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*****I**

REPORT

on the proposal for a European Parliament and Council directive on the protection of the environment through criminal law
(COM(2001) 139 – C5-0116/2001 – 2001/0076(COD))

Committee on the Environment, Public Health and Consumer Policy

Rapporteur: Ria G.H.C. Oomen-Ruijten

Symbols for procedures

- * Consultation procedure
majority of the votes cast
- **I Cooperation procedure (first reading)
majority of the votes cast
- **II Cooperation procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- *** Assent procedure
*majority of Parliament's component Members except in cases
covered by Articles 105, 107, 161 and 300 of the EC Treaty and
Article 7 of the EU Treaty*
- ***I Codecision procedure (first reading)
majority of the votes cast
- ***II Codecision procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- ***III Codecision procedure (third reading)
majority of the votes cast, to approve the joint text

(The type of procedure depends on the legal basis proposed by the Commission)

Amendments to a legislative text

In amendments by Parliament, amended text is highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.

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PROCEDURAL PAGE

By letter of 15 March 2001 the Commission submitted to Parliament, pursuant to Articles 251(2) and 175(2) of the EC Treaty, the proposal for a European Parliament and Council directive on the protection of the environment through criminal law (COM(2001) 139 – 2001/0076(COD)).

At the sitting of 2 April 2001 the President of Parliament announced that she had referred this proposal to the Committee on the Environment, Public Health and Consumer Policy as the committee responsible and the Committee on Legal Affairs and the Internal Market and Committee on Citizens' Freedoms and Rights, Justice and Home Affairs for their opinions (C5-0116/2001).

The Committee on the Environment, Public Health and Consumer Policy appointed Ria G.H.C. Oomen-Ruijten rapporteur at its meeting of 29 May 2001.

It considered the Commission proposal and draft report at its meetings of 26 February 2002 and 21 March 2002.

At the latter meeting it adopted the draft legislative resolution by 35 votes to 4, with 0 abstentions.

The following were present for the vote: Caroline F. Jackson (chairman), Mauro Nobilia, Anneli Hulthén (vice-chairmen), Ria G.H.C. Oomen-Ruijten (rapporteur), Per-Arne Arvidsson, Hans Blokland, David Robert Bowe, Raffaele Costa, Chris Davies, Monica Frassoni (for Marie Anne Isler Béguin, pursuant to Rule 153(2)), Robert Goodwill, Françoise Grossetête, Cristina Gutiérrez Cortines, Eija-Riitta Anneli Korhola, Bernd Lange, Paul A.A.J.G. Lannoye (for Hiltrud Breyer), Peter Liese, Torben Lund, Jules Maaten, Minerva Melpomeni Malliori, Erik Meijer (for Pernille Frahm), Jorge Moreira da Silva, Riitta Myller, Giuseppe Nisticò, Marit Paulsen, Fernando Pérez Royo (for Dorette Corbey), Frédérique Ries, Dagmar Roth-Behrendt, Guido Sacconi, Karin Scheele, Ursula Schleicher (for María del Pilar Ayuso González), Peter William Skinner (for Anne Ferreira, pursuant to Rule 153(2)), María Sornosa Martínez, Bart Staes (for Alexander de Roo), Robert William Sturdy (for John Bowis), Charles Tannock (for Martin Callanan), Antonios Trakatellis, Kathleen Van Brempt and Phillip Whitehead.

The opinions of the Committee on Legal Affairs and the Internal Market and the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs are attached.

The report was tabled on 25 March 2002.

The deadline for tabling amendments will be indicated in the draft agenda for the relevant part-session.

LEGISLATIVE PROPOSAL

Proposal for a European Parliament and Council directive on the protection of the environment through criminal law (COM(2001) 139 – C5-0116/2001 – 2001/0076(COD))

The proposal is amended as follows:

Text proposed by the Commission ¹

Amendments by Parliament

Amendment 1
Recital 1 a (new)

(1a) The European Council on 15-16 October 1999 in Tampere stated in point 48 of the conclusions that it was of the opinion that, with regard to national criminal law, efforts to agree on common definitions, incriminations and sanctions should be focused in the first instance on a limited number of sectors of particular relevance, such as environmental crime.

Justification

In this way, the European Council confirmed that environmental crime is one of the sectors where the Member States should agree common definitions, incriminations and sanctions in the field of national criminal law.

¹ OJ C 180, 26.6.2001, p. 238.

Amendment 2
Recital 1 b (new)

(1b) Pursuant to Article 175(1) of the EC Treaty, the Council, acting in accordance with the codecision procedure provided for in Article 251 of the EC Treaty, is to decide what action is to be taken by the Community in order to achieve the objectives of environmental policy as referred to in Article 174 of the EC Treaty.

Justification

Self-explanatory.

Amendment 3
Recital 1 c (new)

(1c) Pursuant to Articles 29 and 47 of the TEU which state the primacy of the EC Treaty over the EU Treaty, and given the case law of the Court of Justice (for instance in cases C-170/96 and C-333/99) which does not exclude the possibility that necessary measures to guarantee the application and effectiveness of Community law may include criminal penalties.

Justification

The articles that are referred to state that the EC Treaty prevails over the EU Treaty; criminal penalties are not excluded as measures to be taken to guarantee the application and effectiveness of Community law, which is supported by two cases of the Court of Justice.

