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LETTER

From:	Meijers Committee
To:	Working Party on Judicial Cooperation in Criminal Matters (COPEN) (Environmental Crime)

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Subject:	Comments by the Meijers Committee on the draft Directive of the European Parliament and of the Council on the protection of the environment through criminal law
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Delegations will find attached, for information, the above-mentioned comments.

To Secretary General Council of the EU

Date 5 December 2022

Subject Comment on the 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, COM(2021) 851 final

**Meijers
Committee**
Standing
committee of
experts on
international
immigration,
refugee and
criminal law

Dear Ms Blanchet,

The Meijers Committee hereby sends you our commentary on the 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 (COM(2021) 851 final).

The Meijers Committee has taken note of the initiative to strengthen the fight against environmental crime by means of criminal law, such as through an extension of offence definitions and new harmonized provisions on sanction levels and additional sanctions and measures. The Meijers Committee supports the proposal in various respects. It particularly welcomes the proposed additions that would require Member States to facilitate the actual and practical application of the EU legal framework for fighting environmental crime, such as by ensuring sufficient financial, technical and technological resources, sufficient personnel, and by demanding ongoing training of the relevant national authorities and their personnel (draft Articles 16-17, et seq.). The Meijers Committee also wishes to express its support for the proposed definitions/descriptions of unclear terms (e.g. in draft Article 3(3)) and the attempts to improve the accessibility of the legal framework by refining the term 'unlawful' (Article 2(1)).

The Meijers Committee nevertheless sees significant reasons to bring to your attention some critical remarks and questions, and to share a number of suggestions for improvement of the proposed new directive. In this comment we will make some specific recommendations regarding the Commission's proposal.

As always, we remain at your disposal for further information and to answer your questions.

Yours faithfully,



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COMMENT ON THE 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, COM(2021) 851 FINAL

NOVEMBER 2022

The Meijers Committee welcomes the proposed additions that would require Member States to facilitate the actual and practical application of the EU legal framework for fighting environmental crime, such as by ensuring sufficient financial, technical and technological resources, sufficient personnel, and by demanding ongoing training of the relevant national authorities and their personnel (draft Articles 16–17, et seq.). The Meijers Committee also wishes to express its support for the proposed definitions/descriptions of unclear terms (e.g. in draft Article 3(3)) and the attempts to improve the accessibility of the legal framework by refining the term ‘unlawful’ (Article 2(1)). At the same time, the Meijers Committee would like to share a number of suggestions for improvement of the proposed new directive. In this comment, the Meijers Committee will make some specific recommendations regarding the Commission’s proposal.



Meijers Committee

Standing Committee of Experts on International
Migration, Refugee and Criminal Law

Note on the Proposal for a directive of the European Parliament and the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC, COM(2021) 851 final

The Meijers Committee has taken note of the initiative to strengthen the fight against environmental crime by means of criminal law, such as through an extension of offence definitions and new harmonized provisions on sanction levels and additional sanctions and measures. The Meijers Committee supports the proposal in various respects. It particularly welcomes the proposed additions that would require Member States to facilitate the actual and practical application of the EU legal framework for fighting environmental crime, such as by ensuring sufficient financial, technical and technological resources, sufficient personnel, and by demanding ongoing training of the relevant national authorities and their personnel (draft Articles 16–17, et seq.). The Meijers Committee also wishes to express its support for the proposed clarifications of vague terms (e.g. in draft Article 3(3)) and the improved accessibility of the legal framework by refining the term 'unlawful' (Article 2(1)).

The Meijers Committee nevertheless sees significant reasons to bring to your attention the following critical remarks and questions, and to submit a number of suggestions for improvement of the proposed new directive.

Evidence-based criminalisation and 'ultima ratio'

1. Whereas the Meijers Committee sees in the supporting documents an evidence base for the aforementioned proposals with regard to requiring sufficient resources, staff, training, and other practical facilitations, the evidence base for a number of other proposals is (nearly) absent. This particularly applies to the proposed extensions of crime categories as defined in draft Article 3. As follows clearly from evaluations of Directive 2008/99/EC (which is to be replaced by the proposed Directive) it was not possible to relate the observed low rate of detection, prosecution and conviction to the prevailing (allegedly too confined) scope of substantive criminal law measures – not in the least because systematic, reliable and recent statistics in this area are lacking.¹ Instead, findings repeatedly show that other factors, such as a lack of political will or priority, shortage of resources and personnel, and insufficient levels of knowledge and expertise are greatly contributing to the weak performance in combating environmental crime in practice.² It is therefore indeed justified – and supported by the Meijers Committee – that proposals have been submitted to address these particular issues in the domestic legal orders of the Member States.

