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From:	General Secretariat of the Council
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Subject:	Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC - New comments and drafting suggestions by Member States on Art. 2-4, in the light also of Presidency papers

At the meeting of the Working Party on Judicial Cooperation in Criminal Matters (COPEN) on 31 March 2022, the Presidency invited delegations that so wished to submit further comments / drafting suggestions in writing on Articles 2-4 of the proposal for a Directive, in the light also of Presidency papers 6917/22 and 7564/22, and the relevant discussions. The comments received from Member States have been set out in the Annex.

To be noted that the comments that have been received in an earlier stage in respect of Articles 1-4 of the proposed Directive have been set out in 5845/22 and 6984/22.

Comments on the text as from Article 5 have been set out in 6670/2/22 REV 2 (but some of the comments in that note also contain comments on Articles 2-4).

ANNEX

Contents

AUSTRIA

Austria 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.

In our comments, we will follow the structure as laid oud in the presidency papers No. 6917/22 (DROIPEN 25) and No. 7564/22 (DROIPEN 42) and we will comment on some of the items listed therein:

I. 6917/22 (DROIPEN 25)

1.a Identification of the applicable sectoral regulations

We can support deletion of the Annexes and instead referring to applicable European sectorial administrative legislation. We note, however, that certain offences do not contain such referral to sectoral administrative legislation (Art. 3 (1)(a), Art. 3 (1)(b), Art. 3 (1)(k)).

1.b The need to deal with attacks on human life or integrity

In our view, this issue could be dealt with in the recitals.

1.c "at least serious negligence"

In principle, we concur with this assessment. However, we believe that certain offences currently listed in Art. 3 para 2 should not constitute criminal offences when only committed with serious negligence. This concerns Art. 3 (1)(d) and (p)(ii). Also, it can be questioned whether there is reasonable justification for gross negligent conduct with respect to Art. 3 (1)(b), (k) and (n) that criminalize the "placing on the market" of certain products etc..

2. Examination of sub-points (a) to (r)

2.b Sub-point (b)

We are reluctant to include a definition of „*placing on the market*“ in Art. 3 (1)(b), since the term „*placing on the market*“ is also included in other offences (eg. Art. 3(1)(c)). The issue that the retailer and/or customers are no perpetrators under this provision could be clarified in a recital.

Furthermore, the notion of what is understood by „*another requirement enacted for environmental reasons*“ should be clarified.

2.d Sub-point (d)

We question whether this offence is compliant with the *ultima-ratio* principle of criminal law. In particular, the wording that the conduct has to cause or is likely to cause „*substantial damage to the factors defined in Article 3 (1) of Directive 2011/92/EU“* is unclear. We are in favour of replacing this phrase with the well-established wording contained in other provisions (e.g. lit. a, b und c), namely that the conduct „*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*“.

2.l Sub-point (l)

The inclusion of a reference to Annex V of the Directive 92/43/EEC („*when species in Annex V are subject to the same measures as those adopted for species in Annex IV*“) is unclear to us, since the measures for species under Annex V differ considerably from the measures for species under Annex IV. We, therefore, do not see a need to include the reference to Annex V.

2.o Sub-point (o)

We support the new text proposal of the presidency.

2.p Sub-point (p)

Art. 30 of Regulation (EU) No. 1143/2014 of the European Parliament and of the Council already contains a provision on sanctions for violations of said Regulation. The proposed Art. 3 (1) (p) (i) aims at criminalizing certain conduct prohibited by the Regulation **without stating any further elements required**. From an *ultima-ratio* perspective, we believe that the usual language that the conduct "*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 animal or plants*" should be included in Art. 3 (1) (p) (i). In general, Articles 8 and 9 of Regulation (EU) 1143/2014 are very broad and therefore not suited to be used as a basis for defining criminal conduct in a criminal provision. Hence, we question the need for and adequacy of sub-point p (ii).

II. 7564/22 (DROIPEN 42)

1. The condition of unlawfulness

1. a. The link between article 2 paragraph 1 and the chapeau of article 3 paragraph 1

We thank the Presidency for their deliberations and alternative text proposals. However, we are of the strong view that the **term "unlawful" should remain in Art. 3 and should not be deleted there**. The reason for this is that Art. 3 lists the offences which have to be criminalized under national law and it should be explicitly stated in this Art. 3 that the conduct being unlawful is an essential element of every offence ("*Tatbestandselement*").