Amendment 4
Recital 1 d (new)

(1d) On this basis, any measures may be taken which serve the environmental objectives referred to in Article 174 of the EC Treaty, provided that they do not violate the subsidiarity principle.

Justification

The environmental objectives referred to in Article 174 of the EC Treaty should be pursued by means of corresponding measures, so long as they are compatible with the subsidiarity principle.

Amendment 5
Recital 1 e (new)

(1e) The Community has the competence, in the field of environmental protection, to decree that behaviour be subject at national level to criminal sanctions, this being without prejudice to complementary measures in the context of judicial cooperation under the TEU.

Justification

Indicating the competence of the Community in the area of environmental protection at a national level while acknowledging that complementary measures under the EU Treaty remain possible.

Amendment 6
Recital 1 f (new)

(1f) This proposal for a directive is a follow-up to existing environmental directives and regulations and merely adds to them an instrument to enforce this legislation more effectively.

Justification

The instruments currently available to enforce this legislation are not always adequate, and could be enhanced by this proposal.

Amendment 7
Recital 1 g (new)

(1g) This proposal for a directive is not based on specific provisions of criminal law: the purpose is rather to use criminal-law provisions at national level to pursue an effective environmental policy.

Justification

The proposal for a directive seeks in general to secure the pursuit of a more effective environmental policy, without going into detail regarding criminal-law provisions. In this context it is important to indicate that criminal-law provisions are to be deployed at national level, to make it clear that this directive is not intended to empower the Community to intervene in national criminal-law provisions.

Amendment 8
Recital 1 h (new)

(1h) Article 31 of the Treaty on European Union institutes a power to take common action on judicial cooperation: in particular, paragraph (e) provides for ‘progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime’, etc.

Justification

The article cited here supports the proposal that the Community has the power to establish

minimum rules to combat environmental crime, provided that such crime is organised.

Amendment 9
Recital 1 i (new)

(1i) This proposal only contains minimum rules, thereby leaving Member States free to introduce or apply more stringent penalties for environmental offences other than those referred to in the directives. A draft Council framework decision based on Articles 34(2) and 31 of the TEU could complement in this field the directive based on Article 175(1) of the Community Treaty.

Justification

Member States must retain the power to adopt more far-reaching national criminal sanctions for purposes of environmental protection than those arising from Community law. The draft Council framework decision could have a complementary effect in addition to this.

Amendment 10
Recital 1 j (new)

(1j) The European Parliament recommendation on criminal sanctions and Community law* should be taken into account.

**** Adopted texts, item 1, 15.11.2001 (B5-0707/2001)***

Justification

Self-explanatory.

Amendment 11
Recital 1 k (new)

***(1k) The Opinion of the Agriculture,
Rural Development and Environment
Section of the Economic and Social
Committee, and particularly point 3(2) of
this Opinion (CES 463/2001 fin) should
be taken into account.***

Justification

Self-explanatory.

Amendment 12
Recital 1 l (new)

(1l) The use of criminal sanctions is indispensable for the purpose of enforcing environmental rules, and the EC Treaty provides scope for criminal sanctions.

Justification

Self-explanatory.

Amendment 13
Recital 1 m (new)

(1m) The Council should refrain from taking action on environmental criminal law before the draft directive on the protection of the environment through criminal law is adopted.

Justification

Self-explanatory.

Amendment 14
Recital 1 n (new)

(1n) As no explicit penalties, in terms of type and severity, are being indicated, but a framework is merely being established for criminal sanctions, the subsidiarity principle is complied with.

Justification

Self-explanatory.

Amendment 15
Recital 4

(4) ***Experience has shown*** that the existing systems of sanctions have not been sufficient to achieve complete compliance with Community law. ***Such compliance can and should be strengthened*** by the ***application*** of criminal sanctions, which demonstrate a social disapproval of a qualitatively different nature compared to administrative sanctions or a compensation mechanism under civil law.

(4) ***It has become apparent*** that the existing systems of sanctions have not been sufficient to achieve complete compliance with Community law. Compliance ***with it will be improved*** by the ***introduction*** of criminal sanctions, which demonstrate a social disapproval of a qualitatively different nature compared to administrative sanctions or a compensation mechanism under civil law.

Justification

It is important to indicate that compliance with Community law will actually be improved by introducing criminal sanctions, and that this is not just a possibility.

Amendment 16
Recital 4 a (new)

(4a) Community law enables the Community legislator to ensure compliance with obligations which he imposes by making it compulsory for Member States to provide for appropriate sanctions to be taken so as to ensure that those obligations are complied with. If the Community legislator considers that compliance with Community rules may only be guaranteed by the imposition of criminal sanctions, he has the legal capacity to oblige Member States to provide for such sanctions.

