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NOTE

From: Presidency
To: Delegations
Subject: Discussion paper on the state of environmental criminal law in the European Union

Delegations will find attached a discussion paper, including questions, on the state of environmental criminal law in the EU.

Delegations are kindly invited to prepare for discussion at the Working Party on Substantive Criminal Law (DROIPEN) meeting, which is scheduled for 23 July 2019, on the themes and questions set out in this paper.

Although the focus of the discussion will be on matters related to criminal law, the Presidency encourages the delegations to prepare for the discussion, where relevant, by coordinating with their experts on environmental matters.

**DISCUSSION PAPER ON THE STATE OF ENVIRONMENTAL CRIMINAL LAW IN THE
EUROPEAN UNION**

NB: In this discussion paper, ‘environmental crime’ is defined as offences covered by Directives 2008/99/EC and 2009/123/EC, as well as other offences related to EU legislation on the environment that might be approximated under Article 83(2) of the Treaty on the Functioning of the European Union (TFEU).

I. Introduction

• Context and aim of the discussion

In accordance with its motto of ‘Sustainable Europe, sustainable future’, the Finnish Presidency considers that measures against offences that harm the environment are of the utmost importance. Ensuring compliance with the rules for protecting the environment and wildlife plays a key role in supporting sustainable development.

The EU has in place a criminal legal framework on the protection of the environment (Directive 2008/99/EC) and on ship-source pollution (Directive 2009/123/EC). These legal instruments provide a comprehensive set of minimum rules requiring various types of conduct that are harmful to the environment to be criminalised.

Under the Romanian Presidency, the Council held discussions on the future of substantive criminal law. In its report¹, the Presidency concluded, *inter alia*, that at this stage, the emphasis should be on ensuring the effectiveness and quality of the implementation of *existing* EU legislation, and that more efforts should be deployed to that effect. However, the Romanian Presidency identified certain areas in which it could be appropriate to carry out a full and thorough examination/analysis of the necessity and advisability of establishing (further) minimum rules concerning the definition of criminal offences and sanctions. These areas include environmental crimes, including maritime, soil and air pollution.

¹ 9318/19.

The Commission is currently carrying out a review of legislation in the field of environmental crime, the results of which should become available at the end of 2019².

The eighth round of mutual evaluations³, concerning the illegal trafficking of waste and the illegal production or handling of dangerous materials, is to be finalised during the Finnish Presidency. It will give a comprehensive picture of the practical implementation and operation of the European policies on preventing and combating environmental crime in these areas.

It is now more than 10 years since the criminal law directives on environmental crime and ship-source pollution were agreed upon. Since then there have been various developments, not only in the substantive environmental legislation in the Member States, but also in harmful activities against the environment. The Presidency considers that it is the right time for criminal law experts to discuss the adequacy of the current EU criminal-law framework concerning environmental crime. The aim is to better identify whether there are cases where further approximation of the Member States' criminal laws could be essential, in accordance with Article 83(2) TFEU.

When assessing the need for new criminal law at the EU level, basic principles concerning the use of criminal law, as recognised by the EU's institutions,⁴ in particular the principles of *ultima ratio*, proportionality⁵ and subsidiarity⁶, should be followed. To this end the Presidency considers it useful to conduct the discussion on the criminal legal framework within the broader context of measures against environmental crime. Although there are clearly areas of particular concern, such as illicit waste and wildlife trafficking, the Presidency considers that the discussions should cover the environmental criminal legal framework as a whole.

² Evaluation Roadmap, 'Evaluation of the Environmental Crime Directive'
https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-4981980_en

³ 7752/1/17 REV 1 and 7834/2/17 REV 2.

⁴ Council conclusions of 30 November 2009 on model provisions, guiding the Council's criminal law deliberations (16542/2/09 REV 2 and 16798/09, 16883/09), Commission Communication 'Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law', 20 September 2011 (COM(2011) 573 final), European Parliament report on an EU approach to criminal law, 24 April 2012 (A7-0144/2012).

