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 together relevant parties - judges, prosecutors, regulators, inspectors, and police officers - 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).

In the sequence of the TAIEX-EIR Multi-country Flagship Workshop on Environmental Compliance and Governance, which we all welcome, we present our considerations and comments on the Council´s Partial General Approach.

1. Introduction

Practitioners who work daily in the fight against environmental crime have, over the years, made major efforts to implement the ECD in force, Directive 2008/99/EC, but there have been too many obstacles to its practical implementation that have 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" and also cause social and economic damage, both in Europe and worldwide. It is related to 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*"[1]. Therefore ensuring the revised ECD will be an effective tool in practice to prevent, deter and defeat environmental crime is a duty that calls all of us, also as citizens and part of a society whose welfare must be safeguarded.

At a global level, one can see a progressive worsening of the situation. We can refer to the joint UNEP- INTERPOL reports of 2014 and 2016. For Europe we can refer to the Serious and Organised Crime Threat Assessments of Europol, Eurojust's Strategic Project on Environmental crime, the Council of the European Union "Conclusions on countering environmental crime", adopted on 8 December 2016, the results of the Working Party on General Matters including Evaluations (GENVAL), evaluations of the practical implementation and operation of the European policies on prevention and combating environmental crime, tabled at the Meeting of the EU Council of Justice and Home Affairs Ministers of 5 December 2019.

The 4 Networks were widely involved and consulted in the process of evaluation of 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

[1] Extracted from COMMISSION STAFF WORKING DOCUMENT 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 (ENVIRONMENTAL CRIME DIRECTIVE)

Consumers (DG JUST), namely under the Environmental Compliance and Governance Forum and its Working Group on Environmental Crime. This involvement ensured the opportunity for practitioners to contribute with their knowledge and experience, and we are pleased to find ourselves contributing to this new procedure.

2. The New Proposal Improvements

We consider that the proposal for a new ECD seeks to address most of the problems identified by practitioners, on what works and does not work in the day-to-day practice of implementation on the ground. In particular, we, highlight the importance of the improved framework:

- Offences (art. 3) – Broadening the scope to more areas that affect the environment and natural resources and introducing in some areas concrete requirements to ensure common and clear definitions of environmental 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) – Requiring sanctions for environmental offences to be effective, dissuasive, and proportionate for natural persons;

- Liability of legal persons (art. 6) – Refining liability for legal persons, making perpetrators' economic activities also liable;

- Sanctions for legal persons (art. 7) – Requiring effective, dissuasive, and proportionate sanctions for legal persons;

- Detailing 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 concrete limitation periods;

- Jurisdiction (art. 12) - Establishing cross-border jurisdiction to counter offences with cross-border nature;

- Whistle-blowers and Rights for the public concerned (art. and 13 and 14) – Protecting those who report breaches of Union environmental law or cooperate with investigations;

- Resources, training, investigative tools (art. 16-18) – Addressing lack of capacity from authorities, 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 amongst Member States, and particularly including references to the assistance of European networks of practitioners working on matters relevant to combatting environmental offences and related infringements; (art. 20) – establishing objectives, priorities and corresponding measures and resources needed;

- Data collection and statistics (art. 21) - Collecting accurate, consistent, and comparable data.

3. Going Further

We welcome the new proposal and in particular the statement "Given the possible devastating impacts of environmental crimes on the environment and human health, it is important that potential perpetrators do not perceive parts of the EU as operating a lighter and less effective regulatory regime."

The proposed new Directive reflects the need for an Environmental Crime Directive which is ambitious and broad in scope and that identifies environmental crime as a serious issue and acknowledges that criminal enforcement needs to be strengthened. We welcome the addition of some twenty new categories of environmental activity which are capable of being considered offences and covered by the availability of criminal sanctions. The proposal generally reaffirms the need for increased criminal prosecution to ensure effective, dissuasive, and proportionate punishment and deterrence.

