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INFORMATION

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 - Answers from the European Parliament to questions from the Presidency on the 'catch-all provision'

As indicated in ST 9922/23 (see point 5 on page 4), the Presidency has submitted some questions to the European Parliament on the 'catch-all provision' (line 94c).

Please find attached the answers provided by the European Parliament.

Answers from the European Parliament to questions from the Presidency on the catch-all provision

- 1) The interaction between the first sentence (which has ‘unlawful’ and ‘committed intentionally’ as a qualifier) and the second sentence (which does not have such a qualifier) seems unclear. Are these two sentences linked, and if so: how? Or are both sentences meant to constitute, each for own, a basis for the criminalisation of conduct that is not yet covered by any of the 19 offences described in Article 3(1)?**

Legally speaking it is not possible for the second sentence of line 94c to be of stand-alone character, i.e. without a link to the first sentence, since the second sentence would then lack a legal basis. It is only if the second sentence of line 94c is linked to the first sentence, so that the second sentence too refers to conduct that is “unlawful”, that that second sentence is also legally possible. Otherwise it would mean that the second sentence criminalises “any conduct causing severe and widespread, or severe and long-term, or severe and irreversible damage” as such. That is not possible, as Article 83(2) does not allow for stand-alone criminalisation of conduct, it only allows for criminalisation of infringements of EU “harmonisation measures”, i.e. EU law.

- 2) The proposal for a Directive is based on Article 83(2) TFEU, which allows for the establishment of minimum rules with regard to the definition of criminal offences and sanctions in an area that has been subject to harmonisation measures. Hence, the provisions of the proposed Directive presuppose that Union measures to protect the environment have already been adopted. Which Union measures are meant by your proposed amendment? Can you give an example of conduct that is not yet covered by any of the 19 offences described in Article 3(1) and which would be covered by the provision of Article 3(1a)?**

The Commission proposal does not criminalise environmental conduct autonomously, but criminalises conducts consisting in a list of infringements of existing EU legislation (list under Article 3(1)) and also, more generally, conduct that is “unlawful”, i.e. “infringing [...] Union [law]” (introductory part of Article 3(1) in combination with Article 2(1)). Article 83(2) TFEU allows the EU legislator to establish minimum rules on the definition of criminal offences and sanctions if that “proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures”. In other words, Article 83(2) TFEU requires the existence of EU “harmonisation measures” the effective implementation of which it is essential to ensure. It follows that Article 83(2) TFEU does not allow for autonomous, or stand-alone, criminalisation of conduct ; it only mandates criminalisation (or more precisely, the “establish[ment] of minimum rules with regard to the definition of criminal offences and sanctions”) of conduct infringing existing EU “harmonisation measures”, i.e. EU law. Clearly, Article 3(1) does not mention all the legal acts which provided for harmonisation measures in the field of environmental protection.

The examples of acts which are not listed in Article 3(1) could be:

- 1) Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe.
- 2) Directive 2004/107/EC of the European Parliament and of the Council of 15 December 2004 relating to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air.
- 3) Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy.

3) It is generally agreed that criminal law should be the 'ultima ratio' to ensure respect for measures aimed at protecting the environment. Do you consider that the proposed amendment respects the principle of 'ultima ratio', given that the amendment has a scope which is very open and seems endlessly wide?

The new Article 3(1a) introduced by Parliament leaves the gist of the Commission proposal untouched. It would simply make the category of conduct criminalised by the present Directive beyond the list of infringements of EU legislation which Article 3(1) refers to (specifically or through the term "unlawful") potentially much wider, but not "endlessly wide", as in fact there would have to be previous harmonisation measures.

That is legally possible if two conditions are met :

- (i) such criminalisation continues to relate to existing "harmonisation measures" as meant in Article 83(2) TFEU, i.e. to relate to infringements of Union law
- (ii) such criminalisation respects the principle of legal certainty (nullum crimen, nulla poena sine lege).

As for the first sentence of line 94c, condition (i) is met : that sentence includes the word "unlawful" also used in Article 2(1) of the Commission proposal and thus continues to refer, through the definition of "unlawful" in said Article 2(1) (which is Article 3(1) in the Council text), to "conduct infringing [Union law]".

As to the condition (ii), this is very closely tied to the definition of "unlawful", on which three institutions have diverging views. The clarity of this definition will also define the clarity and legal certainty of Article 3 paragraph 1a.

- 4) A general requirement within criminal law is that potential offenders should, on the basis of the legality principle (the *lex certa* principle), know whether an act they intend to commit will fall under criminal law or not. The legality principle forms part of the principles of the rule of law. Do you consider that the proposed 'catch-all' amendment, with its open and wide scope, complies with this principle?**

As explained above, the proposed approach would be wider than the Commission proposal, but not "open" or "endlessly wide". The offender would know that if he intends to violate one of the Union acts or national acts referred to in the definition of "unlawful" he would potentially commit a crime. The clarity and certainty should be secured in that definition.