⁵ Article 5(4) of the Treaty on European Union (TEU) and Protocol (No 2) on the application of the principles of subsidiarity and proportionality.

⁶ Article 5(3) TEU and Protocol (No 2) on the application of the principles of subsidiarity and proportionality.

The criminal legal framework under Article 83(2) TFEU

Directive 2008/99/EC on the protection of the environment through criminal law⁷ contains minimum rules requiring the criminalisation of unlawful conduct that causes or is likely or presumed to cause damage to the environment or wildlife or death or serious injury to persons. The conduct is defined as ‘unlawful’ when it infringes the EU legislation listed in one of the Annexes to the Directive or an administrative decision giving effect to such legislation. Such conduct must be criminalised whether committed intentionally or with serious negligence. It is required that legal persons can be held liable for such criminal offences. The liability of legal persons can be of criminal or other nature. The offences must be punishable by effective, proportionate and dissuasive criminal penalties. The Directive does not contain more detailed requirements on the types and levels of the penalties.

Directive 2005/35/EC on ship-source pollution and Directive 2009/123/EC amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements⁸ contains minimum rules requiring the criminalisation of ship-source discharges of polluting substances into the waters. Illicit ship-source discharges of polluting substances should be regarded as a criminal offence as long as they have been committed with intent, recklessly or with serious negligence and result in deterioration in the quality of water. Repeated, less serious cases of illicit ship-source discharges of polluting substances which in conjunction result in deterioration in the quality of water, should also be regarded as a criminal offence. It is required that legal persons can be held liable for such criminal offences. The liability of legal persons can be of criminal or other nature. The offences must be punishable by effective, proportionate and dissuasive criminal penalties. The Directive does not contain more detailed requirements on the types and levels of the penalties.

⁷ Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law.

⁸ Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements.

Examples of related developments in the EU's environmental policy

In the Council Conclusions on countering environmental crime (8 December 2016)⁹ the Council promoted good practices, including gathering of information and cooperation of relevant authorities and other actors, in order to reinforce countering environmental crime. In the Council Conclusions on setting the EU's priorities for the fight against organised and serious international crime between 2018 and 2021¹⁰ (18 May 2017) one of the priorities set was to disrupt organised criminal groups' involved in environmental crime, more particularly wildlife and illicit waste trafficking.

In February 2016, the European Commission adopted a communication on the EU Action Plan against Wildlife Trafficking¹¹. It sets out a comprehensive set of measures against wildlife crime inside and outside the EU. The Action Plan runs until 2020 and is being implemented jointly by the EU and its Member States. In October 2018, the Commission adopted a progress report¹² and the overall results will be evaluated in 2020.

In 2018, the Commission adopted an Action Plan on environmental compliance assurance¹³. The new Environmental Compliance and Governance Forum¹⁴ established under this Action Plan brings together Member States representatives and representatives of top practitioners' bodies, such as IMPEL and ENPE, in order to work more closely together on compliance assurance and wider governance issues. One of the actions is devoted to preparation of a guidance document on combating environmental with a focus on waste and wildlife crime¹⁵. This action is in addition to several other actions aimed at reinforcing the capacities of national environmental inspectors, police, prosecutors and judges working on combating environmental offences and crimes.

EU level networks of environmental practitioners, such as ENPE (prosecutors), IMPEL (inspectors), EUFJE (judges) and EnviCrimeNet (police and other enforcement officers) facilitate sharing good practices, developing practical tools for detection and investigation and training. These networks now work together with the Commission's support.

⁹ 15412/16

¹⁰ 9450/17

¹¹ COM(2016) 87 final.

¹² COM(2018) 711 final.

¹³ COM(2018)10 final and SWD(2018) 10 final.

¹⁴ For more information about the Action Plan and the work of the Forum see:
http://ec.europa.eu/environment/legal/compliance_en.htm

¹⁵ Relevant documents are available at [CIRCABC](#).

