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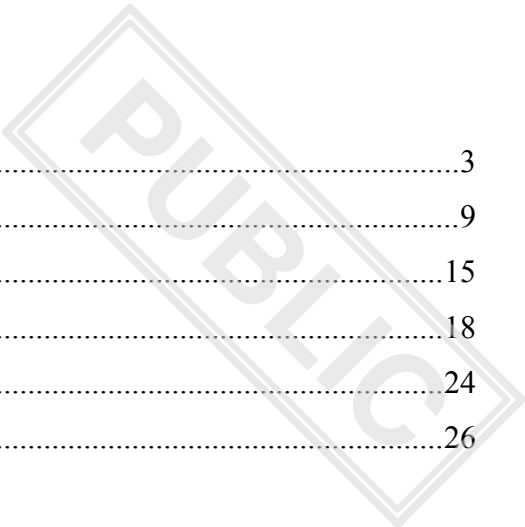
Subject: Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC
- Comments and drafting suggestions by Member States in relation to the revised Presidency text

At its meeting on 6 May 2022, the Working Party on Judicial Cooperation in Criminal Matters (COPEN) discussed the revised Presidency text set out in 8569/22. Subsequently to the meeting, the Presidency invited delegations that so wished to submit comments / drafting suggestions in writing.

The input so received is set out in the Annex.

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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.

Article 2, new paragraph 1

The definitions in the descriptions of the offences in art. 3, paragraph 2 would in practice be determined by those pieces of legislation to which there are references in the descriptions. It would, however, be appropriate to note the importance of the principle of legality in the text. It would seem reasonable to add to the recitals, for example, a note on that what is stated in art. 2, paragraph 1 will not mean contradicting the principle of legality nor undermining its importance.

As regards the reference to art. 3, paragraph 1, points a and b, it should be noted that a certain definition included in the national legislation of a Member State may, as regards to its meaning, partly be derived from EU law and partly from other regulation, for example for a specific reason having to do with a national basis. There may be situations in which some level of inconsistency between a certain definition according to points a and b may appear.

Article 3

We continue to have some concerns over whether all offences in art. 3 are defined with enough precision from the point of view of the principle of legality.

We would suggest an amendment to art. 3, new paragraph 1 as follows: “For the purpose of this Directive the ‘unlawful’ conduct shall mean a conduct infringing *an obligation or a prohibition prescribed in one of the following...*” so that a reference to an obligation or a prohibition which has been prescribed in the law/legislation would be added to the definition of unlawful. This would make the definition of unlawful more precise as it would be connected to infringing an obligation or a prohibition enacted in the law/legislation.

Art. 3, new paragraph 2, subparagraph b

It still seems unclear according to which regulations the unlawful placing on the market would be determined. We find it difficult to figure out how a provision based on this subparagraph could be drafted. The description of the act/conduct is still imprecise.

As of for the proposition of the Chair specifically, for example, the terms “larger scale” and “by a number of users” are vague. It would seem challenging to draw the distinction between acts which would have to be criminalized and acts which would not. The principle of legality calls for predictability. There remain many questions: For example, should it be determined how many persons would have to use the product at the same time? Or during which period of time would a certain number of people use the product? How could it be proved that the use of a product on a larger scale would cause the mentioned consequences or danger thereof? How a combined effect is to be proven? Are these described in pieces of EU legislation?

Art. 3, new paragraph 2, subparagraph d

It seems the reference to Annex II of directive 2011/92/EU may lead to such projects being in the scope of the subparagraph of which EIA is not required. For example, in Finland, an EIA is required for the projects in Annex II only if the competent authority makes a decision in which this is determined.

We suggest that instead of referring to Annexes I and II of directive 2011/92/EU (EIA directive), the subparagraph would include a reference to art. 4, paragraphs 1 and 2 of the EIA directive. The subparagraph would thus read: “ d) the execution of projects referred to in Article 1(2)(a) **and 4(1) and (2) listed in Annex I or II** of Directive 2011/92/EU”.

This would lead to this subparagraph covering those projects for which an EIA is obligatory (art. 4(1) of the EIA directive) and those projects for which an EIA is required according to the system in use in the Member State in question (art. 4(2) of the EIA directive).

Art. 3, new paragraph 2, subparagraphs i and i bis

We are concerned that this subparagraph covers also acts which are not environmental offences but rather occupational safety offences. If the idea is to criminalize acts which have to do with spilling oil, emitting gas or such, this should be mentioned in the subparagraph. It would seem necessary to include in to the text of the paragraph a reference to spilling oil and emitting gas.

In its current version, we believe the subparagraph could cover for example acts which involve infringing the regulations on occupational safety during the construction, operation or dismantling of an installation rather than environmental legislation. For example, if a heavy object falls on a person as an installation meant in the subparagraph is being constructed or operated in a situation in which occupational health and safety regulations are not followed, we believe this would now be in the scope of this subparagraph. This seems not to be the idea of this directive and this would also not fulfill the objects of the directive as regards the protection of the environment. There could also arise questions as to the appropriateness of the legal basis as regards such acts. This should also be looked at as regards subparagraph i.

