Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law'  

(2008/C 10/12)

On 28 February 2007 the Council decided to consult the European Economic and Social Committee, under Article 174 of the Treaty establishing the European Community, on the abovementioned proposal.

The Section for Agriculture, Rural Development and the Environment, which was responsible for preparing the Committee’s work on the subject, adopted its opinion on 6 September 2007. The rapporteur was Mr Retureau.

At its 438th plenary session, held on 26 and 27 September 2007 (meeting of 26 September), the European Economic and Social Committee adopted the following opinion by 149 votes to three with ten abstentions.

1. Conclusions

1.1 Once again, the Committee welcomes the fact that serious environmental offences may be subject to criminal sanctions. It restates that, in its view, the Commission should have the power to compel Member States to apply proportionate and dissuasive criminal sanctions when necessary in order to ensure the application of Community policies, especially in the field of protecting the environment against serious offences: such sanctions should be applied as part of the criminal justice system of each Member State. Lastly, the Commission should have the power to supervise the effectiveness of the criminal law applied in the field in question, and should actively exercise this power.

1.2 The proposal for a directive targets for example offences committed in the framework of criminal organisations (which it views as an aggravating circumstance). The Committee is convinced that such actions should be subject to sanctions, including an approximation of the criminal law rules in the Member States, but the Treaty and case-law are quite clear regarding the repression of acts committed in the framework of criminal organisations: approximation of the Member States’ rules of criminal law can in principle only take place under the provisions on police and judicial cooperation in criminal matters as laid down in Title VI of the Treaty on European Union (TEU), and not under the EC Treaty (TEC) as proposed by the Commission.

1.3 The Committee also wonders if the stipulation that certain offences are to be punished by imprisonment does not exceed the powers under the first pillar, constituting interference in the choice of the most appropriate sanctions which should in principle remain a competence of the Member States.

1.4 It is of the view that Community competence should be restricted to defining obligations and stipulating that criminal sanctions are to apply. A framework decision based on Title VI of the Treaty on European Union would be needed in order to go further and lay down a system of penalties.

1.5 By the same token, the Committee would question if Community law can extend to imposing a maximum level of sanctions.

1.6 The Committee would like the obvious political aspects raised by the division of competences, and the role that it wishes the Parliament to play in all legislation touching upon criminal matters, to be covered by more precise Court of Justice case-law, by an interinstitutional agreement, or by a reform that could be built into the reform of the Treaties by the current IGC. It would tend to prefer this latter option, given the urgent need to adopt effective sanctions to protect the environment.

2. Introduction

2.1 In 1998, the Council of Europe opened a Convention on the Protection of the Environment through Criminal Law for signature. This was significant because it represented the first international convention to criminalise acts causing or likely to cause environment damage. However, Germany followed by France and the UK expressed its reluctance to ratify the Convention. As a result, Denmark and the Commission both presented separate initiatives aiming to protect the environment under criminal law.

2.2 The Council’s framework decision, adopted by the Council at Denmark’s proposal, and against the opinion and proposals of the Commission, defined a number of environmental offences, for which the Member States were asked to introduce criminal sanctions. Its provisions were based largely on those of the Council of Europe’s Convention on the Protection of the Environment through Criminal Law of 4 November 1998 and which has, to date, been signed by ten Member States.

2.3 The Commission opposed the legal basis chosen on various Council bodies. It believed Article 175(1) of the EC Treaty to be the right legal basis in this regard and, on 15 March 2001, had presented a Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law based on this Article (T), although Article 174 of the EC Treaty conferred no powers on the Community in criminal matters.

(T) OJ C 180, p. 238.
2.4 On 9 April 2002, the European Parliament adopted a report on both the proposed directive and the draft framework decision. It agreed with the approach advocated by the Commission at that time (a directive and a framework decision).

2.5 The Council, however, adopted not the directive and framework decision proposed by the Commission, but an amended version of its draft framework decision, based on Article 34 of the Treaty on European Union which, in its opinion, represented an appropriate instrument to oblige the Member States to introduce criminal sanctions. It emphasised that most Member States were hostile to recognising criminal powers on the part of the Community, and were convinced that such matters came under the provisions for police and judicial cooperation in criminal matters set out in Title VI of the Treaty on European Union.

2.6 The case was brought before the Court of Justice, which issued a judgment on 13 September 2005 (2).

2.7 The European Parliament coincides with the Court and the Advocate General in considering that there is no general Community power to harmonise criminal law, but in certain clearly defined fields, such as the present one of environmental protection, the Community could oblige the Member States to prescribe criminal sanctions.

For its part, the Commission has interpreted the judgment very broadly, granting itself wide-ranging powers in many Community policies other than the environment.

