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MEETING DOCUMENT

From:	General Secretariat of the Council
To:	Working Party on the Environment
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Subject:	Air Quality Directive: WPE on 11 July 2023 - Presidency steering note

With a view to the WPE on 11 July on the abovementioned proposal, delegations will find attached a Presidency steering note to guide the discussions.

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Steering note

WORKING PARTY ON THE ENVIRONMENT- 11 July 2023

Ambient Air Quality Directive (AAQD)

As a basis for the discussion at the WPE on 11 July, the Presidency has prepared this steering note to guide a thorough examination of the Articles and Annexes set out below, structured as follows:

Intervention rounds:

1. Article 19
2. Article 22 and Annex IX
3. Articles 27-29
4. Annex III.A.2 + Annex IV.B. 2(f), Annex I, section 4 and Article 15(4)
5. Article 31(1) and Article 32

The steering note also includes drafting proposals for Article 19(1), Article 19(2) and Article 23(1) and Article 23(2), following on from discussions at previous WPEs.

In the different sections of this steering note, the Presidency invites delegations to indicate their preferred options.

Following the WPE, the Presidency invites delegations to send drafting proposals relating to the issues raised in this steering note by **18 July 2023 cob**.

INTERVENTION ROUND 1. Article 19: Air quality plans

A. Timeframe for establishing and implementing air quality plans (Article 19(1))

According to Article 19(1) and in light of the clarification provided at the WPE on 15 June WPE, Member States must establish air quality plans for zones where pollutant levels in ambient air exceed limit values within two years of the recorded exceedance. These plans should define measures to attain the limit values within four years from the end of the calendar year in which the exceedance occurred.

Based on the previous clarifications, the Presidency proposed the following wording for this Article:

"1. Where, in given zones the levels of pollutants in ambient air exceed any limit value, laid down in Section 1 of Annex I, Member States shall establish air quality plans for those zones as soon as possible and no later than 2 years after the calendar year during which that exceedance of any limit value was recorded. Those air quality plans shall set out appropriate measures to achieve the concerned limit value and to keep the exceedance period as short as possible, and in any case no longer than 4 years from the end of the calendar year in which the first exceedance was recorded."

Where exceedances of any limit values persist during the third calendar year after the establishment of the air quality plan, Member States shall update the air quality plan and the measures therein, and take additional and more effective measures, in the subsequent calendar year to keep the exceedance period as short as possible.”

The Presidency requests feedback from delegations on whether they would support this wording.

B. Air Quality Plans for ozone (Article 19(2))

During the WPE of 15 June, delegations were invited to provide their opinions on different aspects of Article 19(2), which refers to ozone action plans. Based on the comments previously made by delegations on the territorial scope for air quality plans for ozone and the establishment of air quality plans to achieve ozone target values, the Presidency would like to propose the following wording for discussion:

*“2. Where in a in a given ~~NUTS-1~~ territorial unit **covering at least the air quality zone**, the levels of pollutants in ambient air exceed the ozone target value, laid down in Section 2 of Annex I, Member States shall establish air quality plans for those territorial units as soon as possible and no later than 2 years after the calendar year during which the exceedance of the ozone target value was recorded. Those air quality plans shall set out appropriate measures in order to achieve the ozone target value and to keep the exceedance period as short as possible. Where exceedances of the ozone target value persist during the fifth calendar year after the establishment of the air quality plan in the relevant ~~NUTS~~ $\pm$ territorial unit, Member States shall update air quality plan and the measures therein, and take additional and more effective measures, in the subsequent calendar year to keep the exceedance period as short as possible. **Member States shall inform the Commission which territorial unit they are going to use to establish air quality plans for ozone.***

Member States may refrain from establishing air quality plans for ozone for a given territorial unit when there is no significant potential, taking into account orographic, meteorological and economic conditions, to address the exceedance.

If Member States do not establish an air quality plan in accordance with paragraph 1, the Member State shall notify the Commission with the necessary information justifying that there is no significant potential to address the exceedance and an action plan is not the appropriate measure to address this exceedance.