Art. 3, new paragraph 2, subparagraph n

We are still not convinced that the acts in subparagraph n are comparable to the other acts in the article as regards the blameworthiness of the acts which leads to considerations on whether these should be included in the directive at all. It must be noted at this point already that it is especially problematic that these acts are included in the category of 5-years-threshold according to art. 5, new paragraph 4.

Art. 3, new paragraph 2, subparagraphs q and r

These subparagraphs should be placed in square brackets as the negotiations on the new proposals for regulations on the ozone depleting substances and f gases (COM(2022) 150 final ja COM(2022) 151 final) have only just begun. The obligations on criminalizations should be in line with the obligations in the future regulations.

Art. 3, new paragraphs 3-6

We would suggest deleting the reference to subparagraphs n and p ii from the list. It is reasonable that these acts are criminalized as intentional but not as committed out of gross negligence.

We support the amendments by the Chair to paragraphs 4-6 in that the elements described in those paragraphs would not have to be ensured in the national legislation of the Member States.

Article 4

We support deleting the reference to subparagraph d from this paragraph. Also the reference to subparagraph h would be best deleted. As the punishability of these acts is partly based on the joint effect of minor acts, it would be challenging to apply the provisions on attempt on these acts.

Article 5

Art. 5, paragraph 2

We support the proposition of the Chair to delete from this paragraph the references to acts which are likely to cause death of a person and to acts which cause a serious injury.

It is unclear why subparagraph e(i) has been remained in the subparagraph. It is not logic in that other subparagraph mentioned include the element of causing or being likely to cause a consequence of danger thereof. The same comment applies to art. 5, subparagraph 3.

Art. 5, subparagraph 2 and the new recital (11 bis) linked to it continue to be, however, problematic as regards the imputability of the acts in question. As has been previously brought up in our comments, intentionality must cover both the act and the consequence in the Finnish system. The 10 year threshold may only be justified as regards such intentional acts that intentionally cause the death of a person. The intentionality must cover all elements of the act, that is, also the death of a person.

Questions on imputability, that is, on how to define intentionality, for example, are a part of the general part of the criminal law and apply to all crime categories. Recital 11 bis ought to be deleted or alternatively it would need to be formulated so that it is evidently only a guideline and will not include an obligation for the Member States to make amendments to their system.

The general part of the criminal law of the Member States should not be harmonized in this way. This would anyway be problematic in a directive which only covers one category of crime. This is a matter of minimum harmonization and nothing would prevent the Member States from having less stringent preconditions for intentionality in their national system.

As regards the text of article 5, paragraph 2, it ought to be amended so that there would be a clear link to the intentional act and the precondition of intentionality. It should not be possible to read the text so that any causing of death of a person linked to an intentional act would be covered by this paragraph. It cannot be so that the death of person is an element of an offence or of determining a sentence to which the preconditions of imputability do not apply. For example, a 10-year threshold is not justified for an intentional environmental offence whereby a death is caused unintentionally.

Art. 5, new paragraph 4

We consider the threshold of five years high and suggest a threshold of 4 years.

We suggest removing from this paragraph to the new paragraph 5 (the category of 3-year-threshold) the references to the following subparagraphs: d, e(i), f, g, h and n.

Art. 5, new paragraph 5

We would consider the threshold of 2 years appropriate for the acts referred to in this paragraph.

Article 7

As has been brought up by FI and some other delegations, the national systems for determining the (economic) sanctions for legal persons may be justifiably different. Those systems have usually been in use for a long time and are general and generic in nature in that they apply to all categories of crime. Setting obligations which would require changes to these basic systems would be problematic.

Paragraphs 1 and 2 in article 7 as such go further in harmonization than the 2008 directive on environmental offences. They would be enough to guarantee an appropriate level of harmonization.

As from the point of view of the Finnish delegation, paragraphs 3-5 in art.7 are in their current form problematic from the point of view of the basic solutions of the national legal system and may not be accepted.

FI would thus suggest deleting paragraphs 3-5 from art. 7. The system for determining the minimum of maximum limit of fine for legal persons as a certain percentage of the total worldwide turnover is suitable for competition regulation, for example, because in that field determining the fines for legal persons has to do with confiscative purposes and aiming at eliminating the possibility of gaining profit from infringements, but not for a criminal law instruments which has different functions.

Alternatively paragraphs 3-5 should be optional or a solution should be found in which enough flexibility is ensured for Member States.

Articles 8 and 9

We support the flexibility offered by the proposal of the Chair as regards the chapeaus of articles 8 and 9.

As regards art. 8 and the new point e, there is now a reference to a similar infringement. In the original proposal the reference is to infringements. It might be reasonable to formulate the text as follows: "...one or more similar previous infringements". One similar infringement might not be enough to create grounds for aggravating the sentence.