However, the significant broadening of the scope of criminal behaviours as has been proposed in draft Article 3, is not supported by the aforementioned findings. The proposals in draft Article 3 therefore also seem to be at odds with the message conveyed in the *ultima ratio* principle – a principle that has been embraced by all of the EU's law-making institutions – requiring the legislature to only invoke the criminal law if alternative measures have proven to be insufficient to achieve the objectives aimed at. **For all these reasons, the Meijers Committee recommends to reconsider the adjustments proposed in draft Articles 3.** For instance, to what extent is it necessary and proportionate to oblige the criminalization of serious circumvention of requirements to do an environmental

¹ Council document 14065/19, Final report on the Eighth round of mutual evaluations on environmental crime, p. 8–9.

² Idem, p. 10–13. Compare also Commission Staff Working Document, 'Evaluation of the Directive 2008/99/EC of the European Parliament and the Council of 19 November 2008 on the protection of the environment through criminal law', SDW(2020) 259 final, par. 5.1.4 on p. 33–34.

impact assessment (draft Article 3(1)(d) as the presence of such assessment is required as a condition for getting a consent while acting without a consent is already punishable? With regard to this example, the Meijers Committee fails to see a convincing necessity and therefore recommends to revoke this subsection. Likewise, the Meijers Committee recommends to revoke other subsections if it appears not possible to substantiate a convincing necessity.

Sufficient legal basis?

2. Despite the support expressed in the previous point for the proposed obligations regarding sufficient resources, staff, training, and other practical facilitations, the Meijers Committee wonders whether Article 83 TFEU actually provides the appropriate legal basis for such obligations. This article 'only' envisages the adoption of common norms with regard to the definitions of offences and sanctions, but does not seem to cover other matters. It has been suggested, however, that Article 84 TFEU could be relied on for such other matters.³ In view of the convincing arguments that have been put forward to support this suggestion, **the Meijers Committee suggests to consider adding Article 84 TFEU as legal basis, all the more so as the Meijers Committee take the stance that promoting and supporting the action of Member States in the field of crime prevention will be a significant contribution to the battle against environmental crime and meet the last resort principle.**

Common definitions

3. One of the positive aspects of the draft Directive is its attempt to further operationalize a number of terms, such as the "substantial damage" by means of requiring Member States to adopt legislation that takes account of the five elements mentioned in draft Article 3 para. 3. However, with regard to a number of other definitions, or the lack thereof, the Meijers Committee wishes to raise the following points.
4. The Meijers Committee is of the opinion that there are several other vague terms that would likewise require clarification, such as:
 - The term 'serious injury' (e.g. in draft Article 3 para. 1);
 - The requirement with regard to legal persons that 'offences have been committed for their benefit' (draft Article 6 para. 1). With regard to this phrase, it is particularly unclear whether such benefits include costs saved and negligible benefits? The answer to this twofold question determines the exact scope of criminal liability, which should be sufficiently clear beforehand;
 - The proposed aggravating circumstance that 'the offence generated or was expected to generate substantial financial benefits, or avoided substantial expenses, directly or indirectly' (draft Article 8 under g);
 - The proposed aggravating circumstance that 'the offender...interferes with witnesses or complainants' (draft Article 8 under j). What (kind of) 'interfering' is implied?

³ See Grasso, G., Sicurella, R., Scalia, V. (2015), *Articles 82-86 of the Treaty on the Functioning of the European Union and Environmental Crime. Study in the framework of the EFFACE research project, Catania: University of Catania*, p. 33-34

(https://www.ecologic.eu/sites/default/files/publication/2015/efface_art82-86tfeu_and_environmental_crime.pdf)

The Meijers Committee asks for clarification on the aforementioned definitions/terms.

5. Regarding the definition of 'public concerned', draft Article 2 para. 4 lists several groups of persons, amongst others 'persons having a sufficient interest or maintaining the impairment of a right'. The

Meijers Committee wonders whether the second part of this definition ('maintaining the impairment of a right') has a sufficient distinctive meaning or only leads to (too) wide a definition. After all, under the current definition, the mere claim that a right has been breached, without any requirement that the persons concerned have been – or are likely to be – affected by the crime themselves, seems to suffice for being qualified as 'public concerned'. According to the Meijers Committee such a broad definition would be neither appropriate nor workable. **It is therefore recommended to reconsider the precise scope of the proposed definition of 'public concerned' (draft Article 2 para. 4).**

The scope of draft Article 3

The Meijers Committee fails to see the added value of the phrase 'without ... an assessment with regard to their effects on the environment' in draft Article 3 para. 1 (d), since it already follows from Directive 2011/92/EU (OJ L 26, 28.1.2012) – referred to in draft Article 2 – that Member States are obliged to ensure that any project requiring such an assessment also requires a development consent. **It is therefore requested to clarify the possible added value of the phrase 'without ... an assessment with regard to their effects on the environment'.** More generally, the Meijers Committee advises to better substantiate the necessity and proportionality of obliging the criminalization of serious circumvention of requirements to do an environmental impact assessment, in light of the basic principle that criminal law should be a last resort.

