



Council of the European Union
General Secretariat

Brussels, 24 October 2023

WK 13582/2023 INIT

LIMITE

**COPEN
DROIPEN**

**JAI
ENV
CODEC**

This is a paper intended for a specific community of recipients. Handling and further distribution are under the sole responsibility of community members.

REPORT

From:	General Secretariat of the Council
To:	Working Party on Judicial Cooperation in Criminal Matters (COPEN) (Environmental Crime)
N° prev. doc.:	WK 13500/23
N° Cion doc.:	ST 14459/23 + COR 1
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 - Consultation by the Presidency following the JHA Counsellors meeting on 18 October 2023 - Replies provided by Member States

By note of Thursday 19 October 2023 (WK 13500/23), the Presidency submitted some questions to delegations regarding the DE/FR/SE proposal for a qualified (or aggravated) offence.

The replies provided by the Member States are set out in the Annex.

Written contributions

BULGARIA	2
CZECH REPUBLIC	3
ESTONIA.....	5
FINLAND	7
FRANCE – GERMANY – SWEDEN	9
GREECE	12
IRELAND	13
LATVIA.....	14
LITHUANIA.....	15
MALTA	16
NETHERLANDS.....	17
POLAND	19
PORTUGAL	20
ROMANIA.....	22
SLOVENIA.....	23

BULGARIA

With reference to the consultations concerning the proposal for a qualified offence under the Directive on environmental crimes, I am sending below the replies of the Bulgarian delegation to the questions in WK 13500/2023 INIT:

Q 1): The qualified offence should encompass only the intentional conduct. We oppose to criminalize the conduct committed by serious negligence in the text of the qualified offence. The Directive is setting minimum standards and as the concept of negligence differ in the Member States, it would be more appropriate to leave this to the national law and the national legislator to provide for negligent crimes where needed.

Q 2): The qualified offence should concern only the destruction or severe damage to "an ecosystem or natural habitat". As a compromise, damage to "soil quality or water quality" could be added, but not to "air quality";

Q 3a): Five years are agreeable as penalty for natural persons accompanying the qualified offence;

Q 3b): No specific sanction for legal persons should accompany the qualified offence. At the time of adoption of the general approach Bulgaria has already expressed its concerns about the lack of due consideration for the overall level of severity and coherence of the member states' national systems of sanctioning legal persons for crimes (see FI/BG declaration);

Q 4): In principle we prefer to include the text as an aggravating circumstance in Art.8. As a compromise we can accept to introduce the whole text of the qualified offence in Art.5. As a further compromise we could consider distributing the elements of the DE/FR/SE proposal over Articles 3 and 5, but not over Art.7 (we can not accept the inclusion of new paragraph 3da in Art.7 - see also the reply to Q 3b). In addition, we consider that the qualified offence should be limited to the acts under Art.3(2) letters a);d); e); h); i); j); k); l); o); p).

Q 5): Concerning Art.25, paragraph 2: the report of the Commission should assess only "the need to update the list of environmental criminal offences", but not ~~"whether the 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"~~. In addition we would like to delete "air quality" in recital 16.

CZECH REPUBLIC

Question 1

The answer to this question is linked to the issue of the placement of such provision (Question 4, please see below). If the provision is placed within Article 5 (Sanctions), the Czech Republic supports its extension also to cover serious negligence. If the core of the provision is placed within Article 3 (Offences), we are of the opinion that it should only cover serious negligence in relation to the established criminal offences that can be committed by serious negligence, which are listed in a specific provision.

Question 2

When such result as a complete destruction or substantial long-lasting or substantial widespread damage to the environment is considered, we are of the opinion that significant damage to one of the essential elements of the environment (water, soil, air, etc.) will inevitably damage the other elements of the environment, due to their interdependence. It is therefore questionable whether it is necessary to list the individual elements of the environment when such a substantial damage to one of them will necessarily cause damage to the environment as a whole.

If we are to pick one of the options presented by the Presidency in the document, we can agree with the inclusion of air, soil and water quality in the provision.

Question 3

We can agree with the proposed level of criminal sanctions of 8 years for natural persons.

We understand that such a level of sanctions shall be provided for the intentional commission of the offence. A question arises, whether a specific level of sanctions should be established for the commission of the offence by serious negligence. For such a case, we consider that the level of the sanctions should not exceed 5 years.

We do not agree with the introduction of a special penalty rate for legal persons. We prefer to keep this provision in line with the provision on causing of death, that provides for special level of sanctions of 10 years for natural persons, while not providing for special penalty rate for legal persons (Article 5 paragraph 2 – line 116). We prefer to keep the sanctioning system devised for legal persons in the Council general approach.

Question 4

We strongly insist on placing this provision under Article 5 (Sanctions) – and only there – and aligning it with the similar provision on causing of death by the offences established under the Directive (Article 5 paragraph 2 – line 116). We appreciate the DE/FR/SE proposal in regard to the “qualified” element of the provision. We do not wish to make it a standalone criminal offence, which if it was included in the Article 3 (Offences), it could be understood as such.

