

EUROPEAN PARLIAMENT

2004



2009

Committee on Civil Liberties, Justice and Home Affairs

2007/0022(COD)

27.3.2008

OPINION

of the Committee on Civil Liberties, Justice and Home Affairs

for the Committee on Legal Affairs

on the proposal for a directive of the European Parliament and of the Council
on the protection of the environment through criminal law
(COM(2007)0051 – C6-0063/2007 – 2007/0022(COD))

Draftsman: Luis Herrero-Tejedor

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SHORT JUSTIFICATION

The draftsman of the committee on Civil Liberties, Justice and Home Affairs would like to suggest the following remarks to the rapporteur in the Legal Affairs committee with regard to the proposal of the European Parliament and of the Council on the protection of the environment through criminal law.¹

The draftsman is of the opinion that, to a big extent, legislation protecting the environment should be enforced through criminal sanctions since only the latter will have a sufficiently dissuasive and deterrent effect.

The current Commission proposal replaces the Proposal for a Directive on the Protection of the Environment through Criminal Law (2001/0076(COD)) in order to implement the judgment of the European Court of Justice (ECJ) in the so called 'environment case'² by which Framework Decision 2003/80/JHA was annulled. In this case the ECJ decided that the Community could take measures relating to the criminal law of the Member States which it considers necessary in order to ensure that the rules concerning environmental protection are fully effective. It was therefore necessary to withdraw the 2001 proposal and to present a new proposal. The new text takes into consideration Articles 1-7 of the annulled Framework Decision as they should have been adopted on the basis of Article 175 EC-Treaty rather than on the basis of Title VI TEU.

Its aim is to ensure a partial approximation with regard to which serious breach environmental legislation should be considered as criminal offences throughout the EU. These offences should be punishable by effective, proportionate and dissuasive criminal sanctions and in the most serious cases the level of sanctions is subject to approximation too.

Recently, on the 23rd of October 2007, the European Court of Justice gave judgment in the so called 'ship-source pollution case'.³ In this case the ECJ confirmed its judgment of 13 September 2005 (the environment case). On the question whether the Community was competent to determine the type and level of criminal penalties that the Member States were required to lay down, however, the ECJ clearly stated that this was not a Community competence⁴. Much to the regret of the draftsman the ECJ left this last issue without any motivation and it remains unclear how it came to this decision. Especially when keeping in mind the logic behind the proposal (trans-boundary nature of environmental crime) this point is disappointing. It means that offenders still are in a position to exploit existing differences between Member States legislation to their advantage (as the level of sanctions that are applied to similar offences in the different Member States are very different) as apparently within the current state of play no approximation on the level of penalties at Community level is allowed. The draftsman therefore thinks that, in order to effectively protect the environment, approximation of the level of the sanctions is of the utmost importance and regrets that the ECJ did not grant this faculty to the Community.

¹ COM(2007)0051 of 9 February 2007.

² C-176/03, of 13 September 2005.

³ C-440/05 (Commission v. Council).

⁴ Paragraph 70 of the judgment.

It remains to be seen what the Lisbon-Treaty (which presumably enters into force in 2009) may bring us on this point as then there is foreseen the possibility to establish minimum rules with regard to the definition of criminal offences and sanctions by means of the co-decision procedure¹.

Given the trans-boundary nature of environmental crime, an established set of minimum standards concerning environmental crime and sanctions would be a useful instrument in maintaining a comprehensive and effective environmental protection strategy.

The draftsman would therefore advise to the rapporteur of the Legal Affairs committee to take into consideration the following amendments:

AMENDMENTS

The Committee on Civil Liberties, Justice and Home Affairs calls on the Committee on Legal Affairs, as the committee responsible, to incorporate the following amendments in its report:

Text proposed by the Commission	Amendments by Parliament
	Amendment 1 Recital 11
<i>11. Furthermore, the significant differences in the level of sanctions in the Member States make it necessary to foresee, under certain circumstances, an approximation of those levels corresponding to the seriousness of the offence.</i>	<i>deleted</i>
	<i>Justification</i>
	<i>In view of the judgment issued by the European Court of Justice on 27 October 2007, this recital - which alludes to a harmonisation of sanction levels - should preferably be deleted.</i>
	Amendment 2 Recital 12
<i>12. Such an approximation is particularly</i>	<i>12. The commission of such</i> offences in the

¹ Article 69 (f) paragraph 2, although the UK, Ireland and Denmark will (along with other Member States) be able to pull the 'emergency brake' to block the adoption of criminal law measures concerning.

important where the offences have serious results or the offences are committed in the framework of criminal organisations which play a significant role in environmental crime.

framework of criminal organisations ***should be regarded as an aggravating circumstance.***

Justification

This amendment is consistent with the amendment calling for recital 11 to be deleted. However, a request should nonetheless be made for the commission of environmental offences in the framework of criminal organisations to be regarded as an aggravating circumstance. This in no way affects the Member States' power to determine the type and the level of sanctions.

