cause death or serious injury to persons **should not be included in the basic merits of criminal offences** without direct connection to acts consisting in endangering or damaging the environment, as this is a draft directive harmonising criminal protection of the environment [e.g. letter (a) is correctly worded, as death or serious injury does not stand alone, but only as a characteristic of the seriousness of the discharge, emission, etc. of materials or substances into water, air, etc. in quantities that cause or are likely to cause death or serious injury to health.

On the contrary, in letter (b) said consequence is already related directly to the placing on the market of a product, which is very vague and there is no direct connection – for example, a faulty product can cause death and it will have nothing to do with the environment]. The primary protected object of these offences should be the environment, so the individual acts in Article 3(1) [in particular (b), (c), (e), (i), (j) and (p)] need to be revised in this respect. Causing death or serious injury to persons may only be relevant as a consequence of endangering or damaging the environment, i.e., it may also be established, for example, as a (particularly) aggravating circumstance with a higher penalty rate.

The Czech Republic also identifies a problem in a certain inconsistency in the wording of the individual acts in Article 3(1). For some of the acts, a uniform formulation of a possible or actual consequence consisting of causing death or serious injury, substantial damage to the quality of air, soil, water, animals or plants is used, while for the remaining acts, reference is made to the individual areas and objectives of the legislation in question. The Czech Republic would consider it appropriate to explain whether there was any intention in this different approach to the formulating of the individual provisions of this article and if so, what it was.

In view of the above, the Czech Republic requests that **the wording of the acts referred to in Article 3(1) of the draft directive be brought into line with the purpose and legal basis of the directive**, i.e. that the presumed consequence of causing death or serious injury to any person be either omitted from the basic merits of the individual offences or linked to the endangerment or damage to the environment, or that the causing of such a consequence be considered an aggravating circumstance under Article 8 of the draft directive.

As regards the acts to be punished under Article 3 of the draft Directive, the Czech Republic considers that, given its legal basis, the directive should regulate only offences that endanger or damage the environment, or one of its components, and not other offences that may affect or relate to the environment, but the objective aspect of their merits does not presuppose endangering or damaging any of the components of the environment. **Such crimes primarily protect a legal interest other than the interest in protecting the environment.** For the proposed offences that do not involve direct threat or damage to the environment in their basic merits there is no need to harmonise them through the proposed Directive; such acts can be punished under other criminal offences or by administrative law. These are, for example, the acts referred to in letter (e) point (i), letter (f), (n) or (p) point (i). In the case of environmental offences, there must be a endangerment of or damage to the environment of a certain intensity or extent to justify criminal sanctions.

Regarding individual letters:

In letter (b), the Czech Republic asks for clarification of the term "*in violation of a prohibition or other requirement*" and its relation to the unlawfulness referred to in the introduction to Article 3(1). The Czech Republic would also consider it more appropriate to link the quantitative measure "*on a larger scale*" to the conduct, i.e. the placing on the market of the product, rather than to the causing of the consequence. We therefore propose the following wording:

(b) the placing on a larger scale of a product on the market of a product which, in breach of a prohibition or another requirement, causes or is likely to cause death or serious injury to any person or substantial damage to air, water or soil quality, or to animals or plants as a result of the product's use on a larger scale;

In letter (d), the Czech Republic proposes to enumerate the individual consequences, i.e. air quality, soil quality, water quality, animals or plants, instead of referring to the factors defined in Article 3(1) of Directive 2011/92/EU, when defining the consequences of the acts, as is the case for other acts listed in Article 3(1). In addition, we request that the individual consequences be limited so that they consist in endangering or damaging the environment or its individual components. The factors defined in Article 3(1) of Directive 2011/92/EU are much broader in scope, since, in addition to soil, water, air and climate, they also include population and human health; biodiversity, with particular attention to species and habitats protected under Directive 92/43/EEC and Directive 2009/147/EC; material assets, cultural heritage and the landscape.

As regards the protection of biodiversity, and species and natural habitats within the meaning of Council Directive 92/43/EEC in particular, protection is provided for separately in letters (l) and (p), and therefore it is not necessary to define it in this letter separately and differently from other letters, which usually refer only to the protection of air, soil, water, animals and plants [compare with letters (a), (b), (c), (o), (p), etc]. Moreover, it is not clear how the consequence defined as "*interaction between the factors*" should be determined and penalised. Therefore, and also in view of the cumulative references to other EU legislation, we propose the following wording:

(d) the execution of projects referred to in Article 1(2)(a) of Directive 2011/92/EU of the European Parliament and of the Council without a development consent or an assessment with regard to their effects on the environment, which causes or is likely to cause substantial damage to the factors defined in Article 3(1) of Directive 2011/92/EU quality of air, the quality of soil or the quality of water, or to animals or plants;

In letter (e), we propose to remove the part of the act consisting of " the supervision of such operations and the after-care of disposal sites", as in our view the essential conduct from the point of view of criminal law is the illegal disposal of waste. The penalty for neglect of operational supervision or neglect of aftercare of a waste disposal facility may, in our opinion, also be left to administrative law, or it may involve some form of criminal complicity, depending on the circumstances. Beyond this, it is not clear from the provision who should carry out such operational supervision, nor what is meant by this term in particular. Should the EC insist on using this term, the Czech Republic asks for a more detailed explanation.