We understand the objectives of the provision as aiming at an increased protection of the environment as a whole. This objective would be fulfilled by placing the provision under Article 5 (Sanctions). Since the provision does not criminalise any new conduct, and only refers to established offences under the Directive and provides for an increased sanction level for a certain form of consequence, it would indeed be more suitably placed under Article 5 (Sanctions), taking into account the structure of the Directive.

Question 5

Regarding the recital 16 amendment: In relation to the reasoning provided in our answer to Question 4, we maintain our position against a standalone criminal offence established by the provision in question. We understand the provision as a “qualified criminal offence”, that stands as an accessory provision to the established criminal offences under the Directive – which is evident from its wording, where it refers to the established offences. As such, it would be incorrect to use the wording “crime of particular gravity” which would indicate its status of a standalone offence. We propose to make it clear in the recital, that this provision is intended as a “qualified criminal offence” which is an accessory provision to already established “principal” criminal offences.

There is already a distinction between groups of environmental offences provided in the Directive. This is done by dividing the offences into two groups with different levels of sanctions. Establishing another type of offence by using the wording “crime of particular gravity” would disrupt the structure of the offences in the Directive. Moreover, the term “particularly serious offence” is used in other criminal directives, and until now, it has always been left to the interpretation of Member States themselves for the purposes of a given directive and to decide which criminal offences would fall in that category. Therefore, we do not support such amendment to recital 16.

Possible wording to be considered could read:

*Where an environmental criminal offence committed with intent causes destruction or irreversible or long-term 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 qualifying circumstance of the offence** and sanctioned as such.*

Regarding the amendment to Article 25: We do not see a need to provide for additional evaluation criteria. We do not support the changes proposed to the Article 25.

ESTONIA

Question 1): only intentional conduct, or also serious negligence?

Q 1: Member States are invited to indicate if the qualified offence should not only encompass intentional conduct, but also conduct committed by serious negligence.

EE: we strongly prefer including only intentional conducts.

Question 2): Only ecosystem and natural habitat, or also air quality, soil quality or water quality?

Question 2): Member States are invited to indicate if the qualified offence should concern destruction or severe damage to “an ecosystem or natural habitat, or to air quality, soil quality or water quality”, or only to “an ecosystem or natural habitat”.

EE: our preference would be to stick to only „an ecosystem or natural habitat“.

Question 3): Which penalties (and sanctions)?

- Penalties for natural persons

Question 3a): Member States are invited to indicate which penalty for natural persons should accompany the qualified offence. Would eight years be agreeable?

EE: we agree with PRES that in the light of the nature of the qualified offence, the penalty should be higher than 5 years. Eight year could be agreeable, but we wouldn't want to go much further than that.

- Sanctions for legal persons

Question 3b): Member States are invited to indicate if a specific sanction for legal persons should accompany the qualified offence. In case Member States reply affirmative to this question, they are invited to indicate which sanction that should be. Would “not less than 8% of the total worldwide turnover of the legal person”, and, alternatively, “not less than 50 million euro” be agreeable?

EE: we would be very reluctant to introduce specific sanctions for legal persons. We support DE/FR/SE in their statement that a prerequisite for any agreement regarding an alternative to a general/catch all clause is that the Parliament accepts the Council general approach on Article 5 and 7, which includes the two methods of calculating the fines for legal persons as agreed in the Council general approach.

Question 4): structure of the text, where can it best be put?

Question 4: Member States are invited to indicate if they can accept distributing the elements of the DE/FR/SE proposal over Articles 3 and 5 (and possibly 7).

EE: we agree that distributing the elements of the proposal over articles 3 and 5 is a good idea. We do not support anything additional in art 7.

Question 5): additional texts proposed in Article 25 and recital 16

The DE/FR/SE proposal contains additional text proposals in Article 25 and in recital 16.

Question 5: Member States are invited to indicate their opinion on these text proposals.

EE: we are flexible with the changes proposed to art 25 and recital 16.

FINLAND

Question 1): only intentional conduct, or also serious negligence?

Q 1: Member States are invited to indicate if the qualified offence should not only encompass intentional conduct, but also conduct committed by serious negligence.

This is a question which is clearly linked to the question on penalties. If the minimum maximum would be very high, it should only encompass intentional conduct. If the level of the minimum maximum could be considered reasonable, it could also be considered to be acceptable that it encompasses also conduct committed by serious negligence. However, we do not see it as justified to apply the same minimum maximum to the intentional acts as to the acts committed by serious negligence.

Question 2): Only ecosystem and natural habitat, or also air quality, soil quality or water quality?

Q 2: Member States are invited to indicate if the qualified offence should concern destruction or severe damage to “an ecosystem or natural habitat, or to air quality, soil quality or water quality”, or only to “an ecosystem or natural habitat”.

