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From:	General Secretariat of the Council
To:	Delegations
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Subject:	Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC - Comments by Member States on the questions set out in Presidency paper 7656/22

At the meeting of the Working Party on Judicial Cooperation in Criminal Matters (COPEN) on 12 April 2022, delegations examined note 7656/22 by the Presidency. At the end of the meeting, the Presidency invited delegations that so wished to submit further comments / drafting suggestions concerning the questions in this note in writing.

The comments received from the Member States have been set out in the Annex.

To be noted that the comments that have been received in respect of Articles 1-4 of the proposed Directive have been set out in 8141/2/22 REV 2 (and earlier comments in 5845/22 and 6984/22).

Comments on the text as from Article 5 have been set out in 6670/2/22 REV 2.

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AUSTRIA

I. 7656/22 (DROIPEN 47) – chapter 2 (legal persons)

a. Definition of legal persons – Art. 2 (3)

No objection.

b. Liability of legal persons – Art. 6

No objection.

c. Sanctions – Art. 7

A. General remarks

1. We **welcome** that the traditional system of "effective, proportionate and dissuasive" sanctions is complemented by sanctions (fines) related to the **turnover** (a system widely used in competition law, financial market regulation and data protection).
2. We **might go along** with the idea that the new turnover-based system **only** applies to **intentional** offences and that the obligation on Member States to sanction legal persons for negligent behaviour remains at effective, proportionate and dissuasive sanctions. However, another option could be to provide for a maximum limit of a **lower percentage** of the turnover.
3. We **do not agree** with the concept that sanctions related to the **turnover** only apply to cases where a person in a **leading position** has committed the offence (Art. 6 (1)), and thus for cases where the offence has been committed by a subordinated person and was made possible by the lack of supervision and control of a leading person (Art. 6 (2)) only effective, proportionate and dissuasive sanctions apply. We do not consider that the latter cases are generally speaking less severe (and their possible effects on the environment are definitely not).

4. We think that similar to the provision on sanctions for natural persons (Art. 5), the text should draw a **clear line** between **fines** on the one hand and **additional sanctions** on the other hand. Fines should be provided for in an obligatory manner, i.e. for any case; in the contrary, it should be left to the discretion of the national legislator if additional sanctions are applied.
5. We **do not agree** that **additional sanctions** only have to be provided for cases where a person in a **leading position** has committed the offence (Art. 6 (1)); this is a step backwards compared to former Directives.
6. It should be left to the Member States to decide if **additional sanctions** are applied by the criminal courts or by administrative authorities, as a consequence of a conviction.

B. Answers to Questions 10 – 17

Q 10: We would prefer – for additional sanctions – the wording from the PIF directive: "may include other sanctions, such as …" (for fines see drafting suggestion below)

Q 11 (provisional answer): If the heading is adjusted as proposed under Q 10, these issues might be of less importance; however, the additional sanctions under Art. 5 and those under Art. 7 should not differ from each other without reason (if there is a reason, it should be expressed in the recitals).

Q 12: As explained above (C.3), we favour strongly that for the two situations (Art. 6 (1) and (2)), the same fines are provided for.

Q 13: As explained above (C.3 and 5), we favour strongly that for the two situations (Art. 6 (1) and (2)), the same sanctions (fines and additional sanctions) are provided for.

Q 14: Yes.

Q 15: No definite answer at this stage.

Q 16: In the light of the above, we think that this paragraph should apply only to cases of negligent behaviour.

C. Drafting suggestions

In **Art. 7 (1)**, replace "Article 6 (1)" by "Article 6", and add at the end: "including criminal or non-criminal fines".

In **Art. 7 (2):**

- Heading: replace “Article 6 (1)” by “Article 6”, and “shall include” by “may include other sanctions, such as”
- delete (a).

Delete **Art. 7 (3).**

In **Art. 7 (6)**, replace “pursuant to paragraph 1” by “for an offence referred to in Article 3 (2)”.

BELGIUM

1. Penalties for natural persons (article 5)

- Based on the written comments received from the delegations and the discussions during the COPEN meeting on 23 February 2022, the Presidency has identified the following questions:

  - Q1: in general, do the delegations agree with the **three thresholds of 10, 6 and 4 years** for the term of imprisonment or would they prefer other thresholds?

    Bearing in mind, as mentioned by one of the delegations, that the Justice and Home Affairs Council in its session on 24-25 April 2002 adopted conclusions entitled: "*Conclusions of the Council on the approach to be followed for harmonisation of penalties*" (document ST 9141/02), in which the Council stated: "*In order to allow Member States to preserve the coherence of their national penalty systems, a certain flexibility is needed when approximating criminal sanctions [...]. The Council agrees to establish a system of penalty levels to be used in such cases. The Council agrees that this system consists of the following levels of criminal penalties: Level 1: penalties of a maximum of at least between 1 and 3 years of imprisonment; Level 2: penalties of a maximum of at least between 2 and 5 years of imprisonment; Level 3: penalties of a maximum of at least between 5 and 10 years of imprisonment; Level 4: penalties of a maximum of at least 10 years of imprisonment (cases where very serious penalties are required).*" The proposed directive therefore uses levels 2, 3, and 4.

As regards the threshold of 10 years for the term of imprisonment, this is currently designated for certain aggravated offences concerning trafficking in human beings[1], for certain offences relating to a terrorist group (threshold of at least eight years)[2], and even for certain aggravated offences concerning sexual abuse or sexual exploitation of children[3].

The envisaged harmonization of the penalty for natural persons in Article 5 results in a fairly high maximum penalty being registered across the Union for the envisaged criminal offenses relating to serious endangering offences. BE has concerns as regards the proposed maximum prison sentence of at least 6 years seeing the impact on the current Belgian system and the related multiplicity of adjustments required. For example in BE and more specifically on the Flemish level and for the Brussel Capital Region, the majority of environmental crimes, has a maximum prison sentence of 3 or 5 years, meaning that these articles will also require specific adjustments.

Furthermore, BE would like to underline the importance of coherence with other already existing penalty and sentencing regimes in other EU instruments. Therefore, we would propose to align this system with already existing 10, 5, 3 years thresholds.

- Q2: again in general, should **article 5(2), (3) and (4)** also encompass inciting, aiding and abetting and, if it constitutes a criminal offence, attempt, and, for **article 5(3) and (4)**, offences committed with at least serious negligence?

As far as complicity and attempt are concerned, it should indeed be possible to include these circumstances when envisaging penalties for natural persons .

1 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA

2 Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA

3 Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA

On the other hand, with regard to gross negligence, according to BE, it could be difficult to concretise this for certain offences: in particular b) (placing on the market), c) (manufacture), l (protected species), m) (trade in 'species). If gross negligence were to be retained, in any case it should not, in the above-mentioned cases, lead to a mitigation of the penalty.

- **specifically regarding article 5(2)**, if the offence causes death or is likely to cause death or serious injury to any person, irrespective of the moral element (intentional or with at least serious negligence):
  - Q3: should this article 5(2) apply to only some sub-points of article 3?

Il nous semble préférable de viser l'ensemble.

  - Q4: should it only apply when the offence caused a result, and, if so, only in the event of death?

BE does not support the idea of introducing the notion of "result actually occurring". From the moment the offense is established, regardless of its result it should be punishable. Therefore, we are not in favour of adding this notion.

  - Q5: should there be a difference in penalty thresholds based on the moral element, and, if so, with a reduced penalty for offences committed with at least serious negligence or with a harsher penalty for offences committed intentionally?

