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MEETING DOCUMENT

From:	General Secretariat of the Council
To:	Working Party on Judicial Cooperation in Criminal Matters (COPEN) (Environmental Crime)

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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 - Additional suggestions in view of the COPEN meeting on 7 June 2023
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At the technical meetings on 1 and 2 June 2023, the Commission indicated that it would submit some proposals for compromise solutions and some further explanations (see also ST 9922/23).

Please find the proposals and explanations submitted by the Commission in [Annex I](#).

The Presidency has scrutinised the proposals and has made some observations, see [Annex II](#). The Presidency has also made an additional suggestion on deforestation.

The Presidency would appreciate it if Member States, at the meeting on 7 June 2023, could provide their (initial) assesment of the Commission proposals in the light of the observations by the Presidency, and on the Presidency suggestion on deforestation.

**ECD proposal:
COM informal suggestions as a follow up to technical meetings of 1-2 June
Non-paper**

1. Additional qualifier (line 66)

After reflection, we would like to suggest considering instead of the additional qualifier proposed by the EP – “*biodiversity, ecosystem services and functions*” to use “***ecosystem or ecosystem services or functions***”. In our view, this addition would have added value and would add additional layer because:

- These terms are used (and defined) in EU environmental law and have a lower level meaning compared to ‘biodiversity’, while reflects the holistic element the EP wished to introduced (to our understanding).
- Indeed, ‘biodiversity’ is understood as the variability among living organisms arising from all sources, and has such a wide meaning that it would be difficult to argue that an individual conduct impacts it to a *substantial* degree, as required under this qualifier.
- However, an ecosystem refers to a more localised complex of living organisms and their non-living environment, as it is apparent in the definitions below.
- Ecosystem services refer to services to people, and this term is often used alongside with ecosystem functions, see for example the UN CBD [framework](#) while the latter is not defined in EU law.
- However, the EU legislation has a several definitions of ecosystem / ecosystem services (even though similar in substance). As the qualifier should have a cross-cutting meaning, in our view it would be better to define these terms. We propose the below definitions underlined.

We base this on the definitions on the following legal acts/proposals:

i) Regulation 734/2008 on the protection of vulnerable marine ecosystems in the high seas from the adverse impacts of bottom fishing gears

‘marine ecosystem’ means a dynamic complex of plant, animal and microorganism communities and their non-living environment interacting as a functional unit”

Comment: in this definition, **there are three elements: plants, animals and environment as well as their functional interaction, which is a key element of the definition.**

ii) Nature Restoration Law, COM proposal

(1) ‘ecosystem’ means a dynamic complex of plant, animal, and microorganism communities and their non-living environment, interacting as a functional unit, and includes habitat types, habitats of species and species populations;

draft Council GA: (1) ‘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;

iii) Invasive Alien Species Regulation

(5) 'biodiversity' means the variability among living organisms from all sources, including terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems;

(6) 'ecosystem services' means the direct and indirect contributions of ecosystems to human wellbeing

iv) Taxonomy Regulation

Article 3

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

(14) 'ecosystem services' means the direct and indirect contributions of ecosystems to the economic, social, cultural and other benefits that people derive from those ecosystems;

(15) 'biodiversity' means the variability among living organisms arising from all sources including terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part and includes diversity within species, between species and of ecosystems;

Comment: the same definition as in Regulation 734/2008 (see above).

2. Draft recital on the term “legal person” (revised recital 8c; line 17c)

The text is based on a draft proposal by the Swedish Presidency with some proposed refinements:

“(8c) With regard to offences and sanctions provided for in this Directive, legal persons should be understood as not including States or public bodies exercising State authority and public international organisations. As this Directive provides for minimum rules, Member States may adopt more stringent criminal law rules in national law, including could provide criminal liability for public bodies.”

3. Recital on the term “energy” (link to the definition of the “pollution” offence in Article 3 (1) (a); line 66)

The introduction of different forms of energy, such as heat, noise or seismic vibration, into the environment can cause substantial damage to the quality of air, water or soil or substantial damage to animals or plants [...] or death or serious injury to persons [harm to human health] [to adapt to the qualifier, line 66]. Various instruments of Union environmental law regulate on the introduction of energy into the environment, for example in the area of protection of the marine environment, noise control or industrial emissions. Therefore, in such cases, introduction of energy into the environment which causes or is likely to cause such damage should constitute an offence under this Directive if it causes or is likely to cause substantial damage to the environment or human health.

