



Council of the European Union
General Secretariat

Brussels, 08 November 2023

Interinstitutional files:
2021/0422 (COD)

WK 14533/2023 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.

NOTE

From:	General Secretariat of the Council
To:	Working Party on Judicial Cooperation in Criminal Matters (COPEN) (Environmental Crime)
N° prev. doc.:	ST 14529/23
N° Cion doc.:	ST 14459/21 + COR 1
Subject:	Proposal for a Directive on the protection of the environment through criminal law - Revised Presidency proposals following the meeting of the JHA Counsellors + Experts on Wednesday 8 November (morning session)

In view of the afternoon session, please see attached revised Presidency proposals on the issues of 'Authorisations' and 'Qualified offence'.

WK 14533/2023 INIT

LIMITE

EN

Revised texts

A) Authorisations – Article 3 (in GA) – Line 59 (to be moved after line 64d)

The following revised texts are proposed:

- Insertion of a new sub paragraph in Article 3(1), after line 64d, worded as follows:

*“The conduct shall be deemed unlawful even if it is carried out under an authorisation by a competent authority in a Member State when the authorisation was obtained fraudulently or by corruption, extortion or coercion, **or is in manifest breach of relevant substantive legal requirements.**”*

- With the following text for recital 8 (change of “or” into “and”):

*“(8) A conduct should be considered unlawful also when it is carried out under an authorisation by a competent authority in a Member State if such authorisation was obtained, inter alia, fraudulently, or by corruption, extortion or coercion. Further, being in possession of an authorisation should not preclude the criminal liability of the holder of the authorisation, **where the authorisation is manifestly contrary to substantive legal requirements. In this context, ‘in manifest breach of relevant substantive legal requirements’ should refer to an obvious ~~or~~ and substantial contradiction with substantive legal requirements. This does not include breaches of procedural requirements or minor elements covered under the authorisation. This provision does not shift the duty to ensure legality of authorisations from competent authorities to operators. Moreover, where an authorisation is required, the fact that the authorisation is lawful does not preclude criminal proceedings against the holder of the authorisation who does not comply with all specific obligations of the authorisation or with other relevant legal obligations not covered by the authorisation.**”*

B) Qualified offence – Article 3(1a) – Line 94c

The following revised compromise package is proposed:

Operative part:

New paragraph 2a in Article 3:

*“2a. Member States shall take the necessary measures to ensure that offences referred to in Article 3(2), ~~where they are committed intentionally, are punishable by a maximum term of imprisonment of at least~~ **are considered an qualified offence** if they cause ~~unlawful and intentional~~ destruction of, or ~~substantial widespread and irreversible or substantial and long-lasting,~~ **widespread** and substantial damage to, an ecosystem **of considerable size or environmental value**, or to a natural habitat within a protected site, or to air quality, soil quality or water quality; ~~and where such result is caused either intentionally or with at least serious negligence.~~”*

New paragraph (2a) in Article 5:

*“2a. Member States shall take the necessary measures to ensure that the offence referred to in Article 3(2a) is punishable by a maximum term of imprisonment of at least **eight** years ~~when the result is caused intentionally and by a maximum term of imprisonment of at least~~ **[six] years when the result is caused with serious negligence**”.*

New paragraph (5a) in Article 7:

*“5a. Member States shall take the necessary measures to ensure that legal persons held liable pursuant to Article 6 for the offence referred to in Article 3(2a), are punishable by ~~more severe~~ **aggravated** criminal or non-criminal sanctions or measures, which shall include fines and may include other sanctions or measures as defined in this Article”.*

Article 8 b) could be maintained, but it should be put in a separate paragraph of Article 8, applying only to Article 3(2), 3(3) and 4 (and not to Article 3(2a)):

“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.

New recital and revised recitals:

“(11a) Where an unlawful conduct provided for in this Directive, committed intentionally, causes the death to any person, the intention should be interpreted in accordance with national laws, with due regard to relevant case law of the Court of Justice of the European Union. Therefore, it could be understood, for the purposes of this Directive, as the intention to cause death, or it could also cover the situation in which the perpetrator has acted, or refrained from acting, voluntarily and in violation of a particular obligation, but without wanting or accepting the death of any person that nevertheless occurred. The same logic applies where an unlawful conduct provided for in this Directive, committed intentionally, causes serious injury to any person, or destruction of, or irreversible or long-lasting, widespread and substantial damage to, an ecosystem of considerable size or environmental value, or to a natural habitat within a protected site, or to air quality, soil quality or water quality.”

“(xx) Criminal conduct defined under Article 3(2) of this Directive may lead to catastrophic results ~~that could be sought directly by the perpetrator, or could have been anticipated.~~

Where an environmental offence referred to in this Directive causes the unlawful destruction, or ~~widespread and~~ irreversible or long-lasting, widespread and substantial damage to, an ecosystem of considerable size or environmental value or to a natural habitat within a protected site, or to air quality, soil quality or water quality, this catastrophic result ~~should be considered as a crime of particular gravity. Therefore, such offence should be considered as a qualified offence and, consequently, sanctioned with more severe penalties. These particularly serious results for the environment~~ This qualified offence includes cases comparable to ecocide, which is already covered by the legal systems of certain Member States ~~and for which the United Nations are currently working on an official international definition.~~

~~Where an environmental criminal offence defined in this Directive is committed intentionally and causes destruction of, or widespread and irreversible or long-lasting substantial damage to an ecosystem of considerable size or environmental value, or to a natural habitat within a protected site, or to air quality, soil quality or water quality, such offence should be considered as a qualified offence.~~

~~This qualified offence is based on the production of a particularly serious damage caused by any of the criminal conducts defined in Article 3(2), provided that they are committed intentionally. The penalty for this offence reflects the greater seriousness of the result, increasing the minimum of the maximum limit of imprisonment for natural persons, and differentiating according to whether the final result is produced intentionally or with serious negligence. Member States remain free to adopt or maintain more stringent criminal law rules in that area.”~~