1.b The notion of "Union legislation"

We suggest to add a recital clarifying - in accordance with constant case law of the ECJ[1] - that criminal law measures against individuals (or legal persons) cannot be based directly on a Directive not even - because of the prohibition of analogy - by way of interpretation in conformity with Union law. Therefore, it should be clarified, that only violations of national laws that implement the respective Directives can form the basis for criminal liability of an individual (or legal person).

[1] ECJ 16.6.2005, C-105/03, *Pupino*.

1.d Autorization obtained fraudulently, or by corruption, extortion or coercion

In our view, this issue is a matter of national criminal law that should not be regulated in this Directive. We are in favor of deleting this sentence.

2. The guidelines in Article 3 paragraph 3, 4 and 5

The Commission has stated that it has proposed more precise definitions of terms that were perceived to be unclear in the past, such as 'substantial damage' and 'negligible or non-negligible quantity'. However, when looking at Article 3 paras. 3, 4 and 5 one has to conclude that the **elements listed therein are indeed very vague**. We doubt that by introducing such elements further harmonization may be achieved. In fact, in order to be more precise, these terms would have to be defined specifically in the context of the specific offences in which they are used. This however, as also the Commission has pointed out, is not possible due to the manifold sectoral legislation and the different concepts therein. Therefore, it should be considered whether the aim of more precise definitions simply cannot be achieved in a horizontal Directive such as the present one.

It is, in summary, not appropriate to introduce an obligation of Member States to "ensure that their national legislation specifies that the following elements shall be taken into account". In our view, the new wording proposed by the Presidency should rather state *"...the following elements* ***<u>can</u>*** *[instead of shall] be taken into accoun*t", or similar.

FINLAND

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

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

Article 2, paragraph 1; the concept of "unlawful"

As we have indicated before, one of the most significant issues as regards the concept of unlawfulness is that the acts to be criminalized are described with enough precision. The principle of legality is prescribed in the Charter of Fundamental Rights of the European Union (art. 49).

We consider it important to maintain the reference to "unlawfulness" in the chapeau of article 3, paragraph 1. As has been brought up by many delegations, the double references to unlawfulness should be avoided as regards the subparagraphs of article 3, paragraph 1.

If unlawfulness is to be defined through the general definition in art. 2(1) (or in a separate article) and the references to pieces of EU legislation in the subparagraphs of art. 3(1), this should be mentioned in art. 2(1)(a).

There was a lot of discussion during the COPEN meeting on the 31st of March on the part of art. 2(1), according to which "the conduct shall be deemed unlawful even if carried out under an authorisation by a competent authority in a Member State when the authorisation was obtained fraudulently or by corruption, extortion or coercion".

Some delegations have proposed that the text could be removed from art. 2(1) and the subject would thus only be mentioned in the recitals. Deletion might be a reasonable solution. The text – at least as a part of the operative text – leads to many questions some of which were brought up during the COPEN meeting. It seems that the issue has to do with the principles or doctrines on legitimate expectations/protection of trust and validity, the preconditions for validity of a decision and invalidity and voidness of decisions made by authorities. These principles or doctrines are not part of substantial criminal law by nature. This may further lead to questions on the legal basis of the proposed directive which is purely that of substantial criminal law.

Updating the applicable sectoral administrative rules

It seems evident that if new acts or omissions are to be criminalized after the proposed directive has come to force, this must be done by amending this directive on the protection of the environment through criminal law. It should be further clarified what is meant by "remain unchanged in substance" referred to in recital 10. It should be carefully scrutinized which sort of changes would be such that they would not mean changing the substance of the obligations under Union law. For example, adding a substance to a relevant list of substances in sectoral legislation could in some cases mean a change in substance. It would be reasonable to look at the possibility mentioned by the Council Legal Service of using delegated acts in situations of minor technical changes not widening the scope of punishability.

Article 3, paragraph 1, subparagraphs o–r

Subparagraph n

Our view is that this subparagraph should only cover the most serious acts whereas acts of minor seriousness, such as acts in breach of the due diligence requirements, should not be included in this subparagraph.

