Council of the European Union
General Secretariat

Interinstitutional files:
2021/0422 (COD)

Brussels, 10 November 2023

WK 14597/2023 REV 1

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.

INFORMATION

From:	General Secretariat of the Council
To:	Working Party on Judicial Cooperation in Criminal Matters (COPEN) (Environmental Crime)
N° prev. doc.:	WK 14564/23
N° Cion doc.:	ST 14459/21
Subject:	Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law - Input by Member States following WK 14564/23

Delegations will find attached input provided by Member States following the consultation on the issues of 'authorisation' and 'qualified offence'.

This revised version also contains a proposal by SE for including definitions of ecosystem and natural habitat within a protected site [and a recital explaining the qualifier in the qualified offence].

ANNEX

Contents

BULGARIA

With regard to the upcoming trialogue this afternoon the Bulgarian delegation would like to submit the following comments on Working document No. WK 14533/2023 INIT dated 8 November 2023:

1.Concerning question A) on the authorisation and the relevant recital (8), in a spirit of compromise we are ready to accept the proposed text.

2. As to the qualified offence we still have concerns regarding the mens rea element and would like to keep the wording „*where they are committed intentionally*" in the second line of the new paragraph 2a in Article 3 of the operative part.

Thus, the text would read, as follows:

"2a. Member States shall take the necessary measures to ensure that offences referred to in Article 3(2), ***where they are committed intentionally****, are considered a qualified offence if they cause destruction of, or widespread and substantial damage, which is either irreversible or long-lasting, to an ecosystem of considerable size or environmental value, or to a natural habitat within a protected site, or to the quality of air, the quality of soil, or the quality of water."*

We consider that this issue is very important as Art. 3(2) contains offences which may also be committed with serious negligence according to Art. 3(3). This could lead to a serious confusion in the process of transposition of the Directive and the enforcement of the provisions. We also note that draft recital 11a deals with the concept of intent in general and does not address the issue whether the qualified offence under Art.3(2a) may be committed only intentionally or also by serious negligence. Therefore, without the above wording, member states could be obliged to apply the qualified offence where the respective acts are committed also by serious negligence.

In addition, we still have concerns about the text "*considerable size and environmental value*" and we would like to have more clarifications on that wording.

3. We propose also to delete the new paragraph in Art. 8 for an aggravating circumstance in case we keep the provision of Art. 3(2a) which already constitutes a qualified aggravated offence. We oppose to having two aggravated/qualified provisions which will cause inconsistency and confusion in the transposition.

Finally, we propose the following wording of the 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 **the most severe criminal or non-criminal sanctions or measures provided in this article.**"

CROATIA

Regarding the Qualified offence – Article 3(1a) – Line 94c, as it stands in the document no. WK 14564/2023, we generally regret that there is not enough time to analyze the possible consequences of such a provision.

Taking into account that we did not take the floor on this question yesterday, please note that we can support the new paragraph 2a in Article 3.

We consider that the proposed penalty of eight years of imprisonment for the acts referred to in Article 3(2a), envisaged in paragraph (2a) in Article 5, is too high.

We also consider that, in Article 7, the penalty for legal persons marked as *more severe measures* is not determined enough and as such cannot be accepted. However, we would agree that the circumstances set out in 3(2a) could be taken as aggravating.

Thank you for your efforts in this matter.

CZECH REPUBLIC

We have two comments regarding the qualified offence package:

1) Regarding Art 3 para 2a, we share the comments made yesterday about the fact that not all of the offences in the directive can reach the result of this qualified offence. But since the qualified offence provision is general, we fear that during transposition, we would have to create a qualified offence for all of the offences of the directive, regardless of whether or not they can actually happen, only to be in line with the directive's content.

A list of relevant offences (much like in the provision governing serious negligence) seems a viable solution.

2) Regarding Art 7 para 5a, we again fear the transposition of this provision. We do not have different thresholds of penalties for legal persons based on whether basic or qualified offence was committed. That is for the judge to take into account when deciding on the penalty level. With that in mind, we do not now how to transpose a provision mandating that for qualified offences, legal persons should have more severe penalties than for basic offences.

Also, we were under the impression that with our concession on the "general / qualified offence", EP would accept our sanctions regime. With this provision, the sanction regime of the general approach is breached.

With that being said, I wish you the best of luck when negotiating with the Parliament and hope for the soundest possible legal instrument.

FINLAND

As regards document WK 14564/2023 INIT and the issue of the qualified offence, we maintain our earlier positions and refer to our comments made earlier.

Our additional comment mainly concerns the proposal on Article 8 b) in document WK 14564/2023 INIT.

The chapeau of art. 8, which has been provisionally agreed to our understanding, reads as follows: "In so far as the following circumstances do not already form part of the constituent elements of the criminal offences referred to in Article 3, Member States shall take the necessary measures to ensure that, in relation to the relevant offences referred to in Articles 3 and 4, **one or several** of the following circumstances may, in accordance with the relevant provisions of national law, be regarded as aggravating circumstances:.."