With regard to letter (e) point (i), in line with our general comment, we request the addition of a consequence of substantial endangerment or damage of the environment to this point as well, as less serious violations of hazardous waste management regulations can be left to administrative sanction. Alternatively, we request a justification as to why it is assumed that in all cases the act is of such a socially harmful nature as to justify a criminal sanction. We propose the following wording:

(e) the collection, transport, recovery or disposal of waste, ~~the supervision of such operations and the after care of disposal sites~~, including action taken as a dealer or a broker (waste management), when an unlawful conduct:

*(i) concerns hazardous waste as defined in Article 3(2) of Directive 2008/98/EC of the European Parliament and of the Council and ~~is undertaken in a non-negligible quantity~~ **causes or is likely to cause substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants;***

(ii) concerns other waste than referred to in point (i) and 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 or the quality of water, or to animals or plants;

In letter (f), we request the addition of the consequence of a substantial endangerment of or damage to the environment, or, alternatively, we request a justification as to why it is presumed that in all cases the act is of such a socially harmful nature as to justify a criminal sanction. For the first option, we propose the following wording:

*(f) the shipment of waste, within the meaning of Article 2(35) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council when such shipment ~~is undertaken in a non-negligible quantity~~ **causes or is likely to cause substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants**, whether executed in a single shipment or in several shipments which appear to be linked;*

With regard to letter (g), in line with our general comment, we request the addition of the consequence of a substantial endangerment of or damage to the environment, or, alternatively, we request a justification as to why it is presumed that in all cases the act is of such a socially harmful nature as to justify a criminal sanction. We suggest the following wording in the event of a modification along these lines:

(g) the recycling of ships falling within the scope of Regulation (EU) No 1257/2013 of the European Parliament and of the Council, without complying with the requirements of Article 6(2), point (a) of that Regulation, which causes or is likely to cause substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants;

Concerning letter (h), we suggest that the act be phrased positively rather than negatively (i.e., in which case it is a criminal act rather than in which case it is not). We consider the reference to the exceptions under Article 5 of Directive 2005/35 to be redundant and should therefore be deleted, as this is covered by the requirement in the introduction to Article 3(1) that it must be an unlawful act (Article 5 of the Directive 2005/35 directly states that there is no unlawful act in these cases). In addition, we lack a factor expressing the greater social harmfulness of the act in question (extent, severity of the consequence); we see it in the severity of the consequence rather than in the repetition of the act. We therefore propose the following formulation of the letter:

(h) the ship-source discharges of polluting substances referred to in Article 4(1) of Directive 2005/35/EC of the European Parliament and of the Council on ship-source pollution and on the introduction of penalties, including criminal penalties, into any of the areas referred to in Article 3(1) of that Directive, provided that the ship-source discharges do not satisfy the exceptions set in Article 5 of that Directive; this provision shall not apply to individual cases, where the ship-source discharge does not cause deterioration in the quality of water, unless repeated cases by the same offender in conjunction result in which causes or is likely to cause significant deterioration in the quality of water;

In the case of letter (i), the Czech Republic asks for an explanation of how the installation, operation or dismantling of an installation may cause substantial damage to the quality of air, soil water, animals or plants without the foreseeable consequence being covered by Article 3(1)(a). If the provision in letter (i) does not cover additional acts beyond the letter (a), then the Czech Republic will request its removal from the draft Directive.

With regard to letter (j), the Czech Republic requests clarification of the difference between the terms "manufacture" and "production". If these terms share the same meaning, we suggest using only one of them and, if appropriate, explaining in the recitals that the term used (e.g. "production") also includes other acts (e.g. "manufacture").

Regarding the letter (l), the Czech Republic requests an explanation as to why criminal protection should also be granted to species listed in Article 1 of Directive 2009/147/EC of the European Parliament and of the Council and why administrative sanctions are not sufficient in this case. We ask for an explanation of how the proposed legislation will reflect the fact that the species protected under Article 1 of Directive 2009/147/EEC include both common, widespread species and rare and endangered species, i.e. whether, for example, additional conditions and limiting criteria will be set for criminal sanctions against common species as opposed to rare species. In the Czech Republic's view, the "negligible quantity" condition is inappropriate in this case and is not capable of addressing the significant differences in the status and degree of endangerment of species protected under Article 1 of Directive 2009/147/EC.

Letter m) refers to the prohibition of trade in specimens of protected species of wild fauna or flora or their parts or derivatives listed in Annexes A and B to Council Regulation (EC) 338/97. The Czech Republic considers it necessary to clarify what is to be included in the term unlawful trade; i.e. whether this term is to be interpreted in the sense of the definition of trade in Article 2(u) of the Regulation, or rather in the context of the prohibition in Article 8 of the Regulation, or whether it is a separate term only for the purposes of this Directive [which, however, would be contradictory in view of Article 2(1) of the proposal]. In our view, it would be appropriate to include all activities covered by the Regulation. It is also our view that, in terms of defining the conditions for criminal sanctions, it is necessary to distinguish whether the species concerned are specimens included in Annex A or B to Council Regulation (EC) No 338/97.

