POSITION PAPER FROM PRACTITIONERS OF THE 4 NETWORKS – EUFJE, ENPE, IMPEL AND EnviCrimeNet - ON THE PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE PROTECTION OF THE ENVIRONMENT THROUGH CRIMINAL LAW (ECD)

The 4 Networks, EUFJE - The European Union Forum of Judges for the Environment, ENPE - European Network of Prosecutors for the Environment, IMPEL - European Union Network for the Implementation and Enforcement of Environmental Law and EnviCrimeNet, bringing relevant parties - judges, prosecutors, regulators, inspectors and police officers - together to contribute to joint efforts to fight environmental crime, congratulate and welcome European Union authorities and institutions for all the work that led to the proposal for a new Environmental Crime Directive (ECD).

The practitioners who work daily in the fight against environmental crime have, over the years, made major efforts to implement the original ECD, Directive 2008/99/EC, but there were many obstacles to its practical implementation that prevented criminal environmental law from being effective. "Environmental crimes negatively affect water, air, soil, habitats, our climate, the physical health and well-being of people, and flora and fauna". Environmental crime also causes social and economic damage, both in Europe and worldwide. It is estimated to involve a "global economic loss estimated at USD 91-259 billion, rising by 5-7% annually" which makes "environmental crime the fourth largest criminal activity in the world after drug smuggling, counterfeiting and human trafficking". Ensuring the revised ECD will be an effective tool in practice to prevent, deter and defeat environmental crime is an important responsibility for all of us, not only as practitioners but also as citizens on behalf of society whose welfare must be safeguarded.

The 4 Networks were widely involved and consulted in the process of evaluation of the 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 (ECD), by the European Commission, through Directorate-General for Environment (DG ENV) and Directorate-General for Justice and Consumers (DG JUST), namely under the Environmental Compliance and Governance Forum and its Working Group on Environmental Crimes. This involvement ensured the opportunity for practitioners to contribute with their knowledge and experience.

We consider the proposal for a new ECD addresses many of the problems identified by practitioners, on what works and does not work in the day-to-day practice of implementation on the ground. The new ECD can provide the fundamental, improved framework to overcome the poor implementation and use of Directive 2008/99/EC and address the challenges we will face in a successful fight against environmental crime. In particular, we highlight the importance of:

- Offences (art. 3) – Broadening the scope of the Directive to many more areas that affect the environment and natural resources and introducing in some areas common and clear definitions of environmental crime offences;
- Inciting, aiding and abetting (art. 4) – Specifying punishment for inciting, aiding and abetting a criminal offence when committed intentionally;
- Minimum maximum sanctions (art. 5) – Including sanctions for the offences to be effective, dissuasive and proportionate for natural persons;

- Liability of legal persons (art. 6) – Refining liability for legal persons, ensuring that perpetrators' economic activities are also liable to be dealt with as criminal offences;
- Sanctions for legal persons (art. 7) – Ensuring sanctions for such offences should be effective, dissuasive and proportionate.
- Aggravating and mitigating circumstances (art. 8 and 9) –Taking into account the severity of the crime committed;
- Freezing and confiscation (art. 10) – Preventing and deterring financial gains;
- Limitation periods (art 11) - Including limitation periods;
- Jurisdiction (art. 12) - Establishing cross-border jurisdiction in order to counter offences of a cross-border nature;
- Whistle-blowers and rights for public participation (art. and 13 and 14) – Protecting those who report breaches of environmental law or cooperate with investigations;
- Resources, training, investigative tools (art. 16-18) – Addressing lack of capacity of responsible authorities, which is essential for effectiveness and practical implementation of criminal law;
- Coordination, cooperation and National strategies (art. 19, 20) – Promoting cooperation and communication between all actors along the administrative and criminal enforcement chains within and between Member States is vital. Also this article particularly references to the assistance of European networks of practitioners working on matters relevant to combating environmental crime and related infringements which we particularly welcome; (art. 20) – establishing objectives, priorities and corresponding measures and resources needed;
- Data collection and statistics (art. 21) - Collecting accurate, consistent and comparable data is vital to measure the extent of environmental crime and the effectiveness of measures against it.