As has been commented earlier, we have questions which concern measuring and proving destruction or severe damage to air quality. To some extent these apply also to water quality. As it would seem appropriate not to handle air quality, soil quality and water quality separately but as a joint element, we prefer that the qualified offence should concern only ecosystem and natural habitat.

Question 3): Which penalties (and sanctions)?

Q 3a: Member States are invited to indicate which penalty for natural persons should accompany the qualified offence. Would eight years be agreeable?

The solution on the penalty for natural persons is dependent on other solutions involving the essential elements of this qualified offence. Preliminarily we would suggest a threshold of 5 years for intentional conduct. We cannot accept the threshold of 8 years.

Q 3b: Member States are invited to indicate if a specific sanction for legal persons should accompany the qualified offence. In case Member States reply affirmative to this question, they are invited to indicate which sanction that should be. Would “not less than 8% of the total worldwide turnover of the legal person”, and, alternatively, “not less than 50 million euro” be agreeable?

Our position is that a specific sanction for legal persons is not needed in this case.

Question 4): structure of the text, where can it best be put?

Q 4: Member States are invited to indicate if they can accept distributing the elements of the DE/FR/SE proposal over Articles 3 and 5 (and possibly 7).

We do not support distributing the elements over Articles 3 and 5 (and possibly 7). The model following from distributing the elements would seem to indicate to/demand a certain way of transposing the obligation. It would also seem to deviate from the formulation/model typically used.

Question 5): additional texts proposed in Article 25 and recital 16

Q 5: Member States are invited to indicate their opinion on these text proposals.

We do not have any comments on these proposals.

FRANCE – GERMANY – SWEDEN

Question 1): only intentional conduct, or also serious negligence?

DE/FR/SE: Through the reference to Article 3 (2) our proposal also covers situations where the perpetrator commits the act/conduct with intent but is only severely negligent in relation to the damage (destruction etc.). Furthermore, in light of the structure of the Directive (which requires different minimum maximum penalties for intentional and severely negligent conduct) it would not be logical to add, in the proposed Article 3(2a), situations where the perpetrator commits the act/conduct with severe negligence.

It seems to us that this solution will make it possible to achieve a real gradation of penalties and to maintain consistency in the structure of Articles 3 and 5, particularly in relation to the hypotheses provided for in Article 5 (paragraphs 2 and 3 of the general approach), which already distinguish between the maximum penalties applicable in the case of intentional and unintentional offences causing the death of a person. This shows that a difference has to be made if one wants to keep the penalty proportionate. Of course, should we have the guarantee that this qualified offence will only apply to offences in Art. 3(2), we support deleting the reference to the term "intentional" before the term "destruction" in order to avoid any ulterior "specific intent" related to the will of causing a destruction. In any event the conduct must remain intentional as for the unlawful element, which is why a precise reference to the intentional nature of the offence or a reference to, only, paragraph 2 of Article 3 (intentional offences) is needed.

In this concern, the last drafting solution proposed by the presidency seems the most appropriate if the offence is ultimately referred to Article 3(2) (see question 4 on the new structure):

*“2a. 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~~ **will be considered a qualified offence** 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].”*

Question 2): Only ecosystem and natural habitat, or also air quality, soil quality or water quality?

DE/FR/SE agree with the Presidency that the aggravated offence should address not only destruction of, or substantial and irreversible or substantial and long-term damage to an eco-system or natural habitat but also substantial and irreversible or long-term damage to the quality of air, water and soil. The fact that it may be difficult to prove substantial and irreversible or long-term damage to the quality of air is not a problem from a criminal law perspective and is not a reason for excluding this kind of severe damage from the qualifier.

Question 3a): Which penalty for natural persons should accompany the qualified offence?

DE/FR/SE are flexible with respect to the minimum maximum level of imprisonment but agrees with the Presidency that the number of years must be higher than five. In view of the gradation of penalties already laid down in Article 5, we consider that the maximum penalty of 8 years is justified and consistent with the scale of penalties laid down for intentional and unintentional offences causing the death of a person.

Questions 3b): Should a specific sanction for legal persons accompany the qualified offence?

At the JHA Counsellors meeting on 18 October 2023 DE/FR/SE made it clear that a prerequisite for any agreement regarding an alternative to a general/catch all clause is that the Parliament accepts the Council general approach on Article 5 and 7 – this includes the two methods of calculating the fines for legal persons as agreed in the council general approach.

A relevant comparison can be made to the case of intentional conduct causing death, which entails a specific penalty for natural persons, but not for legal persons. Contrary to the view of the Presidency, in our opinion the situation at hand is not different from a legal and systematic point of view and the introduction of maximum penalties for this specific situation would require a review of Article 7 as a whole in order to take account of the different situations. National legislators will necessarily draw the consequences of the introduction of this qualified offence in order to establish a consistent scale of penalties for natural and legal persons. We therefore consider that the introduction of specific thresholds in Article 7 for this hypothesis is not strictly necessary.