With regard to letter (n), the Czech Republic considers that the placing on the market or making available of illegally harvested timber or timber products is not in itself a crime directly aimed against the environment but is a consequential act which is no longer associated with immediate serious environmental consequences comparable to those of most of the acts covered by Article 3. Such conduct should potentially be prosecuted through offences other than environmental offences and may also potentially be prosecuted as a form of participation in an environmental offence (e.g. aiding and abetting). The Czech Republic therefore proposes that this act be deleted from Article 3(1) or that an explanation be added to the explanatory report or recital of the Directive as to why it is necessary to include this act in the scope of the Directive. If this act remains included among the criminal offences in Article 3(1), a certain quantitative criterion for the placing on the market or making available of illegally harvested timber or timber products, beyond which criminal liability will be incurred, should be added (e.g. "*larger scale*") in order to constitute sufficient social harm to justify criminal sanctions. The act should be comparable in seriousness to other acts described herein, and we believe that the current limitation "*except for cases where the conduct concerns a negligible quantity*" is insufficient. In case this act is kept in the list, we suggest the following wording:

(n) the placing or making available on a larger scale on the Union market of illegally harvested timber or of timber products that were made of illegally harvested wood, falling within the scope of Regulation (EU) No 995/2010 of the European Parliament and of the Council, ~~except for cases where the conduct concerns a negligible~~;

Regarding letter o), the Czech Republic considers it appropriate to point out that the proposed wording of this letter (in combination with the definition of "*habitat within a protected site*") covers only part of the objects of protection in protected sites, or only part of the actions that could have a serious impact on them (only deterioration of a habitat is mentioned, not e.g. direct killing or destruction of species that are to be protected in the site). Since the letter (l), which refers to the killing and destruction of animals or plants, concerns only species listed in Annexes IV and V of Directive 92/43/EEC and does not include species that are subject to protection "*within a protected site*" under that Directive (these species are listed in Annex II of Directive 92/43/EEC), the Czech Republic recommends that the provisions of Article 3(1) be amended to include the protection of these species living in protected sites if they are killed or destroyed on a scale that could endanger their status in a protected site.

With regard to letter (p), the Czech Republic considers that, in view of the focus and objectives of Regulation (EU) 1143/2014 of the European Parliament and of the Council, it is not relevant in this case, apart from causing death or serious injury to persons, to link the act to the damage to air or water quality. The act to be considered criminal should relate primarily to the endangerment or damage to biodiversity.

In light of our general comment, we request that the consequence of significant adverse impact (or likelihood of causing it) on biodiversity (which is the target of Regulation 1143/2014) also be added to point (i) of the letter (p). It is not clear why the harmful consequence is missing here, as compared to point (ii). Alternatively, at least some quantitative criterion, e.g. "*larger scale*" or "*non-negligible*", should be provided, as otherwise, in our view, an administrative sanction may be sufficient. In view of the above, we therefore suggest two possible options of the wording of the provision:

Option 1:

(p) introduction or spread of invasive alien species of Union concern when:

*(i) the conduct breaches restrictions set out in Article 7(1) of Regulation (EU) No 1143/2014 of the European Parliament and of the Council **and has or is likely to have a significant adverse impact on biodiversity or the related ecosystem services;***

*(ii) the conduct breaches a condition of permit issued under Article 8 or of authorisation granted under Article 9 of Regulation (EU) No 1143/2014 and ~~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 or the quality of water, or to animals or plants~~ **has or is likely to have a significant adverse impact on biodiversity or the related ecosystem services;***

Option 2:

(p) introduction or spread of invasive alien species of Union concern when:

*(i) the conduct breaches restrictions set out in Article 7(1) of Regulation (EU) No 1143/2014 of the European Parliament and of the Council **and is undertaken in a non-negligible quantity;***

*(ii) the conduct breaches a condition of permit issued under Article 8 or of authorisation granted under Article 9 of Regulation (EU) No 1143/2014 and ~~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 or the quality of water, or to animals or plants~~ **is undertaken in a non-negligible quantity;***

With regard to letters (q) and (r), the Czech Republic considers it appropriate to set a quantitative criterion for the disposal of the substances in question, the exceeding of which would lead to criminal liability (e.g. "*larger scale*"), in order to ensure that the social harmfulness of the act in question is sufficient to justify criminal sanctions.

Regarding Article 3(2)

The Czech Republic can agree with the requirement to introduce a sanction even for serious negligence, provided that the actions in Article 3(1) are limited to those that endanger or damage the environment in line with our comments above. As the Czech Republic does not agree with the requirement to criminalise intentional acts that are not primarily directed against the environment, it cannot agree with the introduction of criminalisation of such acts in their negligent form.

However, the Czech Republic considers it important to examine whether the list of letters in Article 3(1) to which the requirement to impose a sanction even in the case of serious negligence should apply is correctly defined.

For example, letter (m) is listed in the provisions of Article 3(2), even though negligence cannot in practice occur in this case. On the contrary, e.g. letters (l) and (o) are missing, whereas in these cases serious damage to habitats (or killing or destruction of plants and animals) through negligence can occur and is experienced in practice.

Regarding Article 3(3) to (5)

The Czech Republic considers that there is no legal basis for the provisions of the third, fourth and fifth paragraphs, given that it is not a matter of defining the elements of a criminal offence, nor of harmonising criminal sanctions, but a matter of defining criteria to be taken into account when assessing the fulfilment of certain elements of the facts of a criminal offence, i.e. criteria whose significance for the fulfilment of the normative elements of the facts of a criminal offence is to be assessed by the criminal prosecution authority taking into account the circumstances of the particular case.