Nevertheless, one of the reasons for poor implementation of the first ECD Directive (2008/99) was that its scope was "defined in a complex way" and contained "several unclear definitions used for the descriptions of environmental offences". However, the proposed new Directive retains similar language which gives rise to many of the same concerns. Its language seems to be unnecessarily complex and the opportunity should be seized to simplify the requirements of the Directive wherever possible.

Many of the provisions of the Directive present "thresholds" that it seems necessary to cross before the legislation applies. These thresholds or standards are in some cases quite high. We would suggest that they are unnecessary and counterproductive. The qualifiers "serious misconduct", "substantial harm", "particularly harmful", and "substantial damage" introduce thresholds wich may be difficult to define and prove in criminal proceedings and are susceptible to challenge. By making these thresholds a prerequisite of certain actions, the Commission is introducing layers of complexity in court proceedings which we would suggest are to be avoided. We anticipate the likelihood of an argument as to whether thresholds are passed and standards met, in advance of the hearing of the main triable issues. These standards will make prosecuting environmental cases more difficult.

It should be remembered that Directives must be implemented individually by each Member State in its domestic legislation so any ambiguity or vague terms may lead to variations in legislation across the EU.

4. Specialisation

Our experience shows that having specialised investigators and prosecutors is essential to the successful prosecution of adjudication of environmental offences. We do not suggest that environmental courts are a necessity although they are to be welcomed in some jurisdictions.

However, to properly understand environmental cases, judges should be educated concerning environmental crime. The establishment of environmental or "green" courts risks having environmental crimes viewed differently from other crime types. We wish to ensure that the criminality around environmental offending is recognised as such by the courts and criminal sanctions applied. This should be by whatever is the most effective method in each Member State. However, we would approve of a requirement that all judges who will sit on environmental cases should have received some specialised training in environmental matters as set out in Para 28 of the Council's Partial general approach.

We aim to transfer relevant parties´ - judges, prosecutors, regulators, inspectors, and police officers - contributions to the effectiveness of the fight against environmental crime and we are always available to give our contribution when needed.

5. Highlights

The 4 Networks would still like to highlight their concern about some of the provisions and we suggest that the proposed text clarifies or eliminate vague terms, not undermining the implementation of the revised Directive.

Proposals for amendments are presented as well as respective fundaments and justifications in the ANNEX Below - PROPOSAL FOR AMENDMENT OF THE PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE PROTECTION OF THE ENVIRONMENT THROUGH CRIMINAL LAW.

ANNEX

PROPOSAL FOR AMENDMENT OF THE PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE PROTECTION OF THE ENVIRONMENT THROUGH CRIMINAL LAW

In particular, we, highlight the following:

Article 2, this provision contains definitions of terms used in the Directive but does not include them all. We would suggest if vague notions are to be retained that more definitions could be included to clarify these, including "serious misconduct", "substantial harm", "particularly harmful", and "baseline condition".

It is important to pay attention to the situation of illegal authorisations, that have not been obtained fraudulently or by corruption, extortion, or coercion, e.g. but are authorisations infringing EU law (not observing e.g. EU emission standards). 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. Some further discussion and some careful wording around this issue would be of use to practitioners.

Proposal:
Article 2 definitions (and now in 3 (1)): The Council is now proposing a much-shortened text for Art. 2 and the term "unlawful" has been moved to Article 3 (1), and the sentence on unlawful authorisations has disappeared. A new recital (8) has been introduced. Although the proposal to add "illegal" has not been followed, but the insertion of the words "*inter alia*" in the recital, makes it possible for Member States to use such a broader concept of unlawful permits, without being obliged to do so. We maintain the opinion that it should be included "illegal" authorisations in the text of the Directive for clarity and consistent application of the law in EU coutries.

We also would suggest if vague notions are to be retained, and that more definitions could be included to clarify "serious misconduct", "substantial harm", "particularly harmful", and "baseline condition".

"*Article 3*
Offences
1. Member States shall ensure that the conducts referred to in paragraphs 2 and 3 constitute criminal offences when they are unlawful.

For the purpose of this Directive the 'unlawful' conduct shall mean a conduct infringing one of the following:
(a) Union law which aims to pursue one of the objectives of the Union's policy on the environment as set out in Article 191(1) TFEU;
(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 law referred to in point (a).
2. 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 granted illegally.

