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MEETING DOCUMENT

From:	General Secretariat of the Council
To:	Working Party on Judicial Cooperation in Criminal Matters (COPEN) (Environmental Crime)
N° prev. doc.:	ST 10174/22
N° Cion doc.:	ST 14459 + COR 1
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 - Observations by Austria regarding Art. 5 (5) letter c)

In view of the COPEN meeting on 16 June 2022, delegations will find attached observations by AT regarding Art. 5 (5) letter c) of the draft Directive.

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Observations by Austria

Austria submits the following observations regarding Art. 5 (5) letter c) :

Like other delegations, AT considers that the current wording imposes disproportionate sanctions. AT therefore shares the view that Art. 5 should introduce a facultative, rather than an obligatory inclusion of the proposed additional sanctions or measures into the national legal systems. Accordingly the words „which shall include” should be replaced by „*which may include*”.

Like other delegations we propose to delete in Art. 5 (5) letter c the term “*or permanent*” for the following reasons:

1. According to the Public Procurement Acquis (see Art. 57 Directive 2014/24/EU, Art. 80 Directive 2014/25/EU, Art. 38 Directive 2014/23/EU und Art. 39 of Directive RL 2009/81/EG) economic operators shall or may be excluded from procurement procedures. An obligation to exclude exists for example in cases of a conviction by final judgment for participation in a criminal organisation, as defined in Article 2 of Council Framework Decision 2008/841/JHA, terrorist offences or offences linked to terrorist activities, as defined in Articles 1 and 3 of Council Framework Decision 2002/475/JHA (5) respectively, money laundering or terrorist financing and child labour and other forms of trafficking in human beings. In such cases economic operators – if they didn't implemented sufficient self-cleaning measures according to the Directives (see for ex. Art. 57 (6) of Directive 2014/24/EU) - must be excluded from procurement procedures. However, the maximum period of exclusion if no self-cleaning measures are taken by the economic operator to demonstrate its reliability shall not exceed five years from the date of the conviction by final judgment (see for ex. Art. 57 (7) of Directive 2014/24/EU). AT is of the opinion, that if a maximum exclusion period of five years exists for example in cases of convictions for child labour it would be totally disproportionate to exclude economic operators who committed offences according to Articles 3 and 4 of the proposed Directive (for ex. spread of invasive species in the territory of the Union) permanently from procurement procedures. Furthermore, this sanction would be in addition to the punishment as a criminal offence, which makes the sanction even more problematic.

2. While Article 5 (5) letter c) of the proposed directive allows both a temporary and a permanent exclusion for natural persons, Article 7 (2) letter d) only provides for the possibility of temporary exclusion for legal persons. An objective justification for this differentiation is not evident from the proposed directive and therefore according to AT's point of view extremely problematic. The ECJ repeatedly stated, that the principle of equal treatment, which is one of the fundamental principles of EU law, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see i.e. Rs C-598/19, *Conacee*, at no 36 with further references of judgements). From AT's point of view, it is therefore necessary that Art. 5 (5) letter c) and Art. 7 (2) letter d) must be designed identically (based on the latter provision).
 3. Furthermore, it should be noted that the public procurement directives always provide for "exclusion periods". Therefore, only a temporary limitation of the exclusion is possible according to the PP Directives. Art. 5 (5) letter c) of the proposed directive would not be consistent with that approach insofar as a permanent exclusion is foreseen. As already stated above, an exclusion for unlimited time would be disproportionate and in contradiction to the fundamental Union principle of proportionality. The ECJ stated in C-30/19, *Braathens Regional Aviation AB*, at no 38, that the severity of the sanctions must be commensurate to the seriousness of the breaches for which they are imposed, in particular by ensuring a genuinely dissuasive effect, while respecting the general principle of proportionality. A permanent exclusion from procurement procedures for natural persons for all offences as listed in Art. 3 (or Art. 4) would infringe this principle (see i.e. Art. 3 (1) letter o) habitat degradation). But even in the case of offences resulting in death, an additional (!) exclusion from procurement procedures after a sentence has been served (in the directive proposal planned are a maximum penalty of 10 years of imprisonment and only monetary sanctions for legal entities) is very problematic. The same problem arises with regard to Article 7 (2) letter e) ("permanent disqualification from the practice of business activities").
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