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MEETING DOCUMENT

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 - Compromise proposal by the Netherlands for Article 5
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With reference to note 12221/22, and in view of the discussions in CATS on 21 September 2022, delegations will find attached a compromise proposal by the Netherlands for Article 5 of the draft Directive.

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

NL compromise proposal for Article 5

Compromise proposal

At the COPEN meeting on September 7 and 8 several Member States supported the Swedish proposal to delete article 5.2 and 5.3 and raise the thresholds in article 5.4 and 5.5. In addition, a number of Member States expressed support for deleting article 5.2 and 5.3 but retaining the minimum maximum penalties of six and four years in article 5.4 and 5.5 in line with the proposal by the presidency.

Taking into account that articles 5.2 and 5.3 are highly problematic for several Member States while at the same time being of little relevance for combatting environmental crime effectively, we maintain that these articles should be deleted. We believe that a majority of the member states could support this, provided that the thresholds in articles 5.4 and 5.5 are not raised.

Therefore, in the spirit of compromise The Netherlands would like to submit the following proposal. The proposed changes to article 5 are accompanied by a short explanatory note, which elaborates on the earlier Swedish proposal that has been discussed during the last COPEN meeting.

Article 5

Penalties for natural persons

1. Member States shall take the necessary measures to ensure that offence referred to in Article 3 and 4 are punishable by effective, proportionate and dissuasive criminal penalties.
- ~~2. Member States shall take the necessary measures to ensure that offences referred to in Article 3(2) points (a), (b), (c), (c), (c)bis, (e), (i), (i)bis, (j) and (p) are punishable by a maximum term of imprisonment of at least ten years if the cause death to any person.~~
- ~~3. Member States shall take the necessary measures to ensure that offences referred to in Article 3(3), as it refers to Article 3(2) points (a), (b), (c), (c)bis, (e), (i), (i)bis and (j), are punishable by a maximum term of imprisonment of at least five years if they cause death to any person.~~
4. Member States shall take the necessary measures to ensure that the offences referred to in Article 3(2) points [(a) to (e), (i), (i)bis, (j), (q) and (r)]* are punishable by a maximum term of imprisonment of at least five years.
5. Member States shall take the necessary measures to ensure that the offences referred to in Article 3(2)[points (f), (g), (h), (k) to (p)]* are punishable by a maximum term of imprisonment of at least three years.

* The various subparagraphs of article 3(2) are put between brackets. Our proposal focuses on the fundamental question of the added value of the paragraphs 5(2) and 5(3). Whether specific subpoints should be included in article 5(4) or 5(5), is a separate discussion.

Explanatory note (elaborating on the previous Swedish proposal)

Article 5.2 and 5.3 as currently drafted set a minimum maximum term of imprisonment of 10 years for intentional acts which have caused death to any person and 5 years of imprisonment for offences committed with serious negligence which have caused death to any person. Although the causing of death is part of some of the criminal definitions in article 3 we cannot agree with the proposal to set a specific minimum maximum penalty for offences that have led to this effect. The articles as currently drafted put an obligation on member states to construe “manslaughter by infringing environmental law” offence with a minimum maximum penalty which is lower than the maximum penalty for manslaughter in general in most Member States.

We suggest to delete article 5.2 and 5.3 because as they are drafted they do not have added value. Also, the transposition of these articles in their current would be very problematic to a number of member states, as they are alien to the national criminal justice system for various reasons. It is important that criminal sanctions in the updated Environmental Crime Directive are not only proportional, effective and dissuasive. In addition to this, they should also be relevant: They must clearly have added value on top of the sanctions that are already available in the various Member States.

The original Commission proposal covered not only death of a person, but also serious injury and likelihood of death/serious injury. The current version maintains only intentional and negligent death. However, since environmental crime does not lead to death in such close connection in time to the offence that it can be part of a prosecution, article 5.2 and 5.3 will not have added value in practice. The killing of a person can already be prosecuted under ordinary offences of murder/manslaughter, also in cases where the killing has been caused by infringing environmental law. Furthermore, causing the death of a person by infringing environmental law should not, as a matter of principle, be considered less severe than causing the death of another person in general.

Our proposal means that articles 5.4 and 5.5 will cover all offences in article 3(2) irrespective of the negative effects of the offence, including the offences with the most severe effects to human health and the environment.