Given the offenses covered, gross negligence should not lead to a mitigation of the sentence.

a) Additional sanctions or measures (paragraph 5)

Summary: The Presidency notes that the additional sanctions or measures described in paragraph 5 are intended to: (i) apply to all offences listed in articles 3 and 4, whether committed intentionally or with at least serious negligence, and which are committed, attempted or incited, aided and abetted; (ii) be incorporated into national law; (iii) constitute a minimum foundation, allowing Member states to add others, provided they always include this minimum set.

Looking at the wording alone, the Presidency notes that:

– *the concept of fine is known;*

– *"temporary or permanent exclusions from access to public funding, including tender procedures, grants and concessions" (c), is stated in Directive (EU) 2018/1673 of 23 October 2018 on combating money laundering by criminal law;*

– *the other additional sanctions or measures described in sub-points (a), (d), (e), (f) and (g) would not have any precedent in other instruments of European substantive criminal law.*

➢ Based on the written comments received from the delegations on 6 April 2022 and the discussions during the COPEN meeting on 23 February 2022, the Presidency has identified the following questions:

o Q6: would the delegations like this list to be more **flexible**, specifically by (as an alternative or in addition): (i) only including some of the sub-points from articles 3 and 4 within the chapeau of paragraph 5; (ii) removing some of the sanctions or measures from the list; (iii) allowing Member states to only include one or more of these sanctions or measures in their national law ("*which ~~shall~~* ***may*** *include*")?

In general it can be noted that the draft text focuses on the classic criminal law approach to environmental crimes. The diptych between a criminal and administrative approach is only taken into account to a limited extend. However, there are many European Member States that already use administrative law to curb environmental crimes and infringements, as is the case in BE. It therefore seems desirable to take this dichotomy more into account.

eg. Article 5(5) provides for the fine only as an 'additional' penalty, which is not compatible with the legal reality in many Member States that have a double track. The Flemish Administrative Enforcement Framework Decree includes a system that allows prison sentences to be converted into fines. It is suggested that such a system be considered for inclusion in the proposal. Furthermore, the provision also seems to be contrary to the practice of all Belgian criminal legislators to provide for prison sentences and fines on an equal footing and as an option for the criminal judge. Another example is the following:

In conclusion, a flexible approach towards the implementation in member states, would be important and the preferred approach for BE in this regard.

- some delegations raised that some of these sanctions or measures may not be relevant. In this respect, the Presidency wishes first to gather the thoughts of the delegations on the **following sub-points, which have been the topic of particular discussion**:

  - Q7: (a): is it acceptable in principle?

For BE, the obligation to restore and reinstate the environment in its original order within a certain timeframe, should be maintained.

  - Q8: (e): is it acceptable in principle?

The possibility to withdraw permits, according to BE, should be maintained.

  - Q9: at least seven delegations expressed concerns of a constitutional nature regarding sub-points (f) and (g). As regards sub-point (g), the delegations may wish to decide whether the wording of article 7(2)(k) would be more acceptable.

Regarding point g), it is to be noted that in BE, in certain circumstances, judges have the option to decide to order the publication of decisions. We can therefore support the principle of including and presenting this option to a judge.

2. Sanctions for legal persons (articles 2(3), 6 and 7)

a) Definition of legal persons

Summary: The Presidency notes that the definition of legal persons given in article 2(3) is a word-for-word copy of the definition contained in the 2008 directive, and that it is relatively similar to the wording used in recent European instruments on substantive criminal law, in particular Directive (EU) 2017/1371 of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, known as the PIF Directive, the aforementioned money-laundering directive of 2018, and even Directive (EU) 2019/713 of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA.

The Presidency also notes that the delegations have not made any comments on article 2(3).

- The Presidency therefore proposes that this definition be considered approved.

b) Liability of legal persons

Summary: The Presidency notes that article 6 of the proposed directive is almost identical to the wording of article 6 of the 2008 directive, and that it is relatively similar to the wording used in recent European instruments on substantive criminal law, in particular the PIF Directive, the aforementioned money-laundering directive of 2018, and even the aforementioned "non-cash means of payment" directive of 2019.

The Presidency also notes that the delegations have not made any comments on article 6.

- The Presidency therefore proposes that this article be considered approved.

c) Sanctions

Summary: The Presidency first notes that, contrary to what is proposed for natural persons, the Member States here remain free to determine the nature of the liability, whether criminal, administrative or civil. Note that the issue of compatibility with the legal basis of article 83(2) TFEU has been clarified during previous COPEN meetings.

The proposed directive then differentiates three situations, for which the Presidency has identified the following questions, again based on the written comments received from the delegations on 6 April 2022 and the discussions during the COPEN meeting on 23 February 2022.

– *if the legal person is held liable for **offences committed for its benefit by one of its organs or representatives** (article 7(2)) (whether intentional or with at least serious negligence, committed, attempted or incited, aided and abetted), there must be an exhaustive list of the sanctions or measures that are to be included in national law;*

In this respect, the Presidency notes that the sanctions or measures listed in sub-points (c), (e), (g), (h) and (i) have precedents in other European instruments on substantive criminal law, especially in Directive 2014/62/EU of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA, and even the PIF Directive.

The sanction or measure listed in sub-point (d) may also have a precedent in the aforementioned money-laundering directive of 2018.

Ultimately, only sub-points (b), (f), (j) and (k) appear to be new.

- Q10: would the delegations like this list to be **more flexible**, in particular by removing some of the sub-points OR by allowing the Member states to only include one or more of these sanctions or measures in their national law, using as a template the wording of article 9 of the PIF Directive: "*shall include **criminal or non-criminal fines and may include other sanctions, such as […]***"?

BE would suggest to take a more flexible stance meaning, allowing states to provide only one or more of these sanctions in their national laws.

- Q11: some delegations raised that some of these sanctions or measures may not be relevant. In this respect, the Presidency wishes first to gather the thoughts of the delegations on **sub-points (b), (f), (j) and (k), which are new**.

BE considers these sanctions to be relevant and pertinent.

– *if the legal person is held liable for a **lack of supervision or control** (article 7(3)), the proposed directive uses a more general wording based on the existence of* "*effective, proportionate and dissuasive*" sanctions;

- Q12: would the delegations like the sanctions in this situation to be harmonised?

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– *finally, for all offences **committed intentionally, using the same distinction as for natural persons in terms of thresholds for terms of imprisonment between four and six years**, the proposed directive imposes lower limits for the maximum amount of criminal and non-criminal fines. In principle therefore, the maximum fine cannot be less than 5% or 3% of the total worldwide turnover of the legal person in the business year preceding the fining decision (article 7(4) and (5)).*

- Q13: do the delegations agree that, insofar as article 7(3) does not require the Member states to establish fines, article 7(4) and (5), which regulates the thresholds for fines, should therefore **only apply to the situation described in article 7(2)** (i.e. offences committed for the benefit of the legal person by one of its organs or representatives)?

BE agrees with this stance and proposed system.

- Q14: subject to explanations from the European Commission on the chosen percentage, do the delegations agree in principle on using the **total worldwide turnover** of the legal person in the business year preceding the fining decision?

  In this respect, the Presidency notes that the wording "*total worldwide turnover of the legal person in the business year preceding the fining decision*" is similar to the wording used in article 15 of Directive (EU) 2019/1 of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

One concern is that the fines for legal entities in Article 7 points 4 and 5 are based on turnover. BE can support this idea, but would like to point out a few concerns and practical difficulties: using a percentage of the turnover as the amount of the maximum fine is possible, but makes the regulations unpredictable. Questions that arise here are the following: how is global turnover determined? In Belgium this could be the 'turnover' of a company, but in other countries? Moreover, this is determined based on the financial year preceding the decision to impose a fine, which poses a problem for start-ups. In addition, certain companies are not required to prepare annual accounts.