4. Recital concerning the terms “injury” or “harm”

The term injury [harm to human health] [to adapt to the qualifier, line 66] used in the definition of certain offences in this Directive should be understood in a broad sense, covering any form of physical harm to a person, including a change in body function or cell structure, temporary, fatal or chronic disease, malfunction of the body, deterioration of human physical health .

5. Recital concerning the term “updated” (line 103)

Where this Directive refers to a requirement to obtain an authorisation and comply with it, this should also cover obligations of the duty-holder to update and renew such authorisations.

6. Recital concerning the terms “hazardousness and toxicity” (line 108)

Where, for the purpose of assessing whether conduct concerns non-negligeable quantity, this Directive refers to the extent to which the regulatory threshold, value or another mandatory parameter is exceeded, this should cover assessment of hazardousness and toxicity. In particular, the more hazardous or toxic the material or substance is, the sooner this threshold [qualifier] would be reached, as for particularly hazardous and toxic substances or materials even a very small quantity can cause substantial damage to the environment or human health.

7. Letter (g) of Article 3(1) – illegal ship breaking

We would like to underline that as explained at the meeting we are against limiting this offence to the ‘owner’. The reasons were explained at the meeting and we would like to draw to your attention that:

- Article 6(2)(a) of Regulation 1257/2013 states that ships can be recycled only at authorised facilities: ships “are only recycled at ship recycling facilities that are included in the European List”. This means that whoever tries to recycle pretending to be the owner of the ship breaches (also) that provision of the regulation; in other words, you do not need to be the owner to breach that provision. This is why that offence was worded as it was in the proposal (putting the emphasis on recycling and not on the legal title to recycle) and this is why it is important to take into account that the Regulation provides for a variety of other legal roles.
- In particular, a person without a valid legal title while corresponding to any role indicated in other provisions of the Regulation such as Articles 11 and 12 could justify the circumstance that he/she is bringing the ship to recycling; that person could then be liable under Article 6.2.a; but as the Council put it, it cannot, because only the owner having a valid legal title – also following the broad definition of Article 3.14 - can be criminally liable. Each of those persons could indeed be equally responsible for the breach if they commit the conduct.

- A systematic interpretation of Regulation 1257/2013 confirms that what matters in terms of environmental breach is not who recycles but where the recycling takes place, i.e. whether or not in an authorised facility; in this regard, it is helpful to recall Article 5(2), second subparagraph: “[i]n the case of ships going for recycling, **they shall comply**, as far as practicable, with paragraph 1 of this Article from the date of the publication of the European List of ship recycling facilities (‘the European List’) as set out in Article 16(2)”, i.e. the list referred to in Article 6(2), letter a..
- The point is that if the ship is recycled in a non-authorised facility by a person in the absence of the elements recalled above (no clear evidence that responsibility was taken for the operation of the ship or lack of any other legal title for instance) we have a clear breach of the regulation without any sanction.
- Moreover, a prescriptive personal limitation to the owner could lead that persons acting on behalf of the owner, such as an CEO, are excluded.
- The reason why Article 6 refers to the ship owner in its first subparagraph is that recycling in the allowed facilities is **ALSO** a requirement for the ship owner; but this in no way allows for an interpretation according to which recycling everywhere would be allowed whoever carries out the recycling the operation.
- Finally, it should be recalled the scope of the regulation is based according to the definition of ship, and this also for the sake of criminal liability (see in this regard Article 2(1) and recital 10 of reg 1257/2013 referring to the old ECD) and not on the basis of the role of the person who acts. This further corroborates the point on Article 5(2)(2) recalled above.

Comment: the word ‘owner’ used in the Council text does not correspond to Article 3.14 of Regulation 1257/2013, the text refers to ‘ship owner’, and this should be in any even aligned.

8. Attempt: inclusion of letter (d), line 113

We would like to draw to your attention that the Environmental Impact Assessment Directive distinguishes two stages: an executed project (which refers to the finality) and a project in the process of being executed (see Annex II, para 13(a)). As the Council proposes to refer that definitions should be interpreted as defined in the EU environmental law, if attempt is not criminalised for this offence, this would create a legal loophole. If a project is not ‘executed’, the perpetrator can claim that there is no execution in the meaning of EU environmental law, thus there is no offence.