In this light it can be explained why the aggravated offence, which causes the destruction of, or substantial and irreversible or substantial and long-lasting damage to, the environment would not entail a specific sanction in the event that legal persons can be held liable for the aggravated offence. Therefore, the proposal by DE/FR/SE does not provide for specific sanctions to be imposed by the competent authorities of the Member States on legal persons.

Question 4): structure of the text, where can it best be put?

DE/FR/SE can accept putting the offence element in Article 3 as proposed by the Presidency, on the condition that the reference to the offences provided for in paragraph 2 of Article 3 of the general approach text is maintained in order to refer only to intentional cases. Providing for a qualified offence in Article 3, this new structure should also satisfy the European Parliament.

Having said that, we still have to be extremely careful regarding the exact wording. As already mentioned above, if only elements of Art. 3(2) are considered, it does not seem necessary to repeat “intentional”, the same is true for “unlawful”, which is already covered by Art. 3(1). On the other hand, it may be wise not to refer to all offences defined in Art. 3 (2), because not all of them seem fit to cause such severe consequences, e.g. the famous letter d offence. It also seems to be a bit odd to repeat the elements already mentioned in Art. 3(1)a, but this may be only a question of drafting.

With respect to the proposed new paragraph 3da in Article 7, please see above (question 3b).

Question 5): additional texts proposed in Article 25 and recital 16

In addition, it might be needed to introduce recitals regarding “natural habitat” and “ecosystem” as proposed by the Commission in (st14032/23).

A natural habitat has the meaning defined in Article 1 (b) of the Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora.

An ecosystem means a dynamic complex of plant, animal, fungi and microorganism communities and their non-living environment, interacting as a functional unit, and includes habitat types, habitats of species and species populations.

The exact wording of “natural habitat” and “ecosystem” may however require further consideration.

A new recital based on the Commission proposal in st 14032/23 could be introduced:

*“Article [] defines as an offence a destruction of, **or a substantial and irreversible or substantial and long-lasting damage to**, an ecosystem or natural habitat **[or to the quality of air, soil or water]**. For the purpose of this offence, natural habitats should have the same meaning as defined in the Habitat Directive, Namely, natural habitats should mean terrestrial or aquatic areas distinguished by geographic, abiotic and biotic features, whether entirely natural or semi-natural. Natural habitats include habitats such as dunes, freshwater bodies, marine cost habitats and forests. An ecosystem should mean a dynamic complex of plant, animals, fungi and microorganism communities and their non-living environment, interacting as a functional unit, and includes habitat types, habitats of species and species populations. Ecosystems include terrestrial and inland freshwater ecosystems, such as forests, wetlands, mountains and drylands, as well as marine ecosystems, as well as their services and functions. For the purpose of this offence a destruction of **or a substantial and irreversible or substantial and long-lasting damage** to a ecosystem or a natural habitat should be deemed to occur if it concerns features or components of an ecosystem of a natural habitat affecting their integrity and in a way that causes irreversible or long-lasting damage to ecological services or functions they perform. [For the purpose of this offence, a destruction of **or a substantial and irreversible or substantial and long-lasting damage to an ecosystem or a natural habitat should be deemed to occur** in case of damages to the hydro-morphology of a surface or groundwater body having the effect of destroying of or irreversible harming the ecological service performed by that body.”*

GREECE

- a. On the first question of the Presidency, as included in the working document of the Secretariat of the EU Council WK 13500/2023, we consider it appropriate to limit the criminal act only to intentional conduct. As repeatedly argued in the COPEN working group meetings, defining the proposed crime as conducted by "serious negligence" would finally lead to a punishment of every such negligent conduct, because such a notion has not been adopted by the general part of our criminal code.
- b. Regarding the Presidency's second question, we prefer the wording "an ecosystem or natural habitat", as it better corresponds to the nature of the proposed provision as a 'general offence/catch-all', leaving the EU MSs a better possibility to adapt the provision in question in their national law.
- c. On the third question – sub-question “a”, taking into account the general nature of the criminal offense provided for, it is considered preferable to provide for a penalty of "at least five years" instead of eight proposed by the European Commission, in order to ensure the required flexibility for EU Member States, whereas there is a possibility of adjusting the penalty based on the principle of proportionality.
- d. Regarding the third question - sub-question "b", the option of determining a specific sanction for legal entities is not unknown in the applicable provisions for the protection of the environment. The first option of defining a minimum limit of 8% on the total turnover of the legal entity is preferable.
- e. Regarding the fourth question: From a legal technical point of view, the description of criminal behavior in one article and the reference to the penalty in another can be followed.

IRELAND

Q 1: Member States are invited to indicate if the qualified offence should not only encompass intentional conduct, but also conduct committed by serious negligence.

A.1 Ireland would like to also include, serious negligence.

Inclusion of serious negligence as an aspect of the qualified offence would seem to reflect the intention of the Directive as a whole.

Q 2: Member States are invited to indicate if the qualified offence should concern destruction or severe damage to “an ecosystem or natural habitat, or to air quality, soil quality or water quality”, or only to “an ecosystem or natural habitat”.

