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REPORT

on the draft Council framework decision on the protection of the environment
through criminal law
(15525/2001 – C5-0022/2002 – 2000/0801(CNS))

(Renewed consultation)

Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

Rapporteur: Giuseppe Di Lello Finuoli

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.

CONTENTS

	Page
PROCEDURAL PAGE	4
LEGISLATIVE PROPOSAL	5
DRAFT LEGISLATIVE RESOLUTION	15
EXPLANATORY STATEMENT	17

PROCEDURAL PAGE

At the sitting of 7 July 2000 Parliament adopted its position on the initiative of the Kingdom of Denmark with a view to the adoption of a Council framework decision on combating serious environmental crime (5343/2000 - C5-0078/2000 - 2000/0801(CNS)).

By letter of 14 January 2002 the Council reconsulted Parliament, under Article 39(1) of the EU Treaty, on the draft Council framework decision on the protection of the environment through criminal law (15525/2001 – 2000/0801(CNS)).

At the sitting of 17 January 2002 the President of Parliament announced that he had referred the Council text to the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs as the committee responsible and the Committee on the Environment, Public Health and Consumer Policy for its opinion (C5-0022/2002).

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs had appointed Giuseppe Di Lello Finuoli rapporteur at its meeting of 3 April 2000.

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

At the latter meeting it adopted the draft legislative resolution by 39 votes to 0, with 2 abstentions.

The following were present for the vote: Ana Palacio Vallelersundi, chairman; and Robert J.E. Evans, Lousewies van der Laan, Giacomo Santini, vice-chairmen; Giuseppe Di Lello Finuoli, rapporteur; Maria Berger (for Carmen Cerdeira Morterero), 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 Gerhard Schmid), Marie-Thérèse Hermange (for Giuseppe Brienza), Jorge Salvador Hernández Mollar, Pierre Jonckheer, Anna Karamanou (for Valter Veltroni), Margot Keßler, Timothy Kirkhope, Eva Klamt, Baroness Sarah Ludford, Lucio Manisco (for Fodé Sylla), Luís Marinho (for Martin Schulz), Hartmut Nassauer, William Francis Newton Dunn, Arie M. Oostlander (for The Lord Bethell), Elena Ornella Paciotti, Paolo Pastorelli (for Bernd Posselt), Hubert Pirker, Martine Roure, Heide Rühle, Gerhard Schmid (for Francesco Rutelli), Ilka Schröder, Patsy Sørensen, The Earl of Stockton (for Thierry Cornillet), 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 Adeline Hazan).

The Committee on the Environment, Public Health and Consumer Policy decided on 19 February 2002 not to deliver an opinion.

The report was tabled on 20 March 2002.

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

LEGISLATIVE PROPOSAL

Draft Council framework decision on the protection of the environment through criminal law (15525/2001 – C5-0022/2002 – 2000/0801(CNS))

The proposal is amended as follows:

Draft Council framework decision¹

Amendments by Parliament

Amendment 1 recital 5

(5) The Council considered it appropriate to incorporate into the present Framework decision a number of substantive provisions contained in the proposed Directive, in particular those defining the conduct which Member States have to establish as criminal offences under their domestic law;

(5) Pursuant to Articles 29 and 47 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 that necessary measures to guarantee the application and effectiveness of Community law may include criminal penalties;

Justification

No justification.

Amendment 2 recital 6

(6) The Council has considered this proposal but has come to the conclusion that the majority required for its adoption by the Council can not be obtained because that majority considered that the proposal went beyond the powers attributed to the Community by the Treaty establishing the European Community and that the objectives could be reached by adopting a Framework-Decision on the basis of Title

(6) 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

¹ Not yet published in the Official Journal.

VI of the Treaty on European Union. The Council also considered that the present Framework Decision, based on Article 34 TEU, is a correct instrument to impose on the member States the obligation to provide for criminal sanctions.

Justification

No justification.