GERMANY

(7) In order to constitute an environmental offence under this Directive, conduct should be unlawful under Union law protecting the environment which aims to pursue one of the objectives of the Union's environmental policy, and that has been adopted, in particular, on the basis of Articles 91, 114, 168 and 192 TFEU, or under national laws, administrative regulations or decisions giving effect to that Union law. [The conduct which constitutes each category of criminal offence should be defined and, where appropriate, a threshold which needs to be met for the conduct to be criminalised should be set. Such conduct should be considered a criminal offence when committed intentionally and, in certain cases, also when committed with serious negligence. ~~Illegal conduct that causes death or serious injury of persons, substantial damage or a considerable risk of substantial damage for the environment or is considered otherwise as particularly harmful to the environment constitutes a criminal offence when committed with serious negligence. The directive does not require the introduction of gross negligence for each element of the offence, such as for possession, sale or offering for sale, placing on the market and similar elements. In these cases, MS may limit criminal liability to cases where gross negligence refers to additional elements of the offence, such as the protection status, negligible quantity or the likelihood of the act to cause substantial damage.~~ Member States remain free to adopt or maintain more stringent criminal law rules in that area.] ~~Unless expressly defined in this Directive, the terms used to describe the conducts falling under this Directive should be construed within the meaning of the legal acts respectively and specifically applicable to a particular conduct, when they are defined in those acts.~~

(8) A conduct should be considered unlawful also when it is carried out under an authorisation by a competent authority in a Member State if such authorisation was obtained, ~~inter alia,~~ fraudulently, or by corruption, extortion or coercion. Indeed, being in possession of such an authorisation does not preclude the criminal liability of the holder of the authorisation, ~~as long as~~ **where** the authorisation is unlawful and the holder had knowledge of this unlawfulness or could not be unaware of it. Moreover, operators should take the necessary steps to comply with the legislative, regulatory and administrative provisions concerning the protection of environment applicable when they carry out the respective activity, including by complying with their obligations, as laid down in applicable EU and national laws, in procedures governing amendments or updates to existing authorisations.

11bis) Where an unlawful conduct provided for in this Directive, committed intentionally, causes the death to any person, whether that death constitutes an element of the offence or is an aggravating circumstance, the intention should not necessarily be understood, for the purposes of this Directive, as the intention to cause death. Without prejudice to national laws, such an offence, if necessary aggravated, covers the situation in which the perpetrator has acted, or refrained from acting, voluntarily and in violation of a particular obligation, accepting the risk that his or her conduct may have harmful consequences on the environment or harmful effects on health, but without wanting **or accepting** the death of any person that nevertheless occurred.

(16) A further approximation and effectiveness of sanction levels imposed in practice should be fostered through common aggravating circumstances that reflect the severity of the crime committed. The notion of aggravating circumstances should be understood either as facts allowing the judge to pronounce a higher sentence for the same offence than **without that circumstance the one normally incurred**, or as the possibility of retaining several offences cumulatively in order to increase the level of sanction. **Member States should provide for the possibility of at least one of these aggravating circumstances in their national law in accordance with the applicable rules established by their legal systems on aggravating circumstances. Member States should not be obliged to provide for specific aggravating circumstances beyond that. In case Member States provide for specific aggravating circumstances as set out in this Directive, it remains within the discretion of the judge or the court to determine whether to increase the sentence due to the specific aggravating circumstances, taking into account all the facts of the particular case.** [Where the death of, or serious injury to, a person, have been caused and where these elements are not already constituent for the criminal offence, these could be considered as aggravating circumstances. Equally, when an environmental criminal offence causes substantial and irreversible or long-lasting damage to an entire ecosystem, this **should** be an aggravating circumstance because of its severity, including in cases comparable to ecocide. As the illegal profits or expenditure that can be generated or avoided through environmental crime are an important incentive for criminals, these **should** be taken into account when determining the appropriate level of sanctioning in the individual case.

(18) This Directive should apply without prejudice to the general rules and principles of national criminal law on the sentencing or the application and execution of sentences in accordance with the specific circumstances in each individual case. **With regard to additional sanctions or measures the member states should decide which kind of sanctions or measures should be seen as appropriate.** ~~In particular, concerning the obligation to reinstate the environment within a given period, this Directive does not require that the judicial authority which has imposed this obligation should also be responsible for monitoring the execution of this obligation. Likewise, concerning the withdrawal of permits and authorisations to pursue activities which have resulted in committing the offence, Member States should ensure that national judicial authorities may either impose it themselves in their own proceedings, or request it from another competent authority according to its national procedural rules. Additionnally,~~ The publication of the decision **against a legal person** imposing the sanctions or measures shall be applied in accordance with the right to privacy and without prejudice to the national rules governing the anonymization of court decisions or the duration of publication.

Article 3
Offences

b) the placing on the market, ~~in breach of a prohibition or another requirement aimed at protecting the environment~~, of a product, the use of which ~~on a larger scale~~ results, **in breach of a prohibition or another requirement aimed at protecting the environment**, in the discharge, emission or introduction of a quantity of materials or substances ~~or ionising radiation~~ into air, soil or water, which causes or is likely to cause death or serious injury to any person or substantial damage to air, water or soil quality, or to animals or plants **as a result of the product's use on a larger scale**. The use on a larger scale refers to the combined effect of the use of the product by a number of users;

c) the manufacture, placing or making available on the market, import, export or use of substances, whether on their own, in mixtures or in articles **or of treated articles**, ~~including their incorporation into articles~~, when:

(c)bis ~~manufacture, use, storage~~, import or export of mercury, mercury compounds and mixtures of mercury and mercury-added products **or the manufacturing or placing on the market of mercury added products or the use of mercury or mercury compounds or dental amalgam or the storage of mercury compounds or mixtures of mercury or waste mercury or the reclamation of mercury** in breach of the requirements set out in Regulation (EU) 2017/852 of the European Parliament and of the Council 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;

(f) the shipment of waste, within the meaning of Article 2(35)**(a), (b), (c), (f), (g)(i) and (ii)** of Regulation (EC) No 1013/2006 of the European Parliament and of the Council when such shipment is undertaken in a nonnegligible quantity, whether executed in a single shipment or in several shipments which appear to be linked;

(g) for the owner of a ship falling within the scope of Regulation (EU) No 1257/2013 of the European Parliament and of the Council, the recycling of a ship ~~at a facility which is not included in the European List established under Article 16 of~~ **without complying with the requirements of Article 6(2), point (a)** of that Regulation;

<p>(i)bis the construction, operation and dismantling of an installation, when such a conduct and such an installation fall within the scope of Directive 2013/30/EU of the European Parliament and of the Council, and only if such a 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;</p>
<p>(j) the manufacture, production, processing, handling, use, holding, storage, transport, import, export or disposal of radioactive material or substances, when such a conduct and such a material or substance fall within the scope of Council Directive 2013/59/ Euratom, Council Directive 2014/87/ Euratom or Council Directive 2013/51/ Euratom, and when such a 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;</p>
<p>(p) one of the following conducts relating to Bringing into the territory of the Union, placing on the market, keeping, breeding, transport, use, exchange, permitting to reproduce, grow or cultivate or releasing into the environment of invasive alien species of Union concern when:</p>
<p style="text-align: center;">Article 7 Sanctions for legal persons</p>
<p>3. Member States shall take the necessary measures to ensure that, for legal persons liable pursuant to Article 6(1), offences referred to in Article 3(2) points (k), (l), (m), (o), (p) are punishable by criminal or non-criminal fines, the maximum limit of which shall be not less than 3% of the total worldwide turnover of the legal person in the business year preceding the fining decision and the amount of which shall be proportionate to the seriousness of the conduct and the economic and financial situation of the legal person concerned.</p>

Article 8
Aggravating circumstances

In so far as the following circumstances do not already form part of the constituent elements of the criminal offences referred to in Article 3, Member States ~~shall take the necessary measures to ensure~~ **may provide** that, in relation to the relevant offences referred to in Articles 3 and 4, the following circumstances may, **in accordance with the relevant provisions of national law**, be regarded as aggravating circumstances:

(e) the offender **has previously been convicted of offences of the same nature**

Article 9
Mitigating circumstances

Member States ~~shall~~ **may** take the necessary measures to ensure that, in relation to the relevant offences referred to in Articles 3 and 4, the following circumstances may, **in accordance with the relevant provisions of national law**, be regarded as mitigating circumstances:

LITHUANIA

We appreciate the work done by the Presidency and broadly support the proposed updates, but we still have some key remarks that are very important for the Republic of Lithuania, as it is not possible to transpose the relevant provisions of the Proposal as they stand at present.

Article 3, Part 2, Point b

According to LT, the use of the term “use on which of larger scale” to describe the composition of a criminal offense is inappropriate, as the limits of criminal liability are unreasonably narrowed, additional obstacles to the effective prosecution are established. In this context, it should be noted that the composition of the offense in question presupposes the occurrence of extremely serious consequences, so that criminal liability for such consequences should not be linked to the demonstrable fact that the use of the product in question was on a large scale. It is considered that it is entirely sufficient to provide for criminal liability for the placing on the market of the products in question if their use, whatever their extent, has caused the adverse effects in question. This proposal would also make it easier to prove this offence, without burdening pre-trial investigation bodies or prosecutors with the burden of proving that the product in question was used on larger scale.

Article 3, Part 3

As in previous meetings, Lithuania requests not to apply the requirements of negligence to criminal offenses which do not indicate the occurrence of dangerous consequences. In this context, it should be noted that according to Lithuania criminal law, formal criminal acts t. y. such offenses which provide for criminal liability solely for acts without the occurrence of adverse consequences cannot be committed with negligence. Negligence, as a form of intent, under Lithuania and presumably the criminal law of other Member States, is linked to the unforeseeability of the specific dangerous consequences of a criminal offense when, in the light of the relevant circumstances, the person had and could have foreseen them. According to Lithuania criminal law, it is not possible to link negligence simply to criminal activity, which in general raises doubts at the level of the concept of intent in criminal law. How a person can carelessly dismantle a ship, export, import, place on the market illegally manufactured goods, products, chemicals, sell timber, all of which require an element of will, a specific understanding of the action, otherwise it would generally be considered as a case. In view of this, it is not possible to transpose the relevant provisions of the Proposal into our national law, therefore, without removing from Article 3 (3) subpoints e, f, h, l, m, n, o, q, r from this Article, or without providing for mandatory dangerous consequences for the aforementioned offences, Lithuania cannot accept a partial agreement on the text of the Proposal. If MS consider our proposals to be unfounded, please note at least in the preamble that the provisions of Article 3 (3) apply in MS national law according to their criminal law system, principles, concept of criminal intent, as suggested by German delegation.