For ~~NUTS-1~~ territorial units where the ozone target value is exceeded, Member States shall ensure that the relevant national air pollution control programme prepared pursuant to Article 6 of Directive (EU) 2016/2284 includes measures addressing those exceedances.”

The Presidency requests feedback from delegations on whether they would support this wording.

C. Territorial units most appropriate for AERO AQ plans (Article 19(3))

Article 19(3) sets out requirements for establishing air quality plans for those NUTS 1 territorial units where the average exposure reduction obligation (AERO) is exceeded. Questions have been raised by some delegations on whether NUTS1 territorial units are the most relevant units for establishing AERO Air Quality Plans. In this context they have noted that the NUTS1 level will entail a very high administrative burden and that sometimes domestic competences for air quality assessment and management is not at the NUTS 1 territorial unit.

The Presidency would like input from delegations on whether the provisions regarding AERO in Article 19(3) need amending.

The Presidency sees the following options:

1. Maintain the Commission proposal.
2. Introduce in the wording flexibility as regards the territorial units management, as follows:

*'3. Where in a given ~~NUTS 1~~ territorial unit **covering at least NUTS2 level**, the average exposure reduction obligation laid down in Section 5 of Annex I is exceeded, Member States shall establish air quality plans for those ~~NUTS 1~~ territorial units as soon as possible and no later than 2 years after the calendar year during which the exceedance of the average exposure reduction obligation was recorded. Those air quality plans shall set out appropriate measures to achieve the average exposure reduction obligation and to keep the exceedance period as short as possible. Where exceedances of the average exposure reduction obligation persist during the fifth calendar year after the establishment of the air quality plan, Member States shall update the air quality plan and the measures therein, and take additional and more effective measures, in the subsequent calendar year to keep the exceedance period as short as possible.'*

The Presidency requests feedback from delegations on whether they would support the above amendment of this provision or rather maintain the Commission proposal.

If delegations agree to the above amendment of Article 19(3), modifications will need to be made accordingly to other parts of the proposal, such as articles 4 (28), 12, 13, 16, 23, annex I Section 5 and annex III.B, and annex VIII.A.

INTERVENTION ROUND 2 CHAPTER V: INFORMATION AND REPORTING

A. Article 22: Public information

Article 22 introduces new obligations in terms of information to citizens. The comments received concerning this Article mainly relate to its paragraph 2 and the new obligation for Member States to establish an air quality index (AQI). Among the suggestions made by delegations were the possibility to harmonize the AQI in all Member States, that guidelines should be provided on how to design an AQ index, or that new hourly values for PM_{2.5} and PM₁₀, or even the inclusion of SO₂ in the index, should be optional when concentrations are low and the sub-index of the pollutant is never decisive for the overall index.

The Presidency invites delegations to indicate their positions on this Article and to send concrete drafting proposals if needed.

B. Annex IX: Information to citizens

Annex IX(1)(a) requires hourly UTD data to be provided for PM₁₀ and PM_{2.5} at least for the number of sampling points set out in Annex III. Several delegations noted that this may require the implementation of automatic measurement points at a higher number of points than under the current Directive. Several delegations have made specific proposals, on which the Presidency would like to invite other delegations to comment:

1. Maintain the Commission proposal.
2. Amend the sentence as follows: "and, at least to information from the minimum number of sampling points required under annex III" to " and, at least to information from the minimum number of sampling points required under annex III **except for PM10 and PM2.5 for at least half of the minimum number of sampling points required under Annex III**".
3. Amend the sentence as follows: "and, at least to information from the minimum number of sampling points required under annex III" to " and, at least to information from the minimum number of sampling points required under annex III **if the measurement method is appropriate for up-to-date data (UTD)** ".

Annex IX (2)(c). Information of possible health effects and recommended behaviour.