The 4 Networks would still like to highlight their concerns about some provisions of Art. 3, and the dispositions/suggestions for limitation periods that would include investigation, prosecution, trial and judicial adjudication under Art. 11. They suggest that the proposed text, meant to clarify or eliminate vague terms would need to be amended so as not to undermine the implementation of the revised Directive. Proposals for amendments are presented as well as respective fundaments and justifications in the ANNEX - *PROPOSAL FOR AMENDMENT FOR ARTICLE 2, 3 AND 11 OF THE PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE PROTECTION OF THE ENVIRONMENT THROUGH CRIMINAL LAW AND NOTES ON ARTICLES 6, 7, 8, 9.*

The 4 NETWORKS – EUFJE, ENPE, IMPEL AND EnviCrimeNet expressly welcome the provisions of the proposal for a new ECD providing assistance to European practitioners working on matters relevant to combating environmental crime and related infringements. In supporting practitioners, namely by facilitating the sharing of their knowledge and experience, promoting joint training activities and fostering their collaboration and cooperation, the 4 Networks confirm their willingness to continue to contribute to the process of revising the Environmental Crime Directive. In particular, the 4 Networks seek to pass on the views of relevant parties´ - judges, prosecutors, regulators, inspectors and police officers - so as to contribute to the effectiveness of the fight against environmental crime.

ANNEX

PROPOSAL FOR AMENDMENT FOR ARTICLE 2, 3 AND 11 OF THE PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE PROTECTION OF THE ENVIRONMENT THROUGH CRIMINAL LAW AND NOTES ON ARTICLES 6, 7, 8, 9

ARTICLE 2 DEFINITIONS

"For the purpose of this Directive, the following definitions will apply:

(1) 'unlawful' means a conduct infringing one of the following:

(a) Union legislation, which irrespective of its legal basis contributes to the pursuit of the objectives of Union policy of protecting the environment as set out in the Treaty on the Functioning of the European Union;

(b) a law, an administrative regulation of a Member State or a decision taken by a competent authority of a Member State that gives effect to the Union legislation referred to in point (a).

The conduct shall be deemed unlawful even if carried out under an authorisation by a competent authority in a Member State when the authorisation was **illegal,** obtained fraudulently or by corruption, extortion or coercion; (…)".

Justification:

In practice, conduct is often carried out under an authorisation that is itself contrary to European Union or national law e.g., an environmental permit has been granted but is contrary to environmental laws. The definition of "unlawful" conduct should also include this situation. Such illegal authorisations are much more common than authorisations obtained fraudulently, by corruption, extortion or coercion. Moreover, such fraud, corruption, extortion, coercion is difficult to prove.

By adding "illegal" here, conducts carried out in the framework of illegal authorisations are automatically comprised under art. 3, 1) "Member States shall ensure that the following conduct constitutes a criminal offence when it is unlawful (…):"

ARTICLE 3, 2)

Member States shall ensure that the conduct referred to in paragraph 1, points (a), (b), (c), (d), (e), (f), (h), (i), (j), (k), (m), (n), (p), (ii), (q), (r) also constitutes a criminal offence, when committed with ~~at least serious~~ negligence.

Justification:

Propose to delete the qualifier "at least serious" negligence. Many offences are committed by simple negligence, and this should be sufficient for criminal liability. If not, we are adding another layer, burden of proof for investigating, prosecution and adjudicating authorities.

ARTICLE 3, 3)

(3) Member States shall ~~ensure that their national legislation specifies~~ **issue guidelines to ensure** that the following elements shall be taken into account, where relevant, when assessing whether the damage or likely damage is substantial for the purposes of the investigation and prosecution ~~and adjudication~~ of offences referred to in paragraph 1, points (a) to (e), (i), (j), (k) and (p):

(a) the baseline condition of the affected environment; **or**

b) whether the damage is long-lasting, medium term or short term; **or**

(c) severity of the damage; **or**

(d) spread of the damage; **or**

(e) reversibility of the damage.

These guidelines must be issued in accordance with guidelines provided by European Commission.

(4.) Member States shall ~~ensure that their national legislation specifies~~ **issue guidelines to ensure** that the following elements shall be taken into account**, where relevant,** when assessing whether the activity is likely to cause damage to the quality of air, the quality of soil or the quality of water, or to animals or plants for the purposes of the investigation, prosecution of offences referred to in paragraph 1, points (a) to (e), (i), (j), (k) and (p):

(a) the conduct relates to an activity which is considered as risky or dangerous, requires an authorisation which was not obtained or complied with; **or**

(b) the extent to which the values, parameters or limits set out in legal acts or in an authorisation issued for the activity are exceeded; **or**

(c) whether the material or substance is classified as dangerous, hazardous or otherwise listed as harmful to the environment or human health.