- **Offences Art. 3(2), previous (1)**
  Article 3 (1)
  We welcome the broadening of the scope of the Directive to many more new areas of criminal competence that affect the environment and natural resources and introducing in some areas common and clear definitions of environmental crime offences.
  However, these are limited and qualified by many exemptions and provisons which we do not feel assist the prosecution of criminal behaviour. These offences, now limited to intentional and seriously negligent behaviour, could much more simply be couched in wider terms which can then be made subject to particular exemptions. Now, the limited requirement for criminalisation of activity in certain specified circumstances will tie the hands of investigators and prosecutors and move offences out of the criminal arena. It may mean that on the principles of subsidiarity some Member States will wish to go further so as to establish a more effective enforcement regime, and some will not, which will lead to inconsistency and confusion.
  Very importantly in **Article 3.2 (k)** the abstraction of surface water or groundwater which causes or is likely to cause substantial damage will also imply the need to prove a damage to "the ecological status or potential of surface water bodies or to the quantitative status of groundwater bodies" an extremely complex evaluation that is only done under the complete evaluation of river basins state, completed every 6 years. This is possibly not what was intended and is a high threshold.
  A further example is at **Article 3.2 (h)** where ship-source pollution which does not cause deterioration of the receiving waters, unless it is by a repeat offender, is not criminalised. We find the whole requirement for establishing whether there is deterioriation in water quality and then the retention of the option to criminalise where there is a conjunction of repeated minor cases unhelpful and complicated. Surely these considerations are for courts trying an environmental case and prosecutors in deciding whethe prosecution is appropriate? Simply providing a basic requirement criminalising the offending behaviour is, we would respectfully suggest, the true purpose of the Directive. Reference can then be made to exemptions as necessary.

The risk here is a preliminary challenge to the applicability of the Directive, for example by reference to culpability, to impact, damage or harm, so as to undermine the decision to prosecute.

Proposal Article 3 (2):
We would suggest the removal of references to "intentional" behaviour.
An example of the qualified nature of the criminalisation of behaviour can be found in Article 3 (2) (f) where the provision is only for a non-negligible quantity; we would suggest that the activity is simply criminalised and references to negligible and non-negligible quantity remain in guidance elsewhere.
In (k) delete: the abstraction of surface water or groundwater within the meaning of Directive 2000/60/EC36 which causes or is likely to cause substantial damage (as further defined) to ~~the ecological status or potential of~~ surface water ~~bodies~~ or to ~~the quantitative status of~~ groundwater ~~bodies~~;
A further example is in Article 3 (2) (h) where ship-source pollution we propose to simplify the whole requirement for establishing whether there is deterioriation in water quality and then the retention of the option to criminalise to simply providing a basic requirement criminalising the offending behaviour is, we would respectfully suggest, the true purpose of the Directive. Reference can then be made to exemptions as necessary.

Article 3 (2) and (3) :

We have some concerns regarding the qualifier "at least serious" negligence in Art. 3 (2) of the Commission Proposal. 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.

he requirement of "at least serious negligence", in Article 3(2) is now complemented by Recital 7 and the proposal to introduce a new Recital (11ter); "With regard to the criminal offences provided for in this Directive, the notion of at least serious negligence should be interpreted in accordance with national law."

The reference to "serious negligence" could be deleted as with the word "intentional" for the sake of clarity and the offending behaviour criminalised per se. At the very least the word "serious" should be removed. Many environmental cases are committed negligently and the need to define what amounts to "serious negligence" rather than just negligence somewhere is an unnecessary hurdle.

Proposal Article 3 (3):
We propose the deletion of the qualifier "at least serious" before negligence for the sake of clarity, and the offending behaviour criminalised *per se*.

As an example: "*3. [...] Member States shall ensure that the conduct referred to in paragraph 2 [...] , points (a), (b),*

(c), (c)bis, [...] (e), (f), (h), (i), (i)bis, (j), (k), (l), (m), (n), (o), [...] (q), (r) also constitutes a criminal offence, when committed with ~~at least serious~~ negligence."