Article 5, Part 4 and 5

LT reiterates its proposal to lower the threshold to 4 and 2 years, but if this proposal is not accepted, we consider it appropriate to assess the list of offenses in Article 5 (4) and (5), balancing them according to the seriousness and nature of the offenses. Against this background, we propose to move from Article 3 (4) to (5) the offenses provided for in points (f), (g), (h), (q) and (r), as they are significantly less serious in their degree and nature than other offenses and do not foresee neither the negative consequences nor even a risk of consequences. It is considered that all formal offenses, as described above, which do not have serious consequences, embedded in the offense, should be covered by Article 3 (5) instead of Article 3 (4).

Article 5, Part 6, point a

We suggest adding 'or compensate the damage' to Article 5 (6) (a), as the current wording makes it possible to avoid this additional penalty if it is not possible to repair the damage caused to nature. However, this does not mean that a person cannot be required to make monetary compensation for environmental damage.

ROMANIA

RO can support the revised wording of articles 2-9 and the corresponding recitals as set out in document 8569/22 with the exception of the following for which RO hereby submits its written comments:

1. **Recital 7**, last sentence: it is not specified at what level those acts are, it should be specified that they are acts of the Union.
2. **Recital 8**: RO will have a position depending on the final text.
3. **Recital 11** should be re-examined. RO considers that, as regards the death or injury of a person, the Directive should only cover cases of unintentional offenses, ie those in which the most serious consequence (in this case the death / injury of the person) was caused by negligence, not intentionally. In such cases, national law may provide for either a premeditated crime (the act which resulted in the death of the victim, or to allow concurrent offences rule to operate, which means that the act of pollution will be a concurrent offence with the death of the person by negligence or negligent bodily harm). However, when the death or injury of the person was committed intentionally, the rule of concurrent offences will always apply, which means that the act of pollution will be concurrent with the one of murder or injury, and the directive should not impose another approach to the MS, as this would in fact mean diminishing criminal liability.
4. **Recital 11 bis**: the text needs rewording in such a way as to make it clear that the directive in question does not take into account, when it comes to the intentional infringement of certain provisions in this field, the fact that the perpetrator pursues or accepts murder / personal injury of (a) person (s).
5. **Recital 18**: a limitation of the obligation to restore the environment to where it is possible and including a reference to the reversibility of the damage should be provided; with regard to the publication of the judgment, its anonymization should exempt the perpetrator.

6. **Article 2 Definitions:** RO considers that definitions of "substantial damage" and "total annual turnover" are still needed in order to comply with the principle of legality of criminal law. There is a correlation between the degree of predictability of a criminal law provision and the personal liability of the offender. The relevant law is foreseeable when "the applicant's act, at the time of the commission, constituted an offense defined with sufficient precision by domestic and / or international law to be able to guide the applicant's conduct and prevent arbitrariness (ECHR, *Žaja v. Croatia*, no. 37462/09, § 93, 4 October 2016 with further references).
7. **Article 2, paragraph 2:** from a legislative point of view, the definition of "habitat within a protected site" should be maintained in Article 2-Definitions. Same comment for Article 3, paragraph 2, point o).
8. **Article 2, paragraph 1:** for correlation purposes with art. 3 para. (1), art. 2 paragraph (1) should also refer to art. 3 para (3).
9. **Article 3:** RO believes that the notion of "serious injury" should be added, alternatively, to the notion of "serious harm to human health", for a more complete evocation of the possible results.
10. **Article 3, paragraph 2, point (a):** In this case, unlawful should be defined in the definition. If this remains the case, at least with regard to the circumscription of EU legislation in the sphere of the notion of unlawful, there will certainly be problems in the process of transposition and implementation, given the lack of clarity and predictability.
11. The approach in the draft is deterministic, wanting to incriminate only those behaviors capable of causing the result in relation to the cause-effect principle. But this should be explicitly specified in the directive, in a way that should facilitate its transposition.

12. **Article 3, paragraph 2, point (b)**: the phrase “larger scale” is new, should be discussed and defined, taking into account the fact that there are, for example, different interpretations of data protection authorities of different positions on large-scale processing, in which varies from 5,000 to 50,000 people (in the case of processing special categories of personal data and / or data relating to criminal convictions and offenses, the threshold is 5,000 people. This threshold is doubled to 10,000 people if they are data related to financial and payment services, trusted digital services such as electronic signatures, and communication data, real-time geolocation data, and legal profiling data. Estonia is at high risk, and finally, for all other data, the large-scale threshold is set at 50,000 people, which means that any data covering more than 50,000 people will trigger, for example, the DPIA requirement). At the same time, we have some reservations about the usefulness of letter b), which can be seen as a modality of the offence defined in letter. a) above.
13. **Article 3, paragraph 2, point (c)**: the text also does not refer to the placing on the market as a means of committing the offense, although it is defined in Art. 2 point 11 of Regulation 2017/852. The same comment from art. 3 letter a) regarding the deterministic approach is valid.
14. **Article 3, paragraph 2, point (d)**: the phrase "without development consent" customizes "unlawful". But why isn't the behavior "in breach of (...)" also criminalized? Why is the result limited? Why does the criminalization of serious negligence conduct disappear (since a similar form of result in offence in letter k) remains criminalized also if committed by serious negligence?
15. **Article 3, paragraph 2, point (f)**: the notion "is undertaken in" should be transformed into "when it concerns". Similar changes were proposed (see point i) of letter e) above). In addition, it is difficult to have such a crime committed by negligence.
16. **Article 3 (2) (h)**: a result should be defined at least in the form of a reference to a rule in the Directive (or in the Framework Decision referred to therein). Because, in any case, the present definition that is referred to in an exception about a result (deterioration of water quality).