Amendment 3
Recital 7b

(7b) The European Parliament shares the views expressed by the Commission, as is apparent from its resolution adopted at its sitting of 15 November 2001, in which it asked the Council not to take any action on environmental criminal law before the draft Directive on the protection of the environment through criminal law is adopted; it considers, nonetheless, that it should give its opinion on this new draft framework decision so that the Council may take it duly into account.¹

Justification

This recital sets out the Parliament's views and explains why nonetheless the Parliament is giving its opinion.

Amendment 4
Article 1

¹ Adopted Texts, item 1.

For the purposes of this Framework Decision

For the purposes of this Framework Decision, ***the terms, offences and sanctions defined in the European Parliament and Council Directive/..... adopted on on the protection of the environment through criminal law apply.***

(a) "unlawful" means infringing a law, an administrative regulation or a decision taken by a competent authority, including those giving effect to binding provisions of Community law aiming at the protection of the environment;

(b) "water" means all kinds of groundwater and surface water including the water of lakes, rivers, oceans and seas;

(c) "legal person" means any legal entity having such status under the applicable national law, except for States or other public bodies acting in the exercise of their sovereign rights and for public international organisations.

Justification

The framework decision should be consistent with the directive proposed by the Commission to be adopted on the basis of Article 175 of the EC Treaty. The framework decision should therefore refer back to the Directive and should not repeat what will be covered by the Directive.

Amendment 5 Article 2

Intentional offences

Deleted

Each Member State shall take the necessary measures to establish as

criminal offences under its domestic law:

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

(b) the unlawful discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water which causes or is likely to cause their lasting or substantial deterioration or death or serious injury to any person or substantial damage to protected monuments, other protected objects, property, animals or plants; Deleted

(c) the unlawful disposal, treatment, storage, transport, export or import of waste, including hazardous waste, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants Deleted

(d) the unlawful operation of a plant in which a dangerous activity is carried out and which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants; Deleted

(e) the unlawful manufacture, treatment, storage, use, transport, export or import of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants, Deleted

(f) *the unlawful possession, taking, damaging, killing or trading of or in protected wild fauna and flora species or parts thereof, at least where they are threatened with extinction as defined under national law;* Deleted

(g) *the unlawful trade in ozone-depleting substances;* Deleted

when committed intentionally.

Justification

As above.

Amendment 6
Article 3

Negligent offences Deleted

Each Member State shall take the necessary measures to establish as criminal offences under its domestic law, when committed with negligence, or at least serious negligence, the offences enumerated in Article 2.

Justification

As above .

Amendment 7
Article 4

Participation and instigation

Deleted

Each Member State shall take the necessary measures to ensure that participating in or instigating the conduct referred to in Article 2 is punishable.

Justification

As above .

Amendment 8
Article 5

Penalties

Deleted

1. Each Member State shall take the necessary measures to ensure that the conduct referred to in Articles 2 and 3 is punishable by effective, proportionate and dissuasive penalties including, at least in serious cases, penalties involving deprivation of liberty which can give rise to extradition.

2. The criminal penalties provided for in paragraph 1 may be accompanied by other penalties or measures, in particular the disqualification for a natural person from engaging in an activity requiring official authorisation or approval, or founding, managing or directing a company or a foundation, where the facts having led to his or her conviction show an obvious risk that the same kind of criminal activity may be pursued.

Deleted

Justification

As above.

Amendment 9

Article 6

1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for conduct referred to in **Articles 2 and 3** committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on

- a power of representation of the legal person, or
- an authority to take decisions on behalf of the legal person, or
- an authority to exercise control within the legal person,

as well as for the involvement as accessories or instigators in the commission of conduct referred to in **Article 2**.

2. Apart from the cases already provided for in paragraph 1, each Member State shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission referred to in

1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for conduct referred to in **Article 3 of the European Parliament and Council Directive on the protection of the environment through criminal law** committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on

- a power of representation of the legal person, or
- an authority to take decisions on behalf of the legal person, or
- an authority to exercise control within the legal person,

as well as for the involvement as accessories or instigators in the commission of conduct referred to in **Article 3 of the European Parliament and Council Directive on the protection of the environment through criminal law**.

