



EUROPEAN COMMISSION

*Brussels, 26.7.2022
C(2022)5454 final*

Dear President,

The Commission would like to thank the Bundesrat for its Opinion on the Commission's 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 {COM(2021) 851 final}.

The Commission appreciates the Bundesrat's support of the proposal and its goal to protect the environment more effectively. The proposal forms part of a broader package of ambitious measures to improve Union legislation to protect the environment, biodiversity and climate, as set out in the European Green Deal. It is thus part of the EU's legislative priorities for 2022. The Commission agrees with the Bundesrat that criminal law is a necessary element in every strategy to combat environmental destruction and to ensure the future of the planet and life on earth.

The Bundesrat has raised a number of concerns regarding the definitions and scope of environmental crime, the levels and types of sanctions, the criminal liability of legal persons, prescription periods, rules on jurisdiction and the proposed rights of the public concerned to participate in criminal proceedings.

The Commission welcomes the in-depth inquiry that the Bundesrat carried out into this important subject. Whilst the Commission does not share all conclusions drawn in the Opinion, the detailed work that the Bundesrat has undertaken constitutes an important contribution to the debate in the Council. The Commission has carefully considered each of the issues raised and is pleased to offer some clarifications in the annex to this reply.

The Commission would like to confirm its utmost commitment to respect the proportionality of sanctions, as demonstrated in its detailed Impact Assessment accompanying the proposal. The Commission's proposal is also in line with the Charter of Fundamental Rights.

*Bodo Ramelow
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The negotiations of the co-legislators, the European Parliament and the Council, are ongoing and will take into account the Member States' concerns.

The Commission hopes that the clarifications provided in this reply address the issues raised by the Bundesrat and looks forward to continuing the political dialogue in the future.

Yours faithfully,

*Maroš Šefčovič
Vice-President*

*Virginijus Sinkevičius
Member of the Commission*

As regards the specific points to which the Bundesrat has drawn the Commission's particular attention, the Commission would like to make the following comments:

Points 3 and 4: It is noteworthy that the Commission proposal does not affect opportunities to accelerate permit procedures. When such acceleration is done within the legal framework, the proposal would not affect it. The proposal covers only unlawful conduct, i.e. serious breaches of relevant obligations, and requires Member States to establish criminal sanctions to address them. Moreover, execution of a project without a development consent would constitute an offence only when a substantial damage is caused or likely to be caused.

Point 5 (a): The proposed criminal offence related to products intends to cover serious breaches of environmental rules concerning products when such products pollute and cause or are likely to cause substantial damage or damage to health because of their use in a larger scale. The Commission considers that circumvention of relevant environmental product requirements which leads or is likely to lead to substantial damage due to a larger scale use of the product is a serious violation and should be an offence under the Directive. It is noteworthy that the Commission proposes to criminalise such conduct only when it causes or is likely to cause substantial damage to the environment or human health. It should be noted that consumers and other users are not targeted under this crime but only the operators placing products on the market. The offence relates to situations where the potential for harm lies in the product itself but the harm only materialises or is likely to occur at the stage of product use.

Point 5 (b): The compliance with EU rules on activities with impact on the environment reflects the precautionary principle, the polluter pays principle and the principles that preventive action should be taken and that environmental damage should, as a priority, be rectified at source. In this spirit, the Environmental Impact Assessment Directive requires that projects are subject to an impact assessment, and there is requirement for development consent before their authorization. Nevertheless, experience has shown that in a number of cases projects are being executed without proper assessment and authorisation, contrary to the legal requirements, and such execution can cause significant damage. However, only a limited number of Member States have introduced sanctions applicable to developers that proceed with the execution of projects without the necessary authorisations. The introduction of criminal sanctions is appropriate to highlight the seriousness of such type of behaviour given their deterrent effects and social impacts.

The proposed criminal offence covers violations of obligations related to both development consent and impact assessment. The requirement under Art. 2(1) of Directive 2011/92/EU is clear and concerns both the need for an assessment as well as of a development consent. It is also necessary that the proposed criminal offence covers stages of project-related work and activities which can cause serious damage to the environment. The proposed offence description includes a requirement that the unlawful behavior causes or is likely to cause substantial damage to the factors defined in Article

3 (1) of Directive 2011/92/EU. This ensures that only serious breaches are criminalised. Carrying out projects without any development consent or environmental assessment is likely to result in deterioration or damage of environmental factors, human health, population, heritage and material assets as confirmed also by the case-law of the Court of Justice of the European Union (C-215/06: paras 98; 103 and C-261/18). Considering the effects of such projects on the environment, this type of offence fulfils the requirement of the principle of *ultima ratio* applicable to criminal law.