17. **Article 3, paragraph 2, point (i):** for clarity purposes, the phrase "when such a conduct and such a dangerous activity, substance or mixture" should be replaced by "when these notions".
18. **Article 3, paragraph 2, point (i) (bis):** RO believes that the phrase "when such a conduct and such an installation" could be replaced by "when these notions".
19. **Article 3, paragraph 2, point (j):** RO believes that the phrase "when such a conduct and such a material or substance" could be replaced by "when these notions".
20. **Article 3, paragraph 2, point (l):** acts committed by serious negligence may also be criminalized.
21. **Article 3, paragraph 2, point (o):** from a legislative technique point of view, the definition of "habitat within a protected site" should be maintained in Article 2 - Definitions. The phrase "significant deterioration or disturbance" is still not defined. The latter cannot be included in the "substantial damage" hypothesis for which determination criteria have been established according to art. 3 para. 4. The reference to Directive 2009/147 / EC should not be present, as the reference to Sectoral Directive 92/43 / EEC is sufficient. Acts committed by serious negligence may also be criminalized.
22. **Article 3, paragraph 2, point (p):** The concept of "one of the following conducts" should be replaced by "any conduct".
23. **Article 3, paragraph 2, point (p), point (i):** if the result also occurred, the act should also be criminalized when committed by serious negligence.
24. **Article 3, paragraph 2, point (q):** the phrase "products and equipment containing or relying on such substance" should be clarified if it refers to those defined in Art. 3 point 29 of Regulation 1005/2009 and if so, a reference should be made in this respect, as in the case of substances.
25. **Article 3, paragraph 2, point (q), second sentence:** the term 'release' is not likely to refer to products and equipment. What is meant by this way of committing the offence? Regulation 517/2014 refers only to "equipment containing fluorinated greenhouse gases" and not to "relying on".

26. **Article 3, paragraph 4:** the elements provided for the assessment of the damage caused to the environment as substantial are insufficient to define a concept which must clearly distinguish between criminal liability and other types of liability, in particular none of them set limits. The impact assessment states that one of the shortcomings of the current directive is the lack of well-defined deadlines - negligible or non-negligible amount, hazardous activity, significant damage - stating that this prevents the initiation of criminal investigations (pag. 20, point 2.1.2). However, the draft of the new directive does not take any serious steps to address this issue, since the criteria proposed below do not lead to a concrete pattern. In addition, in transposition, in the absence of concrete benchmarks for delimiting the types of liability, these terms may become vulnerable from the perspective of predictability and clarity of criminal law. In view of the comment made by RO (March 31st meeting), letter a) may be completed as follows: "the initial state of the affected environment, as far as it is known".
27. **Article 3, paragraph 5, point (a):** it will be difficult to determine what it refers to.
28. **Article 4:** why the attempt to execute projects without development approval is not (anymore) sanctioned?
29. **Article 5, paragraphs 2:** if points i) and ii) of letter e) are provided, then those of letter c) must also be in the text; in addition, what is the punishment if the act is likely to cause the death of a person?
30. **Article 5, paragraph 4:** the following phrase should be added to the text: "when, as the case, one of the consequences specified in these provisions has been caused, other than death".
31. **Article 5, paragraph 5:** paragraph 5 partially overlaps with Article 5 (2), which refers to some of the letters in Article 3 (2).
32. **Article 5, paragraph 6, point (f):** RO believes that keeping the text in the directive (but with the need for clarification) could serve the purpose of strengthening the effectiveness of the new instrument. For natural persons, such a sanction is an ancillary penalty.

33. **Article 7, paragraph 3:** the concept of *turnover* has not been clarified. There is no information to in the recitals on any clarification of the latter. Moreover, the system for calculating fines should be more flexible and should not be limited to the criteria of the turnover of the legal persons responsible for the offense. Other mechanisms for calculating fines may be taken into account as long as they ensure the deterrent nature of the sanctions. It should be kept in mind that it is probably the majority of MS that will have to change their sanctioning systems in a way that will have to operate two different procedures in parallel: one for sanctioning legal persons that commit criminal offences related to environment and the other for those who commit other categories of such offences (with the unnatural possibility of applying both procedures simultaneously).
34. **Article 8, point (a):** what is the legislative text that defines it?
35. **Article 8, point (c):** the text should be supplemented by the phrase: "by the same perpetrator".
36. **Article 8 lit. e):** RO believes that further * clarification is required with respect to the relationship between recidivism and the aspects referred to in this article as "aggravating circumstances", all the more as the clarification from para. 16 of the preamble does not seem to consider recidivism, but only the concurrent offences. If this form of aggravation of punishment (recurrence) is desired then the exception at the end of the text is natural because it highlights an exception. But here, also taken into account as an exception, the category of serious negligence offenses should also be highlighted, because the institution of recurrence is not compatible with the idea of offenses committed by negligence.