A.2 Ireland would like to suggest rewording the text to

- destruction or severe damage to “an ecosystem or natural habitat, or contribute to severe increase in air pollution, soil pollution or water pollution?

We would not like to see air quality removed from this given the significant immediate health impacts of poor air quality on health even within a small geographic area, depending on population density.

The increase in pollution does not need to be irreversible or long term to cause a substantial problem. We agree that severe damage to air quality is poor wording.

Q 3: Which penalties (and sanctions)?

- Penalties for natural persons

A.3 Clarification sought - it should be made clear, which aspects fall to member states to decide, with regard to penalties.

Q 4: Member States are invited to indicate if they can accept distributing the elements of the DE/FR/SE proposal over Articles 3 and 5 (and possibly 7).

A.4 Ireland can accept - It seems logical to include the offence aspect at article 3 and the penalty aspect at article 5.

Q 5: additional texts proposed in Article 25 and recital 16

The DE/FR/SE proposal contains additional text proposals in Article 25 and in recital 16.

Member States are invited to indicate their opinion on these text proposals.

A.5 Ireland would agree with the proposed amendments to the text of Article 25 in relation to review after a certain timeframe.

As regards recital 16, the description of aggravating circumstances proposed seems accurate and appropriate and the amendment of the text appears correct.

LATVIA

Please see below answers of Latvia:

1. ***Member States are invited to indicate if the qualified offence should not only encompass intentional conduct, but also conduct committed by serious negligence.***

Latvia agrees with the Presidency's view that it is mostly serious negligence, not intentional conduct, that can cause destruction of, or substantial and irreversible or substantial and long-lasting damage to the environment. We therefore consider that the commission of the offence of serious negligence could be punishable.

2. ***Member States are invited to indicate if the qualified offence should concern destruction or severe damage to “an ecosystem or natural habitat, or to air quality, soil quality or water quality”, or only to “an ecosystem or natural habitat”.***

Latvia agrees that substantial damage to the quality of air, soil and water is already included in other criminal offences referred to in Article 3 of the Directive, so it only would be logical to include these features in the qualifier of the qualified offence.

3. ***Member States are invited to indicate which penalty for natural persons should accompany the qualified offence. Would eight years be agreeable?***

Latvia can support the proposed sentence of eight years' imprisonment.

4. ***Member States are invited to indicate if a specific sanction for legal persons should accompany the qualified offence. In case Member States reply affirmative to this question, they are invited to indicate which sanction that should be. Would “not less than 8% of the total worldwide turnover of the legal person”, and, alternatively, “not less than 50 million euro” be agreeable?***

Latvia considers that the proposed qualifying infringement penalty to be applied to legal persons should be in line with the alternative approach endorsed in the general approach. Also, given that the offence will be defined as a qualifying offence, the level of the penalty should also be higher. Latvia therefore can support the “not less than 8% of the total worldwide turnover of the legal person”, and, alternatively, “not less than 50 million euro” fines.

5. ***Member States are invited to indicate if they can accept distributing the elements of the DE/FR/SE proposal over Articles 3 and 5 (and possibly 7).***

Latvia considers that this qualifying infringement should be defined in accordance with the structure of the existing articles of the Directive. Therefore we can accept distributing the elements of the DE/FR/SE proposal over Articles 3 and 5 (and possibly 7).

6. ***The DE/FR/SE proposal contains additional text proposals in Article 25 and in recital 16. Member States are invited to indicate their opinion on these text proposals.***

Latvia notes that it is not clear how the proposed offence will be implemented in Member States' national legal systems.

LITHUANIA

Q 1: Member States are invited to indicate if the qualified offence should not only encompass intentional conduct, but also conduct committed by serious negligence.

LT believes that the DE, SE, FR proposal and the COM proposal on the new offence clearly define its limits through the intentional form of culpability. This type of offence, which seeks to punish individuals for the most severe environmental damage, should be purely intentional. We do not consider that there is a conflict here with other offences which provide for criminal liability where they are committed negligently, since in the case of the offence in question, if the consequences are caused by negligence, we will apply the specific provision, regardless of severity of the damage.

Q 2: Member States are invited to indicate if the qualified offence should concern destruction or severe damage to “an ecosystem or natural habitat, or to air quality, soil quality or water quality”, or only to “an ecosystem or natural habitat”.

LT considers that the offence should concern only the destruction or severe damage to “an ecosystem or natural habitat”.

Q 3a: Member States are invited to indicate which penalty for natural persons should accompany the qualified offence. Would eight years be agreeable?

LT does not support the introduction of an additional level of imprisonment. For this reason, we believe that the objectives of the proposal can be fully achieved by keeping the sanction in question within the 5-year imprisonment category. The introduction of another different level of sanction could lead to unjustified confusion and complicate transposition into national law.