Moreover, the criteria are defined in a relatively general way, so they may not provide added value for practice. In our opinion, the definition of the criteria to be taken into account by law enforcement authorities when assessing the fulfilment of certain elements of the offence should rather be dealt with in the form of soft law instrument, e.g. a uniform methodology issued at EU level, in which the individual criteria could be elaborated in more detail so as to provide real added value for the practice.

Alternatively, these criteria could be moved into the recital of the Directive.

Similarly, we find the criteria also deficient from a substantive point of view, e.g.:

Under Article 3(3)(a), the baseline conditions of the environment concerned are to be taken into account for the assessment of whether there has been significant damage or deterioration – this circumstance, in our view, is not indicative of whether significant damage or deterioration has occurred. The extent and severity of the damage or deterioration is always assessed in relation to the original state of the environment, but the fact that the perpetrator damages an environment that is already in a poor state does not automatically mean that the damage or deterioration caused is less severe.

With regard to the reversibility of the damage or deterioration referred to in **Article 3(3)(e)**, in our view this criterion can be subsumed under the letter (b) – if the damage is irreversible, it will be long-term damage [or the letter (b) can be amended to include “*permanent*” damage”]; irreversible damage will also affect the assessment of the severity of the damage or deterioration as defined in letter (c).

In the case of Article 3(3), this would essentially leave as a criterion only that in assessing substantial damage or deterioration, the severity, permanence and extent of the damage or deterioration should be taken into account, which does not provide much added value in practice, as these are the criteria typically assessed.

In the case of Article 3(4)(a), it is not clear what is meant by the referred “*risky or dangerous activity*” beyond the fact that such activity endangers the environment (which is a general feature of the facts) and beyond the classification of the material or substance within the meaning of letter (c).

As regards Article 3(5)(c), the obligation to take into account the conservation status of the fauna or flora species concerned when assessing whether the act was committed in negligible or non-negligible quantities is irrelevant, for example, in the case of the transport of waste under Article 3(1)(f) and the placing on the market of illegally harvested timber under Article 3(1)(n).

Similarly, we consider it debatable whether, for example, the cost of repairing the damage should be taken into account for the consideration of ‘negligible quantity’ (i.e. for the assessment of a certain quantitative parameter) - and whether this criterion should not, by its very nature, rather be a criterion that is indicative of the extent of the damage (i.e. whether this criterion should not rather be the content of paragraph 3).

In view of the above, the Czech Republic proposes to remove the provisions in question from the draft directive. We propose to address these issues in more detail at the soft-law level so that the resulting material provides added value for practice.

Regarding Article 4

The Czech Republic can support the proposed wording of this provision on the condition that the actions referred to in Article 3(1) of the draft Directive are limited in the sense of the comments made.

In order to avoid problems of interpretation, we propose, in line with recital 13, to amend Article 4(1) to make it clear that it applies to intentional offences, similar to paragraph 2.

*(1) Member States shall ensure that inciting, and aiding and abetting the commission of any of the criminal offences referred to in Article 3(1) **when committed intentionally** are punishable as criminal offences.*

In the case of Article 4(2), the Czech Republic will ask for an explanation as to why the proposal does not also provide for criminal attempt in letter (g), (l), (o) and letter (p) point (i). Assuming that the social harmfulness of the offences is assessed according to the level of criminal penalties, the list of offences in Article 4(2) does not correspond to the provisions of Article 5(4), which puts them on an equal level (by requiring a maximum penalty of at least four years) with letter (k), (l), (m), (o) and letter (p) of Article 3(1).

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 at this point. The comments are thus preliminary comments by the expert level.

Article 3, paragraphs 3-5

The national systems of Member States differ in how much detail issues such as those in article 3, paragraph 3-5 are regulated by legislation and other binding legal sources such as preparatory material, which is the case in Finland. It is also important to respect the independence of the courts and leave them enough room for deliberation. This has to do with national solutions on a wider scale, which ought to be respected and the text of the paragraphs formulated in a way, which allows for national solutions. It is in any case important to be flexible as regards the transposition of the obligations of the paragraphs. One possible option could be to address the issues now in art. 3 paragraphs 3-5 in the recitals, as suggested by some of the delegations, or to formulate the chapeaus of the subparagraphs so that it would not be required that the elements referred to in the subparagraphs are specified in the national legislations (“Member States shall ensure that ~~their national legislation specifies that~~ the following elements shall be taken into account...”).

In addition, a detailed comment on article 3, paragraph 4, subparagraph a: there is a reference to “risky or dangerous” activity. The Commission has indicated at the COPEN meeting on the 23rd of February 2022 that the wording refers to the activity being risky or dangerous from the point of view of the environment. This ought to be added to the wording or the recitals for the sake of clarity.

Article 4

As regards article 4, paragraph 2, a thorough examination from the point of view of necessity and proportionality ought to be conducted as article 3 is prominently wider than in the 2008 directive and as the definition of “illegal” seems to be wider, as well.

As to many of the acts defined in article 3, paragraph 1, it seems questionable how the essential elements of an offence may be fulfilled in an attempt. For example, the acts defined in article 3, paragraph 1, subparagraphs d and k seem questionable in this regard.