In annex IX, point 2(c) on "information on the type of population concerned, possible health effects and recommended behaviour", it has been suggested that this information should be harmonised across the EU to avoid different messages in different Member States. In this respect, the Presidency would like to ask delegations which of the following options they would prefer:

1. Maintain the Commission proposal.
2. Harmonize information to be provided under Annex IX, point 2.c) of possible health effects and recommended behaviour. Guidance on this harmonized information would be prepared by the Commission in cooperation with WHO.

The Presidency invites delegations to indicate their positions on this Annex and to send concrete drafting proposals if appropriate.

INTERVENTION ROUND 3 CHAPTER VII: ACCESS TO JUSTICE, COMPENSATION AND PENALTIES

The abovementioned issues covered by Articles 27, 28 and 29 of the Commission proposal are under discussion in the context of negotiations on the revision of other EU environmental legislation such as the Industrial Emissions Directive (IED) and the Urban Wastewater Treatment Directive (UWWTD). A general approach on the IED has already been reached at the Council. In this respect, in the WPE discussions on the AAQD, a number of delegations suggested that issues relating to access to justice, compensation and sanctions should be dealt with in a harmonised manner with other proposals, such as the IED or UWWTD.

Some delegations have also suggested that it would be more appropriate to deal with the subjects within horizontal rather than sectorial legislation.

A. Article 27: Access to justice

The Commission proposal introduces a new Article 27 on access to justice, to guarantee that equal access to justice is provided across the Member States. This Article provides for the possibility for the public concerned to bring action in court to impugn decisions, acts or omissions relating to certain obligations laid down in this Directive proposal. Delegations have raised questions about the implications in terms of possible new obligations of including the proposed new Article given that all Member States are parties to the Aarhus Convention.

Based on the discussions and comments received from delegations, the Presidency invites delegations to indicate their positions on the following options:

1. Maintain the Commission proposal.
2. Amend the wording of the Commission proposal consistently with text agreed within the Council on other proposals (IED). In this respect one possible drafting proposal based on the IED general approach could be as follows:

*"1. Member States shall ensure that, in accordance with ~~their~~ **the relevant** national legal system, members of the public concerned have access to a review procedure before a court of law, or another independent and impartial body established by law, to challenge the substantive or procedural legality of all decisions, acts or omissions concerning air quality plans referred to in Article 19, and short term action plans referred to in Article 20, of the Member State, provided that any of the following conditions is met:*

*(a) ~~the members of the public understood as one or more natural or legal persons and, in accordance with national law or practice, their associations, organisations or groups,~~ **They** have a sufficient interest;*

*(b) ~~where the applicable law of the Member State requires this as a precondition, the members of the public maintain the impairment of a right. They~~ **maintain the impairment of a right, where administrative procedural law of a Member State requires this as a precondition.***

Member States shall determine what constitutes a sufficient interest and impairment of a right consistently with the objective of giving the public concerned wide access to justice.

*~~The interest of any non-governmental organisation which is a member of the public concerned shall be deemed sufficient for the purposes of the first paragraph, point (a).~~ **To this end, the interest of any non-governmental organisation promoting environmental protection and meeting any requirements under national law shall be deemed sufficient for the purpose of the first subparagraph, point (a).** Such organisations shall also be deemed to have rights capable of being impaired for the purposes of the first subparagraph, point (b).*

2. To have standing to participate in the review procedure shall not be conditional on the role that the member of the public concerned played during a participatory phase of the decision-making procedures related to Article 19 or 20.

3. The review procedure shall be fair, equitable, timely and not prohibitively expensive, and shall provide adequate and effective redress mechanisms, including injunctive relief as appropriate.

3a. Member States shall determine at what stage the decisions, acts or omissions may be challenged.

4. This Article does not prevent Member States from requiring a preliminary review procedure before an administrative authority and does not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

5. Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures referred to in this Article."