- Q15: do the delegations agree that **situations where the offence causes death or is likely to cause death or serious injury to any person** do not entail a different penalty threshold for legal persons, whereas they do entail a different penalty threshold for natural persons?

– ***this leaves article 7(6), which reads:*** *"Member States shall take measures to ensure that the illegal profits generated from the offence and the annual turnover of the legal person are taken into account when a decision is made on the appropriate level of a fine pursuant to paragraph 1" which appears to apply to every fine, whether criminal or administrative or civil, in the meaning of article 7 (1), (2), (4) and (5):*

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- Q16: would the delegations like to comment on this paragraph?

Article 7 point 6 states that the illegal profits made by committing an offense must also be taken into account when determining the amount of the fine. In administrative enforcement procedures, however, a 'deprivation of profit' is provided for the 'gross capital advantage' obtained from the environmental violation or crime. In classic criminal law, a confiscation of the acquired capital gains will also be possible or obligatory by the court. The 'illegal profits' will therefore already be calculated and 'reclaimed', making it illogical to take this into account again when determining the amount of the fine.

- Q17: if so, should this paragraph be moved within article 7, insofar as it does not appear to apply to article 7(3), which leaves the Member states free to determine the nature of the sanctions to apply.

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3. Aggravating circumstances (article 8)

Summary: Article 8 of the proposed directive establishes ten aggravating circumstances that the Member states must incorporate into their national law: (i) ***for each of the offences*** *referred to in articles 3 and 4 (offences committed intentionally or with at least serious negligence; committed, attempted or incited, aided and abetted); (ii) but only "****in so far as the following circumstances do not already form part of the constituent elements of the criminal offences****".*

The Presidency notes that one of these aggravating circumstances has a precedent in a European instrument of substantive criminal law, in particular sub-point (c) in the aforementioned money-laundering directive of 2018.

On the other hand, sub-points (a), (b), (d), (e), (f), (g), (h), (i) and (j) are new.

- Based on the written comments received from the delegations on 6 April 2022 and the discussions during the COPEN meeting on 23 February 2022, the Presidency has identified the following questions:

    - Q18: do the delegations feel that the wording "**in so far as the following circumstances do not already form part of the constituent elements of the criminal offences referred to in Article 3**" is clear enough to clarify the relationship between, first, the constituent elements of the offences and, second, the aggravating circumstances?

BE can agree with the proposed wording.

    - Q19: would the delegations like this list to be **more flexible**, in particular by removing some of the sub-points OR by allowing the Member states to only include one or more of these aggravating circumstances in their national law?

BE would suggest a more flexible approach regarding this article on aggravating circumstances. Currently, in BE no fixed list of these circumstances is used. The assessment is made and based on a case by case approach and analysis.

    - do the delegations confirm the questions they have shared since the beginning of the negotiations? More specifically:

        - Q20: do the delegations agree that the death of a person or serious injury to a person, when it is an aggravating circumstance within the meaning of **sub-point (a)**, is punished in the same manner, for natural persons, as when the death or serious injury is a constituent element of the offence, bearing in mind the wording of article 5(2) which refers to: "*offences referred to in Article 3 [which] cause or are likely to cause death or serious injury to any person*" in relation to the threshold of 10 years for the term of imprisonment?

BE agrees with this viewpoint.

- Q21 for the European Commission: as regards the following points which have raised several written comments, the European Commission may clarify: the concept of similar infringements and the time frame referred to in **sub-point (f)**, the concept of inspection authorities in sub-point (i), the concept of inspection in sub-point (j), and how to take into account, as aggravating circumstances within the meaning of **sub-points (h), (i) and (j)**, behaviours that appear to have occurred after the date of the offence;

- Q22: do the delegations feel that **sub-point (g)** poses difficulties in terms of evidence?

In certain circumstances, in BE, it is indeed possible to make this analysis on financial benefits or the avoidance thereof. However, from experience, it can indeed be acknowledged that providing proof to substantiate these circumstances, can be difficult.

4. Mitigating circumstances (article 9)

*Summary: Article 9 of the proposed directive establishes an obligation for Member states to ensure that certain **subsequent actions by the offender** can be regarded as mitigating circumstances, especially efforts taken to restore nature to its previous condition or cooperation with the judicial and administrative authorities to find evidence or identify accomplices and other offenders.*

The Presidency notes that this concept of mitigating circumstances is not novel, and reflects the content of Directive (EU) 2017/541 of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA.

The Presidency also notes that the Member states are free to determine how to implement this article i.e. there is no obligation to provide in national legislation that these circumstances systematically lead to a reduction of the penalty incurred.

- Based on the written comments received from the delegations on 6 April 2022 and the discussions during the COPEN meeting on 23 February 2022, the Presidency has identified the following questions:

- Q23: would the delegations like the **legal effect** that ought to be given to these mitigating circumstances to be clarified?

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- Q24: do the delegations feel that the **two circumstances described** in sub-points (a) and (b) are relevant? Does the wording of any of these sub-points need to be changed?

According to BE, point a is quite clear. Point b is might be less known / seems to be a little more novel as specified (as the attitude of the offender is taken into account in the sanction imposed on him).

- Q25: would the delegations like to **extend** this list of mitigating circumstances?

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FINLAND

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.

Q1: in general, do the delegations agree with the three thresholds of 10, 6 and 4 years for the term of imprisonment or would they prefer other thresholds?

It seems essential to continue discussions on what is the actual blameworthiness and harmfulness of the acts defined in art. 3 subparagraph 1 and 2 and on what are appropriate levels of punishment accordingly. The thresholds of 10, 6 and 4 years are rather severe as a whole in relation to the acts defined in art. 3. The current EU instruments on criminal law do not generally entail this level of thresholds even though there are serious acts defined in them. The systems of criminal law and sanction levels in Member States form a coherent whole in which the punishments to be issued for different offences and offence categories are to be in reasonable relation to each other. A disproportionately harsh level of sanctions in one crime category may disrupt the balance and coherence of the entire system. There ought to be more room for national solutions than what would be possible according to the current proposal.

As regards the thresholds of 6 and 4 years, it would seem more appropriate to set them at 4 and 2 years accordingly. It is important to note on a general level that acts which *are likely* to cause a consequence – a criminalization of endangerment – are to be punished more leniently than acts which actually lead to a consequence. A difference in thresholds should also be made as to those acts which are committed intentionally compared to those committed out of gross negligence. Views expressed in this chapter would be in line with the art. 49 of the Charter of Fundamental Rights of the EU on proportionality.

One of the most essential questions is the threshold of 10 years which is a highly severe threshold. It is particularly important that intentional acts and acts committed out of gross negligence are not treated in the same manner. It is also important to differentiate between acts causing a severe consequence and acts merely being likely to cause one. A difference should also be made between acts which cause a severe consequence to a person and those which cause that to the environment. There is also a need to differentiate between acts that lead to a person dying and acts which lead to a person being injured.

The 10-year-threshold could only be accepted as regards those intentional acts which intentionally cause the death of a person. From what we have understood from the comments of the Commission at the COPEN meeting on the 12th of April, the proposed directive is, however, not supposed to cover such acts which would be considered homicide.

The differences mentioned above should show in the obligations on the levels of punishments.

The Chair has referred in document 7656/22 to certain serious offences for which thresholds of 8 or 10 years are set. These are very serious offences which are targeted at persons. It seems reasonable to reserve the most severe levels of punishment for especially severe offences targeted at persons which are especially blameworthy and harmful.

Q2: again in general, should article 5(2), (3) and (4) also encompass inciting, aiding and abetting and, if it constitutes a criminal offence, attempt, and, for article 5(3) and (4), offences committed with at least serious negligence?