The new Directive on port reception facilities for the delivery of waste from ships (2019/883/EU)¹⁶ was published on 7 June 2019 and will enter into force 20 days after publication. In recital 13 of the Directive it is stated that the Commission should look into the revision of Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements, in particular through an extension of the Directive's scope.

In December 2015, the Commission adopted the Circular Economy Action Plan¹⁷. A circular economy aims to maintain the value of products, materials and resources for as long as possible by returning them into the product cycle at the end of their use, while minimising the generation of waste. As part of the Circular Economy Action Plan, a package of legislative proposals on waste entered into force in July 2018 and the directives¹⁸ must be implemented in the national legislation of the Member States by 5 July 2020.

The Environmental Liability Directive (ELD)¹⁹ entered into force on 30 April 2004 and has subsequently been amended several times. The purpose of the ELD is to establish a framework for environmental liability (the 'polluter pays' principle, Article 191(2) TFEU). The ELD is based on the powers and duties of public authorities and aims at ensuring that the financial consequences of certain types of harm caused to the environment will be borne by the economic operator who caused this harm. The Directive provides measures to prevent and to remedy environmental damages.

¹⁶ Directive (EU) 2019/883 of the European Parliament and of the Council of 17 April 2019 on port reception facilities for the delivery of waste from ships, amending Directive 2010/65/EU and repealing Directive 2000/59/EC.

¹⁷ COM (2015) 614.

¹⁸ Directive (EU) 2018/849 of the European Parliament and of the Council of 30 May 2018 amending Directives 2000/53/EC on end-of-life vehicles, 2006/66/EC on batteries and accumulators and waste batteries and accumulators, and 2012/19/EU on waste electrical and electronic equipment;

Directive (EU) 2018/850 of the European Parliament and of the Council of 30 May 2018 amending Directive 1999/31/EC on the landfill of waste;

Directive (EU) 2018/851 of the European Parliament and of the Council of 30 May 2018 amending Directive 2008/98/EC on waste;

Directive (EU) 2018/852 of the European Parliament and of the Council of 30 May 2018 amending Directive 94/62/EC on packaging and packaging waste.

¹⁹ Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

II. Issues for discussion

Theme 1: *Environmental crime as a serious phenomenon*

The purpose of discussing this theme is to have a brief overview of areas of environmental crime where criminal activity is considered to be more frequent or serious, in order to clarify the context and facilitate the discussions on the subsequent themes. Insofar as these matters have already been clarified in the context of the eighth round of mutual evaluations, a reference to it may be enough.

Member States are kindly invited to indicate whether they can provide systematic data, such as statistics or other research-based data, related to their replies.

- *Please indicate areas of environmental offences where criminal activity is more frequent or serious on the basis of:*
 - *harmful effects to the environment or wildlife*
 - *highest proceeds*
 - *organised crime*
 - *most criminal proceedings*
 - *other relevant factors*

Theme 2: Successes and challenges in countering environmental offences

The purpose of discussing this theme is to share views and relevant data on where the major problems are in following the rules in environmental legislation, and thereby to better identify whether there are significant shortcomings attributable to Directives 2008/99 and 2009/123. In addition, if such shortcomings are identified, the purpose is to share ideas/ best practices on the most feasible ways to address them.

Member States are kindly invited to indicate whether they can provide systematic data, such as statistics or other research-based data, related to their replies.

- *What types of measures against environmental offences have been most successful?*
 - Delegations are invited to take into account measures against environmental offences broadly, including e.g. compliance programmes for companies, compliance monitoring, including inspections and investigations, administrative or civil-law sanctioning systems, port state control for ships²⁰, random checks by authorities, arrangements for cooperation and coordination between competent authorities, etc.
- *Where do the major problems in countering environmental offences lie?*
 - Delegations are invited to provide information on major shortcomings in some aspects of tackling environmental offences, e.g. in ensuring resources (staff/dedicated budget) for law enforcement or compliance monitoring (including inspections and investigations), in assessing the effects on the environment, in training or specialisation of authorities, in the clarity of the legal provisions on substantive environmental law, in practical possibilities to follow the norms, in available investigative tools, in the lack of cooperation between different relevant authorities (e.g law enforcement, judiciary and monitoring authorities) in a domestic context, in the lack of transnational cooperation, in the lack of availability or sharing between authorities of relevant data or information, in awareness or in criminal law.

