REVISION OF THE EU ENVIRONMENTAL CRIME DIRECTIVE

VCI Position

Introduction:

On 15 December 2021, the EU Commission presented the proposal for a Directive on the protection of the environment through criminal law and replacing Directive 2008/99/EC. Effective enforcement of EU environmental law is of decisive importance for the chemical-pharmaceutical industry. Adequate tools and resources to detect, investigate and prosecute criminal activities as well as effective coordination and cooperation mechanisms between all Member States are a prerequisite for this. In particular, harsher sanctions are justified and necessary where criminal activities show clear strategies to deliberately circumvent existing provisions.

From the viewpoint of the German chemical industry association VCI, the submitted Commission proposal should define criminal offences more precisely and link them in each case to a clearly defined breach of administrative law. This applies especially to offences for which already the likelihood of causing substantial damage can be grounds for punishment. Furthermore, the minimum thresholds for the maximum terms of imprisonment[1], require differentiation as regards the degree of unlawfulness. Thus, it must be distinguished whether the violation was committed intentionally or by gross negligence and whether it caused damage or not. The same applies to the distinction between perpetration on the one hand and the participation in or the attempt of a crime on the other.

Detailed Comments:

1. Clarifications regarding punishable acts

Like under the existing Environmental Crime Directive (2008/99/EC), the individual offences according to Article 3 continue to refer to breaches of administrative law. However, the definition of the term *“unlawful”* in Article 2(1) of the proposal should clearly state that an offence invariably refers to the list of actions in Article 3. It follows from the principle of certainty in criminal law that any offence must be clearly defined. Consequently, it is necessary to define the punishable acts in Article 3 in a conclusive and sufficiently clear manner.

In particular, the following precisions should be made in the area of the chemicals legislation:

- Article 3(1)(c) (iii) and (iv):
  The criminal offences in relation to Regulations (EC) No 1107/2009 and (EC) No 528/2012 should be defined more precisely by linking criminal liability to the absence of a substance approval or product authorisation.

[1] For example, Article 5(2) of the proposal is to obligate the Member States to ensure that certain offences *“are punishable by a maximum term of imprisonment of at least 10 years …”*

- Article 3(1)(c) (v):
  The offence that contravenes against Regulation (EC) No 1272/2008 must be clearly specified.

2. Clear-cut borderline to endangerment crime

Some of the offences listed in Article 3 presuppose that the activity can *“ … cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants.”*
Where no damage has occurred, Article 3(4) demands to take into account certain elements in order to assess *“whether the activity is likely to cause damage”*. Mentioned here are the risky or dangerous character of an activity and the dangerous or hazardous nature of a material or substance as well as the extent to which values, parameters or limits are exceeded. In this context, it should be clarified that there must be a concrete causal link between the established breach of administrative law and the damage or the danger of damage.

3. Differentiation in the severity of penalties depending on the degree of unlawfulness

The VCI assumes that the Member States will retain their scope for own action in implementation and that they can and will make the precisions necessary for a high level of legal certainty in their national implementation efforts. Also, differentiations should be made already in the Directive itself, based on the degree of unlawfulness of a violation. The principle of proportionality requires that grossly negligent infringements be punished less severely than intentional violations. Moreover, violations that caused no damage should be punished less severely than violations that caused damage. The same applies for the distinction between perpetration on the one hand and the participation in or the attempt of a crime on the other. Furthermore, regarding the principle of proportionality it should be closely examined whether negligence, participation or attempt should be punishable in all the cases listed in the draft.

4. Sanctions and aggravating circumstances

Sanctions (Article 7) should not be based on turnover, as companies with lower margins would be much more affected by such sanctions than companies with high margins. Furthermore, winding-up companies as a sanction is not proportionate. either. Also, the publication of judicial decisions as public exposure *("name and shame")* can lead to disproportionate results and should not be included in the range of possible sanctions. Harsher sanctions in the sense of aggravating circumstances (Article 8) might be legitimate if the offender actively obstructs inspections, customs controls or investigational activities (Article 8(j)). By contrast, the mere lack of support of inspection or other enforcement authorities (Article 8(i)) must not be considered an aggravating circumstance, given the nemo-tenetur principle.

5. Clarification regarding access to courts

The rights of the public concerned to participate in proceedings under Article 14 should be brought in a more precise form. According to the definition in Article 2(4), the term *"public concerned"* includes non-governmental organisations. In this respect, recital 26 refers to Article 9(3) of the Aarhus Convention, although Article 9(3) provides for the right to challenge acts and omissions – while it does not provide for the participation in proceedings concerning criminal offences. This latter right of participation should be limited to individual persons affected by the criminal act.

6. Subsidiarity and basis of empowerment (Article 83 TFEU)

As several existing sectoral legal acts already stipulate various obligations to introduce sanctions[2] for the Member States, it is doubtful whether there is a need for such detailed provisions in the Directive, against the backdrop of the principle of subsidiarity.

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The VCI represents the interests of around 1,900 companies of the chemical-pharmaceutical industry and sectors close to chemistry vis-à-vis politicians, public authorities, other industries, science and media. In 2021, the VCI member companies realised sales of ca. 220 billion euros and employed over 530,000 staff.

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[2] For example, the following Regulations: Article 126 (EC) No1907/2006 (REACH) Article 47 (EC) No 1272/2008 (CLP), Article 87 (EC) No. 528/2012 (Biocidial Products), Article 72 (EC) No 1107/2009 (PPP), Article 14 (EU) 2019/1021 (POP).