Q 3b: Member States are invited to indicate if a specific sanction for legal persons should accompany the qualified offence. In case Member States reply affirmative to this question, they are invited to indicate which sanction that should be. Would “not less than 8% of the total worldwide turnover of the legal person”, and, alternatively, “not less than 50 million euro” be agreeable?

Similarly, as in the case of imprisonment, we believe that the level of the fine currently provided for is fully sufficient and there is no need to create a separate category for this offence. In this respect, it should be noted that no separate rule for the amount of fine is introduced for conduct that causes the death of a person.

Q 4: Member States are invited to indicate if they can accept distributing the elements of the DE/FR/SE proposal over Articles 3 and 5 (and possibly 7).

Given the importance for LT of being able to transpose this provision through the generic offence with the most serious consequences, we believe that it should remain in Article 5 as in the DE, SE, FR proposal.

Q 5: Member States are invited to indicate their opinion on these text proposals.

We have no comments or suggestions and agree with the proposed recital.

MALTA



GOVERNMENT OF MALTA
MINISTRY FOR FOREIGN AND
EUROPEAN AFFAIRS AND TRADE
EU COORDINATION DEPARTMENT

Malta's Comments – Consultation by the Presidency following the JHA Counsellors' meeting on 18 October 2023 (WK 13500/2023)

Question 1: Member States are invited to indicate if the qualified offence should not only encompass intentional conduct, but also conduct committed by serious negligence.

In line with our national position, Malta maintains a constant approach that serious negligence (which notion is to be interpreted in line with the respective national law of the Member States) should also be covered. The Maltese authorities emphasise that environmental crimes are typically not intentional, and "serious negligence" should encompass actions or omissions that go beyond preventable accidents that have foreseeable consequences.

Question 2: Member States are invited to indicate if the qualified offence should concern destruction or severe damage to "an ecosystem or natural habitat, or to air quality, soil quality or water quality", or only to "an ecosystem or natural habitat".

Malta recommends limiting the qualified offence to "an ecosystem or natural habitat" to prevent the provision's scope from becoming overly broad which could be counterproductive. At this stage, especially within the very tight timeframe as well as the fact that there was no proper assessment carried out which identifies the need for such offence and the extent of its scope, the Maltese authorities would be hesitant towards accepting a broader scope.

Question 3a): Member States are invited to indicate which penalty for natural persons should accompany the qualified offence. Would eight years be agreeable?

Malta is in a position to agree to the proposed eight (8) years.

Question 3b): Member States are invited to indicate if a specific sanction for legal persons should accompany the qualified offence. In case Member States reply affirmative to this question, they are invited to indicate which sanction that should be. Would "not less than 8% of the total worldwide turnover of the legal person", and, alternatively, "not less than 50 million euro" be agreeable?

Malta maintains its horizontal position on sanctions for legal persons and therefore prefer maintaining the same approach as was agreed upon in the general approach leaving a degree of flexibility to Member States to decide which of the two alternatives should be opted for. Malta maintains its strong preference for maximum fixed fines.

Question 4: Member States are invited to indicate if they can accept distributing the elements of the DE/FR/SE proposal over Articles 3 and 5 (and possibly 7).

Malta is also able to accept this proposal.

Question 5: 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.

The Maltese authorities reiterate that that the qualified offence should only refer to "an ecosystem or natural habitat."

NETHERLANDS

In this document, the Netherlands will answer the questions asked by the Presidency in document WK 13500/2023 INIT. We would like to thank the Presidency for their work and the various constructive proposals that were presented to the Member States.

Question 1

In general, The Netherlands is reluctant to harmonise ‘serious negligence offences’ and accommodating sanction levels. However, looking at the draft Directive in its entirety and taking into account that the aggravated offence for (certain) environmental offences that cause death to a person (articles 5(2) and (2a) of the GA) apply to both intentional and serious negligence-offences, we could consider the possibility of applying the proposed qualified offence to serious negligence-conduct. **However, since the culpability of serious negligence-offences is lower than the culpability of intentional offences,** we think this should be reflected in the sanction level for the ‘serious negligence aggravated offence’. Therefore, the minimum level for the maximum term of imprisonment for the ‘serious negligence aggravated offence’ should be significantly lower than its intentional counterpart.

Question 2

Since substantial damages to the quality of air, soil and water is the essential qualifier in many of the existing offences in article 3, we think it is coherent to also include these in the qualified offence and not limit it to only ecosystems and natural habitats.

Question 3a

A minimum maximum-penalty of eight years of imprisonment could be deemed acceptable for the qualified offense when committed intentionally.

Question 3b

In line with the reasoning behind the DE/FR/SE proposal, The Netherlands is not in favour of creating specific penalties for legal persons in the case. If at any point a specific penalty would be created, the existing system for the calculation of the turnover-based fine of the GA (lines 148b-148e of the four column-document) should be used.

