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- Presidency report

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At the meeting of CATS on 19 September 2019, delegations examined the report by the Finnish Presidency on the state of environmental criminal law (11826/19). The Commission and the Member States welcomed this report, and agreed that it accurately reflected the outcome of the debate that was launched on this issue with the aim to gather views of experts on whether there are sufficient grounds for introducing further or revised minimum rules in the field of environmental criminal law, in keeping with the EU competences established by the Treaties.

The report as agreed by CATS is set out in the Annex.

THE STATE OF ENVIRONMENTAL CRIMINAL LAW IN THE EUROPEAN UNION**Report from the Finnish Presidency****I. Introductory part****• Context**

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.

Serious forms of environmental crime often have a cross-border dimension and many times involve organised crime groups or corporate actors. The EU is directly affected by environmental crime as origin or destination market or as a transit point between two regions of the globe. 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 report<sup>1</sup>, 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.

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<sup>1</sup> 9726/19

The Commission is currently carrying out a comprehensive evaluation of the Environmental Crime Directive. Based on Better Regulation principles, this evaluation will include, inter alia, data collection both on the scale of environmental crime and analysis of the effectiveness of the Directive with its current scope and of its consistency with other relevant EU level legislation and cooperation instruments. A wide public consultation as well as targeted consultations with experts and practitioners dealing with combating environmental crime will take place. The results of the evaluation should become available in Spring 2020.<sup>2</sup>

The eighth round of mutual evaluations<sup>3</sup>, 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 and provide an empirical basis for further reflections on the possible need for further EU level actions.

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 and at EU level, but also in harmful activities against the environment. The Presidency considered therefore that it was the right time for criminal law experts to discuss the adequacy of the current EU criminal law framework concerning environmental crime. The aim was 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.

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<sup>2</sup> Evaluation Roadmap, 'Evaluation of the Environmental Crime Directive'  
[https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-4981980\\_en](https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-4981980_en)

<sup>3</sup> 7752/1/17 REV 1 and 7834/2/17 REV 2.

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,<sup>4</sup> in particular the principles of *ultima ratio*, proportionality<sup>5</sup> and subsidiarity<sup>6</sup>, should be followed. To this end the Presidency considered 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 felt that the discussions should cover the environmental criminal legal framework as a whole.

#### *The criminal legal framework under Article 83(2) TFEU*

Directive 2008/99/EC on the protection of the environment through criminal law<sup>7</sup> 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 when 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.

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- <sup>4</sup> 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).
- <sup>5</sup> Article 5(4) of the Treaty on European Union (TEU) and Protocol (No 2) on the application of the principles of subsidiarity and proportionality.
- <sup>6</sup> Article 5(3) TEU and Protocol (No 2) on the application of the principles of subsidiarity and proportionality.
- <sup>7</sup> 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.

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 infringements<sup>8</sup> 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.

#### *Examples of related developments in the EU's environmental policy*

In the Council Conclusions on countering environmental crime (8 December 2016)<sup>9</sup> 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 2021<sup>10</sup> (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 Trafficking<sup>11</sup>. 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 report<sup>12</sup> and the overall results will be evaluated in 2020.

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<sup>8</sup> 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.

<sup>9</sup> 15412/16

<sup>10</sup> 9450/17

<sup>11</sup> COM(2016) 87 final

<sup>12</sup> COM(2018) 711 final

In 2018, the Commission adopted an Action Plan on environmental compliance assurance<sup>13</sup>. The new Environmental Compliance and Governance Forum<sup>14</sup> 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 crime<sup>15</sup>. 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.

The new Directive on port reception facilities for the delivery of waste from ships (2019/883/EU)<sup>16</sup> 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 Plan<sup>17</sup>. 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.

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<sup>13</sup> COM(2018)10 final and SWD(2018) 10 final.

<sup>14</sup> For more information about the Action Plan and the work of the Forum see: [http://ec.europa.eu/environment/legal/compliance\\_en.htm](http://ec.europa.eu/environment/legal/compliance_en.htm)

<sup>15</sup> Relevant documents are available at [CIRCABC](#).

<sup>16</sup> 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.

<sup>17</sup> COM (2015) 614.

As part of the Circular Economy Action Plan, a package of legislative proposals on waste entered into force in July 2018 and the directives<sup>18</sup> must be implemented in the national legislation of the Member States by 5 July 2020.

The Environmental Liability Directive (ELD)<sup>19</sup> 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.

- **Questionnaire and aim of this report**

On 9 July 2019, the Finnish Presidency presented a questionnaire with a set of questions addressed to the Member States (10954/19). The questions related to five themes: 'environmental crime as a serious phenomenon'; 'successes and challenges in countering environmental offences', 'offences and sanctions', 'the clarity of environmental criminal law', and 'other issues'.

On the basis of the questionnaire, a discussion was held in the Friends of the Presidency meeting on 23 July 2019, at which Member States provided useful input. Subsequently to this meeting, several Member States provided written replies to the questionnaire (WK 9205/19 + ADD 1 + ADD 2 + ADD 3).

On 5 September 2019, delegations discussed the issue of EU environmental criminal law again, on the basis of a Presidency note containing more detailed questions (11797/19).

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<sup>18</sup> 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.

<sup>19</sup> 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.

On the basis of the input thus gained, the Finnish Presidency has drafted the current report, which aims to provide assistance in the process of evaluation and possibly further developing the regulatory framework in the field of EU environmental criminal law, without prejudice to the right of initiative of the Commission and acknowledging that the needs currently perceived by Member States may evolve in the future.