Amendment 3
Article 3, point (a)

(a) the discharge, emission or introduction of a quantity of materials or ionising radiation into air, soil or water, which causes death or serious injury to any person; ***deleted***

Justification

In order to be sanctioned as a criminal offence, a determined behaviour shall be necessarily unlawful (i.e., which infringes Community legislation or a law). Hence, the possibility of sanctioning criminally a behaviour which is not unlawful shall be ruled out.

Amendment 4
Article 3, point (h a) (new)

(ha) the introduction into the environment of genetically modified organisms (GMOs) that are not approved by the European Union;

Justification

The risks of GMOs to men and environment are hardly known. Therefore no GMOs should be introduced into the environment at all. But if they are still introduced into the environment, that should not occur until they have been approved by the European Union. If any GMOs are introduced intentionally without having been approved, that should be viewed as a criminal offence.

Amendment 5
Article 4

Member States shall ensure that participation in or instigation of the conduct referred to in Article 3 constitutes a criminal offence.

Member States shall ensure that participation in or instigation of the **intentional** conduct referred to in Article 3 constitutes a criminal offence.

Justification

From a legal point of view, participation or instigation of a negligent behaviour can hardly be considered as a criminal offence. Only intentional participation and instigation could be considered as such.

Amendment 6
Article 5, paragraph 1

1. Member States shall ensure that the commission of the offences referred to in Articles 3 and 4 is punishable by effective, proportionate and dissuasive **criminal** sanctions.

1. Member States shall ensure that the commission of the offences referred to in Article 3 and 4 is **systematically** punishable by effective, proportionate and dissuasive sanctions **of a criminal nature**.

Justification

This wording makes it clearer that the offences referred to in Articles 3 and 4 must in all cases be punishable by criminal sanctions, although the possibility whereby the Member States may impose additional sanctions of a different kind on top of criminal sanctions must not be excluded (see my amendment to Article 5(5)).

Amendment 7
Article 5, paragraph 2

2. Member States shall ensure that the commission of the offences referred to in Article 3 (b) to (h) is punishable by a maximum of at least between one and three years imprisonment where the offence is committed with serious negligence and causes substantial damage to air, soil, water, animals or plants.

deleted

Justification

In its judgment of 23 of October 2007 (C-440/05, Commission v. Council), the ECJ clearly stipulated that "...the determination of the type and level of the criminal penalties to be

applied does not fall within the Community's sphere of competence". In order to render the Commission proposal consistent with the judgment, these paragraphs should be deleted.

Amendment 8
Article 5, paragraph 3

3. Member States shall ensure that the commission of the following offences is punishable by a maximum of at least between two and five years imprisonment: *deleted*

(a) the offence referred to in Article 3(a), where the offence is committed with serious negligence;

(b) the offences referred to in Article 3 (b) to (f), where the offence is committed with serious negligence and causes the death of or serious injury to a person;

(c) the offences referred to in Article 3 (b) to (h) where the offence is committed intentionally and causes substantial damage to air, soil, water, animals or plants;

(d) the offences referred to in Article 3, where the offence is committed in the framework of a criminal organisation within the meaning of Framework Decision [... on the fight against organised crime].

Justification

In its judgment of 23 of October 2007 (C-440/05, Commission v. Council), the ECJ clearly stipulated that "...the determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence". In order to render the Commission proposal consistent with the judgment, these paragraphs should be deleted.

Amendment 9
Article 5, paragraph 4

4. Member States shall ensure that the commission of the following offences is punishable by a maximum of at least between five and ten years imprisonment: *deleted*

(a) the offence referred to in Article 3 (a),

where the offence is committed intentionally;

(b) the offences referred to in Article 3 (b) to (f) where the offence is committed intentionally and causes the death of or serious injury to a person.

Justification

In its judgment of 23 of October 2007 (C-440/05, Commission v. Council), the ECJ clearly stipulated that "...the determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence". In order to render the Commission proposal consistent with the judgment, these paragraphs should be deleted.

Amendment 10 Article 5, paragraph 5

5. *The* criminal sanctions ***provided for in this article*** may be accompanied by ***other*** sanctions or measures, ***in particular***:

(a) the disqualification of a natural person from engaging in an activity requiring official authorization or approval, or founding, managing or directing a company or a foundation, where the facts having led to his conviction show a high risk that the same kind of criminal activity may be pursued again;

(b) the publication of the judicial decision relating to the conviction or any sanctions or measures applied;

(c) the obligation to reinstate the environment.