Article 5, subparagraph 2–4 should not encompass inciting, aiding and abetting nor attempt. The levels of sanctions for these acts should be left to the national solutions which may be general in nature in that they apply to all categories of crime.

As indicated above, offences committed out of gross negligence demonstrate a lower level of guilt than intentional acts and the punishment levels for such acts should thus be lower.

Q3: should this article 5(2) apply to only some sub-points of article 3?

Art. 5, paragraph 2 should only apply to those sub-points of art. 3 which include the element of causing death or serious injury. These sub-points should be referred to in art. 5, subparagraph 2.

It is important to note that the threshold for 10 years may only be justified as regards intentional acts through which the death of a person has been intentionally caused. There has previously been discussion on whether the intentionality which is referred to in the chapeau of art. 3, paragraph 1 also covers the intentional causing of the death of a person or other consequence or danger thereof referred to in the sub-points of art. 3(1). To our understanding it is clear that the current wordings lead to the intentionality covering also the causing of death for example.

Q4: should it only apply when the offence caused a result, and, if so, only in the event of death?

Yes and only in the event the death is caused intentionally. The Finnish system for example includes that if an act is criminalized as intentional, the intentionality must cover all elements of the offence – that is, also the causing of death of a person, for example. Any other sort of model would be problematic for the basic principles of the national criminal law system.

Q5: should there be a difference in penalty thresholds based on the moral element, and, if so, with a reduced penalty for offences committed with at least serious negligence or with a harsher penalty for offences committed intentionally?

See our comments to Q1. In addition, it should be noted that the threshold of 10 years is severe and severe enough for intentional acts.

Q6: would the delegations like this list to be more flexible, specifically by (as an alternative or in addition): (i) only including some of the sub-points from articles 3 and 4 within the chapeau of paragraph 5; (ii) removing some of the sanctions or measures from the list; (iii) allowing Member states to only include one or more of these sanctions or measures in their national law ("which shall may include")?

As the Chair has indicated, many of the sanctions or measures in art. 5, paragraph 5 are new to the EU instruments on criminal law. Most seem to be quite far from what are traditionally taken for criminal sanctions or penalties. For example in Finland, criminal punishments which are all included in the criminal code are general in nature and apply to all categories of offences (with the rare exception of specific penalties for public officials and soldiers for certain offences). The introduction of the sanctions or measures in the criminal system and process would thus lead to need for substantial changes in the national system.

Our stand towards the current wording of article 5, paragraph 5 is critical. We are in favor of flexibility and national latitude and support the proposition of the Chair of the wording of the chapeau to be modified to "…which may include". Introduction of these sanctions or measures ought to be optional.

Q7: (a): is it acceptable in principle?

Our stand towards sub-point a is reserved. Issuing an obligation to reinstate the environment is a matter which belongs to the duties of administrative authorities in Finland and it is dealt with within the administrative process. Expertise in these issues lies with the competent administrative authorities and courts.

Q8: (e): is it acceptable in principle?

Our stand towards sub-point a is critical. Administrative permits are issued by the administrative authorities which also may withdraw a permit or modify the terms of the permit if the conditions described by legislation are fulfilled. Withdrawing a permit is by nature a matter to be dealt with within the administrative process. Expertise in these issues lies with the competent administrative authorities and courts.

Q9: at least seven delegations expressed concerns of a constitutional nature regarding sub-points (f) and (g). As regards sub-point (g), the delegations may wish to decide whether the wording of article 7(2)(k) would be more acceptable.

As has been pointed out earlier, the proposed sanction or measure in sub-point f is problematic from the point of view of the Constitution of Finland and it should not be included in the directive.

Our stand towards sub-point a is also critical. The decisions by the courts are public in Finland as it is, if they have not been declared secret in part or as a whole for grounds described in legislation, such as protection of the injured party. In practice significant court decisions are for the most part currently reported in the media. The measure in sub-point g is ill-fitted for the national system of criminal sanctions. It would also cause administrative burden without obvious added value compared to the current system. Possible problems as for the data protection issues mentioned by the German delegation, for example, should also be taken into consideration.

Q10: would the delegations like this list to be more flexible, in particular by removing some of the sub-points OR by allowing the Member states to only include one or more of these sanctions or measures in their national law, using as a template the wording of article 9 of the PIF Directive: "shall include criminal or non-criminal fines and may include other sanctions, such as […]"?

Finland is in favor of flexibility and using the wording of article 9 of the PIF directive.

We also pointed out in COPEN meeting on the 12th of April the following: if those Member States whose system includes criminal liability for legal persons will have to include in their criminal law system the sanctions or measures so that they are issued in criminal process, this would mean a major systemic change in those Member States. For example in Finland, the system includes the criminal liability for legal persons but most measures or sanctions described in art. 7, paragraph 2 are not in use as a criminal penalty nor in the criminal process. As most of the current penalties are general in nature, introducing new ones into the system would affect all categories of crime, not just environmental offences. This seems to be in contradiction with the view by the Commission of not aiming at disrupting the basics of the national systems. We also think that the concerns the Czech delegation has raised in their written comments as to the legal basis of the proposed directive from the point of view of the measures in art. 7(2) ought to be addressed.

We would also like to underline that in an ideal situation the systems of administrative sanctions and criminal sanctions form a coherent whole in which lenient (administrative) measures are reserved for minor infringements and the sanctions get more severe and also include criminal sanctions as the criminal offences get more severe. The most severe sanctions, i.e. criminal penalties and particularly imprisonment, are to be reserved for the most serious and harmful offences. From what we have understood from the comments of the Commission, they would like to see the same sanctions on both the administrative and criminal "sides" of the sanction system. We believe this sort of dual and over-lapping system of sanctions is not something to strive after. It would most likely make the system unclear and difficult to grasp which could also weaken the preventive effect of sanctions. As we have indicated before, there are well-functioning systems of administrative sanctions on some areas of environmental protection and introducing new, possibly identical sanctions in the criminal law process could only lead to confusion and unreasonable administrative and other burdens and costs.

Q11: some delegations raised that some of these sanctions or measures may not be relevant. In this respect, the Presidency wishes first to gather the thoughts of the delegations on sub-points (b), (f), (j) and (k), which are new.

The same comments apply to sub-point b as to art. 5, paragraph 5, sub-point a.

The same comments apply to sub-point f as to art. 5, paragraph 5, sub-point e.

Our stand towards sub-point j is critical. It is unclear what the obligation would mean in practice, i.e. what the scheme would need to include in practice. The effectiveness and preventiveness of this measure is also questionable. It seems evident that this measure is not well suited for the criminal law process.

The same comments apply to sub-point k as to art. 5, paragraph 5, sub-point g.

if the legal person is held liable for a lack of supervision or control (article 7(3)), the proposed directive uses a more general wording based on the existence of "effective, proportionate and dissuasive" sanctions;

Q12: would the delegations like the sanctions in this situation to be harmonised?

Finland is in favor of the proposal of the Commission and does not see a need for further harmonization.

Finally, for all offences committed intentionally, using the same distinction as for natural persons in terms of thresholds for terms of imprisonment between four and six years, the proposed directive imposes lower limits for the maximum amount of criminal and non-criminal fines. In principle therefore, the maximum fine cannot be less than 5% or 3% of the total worldwide turnover of the legal person in the business year preceding the fining decision (article 7(4) and (5)).

Q13: do the delegations agree that, insofar as article 7(3) does not require the Member states to establish fines, article 7(4) and (5), which regulates the thresholds for fines, should therefore only apply to the situation described in article 7(2) (i.e. offences committed for the benefit of the legal person by one of its organs or representatives)?