9. A recital on online

When offences defined in this Directive cover conduct such as making available or placing on the market, sale, offering for sale or trading, this should include conduct committed by means of information and communication technologies (online trade).

Comment: based on the text used in the Violence against Women and Human Trafficking proposals.

Additional suggestions submitted to the COPEN Working Party on 7 June 2023

Part A: Commission suggestions with observations by the Presidency

Member States are kindly invited to indicate whether they can accept the Commission suggestions as set out in Annex I, in the light of the observations by the Presidency as set out below.

1. Addition qualifier (line 66)

The Presidency considers that it is sufficient to add “organism” to the qualifier but is interested to hear the views of Member States on the Commission suggestion.

2. Draft recital on the term “legal person” (revised recital 8 c; line 17c).

The Presidency suggests a few minor editorial changes, as follows:

*“(8c) With regard to offences and sanctions provided for in this Directive, legal persons should be understood as not including States or public bodies exercising State authority and public international organisations. As this Directive provides for minimum rules, Member States ~~may~~ **could** adopt more stringent criminal law rules in national law, including ~~could provide~~ criminal liability for public bodies.”*

3. Recital on the term energy

At the technical meeting it was discussed to include “energy” in subletter a) on the condition that the institutions could agree on a recital. The Presidency suggests the following changes to the COM proposal:

*“**This Directive should apply, as far as emissions are concerned, also to energy, since the introduction of different forms of energy, such as heat, noise or seismic vibration, into the environment can cause substantial damage to the quality of air, water or soil or substantial damage to animals or plants [...] or death or serious injury to persons [harm to human health]. Various instruments of Union environmental law regulate on the introduction of energy into the environment, for example in the area of protection of the marine environment, noise control or industrial emissions. Therefore, in such cases, introduction of energy into the environment which causes or is likely to cause such damage should constitute an offence under this Directive if it causes or is likely to cause substantial damage to the environment or human health.**”*

4. Recital concerning the terms “injury” or “harm”

The Presidency suggests accepting the COM proposal on a new recital, but clarifying that mental health is not included in the term “injury”:

“The term injury [harm to human health] [to adapt to the qualifier, line 66] used in the definition of certain offences in this Directive should be understood in a broad sense, covering any form of physical harm to a person, including a change in body function or cell structure, temporary, fatal or chronic disease, malfunction of the body, deterioration of human physical health, but excluding mental health.”

5. Recital concerning the term “updated” (line 103)

The Presidency suggests accepting the COM proposal.

6. Recital concerning the terms “hazardousness and toxicity” (line 108)

The Presidency suggests accepting COM proposal, with the editorial changes suggested below:

Where, for the purpose of assessing whether a conduct concerns non-negligeable quantity, this Directive refers to the extent to which the regulatory threshold, value or another mandatory parameter is exceeded, this should among other things cover assessment of hazardousness and toxicity. In particular, the more hazardous or toxic the material or substance is, the sooner this threshold [qualifier] would be reached, as for particularly hazardous and toxic substances or materials even a very small quantity can cause substantial damage to the environment or human health.

7. Letter (g) of Article 3(1) – illegal ship breaking

See row 81 in the 5-column document (9922/23).

8. Attempt: inclusion of letter (d), line 113

Member States are invited to take account of the observation by COM when considering the Presidency request in the fifth column of line 133 in 9922/23.

9. A recital on online

The Presidency suggests accepting the COM proposal on a new recital, explaining that offences also cover acts committed online:

“When offences defined in this Directive cover conduct such as making available or placing on the market, sale, offering for sale or trading, this should include conduct committed by means of information and communication technologies (online trade).”

Part B: Presidency suggestion on “Deforestation” (line 88)

At the COPEN meeting on 31 May 2023, a few Member States opposed the inclusion of Article 3c) in letter n) on the basis that criminal liability could be deemed to be unproportional for natural persons or small companies that only harvest timber rarely. An exception for such actors was requested.

The Presidency suggests a recital which clarifies the meaning of “negligible quantity” in the context of this offence (possible to be inserted in connection with the proposed recital concerning the terms “hazardousness and toxicity”), as follows:

“With regard to the determination of whether a commodity or a product associated with deforestation and forest degradation is negligible or non-negligible, Member States could take into account the quantity in net mass or, where applicable, volume or number of items.”
