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## MEETING DOCUMENT

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From:	General Secretariat of the Council
To:	Working Party on Judicial Cooperation in Criminal Matters (COPEN) (Environmental Crime)

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N° prev. doc.:	ST 14032/23
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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 - Proposal by France, Germany and Sweden relating to the amendment on the 'general clause'
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In view of the JHA Counsellors meeting on Wednesday 18 October 2023, delegations will find attached a proposal by France, Germany and Sweden relating to the EP amendment on the 'general clause' (formerly called 'catch all') in line 94c.

## Possible compromise proposal by DE / FR / SE

### **Environmental Crime Directive - Line 94c (General clause/Catch all)**

This proposal addresses aspects of the Parliament's proposal in line 94c: firstly, the urge to address severe forms of environmental crime, and secondly the issue of future proofing the directive.

The Council sees the important signal the EP wants to set by defining a new offence which considers the most severe consequences of certain environmental crimes. We understand the importance of covering not only specific consequences for certain areas like air, soil, and water but also devastating changes to the environment such as the destruction of a natural habitat or ecosystem.

However, the Council also underlines the need to uphold fundamental criminal law principles based on the rule of law. In particular, the construction of criminal offences must respect the principles of legal certainty and predictability. We think that there is a legally sound possibility to fulfil the EP's wishes by introducing a qualifying element, in practice this would be an aggravated offence covering the most severe forms of environmental destruction. This would be a new element in EU environmental criminal law. Introducing such a qualifying element would be "more" than a super-aggravating circumstance because it ties a severe punishment to specific environmental crimes if they have led to severe consequences.

In the current draft the most severe qualifying element – as it is common in criminal law – is the death of a person. The death of a person is not only an aggravating circumstance but justifies a specific qualifier, as is laid down in Art. 5 (2) [and (3) in the GA]:

*Art. 5 (2) reads:*

*Member States shall take the necessary measures to ensure that offences referred to in Article 3(2) points (a), (b), (c), (c)bis, (e), (i), (i)bis, (j), and (p) are punishable by a maximum term of imprisonment of at least ten years **if they cause or are likely to cause death or serious injury to any person.***

*[In the GA it is added:*

*(3) Member States shall take the necessary measures to ensure that offences referred to in Article 3(3), in so far 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.**]*

In order to take the EP's wishes into account we consider it feasible to introduce a new Article, thereby also setting the political signal that environmental disasters need to be taken just as seriously and must be punished as seriously as crimes that cause the death of a person.

We propose to use the words “irreversible” and “long-lasting” in the new Article but without defining them, since we believe that Member states should be able to define these terms as they deem appropriate in their national law. As a consequence of our proposal, Article 8a needs to be deleted, which means that the word “ecosystem” should be defined in the Directive.

The New Article 5(2)bis could read as follows:

***Member states shall take the necessary measures to ensure that offences referred to in Article 3(2) are punishable by a maximum term of imprisonment of at least [] if they cause unlawful and intentional destruction of, or substantial and irreversible or substantial and long-lasting damage to, an ecosystem or natural habitat, or to air quality, soil quality or water quality .***

Deletion of article 8 a) (and possibly other articles)

- ~~a) “the offence caused destruction or irreversible or long-lasting substantial damage to an ecosystem as defined in Article 2(13) of Regulation (EU) 2020/852.~~**

Amendment Article 25(2)

***“[five years after the transposition period of this Directive is over] the commission shall carry out an evaluation of the impact of this Directive, and submit a report to the European Parliament and the Council **assessing, with regard to the general objective to strengthen the protection of the environment,*****

- the need to update the list of environmental criminal offences, and***
- whether this Directive effectively addresses the unlawful and intentional destruction of or causing of substantial and irreversible or substantial and long-lasting damage to an ecosystem or natural habitat, or to air quality, soil quality or water quality,***

Member States shall provide the Commission with necessary information for the preparation of that report, including a summary about the implementation and actions taken in accordance with Article 16 to 20”

## Recitals

(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 the one normally incurred without these facts, 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 accordance with the applicable rules established by their legal systems on aggravating circumstances. In any case, it should remain within the discretion of the judge or the court to determine the actual amount of the sanction, taking into account all the circumstances of the individual 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~~ **Where** an environmental criminal offence committed with intent causes ~~substantial and~~ **destruction or irreversible or long-lasting substantial damage to an entire ecosystem or to a natural habitat, or to air quality, soil quality or water quality, this should be considered as a crime of particular gravity and sanctioned as such** ~~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.~~

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