Articles 3 (3) (4) (5):

We have also concerns with the complex definition of elements that shall be taken into account, where relevant, when assessing the damage or likely damage mentioned in Article 3 (3), 3(4) and 3 (5). Under the wording of those paragraphs in the initial Commission Proposal should those elements not be taken fully into consideration, the 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 would seriously undermine the objective of the directive.

The Council seem to propose to modify Art 3 (4) – (6) , and to introduce the following introduction of the various paragraphs 'In order to assess whether the damage or likely damage is substantial [...] one or more of the following elements shall be taken into account, where relevant […]". Recital (11) seems to deal with the issue : "*Qualitative and quantitative thresholds used to define environmental criminal offences should be clarified by providing a non-exhaustive list of circumstances which should be taken into account, where relevant, when assessing such thresholds by authorities which investigate, prosecute and adjudicate offences. This should promote the coherent application of the Directive and a more effective fight against environmental crimes as well as provide for legal certainty. However, such thresholds or their application should not make the investigation, prosecution or adjudication of criminal offences excessively difficult*."

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 a long-lasting, medium-term or short term", "reversibility of the damage", "the cost of restoration of environmental damage" and "activity considered as risky or dangerous" or "serious".

Whilst we welcome the lessening of the burden here, it is not clear how the assessment will be made, who shall do it, at which stage of the enforcement chain, and if all the efforts of regulators to collect the necessary evidence will prove to be enough in court proceedings. Practitioners need a common language and comprehension of environmental problems combined with a more technical juridical explanation of terms, bringing together the work from the judiciary, environmental authorities, NGOs and citizens in decided cases, to support an effective and harmonised application of the law "on the ground" and create a more level playing field between countries and continents. Some more work may be needed here.

Article 3.4 : The requirement to have "substantial harm" could significantly reduce the number of cases which could be prosecuted. It may be that the **risk** of harm was substantial or that it may be a less serious offence of its type with only major harm or significant harm but none the less deserving of prosecution. The assessment of whether or not there is substantial harm is primarily an issue for sentencing. Consideration

should be given to issuing guidance in this area by European Commission to ensure a level playing field across EU. Guidance of this nature exists for the Environmental Liability Directive.

Article 3.5 : We recognise these elements as important in establishing likelihood of damage but we would suggest that it is not appropriate to bring these elements into an assessment of whether or not there is prima facie criminality. These elements might in preference be constituent elements of a sentencing guideline or similar. If there is a need to specify elements which make an offence more serious, then that simple concept should be set out. Member States can introduce a guideline or tiered approach with elements such as death or serious harm being an aggravating factor resulting in an increase in the maximum available sentence. We do however welcome the Council amendment of this section as it allows for reference to one or more of the elements cited, not all and not as an exhaustive list and not as a threshold test.

Article 3.6: We see that an attempt has been made to improve the concept of negligible or non-negligible quantities. We would urge to go further and remove this unnecessary limitation on criminal liability. No one in the enforcement chain is looking to criminalise activities in negligible quantities. What may or may not be negligible quantities should be for courts to decide but based on European Commission to ensure a level playing field across EU.

Proposal Article 3 (4) (5) (6):
We propose: .
"4. [...] In order to assess whether the damage or likely damage is substantial [...] within the meaning of paragraph 2 [...], points (a) to (d), (e) (ii), (i), (i)bis, (j), (k) and (p) (i) and (ii), Member States shall issue guidelines to ensure that one or more of the following elements shall be taken into account, where relevant:
(a) the baseline condition of the affected environment;
(b) whether the damage is long-lasting, medium term or short term;
[...]
(c) [...] spread of the damage;
(d) [...] reversibility of the damage
These guidelines must be issued in accordance with overarching guidance provided by the European Commission."
"5. [...] In order to assess whether the activity is likely to cause damage to the quality of air, the quality of soil or the quality or status of water, or to animals or plants [...] within the meaning of paragraph 2 [...], points (a) to (d), (e) (ii), (i), (i)bis, (j), (k) and (p) (i) and (ii), Member States shall issue guidelines to ensure that one or more of the following elements shall be taken into account, where relevant:
(a) the conduct relates to an activity which is considered as risky or dangerous for the environment or human health, and requires an authorisation which was not obtained or complied with;