Additional sanctions or measures for natural and legal persons

6. Draft Article 5 para. 5 (para. 6 in the latest document for COPEN 11563/22⁴) would oblige the Member States to provide for a number of additional sanctions/measures, potentially to be imposed on natural persons who would be convicted for the crimes referred to in draft Articles 3-4. As far as the Meijers Committee is aware of, such a list of additional measures has not been proposed previously. One would therefore expect a much more elaborate explanation on why this type of sanctions has been proposed, and on what is to be expected from such sanctions in terms of prevention and effectiveness – information that would preferably follow from scientific sources. In the absence of such an explanation, it remains highly unclear what justifies this part of the proposal. Moreover, the novelty of this type of EU-level sanctions raises the question whether and to what extent it is the Commission's intention to increasingly propose harmonisation measures regarding sanctions other than custodial sanctions and fines, i.e. also in the context of other areas of crime. **The Meijers Committee therefore strongly recommends to provide more justifications for the proposal to provide for additional measures for natural persons**

⁴ See annex to the Note on '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 - Selected questions on the issue of sanctions', Council document 12221/22 (<https://data.consilium.europa.eu/doc/document/ST-12221-2022-INIT/en/pdf>).

and to clarify whether and to what extent the proposed additional sanctions/measures belong to a newly developed sanctioning policy in EU law.

7. Related to the previous point is the observation that draft Article 5 para. 5 does not propose to harmonize the conditions under which the proposed additional sanctions/measures could be imposed on natural persons in the Member States, such as conditions related to the seriousness of crime, or the period of time for which temporary measures could last. Without such conditions, the risk may be that what is called 'additional' on paper, or what might be qualified as a 'measure' rather than a penalty or sanction, in practice would turn out to be, or would at least be experienced as something being far from 'additional', or as something very harsh and punitive, thereby potentially raising issues under the proportionality principle (Article 49 EU Charter of Fundamental Rights). **The Meijers Committee therefore raises the question why such conditions have not been mentioned, and whether it could be considered to do so as yet, at least in light of the proportionality principle.**
8. As a next point in relation to the issue of additional sanctions/measures to natural persons, the Meijers Committee wishes to point out the severe character of one specific additional measure, i.e. the measure proposed under draft Article 5 para. 5: 'temporary bans on running for elected or public office'. The imposition of such a sanction/measure would entail a restriction to the fundamental rights laid down in Articles 39-40 of the EU Charter of Fundamental Rights. According to the Meijers Committee, the type of crime the proposed Directive deals with fails to justify such a far-going answer. **The Meijers Committee therefore agrees with the wish expressed in the Council document of September 2022 (12221/22) to remove the temporary exclusion ground (i.e. temporary bans on running for elected or public office).**
9. Given the type of crime the proposed Directive covers, it makes sense that the proposed Directive envisages various provisions related to the liability of legal persons, for it is not seldomly in the context of legal persons that environmental crimes are being committed. With regard to the proposed sanctions, however, the Meijers Committee wishes to raise the same questions as asked previously under points 7 and 8. Hence, it is requested **to provide more justifications for the proposal to introduce additional sanctions/measures for legal persons, and to reflect on how the proportionality principle can be safeguarded, specifically in relation to the size of a legal person, in the course of imposing such additional sanctions/measures.**

Mitigating circumstances

10. Draft Article 9 envisages so-called mitigating circumstances. Whereas the Meijers Committee in general very much supports the attention for this legal figure, the fact is that under the domestic criminal laws of some Member States (such as the Netherlands), statutory mitigating circumstances are unknown. This raises the question whether such mitigating circumstances should be regulated at EU-level, and if they should be, how a provision as the drafted one could ensure that its essence will be implemented and applied in practice. The Meijers Committee thus recommends to engage in legal-comparative research to come to an unified vision on the question if and how mitigating circumstances should be part of EU criminal law instruments.

Limitation periods

11. Article 11(2) on limitation periods requires that Member States enable the investigation, prosecution, trial and judicial decision at least ten, six or four years (depending on the offence) from the time when the offences were committed. However, many environmental offences are characterized by the long period between the offence being committed and the offence being detected. In this regard, **the Meijers Committee recommends to reconsider for each particular offence whether whether the moment of commission or the moment of detection shall be taken as a point of reference.**

Protection of persons who report environmental offences or assist the investigation

12. According to the proposed Article 13 para. 1 the same protection as referred to under Directive (EU) 2019/1937 (the Whistleblower Directive) should be granted to 'persons reporting criminal offences'. The (concise) explanatory memorandum on draft Article 13 says that the group of 'persons reporting' is broader than the group defined under the Whistleblower Directive as it mentions not only "whistleblowers" but also "environmental defenders and others reporting information or providing evidence to an investigation relating to environmental criminal offences" (page 19 sub article 13). **As far as the Meijers Committee is concerned, this important addition in the explanatory memorandum, needs to be added in the text of Article 13 itself.**