Justification

This amendment clarifies that, in the context of the distribution of powers between the Community and the Union, the proposal for a Directive under the first pillar is the appropriate legal instrument and that Article 175 (1) TEC is the correct legal basis for the

protection of the environment through criminal law in the Community. The protection of the environment is a fundamental objective of the Community (Articles 3 and 6 TEC), to be pursued by the Community policy according to Title XIX TEC. The Community has, within this competence, the power to regulate behaviour in order to achieve this Community objective and it has the competence to legislate that the regulated behaviour (or the non-compliance with the regulated behaviour) be sanctioned at national level. Where criminal law is the only means to guarantee that Community law is enforced effectively, Member States can be obliged to provide for criminal sanctions. Even where Community law does not provide expressly for criminal sanctions, Member States can be obliged to take appropriate steps to enforce Community law according to the Court's case law on Article 10 TEC. One also has to keep in mind that the Court of Justice has "full" jurisdiction in the first pillar (infringement procedures; control of legality at the initiative of other institutions; preliminary rulings on validity and interpretation), but only a very limited jurisdiction in the third pillar. The possibility for a citizen to invoke the responsibility of a Member State exists only with the directive: in case of infringement by a Member State, the latter may have the obligation to make reparation for the loss and damage caused to individuals. This possibility does not exist with a framework decision, as infringement procedures are not provided for third pillar instruments.

Amendment 17
Recital 5

(5) Common rules on criminal sanctions **would** make it possible to use methods of investigation and assistance within and between Member States, which are more effective than the tools available under administrative cooperation.

(5) Common rules on criminal sanctions make it possible to use methods of investigation and assistance within and between Member States, which are more effective than the tools available under administrative cooperation.

Justification

It is important to indicate that criminal sanctions actually make it possible to use methods of investigation and assistance more effectively within and between Member States.

Amendment 18
Article 2, paragraph (b)

(b) "activities" means active behaviour and failure to act, insofar as there is a legal

(b) "activities" means active behaviour and failure to act, **or incitement thereto**, insofar

duty to act.

as there is a legal duty to act.

Justification

Not only active behaviour and failure to act but also incitement thereto should be subject to criminal sanctions, so that the person ultimately responsible for an offence can also be punished.

Amendment 19
Article 3, introductory part

Member States shall ensure that the following activities are criminal offences, when committed intentionally or with serious negligence, as far as they breach the rules of Community law protecting the environment ***as set out in the Annex*** and/or rules adopted by Member States in order to comply with such Community law:

Member States shall ensure that the following activities are criminal offences, when committed intentionally or with serious negligence, as far as they breach the rules ***and prohibitions*** of Community law protecting the environment and/or rules adopted by Member States in order to comply with such Community law:

Justification

It would be better not to refer to specific rules in the annex which may be breached but to refer in general terms to breaches of rules and prohibitions of Community law protecting the environment. Otherwise, breaches relating to activities not explicitly mentioned in these provisions might be committed with impunity.

Amendment 20
Article 3, paragraph (a) a (new)

(aa) the discharge, emission or introduction of a quantity of harmful substances or ionising radiation into air, soil or water;

Justification

Harmful substances and ionising radiation are significant sources of pollution of air, water and soil. These forms of pollution should be classified as activities which constitute violations of Community law for the protection of the environment.

Amendment 21
Article 3, paragraph (b)

(b) the discharge, emission or introduction of a quantity of materials into air, soil or water and the treatment, disposal, storage, transport, export or import of hazardous waste;

(b) the discharge, emission or introduction of a quantity of materials into air, soil ***or subsoil or surface or underground*** water and the ***production***, treatment, disposal, storage, transport, export or import of hazardous waste;

Justification

The terms 'soil' and 'water' are inadequate and it must be specified that the directive also applies to subsoil and surface and underground water, and to those who produce dangerous waste.

Amendment 22
Article 3, paragraph (d)

(d) the possession, taking, damaging, killing or trading of or in protected wild fauna and flora species ***or*** parts thereof;

(d) the possession, taking, damaging, killing or trading of or in protected wild fauna and flora species, parts thereof ***or derived products***;

Justification

The proposed specifications are needed to eliminate doubt about the application of the directive and to prevent any activities from being considered lawful because they are not specifically mentioned.

Amendment 23
Article 3, paragraph (f)

(f) trade in ozone-depleting substances;

(f) trade in ***or use of*** ozone-depleting substances;

Justification

The proposed specifications are needed to eliminate doubt about the application of the directive and to prevent any activities from being considered lawful because they are not specifically mentioned.

Amendment 24
Article 4, introduction

4. Member States shall ensure that the offences referred to in Article 3, and the participation in or instigation of such offences are punishable by effective, proportionate and dissuasive sanctions.

4. Member States shall ensure that the offences referred to in Article 3, and the participation in or instigation of such offences are punishable by effective, proportionate and dissuasive ***criminal*** sanctions.

Justification

In this context, ‘criminal sanctions’ defines more clearly the scope of the measures which may be taken in response to an offence.

Amendment 25

Article 4, paragraph (a)

(a) As concerns natural persons, Member States shall provide for criminal penalties, involving in serious cases deprivation of liberty.

(a) As concerns natural persons, Member States shall provide for criminal penalties, involving in serious cases deprivation of liberty ***and confiscation of the relevant profits.***

Justification

This amendment adds the possibility to confiscate the relevant profits.

Amendment 26

Article 4, paragraph (a)

Does not affect English version.

