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MEETING DOCUMENT

From:	General Secretariat of the Council
To:	Working Party on Judicial Cooperation in Criminal Matters (COPEN) (Environmental Crime)
N° prev. doc.:	ST 13298/23
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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 - Presidency proposal for a "general offence"

Following the discussions of this morning in the meeting of the JHA Counsellors + Experts (COPEN, environmental crime) on the compromise text for a "general offence" (13298/23, point 16), delegations will find attached a note by the Presidency containing a revised proposal for such text.

PRESIDENCY'S COMPROMISE TEXT FOR A NEW GENERAL OFFENCE

A new paragraph 3 to be inserted in Article 3

The Presidency welcomes the compromise proposal put on the table by the Commission, and appreciates the efforts made to find a way to address the serious technical shortcomings that the Council observed in the Parliament's proposal.

However, during the meeting this morning, Member States expressed concerns about a number of issues contained in the Commission's proposal.

In the light of MS' comments, the Presidency has worked on a possible new compromise proposal, largely based on the Commission compromise text but trying to accommodate MS' concerns as expressed this morning. The Presidency's proposal goes still in the direction of an aggravation, but also include elements to cover future developments of EU law. The PCY is of the opinion that this two-folded approach would satisfy the EP.

Main elements of the proposal

- 1- By using the term '*unlawful*', the proposal adheres to the definition contained in the Directive – which the Council has transferred to Article 3 – and thus refers solely to the objectives of EU policy set out in Article 191(1) TFEU. This is not evident in the compromise proposal tabled by the Commission, where the legal reference to EU and national law is open and, therefore, too generic.
- 2- The Presidency text is limited to intentional conducts, which also makes the conduct more precise. This does not exclude that Member States can go further.
- 3- Legal certainty on the description of the conduct: '*destruction*' and '*causation of (...) damage*' are specific types of conduct producing catastrophic results. This satisfies the requirements of the principle of legality. At the same time these types of conduct are broad enough not to generate gaps. Thus, this reduces the risk of leaving unpunished conduct that can be extremely harmful to the environment, which seems to be one of the main EP's concerns. The Parliament used the words '*any conduct*', which are much vaguer.
- 4- The offence covers both the complete destruction of an ecosystem or natural habitat and irreversible or long-term substantial damage to them, or to the quality of air, the quality of soil or the quality of water. It has to be noted that, unlike other offences included in Article 3, for instance in paragraph 1 (paragraph 2 in the Council's version) where only substantial damage is required, here the damage, in addition to being substantial, must be '*irreversible or long-term*' (cumulative condition). Therefore, there is no overlap, the conduct is different and more serious.
- 5- The sentence "*where it is not covered by one of the offences referred to in Article 3(1)*" is deleted: if the action was covered by one of the specific offences in Art. 3(1), it should be still possible to apply the aggravated modality, in order not to incur in a contradiction.

- 6- It is true that, in theory, this offence could include conduct that is not expressly provided for in the current letters of art. 3(1), but this is unlikely to be the case because the offence of letter a) includes a huge range of actions likely to produce this result.
- 7- This is a future-proof text, since the requirement that the conduct has to be 'unlawful' makes it possible to cover future developments of EU law, so that the abovementioned conduct, as the most serious imaginable from an environmental perspective, will be criminal without the need to amend the Directive. For other possible future less serious conduct, the review clause of Article 25, paragraph 3, interpreted in accordance with the dynamic referral explained in Recital 10, may apply. In fact the Presidency's proposal makes an open and dynamic reference to other non-criminal, environmental rules, in the same way as in the offence referred to in letter a) of Article 3(1).
- 8- It is an offence susceptible to be committed equally by natural and legal persons.
- 9- The proposed offence does not include causing death or injury to persons. If, in addition to the destruction or catastrophic damage to the environment, death or injury to persons are caused, the corresponding offences of homicide and injury will also apply.
- 10- The compromise proposal does not set out any specific minimum maximum penalty for this new offence. The proposal defines aggravated conduct in relation to the other offences included in the Directive. The proposal leaves it up to Member States how this aggravation is to be implemented, in accordance with their national systems. The proposal tabled by the Commission does include a minimum maximum penalty, which predetermines a certain assessment of proportionality that the Presidency believes should be left to the Member States.

In the light of the abovementioned comments, the Presidency suggests the following text:

[3] 'Member States shall ensure that the unlawful and intentional destruction of, or the causation of irreversible or long-term substantial damage to, an ecosystem or natural habitat, or the quality of air, the quality of soil or the quality of water, constitutes an aggravated criminal offence'

6) Liability of legal persons – Article 6(3) – Line 133

Following this morning's session, the Presidency proposes the following compromise text for the recital accompanying Article 6(3):

*“3. Liability of legal persons under this Directive should not exclude criminal proceedings against natural persons, who are perpetrators, inciters or accessories in the offences referred to in this Directive. **Such persons should, where appropriate, include corporate board members.**”*

Unless Member States indicate otherwise, the Presidency assumes that this text is acceptable to delegations.