2.8 Following the CJEC judgment annulling the framework decision, the Commission has presented a new proposal for a directive. The Court judged that, although as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence, this does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from 'taking measures which relate to the criminal law' of the Member States when they are necessary in order to ensure that Community legislation on environmental protection is fully effective (3). The Committee recalls that the Court emphasised the fact that in principle, the Community had no competence in criminal matters, which the Treaty on European Union sees as a sovereign sphere of the Member States. The wording quoted above — measures which relate to the criminal law — is so vague as to be open to all kinds of interpretations, often contradictory.

2.9 This judgment underpins the Commission's presentation of an amended proposal for a directive (4), which contains both incriminations and sanctions, as it believes that the purely administrative sanctions or certain criminal sanctions applicable in some countries are too disparate or too weak to have an adequate deterrent effect, particularly where organised crime is involved. It therefore considers that steps should be taken to ensure a minimum level of harmonisation of the criminal law applicable to serious environmental offences, whether resulting from acts with criminal intent or serious negligence.

2.10 In an earlier opinion (5), the EESC supported the Commission's initial proposal for a directive, and its proposal for a framework decision, under which the Member States were to adopt effective, proportionate and dissuasive criminal sanctions to combat offences against the environment. The action for annulment brought by the Commission and supported by the European Parliament against the Council's framework decision was also supported by the Committee, although in a preliminary procedural decision, the Court ruled out any intervention by the Committee.

2.11 The purpose is therefore to assess whether:

— the new proposals tally with the framework established by the Court,

— the proposed sanctions are commensurate with the aim of ensuring the effectiveness of environmental law and a higher level of harmonisation of national laws (obligation to introduce sufficiently dissuasive criminal sanctions in order to guarantee the effectiveness of applicable legislation).

2.12 The wide-ranging debate which has sprung up since the judgment at policy level and with regard to legal opinion on the 'constitutionality' or otherwise of extending the Community's competences to criminal matters for the implementation of Community policies, and debate on the precedence of the EC Treaty over the Treaty on European Union in such areas, will nevertheless have to be considered by the Committee (6) with regard to the numerous legislative proposals that the Commission envisages revising, as it has recently done in the field of intellectual property (7), for example.

2.13 Many Member States challenge the rather broad interpretation that the Commission would make of the judgment, with regard both to the content of the new environmental proposals and to the introduction of a minimum penal element for the effective implementation of all Community policies (and not only of a clearly cross-sectoral policy, such as the environment), although in any case nothing is explicitly laid down in the EC Treaty. According to these Member States, use of the Court's case-law must be restricted to environmental policy on account of the cross-sectoral and cross-border nature of the environment, and of the wording of the Court's judgment, and must not be taken by the Commission as a blank cheque for all Community policies.

2.14 In the particular case under examination, the Committee will limit its comments to the proposals concerning the environment, the only area explicitly covered by the Court's judgment.


(2) It should be noted that the mandate for the reform of the treaties puts the revised EC Treaty and Treaty on European Union on an equal footing.

(3) CESE 981/2007 (not yet published in the OJ).
2.15 In brief, the Commission has decided to propose incriminations and criminal sanctions, in the form of a minimum set of punishments, for ‘environmental crime’ with regard to any natural or legal person who commits, abets or instigates serious environmental offences, or who gives rise to such offences through serious negligence. Imprisonment and/or fines, together with additional sanctions (Article 5), are specified, and may be extended or supplemented by additional incriminations and sanctions under national law.

3. The Committee’s comments

3.1 The Committee is disappointed that penal sanctions in the environment, the principle and level of which it supports, as it did the Commission’s proposal for a directive and for a framework decision in 2005, should have been delayed for years and may still be further delayed as a result of disagreement between the institutions on the division of competences in the EC Treaty and Treaty on European Union. It hopes that a political solution will rapidly be devised by the institutions, inter alia for the involvement of Parliament, and that the treaties can be clarified, by means of the recently-opened IGC or, failing that, by future Court case-law.

3.2 The definition of environmental offences subject to criminal sanctions, such as ‘significant deterioration’, has not yet been interpreted when being incorporated into domestic law or in the criminal case-law of the various Member States.

3.3 The Committee notes that the directive targets ‘serious offences’ as a priority, especially those committed by criminal organisations, or committed on a large scale by legal persons, and that it sets out to bring the applicable sanctions at Community level closer into line with each other, to prevent legal loopholes being used by criminals. But questions concerning organised crime come under Title VI of the Treaty on European Union on police and judicial cooperation in criminal matters, and must therefore be governed by an appropriate legal instrument such as, for example, the framework decision.