Justification

Amendment 27

Annex

ANNEX

List of Community law provisions protecting the environment, referred to in Article 3

Deleted

Council Directive 70/220/EEC of 20 March 1970 on the approximation of the laws of the Member States relating to measures to be taken against air pollution by gases from positive-ignition engines of motor vehicles;

Council Directive 72/306/EEC of 2 August 1972 on the approximation of the laws of the Member States relating to the measures to be taken against the emission of pollutants from diesel engines for use

in vehicles;

Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils;

Council Directive 75/442/EEC of 15 July 1975 on waste;

Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community;

Council Directive 76/769/EEC of 27 July 1976 on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations;

Council Directive 77/537/EEC of 28 June 1977 on the approximation of the laws of the Member States relating to the measures to be taken against the emission of pollutants from diesel engines for use in wheeled agricultural or forestry tractors;

Council Directive 78/176/EEC 20 February 1978 on waste from the titanium dioxide industry;

Council Directive 79/117 of 21 December 1978 prohibiting the placing on the market and use of plant protection products containing certain active substances;

Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds;

Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances;

Regulation (EEC) No 348/81 of 20 January 1981 on common rules for

imports of whales or other cetacean products;

Council Directive 82/176/EEC of 22 March 1982 on limit values and quality objectives for mercury discharges by the chlor-alkali electrolysis industry;

Council Directive 83/129/EEC of 28 March 1983 concerning the importation into Member States of skins of certain seal pups and products derived therefrom;

Council Directive 83/513/EEC of 26 September 1983 on limit values and quality objectives for cadmium discharges;

Council Directive 84/156/EEC of 8 March 1984 on limit values and quality objectives for mercury discharges by sectors other than the chlor-alkali electrolysis sector;

Council Directive 84/360/EEC of 28 June 1984 on the combating of air pollution from industrial plants;

Council Directive 84/491/EEC of 9 October 1984 on limit values and quality objectives for discharges of hexachlorocyclohexane;

Council Directive 86/278/EEC of 12 June 1986 on the protection of the environment, and in particular of the soil, when sewage sludge is used in agriculture;

Council Directive 86/280/EEC of 12 June 1986 on limit values and quality objectives for discharges of certain dangerous substances included in List I of the Annex to Directive 76/464/EEC;

Council Directive 88/77/EEC of 3 December 1987 on the approximation of the laws of the Member States relating to the measures to be taken against the emission of gaseous pollutants from diesel

engines for use in vehicles;

Council Directive 88/609/EEC of 24 November 1988 on the limitation of emissions of certain pollutants into the air from large combustion plants;

Council Directive 89/369/EEC of 8 June 1989 on the prevention of air pollution from new municipal waste incineration plants;

Council Directive 89/429/EEC of 21 June 1989 on the reduction of air pollution from existing municipal waste incineration plants;

Council Directive 90/219/EEC of 23 April 1990 on the contained use of genetically modified micro-organisms;

Council Directive 90/220/EEC of 23 April 1990 on the deliberate release into the environment of genetically modified organisms;

Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment;

Council Directive 91/689/EEC of 12 December 1991 on hazardous waste;

Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora;

Council Directive 92/112/EEC of 15 December 1992 on procedures for harmonising the programmes for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry;

Council Regulation (EEC) 259/93 of 1 February 1993 on the supervision and control of shipments of waste within ; into and out of the European Community;

Council Directive 93/76/EEC of 13 September 1993 to limit carbon dioxide emissions by improving energy efficiency(SAVE);

Directive 94/12/EC of the European Parliament and the Council of 23 March 1994 relating to measures to be taken against air pollution by emissions from motor vehicles and amending Directive 70/220/EEC;

Council Directive 94/63/EC of 20 December 1993 on the control of volatile organic compound(VOC) emissions resulting from the storage of petrol and its distribution from terminals to service stations;

Council Directive 94/67/EC of 16 December 1994 on the incineration of hazardous waste;

Council Directive 95/21/EC of 19 June 1995 concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions (port state control);

Council Directive 96/59/EC of 16 September 1996 on the disposal of polychlorinated biphenyls and polychlorinated terphenyls;

Council Directive 96/61/EC 24 September 1996 concerning integrated pollution prevention and control;

Council Directive 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances;

Directive 97/68/EC of the European Parliament and of the Council of 16

December 1997 on the approximation of the laws of the Member States relating to measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road mobile machinery;

Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein;

Directive 98/69/EC of the European Parliament and of the Council of 13 October 1998 relating to measures to be taken against air pollution by emissions from motor vehicles and amending Council Directive 70/220/EEC;

Directive 98/70/EC of the European Parliament and of the Council of 13 October 1998 relating to the quality of petrol and diesel fuels and amending Council Directive 93/12;

Council Directive 99/13/EC of 11 March 1999 on the limitation of emissions of volatile organic compounds due to the use of organic solvents in certain activities and installations;

Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste;

Council Directive 1999/32/EC of 26 April 1999 relating to a reduction in the sulphur content of certain liquid fuels and amending Directive 93/12/EEC;

Directive 1999/96/EC of the European Parliament and of the Council of 13 December 1998 on the approximation of the laws of the Member States relating to measures to be taken against the emission of gaseous and particulate pollutants from compression ignition engines for use in vehicles, and the emission of gaseous pollutants from positive ignition engines fuelled with natural gas or liquefied

petroleum gas for use in vehicles and amending Council Directive 88/77;

Directive 2000/53/EC of the European Parliament and of the Council of 18 September 2000 on end of life vehicles;

Directive 2000/59/EC of the European Parliament and of the Council of 27 November 2000 on port reception facilities for ship-generated waste and cargo residues;

Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy;

Regulation (EC) No 2037/2000 of the European Parliament and of the Council of 29 June 2000 on substances that deplete the ozone layer;

Justification

It would be better not to include an annex listing regulations in connection with which breaches of Community law protecting the environment may occur. Otherwise, breaches relating to activities not explicitly mentioned in these provisions might be committed with impunity.