In addition, it seems unclear which sort of an act would constitute an attempt as regards the act defined in article 3, paragraph 1, subparagraph f. There is a reference in the subparagraph to whether the act is executed “in a single shipment or in several shipments which appear to be linked” – how is this element to be viewed from the point of view of an act constituting an attempt? We have somewhat similar questions on subparagraph h.

HUNGARY

General comments on Article 3

1. Injury or death to a person

Most of the offences in Article 3(1) include the following element: „the activity causes or is likely to cause death or serious injury to any person”.

On behalf of HU, it is proposed to delete this reference. This concerns points (a), (b), (c), (e), (i), (j) (p).

Article 3 lists the baseline scenario, ie. the essential elements of all the crimes against the environment. This article should always clearly establish a link between the protected object / interest, namely the environment and the acts by which environmental criminal offences may be committed.

If the activity directly causes injury to a person (without having an impact on the environment), it is a sui generis offence, qualified as homicide or bodily injury.

The primary criterion for a crime to be listed in this directive should be its impact on the environment. If such a criterion is met, it may be possible to add further qualifiers, for instance death or serious injury on top of the primary harm or threat to the environment. It may be considered as an aggravated case or an aggravating circumstance.

2. Penalties

This question above is closely linked to Article 5(2), according to which imprisonment is at least 10 years is possible if the offences referred to in Article 3 cause or are likely to cause death or serious injury to any person. The proposed penalty is exaggerated.

3. Damage to environmental elements, significant, negligible quantity

The majority of the offences referred to in Article 3(1) contain an additional element which, in order to stress the ultima ratio nature of criminal sanctions, qualifies the administrative breach laid down in EU legislation to be more serious: the activity causes or is likely to cause significant damage to the quality of air, soil or water or to animals or plants, or the conduct concerns a negligible quantity. In contrast, in some cases, the mere breach of a provision in a regulation / constitutes a criminal offence.

In *the case of points (q) and (r)*, an unlawful conduct with ozone-depleting substances or fluorinated greenhouse gases is in itself a criminal offence, but *points (e) (waste) and (j) (radioactive substance)* requires non-negligible quantity or harmful impact to occur. In *point (g)*, the mere criminal liability of a ship being recycled in an inappropriate installation is merely substituting criminal liability.

We would like to ask for an explanation and, if necessary, a more coherent application of the additional criteria throughout the text.

4. Relationship between the conduct and the result

In some points listed in Article 3, the link between the offence and the result is so remote that the causal link cannot be established. Thus, e.g. in *point (b)* for placing on the market, *in point (c)* for manufacture and placing on the market, or *in point (j)* for export and import. From the point of view of criminal law, it is not appropriate to provide for a criminal offence which is impossible to prove. As an example, the manufacturer of a certain product should not be held liable for the subsequent misuse of it by someone causing environmental damage.

We propose to delete the conducts listed above from those points as mentioned.

Detailed comments and drafting proposals

point (a): delete the reference to injury caused to persons in the light of what has been explained earlier.

(a) the discharge, emission or introduction of a quantity of materials or substances or ionising 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 or the quality of water, or to animals or plants;

point (b): delete (b) in view of what has been explained earlier.

~~(b) the placing on the market of a product which, in breach of a prohibition or another requirement, causes or is likely to cause death or serious injury to any person or substantial damage to air, water or soil quality, or to animals or plants as a result of the product's use on a larger scale;~~

point (c): delete the terms manufacturing and placing on the market, as well as the reference to injury caused to persons, in view of what has been explained earlier.

(c) the ~~manufacture, placing on the market or use~~ of substances, whether on their own, in mixtures or in articles, including their incorporation into articles, when:

(i) this activity is restricted pursuant to Title VIII and Annex XVII of Regulation (EC) No 1907/2006 of the European Parliament and of the Council; or

(ii) this activity is prohibited pursuant to Title VII of Regulation (EC) No 1907/2006; or

(iii) this activity is not in compliance with Regulation (EC) No 1107/2009 of the European Parliament and of the Council; or

(iv) this activity is not in compliance with Regulation (EC) No 528/2012 of the European Parliament and of the Council; or

(v) this activity falls under Regulation (EC) No 1272/2008 of the European Parliament and of the Council; or

(vi) this activity is prohibited pursuant to Annex I to Regulation (EU) 2019/1021 of the European Parliament and of the Council,

and it 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 or the quality of water, or to animals or plants;~~

point (d): in order to introduce uniform and transparent rules, the proposal should not refer to the factors set out in Article 3(1) of Directive 2011/92/EU in relation to the result, but to repeat the phrase used in the other point (air, soil or water quality or significant damage to animals or plants). Article 3(1) of Directive 2011/92/EU also refers to factors such as material goods and cultural heritage, which are not the subject-matter of this Directive.

*(d) the execution of projects referred to in Article 1(2)(a) of Directive 2011/92/EU of the European Parliament and of the Council without a development consent or an assessment with regard to their effects on the environment, which causes or is likely to cause substantial damage ~~to the factors defined in Article 3(1) of Directive 2011/92/EU;~~ **placeholder for additional qualifiers, such as substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants***

point (e): delete the reference to injury caused to persons in the light of what has been explained earlier.