2. Apart from the cases already provided for in paragraph 1, each Member State shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission referred to in

Articles 2 and 3 for the benefit of that legal person by a person under its authority.

Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in the conduct referred to in *Articles 2 and 3*.

Article 3 of the European Parliament and Council Directive on the protection of the environment through criminal law for the benefit of that legal person by a person under its authority.

Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in the conduct referred to in *Article 3 of the European Parliament and Council Directive on the protection of the environment through criminal law*.

Justification

Provisions harmonising the liability of legal persons are not included in the draft directive and can be left in the framework decision, but they should refer to the directive.

Amendment 10 Article 7

Sanctions for legal persons

Deleted

Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 6 is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such as:

- (a) exclusion from entitlement to public benefits or aid;*
- (b) temporary or permanent disqualification from the practice of industrial or commercial activities;*
- (c) placing under judicial supervision;*
- (d) a judicial winding-up order;*
- (e) the obligation to adopt specific measures in order to avoid the consequences of conduct such as that on which the criminal liability was founded.*

Deleted

Deleted

Deleted

Deleted

Deleted

Justification

As for amendment 3 above.

Amendment 11
Article 8, paragraph 1

1. Each Member State shall take the necessary measures to establish its jurisdiction with regard to the offences referred to in **Articles 2 and 3** where the offence has been committed:

- (a) fully or in part in its territory, even if the effects of the offence occur entirely elsewhere;
- (b) on board a ship or an aircraft registered in it or flying its flag;
- (c) for the benefit of legal persons with a registered office in its territory;
- (d) by one of its nationals if the offence is punishable under criminal law where it was committed or if the place where it was committed does not fall under any territorial jurisdiction.

1. Each Member State shall take the necessary measures to establish its jurisdiction with regard to the offences referred to in **Article 3 of the European Parliament and Council Directive on the protection of the environment through criminal law** where the offence has been committed:

- (a) fully or in part in its territory, even if the effects of the offence occur entirely elsewhere;
- (b) on board a ship or an aircraft registered in it or flying its flag;
- (c) for the benefit of legal persons with a registered office in its territory;
- (d) by one of its nationals if the offence is punishable under criminal law where it was committed or if the place where it was committed does not fall under any territorial jurisdiction.

Justification

The framework decision should refer to the directive.

Amendment 12
Article 9, paragraph 1

1. (a) Any Member State which, under its law, does not yet extradite its own nationals shall take the necessary measures to establish its jurisdiction over the offences provided for in **Articles 2 and 3** when committed by its own nationals outside its territory.

(b) Each Member State shall, when one of its nationals is alleged to have committed in another Member State an offence involving the conduct described in **Articles 2 and 3**, and it does not yet extradite that person to that other Member State solely on the ground of his nationality, submit the case to its competent authorities for the purpose of prosecution if appropriate. In order to enable prosecution to take place, the files, information and exhibits relating to the offence shall be transmitted in accordance with the procedures laid down in Article 6(2) of the European Convention on Extradition. The requesting Member State shall be informed of the prosecution initiated and of its outcome.

1. (a) Any Member State which, under its law, does not yet extradite its own nationals shall take the necessary measures to establish its jurisdiction over the offences provided for in **Article 3 of the European Parliament and Council Directive on the protection of the environment through criminal law** when committed by its own nationals outside its territory.

(b) Each Member State shall, when one of its nationals is alleged to have committed in another Member State an offence involving the conduct described in **Article 3 of the European Parliament and Council Directive on the protection of the environment through criminal law**, and it does not yet extradite that person to that other Member State solely on the ground of his nationality, submit the case to its competent authorities for the purpose of prosecution if appropriate. In order to enable prosecution to take place, the files, information and exhibits relating to the offence shall be transmitted in accordance with the procedures laid down in Article 6(2) of the European Convention on Extradition. The requesting Member State shall be informed of the prosecution initiated and of its outcome.

Justification

The framework decision should refer to the directive.