3. Any other drafting proposal that delegations may consider more appropriate.

B. Article 28: Compensation for damage to human health

In discussions so far, delegations have expressed concerns relating to the proposed new Article, such as:

- The difficulty of reversing the burden of proof for the competent authorities.
- A presumed causal link between the violation of certain provisions of the draft Directive and the damage caused as sufficient to justify a claim for compensation.
- The possibility to bring collective action, which raised questions of compatibility with national legal systems and procedural autonomy in general. Some delegations have asked how collective actions would work in relation to damage to human health, where claims for compensation would require medical examination and acquisition of evidence at the individual level.
- The difficulty for local authorities to deal with transboundary and large-scale pollution.

Some delegations have proposed more general provisions for this Article, such as in the general approach on the IED proposal while some others have requested that the Article be deleted altogether.

To make progress in the discussions, the Presidency invites delegations to elaborate on their views and possible concerns regarding the specific provisions of this Article, grouped as follows:

1. Scope of the right to compensation (paragraphs 1, 2 and 3): who is entitled to compensation, who is responsible for the damage and for which violations of the Directive (including possible collective action)
2. Causal link and associated burden of proof (paragraph 4)
3. Other rules and procedural elements (paragraphs 5 and 6): guarantee of effectiveness and limitation periods for bringing action.

The Presidency would also welcome drafting proposals from delegations.

C. Article 29: Penalties.

As in Articles 27 and 28, a number of delegations have asked for harmonization with provisions in other legislation (IED proposal or Directive 2008/99/EC on the protection of the environment through criminal law).

The Presidency invites the delegations to indicate their positions on the following options:

1. Maintain the Commission proposal
2. Amend the proposed provisions consistently with agreed text on other proposals. The following drafting proposal is based on the IED general approach:

*"1. Without prejudice to the obligations of Member States under Directive 2008/99/EC of the European Parliament and of the Council, Member States shall lay down the rules on penalties applicable to **infringements** ~~violations by natural and legal persons~~, of the national provisions adopted pursuant to this Directive and shall ensure that those rules take all measures necessary to ensure that they are implemented. The penalties provided for ~~shall~~ **must** be effective, proportionate*

and dissuasive. ~~Member States shall notify the Commission without undue delay of those rules and of any subsequent amendment thereof.~~

~~2. The penalties referred to in paragraph 1 shall include fines proportionate to the turnover of the legal person or to the income of the natural person having committed the violation. The level of the fines shall be calculated in such a way as to make sure that they effectively deprive the person responsible for the violation of the economic benefits derived from that violation. In the case of a violation committed by a legal person, such fines shall be proportionate to the legal person's annual turnover in the Member State concerned, taking account, inter alia, the specificities of small and medium-sized enterprises (SMEs).~~

3. Member States shall ensure that the penalties referred to in paragraph 1 **established pursuant to this Article** give due regard to the following, as applicable:

(a) the nature, gravity, extent and duration of the ~~violation~~ **infringement**;

~~(b) the intentional or negligent character of the violation;~~

(c) the population, including sensitive population and vulnerable groups, or the environment affected by the ~~violation~~ **infringement bearing in mind the impact of the infringement on the objective of achieving a high level of protection of human health and the environment**;

(d) the repetitive or singular character of the ~~violation~~ **infringement**.

3a. Member States shall without undue delay notify the Commission of the rules and measures referred to in paragraph 1 and of any subsequent amendment affecting them.

INTERVENTION ROUND 4

A. Annex III.A.2 and Annex IV.B. 2(f) references to Best Available Techniques (BAT)

Annex III.A.2 (Point sources) provides that sampling points in the vicinity of point sources shall be sited so that the application of Best Available Techniques (BAT) as defined by Directive 2010/75/EU, can be monitored. Some delegations have questioned these provisions since it is not obvious how this can be done in practice, considering the different goals of the Air Quality Directive and the Industrial Emissions Directive. The Presidency notes that this provision is adapted from an existing provision in Directive 2004/107/EC, which the current Commission proposal extends to all pollutants. In the light of the comments and proposals received from delegations, the Presidency would like to ask delegations which of the following options they prefer (please note that any amendments that are made to the sentence on BAT in Annex III, Point A.2, should also be made to the corresponding sentence in Annex IV, Point B.2 (f) on Macroscale siting of sampling points):

1. Maintain the Commission proposal.
2. Amend the last sentence of Annex III.A.2 as follows:
~~Such sampling points shall be sited such that the application of BAT (Best Available Techniques) as defined by Directive 2010/75/EU can be monitored.~~ **Sampling points established in the framework of the Directive 2010/75/EU, provided that they comply the requirements set out in this Directive, shall be taken into account in determining compliance with the minimum number of sampling points and, when possible, may also**

be sited in a way that the application of BAT (Best Available Techniques) as defined by Directive 2010/75/EU can be monitored.