*(e) the collection, transport, recovery or disposal of waste, the supervision of such operations and the after-care of disposal sites, including action taken as a dealer or a broker (waste management), when ~~an~~ **the** unlawful conduct:*

(i) concerns hazardous waste as defined in Article 3(2) of Directive 2008/98/EC of the European Parliament and of the Council and is undertaken in a non-negligible quantity;

(ii) concerns other waste than referred to in point (i) and 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 or the quality of water, or to animals or plants;

point (g): the offence should include an additional element in order to meet the standards for the ultima ration nature of criminal law, for example the activity causes or is likely to cause significant damage to air, soil or water quality or to animals or plants.

*(g) the recycling of ships falling within the scope of Regulation (EU) No 1257/2013 of the European Parliament and of the Council, without complying with the requirements of Article 6(2), point (a) of that Regulation; **[placeholder for additional qualifiers]***

point (h): avoid exceptions and the use of a negative criterion to determine the outcome of the offence (if there is a significant deterioration in water quality).

*(h) the ship-source discharges of polluting substances referred to in Article 4(1) of Directive 2005/35/EC of the European Parliament and of the Council⁴² on ship-source pollution and on the introduction of penalties, including criminal penalties, into any of the areas referred to in Article 3(1) of that Directive, **provided that the ship-source discharges do not satisfy the exceptions set in Article 5 of that Directive; this provision shall not apply to individual cases, where the ship-source discharge does not cause deterioration in the quality of water, unless repeated cases by the same offender in conjunction result in deterioration in the quality of water;***

point (i): delete the reference to injury caused to persons in the light of what has been explained earlier.

(i) the installation, operation or dismantling of an installation in which a dangerous activity is carried out or in which dangerous substances, preparations or pollutants are stored or used falling within the scope of Directive 2012/18/EU of the European Parliament and of the Council, Directive 2010/75/EU of the European Parliament and of the Council or Directive 2013/30/EU of the European Parliament and of the Council and 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 or the quality of water, or to animals or plants;

point (j): delete the reference to injury caused to persons in the light of what has been explained earlier. In addition, in the case of exports and imports, it is questionable whether the causal link can be established with the environmental harmful result that occurred.

(j) *the manufacture, production, processing, handling, use, holding, storage, transport, ~~import, export~~ or disposal of radioactive material falling within the scope of Council Directive 2013/59/Euratom⁴⁶, Council Directive 2014/87/Euratom⁴⁷ or Council Directive 2013/51/Euratom⁴⁸, 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 or the quality of water, or to animals or plants;*

point (k): almost all of the offences referred to in Article 3(1) contain references to specific EU legislation. With regard to point (k), we consider it necessary to identify the relevant EU acts and to specify, in accordance with the principle of nullum crimen, what conduct is unlawful.

(k) *the abstraction of surface water or groundwater which causes or is likely to cause substantial damage to the ecological status or potential of surface water bodies or to the quantitative status of groundwater bodies; [placeholder for qualifiers]*

point (p): delete the reference to injury caused to persons in the light of what has been explained earlier. It is also proposed to review the outcome of the introduction of invasive species, which is likely to result in significant damage to the environment (soil, water, air) but to flora and fauna.

(p) *introduction or spread of invasive alien species of Union concern when:*

(i) *the conduct breaches restrictions set out in Article 7(1) of Regulation (EU) No 1143/2014 of the European Parliament and of the Council⁵³;*

(ii) *the conduct breaches a condition of permit issued under Article 8 or of authorisation granted under Article 9 of Regulation (EU) No 1143/2014 and causes or is likely to cause ~~death or serious injury to any person or substantial damage~~ **or significant deterioration** to the ~~quality of air, the quality of soil or the quality of water, or to animals or plants~~ **habitat within a protected site or specimens of protected wild fauna or flora;***

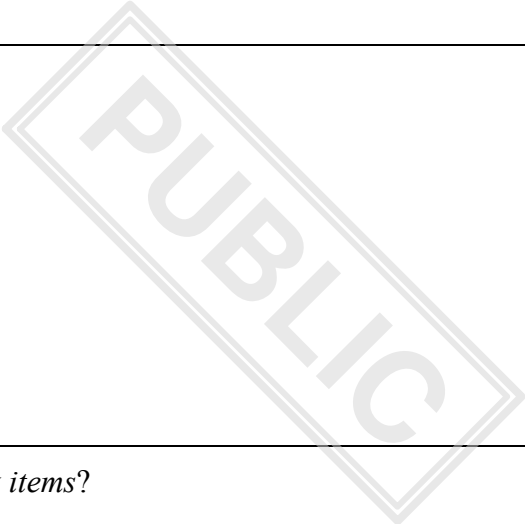
These observations may be subject to further amendments or changes in the proposals, depending on internal consultations.