Question 4

Since the proposed qualified offence does not provide for a substantive widening of the offences that are already included in article 3, it would not be preferable to put (parts of) the DE/FR/SE proposal in article 3. In this regard, it should be noted that the higher sanction levels for offences that cause the death of a person are also only included in article 5 (paragraphs 2 and 2a of the GA) and not in article 3. From a systematic point of view, it would make sense to follow this logic.

Question 5

We think that the addition in article 25(2) should be limited to assessing the need to update the list of environmental criminal offences, as this also could include an assessment of the effectivity of the qualified/aggravated offence. From a practical point of view: the introduction of the qualified/aggravated offence would require changes in in the legislation of many MS and subsequent implementation activities by the national organisation responsible for investigating and prosecuting environmental offences. Taking into account that criminal investigations in such offences are complex and therefore often take a long time, it is reasonable to expect that there will only be a limited number of final convictions for this offence at the moment proposed moment of evaluation.

POLAND

Question 1: only intentional conduct, or also serious negligence?

In Poland's view qualified offence should only encompass intentional conduct.

Question 2: Only ecosystem and natural habitat, or also air quality, soil quality or water quality?

Poland further reiterates its previous comments that there is currently no defined "ecosystem" in EU law. The wording 'ecosystem or natural habitat' should not be combined. Therefore, a qualifying offence should relate only to the destruction or severe damage of a "natural habitat types in accordance with directive 92/43/EEC"

Question 3a: Which penalties?

A maximum penalty of eight years' imprisonment for individuals is acceptable for Poland.

Question 3b: Which penalties? – legal persons

In Poland's view, a qualified offence should not be accompanied by a specific sanction for legal persons.

Question 4: structure of the text, where can it best be put?

The distribution of the elements of the DE/FR/SE proposal into Articles 3 and 5 (and possibly 7), is acceptable to Poland if the other comments on the shape of the text are taken into account.

Question 5: additional texts proposed in Article 25 and recital 16

The additional text proposals in Article 25 and Recital 16 are acceptable to Poland.

PORTUGAL

Questions to Member States

Question 1): only intentional conduct, or also serious negligence?

Q 1: Member States are invited to indicate if the qualified offence should not only encompass intentional conduct, but also conduct committed by serious negligence.

The Portuguese delegation supports the inclusion of serious negligence in the definition of the qualified offence. There are several reasons to support this approach: (i) significant environmental damage is more frequently caused by serious negligence rather than through a deliberate intent to harm the environment. By including serious negligence, the directive captures this reality; (ii) this approach is consistent with that followed in other offences of Article 3 (2) where serious negligence is some cases penalised. It would be inconsistent not to address similar conducts that lead to catastrophic damage in the qualified offence; (iii) reinforced protection of the environment. By including serious negligence, the deterrent effect of the directive regarding actions that severely harm the environment is enhanced, irrespective of the intent. This may encourage individuals and legal persons to invest in adequate prevention measures.

Question 2): Only ecosystem and natural habitat, or also air quality, soil quality or water quality?

Q 2: Member States are invited to indicate if the qualified offence should concern destruction or severe damage to “an ecosystem or natural habitat, or to air quality, soil quality or water quality”, or only to “an ecosystem or natural habitat”.

In the view of the Portuguese delegation the qualified offence should concern the destruction or severe damage to “an ecosystem or natural habitat, or to air quality, soil quality or water quality”. This inclusion is consistent with the wording of certain offences listed in Article 3(2), where substantial damage to air, soil and water is referred to as a qualifier; this allows for a more comprehensive approach to environmental protection and avoids possible gaps.

Question 3): Which penalties (and sanctions)?

- Penalties for natural persons

Q 3a: Member States are invited to indicate which penalty for natural persons should accompany the qualified offence. Would eight years be agreeable?

The Portuguese delegation agrees that the maximum minimum penalty for the qualified offence committed by natural persons should be higher than the one prescribed for the basic offences. Precise quantum to be defined at a later stage once there is agreement between the co-legislators on the basic principles.

- Sanctions for legal persons

Q 3b: Member States are invited to indicate if a specific sanction for legal persons should accompany the qualified offence. In case Member States reply affirmative to this question, they are invited to indicate which sanction that should be. Would “not less than 8% of the total worldwide turnover of the legal person”, and, alternatively, “not less than 50 million euro” be agreeable?

The Portuguese delegation agrees that the maximum minimum penalty for the qualified offence committed by legal persons should be higher than the one prescribed for the basic offences. Precise quantum to be defined at a later stage once there is agreement between the co-legislators on the basic principles.

Question 4): structure of the text, where can it best be put?

Q 4: Member States are invited to indicate if they can accept distributing the elements of the DE/FR/SE proposal over Articles 3 and 5 (and possibly 7).

The Portuguese delegation is supportive of a systematic redistribution of the different elements of the proposed qualified offence over Articles 3, 5 and 7. This separation would allow for a better alignment with the existing structure of the directive and more visibility and transparency for the stakeholders. This enhanced visibility may prove a decisive argument for the Parliament: Moreover, it addresses the concerns raised by the Council Legal Service and the Commission regarding the readability of the Directive for the stakeholders.