DRAFT LEGISLATIVE RESOLUTION

European Parliament legislative resolution on the proposal for a European Parliament and Council directive on the protection of the environment through criminal law (COM(2001) 139 – C5-0116/2001 – 2001/0076(COD))

(Codecision procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to the European Parliament and the Council (COM(2001) 139¹),
 - having regard to Articles 251(2) and 175(2) of the EC Treaty, pursuant to which the Commission submitted the proposal to Parliament (C5-0116/2001),
 - having regard to Rule 67 of its Rules of Procedure,
 - having regard to the report of the Committee on the Environment, Public Health and Consumer Policy and the opinion of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (A5-0099/2002),
1. Approves the Commission proposal as amended;
 2. Asks to be consulted again should the Commission intend to amend the proposal substantially or replace it with another text;
 3. Instructs its President to forward its position to the Council and Commission.

¹ OJ C 180, 26.6.2001, p. 238.

EXPLANATORY STATEMENT

The conclusions of the Tampere European Council of 15 and 16 October 1999 stated that there were a number of sectors of particular relevance where efforts should be made to agree on common definitions with regard to ‘incriminations and sanctions’ for breaches of Community law. One of these was, quite rightly, stated to be environmental crime.

Experience has shown that the existing systems of penalties for environmental offences are not adequate to ensure full compliance with Community law. There are major disparities in the enforcement of legislation. Non-compliance or inadequate compliance with environmental rules has an adverse impact on the environment and also seriously distorts competition on the internal market. Pollution often has a transboundary impact. The proposal to introduce a system of minimum criminal sanctions will therefore underpin existing environmental directives and regulations more effectively.

In addition to this proposal, the Council is currently debating a Danish initiative for a framework agreement to tackle environmental crime.

Your rapporteur considers that the Commission’s proposal is far preferable to the Danish initiative. In a new set of recitals, she states why she has reached the conclusion that the criminal law does not come solely within the purview of the European Union. Moreover, the proposal is for minimum rules, so that Member States will be free to adopt more far-reaching criminal sanctions on their own initiative.

Your rapporteur also wonders whether the scope of the proposal which is being debated by the Council connects up sufficiently with EU legislation. Essentially, Denmark’s proposal seeks to impose penalties for hazards and risks only if they have an impact on human beings. Pursuant to Article 174, the environmental objectives of the European Community are far broader, and therefore deserve corresponding means of enforcement by means of the criminal law.

As regards the substance of the draft proposal, your rapporteur considers that, rather than listing all the legislation in an annex, it would be more appropriate to mention the sectors where criminal sanctions apply in the body of the legislation itself. Moreover, in view of the sensitivity felt in the Member States with regard to damage to habitats, a reference to the element of deliberate action should be inserted in addition to that of significant deterioration of a habitat.

20 March 2002

OPINION OF THE COMMITTEE ON LEGAL AFFAIRS AND THE INTERNAL MARKET

for the Committee on the Environment, Public Health and Consumer Policy

on the proposal for a European Parliament and Council directive on the Protection of the Environment through Criminal Law
(COM(2001) 139 – C5-0116/2001 – 2001/0076(COD))

Draftsman: Matti Wuori

PROCEDURE

The Committee on Legal Affairs and the Internal Market appointed Matti Wuori draftsman at its meeting of 29 May 2001.

It considered the draft opinion at its meetings of 10 October 2001, 25 February 2002 and 19 March 2002.

At the last meeting it adopted the following amendments by 13 votes to 1, with 7 abstentions.

The following were present for the vote: Willi Rothley acting chairman; Matti Wuori draftsman; Paolo Bartolozzi, Maria Berger, Ward Beysen, Bert Doorn, Marie-Françoise Garaud, Evelyne Gebhardt, José María Gil-Robles Gil-Delgado, Malcolm Harbour, Hans Karlsson, Kurt Lechner, Klaus-Heiner Lehne, Neil MacCormick, Manuel Medina Ortega, Angelika Niebler, Béatrice Patrie, Marianne L.P. Thyssen, Gianni Vattimo (for Arlene McCarthy pursuant to Rule 153(2)), Diana Wallis and Stefano Zappalà.