ROMANIA

Comments on article 3(3)-3(5)

<i>Directive</i>	<i>Comments</i>
GENERAL COMMENTS	
Article 3 Offences	
<p>3. Member States shall ensure that their national legislation specifies that the following elements shall be taken into account, where relevant, when assessing whether the damage or likely damage is substantial for the purposes of the investigation, prosecution and adjudication of offences referred to in paragraph 1, points (a) to (e), (i), (j), (k) and (p):</p>	<p>In order to have a uniform application of the criminal law, we consider that the definition of these terms needs to be made at least in the recitals.</p> <p>According to art. 3, the act that “<i>causes or is likely to cause the death or serious injury of any person or substantial damage to the quality of air, water or soil, animals or plants</i>” introduces the notion of “substantial damage”. This is not found in the definitions in art. 2, is neither quantifiable nor measurable from the inspector's point of view. The definition of this term can be taken into account in conjunction with the Environmental Liability Directive (ELD, 2004/35 / EC), where “environmental damage” is defined, but the assessment of its substantiality, in a measurable and quantifiable way, is not explained. The introduction or use of a specific instrument to quantify substantial damage would be a real help in assessing the facts at the site, as soon as possible after the damage is done.</p> <p>The phrase “<i>where relevant</i>” should be clarified and also if these elements/criteria concern the constituent content of the criminal offences. In essence, and it is also valid for paras. 4 and 5, these elements will differentiate between contraventions and criminal offences, which means that each MS will regulate according to its own criminal / legislative / environmental policy (which will lead to minor or major differences, as the case may be). See also Recital 20, 22.</p>

<p>(a) the baseline condition of the affected environment;</p>	<p>For all the conditions below, standards should be created, which are specific and different depending on the field of regulation. In their absence, there will be not only big differences at national case law level, but also at European level. How will the seriousness or the short-term damage be calculated?</p> <p>The general statements in recital 11 are not in a position to provide the necessary clarifications but only state that the thresholds are needed and the fact that the law must be predictable. How are the thresholds imposed so that the legislation is predictable at MS level and its application is unitary at European level?</p>
<p>(b) whether the damage is long-lasting, medium term or short term;</p>	<p>See comments from letter a).</p>
<p>(c) severity of the damage;</p>	<p>Idem</p>
<p>(d) spread of the damage;</p>	<p>Idem</p>
<p>(e) reversibility of the damage.</p>	<p>Idem</p>
<p>4. Member States shall ensure that their national legislation specifies that the following elements shall be taken into account when assessing whether the activity is likely to cause damage to the quality of air, the quality of soil or the quality of water, or to animals or plants for the purposes of the investigation, prosecution and adjudication of offences referred to in paragraph 1, points (a) to (e), (i), (j), (k) and (p):</p>	<p>The texts of para. 4 and para. 5 should be clarified – if these elements / criteria concern the constituent content of criminal offences or are likely to establish qualitative differences from the legal forms of wrongdoing /extra criminal acts/contraventions.</p>
<p>(b) the extent to which the values, parameters or limits set out in legal acts or in an authorisation issued for the activity are exceeded;</p>	<p>It does not follow from the wording of the norm whether the simple exceeding, no matter how small, for any of the areas regulated here is considered or the exceedance must go beyond a certain limit that each state can set.</p>

<p>5. Member States shall ensure that their national legislation specifies that the following elements shall be taken into account when assessing whether the quantity is negligible or non-negligible for the purposes of the investigation, prosecution and adjudication of offences referred to in paragraph 1, points (e), (f), (l), (m), (n):</p>	
<p>(a) the number of items subject to the offence;</p>	<p>What is meant by <i>items</i>?</p>
<p>(b) the extent to which the regulatory threshold, value or another mandatory parameter is exceeded;</p>	<p>It is necessary for the Commission to clarify whether it will be up to the MS to decide whether immediately after exceeding the set thresholds or after a certain value of it.</p>
<p>(d) the cost of restoration of environmental damage.</p>	<p>Further clarifications are needed in order to identify the best way of transposing this provision into domestic legal order.</p>

SWEDEN

At this stage, we limit our comments to Articles 2-3.

Article 2

The definition of “unlawful”

In Directive 2008/99/EC the concept of unlawful is defined as infringement of the legislation listed in annex A. Annex A has not been updated since the directive was adopted and as a result, the list is outdated. Very few of the legal acts listed in the annex are still in force. This is one of the major shortcomings with the current Directive and we welcome that the Commission has proposed a way to address this shortcoming.

In the Commission proposal “unlawful” is defined as a conduct infringing Union legislation, which irrespective of its legal basis contributes to the pursuit of the objectives of Union policy of protecting the environment and national law giving effect to such legislation.

Sweden can support the proposed definition of “unlawful”. We believe that this “dynamic” definition gives the Directive a flexibility that the current directive lacks and that it ensures that the Directive, at least in part, will be relevant also for new legal acts. This is important since several legal acts referred to in the subparagraphs of article 3 are in the process of being revised and may be given new titles (for example, the Reach regulation, the CLP regulation and the IED).

As long as the criteria in each subparagraph are clearly described we believe that the requirements of the principle of legality are fulfilled. In practice, the term “unlawful” will include the infringement of acts adopted pursuant to Article 192 and acts adopted under Article 114 with the double aim of ensuring the free movement of goods and a high level of protection of human health and the environment (that is the case for the acts listed in 3.1 c). A conduct will only constitute a criminal offence according to the Directive if it is unlawful and fall under any of the subparagraphs in art 3.1. All subparagraphs except 3.1 a, b, e and k refer to other pieces of legislation which means that the “dynamic” definition of unlawful will only have an effect with respect to subparagraphs a, b, e and k.