(b) the extent to which the values, parameters or limits set out in [...] one of the acts listed under paragraph 1, points (a) or (b), or in an authorisation issued for the activity are exceeded;
(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 overarching guidance provided by European Commission."
"*6. [...] In order to assess whether the quantity is negligible or non-negligible [...] within the meaning of paragraph 2 [...], points (e) (i), (f), (l), (m), (n), Member States shall issue guidelines to ensure that one or more of the following elements shall be taken into account, where relevant:*
(a) the number of items subject to the offence;
(b) the extent to which [...] a regulatory threshold, value or another mandatory parameter foreseen in one of the acts listed under paragraph 1, points (a) or (b), is exceeded;
(c) the conservation status of the fauna or flora species concerned;
(d) the cost of restoration of environmental damage, when quantifiable.
These guidelines must be issued in accordance with overarching guidance provided by European Commission."

- **Inciting, aiding, and abetting (Article 4)**
  We welcome the proposal to specify punishment for inciting, aiding and abetting a criminal offence when committed intentionally. Nevertheless, adding the limitation to criminal offences that are "committed intentionally", is not a useful provision. The requirement to show intent in all such cases may lead to less criminalisation rather than more, as many offences are committed recklessly or negligently and should also be capable of being dealt with as an offence.

Proposal Article 4:
We propose to delete:
"*Article 4*
Inciting, aiding and abetting and attempt
1. Member States shall ensure that inciting, and aiding and abetting (could include facilitating) the commission of any of the criminal offences referred to ~~intentionally~~ in Article 3(2)[...] are punishable as criminal offences.
2. Member States shall take the necessary measures to ensure that an attempt to commit ~~intentionally~~ any of the criminal offences referred to in Article 3 (2)[...] points (a), (b), (c), (c)bis, [...] (e), (f), (h), (i), (i)bis, (j), (k), (m), (n), (p) (i) and (ii), (q), (r) [...] is punishable as a criminal offence."

- **Minimum maximum sanctions (Article 5)**

We welcome the introduction of minimum maximum custodial sentences for natural persons. We welcome all of the various penalties and sanctions set out in the Article and agree that these should be available to the courts. We would not wish to see any reduction or weakening of these minimum requirements as they are important for consistency across the Union and for investigation purposes.
The provision of the Commission Proposal will contribute in our view to the creation of a level playing field across the EU.
To limit the scope of application of the "minimum maximum" term of imprisonment to instances that cause death and do not provide anymore those severe sanctions for instances that "are likely to cause death" or that "cause or are likely to cause (…) serious injury to any person", and to lower the minimum of the maximum sanctions to five (instead of six) or three (instead of four) years will weaken the Directive. One must be aware that maximum sanctions are in practice only imposed exceptionally and when the judiciary has very good reasons, taking into account the concrete facts and circumstances of the case, to do that.
The same is true for the weakening of the obligation to reinstate the environment by making it optional for the Member States (Art. 5(6)). The compensation in cases of irreversible harm is an improvement (Art. 5(6) (a)). Of course this entails the risk of buying off irreversible damage.

Proposal Article 5:
We propose to maintain the original text of the proposal of the Directive.

- **Liability of legal persons (Article 6)**
  The Commission Proposal is refining liability for legal persons, ensuring that perpetrators' economic activities are also liable to be dealt with as criminal offences. We support the Commission Proposal. We welcome this provision but feel that it has been overcomplicated. The basic requirement should simply be that legal persons can be held liable and convicted of offences for which natural persons can be convicted. There is clearly a need to include representatives who may bind a company by their actions. The term "leading position within the legal person" is quite vague and could be expanded to include Responsible Corporate Officer, Director and Senior Manager.