Point 6: The Commission takes note of the observation concerning different terminology used in the German translation of Article 3 (1) (j) of the Commission proposal and relevant provisions in Directive 2013/59/Euratom. The wording will be adapted during the interinstitutional negotiations to guarantee full coherence with the wording of Directive 2013/59/Euratom.

Point 7: The Commission takes note of the statement concerning the offence described in Article 3(1), point (k) of the proposal, which we understood as referring to a situation in which water works continue while awaiting regularisation under a revised permit. In such case, this conduct would not be considered criminal offence under the proposal, as long as it does not represent a breach of the relevant obligations under environmental law.

Point 8: The Commission proposal aims at strengthening the protection through criminal law of wild fauna and flora species protected under EU law. In the last four decades, global wildlife populations fell by 60% as a result of human activities. Globally, up to one million species are threatened with extinction. Biodiversity loss and ecosystem collapse are one of the biggest threats facing humanity in the next decade. The proposal simplifies the threshold for environmental criminal offences concerning protection of wildlife and exempts from criminal offences only cases where the conduct concerns a negligible quantity of specimens of protected wild fauna or flora species. It removes the second element of the threshold under Directive 2008/99/EC and no longer requires demonstrating that the conduct has a non-negligible impact on the conservation status of the species.

Concerning the scope of the criminal offence in Article 3 (1), point (l), of the Commission proposal, the Commission would like to observe that, in addition to the provisions on species which benefit from special protected areas, Article 5 (1) of the Birds Directive establishes a general system of protection for all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies. The relevant prohibitions and deriving obligations relate to both categories, and the Commission considers that both categories of species deserve protection also through criminal law.

As regards the reference to ‘...species listed in Annexes IV and V (when species in Annex IV are subject to the same measures as those adopted for species in Annex V HD)’ in Article 3(1), point (l), of the Commission proposal, the Commission would like to observe that species under the Habitats Directive are subject to surveillance of their conservation status and when the evolution of the conservation status of a species in Annex V shows

that restrictions are necessary to ensure a favourable conservation status, Member States have to enact them. The trigger for this is the evolution of the status on the basis of the surveillance results and the relevant measures can include different types of restrictions measures to ensure the necessary protection also of species listed in Annex V of the Habitats Directive.

Thus, when species listed in Annex V are subject to similar measures as those in Annex IV, a breach of those measures should also be sanctioned under criminal law, and this is reflected in the above-mentioned part of the offence definition. Only 15% of the species under the Habitats Directive are in a favourable status. Many species in Annex V are in poor status. This calls for a higher level of ambition compared to the past.

Point 9: The Commission would like to clarify that only unlawful conduct shall be defined as a criminal offence under the current Directive 2008/99/EC and the proposed new Directive. The Commission proposal defines in Article 2 (1) what is unlawful conduct. Exceptions applied according to the relevant legal provisions will mean that the exceptionally allowed environmentally harmful activities are not considered criminal offence.

Points 10 and 11: The Commission would like to clarify that the criminal offence as defined in Article 3(1), point (p), of the Commission proposal covers only species of Union concern included in the Union list based on Article 4(1) in connection with Article 4 (3) and the definition in Article 3(3) of the Invasive Alien Species Regulation. Situations under Article 10 of the Invasive Alien Species Regulation are not covered unless the species concerned are included in the list of Union concern.

Point 12: The Commission would like to clarify that the objective of the mentioned provisions is to ensure a more coherent application of the Directive and enhanced legal certainty. The proposal clarifies qualitative and quantitative thresholds used to define environmental criminal offences, such as ‘substantial damage’, ‘likely’ to cause when assessing whether damage is substantial and ‘negligible quantity’. It does so by providing a non-exhaustive list of circumstances to be taken into account when assessing such thresholds by authorities which investigate, prosecute and adjudicate offences and decide on individual cases.

Point 13: The Commission would like to clarify that the objective of the mentioned provision is to ensure a more coherent application of the Directive and enhanced legal certainty concerning offences whose definition includes a requirement of likelihood of causing damage. The proposal provides for a non-exhaustive list of circumstances to be considered when such likelihood is assessed by authorities which investigate, prosecute and adjudicate offences and decide on individual cases. Authorisations are used to ensure, inter alia, that potentially harmful and risky activities are undertaken in a specific way and subject to specific conditions and restrictions. Non-compliance with such an authorisation or undertaking activities without obtaining the necessary authorisation is therefore an important element to be taken into account when assessing the likelihood of causing damage. However, the mere absence of an authorisation or the mere fact that an activity is risky or not fully in line with an existing relevant

authorisation would not automatically lead to the assumption of likelihood of causing substantial damage. The other elements listed in Article 3(4), point (a), of the Commission proposal would have to be considered in practice too, together with all circumstances of each individual case. Furthermore, the national legislator would have a discretion how at best to transpose this provision.