Article 3.1

Subparagraph a) – The discharge, emission or introduction of material, substances or ionising radiation into air, soil or water

The concept of “material or substance” in subparagraph a) needs to be clarified since related concepts are introduced in subparagraph b) and c) *i.e.* “product” and “substances, whether on their own, in mixtures or in articles”. These concepts are to a great extent overlapping and need to be carefully considered and clarified.

Subparagraph b) – placing on the market of an unlawful product and damage through the use on a large scale

According to the Commission the aim of this paragraph is to target illegal conducts such as Dieselgate. Such violations of the law are indeed severe and should be sanctioned, but it is unclear if this subparagraph will have that effect. The conditions in the Dieselgate case show the difficulties in applying the criteria in subparagraph b). In Dieselgate, Volkswagen had intentionally programmed their cars so that the actual emissions of NO_x and CO₂ was considerably higher in real world driving than in laboratory testing. Consequently, the cars emitted more NO_x and CO₂ than indicated by the company. How much more depended on the actual use of the cars, which of course could only be roughly estimated. In order to prove that the criteria in subparagraph are fulfilled the excessive emissions of NO_x and CO₂ compared to the indicated emissions would have to be calculated and a causal link between the excessive emissions and a substantial damage to air, water or soil quality, or to animals or plants would have to be established. Applying article 3.4 would lead to a conclusion that a damage is likely but article 3.3 would be no help in determining whether the likely damage is substantial. Unless higher levels of NO_x and CO₂ in the atmosphere is considered a substantial damage as such, we cannot see how the negative effects of the excessive emission from the VW-cars can be separated from the negative effects of the already high levels of NO_x and CO₂ in the atmosphere and how a causal link between the excessive emissions and any damage to the environment can be proven.

In addition, it is unclear what is covered by the term “product”. “Product” is not explicitly defined in any Union legal act. In Regulation (EU) 2019/1020 on market surveillance, the term “product” refers to items that are subject to the Union harmonisation legislation listed in the annex to the regulation, that means substances, mixtures and articles. We suggest that the terms substances, mixtures and articles are used also subparagraph b).

Subparagraph c) – unlawful manufacturing, placing on the market or use of substances as such or in mixtures or articles

A reference to Regulation (EU) 2017/852 on mercury should be included in this subparagraph.

Subparagraph e) – waste crime

Point i) concerns waste that is classified as hazardous and is undertaken in a non-negligible quantity. We believe that it is reasonable that a substantial damage does not have to be demonstrated here. Hazardous waste has been classified as such, precisely because an improper management can lead to substantial damage. This is inherent in the term “hazardous waste”.

Subparagraph h) - ship-source pollution

This subparagraph is intended to correspond to Directive 2009/123/EC. The proposed wording exempts “individual cases” from criminal liability where the ship-source discharge does not cause deterioration in the quality of water. However, the term “individual cases” is not used in the Directive 2009/123/EC. In that Directive “minor cases” are exempted. We believe that this term is more appropriate since ship-source discharge, in almost all cases, are individual discharges. Using the term “individual cases” instead of “minor cases” give the exemption in this subparagraph another meaning than the exemptions in Directive 2009/123/EC. “Individual cases” should therefore be replaced by “minor cases”.

Subparagraph i) - dangerous activities/dangerous substances

The meaning of the term “dangerous activity” is unclear with regard to IED. It needs to be clarified whether all industrial activities under IED are dangerous activities or just some.

Subparagraph k) – illegal abstraction of surface water or groundwater

It is unclear how the term “substantial damage” relates to the terms used in the Water Framework Directive 2000/60/EC (“deterioration of status” and “jeopardising the attainment of good status”). It is also unclear how “substantial damage” corresponds to the term “water damage” which in the Environmental liability Directive 2004/25/EC is defined as “any damage that significantly adversely affects: (i) the ecological, chemical or quantitative status or the ecological potential, as defined in Directive 2000/60/EC, of the waters concerned”.

In our view a water damage in the meaning of the ELD should be considered as a “substantial damage” in this area. This could be clarified in a preamble.

Subparagraph n) – illegally harvested timber

It is reasonable and justified to include illegal timber trade in the Directive as illegal timber trade is a transnational problem. A harmonized criminalization and an approximation of sanction levels can therefore help fighting crime in this area. However, the discussions of a new draft timber regulation have recently started in the Council working party. The draft has a significantly expanded scope and a partly different content from the current Timber Regulation. It is only when the scope and other important issues have been clarified that it is appropriate to take a position on which unlawful conducts in the new regulation should be criminalised.

Subparagraph q and r – ozone depleting substances and fluorinated greenhouse gases

Not all conducts which violate Regulation (EC) No 1005/2009 or Regulation (EU) 517/2014 are severe and require a criminal sanction. Certain conducts, such as a lack of control of equipment containing fluorinated greenhouse gases (which is a “use”), may be better suited to deal with through administrative sanctions instead of penalties

We propose that subparagraphs q) and r) are deleted and that Regulation No 1005/2009 and Regulation (EU) 517/2014 are included in subparagraph c) and that the words “export or import” should be added to the chapeau of that paragraph.

Article 3.2

As the Commission has underlined in the explanatory memorandum, the EU environmental rules rely to a great extent on preventive and precautionary measures. The EU environmental policy is based on these principles and as a result, a high standard of care is placed on the operators. We therefore agree with the Commission that gross negligent conduct should be treated as sufficiently grave to be criminalised.