Proposal Article 6:
We propose that the basic requirement should simply be that legal persons can be held liable and convicted of offences for which natural persons can be convicted. There is clearly a need to include representatives who may bind a company by their actions. The term "leading position within the legal person" is quite vague and could be expanded to include Responsible Corporate Officer, Director, and Senior Manager.
This Article might benefit from a link with the definition of "beneficial owner" witihin DIRECTIVE (EU) 2015/849 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2015

- **Sanctions for legal persons (Article 7)**
  The Commission Proposal ensures that sanctions for such offences should be effective, dissuasive and proportionate. It will contribute to create a level playing field. The new proposal of minimum maximum fines expressed as a percentage of the total worldwide turnover is attractive, 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. Turnover is not the same as profit and we do not wish to see corporations being would up and fines unpaid because sentences are mechanistic and unrealistic.
  This could be overly complex and the original proposal, including Art. 7 (6) on the obligation to take into account the illegal profits (Art. 6 (6)), complemented with some additional types of sanctions could be more appropriate.

  We agree with the various sanctions and measures detailed here. Organisational Community Service could be included. Corporate Probations Orders including Environmental Compliance Plans, with court appointed monitors as a condition of probation, have had some success in the USA. These could be included here. The absolute requirement to "reinstate" the environment may be impossible to achieve so we would suggest that additional wording such as remediation and reparation orders could be included here.

  At Article 7.2.a. reference is made to criminal "or non-criminal fines". We are not sure what is intended by the term "non criminal fines" but we should be looking to establish criminal fines in this Directive and we would suggest removal of that reference.

Proposal Article 7:
We propose:
Mantain the original proposal, including Article 7 (6) on the obligation to take into account the illegal profits (Art. 6 (6)), complemented with some additional types of sanctions We agree with the various sanctions and measures included here, suchas as Organisational Community Service, Corporate Probations Orders including Environmental Compliance Plans, with court appointed monitors as a condition of probation, and additional wording such as remediation and reparation orders could be included here.
In Article 7.2.a. we would suggest the removal of that reference to criminal ~~"or non-criminal fines"~~.

- **Aggravating and mitigating circumstances (Articles 8 and 9)**
  The Commission Proposal to include these factors allows all concerned to take into account the severity of the crime committed and then any mitigating factors.

  The Council proposes deleting the aggravating circumstances: (a) offence caused death or serious injury to a person, (g) substantial financial benefits or savings, (h) link with and enforcement of the Environmental Liability Directive 2004/35/EC (ELD), (i) lack of assistance and (j) obstruction. We would not wish to see these factors deleted. This would be a missed opportunity, especially in serious cases where (a) occurs.

  In Article 8 (b) a definition of "ecosystem" is added from Regulation 2020/852 on sustainable investments: "'ecosystem' means a dynamic complex of plant, animal, and micro-organism communities and their non-living environment interacting as a functional unit. The assessment of whether the offence caused "destruction or irreversible or long-lasting substantial damage to an ecosystem" is complex and will lead to discussions in court. Can a less formal wording be found?

  Article 9, a) adds "restoration of nature to its previous condition by the offender". However, restoration of nature is post crimen and a duty and has limited value as a mitigating circumstance. Mitigating circumstances are for example the young age of the offender or blank criminal record. Full restoration to its previous condition may not be possible so the lesser standards of remediation or rehabilitation may be useful here.

  We would also welcome the inclusion of the words "co-operates with" authorities in this section as co-operation can take many forms beyond the two examples provided.

Proposal Articles 8 and 9: We should revert to the text of the Commission Proposal for these articles.

- **Limitation periods (Article 11)**
  According to Article 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. We would like to see clarity around what is meant by "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. Article 11 (4) is about the limitation period for the enforcement of imprisonment penalties. This should be clarified here and in the title of the Article itself.

The new proposal on Article 11 ((1) judicial "adjudication" is replaced by "decision". We would prefer deleting the trial and judicial adjudication phase to avoid delaying tactics by the defence during court proceedings causing proceedings to fail through no fault of the prosecuting authorities. In addition the starting point of limitation periods must be the discovery of the offence or environmental damage, as in environmental cases this typically can occur much later than the commission of the offence. The period has been adapted in line with the lowered penalties in Article 5 (6 years of imprisonment -> 5 years and 4 years -> 3 years). This seems acceptable. We refer to our position paper regarding the conflict with existing limitation periods in Member States and the complexity of this provision which could also be limited to the first paragraph ("sufficiently long" period). We do not understand the aim of the derogation clause in Article 11, paragraph 3.