We have no specific stand on this issue at this point.

Q14: subject to explanations from the European Commission on the chosen percentage, do the delegations agree in principle on using the total worldwide turnover of the legal person in the business year preceding the fining decision?

In this respect, the Presidency notes that the wording "total worldwide turnover of the legal person in the business year preceding the fining decision" is similar to the wording used in article 15 of Directive (EU) 2019/1 of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

Finland is not in favor of determining the maximum limit of the fines for legal persons by setting it at a certain percentage of the total worldwide turnover of the legal person. In Finland, for example, it is possible to issue a fine to a legal person in criminal law process but the way the amount of fine is determined is fundamentally different from that proposed here. According to the criminal code of Finland, the amount of fine for a legal person is based on decision by the court on a fixed amount from a scale of a sum of money prescribed in the criminal code. The provisions on corporate criminal liability are applied to all offence categories. Obliging Member States to ensure that the fines are determined in the way described in art. 7, paragraphs 4-5 would lead to needs to amend the national system in its fundamentals.

It should be underlined that the fines referred to in directive 2019/1 are by nature administrative as is the whole directive so adopting certain solution to a criminal law instrument cannot be made straight-forwardly. The function of administrative fines for legal persons is both sanctioning and confiscative, the function of criminal fines for legal entities being sanctioning.

Q15: do the delegations agree that situations where the offence causes death or is likely to cause death or serious injury to any person do not entail a different penalty threshold for legal persons, whereas they do entail a different penalty threshold for natural persons?

We agree.

this leaves article 7(6), which reads: "Member States shall take measures to ensure that the illegal profits generated from the offence and the annual turnover of the legal person are taken into account when a decision is made on the appropriate level of a fine pursuant to paragraph 1" which appears to apply to every fine, whether criminal or administrative or civil, in the meaning of article 7 (1), (2), (4) and (5):

Q16: would the delegations like to comment on this paragraph?

Q17: if so, should this paragraph be moved within article 7, insofar as it does not appear to apply to article 7(3), which leaves the Member states free to determine the nature of the sanctions to apply.

We would support deleting the referral to illegal profits from this paragraph. This is a general question to be dealt with as part of confiscation and thus not in this directive.

Q18: do the delegations feel that the wording "in so far as the following circumstances do not already form part of the constituent elements of the criminal offences referred to in Article 3" is clear enough to clarify the relationship between, first, the constituent elements of the offences and, second, the aggravating circumstances?

Yes.

Q19: would the delegations like this list to be more flexible, in particular by removing some of the sub-points OR by allowing the Member states to only include one or more of these aggravating circumstances in their national law?

Finland is in favor of the list being more flexible so that Member States may include one or more of the aggravating circumstances in their national law (using the "may" wording).

It should be noted, that the provisions on aggravating circumstances are generally applicable in the Finnish system, for example, and there are no aggravating circumstances which would be specific to only one offence category, like environmental offences. An obligation to introduce new aggravating circumstances or provisions on offence-specific aggravating circumstances would thus lead to significant problems from the point of view of the current system.

Many circumstances mentioned in art. 8 are such that they in any case already, according to the current legislation, have an aggravating effect when determining the sentence on the basis of the general principle in determining the punishment of the correspondence of the gravity of the offence and the severity of the punishment. That means these circumstances do in practice make the sentence more severe. There would thus be no need to specifically include them into the national systems as aggravating circumstances. For example, the use of false or forged documents usually demonstrates premeditation which for its part is an aggravating circumstance in the Finnish legislation. It is reasonable to describe aggravating circumstances in legislation on a general level, not in too much detail. In addition, many of the circumstances in the sub-points of art. 8 are such by nature that they are already taken into consideration as part of the general evaluation of the courts when determining a sentence.

Sub-points c and f could be possible as they are general in nature. It would in any case be essential to describe the aggravating circumstances clearly. There are still many questions on, for example, sub-points g, h, i and j.

As for **art. 8, sub-point a**, the Commission has indicated (if we have understood correctly) at the COPEN meeting on the 12th of April that the proposed directive is not supposed to cover intentional acts which intentionally cause the death of a person. Instead this sort of acts would be covered by provisions on homicide which are included in all of the national systems of Member States. It is, however, still unclear how 1) the (future) provisions on acts in art. 3, paragraph 1, subparagraph which include causing the death of or serious injury to a person, 2) art. 8, sub-point a and 3) national provisions on homicide and assault are to be applied. If a person is intentionally killed or injured by an act which constitutes an environmental offence these actions would most likely be considered as two separate but interconnected offences, i.e. environmental offence and homicide/assault. It is difficult to see what would be the point of this aggravating circumstance.

As for **art. 8, sub-point b**, it is not clear what is the distinction between the "substantial" damage referred to in many of the sub-points of art. 3, paragraph 1 and the "irreversible or long-lasting substantial" damage referred to in art. 8, sub-point b.

As for **art. 8, sub-point d and e**, it is still unclear how it is taken into account as to these aggravating circumstances that using false or forged documents is as such a separate offence as may be infringing one's duties as a public official.

Sub-points g-j seem still unclear in many ways. For example, it is unclear whether sub-point i refers to the acts or omissions of the offender before the environmental offence is committed or during or after the commission of the offence. It is also questionable how the sub-point relates to the right not to incriminate oneself.

Q20: do the delegations agree that the death of a person or serious injury to a person, when it is an aggravating circumstance within the meaning of sub-point (a), is punished in the same manner, for natural persons, as when the death or serious injury is a constituent element of the offence, bearing in mind the wording of article 5(2) which refers to: "offences referred to in Article 3 [which] cause or are likely to cause death or serious injury to any person" in relation to the threshold of 10 years for the term of imprisonment?

Yes.

Q21 for the European Commission: as regards the following points which have raised several written comments, the European Commission may clarify: the concept of similar infringements and the time frame referred to in sub-point (f), the concept of inspection authorities in sub-point (i), the concept of inspection in sub-point (j), and how to take into account, as aggravating circumstances within the meaning of sub-points (h), (i) and (j), behaviours that appear to have occurred after the date of the offence;

See comments to Q19.

Q22: do the delegations feel that sub-point (g) poses difficulties in terms of evidence?

Yes.

Q23: would the delegations like the legal effect that ought to be given to these mitigating circumstances to be clarified?

We have understood from the discussions at the COPEN meeting on the 12th of April that there would not follow an obligation for the Member States to define the mitigating circumstances in legislation. We support this premise.

Q24: do the delegations feel that the two circumstances described in sub-points (a) and (b) are relevant? Does the wording of any of these sub-points need to be changed?

We do not recognize any major problems with these sub-points at this point.

Q25: would the delegations like to extend this list of mitigating circumstances?

There is no need for extending the list.

NETHERLANDS

The Netherlands would again like to thanks the Presidency fort the opportunity to provide written comments on the articles 5-9 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 7656/22.

Presidency note 7656/22

Q1: We understand the proposal of the Commission to introduce high thresholds for minimum levels of maximum punishments in order to ensure effective protection of the environment through the use of criminal law. However, we think that the proposed thresholds are too high, especially in comparison with other EU criminal law instruments. In line with the Council Conclusions of 24 and 25 April 2002 on the approach to apply regarding approximation of penalties (ST 9141/02), the thresholds of 4 and 6 years should be replaced by thresholds of 3 and 5 years. In addition to this, such thresholds should only be used for offences that are committed intentionally.