Member States would thus have the choice in which of the aggravating circumstance(s) in art. 8 they transpose.

As for the proposal in the document WK 14564/2023 INIT for Article 8 b), it would seem to indicate that the Member States would have to ensure that the circumstances of art. 8 b would constitute an aggravating circumstance.

If this would lead to an obligation to introduce the aggravating circumstance of art. 8 b (new art. 8, paragraph 2), we oppose this change. As for art. 8, we have only agreed to a "one or several" formulation.

In addition, we would like to point out that, as for the text of revised recital 11a, it was agreed during the COPEN meeting yesterday, that there would no longer be a reference to "…with due regard to relevant case law of the Court of Justice of the European Union" but that the wording would be changed to "…taking into account the relevant case law…" (noting that we opposed any kind of reference to the case law of the Court of Justice).

FRANCE

First of all, we thank you again for your great job on these topics (especially the aggravated offence) and for having taken into account our main concerns.

We can accept the compromise you propose.

Good luck for the meeting with the EP.

GERMANY

We agree to the proposal as yesterday already signalled.

Only on minor point: In the new Four-Columns-Table in Line 65 in the last column Art. 3 para 2 is still named Art. 3 para 1. It is correct in the column of the Council Mandate, but not in the Draft Agreement. Since this could lead to confusion regarding the question what we are referring to in the new article of the qualified offence this should be corrected before sending it to parliament.

ROMANIA

We cannot agree with the text proposed for art. 3 paragraph (1), for the arguments presented in the mandate, which remain valid.

In addition, besides the fact that the text imposes on the authorization applicant a specific responsibility to its issuer, an approach with which we cannot agree even if the issuer is not absolved of responsibility, it is also an unpredictable one.

Thus, on the one hand, the term "substantial breach" is a vague one, difficult to evaluate by the person requesting the authorization, therefore it can cause problems from the perspective of the ECHR standards, and on the other hand, it is possible to arise situations in which the said person is not able to evaluate the respective breaches, not having the necessary knowledge in order to do so. This is all the more so since the matters that the beneficiary of the authorization should know are extremely technical ones that require specialized, possibly interdisciplinary knowledge, many times outside of his/her professional education.

An essential principle of criminal law is that each person is responsible only for his/her own acts. Or, in the analyzed situation, the state would hold a person responsible for carrying out an activity that the respective state itself allowed, through its representatives, ending up in the situation where the respective person is responsible for the fault of another.

SWEDEN

We do not have any important findings to report! The proposed texts on "authorisations" and the "qualified offence" are perfectly fine for us.

But, we do think that there is a need for a recital which clarifies the meaning of the qualifier in the aggravated offence. There were also other member states that called for that yesterday. We will submit a proposal this afternoon or tomorrow so that it can be discussed on Monday.

Thank you for hard work on this file and good luck at the technical meeting today.

[new message 10 November 2023]

We have discussed a new recital on the qualifier in the qualified offence but have come to the conclusion that what we need is instead a recital clarifying the meaning of ecosystem. We propose a new definition in article 2.2. (moved from article 8.2) and a new recital which is based on the proposal by Commission but adding that eocsystem should not be understood as including smaller items, see attached. We think this is important not only for the qualified offence but also for the offences in article 3.2. We also propose that the definition of habitat within a protected site is moved from letter o to article 2.2.

SE proposal for including definitions of ecosystem and natural habitat within a protected site [and a recital explaining the qualifier in the qualified offence]

1. Definition of ecosystem

The term ecosystem is used in most of the offences in article 3 but is defined first in article 8.2, as having the same meaning as in article 2(13) in Regulation (EU) 2020/852. We understand that the intention is that the term ecosystem should have the same meaning in article 3 and we therefore propose to move the definition from 8.2 to article 2.2.

( ) 'ecosystem' means a dynamic complex of plant, animal, fungi and micro-organism communities and their non-living environment interacting as a functional unit.

The Commission has clarified that this definition excludes small ecosystems such as stumps and anthills and we propose that this is explained in a recital.

"(yy) an ecosystem should mean a dynamic complex of plant, animal, and micro-organism communities and their non-living environment interacting as a functional unit, and include habitat types, habitat of species and species populations. Ecosystems include terrestrial and inland freshwater systems, such as forests, wetland, mountains and dryland, and marine ecosystems, as well as their services and function. For the purpose of this Directive, the term ecosystem should not be understood as including smaller units like beehives, anthills and stumps."

2. Definition of habitat within a protected site

This term is now used in article 3.2 o) and the qualified offence. It therefore makes sense to move this definition (which is included in letter o) to article 2.2.

( ) "Habitat within a protected site means any habitat of species for which an area is classifice as a special protection are pursuant to Article 4(1) or (2) of Directive 2009/47/EC of the European Parliament and of the Council or any natural habitat of habitat of species for which a site is designated as a special area of conservation in accordance with Article 4(4) of Council Directive 92/43/EEC of for which a site is listed as a site of Community importance in accordance with Article 4(2) of Council Directive 92/43/EEC."