Previous comments on this topic: "The relationship with repeated offences (recidivism) requires clarification. For example, recidivism has limited effects in time. Is it intended that this ban be a permanent one, without the possibility of rehabilitation? We believe that the text should be supplemented by these clarifications in order to facilitate the transposition process. For the incidence of this aggravating circumstance, is it necessary to have a conviction for a similar offence or is it sufficient to commit an act provided by criminal law? Does „similar previous infringement” only consider offences or misdemeanors, too?"

SPAIN

COMMENTS TO ARTICLE 3 (2):

1.- **Current drafting Art. 3.2 c):** the manufacture, placing or making available on the market, import, export or use of substances, whether on their own, in mixtures or in articles, including their incorporation into articles, when (...):

Proposal: **include a new paragraph: vii) *this conduct is not in compliance with Regulation 649/2012 of the European Parliament and of the Council of 4 July 2012, concerning the export and import of hazardous chemicals.***

Offences related to lack of compliance with Regulation 649/2012 should be added.

2.- **Current drafting Art. 3.2 n):** the placing ~~or making available~~ on the Union market of illegally harvested timber, or of timber products derived from such timber, in breach of the prohibitions and obligations set out in Article 4(1) of that were made of illegally harvested wood, falling within the scope of Regulation (EU) No 995/2010 of the European Parliament and of the Council, except for cases where the conduct concerns a negligible quantity.

Proposal: **Referral to Article 4 should cover Article in its entirety, not only paragraph (1).**

Therefore: “in breach of the prohibitions and obligations set out in **Article 4** of Regulation (EU) No 995/2010”.

From experience on the application of Regulation 995/2010, many Member States deal with difficulties in proving before a Court and sanctioning exclusively on grounds of “placing on the market of illegally harvested timber or timber products derived from such timber”. Article 4 requires, before placing timber on the market, that operators (paragraphs 2 and 3) shall exercise due diligence or shall maintain and regularly evaluate the due diligence system, in order to assure that there is no considerable risk of illegality. Evidence on the lack of compliance with these obligations established in paragraphs (2) and (3) would facilitate sanctioning procedure. Therefore, it is preferred to mention the entire Article 4.

Moreover, referral to Article 4 in its entirety is more consistent with the Proposal of a Regulation on deforestation, in which compliance with Article 3 is considered in its entirety, in particular, to comply with the obligation of a due diligence statement (c), and not exclusively that the products are deforestation-free and to comply with the requirement of legality (a and b).

3/ **Current drafting Art. 3. 2 q)** production, placing on the market, import, export, or use, ~~emission or release~~ of ozone depleting substances as defined in Article 3 (4) of Regulation (EC) No 1005/2009 of the European Parliament and of the Council or production, placing on the market, import, export or use of products and equipment containing or relying on such substances.

Proposal: not to delete “emission or release”. Reason for this proposal is that the Proposal of the new Regulation declares as follows: *“The intentional release of ozone depleting substances including when contained in products and equipment into the atmosphere shall be prohibited where the release is not technically necessary for the intended uses permitted under this Regulation”*. Therefore, it is proposed not to eliminate “emission or release”, apart from the illegal commercialization.

SWEDEN

Article 3.1

Subpoints q) and r) – illegal conducts relating to the Ozone Depleting Substances Regulation and the F-gas Regulation

All illegal conducts that lead to an increased risk of emissions of f-gases and ODS into the atmosphere must be considered as serious. However, all illegal conducts do not have to be criminalised. Administrative sanctions could sometimes be a more effective sanction. That seems to be also the view of the Commission since the proposals for a revised F-gas regulation (COM(2022) 150 final) and a revised ODS Regulation (COM(2022) 151 final) both include an obligation to impose severe administrative penalties and take other administrative measures in relation to infringements of the Regulations.

According to the Presidency proposal the words “emission or release” have been deleted in subparagraph q) and “production”, “export” and “emission” have been deleted in subparagraph r). We welcome the attempt to define the criminal conducts more clearly, but we do not agree with the proposed deletions in subparagraph q) and r). We believe that the most serious offences are the production, import, export and the making available of illegal f-gases and ODS on the market. Investigation of such offences often has cross-border dimension. In addition, this is where the criminal networks are present. Consequently, this is where a criminal sanction is most effective and required in order to enforce compliance.

Where the illegal conducts concern use, emission or release of f-gases or ODS, criminal sanctions are not necessarily required. These offences are most likely committed by companies with legitimate businesses that are susceptible to the threat of severe administrative sanctions. Against that background and considering that administrative sanctions are also more cost efficient for member states, member states should not be required to provide for criminal sanctions for use, emission or release of f-gases or ODS. But they should of course be able to do so.

It is important to carefully consider which sanctions are the most effective to combat conducts which contravene the f-gas regulation and the ODS regulations and this must be discussed more thoroughly.