The Commission takes note of the view of the Bundesrat that the terms ‘risky’ and ‘dangerous’ may require further clarification. The Commission notes that EU environmental law is based on the precautionary principle, as set out in Article 191(2) TFEU. Therefore, these elements (the level of risk, how the activity is dangerous) are highly relevant when assessing the likelihood of damage.

Point 14: The Commission agrees that rules adopted at EU level on criminal sanctions must respect the Member States’ legal systems and traditions. The 2008 Directive currently in force thus leaves discretion to the Member States, requiring only that the sanctions must be effective, dissuasive and proportionate.

The evaluation of this Directive found that the objective of effective and dissuasive sanctioning in all Member States has not been achieved. In all Member States, sanctions imposed for environmental crime are systematically far too low to be a deterrent. Moreover, sanction levels available in the Member States differ widely ranging from maximum levels of 2 year to life-long imprisonment for offences describes under Article 3(1), point (a), of the current Directive, thus possibly enticing ‘forum shopping’ in the EU (see the overview in the Commission’s evaluation report of the Environmental Crime Directive, SWD (2020), 259 final, page 31).

The Commission therefore has decided to harmonise maximum levels of sanctions that should be available in the Member States. The proposed sanction levels reflect the severity of environmental crime. The appropriate sanction level in the individual case remains subject to the discretion of the trial judge.

Similar considerations apply for the set of additional sanctions as proposed under Articles 5(5) and Article 7(2) and that should be available to the trial judge. Especially for legal persons, those additional sanctions are often more effective and dissuasive than financial fines. Such are the exclusion from public procurement procedures and the withdrawal of permits for activities which have resulted in the offence. The Commission considers it important that additional sanctions are available in all Member States. With regard to the particular sanctions mentioned in the Bundesrat’s opinion – such as placing under judicial supervision, judicial winding-up and closure of establishments used for committing the offence -, these are also possible under other EU criminal law instruments, e.g. the Market Abuse Directive 2014/57/EU and the Directive 2017/1371/EU on the fight against fraud to the Union’s financial interests by means of criminal law. The necessity of individual sanctions are, however, still debated in the Council negotiations.

Point 15: The Commission can confirm that Article 7 does not require from Member States to introduce criminal sanctions for legal persons. The Commission thus respects the different legal systems of the Member States.

Point 16, 17: With regard to Article 8 point (d) of the proposal, the Commission would like to clarify that the use of forged or false documents is not a constituent element of one of the environmental crimes defined under Article 3(1) of the proposal. As an aggravating circumstance, this element could lead to higher sanctions, but subject to the discretion of the criminal judge who would have to consider the circumstances of the individual case. With regard to Article 8 points (h) and (i), the Commission will further assess the arguments of the Bundesrat, along with the Presidency and the Member States in the Council negotiations.

Point 18: With regard to Article 11 of the proposal, the Commission wishes to clarify that the limitation period concerns the period in which the offences can be investigated, prosecuted and sentenced. It does not concern the period during which a sentence can be executed.

Point 19: With regard to Article 12(1) point (d), the Commission considers that persons who have committed environmental crime should not be treated differently depending on whether they are nationals or non-nationals residing in the respective Member State. In the interest of efficient criminal proceedings, it is useful to establish jurisdiction in the Member State where the accused person lives and has established his/her/its centre of vital interests.

Point 20: The provision in Article 14 of the Commission proposal on the rights of the public concerned to participate in criminal proceedings does not introduce new procedural rules but only requires Member States to ensure, in accordance with their national legal system, that members of the public concerned have the appropriate rights to participate in criminal proceedings concerning criminal offences covered by the proposed Directive. As explained in recital 26 of the proposal, this should be done within the scope of the relevant national legal framework and subject to the relevant national procedural rules. The proposal therefore does not interfere in the criminal procedural law.

Point 21: The Commission agrees that prevention measures can play an important role in combating environmental crime. The proposed provision of Article 15 reflects the considerations expressed in the opinion of the Bundesrat.

Point 22: The Commission would like to observe that the restrictions under Article 7 of the Invasive Alien Species (IAS) Regulation apply also to invasive alien species that are widely spread once they have been included on the list of Union concern. Once a species is included on the list of Union concern, the relevant obligations (including under Article 7) apply across the Union, and irrespective of whether the species is widespread or not. This is necessary to ensure effective environmental protection and to avoid further spread of invasive alien species in a particular region to other areas where they are not widespread. It is important to apply restrictions to widespread species even within one country, so that they do not spread to new areas in the same country. Against this background, it is appropriate and necessary that the relevant criminal offence in the Commission proposal for a new Environmental Crime Directive covers both already widespread and not widespread invasive alien species.