These guidelines must be issued in accordance with guidelines provided by European Commission.

(5.) Member States shall ~~ensure that their national legislation specifies~~ **issue guidelines to ensure** that the following elements shall be taken into account**, where relevant,** when assessing whether the quantity is negligible or non-negligible for the purposes of the investigation, prosecution of offences referred to in paragraph 1, points (e), (f), (l), (m), (n):

(a) the number of items subject to the offence; **or**

(b) the extent to which the regulatory threshold, value or another mandatory parameter is exceeded; **or**

(c) the conservation status of the fauna or flora species concerned; **or**

(d) the cost of restoration of environmental damage.

These guidelines must be issued in accordance with guidelines provided by European Commission.

Justification:

In the proposed Art. 3 the elements mentioned in its paragraphs 3, 4 and 5, would be legally binding elements for investigation, prosecution and sentencing, as Member States *shall ensure* that "their national legislation *specifies*" that those elements are taken into consideration in each of those phases of the enforcement chain.

It is specified that elements "shall be taken into account, where relevant" but many of those elements are very complex to assess or are giving rise to different interpretations and understandings, namely whether the "damage is long-lasting, medium term or short term", "reversibility of the damage", "severity of the damage" and "the cost of restoration of environmental damage" and "activity considered as risky or dangerous" or "serious".

However, under the current wording of those paragraphs, when those elements would not be taken fully into consideration the different decisions taken in the investigation, prosecution and adjudication phases could be invalidated. Perpetrators could rely on the complexity, wide margins of understandings and burden of proof for authorities of that legal requirement to challenge the validity of those decisions and this can seriously undermine the objective of the directive.

Clear thresholds relating to terms and dispositions already existing in the European Union environmental acquis would be the best approach for practitioners. In the absence of clear definitions in the Directive itself, that is the reason why we propose to amend those paragraphs in such a way that Member States *shall issue guidelines for the same purpose* and *limited to the phases of investigation and prosecution.* Guidelines are by nature more flexible, cannot be relied on by perpetrators and cannot be used by them to challenge the legality of investigation and prosecution decisions. Such guidelines can be issued by the executive branch of government or other competent authorities (public prosecutors offices e.g.) in conformity with national law and in accordance with guidelines provided by European Commission. The guidelines should not as such apply on the adjudication phase, because issuing such – in fact - sentencing guidelines by the executive branch of government would be seen in many legal systems as contrary to the separation of powers. Guidelines that apply in the investigation and prosecution phase can be taken into consideration in the adjudication phase by the judiciary, while deliberating on the proportionate nature of the sanctions to be imposed.

Practitioners in the field of implementation of environmental law also stressed that the clarifications and interpretations in the existing environmental acquis should guide the understanding and application of the ECD. Referring clearly to the terminology and meaning of the existing European environmental acquis (Industrial Emissions Directive – IED; Seveso Directive, Water Framework Directive – WFD; Registration, Evaluation, Authorisation and Restriction of Chemicals - REACH, Environmental Liability Directive – ELD, Waste Framework Directive – WFD, Habitats and Birds Directives – HD and BD, ...) in the ECD as a basic principle would allow for a consistent understanding of its indeterminate legal concepts. Practitioners need a common language and comprehension of environmental problems combined with more technical juridical concrete explanation of terms, bringing together the work from the judiciary, environmental authorities and citizens in concrete cases, to support a harmonised application of law "on the ground" and create a more level playing field between countries and Member States.
Exemplarily, the ELD term and elements "significant" could be used in alignment with "substantial" term and elements defined in the new ECD, building on the "acquis" of the ELD for the characterisation of damage, as well as the terms "dangerous" waste or for groundwater or surface water, exceedance in, at least one parameter relating to the baseline status of the body of water or its classification for a given purpose, or the occurrence of mortality of species associated with the aquatic ecosystem.

ARTICLE 11

Limitation periods for criminal offences **and the introduction of custodial penalties**

1. Member States shall take the necessary measures to provide for a limitation period that enables the investigation, prosecution, and ~~judicial adjudication~~ **charging** of criminal offences referred to in Articles 3 and 4 for a sufficient period of time after the ~~commission~~ **discovery** of those criminal offences, in order for those criminal offences to be tackled effectively.