²⁰ See Directive 2009/16/EC on port State control.

- *Are there problems that could be addressed by new criminal law at EU level?*
 - Directives 2008/99 and 2009/123 contain a comprehensive set of minimum rules on conduct that must be criminalised in the Member States, yet the Directives lack certain types of rules that exist in some other criminal law directives e.g. jurisdiction, attempted offences, conspiracy, availability of investigative tools for serious crime. Are there grounds demonstrating that the lack of such types of rules has created significant difficulties in tackling environmental offences at domestic level or in cross-border situations? Is it feasible and essential to adopt such rules in EU environmental crime legislation? On types and levels of criminal penalties, please see below under Theme 3 (Sanctions).
 - Are there grounds demonstrating other types of significant shortcomings attributable to Directives 2008/99 and 2009/123? If yes, what would be the most feasible ways to address them?
- *Is there a need to amend the annexes to Directive 2008/99?*
 - Annexes A and B list the legislation the infringement of which constitutes unlawful conduct pursuant to the Directive. Recital 15 of the Directive states that '*Whenever subsequent legislation on environmental matters is adopted, it should specify where appropriate that this Directive will apply. Where necessary, Article 3 should be amended.*'

Are such references to Directive 2008/99 made in all the relevant legislation adopted after the Directive, or should the annex(es) be amended?

Theme 3: Sanctions

The purpose of discussing this theme is to share views and relevant data on whether there are reasons to consider that establishing minimum rules on criminal sanctions in the area of environmental crime is essential in accordance with Article 83(2) TFEU.

The Presidency notes that if establishing additional minimum rules on criminal sanctions proved essential, it should be taken into account that legal traditions differ across Member States, and that the coherence of national systems must be maintained as much as possible, while at the same time striving to achieve common minimum rules.²¹

Member States are kindly invited to indicate whether they can provide systematic data, such as statistics or other research-based data, related to their replies.

- *Are there problems in countering environmental crime that could be addressed by additional minimum rules on criminal and/or non-criminal sanctions?*
 - Relevant indicators could be, for example, data showing that lower levels of penalties attract environmental crime on a significant scale.
- *If establishing additional minimum rules on sanctions proved essential, should the Member States have the option, at least in some types of cases, of choosing between applying criminal sanctions and applying other types of, e.g. administrative, sanctions or measures?*
 - It should be noted that the Member States may have systems of non-criminal (e.g. administrative) sanctions that can work effectively.

²¹ See ‘The future of substantive criminal law’ (9318/19), p. 6.

Theme 4: *The clarity of environmental criminal law*

The purpose of discussing this theme is to share views and experiences on the effects of the complexity of environmental criminal law and how to deal with it.

As in Directive 2008/99, in domestic environmental criminal law the punishable conduct is often not fully described in the criminal-law provision itself but also partly in one or more provisions of substantive environmental law or in an administrative decision giving effect to that law, which are referred to in the criminal-law provision. This can lead to complexity and ambiguity as to what exactly is punishable, and may be problematic under the principle of legality enshrined in Article 49 of the EU Charter of Fundamental Rights.

- *Have you found the complexity or ambiguity of environmental criminal legislation to be:*
 - a disincentive to comply with the law;
 - a hindrance for monitoring, law enforcement or criminal proceedings?
- *When implementing Directives 2008/99 and 2009/123, has your Member State found specific ways to keep the domestic criminal law clear and simple?*
- *Is there room for improving clarity in the EU criminal-law instruments themselves while ensuring that the instruments can be implemented in various types of legal systems without undermining their consistency?*

Theme 5: *Other issues*

- *Would you like to draw the attention to any other issue related to environmental criminal law?*
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