



*EU Environmental Policy Briefing\**

**Commission Proposes New Directive on Protection of the Environment through Criminal Law**

23 February 2007

On 9 February 2007, the Commission presented to Parliament and Council a proposal for a Directive on the protection of the environment through criminal law (COM (2007) 51)<sup>1</sup>, which is intended to lay down some basic harmonised standards at EU level for the application by Member States of criminal sanctions to serious violations of environmental law.

This initiative is the latest development in a long-standing legal and political struggle between the Commission and the Council on the competence of the EC to legislate on environmental criminal law. While there is political agreement on the need to achieve some measure of convergence in this area, the institutions are at odds over the question whether this should be done through the Community legislative method or through some form of intergovernmental cooperation under the EU Treaty's 'third pillar'.

Early intergovernmental cooperation was actually initiated under the auspices of the Council of Europe in the mid-1990s, resulting in the adoption of a Convention on the Protection of the Environment through Criminal Law in 1998,<sup>2</sup> referring in its preamble to 'the need to pursue a common criminal policy aimed at the protection of the environment'. Though signed by 11 EU Member States, this Convention was ratified only by Estonia and has not entered into force.

However, the Council of Europe Convention inspired Denmark to propose the adoption of a 'framework decision' under the provisions on judicial cooperation in criminal matters of the 'third pillar' of the EU Treaty. Such decisions are legally binding on the Member States but can only be adopted unanimously. Moreover, the powers of the Court of Justice to enforce 'third pillar' decisions are severely limited compared to ordinary EC legislative acts, as the Commission cannot bring infringement proceedings against the Member States and the competence of the Court to give preliminary rulings is optional only. In response to the Danish proposal, the Commission proposed the adoption of a Directive on the same subject matter under

---

\* This work was funded by the statutory conservation and countryside bodies in the UK, as part of a contractual arrangement with IEEP to provide intelligence on EU environment policy and other policies which impact on the environment. It reflects the independent views of the IEEP and not necessarily the views of the funding bodies. For further information contact Emma Watkins at [ewatkins@ieep.eu](mailto:ewatkins@ieep.eu)

the environmental provisions of Article 175 of the EC Treaty in 2001,<sup>3</sup> arguing that the use of the EU Treaty as a legal basis was inappropriate since the same measure could be adopted under the EC Treaty in view of its environmental protection objective. Notwithstanding the Commission's objections, supported by the European Parliament, the Council ignored the Commission proposal and instead adopted Framework Decision 2003/80/JHA<sup>4</sup> based on Denmark's proposal. The Commission then brought an action for annulment of this Framework Decision before the Court of Justice on the grounds that the Council lacked competence to adopt it under the EU Treaty.

In an important judgment of September 2005, the Court found in favour of the Commission and annulled Framework Decision 2003/80/JHA.<sup>5</sup> It held that the Community legislature has the power, under Article 175 of the EC Treaty, to take 'measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective'. Consequently, the Council's action under the EU Treaty amounted to unlawful encroachment on those powers.

The Commission now relies on this judgment to reintroduce an ambitious legislative proposal on environmental crime. In substance, the current proposal goes beyond both the unsuccessful Commission proposal of 2001 and the 2003 Framework Decision. The Commission considers that the existing sanctions in the Member States are insufficient to ensure effective implementation of EC environmental policy due to disparities in the type and level of sanctions. Some Member States provide for administrative sanctions only, whereas the Commission is of the opinion that criminal sanctions should be introduced for all serious environmental offences. The proposed Directive would define those offences and require Member States to ensure that they constitute criminal offences under their national law. Moreover, it would also achieve some measure of harmonisation of the level of the sanctions for the most serious offences, by specifying that these should be punishable by imprisonment and laying down its minimum and maximum duration, depending on the nature and circumstances of the offence. Finally, the proposal defines the conditions of liability of legal persons and also prescribes the level of fines to be applied to them for the most serious environmental offences. In the case of legal persons, Member States would have the choice between criminal or non-criminal fines, provided their level meets the requirements of the proposed Directive.

As it is based on Article 175(1) of the EC Treaty, the proposal could be adopted by a qualified majority vote in the Council under the co-decision procedure, but it seems unlikely that Member State resistance to harmonisation of environmental criminal law will be any less pronounced in the enlarged EU than it was in 2003.

### ***References***

1. Commission Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law, COM (2007) 51 final, 9 February 2007.
2. Convention on the Protection of the Environment through Criminal Law, Strasbourg, 4 November 1998, Council of Europe, European Treaty Series, No. 172; <http://conventions.coe.int/Treaty/en/Treaties/Word/172.doc>

3. Commission Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law, COM (2001) 139 final, 13 March 2001.
4. Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law, [http://eur-lex.europa.eu/pri/en/oj/dat/2003/l\\_029/l\\_02920030205en00550058.pdf](http://eur-lex.europa.eu/pri/en/oj/dat/2003/l_029/l_02920030205en00550058.pdf)
5. ECJ Judgment of 13 September 2005, Case C-176/03, Commission v Council, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003J0176:EN:HTML>

Marc Pallemmaerts, Senior Fellow  
[mpallemmaerts@ieep.eu](mailto:mpallemmaerts@ieep.eu)

© Copyright IEEP 2007