

Drafting suggestions submitted by Hungary for amending Recital 7 and 15 of the draft Directive on environmental crime

Hungary wishes to make the following two proposals to clarify the current text of Articles 5 and 7. (Our proposals are marked by **highlight, as well as bold and underlined.**)

1. Hungary suggests to insert the following sentence in Recital 7 or 11ter, as appropriate:

„Serious negligence describes a particularly grave breach of the duties of care.”

- (7) In order to constitute an environmental offence under this Directive, conduct should be unlawful under Union law **which aims to pursue one of the objectives of the Union's environmental policy, and that has been adopted, in particular, on the basis of Articles 91, 114, 168 or 192 TFEU, or under national laws, administrative regulations or decisions giving effect to that Union law.** The conduct which constitutes each category of criminal offence should be defined and, where appropriate, a threshold which needs to be met for the conduct to be criminalised should be set. Such conduct should be considered a criminal offence when committed intentionally and, in certain cases, also when committed with **at least serious negligence.** **Serious negligence in this context describes a particularly grave breach of the duties of care.** Illegal conduct that causes death or serious injury of persons, substantial damage or a considerable risk of substantial damage for the environment or is considered otherwise as particularly harmful to the environment **should also** constitute a criminal offence when committed with **at least serious negligence.** **This Directive does not require the introduction of the notion of at least serious negligence for each element of the offence, such as for possession, sale or offering for sale, placing on the market and similar elements. In these cases, Member States may limit criminal liability to cases where the notion of at least serious negligence relates to certain elements of the offence, such as the protection status, negligible quantity, or the likelihood of the act to cause substantial damage.** Member States remain free to adopt or maintain more stringent criminal law rules in that area. **Unless expressly defined in this Directive, the terms used in this Directive should be construed within the meaning of the legal acts respectively and specifically applicable to a particular conduct, when they are defined in those acts. This Directive should ~~shall~~ not have the effect of modifying the obligation to respect the fundamental rights and legal principles as enshrined in Article 6 of the TEU, including the principle of *nullum crimen, nulla poena sine lege.***

Explanation: in the spirit of compromise, we wish to refer to the jurisprudence of the Court (CJEU), which already explained the core meaning of serious negligence. This concept is slightly different from our national criminal law, and we assume that some other national laws interpret negligence, thus serious negligence in a different manner. In order to clarify that this concept may have a slightly different meaning for the purposes of this directive, we see it essential to explain this in the recital.

To recap, the Court interpreted this term in its judgment C-308/06:

„72. It is true that Article 4 of Directive 2005/35, read in conjunction with Article 8 thereof, obliges the Member States to punish ship-source discharges of polluting substances if committed ‘with intent, recklessly or by serious negligence’, without defining those concepts. 73. It is, however, to be pointed out, first of all, that those various concepts, in particular that of ‘serious negligence’ referred to by the national court’s questions, correspond to tests for the incurring of liability which are to apply to an indeterminate number of situations that it is impossible to envisage in advance and not to specific conduct capable of being set out in detail in a legislative measure, of Community or of national law. 74. Next, those concepts are fully integrated into, and used in, the Member States’ respective legal systems. 75. In particular, all those systems have recourse to the concept of negligence which refers to an unintentional act or omission by which the person responsible breaches his duty of care. 76. Also, as provided by many national legal systems, the concept of ‘serious’ negligence can only refer to a patent breach of such a duty of care. 77. Accordingly, ‘serious negligence’ within the meaning of Article 4 of Directive 2005/35 must be understood as entailing an unintentional act or omission by which the person responsible commits a patent breach of the duty of care which he should have and could have complied with in view of his attributes, knowledge, abilities and individual situation.”

2. Hungary suggests to amend Recital 15 as follows:

(15) Where **possible according to** national law ~~provides for it~~, legal persons should also be held criminally liable for environmental criminal offences according to this Directive. Member States whose national law does not provide for the criminal liability of legal persons should ensure that their administrative sanctioning systems provide for effective, dissuasive and proportionate sanctions types and levels as laid down in this Directive in order to achieve its objectives. **The maximum levels of fines provided for in this Directive for the offences referred to therein should apply at least to the most serious forms of such offences.** ~~Financial situation~~ The seriousness of the conduct, and the individual, financial and other circumstances of legal persons, should be taken into account to ensure the effectiveness, dissuasiveness and proportionality of the sanction imposed. With regard to maximum levels of fines in national law, Member States, **whether they refer to may either use a percentage of the total worldwide turnover of the legal person concerned, or they may determine the maximum level of fines in absolute amounts, they remain free to apply the criteria set out by national law to calculate the fines. Setting common standards for the maximum levels of fines is without prejudice to the principles of national criminal law and the application of criminal sanctions under national law . The maximum level of fines determined in absolute amounts should be provided for in national law, which may decide on the method of their calculation, and should apply proportionally with regard to individual, financial and other circumstances economic and financial situation of the legal person at least to the most serious forms of offences provided for in this Directive.**

Explanation: again, in the spirit of compromise, we would like to make sure that the directive does not harmonise the criteria for determining criminal fines for legal persons, but rather provides for a minimum harmonisation by setting the minimum of maximum levels of fines.

In our view, the current version also needs a slight amendment, since the wording “either+or” excludes the combination of the two approaches. We propose a wording which makes it clear that at least one of the options set out in Article 7 has to be applied. However, if needed, any of the two approaches can be combined with other criteria. For example, a Member State would be able to set the levels of fines taking into account the financial advantage sought by the crime, as long as it is higher than the specific percentage of the worldwide annual turnover (ie. 3 or 5 % of the worldwide annual turnover).



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MEETING DOCUMENT

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Delegations will attached a drafting suggestion by HU for amending Recitals 7 and 15 of the above-mentioned draft Directive.