It is important to note that the proposition for the Regulation on forest degradation (COM(2021) 706 final) includes articles on penalties (art. 23) as well as market surveillance measures (art. 22). What would be the relation between these articles and the directive on the protection of the environment through criminal law? Art. 23 of the proposal for the Regulation seems to cover all acts that are in violation of the duties and prohibitions included in the Regulation.

Subparagraph p

We have understood from the comments by the Commission during the COPEN meeting on the 31st of March 2022, that subparagraph p has been meant to cover all the acts mentioned in article 7(1) of Regulation 1143/2014. If so, the wording of the subparagraph needs to be amended so that the other acts than introduction and spread mentioned in article 7(1) of Regulation 1143/2014 are mentioned in subparagraph p, as well.

Our clear view is that the acts in subparagraph p (i) should only cover acts which cause or are 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 – like the acts in subparagraph p (ii). The directive is supposed to cover serious offences, whereas acts, which do not cause such a consequence or danger thereof, may reasonably be covered with more lenient criminal punishments than those described in art. 5 or with administrative sanctions.

Even if p (i) would be amended with adding to it the element of causing or being likely to cause one or some the said consequences, we have doubts about whether the level of punishment according to article 5, paragraph 4 will be proportionate.

Article 3, paragraphs 3-5

As brought up by several delegations during the COPEN meeting on the 31st of March, flexibility is needed as regards the transposition of the article. It is not evident what would be the added value of obliging the Member States to enact on these guidelines or elements in this much detail in legislation.

Article 4 (Inciting, aiding and abetting, and attempt)

Article 4 is intrinsically linked to the offences described in article 3. Final stands on article 4 may thus be taken only after the offences in article 3 have be defined in more detail. We support the idea of clarifying art. 4, subparagraph 2 as regards the intentionality of the attempt. The scope of criminalizing attempt should not cover art. 3, para. 1, subparagraph p I, and art. 3, para. 1, subparagraph d should neither be covered by it.

NETHERLANDS

14 April 2022

The Netherlands would like to thank the Presidency fort the opportunity to provide written comments on the articles 1-4 of the proposal for a Directive on the protection of the environment through criminal law and replacing Directive 2008/99/EC, in addition to the remarks made at previous COPEN meetings. Our remarks will follow the structure of the Presidency note's numbered 6917/22 and 7564/22.

Presidency note 6917/22

1a. Identification of the applicable sectoral administrative regulations

The Netherlands can support the proposed deletion of the annexes. The fact that the existing annexes have not been updated since 2008, shows that the old system is not ideal for keeping the Directive up to date. In this respect, it can be beneficial to refer to sectoral EU-legislation in general terms only. With a view to legal certainty it is regarded important that the offences in article 3 are listed in a specific way. When certain provisions are unclear, references to specific (existing) sectoral legislation can help to make vague terms more clear.

1b. The need to deal with attacks on human life or integrity

The Netherlands can support the proposed addition to the recitals. We also note that this subject is closely linked to article 5(2) of the directive. According to The Netherlands, the element "causes or is likely to cause death or serious injury to any person" should be one of the constituent elements of applicable offences and should not be put in a separate provision such as article 5(2), which applies to all the offences mentioned in article 3 of the proposed directive (including criminal offences committed with serious negligence).

1c. "at least serious negligence"

As the Presidency note already mentions, the concept of "at least serious negligence" was already part of the Directive 2008/99/EC and is therefore in line with the Dutch criminal law system. However, because this might not be the case for all legal systems of the Member States (MS), it is preferred to leave as much room as possible for MS to refer to the concept of "at least serious negligence" in a way that suits the national law of the MS.

2. Arrangement of sub-items

The Netherlands do not see a need to change the arrangement of the sub-items at this stage.

2a. Sub-point (a)

No remarks

2b. Sub-point (b)

This sub-point raises a number of questions. Firstly, it is not clear which sectoral legislation is included by the proposed addition "in breach of a prohibition or another requirement enacted for environmental reasons". Secondly, it is not clear how this element relates to the prerequisite of unlawfulness as mentioned in the header of article 3(1). The Netherlands agrees with the remarks that were made by the Czech Republic in this regard.