Question 5): additional texts proposed in Article 25 and recital 16

The DE/FR/SE proposal contains additional text proposals in Article 25 and in recital 16.

Q 5: Member States are invited to indicate their opinion on these text proposals.

Amendments to Article 25 and recital 16 should be discussed at a later stage once there is agreement between the co-legislators on the basic principles. In any case, the rationale for the qualified offence should be explained in a separate recital in order to allow for a clear differentiation from the aggravating circumstances.

ROMANIA

Q1 – „Member States are invited to indicate if the qualified offence should not only encompass intentional conduct, but also conduct committed by serious negligence.”

As a principle, the criminalization of acts committed through negligence is justified when the damage is serious and if the acts are committed more frequently with this form of guilt.

Q2 – “Only ecosystem and natural habitat, or also air quality, soil quality or water quality?”

In our opinion, the proposed aggravated offense should be better separated from its basic forms, therefore it should be restricted to the most serious forms of environmental damage;

The difficulty of proving criminal behavior in some cases must also be considered;

An option would be to take over the content of the aggravating circumstance from art. 8 letter b) - the offense caused destruction or irreversible or long-lasting substantial damage to an ecosystem as defined in Article 2 (13) of Regulation (EU) 2020/8521 or substantial damage to protected species referred to in Article 3 (1) points (l) and (m).

Q3A – “Member States are invited to indicate which penalty for natural persons should accompany the qualified offence. Would eight years be agreeable?”

Q3B – “Member States are invited to indicate if a specific sanction for legal persons should accompany the qualified offence. In case Member States reply affirmative to this question, they are invited to indicate which sanction that should be. Would “not less than 8% of the total worldwide turnover of the legal person”, and, alternatively, “not less than 50 million euro” be agreeable?”

The DE/FR/SE proposal only changes formal aspects, in the sense that instead of an aggravating circumstance, a separate incrimination is proposed, but this crime is not new, it is only an aggravated form of the crimes already existing in the proposal.

We prefer keeping the aggravating circumstance at art. 8 b) and the MS should appreciate on the level of sanctions, according to their internal mechanisms of aggravated circumstances.

Regarding the liability of legal entities, it is preferable to maintain the general approach and not to establish a specific penalty in this case as well.

Q4 – “Member States are invited to indicate if they can accept distributing the elements of the DE/FR/SE proposal over Articles 3 and 5 (and possibly 7).”

Not being a new crime, but only an aggravated form of the existing ones, it is preferable to insert the text according to the DE/FR/SE proposal - art 5(2) bis.

Q5 – Member States are invited to indicate their opinion on these text proposals.

Regarding the recital, the reference to ecocide should be removed, as it is not yet defined by international or European law.

Regarding the text from art. 25, we do not support the proposal that the qualified offense be the subject of the evaluation expressly.

SLOVENIA

Q 1): Member States are invited to indicate if the qualified offence should not only encompass intentional conduct, but also conduct committed by serious negligence.

The way we understand the proposal the intent is envisaged in relation to the consequence (destruction, substantial and irreversible/long lasting damage) and not to the conduct as such as offences in Article 3(2) are intentional. If crimes covered by the proposal are considered as having a particular gravity similar to ecocide then it is reasonable that we only cover intent in relation to the consequence. In addition, if we were to include serious negligence in the scope of this qualified offence, we would have to make additional differentiation when determining sanctions as penalties can not be the same with intent and serious negligence.

Q 2): Member States are invited to indicate if the qualified offence should concern destruction or severe damage to “an ecosystem or natural habitat, or to air quality, soil quality or water quality”, or only to “an ecosystem or natural habitat.”

Slovenia would insist that the destruction or severe damage would include “air quality, soil quality or water quality” as soil, water and air are the three basic elements of our environment. They should be included in this qualified offence which aims to criminalise the most grave examples of environmental crime. In addition, this notion is also included in the offences in Article 3(2).

Q 3a): Member States are invited to indicate which penalty for natural persons should accompany the qualified offence. Would eight years be agreeable?

Still scrutinizing.

Q 3b): Member States are invited to indicate if a specific sanction for legal persons should accompany the qualified offence. In case Member States reply affirmative to this question, they are invited to indicate which sanction that should be. Would “not less than 8% of the total worldwide turnover of the legal person”, and, alternatively, “not less than 50 million euro” be agreeable?

Slovenia does not see a good reason why legal persons should not be held liable for this qualified offence. Most often it will probably be legal persons committing severe criminal offences against the environment. With regards to the level of sanction, we still need time to consider this issue.

Q 4): Member States are invited to indicate if they can accept distributing the elements of the DE/FR/SE proposal over Articles 3 and 5 (and possibly 7).

Still scrutinizing. Preliminary, we are more in favour of the DE/FR/SE proposal.

Q 5): Member States are invited to indicate their opinion on these text proposals.

Slovenia supports text proposals in Article 25 and in recital 16.