## **II. Issues for discussion**

### **Theme 1: *Environmental crime as a serious phenomenon***

The purpose of discussing this theme was to gain 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 had already been clarified in the context of the eighth round of mutual evaluations, a reference to it was deemed to be enough.

### **Theme 2: *Successes and challenges in countering environmental offences***

The purpose of discussing this theme was to share views and relevant data on where the major problems were 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 were identified, the purpose was to share ideas/best practices on the most feasible ways to address them.

### **Theme 3: *Sanctions***

The purpose of discussing this theme was to share views and relevant data on whether there are reasons to consider that establishing further minimum rules on criminal sanctions in the area of environmental crime is essential in accordance with Article 83(2) TFEU. The Presidency noted 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 should be maintained as much as possible, while at the same time striving to achieve common minimum rules.

#### **Theme 4: *The clarity of environmental criminal law***

The purpose of discussing this theme was 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 could lead to complexity and ambiguity as to what exactly is punishable, and it might be problematic under the principle of legality enshrined in Article 49 of the EU Charter of Fundamental Rights.

#### **Theme 5: *Other issues***

Under this theme, Member States could draw the attention to any other issue related to environmental criminal law.

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

### **III. Outcome of discussions**

Based on the views expressed by delegations in the above mentioned debates held in the meetings of the Friends of the Presidency and in the written replies to the questionnaire, the Presidency draws the following conclusions, without prejudice to the right of initiative of the Commission:

1. Areas where criminal activity is more frequent or considered as more serious are, in particular, illicit waste trafficking, wildlife trafficking, maritime pollution and forest fires. There are forms of environmental offences, including in these areas, that should be considered as serious. The seriousness of the offence may depend on factors such as serious harmful effects to the environment or health or that it was committed by an organised crime group, as well as other circumstances of the case.

2. Successful measures against environmental offences have been, in particular:
- Flexible use of both administrative and criminal sanctions
  - Specialisation and training of different agencies (such as police, investigators, prosecutors and courts)
  - An integrated approach, involving all actors of the law enforcement cycle (such as police, prosecution and courts).
  - A multidisciplinary approach, with the involvement of experts, where necessary, on natural sciences, economics and financial matters
  - Awareness-raising campaigns and guidelines for both authorities and private entities
  - New technology, such as electronic platforms used in preventing and detecting waste crime
  - Involvement of the private sector in preventing and fighting waste crime
  - Guidance documents
3. The main challenges in countering environmental offences in the Member States can be attributed to shortcomings, notably in the following measures:
- Training and specialisation of authorities
  - Ensuring sufficient resources
  - Awareness and understanding of the seriousness of the effects of environmental offences
  - Cooperation among different types of domestic authorities (e.g. between judicial and monitoring authorities)

- Cross-border cooperation in criminal matters
  - Clarity of the applicable legal framework
  - Availability of relevant data or information, or sharing of it between authorities
  - Ensuring the participation of the private sector
4. In order to prevent and counter environmental offences in the Member States more effectively, stronger efforts are necessary and they should focus mainly on the measures mentioned in point 3 above.
5. The main challenges in countering environmental offences in the Member States are not attributable to major shortcomings in Directives 2008/99 and 2009/123. The following issues have, however, been pointed out:
- The Directive 2008/99 contains terms such as ‘serious injury’ and ‘substantial damage’ without further definitions, and there is variation in Member States’ criminal legislation and practices, in particular as to what constitutes a serious environmental offence.
  - Although it is necessary that Directives are limited to minimum standards and leave sufficient room for implementation in various types of legal systems, this variation may, in certain cross-border cases, entail shortcomings, in particular, in smooth police and judicial cooperation in criminal matters.
  - It is yet to be established whether some of the problems recognised should be addressed with further EU minimum rules, in accordance with Article 83(2) TFEU, and whether some could be better addressed with other measures, such as soft law, practical or policy measures, including common recommendations at EU level.

- For example, given the wide range of different types of environmental offences it may not be feasible to clarify the notions ‘serious risk’ and ‘substantial damage’ significantly further in an EU criminal law directive, but it may nonetheless be possible to find more consensus on how these concepts should be understood.
6. The fact that the Member States have different sanction regimes does not alone justify further minimum rules. However, if there is robust data demonstrating significant shortcomings in attaining the minimum of effectiveness, dissuasiveness and proportionality of criminal sanctions, the feasibility of additional common minimum rules on sanctions should be considered in accordance with Article 83(2) TFEU and taking into account the Council conclusions of April 2002 on the approach to apply regarding the approximation of penalties.<sup>20</sup> However, in any event, the option of more stringent criminal sanctions should not be considered as substitute for the measures pointed out in point 3 above.
  7. It is appropriate to carry out a further thorough assessment as to the necessity and advisability of new minimum rules on environmental criminal law.
  8. Should further minimum rules concerning environmental criminal law prove essential, particular consideration should be given to limiting such *further* rules only to serious offences, as that would leave the Member States the possibility to maintain efficient non-criminal (e.g. administrative) sanctioning systems for less serious offences. However, in that case there should be sufficient mutual understanding on what constitutes a serious environmental offence. Due account should, in any event, be given to ensuring effective cross border cooperation.
  9. Notwithstanding the necessity of further minimum rules, it is appropriate to assess whether it is necessary to amend the annexes to Directive 2008/99 taking into account the evolvement of EU environmental legislation over the last decade.
  10. Despite its complexity, the clarity of environmental criminal law can be ensured by taking care that the criminal law provisions, the provisions of material law to which they refer and the references are precise and unambiguous.

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<sup>20</sup> 9141/02