SHORT JUSTIFICATION

1. Background

1. More than 100 directives in the field of environment are today in force. However, there are still many cases of severe non-observance of Community environmental law. These trends of non-observance show that the sanctions currently established by the Member States are not sufficient to achieve full compliance with Community law. That is the reason why the Commission proposes a directive which requires the Member States to provide for criminal sanctions. Only this type of measures seems adequate and dissuasive enough to achieve proper implementation of environmental law.
2. The proposed Directive applies only to important types of pollution which can be attributed to individuals or legal persons and which are in breach of Community law protecting the environment and/or rules adopted by Member States in order to comply with such Community law. The draft Directive does not create a list of new illegal acts. The existing Community law already provides for prohibitions. The Annex to the proposed Directive sets out exhaustively the relevant Community provisions, which prohibit the activities described in Article 3 of the draft Directive. The Member States, by transposing this Directive, will only have to attach to these existing prohibitions some criminal sanctions. The activities described in Article 3 of the draft Directive and considered to represent a serious risk, shall be punished independently of an eventual damage that is caused, if committed by intention or serious negligence.

2. Legal basis

3. There is growing an institutional conflict on the protection of the environment through criminal law. The Council is on the way to adopting a Framework Decision on this subject under the third pillar (single consultation of the EP, Art. 39 TEU), while the Commission has presented a draft Directive under the first pillar on the same subject (co-decision procedure). There are therefore two draft texts dealing with the same subject but having a different legal basis. The choice between the two proposals is not neutral : the draft Framework Decision is narrower in scope than the draft Directive. In its recommendation on criminal sanctions and Community law of 15 November 2001 the European Parliament recommended that Council refrain from taking any action on environmental criminal law before the draft Directive on the protection of the environment through criminal law is adopted. It also recommended that the Commission take appropriate action should Council envisage adopting the draft Framework Decision prior to the adoption of the abovementioned draft Directive.
4. *It emerges from Article 47 TEU that Community law prevails over the law of the Union. If an area falls within the sphere of Community competence, it is legally not possible for the Union to adopt common rules by means of an instrument under the third pillar, which would encroach upon Community powers. The Council acting under the third pillar has only supplementary competence. An instrument under Title VI TEU cannot, therefore, be adopted as far as the relevant *acquis* can be established by Community law. If the Community legislator considers that the only way of ensuring compliance with Community rules is to impose criminal penalties, it has the legal capacity to require the Member States to impose such penalties. If the Council were to adopt the Framework Decision as currently drafted, it would contravene Article 47 TEU.*

5. *In this context of the distribution of powers between the Community and the Union, your draftsman considers the proposal for a Directive under the first pillar, on the basis of Article 175 (1) TEC, to form the correct legal instrument and legal basis for the protection of the environment through criminal law in the Community. Article 34 TEU juncto Article 31 (e) TEU cannot serve as an appropriate legal basis for the establishment of a horizontal *acquis* on environmental law because the last mentioned Article covers only the fields of organised crime, terrorism and illicit drug trafficking, thus requiring a link to one of those areas. Given the existence of Community competence, the draft Framework Decision should be divided into two instruments in order to comply with the distribution of powers arising from the TEC and the TEU. The present proposal for a Directive could be complemented by a draft framework decision according to Article 34(2) b TEU dealing with criminal jurisdiction, measures guaranteeing mutual extradition and/or coordination of prosecutions and investigations. As concerns the constituent elements of criminal acts, such a draft framework decision should refer to the draft Community Directive.*

AMENDMENTS

The Committee on Legal Affairs and the Internal Market calls on the Committee on the Environment, Public Health and Consumer Policy, as the committee responsible, to incorporate the following amendments in its report:

Text proposed by the Commission¹

Amendments by Parliament

Amendment 1
Recital 4 a (new)

(4a) Community law enables the Community legislator to ensure compliance with obligations which he imposes by making it compulsory for Member States to provide for appropriate sanctions to be taken so as to ensure that those obligations are complied with. If the Community legislator considers that compliance with Community rules may only be guaranteed by the imposition of criminal sanctions, he has the legal capacity to oblige Member States to provide for such sanctions;

¹ OJ C 180, 26.06.2001, p. 238.

Justification

This amendment clarifies that, in the context of the distribution of powers between the Community and the Union, the proposal for a Directive under the first pillar is the appropriate legal instrument and that Article 175 (1) TEC is the correct legal basis for the protection of the environment through criminal law in the Community. The protection of the environment is a fundamental objective of the Community (Articles 3 and 6 TEC), to be pursued by the Community policy according to Title XIX TEC. The Community has, within this competence, the power to regulate behaviour in order to achieve this Community objective and it has the competence to legislate that the regulated behaviour (or the non-compliance with the regulated behaviour) be sanctioned at national level. Where criminal law is the only means to guarantee that Community law is enforced effectively, Member States can be obliged to provide for criminal sanctions. Even where Community law does not provide expressly for criminal sanctions, Member States can be obliged to take appropriate steps to enforce Community law according to the Court's case law on Article 10 TEC. One also has to keep in mind that the Court of Justice has "full" jurisdiction in the first pillar (infringement procedures; control of legality at the initiative of other institutions; preliminary rulings on validity and interpretation), but only a very limited jurisdiction in the third pillar. The possibility for a citizen to invoke the responsibility by a Member State exists only with the directive : in case of infringement by a Member State, the latter may have the obligation to make reparation for the loss and damage caused to individuals. This possibility does not exist with a framework decision, as infringement procedures are not provided for third pillar instruments.