According to The Netherlands, the proposal for a more detailed definition of "Placing on the market" could also be moved to the recitals: it is not necessary that this be incorporated in article 3, sub-point b, itself.

2c. Sub-point (c)

No remarks.

2d. Sub-point (d)

According to The Netherlands the proposed precisions are not necessary, but they can be made if this is beneficial to other MS. The conduct named in this sub-point already constitutes a criminal offence in The Netherlands, both when committed intentionally and with serious negligence.

Sub-points (e) to (j)

No remarks

2k. Sub-point (k)

In order to increase the clarity of this provision, it might be beneficial to include an explicit reference to the applicable sectoral legislation, such as Directive 2000/60/EC.

2l. Sub-points (l) and (m)

No remarks

2n. Sub-point (n)

The Netherlands can at this stage agree with the proposal to wait for the negotiations to progress with regards to this specific area.

2o. Sub-point (o)

No remarks

2p. Sub-point (p)

For clarity reasons, it could be of added value to emphasize in the recitals that the conduct under sub-sub-point i has to be intentional in order to be criminalized under the proposed directive. This could be set out in a recital.

Sub-points q and r

No remarks

Presidency note 7564/22

1a. The condition of unlawfulness

The proposed changes are not necessary for us. However, it is important that the prerequisite of unlawfulness is clearly stated in the directive. We are therefore not against the introduction of a new article 1a. Since unlawfulness is one of the key elements of criminal offences, The Netherlands prefers not to delete the word 'unlawful' from the heading of article 3(1).

1b. The notion of "Union legislation"

No remarks

1c. The concept contained in article 2, paragraph 1, sub-point (b)

No remarks

1d. The hypothesis of authorization obtained fraudulently, or by corruption, extortion or coercion.

The Netherlands prefers to delete this text from article 2(1) and instead mention this in a new recital. As discussed in previous COPEN meetings, leaving this text in the articles of the directive leaves many questions.

1e. Updating the applicable sectoral administrative rules

The Netherlands agrees that a better working updating mechanism compared to the one used in Directive 2008/99/EC is necessary. At the same time – as pointed out by some delegations during the COPEN meetings – it is important that legal certainty be guaranteed. Since article 3 of the proposed Directive contains several references to existing directives and regulations, it is unclear what happens when these existing instruments are replaced by new instruments, which are applicable to the same type of conduct as the old instrument. In such situations, for reasons of legal certainty, it is preferred that the references to the old EU-instruments are updated as well.

2. The guidelines in paragraphs 3, 4 and 5 of article 3

The Netherlands strongly prefers to move these guidelines to the recitals. In the Dutch criminal law tradition, criteria for assessing the nature of the damage or causal link are not part of the law but are normally put into explanatory memoranda of laws, which leaves independent judges much room to apply them whenever relevant, without forcing them to do so in individual cases. With regards to the environmental crime directive, the same could be reached by putting the guidelines in the recitals instead of in the article 3.

In addition, The Netherlands proposes that the words "shall be taken into account" in the proposed standardized wording, be replaced by "may (or: can) be taken into account".

POLAND

Poland's comments on the Draft 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

We would like to thank for the possibility 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. We will follow the structure as laid oud in the Presidency papers No. 6917/22 and No. 7564/22. At the same time, Poland maintains its analytical reservation in view of the ongoing national consultations on the amendments made to the draft of the directive.

I. Document 6917/22

We do not see a need to rearrange subsections 'a' to 'r' in Article 3(1) of the proposed directive at this stage.

Below is our written commentary on some of the offences described in Article 3 of the proposed directive:

1. As for the offence under subparagraph (b), it is difficult to accept that it makes actual or potential environmental harm resulting from the placing on the market of a product conditional on further 'large-scale use' of the product, which in all likelihood will already be the conduct of another person (not the person who placed the product on the market). Moreover, the lack of specification in this provision of the type of product that is to be the object of the prohibited act is unclear.
2. As regards the offence under point 'd' of Article 3(1) of the proposed directive we question whether this provision is consistent with the *ultima ratio* of criminal law. In this regards, the wording that the conduct *is likely to cause substantial damage to the factors defined in Article 3 (1) of Directive 2011/92/EU"* is questionable. Moreover, it should be noted that the precise definition of the projects to be subject to a prior environmental impact assessment and the perpetrator (the developer or the competent public authority) may unintentionally narrow the circle of responsible parties.
3. We are tentatively considering that the offence of criminalising ship recycling should include an element of environmental damage or serious injury or death to persons.