Q2: In The Netherlands, inciting, aiding and abetting criminal offences, as well as attempts to commit criminal offences are generally punishable and therefore apply to every criminal offence. Concerning attempts to commit a criminal offence and abetting a criminal offence, the maximum sanction level of the main offence is reduced by one third. Also in some cases of inciting criminal offences, a lower maximum sanction level of the main offence can be applicable. As the legal traditions of the MS know different approaches to this matter, we think the sanction levels in article 5 (2), (3) and (4) should not be applicable to inciting, aiding criminal offences as well as attempts to commit a criminal offence.

Q3: We think the scope of this article should be limited to offences that explicitly mention the consequences of the conduct (*if they cause or are likely to cause death or serious injury to any person)* as one of the constituent elements of the criminal offence.

Q4: Article 5(2) provides for the highest sanctions in the proposed directive. These sanctions should therefore only be applicable to the most severe cases: cases in which the conduct actually has resulted in the death (or serious) injury of other people. The Netherlands can agree that the new environmental crime directive also applies to conduct that *is likely* to cause injury of death, but with regards the penalty levels in such cases should be significantly lower compared to conduct that has *actually resulted* in serious injury or even the death of other people.

Q5: We think that the moral element of a criminal offence should play a very large role in determining the suitable minimal-maximum penalty threshold. We therefore strongly disagree with the current wording of article 5(2), which makes no distinction between offences that are intentionally or with serious negligence. In line with our answer to the previous question, the moral elements of the offence as well as the consequences of the offence should play a big role in determining the level of sanctions. According to the current wording, offences that are committed with serious negligence that did not result in the death or serious injury of other people can be sanctioned with a prison sentence of ten years. This is not proportionate.

The Netherlands suggest that the scope of article 5(2) be limited to offences that are committed intentionally. If the

Q6: The Netherlands cannot agree with the proposed mandatory harmonization of the additional sanctions in the area of criminal law. As put forward by many delegations in both written comments and during previous COPEN meetings, article 5(5) should be made much more flexible. Firstly, in The Netherlands, some of the mentioned additional sanctions are only possible in administrative procedures and not in criminal procedures. The proposed Directive should leave room for this. Secondly, the current wording of article 5(5) has a mandatory nature. It would be very beneficial if MS have more space to include one or more of the additional sanctions in their national legal systems. This could be achieved by replacing the word “shall” by “may”, as suggested by the Presidency. We also note that the various additional sanctions have a very different weight. For example, the proposed temporary bans on running for elected or public office can be regarded as a severe punishment that should only be imposed for the most severe offences.

The Presidency note includes a references to Directive (EU) 2018/1673 of 23 October 2018 on combating money laundering by criminal law. This Directive does indeed include a reference to the sanction of (in short) exclusions from access to public funding, but article 8 of that Directive does not include an obligation for MS to make that particular additional sanction possible in national law. Instead, it leaves room voor MS (which (…) *may* include other sanctions). It is very desirable that this approach will also be used in the new environmental crime directive.

Q7: The meaning of this additional sanction is unclear. Not in all cases it will be possible to reinstate the environment. The Dutch legal system has a number of measures/sanctions that *de facto* can be comparable to this proposed additional sanction, both in administrative and in criminal law. The Netherlands suggests to leave MS much room at this point and is not supportive of making this additional sanction mandatory.

Q8: Under Dutch law, the withdrawal of permits and authorisations is an administrative law matter. The Netherlands finds sanctions like these acceptable in principle, but we think MS should have room to use administrative procedures for withdrawing permits.

Q9: The Netherlands has no constitutional concerns in this matter, but prefers the wording of article 7(2)(k) over the wording in article 5(5)(g)

Q10: We refer to our answer to Q6. The proposed wording by the Presidency (*may* include) would be very beneficial.

Q11: The Netherlands think these sanctions could be of added value in individual cases. However MS should not be obliged to make this possible in their national laws, but instead have space to choose which sanctions they want to make possible and also in which kind of procedure (administrative/criminal).

Q12: The Netherlands can agree that the sanctions for this particular form of criminal liability will not be harmonized.

Q13: Yes, we agree with the observations of the Presidency.

Q14: The Netherlands can support this.

Q15: The Netherlands agrees with this.

Q16: If the purpose of this paragraph would be to give guidelines for the level of fines in individual cases, a suggestion would be to incorporate this paragraph in Articles 8 and 9, since the size of the illegal profits could be regarded as an aggravating or mitigating circumstance. However, as described more extensively in Q19, The Netherlands suggests to move this to the recitals and does not agree with an obligation to transpose these circumstances into the national law.

Q17: No remarks.

Q18: Yes, according to The Netherlands this relationship is clear.

Q19: For The Netherlands, it is very important that MS have flexibility with regards to the aggravating and mitigating circumstances. In our criminal law tradition, it is very uncommon to specify all aggravating and mitigating circumstances in the law itself. Instead, these are usually listed in the explanatory memorandum in a non-limitative manner, which leaves the judge space to take into account all the circumstances that he/she thinks are relevant in an individual case. The Netherlands therefore proposes to move the content of the Articles 8 and 9 to the recitals, and/or to explicitly mention in the recitals that there is no obligation to write down these circumstances in the national law itself

The Netherlands also note that while aggravating circumstances can lead to a higher sanction in individual cases, this higher sanction cannot exceed the maximum sanction level for the criminal offence concerned. When applying the aggravating circumstances mentioned in Article 8, the judge can impose a higher sanction than normal, but the level of this sanction cannot exceed the maximum sanction level that is laid down in the criminal code.

Q20: Yes: in the current wording of the proposed Directive, the minimal maximum-penalty in both situations should be 10 years. As mentioned in the previous answer: according to The Netherlands, aggravating circumstances should be taken into account *within* the limits of the penalty threshold en should not as such increase these limits.

Q21 and Q22: No remarks

Q23: The Presidency notes that MS are free to determine how they implement the Article on the mitigating circumstances. The Netherlands suggest that a similar freedom be given for the implementation of Article 7 regarding the aggravating circumstances.

Q24 and Q25: No remarks

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

Document 7656/22

With regard to Article 4, we propose deleting paragraph 2 and adding in paragraph 1 a criminal offence of attempt.

We take a critical view of the proposal in Article 5(2) of the directive to equate the penalties for the offence of causing death or serious bodily injury to persons with those for offences where the offender's conduct merely involves the possibility of causing such an effect. In our view, this solution will cause problems with the transposition of the provisions of the directive.

ROMANIA

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

- provisions related to penalties –

RO comments based on Presidency document 7656/22

1. Penalties for natural persons (article 5)

a) Imprisonment (paragraphs 2, 3 and 4)

Q1: In general, do the delegations agree with the **three thresholds of 10, 6 and 4 years** for the term of imprisonment or would they prefer other thresholds?

Q1: RO agrees with the three thresholds.

Q2: Again, in general, should **article 5(2), (3) and (4)** also encompass inciting, aiding and abetting and, if it constitutes a criminal offence, attempt, and, for **article 5(3) and (4)**, offences committed with at least serious negligence?

Q2: No, we consider it is not necessary, especially in the case of offences committed with at least serious negligence, considering the proportionality principle. Moreover, attempt is not applicable to offences committed with at least serious negligence considering art. 4 para. 2 (the offence must be committed intentionally). MS should have more flexibility considering their substantial criminal law regimes (taking into account para. 9 from the Council Conclusions on model provisions, guiding the Council's criminal law deliberations 2979th JHA Council meeting Brussels, 30 November 2009).

Specifically, regarding article 5(2), if the offence causes death or is likely to cause death or serious injury to any person, irrespective of the moral element (intentional or with at least serious negligence):

Q3: Should this article 5(2) apply to only some sub-points of article 3?