Amendment 2 Recital 4b (new)

(4b) If an area falls within the sphere of Community competence, it is not legally possible for the Union to adopt common rules by means of an instrument under Title VI of the TEU, while complementary measures with regard to improved judicial co-operation could be taken under the TEU. Therefore the Council should refrain from taking any action on environmental criminal law before the above-mentioned draft Directive on the protection of the environment through criminal law is adopted.

Justification

This amendment replaces amendment 2 of the draft opinion which is withdrawn. It refers to the parallel Council third pillar initiative.

It emerges from Article 47 TEU that Community law prevails over the law of the Union. If an area falls within the sphere of Community competence, it is legally not possible for the Union to adopt common rules by means of an instrument under the third pillar, which would encroach upon Community powers. The Council acting under the third pillar has only supplementary competence. An instrument under Title VI TEU cannot, therefore, be adopted as far as the relevant acquis can be established by Community law.

Therefore the draft Framework Decision on the protection of the environment through criminal law should be divided into two instruments : the present draft Directive and a possible draft framework decision containing complementary measures under the TEU.

This amendment also recalls the recommendation of the European Parliament of 15 November 2001 on criminal sanctions and Community law.

20 March 2002

OPINION OF THE COMMITTEE ON CITIZENS' FREEDOMS AND RIGHTS, JUSTICE AND HOME AFFAIRS

for the Committee on the Environment, Public Health and Consumer Policy

on the proposal for a directive of the European Parliament and of the Council on the protection of the environment through criminal law
(COM(2001) 139 – C5-0116/2001 – 2001/0076(COD))

Draftsman: Giuseppe Di Lello Finuoli

PROCEDURE

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs appointed Giuseppe Di Lello Finuoli draftsman at its meeting of 25 April 2001.

It considered the draft opinion at its meetings of 22 January 2002, 20 February 2002 and 19 March 2002.

At the latter meeting it adopted the following amendments unanimously.

The following were present for the vote: Ana Palacio Vallelersundi chairman; Robert J.E. Evans, Lousewies van der Laan and Giacomo Santini vice-chairman; Giuseppe Di Lello Finuoli, draftsman; Maria Berger (for Ozan Ceyhun), Hans Blokland (for Ole Krarup, pursuant to Rule 153(2)), Mario Borghezio, Mogens N.J. Camre (for Niall Andrews), Michael Cashman, Charlotte Cederschiöld, Gérard M.J. Deprez, Evelyne Gebhardt (for Adeline Hazan), Jorge Salvador Hernández Mollar, Pierre Jonckheer, Anna Karamanou (for Carmen Cerdeira Morterero), Margot Keßler, Timothy Kirkhope, Eva Klamt, Jean Lambert (for Alima Boumediene-Thiery), Baroness Sarah Ludford, Lucio Manisco (for Fodé Sylla), Luís Marinho (for Gerhard Schmid), Hartmut Nassauer, William Francis Newton Dunn, Elena Ornella Paciotti, Paolo Pastorelli (for Thierry Cornillet), Hubert Pirker, Martine Roure, Heide Rühle, Ilka Schröder, Olle Schmidt (for Francesco Rutelli), Patsy Sørensen, The Earl of Stockton (for Carlos Coelho), Joke Swiebel, Anna Terrón i Cusí, Gianni Vattimo (for Sérgio Sousa Pinto), Christian Ulrik von Boetticher, Christos Zacharakis (for Mary Elizabeth Banotti) and Olga Zrihen Zaari (for Valter Veltroni).

SHORT JUSTIFICATION

The Council of Europe Convention on the protection of the environment through criminal law (Strasbourg, 4 November 1998) has not been ratified by any of the EU Member States.

To break the inertia, in February 1999 Denmark submitted a proposal for joint action (recast as a draft framework decision following the entry into force of the Amsterdam Treaty) which, although in a rather cursory form, took over some of the proposals made in the aforementioned Convention.

In July of that year, Parliament adopted a report containing major changes to the initial version of the draft framework decision.

In December 2001, the Council drew up a new draft framework decision. The Parliament is now being consulted on this new text.

The Commission expressed a general reservation about the framework decision, to the effect that environmental protection was covered by a large number of Community acts, most of which made provision for penalties, and that the issue should therefore be dealt with by means of a Community instrument (first pillar) based on Article 175(1) of the ECT, not least with a view to establishing an *acquis communautaire* in this area prior to the forthcoming enlargement.

It also noted that, given the environmental degradation in the Union, such penalties were clearly inadequate and that it would thus submit to the Council a proposal for a directive seeking to oblige the Member States to adopt criminal penalties aimed at ensuring that the Community provisions already adopted in this area were more strictly enforced. The Commission maintained that, in so doing, one would not be bringing criminal law within the Community sphere.

The proposal for a directive (COM(2001) 139) which was submitted in March 2001 contained an annex listing 52 existing Community directives dealing with environmental protection and, in the final section of the explanatory memorandum, spoke of 'possible complementary measures under the TEU'.

The Commission noted that 'further steps might have to be taken under the EU Treaty, with regard to improved judicial cooperation' and, as regards the constituent elements of criminal acts, suggested that a framework decision referring to the Community directive itself might be adopted and might focus in particular 'on the area of organised crime and/or terrorism'.