4. It should be noted that the wording of Art. 3 sec. 1 letter e (ii) does not explicitly refer to crimes related to radioactive waste - it is unclear whether it is non-hazardous waste within the meaning of Art. 3 point 2 of Directive 2008/98 / EC of the European Parliament and of the Council and are therefore covered by Art. 3 sec. 1 letter e (ii) or they should be related to Art. 3 sec. 1 lit. j of the draft directive. With reference to point 2 (j) of this document, to the fact that in Directive 2014/87 / Euratom, which is referred to in Art. 3 sec. 1 letter j of the proposed directive, the terms "radioactive material" and "radioactive substances" are not used, so the reference to this directive should be removed from this provision. Moreover, it seems that the indication in this provision of several directives, the scope of which covers the activities penalized therein, may cause interpretation problems related to the understanding of terms such as "radioactive material" or "radioactive substances". Council Directive 2014/87/Euratom should not be mentioned here, as it does not use the term "radioactive material" or "radioactive substances" (which is incorrectly referred to in document 6917/22). Moreover, it is a directive amending Council Directive 2009/71/Euratom establishing a Community framework for the nuclear safety of nuclear installations, and it is the latter directive that could be referred to. However, Council Directive 2009/71/Euratom does not mention radioactive materials, but refers only in one place to radioactive substances (Article 3 point 10 - definition of "design accident"), without giving a definition of this concept, so it should not be mentioned in this article. The scope of application of Council Directive 2013/59/Euratom, indicated in its Art. 2, covers all exposure to ionizing radiation which cannot be disregarded from the point of view of protection against radiation or with regard to the environment.

Therefore, the scope of this directive also covers exposure to radioactive materials used in nuclear facilities, which are covered by Council Directive 2009/71/Euratom. We propose to consider three variants of the wording of Art. 3 sec. 1 letter j of the proposed directive in order to remove the doubts:

a) Citing only Council Directive 2013/59/Euratom and Council Directive 2013/51/Euratom - this provision could read as follows: "(j) the manufacture, production, processing, handling, use, holding, storage, transport, import, export or disposal of radioactive material or substances falling within the scope of Council Directive 2013/59/Euratom or Council Directive 2013/51/Euratom , 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;".

b) Council Directive 2013/51/Euratom uses only the term "radioactive substance", defined identically as in Council Directive 2013/59/Euratom. Therefore, one may also consider resigning from this reference by giving the following wording to Art. 3 sec. 1 letter j of the proposed directive: "(j) the manufacture, production, processing, handling, use, holding, storage, transport, import, export or disposal of radioactive material or substances falling within the scope of Council Directive 2013/59/Euratom, 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; ".

c) The reference to the scope of the directives may also be removed from this provision, replacing it with a reference to the definition of radioactive material and radioactive substance contained in Council Directive 2013/59/Euratom. Thanks to this, it is possible to achieve the effect included in the justification of the proposed directive by the project initiator, i.e. clarification or elimination of unclear terms used in the definitions of environmental crime. The proposed wording of Art. 3 sec. 1 letter j is as follows: "(j) the manufacture, production, processing, handling, use, holding, storage, transport, import, export or disposal of radioactive material or substances as defined in the Council Directive 2013/59/Euratom , 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;".

5. With regard to the proposals concerning the offence under point 'o' of Article 3, it would be preferable to retain the definition of 'habitat within a protected site' under Article 2, while extending the content of the definition of this concept in the way outlined by the Presidency in the document under discussion. On the other hand, we do not share the proposal to prosecute this type of offence only as committed intentionally, which is different from the current directive.