Q3: Such punishment should be considered only for those provisions of Article 3 which provide for in the constituent part of the offence the causing or likelihood of causing the death or serious injury of the person (conduct referred to in points (a), (b) and (c), (e) point (ii), (i), (c) (j), (p) (ii)). Taking into consideration the principle of proportionality of criminal penalties enshrined in art. 49 para. 3 of the Charter of Fundamental Rights and the Council Conclusions on the approach to be followed for harmonization of penalties, this way the highly punitive nature of the penalty might be justified.

Q4: Should it only apply when the offence caused a result, and, if so, only in the event of death?

Q4: From the point of view of the limits of punishment, these situations ("cause" and "are likely to cause") should not be treated together even more since they concern the most important social value, namely the life of the person.

It does not seem justified that in the case of the loss of one or more human lives the punishment should be the same as in the case of only a theoretical danger of death, for example.

Also, from the point of view of the maximum sentence there should be a distinction between the result of death (harm to the ultimate social value, the person's life) and the result of serious bodily harm (harm to bodily integrity as a protected social value).

In support of the above is the fact that, in Article 8, the occurrence of the death of the person is treated as an aggravating circumstance, so we do not see how these two situations could be provided in point 2 with a similar punishment.

Q5: **S**hould there be a difference in penalty thresholds based on the moral element, and, if so, with a reduced penalty for offences committed with at least serious negligence or with a harsher penalty for offences committed intentionally?

Q5: Yes, there should be a difference in penalty thresholds based on the moral elements so offenses committed through fault should be punished less severe than intentional offenses and leave it to each Member State to determine the level of the penalties for offences committed with at least serious negligence versus intentionally (Council Conclusions on model provisions, guiding the Council's criminal law deliberations 2979th JHA Council meeting Brussels, 30 November 2009). In RO legal system, there is no distinction in terms of penalty for different forms of negligence (serious or less serious negligence), even a less negligence guilt being sufficient to incur criminal liability.

There is a need for different paragraphs on the limits of punishment (the maximum) in the case of offences committed intentionally compared to those committed through gross negligence. To keep the 4, 6 and 10 years (benchmark for "maximum", benchmark for "at least") and to regulate (a) separate paragraph for committing offences of gross negligence in the form of "MS take the necessary measures to ensure that the offenses mentioned at ...., committed with gross negligence, shall be punished with a maximum penalty of at least 1/2 of the maximum penalty to be provided for intentional offenses as referred to in ... "

Additional sanctions or measures (paragraph 5)

Q6: Would the delegations like this list to be more **flexible**, specifically by (as an alternative or in addition): (i) only including some of the sub-points from articles 3 and 4 within the chapeau of paragraph 5; (ii) removing some of the sanctions or measures from the list; (iii) allowing Member states to only include one or more of these sanctions or measures in their national law ("*which ~~shall~~ **may** include*")?

Q6: The proposal in point (iii) would be preferable. Paragraph 5 considers sanctions or complementary measures applicable to natural persons, and in the Criminal Code the exclusion from public procurement procedures is not provided for natural persons, but only for legal persons.

Some delegations raised that some of these sanctions or measures may not be relevant. In this respect, the Presidency wishes first to gather the thoughts of the delegations on the **following sub-points, which have been the topic of particular discussion**:

Q7: (a): Is it acceptable in principle?

Q7: (a) Some environmental damage is long-lasting and perhaps permanent, and the entire environment may not be reinstated (for ex. the polluted soils with nitrites, that occurred for long lasting period), which is why this letter should be circumscribed to ***if possible***. Otherwise, it would result in a disproportionate and unenforceable sanction. If the damage occurred as a result of an offence committed with negligence and the cost of returning to the previous situation is very high, the punishment may no longer be proportionate to the act, so from this perspective too, the text should be nuanced.

The obligation to restore the environment to its original state is a mandatory measure also in some texts of current domestic law and this does not depend on the form of guilt with which the offence was committed, nor the material condition of the perpetrator and other aspects, both as long as a form of liability is established.

Q8: (e): Is it acceptable in principle?

Q8: (e) RO considers it necessary for the COM to clarify the intention of this provision and also the time line for the "withdrawal of permits and authorizations" - "until compliance" or "until the damage was repaired". In Romania's case the inspectors highlight the incompliance of the authorization to the issuing authority – The Environmental Agency, followed by the withdrawal of the permit.

Q9: At least seven delegations expressed concerns of a constitutional nature regarding sub-points (f) and (g). As regards sub-point (g), the delegations may wish to decide whether the wording of article 7(2)(k) would be more acceptable.

Q9: As regards letter (f), it is to be analyzed from the ECHR perspective if it is justified, especially in the case of committing offences with negligence and for what period (after rehabilitation?). It is necessary to clarify the term "elected", as it is followed by "or public office". "Elected" positions may also exist in private entities, so the text should refer only to public one, given that it is in any case supplemented by the text of letters d) and e).

As regards letter (g), the wording of article 7(2)(k) would be more acceptable, with the mention that it is necessary to clarify whether it is intended to publish the entire judgment, or only part of it, and in the latter case, which part. We do not believe that the publication of the full judgment (especially of those that comprise hundreds of pages) is possible and therefore the text should be more explicit (for example, the judge may determine which parts of the decision should be published). Moreover, the publication will have to include the anonymization of certain information, according to the specific legislation on the matter and considering the provisions of Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties. However, the Romanian legislation does regulate such penalty both for natural and legal persons.

Furthermore, the publication of the full judgement might not be appropriate where:

- it could be used to identify victims or witnesses, especially if this would place them at risk of suffering reprisals from friends or associates of the offender, or expose them to unwanted media or public attention. Victims should anyway be consulted about proposed publicity and made aware of possible press coverage;

- the offender is known to have a specific vulnerability (e.g. mental health issues or physical ill health), which might mean that publicizing the conviction risks unwarranted adverse consequences (i.e. not simply that the offender objects to the publicity).

2. <u>Sanctions for legal persons (articles 2(3), 6 and 7)</u>

<u>Sanctions</u>

Q10: Would the delegations like this list to be **more flexible**, in particular by removing some of the sub-points OR by allowing the Member states to only include one or more of these sanctions or measures in their national law, using as a template the wording of article 9 of the PIF Directive: "*shall include* ***criminal or non-criminal fines and may include other sanctions, such as […]***"?

Q10: RO considers that there is a need to further differentiate between criminal and non-criminal sanctions, either in the text or in the preamble. The two are not mutually exclusive if they cover separate activities, this aspect must be clearly stated. The MS option for one of them should be clarified. It follows from recital 15 that they concern both the MS that have the criminal liability of legal persons as well as, alternatively, those which do not have that institution. The text does not reflect this idea.

We would not like this list to be more flexible, but rather to reword some sub-points.

Regarding art. 7 lit. j) – the obligation to install due diligence schemes - could be difficult to transpose into national law, especially since it is formulated in general terms. Moreover, in the field of timber trade (Regulation 995/2010, GD 497/2020), the due diligence system is a legal obligation of the operators irrespective of the commission of an offence and cannot be a sanction at the same time. More clarification would be needed.

Q11: Some delegations raised that some of these sanctions or measures may not be relevant. In this respect, the Presidency wishes first to gather the thoughts of the delegations on **sub-points (b), (f), (j) and (k), which are new**.

Q11: -(b) – RO considers it necessary to complete the text with the phrase *whenever possible;*

- (f): for identity of judgement, the text should be completed with the phrase "***temporary or permanent*** withdrawal…", similar to sub-point (e) and (i).

-(j) - There are no explanations in the proposal recitals on this subject.

There is already an obligation to do so in Regulation 995/2010, which applies to operators when the product is first placed on the market and which is independent of any offence.