3.4 The broad character of the incrimination has prompted one British tabloid newspaper to wonder whether simply picking wild flowers could lead to private individuals being imprisoned, if the bunch happened to contain a protected species. It should be emphasised that criminal sanctions are to apply only in ‘serious’ cases and must remain effective, proportionate and dissuasive. The national criminal court judge responsible for applying the sanctions must retain full discretion to gauge the seriousness of the offence and set an appropriate sentence in each individual case, in order to comply with the independence of the judiciary.

3.5 For its part, the Committee is satisfied with the fact that the proposed directive (Article 3) clearly details the unlawful acts covered, in keeping with the general principle of law ‘Nulla poena sine lege’ (1), a general principle that requires criminal legislation to be clear and precise, so that the individuals concerned unambiguously aware of the rights and obligations entailed, or in other words: no sanction without specific legal basis.

3.6 It is clear that infringements of all environmental legislation, whether of national Community or international origin, are covered by the system of criminal sanctions proposed by the Commission. This particularly broad scope could create a legal problem in connection with the national foundation of general law or autonomous instruments for supervising international law. The ‘serious offences’ in question are those committed either within or across national borders. Nevertheless, the Committee agrees with this material and territorial scope, which arises from the very nature of environmental protection, offences against which generally affect the overall environment, regardless of borders.

3.7 Criminal and non-criminal sanctions are laid down for legal persons, but it is not clear if the applicable criminal sanctions can be imposed on natural persons, such as the managers of the companies concerned. The sanctions apply only to persons, belonging to the legal person, who are directly the authors or instigators of the actions subject to proceedings. The Committee considers that the directive should take account of managers who have simply failed to monitor the actions of their subordinates, even if this entails only supplementary sanctions.

3.7.1 The Committee notes that Article 7 of the proposal establishes minimum amounts for maximum fines, but that the Member States may establish more severe penalties, if appropriate, at the time of transposition. It goes no further than ensuring a common minimum, but entails the risk of creating divergent national criminal approaches. The Committee prefers a more vigorous criminal harmonisation approach, in order to avoid the temptations of ‘forum shopping’, even if this means higher minimum amounts for maximum fines.

3.8 According to the Commission’s impact assessment, however, the Member States would enjoy considerable leeway with regard to implementation. In the Committee’s view, regular monitoring of national practices must take place, because discrepancies in transposition are such that the effective approximation of criminal law on the environment could be hampered. The Member States’ usual margin of discretion should in general avoid the creation of areas where it is ‘cheaper’ to pollute. In this regard, the Committee agrees with the proposed legal basis (Article 175 of the EC Treaty).

3.9 With regard to imprisonment, the Committee notes that approximation is proposed on the basis of a three-step scale, corresponding to the conclusions of the Justice and Home Affairs Council of 25-26 April 2002. Alternative sanctions are also provided, additional to reinstating the environment, such as disqualification from engaging in an economic activity; lastly, the majority of serious environmental offences are covered by the scope of Framework Decision 2005/212/JHA on confiscation of crime-related proceeds, instrumentalities and property.

(1) Judgment of the Court of 8 February 2007, Case C-3/06 P, Groupe Danone.
3.10 Moreover, the establishment of a maximum ranging from two to five years is a rather bizarre option: it would have been better to choose a single minimum level for the maximum sentence, in the interests of greater harmonisation, given that this would not in any case jeopardise judges' room for discretion.

3.11 However, the Commission considers that setting limits to Member States' discretion with regard to transposition is contrary to the aim of the directive; there is a conflict between the Committee's preferred approach to criminal law and that of the Commission. In the light of how application actually takes place, it will probably be necessary to opt for one approach rather than another if the aims of the proposal are to be met.

3.12 The EESC is aware that at the present stage of the Community integration process, a regulation on this subject is not possible. Concern is however felt about the need for a clear distinction between administrative sanctions and crime, and to ensure that transposition does not give rise to major differences in Member State legislation — it would not be logical for certain behaviour to be punishable in one Member State and not in another.

3.13 The report on the implementation of the directive (Article 8) should also be addressed to the EESC.

3.14 The views of the EESC as expressed previously (9) should be taken into account, especially regarding:

— ius standi (right to act to initiate public criminal proceedings) so that associations and NGOs can bring proceedings before the courts on the basis of the directive; the Århus Convention system could provide a model for the implementation of this right by accredited NGOs, which would be preferable to any class action system;

— a strengthening the cooperation and investigation machinery of the judicial authorities to enable them to prosecute environmental crimes, recommending the setting up of public prosecutors offices specialising in environmental matters;

— the use of European judicial networks to establish the necessary cooperation regarding cross-border crimes.

Brussels, 26 September 2007.

The President
of the European Economic and Social Committee
Dimitris DIMITRIADIS

(9) See CES 463/2001 fin of 3 August 2001 (NAT/114).