5. *Those* criminal sanctions may be accompanied by ***additional administrative or civil*** sanctions or measures, ***such as***:

(a) the disqualification of a natural person from engaging in an activity requiring official authorization or approval, or founding, managing or directing a company or a foundation, where the facts having led to his conviction show a high risk that the same kind of criminal activity may be pursued again;

(b) the publication of the judicial decision relating to the conviction or any sanctions or measures applied;

(c) the obligation to reinstate the environment.

Amendment 11 Article 5, paragraph 5 a (new)

5a. The Member States shall ensure that the commission of the offences referred to in Articles 3 and 4 in the framework of a criminal organisation as defined in Council Framework Decision [... on the fight against organised crime

(COM(2005)0006)] is deemed to be an aggravating circumstance.

Justification

A request should be made for the commission of environmental offences in the framework of criminal organisations to be regarded as an aggravating circumstance. This in no way affects the Member States' power to determine the type and the level of punishment.

Amendment 12
Article 7, paragraph 2

2. The fines provided for in paragraph 1 shall be: ***deleted***

(a) of a maximum of at least between EUR 300 000 and EUR 500 000 in cases where an offence referred to in Article 3 (b) to (h) is committed with serious negligence and causes substantial damage to air, soil, water, animals or plants.

(b) of a maximum of at least between EUR 500 000 and EUR 750 000 in cases where:

i) the offence referred to in Article 3 (a) is committed with serious negligence, or

(ii) an offence referred to in Article 3 (b) to (h):

- is committed with serious negligence and causes the death or serious injury of a person, or

- is committed intentionally and causes substantial damage to air, soil or water or to animal or plants, or

(iii) an offence referred to in Article 3 is committed intentionally in the framework of a criminal organisation within the meaning of Framework Decision [... on the fight against organised crime];

(c) of a maximum of at least between EUR 750 000 and EUR 1 500 000 in cases

where:

- (i) an offence referred to in Article 3 (a) is committed intentionally, or**
- (ii) an offence referred to in Article 3 (b) to (f) is committed intentionally and causes the death or serious injury of a person.**

Member States may apply a system whereby the fine is proportionate to the turnover of the legal person, to the financial advantage achieved or envisaged by the commission of the offence, or to any other value indicating the financial situation of the legal person, provided that such system allows for maximum fines, which are at least equivalent to the minimum for the maximum fines. Member States that implement the Directive in accordance with such a system shall notify the Commission that they intend to do so.

Justification

In its judgment of 23 of October 2007 (C-440/05, Commission v. Council), the ECJ clearly stipulated that "...the determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence". In order to render the Commission proposal consistent with the judgment, these paragraphs should be deleted.

Amendment 13
Article 7, paragraph 3

3. Member States in which the Euro has ~~not been adopted~~ shall apply the exchange rate between the Euro and their currency as published in the Official Journal of the European Union on [...].

Justification

In its judgment of 23 of October 2007 (C-440/05, Commission v. Council), the ECJ clearly stipulated that "...the determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence". In order to render the Commission proposal consistent with the judgment, these paragraphs should be deleted.

PROCEDURE

Title	Protection of the environment through criminal law
References	COM(2007)0051 – C6-0063/2007 – 2007/0022(COD)
Committee responsible	JURI
Opinion by Date announced in plenary	LIBE 15.3.2007
Drafts(wo)man Date appointed	Luis Herrero-Tejedor 20.3.2007
Discussed in committee	18.12.2007 26.3.2008
Date adopted	26.3.2008
Result of final vote	+: 38 -: 1 0: 0
Members present for the final vote	Alexander Alvaro, Philip Bradbourn, Giusto Catania, Carlos Coelho, Elly de Groen-Kouwenhoven, Esther De Lange, Panayiotis Demetriou, Gérard Deprez, Agustín Díaz de Mera García Consuegra, Bárbara Dührkop Dührkop, Armando França, Urszula Gacek, Patrick Gaubert, Lilli Gruber, Jeanine Hennis-Plasschaert, Lívia Járóka, Ewa Klamt, Wolfgang Kreissl-Dörfler, Stavros Lambrinidis, Henrik Lax, Roselyne Lefrançois, Sarah Ludford, Rareş-Lucian Niculescu, Martine Roure, Inger Segelström, Vladimir Urutchev, Ioannis Varvitsiotis, Manfred Weber
Substitute(s) present for the final vote	Edit Bauer, Anne Ferreira, Ignasi Guardans Cambó, Luis Herrero-Tejedor, Sophia in 't Veld, Sylvia-Yvonne Kaufmann, Metin Kazak, Jean Lambert, Jörg Leichtfried, Siiri Oviir, Nicolae Vlad Popa