3. Remove the last sentence in Annex III.A.2

B. Annex I, section 4. Representativeness of stations for alert threshold exceedances for PM10 and PM2.5

Annex I, section 4.A provides that exceedances should be identified “at locations that are representative of air quality over 100 km² or an entire zone, whichever is smaller”. Although the Commission clarified in a previous WPE that this requirement is already included in the Directive in force, delegations still have concerns. According to the above sentence, not only some urban and rural background measurement locations would be excluded, but also some measurement points near traffic and industry hotspots. However, these locations typically record the highest concentrations of pollutants that short-term action plans are intended to reduce. On this issue, the Presidency would like to know which of these options seem appropriate to the delegations:

1. Maintain the Commission proposal
2. Reword the sentence in Annex I, section 4 as follows, to reflect that representativeness requirements are limited to background sites “To be measured over 3 consecutive hours in the case of sulphur dioxide and nitrogen dioxide, and over three consecutive days for PM10 and PM2.5; **for background locations, such measurements shall be representative of air quality over at least 100 km² or an entire zone, whichever is smaller.**”
3. Delete the phrase “at locations representative of air quality over at least 100 km² or an entire zone, whichever is smaller”.

C. Article 15(4) Prediction of the risk of exceeding thresholds:

Article 15(4) introduces a predictive component regarding alert and information thresholds exceedances. Being able to predict these exceedances is very relevant as it would allow anticipation. Some delegations raised questions regarding the appropriateness of using modelling applications in this context or other tools for this purpose.

The Presidency invites delegations to provide their views on the following suggestion to modify Article 15(4):

*“4. Member States shall ensure that information about actual or predicted exceedances, **based on modelling application or other forecasting tools**, of any alert threshold or information threshold is provided to the public as soon as possible in accordance with points 2 and 3 of Annex IX.”*

The Presidency also welcomes alternative drafting proposals.

INTERVENTION ROUND 5. Article 31(1) and Article 32. Transposition and dates for entry into force

Some delegations have requested clarification on the dates mentioned in Article 32 on entry into force. The Presidency sees that Article 32 has two parts:

- A first part with the date for entry into force for all of the Directive’s provisions: the twentieth day after publication of the Directive in the Official Journal
- A second part establishing the date for application for a group of provisions: the day after the date in the first subparagraph of Article 31.

Article 32 is thus linked to Article 31(1), which enumerates a group of Articles for which Member States shall bring into force laws, regulations and administrative provisions by two years after entry into force of the revised Directive, as set in Article 32. According to this, the date for application of the provisions referred to in the second paragraph of Article 32 is two years after entry into force at the latest. For this group of provisions, it is not foreseen to bring into force laws, regulations and administrative provisions according to Article 31(1).

The Presidency interprets this to mean that the grey parts in the proposal (those listed in Article 31(1)) imply that Member States should bring into force legislative provisions. On the other hand, Articles not marked in grey and thus not requiring domestic laws, regulations and administrative provisions can apply coherently once Member States have in place legislative provisions for the others (see also recital 43).

On the other hand, some delegations consider that for provisions related to monitoring (in particular Article 7 and Annex II and Annex III) the proposed transposition period of two years may not be sufficient to allow assessment regimes to evolve in due time. The Presidency sees that extending the transposition period for Articles enumerated in Article 31(1) (which enter into force on the twentieth day after publication of the Directive in the Official Journal) would not imply changes to the attainment period.

The Presidency would like to ask delegations if this explanation is considered sufficient.