6. In Poland's view, the provision in point "l" is not an 'integral' transposition of Article 3 of the 2008 Directive. This directive directly uses the concept of protected wild fauna or flora, whereas the draft provisions refer to the broader concept of species of wild fauna or flora. The exclusion of the restriction, which in the 2008 directive manifests itself in the limitation of liability to protected species only, is not at all an editorial change but a far-reaching interference which is, moreover, inconsistent with the Habitats Directive, which provides for prohibitions on the killing of animals (Article 12(1)) and destruction of plants (Article 13(1)) only in the case of species listed in Annex IV, i.e. plant and animal species of Community interest which require strict protection. Moreover, the 2008 directive does not in any way contain a provision on species listed in Annexes IV and V of the Habitats Directive. Article 3(f) of the 2008 Directive reads: the killing, destruction, possession or taking of specimens of protected wild fauna or flora species, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species. It is therefore difficult to say that the addition to the new provision of an element referring directly to Annex IV of the Habitats Directive (i.e. to species requiring strict protection) and to Annex V (which merely lists plant and animal species of Community importance whose taking from the wild and exploitation may be subject to management measures, and therefore does not in principle contain compulsory regulations, leaving these matters to the legislation of the Member States) is a mere editorial change. Such an action creates a completely different unit, with a much broader scope of action, relating to a much wider catalogue of species. These are therefore changes of a substantive nature and not of an editorial nature. A reference only to Annex IV, which does indeed refer to strictly protected species, could possibly be regarded as a change of this kind, and we therefore still believe that the provision relating to Annex V is superfluous and, above all, unjustified. In our view, therefore, there is no need to refer to Annex V.

7. With regard to subparagraph "q", we propose inserting the following between "or" and "products" in line 3 and to make it read as follows: "production, marketing, import or export".

8. In sub-paragraph 'r' we propose:

- inserting the following between "or" and "of products" in line 3: "production, placing on the market, selling,import or export";
- inserting "selling" between "use" and "emission" in line 1.

II. Document 7564/22

We cannot support the updating mechanism proposed in the Commission proposal set out in recital 10 as it is based on an evaluation criterion. In Poland's view, it would be more efficient to have an update mechanism which, if further environmental legislation is adopted, would indicate that the proposed directive will also apply to such legislation. This mechanism should also include a reference that, if necessary, Article 3 of the proposed directive will be amended (along the lines of recital 15 in the current directive). Such a structure will, in our view, make the updating mechanism more transparent. Moreover, we should also consider whether such an update mechanism should be provided for as a provision in the text of the proposed directive, rather than just a recital in the preamble.

We can support deletion of the Annexes and instead referring to applicable European sectorial administrative legislation. In our view, the recitals should clarify the scope of the term "Union rules" used in Article 2(1)(a) of the current draft, which is to be moved to Article 1a.

At the same time, it should be noted that the notion of legal basis contained in the above-mentioned provision of the draft also requires further clarification. The proposal of the French Presidency may be accepted.

We can also support the wording of Article 1a(2) of the draft directive (replacing Article 2(1)(b) of the draft) as proposed by the French Presidency.

We accept the proposed wording of Article 1a point 3 of the Directive, which is a modification of the final part of Article 2 point 1 of the European Commission's proposal. In our opinion, according to this, in the case where an authorisation, required by legal regulations at the level of the European Union or by the national law of a given member state, was obtained by the perpetrator through a criminal offence, the premise of considering such conduct as unlawful will also be met.

We perceive as problematic the definition in the draft legislation of the criteria of the "material nature of the damage" (Article 3(3) of the draft), the establishment of a causal link between the committed act and the damage (Article 3(4) of the draft) and the "negligible/significant nature of the quantity" (Article 3(5)). In our view, Article 83(2) TFEU only creates the possibility for harmonisation measures in the area of criminal law by establishing minimum standards. It does so only with respect to the determination of offences and penalties in the given field, and not by defining the evaluative elements of such offences in the national legal orders. The adoption of the criteria proposed is therefore too far-reaching. In our opinion, this aspect is also noted by the French Presidency in document No 7564/22, which points to the advisability of modifying the provisions of Article 3(3), (4) and (5) in such a way as to respect the independence of judicial authorities.

Therefore, in our view, these provisions should be of a non-categorical nature and only list, by way of example, the criteria that national judicial authorities could take into account when assessing the circumstances constituting the elements of environmental offences. In our opinion, the optimal solution would be to define these concepts and indicate exemplary criteria in the preamble to the directive. In this way, it would be possible to standardise the interpretation of the above-mentioned concepts in the practice of the judicial authorities of all Member States of the European Union, without undertaking harmonisation measures at the level of EU law with regard to individual national.