Article 5 Penalties for natural persons

Under Article 5(2) an unlawful conduct committed intentionally, which have caused death to any person, shall be punishable by a maximum term of imprisonment of at least ten years. As Article 5(2) is currently drafted it in principle harmonises the minimum maximum term of imprisonment for murder, which is clearly outside the scope of this directive. Since all or most Member States already have a minimum maximum term of imprisonment of at least ten years for murder, in practice this harmonisation would not, however, have any practical effect.

Recital 11)bis clarifies that, in the event a conduct caused death to any person, the intention should not necessarily be understood as the intention to cause death. It suffices that the perpetrator accepts the risk that the conduct may have harmful effects on the environment or on human health. Consequently, it is only required that the perpetrator is negligent with respect to the risk for harmful effects on the environment or on human health. We believe that it is not appropriate to define meaning of key concepts of criminal law, such as “intention”, in Union law.

Furthermore, it is unreasonable to specify the meaning of intent when there is no corresponding clarification regarding negligence in Article 5(3). It is also not appropriate to define negligence in detail as this too is a concept that differs between Member States.

This shows, in our opinion, that it is not appropriate to have a special regulation for environmental crimes that cause death. Our proposal is therefore to return to the Commission’s proposal which relates to the likelihood of causing death.

If that proposal is not acceptable to other Member States it would be necessary to modify the wording of the offences in Article 3(2). If that proposal is not acceptable to other Member States it would be necessary to modify the wording of the offences in Article 3(2).

Article 7 Sanctions for legal persons

We support the Presidency's proposals concerning Articles 7(1) and 7(2).

As mentioned before and stated in our written proposal, we are concerned about Articles 7(3)–7(5) and strongly oppose the proposed wording in the articles. There is no existing criminal law directive that regulates minimum sanction level for legal persons. The MS criminal law systems are based on partly different traditions and principles, and it is therefore not appropriate to regulate criminal law matters of this nature at such level of detail.

At the meeting this Friday there seemed to be support for redrafting the Article to leave some room for different solutions between the MS in this matter.

As stated, our first suggestion would be to delete the detailed regulation proposed. If there is not enough support for doing so our drafted proposal should be perceived as an attempt to reach a compromise that is acceptable to most MS. In substance, only Article 7(4) is new but in addition to that new paragraph, we have tried to merge the different paragraphs with maximum limits into one paragraph (Article 7 (3)). That way, there is no need to repeat the same text in all different paragraphs. For the same reason, we propose that the text relating to the proportionality is placed in a single paragraph (Article 7(5)). In that paragraph we have also tried to clarify the meaning of the last part of the sentence by adding the word “financial” as it is our understanding of the text that the referral to the situation of the legal person should be understood as the “financial” situation of the legal person.

See the proposed text below:

Article 7 1. (According to the latest proposal)

2. (According to the latest proposal)

3. Member States shall take the necessary measures to ensure that, for legal persons liable pursuant to Article 6(1), offences referred to in Article 3(2) are punishable by criminal or non-criminal fines. Member States shall take the necessary measures to ensure that the maximum limit of such fines shall not be less than

(i) 5 % of the total worldwide turnover of the legal person in the business year preceding the fining decision for offences referred to in Article 3(2) points (a) to (j), (n), (q), (r),

(ii) X % of the total worldwide turnover of the legal person in the business year preceding the fining decision for offences referred to in Article 3(2) points (a), (b), (c), (c)bis, (e) (i) and (ii), (i), (i)bis, (j), and p (i) and (ii) having caused death to any person. Such maximum limit is reduced to Y % for offences referred to in Article 3(3), as it refers to Article 3(2) points (a), (b), (c), (c)bis, (e) (i) and (ii), (i), (i)bis, (j), and p (i) and (ii), having caused death to any person, and

(iii) 3 % of the total worldwide turnover of the legal person in the business year preceding the fining decision for offences referred to in Article 3(2) points (k), (l), (m), (o), (p).

4. Member States may, regarding criminal fines, use other methods to provide a maximum limit and level of fines, provided that the result is similarly effective, proportionate and dissuasive to those listed in Article 7(3).

5. The Member States shall take the necessary measures to ensure that the level of fines is proportionate to the seriousness of the conduct and the financial situation of the legal person concerned.

6. (According to the latest proposal)

Article 8 Aggravating circumstances

Like many other Member States, Sweden can accept the proposal made by the Presidency.

Since there was a debate on e), we suggest drafting that point in the same way as Article 9 in the Directive on combating the sexual abuse and sexual exploitation of children and child pornography (2011/93/EU):

(e) the offender has previously been convicted of offences of the same nature;

Recital 16 needs to be updated and one possibility is to write it in accordance with Recital 21 of the above-mentioned Directive:

(21) Member States should provide for aggravating circumstances in their national law in accordance with the applicable rules established by their legal systems on aggravating circumstances. They should ensure that those aggravating circumstances are available for judges to consider when sentencing offenders, although there is no obligation on judges to apply those aggravating circumstances. The aggravating circumstances should not be provided for in Member States' law when irrelevant taking into account the nature of the specific offence. The relevance of the various aggravating circumstances provided for in this Directive should be evaluated at national level for each of the offences referred to in this Directive.