2. Member State shall the take necessary measures to enable the investigation, prosecution and ~~judicial decision~~ **charging**:

(a) of offences referred to in Articles 3 and 4 which are punishable by a maximum sanction of at least ten years of imprisonment, **within a limitation** ~~for a~~ period of at least ten years from the time when the offence was ~~committed~~ **discovered**, when offences are punishable;

(b) of offences referred to in Articles 3 and 4 which are punishable by a maximum sanction of at least six years of imprisonment, **within a limitation** ~~for a~~ period of at least six years from the time when the offence was ~~committed~~ **discovered,** when offences are punishable;

(c) of offences referred to in Articles 3 and 4 which are punishable by a maximum sanction of at least four years of imprisonment, **within a limitation** ~~for a~~ period of at least four years from the time when the offence was ~~committed~~ **discovered,** when offences are punishable.

3. By way of derogation from paragraph 2, Member States may establish a limitation period that is shorter than ten years, but not shorter than four years, provided that the period may be interrupted or suspended in the event of specified acts.

4. Member States shall take the necessary measures to enable the enforcement of **imprisonment penalties within the following limitation periods:**

(a) a penalty of imprisonment in the case of a criminal offence which is punishable by a maximum sanction of at least ten years of imprisonment, imposed following a final conviction for a criminal offence referred to in Articles 3 and 4, for at least ten years from the date of the final conviction;

(b) a penalty of imprisonment in the case of a criminal offence which is punishable by a maximum sanction of at least six years of imprisonment, imposed following a final conviction for a criminal offence referred to in Articles 3 and 4, for at least six years from the date of the final conviction;

(c) a penalty of imprisonment in the case of a criminal offence which is punishable by a maximum sanction of at least four years of imprisonment, imposed following a final conviction for a criminal offence referred to in Articles 3 and 4, for at least four years from the date of the final conviction.

Justification:

According to art. 11, 1) the limitation period must be sufficiently long to allow investigation, prosecution, trial and judicial adjudication. Trial and judicial adjudication seems a tautology. We are also concerned that delaying tactics by the defence during court proceedings could cause proceedings to fall outside of the limitation period and therefore fail through no fault of the enforcement or prosecuting authorities.

Article 11, 2) will come into conflict with existing limitation periods in the Member States. This limitation period will have to be modified to 10, 6 or 4 years according to article 5 of the proposal.

We wonder whether the obligation for Member States in art. 11, 1) to provide for a sufficiently long limitation period is not sufficient and simpler.

In case article 11, 2) is maintained:

In article 11, 2) there must be a “period” of at least 10 years, c.q. 6 or 4 years from the commission of the offences for the investigation, prosecution, trial. It should be clarified that you mean “limitation” period here.

The possibility of extensions of the limitation period arising from interruption or suspension (article 11 in fine) should be repeated here.

The part of the sentence “when offences are punishable” is not clear.

In article 11, 4) is about the limitation period for the *enforcement* of imprisonment penalties. This should be clarified here and in the title of article 11.


EU FORUM OF JUDGES FOR THE ENVIRONMENT
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We would also take this opportunity to present some contribution notes for evaluation:

Article 6 on "Liability of legal persons": This provision is welcome, but it is overcomplicated for application. We would propose to stop after the requirement to make legal persons liable for offences under Articles 3 and 4 in the first line. This should be a stand-alone requirement. The article then goes on to include representatives who may bind a company by their actions which we feel is a separate issue. The term "leading position within the legal person" is quite vague and could usefully be expanded or defined to include Responsible Corporate Officer, Director and Senior Manager.

Article 7 on "Sanctions for legal persons": Organisational community service or reparation orders could be included here. Corporate Probation Orders including Environmental Compliance Plans with court appointed monitors as a condition of probation have had some success, as for example in the United States of America, and could be included here. The notion of fines linked to percentage of worldwide turnover is a welcome guideline but should not bind the hands of a trial judge who is sentencing a corporation and who can conduct a forensic assessment of a corporation's ability to pay a fine.

Articles 8 and 9: Aggravating and mitigating features should be a matter for guidance, but it is proposed not to include them specifically in the Directive.