SPAIN

→ Art. 3.1(c).

We suggest including Regulation (EU) 2017/852 of the European Parliament and of the Council of 17 May 2017 on mercury in the list of regulations applicable to substances.

→ At. 3.1(k)

We suggest deleting the text "*or is likely to cause*".

Our Ministry for Ecological Transition has extensive experience that shows the remarkable difficulties in administrative proceedings to base reasonable calculations of the quantification of damage to the public water domain. We can foresee, then, even more difficulties in criminal judicial proceedings. From this perspective, in this particular area it may be more effective to keep this type of infringement in administrative proceedings. Therefore, only the actual causing of damage would constitute a criminal offence.

SWEDEN

Comments on Articles 2-4 Environmental Crime Directive

Article 2 – definitions

"Habitat within a protected site"

The obligations in articles 6.2 and 6.4 of Directive 92/43/EC to protect areas apply as soon as an area has been selected as a site of community importance pursuant to article 4.2. It may take several years from the time an area is protected as an area of Community importance as referred to in Article 4(2) and (5) until the site is designated by the Member State as a special conservation area. Since the obligations of the Member States under Article 6(2) to (4) to protect the areas from harmful effects are the same for an area of Community importance as for a special area of conservation, the Environmental Crime Directive should not differentiate between those areas.

Proposal

"'habitat within a protected site' means any habitat of species for which an area is classified as a special protection area pursuant to Article 4(1) or (2) of Directive 79/409/EEC, or any natural habitat or a habitat of species for which a site is ***either selected as sites of Community importance pursuant to Article 4(2) or*** *designated as a special area of conservation pursuant to Article 4(4) of Directive 92/43/EEC*"

Article 3.1

Subparagraph l)

Sweden' is of the opinion that actions committed with at least serious negligence should be criminalised as is the case today. Pursuant to Directive 92/43/EC and Article 2009/147/EC, Member States are obliged to prohibit “deliberate” acts. However, according to the case-law of the Court of Justice of the European Union, the obligation of Member States to prohibit “deliberate acts” (Articles 12 and 13 of Directive 92/43 and Article 5 of Directive 2009/147) is not limited to intentional acts. The Commission's guidance to Article 12 of Directive 92/43 provides a comprehensive account of the CJEU's case-law on the concept of “deliberate”, and summarises, inter alia:

”The term ‘deliberate’ is interpreted by the CJEU as going beyond ‘direct intention’. ‘Deliberate’ actions are to be understood as actions by a person or body who knows that their action will most likely lead to an offence against a species, but intends this offence or, at least, consciously accepts the foreseeable results of his action.”

In addition, Sweden considers that the derogations in Article 3(f) and (g) in Directive 2008/99/EC ("has a negligible impact on the conservation status of the species") is clearer than the proposal for clarification of the derogation in Article 3(5). We prefer the wording in the current Directive

Proposal

(l) the killing, destruction, taking of, possession, sale or offering for sale of a specimen or specimens of wild fauna or flora species listed in Annexes IV ~~*and*~~ ***or*** *V (when species in Annex V are subject to the same measures as those adopted for species in Annex IV) to Council Directive 92/43/EEC49 and the species referred to in Article 1 of Directive 2009/147/EC of the European Parliament and of the Council5, except for cases where the conduct concerns a negligible quantity of such specimens* ***and has a negligible impact on the conservation status of the species****;*

Subparagraph o)

The Presidency has suggested a reference to Article 4(4) of Directive 2009/147/EC. We do not agree with including this reference. According to Article 7 of Directive 92/43/EC, the obligations of the Member States under the first sentence of Article 4(4) of Directive 2009/147/EC have been replaced by the obligations arising from Article 6(2) to 6(4) of Directive 92/43/EC.

The obligation of Member States under Article 6(2) of Directive 92/43/EC to take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species, is not limited to deterioration caused by intentional acts. Sweden cannot therefore see that there is any reason to limit this provision of the Directive to intentional offences. As under Directive 2008/99/EC, actions committed with at least serious negligence should be criminalised.