Legal arguments favourable to the Commission proposal were raised during debates in Council and it was noted that Community law allowed the Community legislator to oblige the Member States to lay down appropriate penalties to ensure compliance with the obligations entered into. If the legislator considered that such compliance could only be ensured by means of criminal penalties, it had the 'legal capacity' to oblige the Member States to provide for such penalties.

The Council did not and obviously still does not agree with this view, since it still maintains that a third-pillar instrument (the framework decision) should be adopted.

It should be noted that, whilst the Community has on a few occasions provided for a choice between criminal or administrative penalties (see Regulation (EEC) No 3483/88 of 7 November 1988 establishing certain control measures for fishing activities), it has yet to adopt any acts providing for criminal penalties alone (to be introduced into national law) being used to enforce Community provisions.

Article 34 TEU, which comes under police and judicial cooperation (including action to protect the environment involving the approximation of criminal provisions), provides the legal basis for the framework decision (third pillar), while Articles 174 and 175 ECT (which gives the Community responsibility for environmental matters) are the legal basis for the directive (first pillar).

During debates in Council, legal arguments were raised that, when acting under the third pillar, the Council has merely ancillary powers, and when the Commission considers that action should be taken under the first pillar, no third-pillar measures may take precedence over that action. Any such measures (in this instance, the framework decision of December 2000) could be challenged before the Court of Justice with a view to having them declared invalid.

Parliament appears to agree wholeheartedly with the Commission's viewpoint. At the sitting of 15 November 2001, it adopted under the procedure without debate a recommendation on criminal sanctions and Community law (B5-0707/2001) and, in paragraph 6 thereof, called on the Council to 'refrain from taking any action on environmental criminal law before the [...] draft Directive on the protection of the environment through criminal law is adopted'.

Furthermore, with a view to ensuring that the legislation is consistent rather than a jumble of first- and third-pillar instruments, it would be a good idea for the whole matter - including the judicial cooperation aspects - to be brought under the first pillar as provided for in Article 42 TEU.

AMENDMENTS

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs calls on the Committee on the Environment, Public Health and Consumer Policy, as the committee responsible, to incorporate the following amendments in its report:

Commission text¹

Amendments by Parliament

Amendment 1
Article 2, (a)

(a) 'legal person' means any legal entity having such status under the applicable national law, except for States or other

(a) 'legal person' means any legal entity having such status under the applicable national law, except for States or other

¹ OJ C 180, 26.06.2001, p. 238.

public bodies acting in the exercise of their sovereign rights and for public international organisations;

public bodies acting in the exercise of their sovereign rights and for public international organisations, ***excluding predominantly economic activities***;

Justification

The specification is needed to eliminate any doubt about the application of the directive in cases in which States and public bodies act for predominantly economic purposes.

Amendment 2
Article 3, (b)

(b) the discharge, emission or introduction of a quantity of materials into air, soil or water and the treatment, disposal, storage, transport, export or import of hazardous waste;

(b) the discharge, emission or introduction of a quantity of materials into air, soil ***or subsoil or surface or underground*** water and the ***production***, treatment, disposal, storage, transport, export or import of hazardous waste;

Justification

The terms 'soil' and 'water' are inadequate and it must be specified that the directive also applies to subsoil and surface and underground water, and to those who produce dangerous waste.

Amendment 3
Article 3, (d)

(d) the possession, taking, damaging, killing or trading of or in protected wild fauna and flora species ***or*** parts thereof;

(d) the possession, taking, damaging, killing or trading of or in protected wild fauna and flora species, parts thereof ***or derived products***;

Justification

The proposed specifications are needed to eliminate doubt about the application of the directive and to prevent any activities from being considered lawful because they are not specifically mentioned.

Amendment 4
Article 3, (f)

(f) trade in ozone-depleting substances; (f) trade in ***or use of*** ozone-depleting substances;

Justification

The proposed specifications are needed to eliminate doubt about the application of the directive and to prevent any activities from being considered lawful because they are not specifically mentioned.

Amendment 5
Article 4, (a)

(a) As concerns natural persons, Member States shall provide for criminal penalties, involving in serious cases deprivation of liberty. (a) As concerns natural persons, Member States shall provide for criminal penalties, involving in serious cases deprivation of liberty ***and the confiscation of the relevant profits.***

Justification

The rules can become more operationally more effective only if provision is made for confiscating profits and assets, compensating for damage and making it compulsory to restore premises to their original state.

Amendment 6
Article 4, (b)

(b) As concerns natural and legal persons, where appropriate, Member States shall provide for fines, exclusion from entitlement to public benefits or aid, temporary or permanent disqualification from the practice of commercial activities, placing under judicial supervision or judicial winding up orders. (b) As concerns natural and legal persons, where appropriate, Member States shall provide for fines ***proportionate to the damage caused, attachment and confiscation of movable or immovable property which has been used to commit the offences or capital goods of an equivalent value, compensation for damage to natural and legal persons,***

restoration (where possible) of the sites,
exclusion from entitlement to public
benefits or aid, temporary or permanent
disqualification from the practice of
commercial activities, placing under
judicial supervision or judicial winding up
orders.

Justification

*The rules can become more operationally more effective only if provision is made for
confiscating profits and assets, compensating for damage and making it compulsory to
restore premises to their original state.*