There is also a recommendation for a proposal for a directive (https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html) on the establishment of a due diligence obligation, including to ensure compliance with environmental standards, which targets certain types of companies (large, small and medium-sized listed companies or small and medium-sized high-risk companies).

– *if the legal person is held liable for a **lack of supervision or control** (article 7(3)), the proposed directive uses a more general wording based on the existence of "effective, proportionate and dissuasive*" sanctions;

Q12: Would the delegations like the sanctions in this situation to be harmonized?

Q12: Yes, harmonization is needed for the proper implementation of the directive.

– *finally, for all offences **committed intentionally, using the same distinction as for natural persons in terms of thresholds for terms of imprisonment between four and six years**, the proposed directive imposes lower limits for the maximum amount of criminal and non-criminal fines. In principle therefore, the maximum fine cannot be less than 5% or 3% of the total worldwide turnover of the legal person in the business year preceding the fining decision (article 7(4) and (5)).*

Q13: Do the delegations agree that, insofar as article 7(3) does not require the Member states to establish fines, article 7(4) and (5), which regulates the thresholds for fines, should therefore **only apply to the situation described in article 7(2)** (i.e. offences committed for the benefit of the legal person by one of its organs or representatives)?

Q13: RO agrees.

Q14: Subject to explanations from the European Commission on the chosen percentage, do the delegations agree in principle on using the **total worldwide turnover** of the legal person in the business year preceding the fining decision?

Q14: RO agrees, in principle, however „*total worldwide turnover"* could be defined at least in the recitals in order to comply primarily with the principle of clarity of the criminal law. Also, there could be a guidance on the method of setting fines considering TWT, similar to competition law – see also Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52006XC0901%2801%29)

Also, discussions can be made regarding the period of time taken into consideration (year preceding the fining decision). If the process takes more than one year, this criterion would allow the legal person to diminish its worldwide turnover, in order to avoid a high level of the sanction, or this diminishment can be the result of the measures taken against this legal person during the criminal proceedings. So, the fining decision should be applicable on the turnover in the year in which the offence occurred.

Q15: Do the delegations agree that **situations where the offence causes death or is likely to cause death or serious injury to any person** do not entail a different penalty threshold for legal persons, whereas they do entail a different penalty threshold for natural persons?

Q15: RO agrees.

– ***this leaves article 7(6), which reads:*** *"Member States shall take measures to ensure that the illegal profits generated from the offence and the annual turnover of the legal person are taken into account when a decision is made on the appropriate level of a fine pursuant to paragraph 1" which appears to apply to every fine, whether criminal or administrative or civil, in the meaning of article 7 (1), (2), (4) and (5):*

Q16: Would the delegations like to comment on this paragraph?

Q16: Illegal profits should be taken into account for a more dissuasive effect. Considering the answer to Q14, therefore either a separate article is required to determine the amount of fines or a guide should be created.

Q17: If so, should this paragraph be moved within article 7, insofar as it does not appear to apply to article 7(3), which leaves the Member states free to determine the nature of the sanctions to apply.

Q17: Yes.

3. Aggravating circumstances (article 8)

Q18: Do the delegations feel that the wording "**in so far as the following circumstances do not already form part of the constituent elements of the criminal offences referred to in Article 3**" is clear enough to clarify the relationship between, first, the constituent elements of the offences and, second, the aggravating circumstances?

Q18: No, the relationship between aggravating circumstances and concurrent (multiple offences) offences needs to be clarified. We refer to the cases in which the aggravating circumstance is an independent crime under national law (murder, manslaughter, organized criminal group, etc. - all MS have such incriminations), and by applying the rules for the concurrent offences, a heavier punishment will result. In this case, the intention of the norm should be clarified. Hence, it should be decided if the double use of this aspect is intended: both as an aggravating circumstance in the environmental crime, and as well as a distinct offence which will constitute concurrent offences together with the environmental offence or it is sufficient to increase the penalty, regardless of which mechanism.

RO believes that the latter interpretation would be the logical one, in which case it would be necessary to reword the text and use a phrase such as "***cause of aggravation*** of punishment" instead of "aggravating circumstance", to allow adaptation to different systems of law of the MS.

Q19: Would the delegations like this list to be **more flexible**, in particular by removing some of the sub-points OR by allowing the Member states to only include one or more of these aggravating circumstances in their national law?

Q19: The text could be more flexible, either by removing some of the sub-points or by allowing the Member states to only include one or more of these aggravating circumstances.

Q20: Do the delegations agree that the death of a person or serious injury to a person, when it is an aggravating circumstance within the meaning of **sub-point (a)**, is punished in the same manner, for natural persons, as when the death or serious injury is a constituent element of the offence, bearing in mind the wording of article 5(2) which refers to: "*offences referred to in Article 3 [which] cause or are likely to cause death or serious injury to any person*" in relation to the threshold of 10 years for the term of imprisonment?

Q20: Multiple offences rules apply. RO does not support the considering of the death or serious injury of a person only as an aggravated circumstance, it is a separate crime and a very serious one. It should not be treated as an aggravated circumstance of another crime.

Q21 For the European Commission: as regards the following points which have raised several written comments, the European Commission may clarify: the concept of similar infringements and the time frame referred to in **sub-point (f)**, the concept of inspection authorities in sub-point (i), the concept of inspection in sub-point (j), and how to take into account, as aggravating circumstances within the meaning of **sub-points (h), (i) and (j)**, behaviors that appear to have occurred after the date of the offence;

Q22: Do the delegations feel that **sub-point (g)** poses difficulties in terms of evidence?

Q22: Yes. The *substantial* should be clarified. Most of the offences covered by this Directive, other than those committed with negligence, are committed to generate financial benefits or to avoid costs. Also, why would committing an offence for financial gain be more serious than for other purposes, such as revenge? We need a criterion to ensure a correct transposition at national level but also a proper approach between MS.

If the central word is "*substantial*", then it should be defined, because it is known that such terms generate difficulties in transposition, evaluation of transposition and can pose problems in terms of predictability of criminal law. Therefore, from our point of view, such expressions should be avoided when possible.

The value of the gain itself, however, will be closely related to the gravity of the act itself and the magnitude of the effects produced.

The "substantial" criterion should also be related to turnover, because it refers to "total worldwide turnover". We consider it necessary for the COM to provide a set of criteria for the purpose of defining this term, precisely for the purpose of foreseeability of the criminal law.

4. Mitigating circumstances (article 9)

Q23: Would the delegations like the **legal effect** that ought to be given to these mitigating circumstances to be clarified?

Q23: Any clarification is welcomed.

Q24: Do the delegations feel that the **two circumstances described** in sub-points (a) and (b) are relevant? Does the wording of any of these sub-points need to be changed?

Q24: Yes; Letter (a) needs rewording: a time limit should be set by which the defendant can make the restoration to the previous condition, where possible, in order for a mitigating circumstance to be incurred. The text could also be supplemented with **"*where possible*"** and ***a deadline*** for restoring the status quo. For e.g. when it comes to sanctions for legal persons art. 7 par. 2 letter b) states the idea of a deadline: ``*the obligation to reinstate the environment **within a given period***``. It is true that the text refers to the mitigating circumstances, but some instruments must be given to the magistrates in order to proper implement the provision for increasing the efficiency of the penalty.

The restoration of degraded nature should be implemented through the furtherance of the "polluter pays" principle, as indicated in the TFEU and in line with the principle of sustainable development. According to the "polluter-pays" principle, an operator causing environmental damage should, in principle, bear the cost of the necessary preventive or remedial measures.

Q25: Would the delegations like to **extend** this list of mitigating circumstances?

RO does not consider it necessary.