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NOTE

From:	General Secretariat of the Council
To:	Delegations
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

Delegations will find in the annex proposals from the Presidency following discussions in the JHA Counsellors (+Experts) meeting of this morning.

Follow up of the discussions in the morning

1) The horizontal issues: energy, harm, ecosystem – line 66

See also lines 67, 75, 76, 83, 83a, 84, 91 and 92.

a) Energy

Revised text of the accompanying recital :

“The introduction of different forms of energy, such as heat, ~~or other~~ sources of thermal energy, noise (including underwater noise) and other sources of sound energy, vibrations, electromagnetic fields, electricity or light, into the environment can cause substantial damage to the quality of air, water or soil or substantial damage to an ecosystem, animals or plants, or death or serious injury to persons. Various instruments of Union environmental law regulate on the introduction of energy into the environment, for example in the area of protection of water, the marine environment, noise control, waste management and industrial emissions. Therefore, in such cases, unlawful introduction of energy into the environment should constitute an offence under this Directive if it causes or is likely to cause substantial damage to the environment or human health.”

c) *Ecosystem*

Revised text of the recital:

*“The environment should be protected in a wide sense, as set out under Article 3(3) TEU and Article 191 TFEU, covering all natural resources - air, water, soil, ecosystems, including ecosystem services and functions, wild fauna and flora including habitats, as well as services provided by natural resources. Some criminal offences in this Directive include a qualitative threshold requiring that the conduct causes death or serious injury to any person or substantial damage to air, water or soil quality, or to **an ecosystem**, animals or plants. In order to protect the environment to the fullest extent possible, this qualitative threshold should be understood in a wide sense including, where relevant, substantial damage to fauna and flora, habitats, to services provided by natural resources and by ecosystems as well as to ecosystem functions. **An ecosystem should be understood as a dynamic complex of plant, animal, fungi and microorganism communities and their non-living environment, interacting as a functional unit, and should cover habitat types, habitats of species and species populations. An ecosystem should also include ecosystem services, through which an ecosystem contributes directly or indirectly to human wellbeing, and ecosystem functions, which refer to natural processes in an ecosystem.**”*

2) Offence related to products – Article 3 (1)(b) – line 67

Revised text of the recital:

“This Directive defines as an offence 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 results in the discharge, emission or introduction of a quantity of materials or substances, energy or ionising radiation into air, soil or water, which causes or is likely to cause substantial damage to the environment or human health as a result of the product's use on a larger scale. In this context, a prohibition or another requirement aimed at protecting the environment should refer to Union law ~~and national law transposing such Union law~~ which has, among its ~~declared~~ stated objectives or aims the protection of environment, including preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilisation of natural resource or combating the climate change, or promoting measures at international level to deal with regional or worldwide environmental problems. On the contrary, if the stated objective of Union law concerns only one or more other areas of Union law, for example protection of workers' health and safety, ~~but not an area which falls under a declared objective of Union policy on environment~~, the conduct should not be covered under this offence.”

4) **The offence of deforestation – Article 3(1)(n) – line 88**

Revised text of the recital:

“With regard to the determination of whether the quantity of a relevant product or relevant commodity associated with deforestation or forest degradation is negligible or non-negligible, Member States could take into account for example the quantity in net mass, or, where applicable, volume or number of items or the negligible scale of the activity in question. Such assessment ~~should~~ could also take into account, where relevant, other criteria listed in this Directive, including the conservation status of the species concerned or the cost of restoration of environmental damage.”

6) **Additional criminal or non-criminal sanctions or measures – Article 5(5) – Lines 119-126 and 136-147**

Revised text :

“Member States shall take the necessary measures to ensure that natural persons who have committed the offences referred to in Articles 3 and 4 may be subject to additional criminal or non-criminal sanctions or measures. [Line 119]

*The sanctions and measures **which must may be available ~~in criminal proceedings~~ shall can include:***

(a) obligation to reinstate the environment within a given period, provided that the damage is reversible, or, the obligation to compensate for the damage to the environment if the damage is irreversible or if the perpetrator is not in a capacity to carry out such a reinstatement. [Line 120]

(b) fines, which shall be proportionate to the seriousness of the conduct and to the financial and other individual circumstances of the natural person concerned. Where relevant, due account shall also be taken of the gravity and duration of the damage caused to the environment and of the financial benefits generated from the offence. [Line 121]

~~The sanctions and measures which may be available [in criminal proceedings] can include:~~

(c) exclusions from access to public funding, including tender procedures, grants, concessions and licences;¹ [Line 122]

(d) disqualification from exercising a leading position within a legal person of the type used for committing the offence;²[Line 123]

(e)(ex.f) temporary bans on running for public office;³[Line 125]

(f) (ex g) where there is a public interest, publication of all or part of the judicial decision that relates to the criminal offence committed and the sanctions or measures imposed following a case-by-case assessment. The personal data of convicted persons may be published only in duly justified exceptional cases. [Line 126] ⁴

7) Civil liability – Article 6(1) point ca) (included by EP) – Line 131a

Revised text of the recital:

“This Directive should not ~~preclude~~ **affect** the civil liability of a legal person in accordance with national law or the obligation of a legal person to compensate for harm or damage caused as a result of a specific offence referred to in this Directive in accordance with Union or national law.”

¹ Agreed text.

² Agreed text.

³ Agreed text.

⁴ In line with this paragraph f) (ex g), a similar but slightly modified text is being considered for line 147 with respect to legal entities.