Article 3.3 and 3.4

Substantial damage is a difficult requisite. It is inevitable that the term "substantial damage" can cause problems of interpretation in individual cases and that it can result in different interpretations and understandings in the Member States. If the concept is to be included in the Directive, a clarification of the meaning is of key importance for the uniform application. However, listing elements that should be taken into account when assessing whether an environmental damage is substantial is a delicate matter because environmental damage is a complex issue. In our view, the elements proposed in Article 3, can lead to a situation where a severe environmental damage is not considered as a "substantial" within the meaning of the Directive (see below). Including the elements in the core legal text therefor increases the risk of invalidation of different decisions taken in the investigation, prosecution and adjudication phases.

Article 3.3	**Comment**
(a) the baseline condition of the affected environment;	Polluting a pristine environment is serious but contaminating an already polluted environment could also be serious. Adding to the level of pollution could seriously damage the capasity of the environment to recover.

b) whether the damage is long-lasting, medium term or short term;	Long term effects are of course serious but that may be the case also for short term effects. The release of highly toxic substances, such as cyanide, into air or water can affect the environment during a short period of time but nevertheless cause extremely serious effects. Release of cyanide into a river can cause the death of all marine organisms downstream, kill living animals that feed on dead fish on the shore and contaminate ground water. However, cyanide degrades rather fast in water and the harmful effect in the water is therefore not long lasting.
(c) severity of the damage;	This factor does not add anything.
(d) spread of the damage;	The spread of the damage over a large area is serious but sometimes a release of a substances in a high concentration in a small area can cause severe damage. For example, the release of a persistent substance into a small area can cause long term damages due to the fact that the substance will remain in the ground for a very long time. It all comes down to which substances that have been released to the environment and the concentration of such substances.
(e) reversibility of the damage.	If the harmful effects subside rapidly and the environment immediately starts to recover, it can still lead to harmful effects on the ecosystem which may take years to identify. If one type of organism vanishes from an area due to a release of a toxic substance, other organisms may take its place and this may result in an unbalanced ecosystem.

Swedish environmental criminal law criminalises actions that have caused (or typically may cause) damage to the environment that is not negligible. This is an easier concept for prosecutors to work with in criminal proceedings than "substantial damage". We do not suggest using the concept "non-negligible" in this Directive since it would expand the criminalisation to a degree which many member states may find unacceptable, but we believe that this way of thinking could be used when defining the concept "substantial damage". That means that substantial damage could be defined as damage that is not *acceptable* taking into account the environmental protection interest in the relevant union environmental legislation that has been infringed.

In order to respect the legal system in the member states the rules of interpretation of the concept "substantial damage" and "likely to cause damage" could preferably be included in a preamble instead of in an article.

Proposal

New wording of preamble 11 and a new preamble 11 a (and deletion of Article 3.3 and 3.4)

"(11) A damage to the environment is characterized by e.g. increased levels of pollution in soil, air or water, degradation of wild flora or fauna, reduction in biodiversity, the disturbance of ecological balance or ecosystem services or the destruction of landscapes. Not all illegal activities resulting in environmental damage need to be criminalised. Some offences could have a qualitative threshold requiring that the illegal activity causes or is likely to cause substantial damage to the environment. When assessing whether a damage to the environment or a likely damage to the environment is substantial or not, due account should be taken to the environmental protection interest of the relevant union legislation, which have been infringed. A damage should be considered substantial if it is not acceptable taking into account the environmental protection interests of the relevant union legislation.

(11a) The occurrence and appearance of environmental damage can be difficult to establish and when an environmental damage has occurred it can be challenging to unravel the causal link between the damage and an illegal activity. This directive should therefore not require proof of that a substantial damage to the environment or death or serious injury to human health has occurred. It should suffice that an illegal activity typically could result in a substantial damage to the environment or seriously harm human health. This may be the case e.g. if the activity concerns a substance or a material which has the inherent capacity to harm human health or the environment, if the conduct relates to a risky or dangerous activity which requires an authorisation which was not obtained or complied with, or if the activity exceeds values, parameters or limits set out in legal acts or authorisations and which aim at protecting the environment or human health.