Any necessary limitation periods should run to the date of charge – not the conclusion of litigation as this might incentivise protracted, defended legal proceedings.

Any limitation period should commence at the earliest on the date of discovery of offence rather than the date the offence was committed. It may be that the crime is not discovered or the source of pollution clearly identified until many years later. For this reason and in accordance with ECJ case law elsewhere, limitation periods might run when sufficient evidence has been gathered for a regulator to establish that an offence has been committed. We have used the more prescriptive requirement below.

Proposal Article 11:

We propose to delete:

Limitation periods for criminal offences and the enforcement of imprisonment penalties

1. Member States shall take the necessary measures to provide for a limitation period that enables the investigation, prosecution, ~~judicial adjudication~~ and 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.

These periods may include extensions of the limitation period arising from interruption or suspension.

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.

These periods may include extensions of the limitation period arising from interruption or suspension."

- **Jurisdiction (Article 12)**
  We welcome this article establishing cross-border jurisdiction in order to counter offences of a cross-border nature, so as to provide a common framework across the Union and to deal with cross-border offending.

- **Whistle-blowers and Rights for public concerned (Article 13 and 14)**
  On Article 13 we welcome these provisions to protect those who report breaches of environmental law or cooperate with investigations, but the new proposal seems to weaken the position of persons reporting offences, so the original text is preferred.

  On Article 14: It is important to define what is meant by public participation and we support the definition of this in Article 2 of the proposed Directive which clarifies this wide ranging concept by setting out a clear reference to national law. Public participation may involve being heard at sentencing including making a Victim Impact Statement or similar. If needed at trial, prosecutors can call on victims as witnesses and suitably qualified individuals as experts. We must be careful to resist victim driven

justice, private prosecutions and the potential for a scenario of private prosecutions and retributive action and we feel the definition is helpful in this regard.

- **Prevention (Article 15):**
  We welcome these important provisions which aim to prevent and reduce environmental crime and avoid members of the public becoming victims of crime. We would suggest that the wording of this paragraph might be extended to provided protection **to the environment itself** through relevant NGOs and other representatives as set out in Para 26 of the Council's Partial General Approach.

- **Resources, training, investigative tools (Articles 16-18)**
  We welcome the provisions of Article 16, addressing the lack of capacity of responsible authorities, which is essential for effectiveness and practical implementation of criminal law on the detection, investigation, prosecution and adjudication of environmental offences. We might usefully include resourcing financial investigators to assess the benefit associated with such offending.
  On Article 17 we welcome this requirement for appropriate training for all in the enforcement chain.
  On Article 18 we welcome this provision designed to ensure the adequacy and effectiveness of investigative tools is ensured in Member States.

- **Coordination, cooperation, and National Strategies (Articles 19, 20);** and
  Data collection and statistics (Article 21)
  On Article 19 We consider that promoting cooperation and communication between all actors along the administrative and criminal enforcement chains within and between Member States is vital. The Commission Proposal references the assistance of European networks of practitioners working on matters relevant to combatting environmental crime and related infringements which we particularly welcome;
  On Article 20 Establishing objectives, priorities and corresponding measures and resources is indeed needed. We welcome the requirement for a National Strategy to combat environmental crime in each Member State and the requirement to review and keep such a strategy up to date.
  On Article 21 We agree that there is a need for accurate and up to date statistics around environmental crime to monitor the effectiveness of strategies and action to combat environmental crime. Collecting accurate, consistent and comparable data is vital to measure the extent of environmental crime and the effectiveness of measures against it. We welcome the Commission Proposal on those issues. The Council seems to propose minor amendments that will not alter the proposal substantially.

- Articles 22- 29: of this proposal are largely administrative provisions, which we support.