DRAFT LEGISLATIVE RESOLUTION

European Parliament legislative resolution on the draft Council framework decision on the protection of the environment through criminal law (15525/2001 – C5-0022/2002 – 2000/0801(CNS))

(Consultation procedure - renewed consultation)

The European Parliament,

- having regard to the draft Council framework decision(15525/2001¹),
 - having regard to the initiative of the Kingdom of Denmark with a view to the adoption of a Council Framework Decision on combating serious environmental crime (5343/2000)²,
 - having regard to its position of 7 July 2000³,
 - having regard to its resolution of 15 November 2001 on criminal sanctions and Community law⁴
 - having regard to Article 29, Article 31(e), and Article 34(2) (b) of the EU Treaty,
 - having been consulted by the Council again under Article 39, paragraph 1, of the EU Treaty (C5-00022/2002),
 - having regard to Rules 106 and 67 of its Rules of Procedure,
 - having regard to the report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (A5-0080/2002),
1. Approves the draft Council framework decision as amended;
 2. Calls on the Council to notify Parliament should it intend to depart from the text approved by Parliament;
 3. Asks the Council to refrain from adopting this complementary framework decision prior to the adoption of the European Parliament and Council Directive on the protection of the environment through criminal law as proposed by the Commission,⁵
 4. Asks to be consulted again on this complementary framework decision if the Council intends to substantially amend the Council text or the Commission proposal for a European Parliament and Council Directive on the protection of the environment through criminal law to which this framework decision refers;

¹ Not yet published in the Official Journal.

² OJ C 39, 11.2.2000, page 4.

³ OJ C 121, 24.4.2001, page 494.

⁴ Adopted Texts, item 1.

⁵ OJ C 180, 26.6.2001, page 238.

5. Instructs its President to forward its position to the Council and Commission.

EXPLANATORY STATEMENT

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, bringing it much more closely into line with the substance and aims of the Council of Europe Convention.

In December 2001, the Council drew up a new draft framework decision making major changes to the original text. 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, which made provisions for administrative 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 *aquis communautaire* in this area prior to the forthcoming enlargement.

It also noted that, given the environmental degradation in the Union, existing 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 concerns 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 third-pillar instrument (the framework decision) should be adopted.

It should be noted that, while 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 not yet adopted any acts providing for criminal penalties alone (to be introduced into national law) being used to enforce Community provisions.

This is precisely the reason for which the latter 'power' - of which there does not seem to be any trace in the Treaties - has never been subjected to examination by the Court of Justice.

The Commission's arguments are based on the division of competencies between the EC Treaty and the EU Treaty and the primacy of Community law established in Article 47 TEU (and 29 TEU).

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 the Council, legal arguments were raised that, when an area falls within the Community sphere of responsibility, it is legally impossible for the Union to adopt common rules by means of a third-pillar instrument without encroaching on the Community's powers.

It was also argued 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 draft framework decision of December 2001) 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, 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'.

The Commission's position on the use of a first-pillar instrument to ensure effective protection of the environment deserves support and Parliament already endorsed a similar approach to resolving the same type of problem when it adopted the proposal for a directive on the criminal-law protection of the Community's financial interests (rapporteur: Mrs Diemut Theato) at first reading on 29 November 2001.

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.

The Council has, nonetheless, forwarded to Parliament a new draft framework decision (20 December 2001) on the protection of the environment through criminal law. Having made major changes to the text already considered and adopted by Parliament on 7 December 2000 (A5-0178/2000), it felt it appropriate to reconsult Parliament.

Parliament, standing by its aforementioned recommendation of 15 November 2001, considers that it should deliver an opinion on this new text and has deleted those parts which are covered by the proposed Directive. However, some additional comments on this new text are set out below.

The new draft framework decision takes account of some of the recommendations which Parliament adopted on the first text submitted by the Kingdom of Denmark (for instance, on the protection of protected species and human health). However, at the same time it seeks to restrict the scope of the environmental protection provisions by introducing concepts such as 'serious injury', 'lasting or substantial deterioration' and protection for species 'threatened with extinction', thus running counter to all the directives already adopted by the Community, which are much more restrictive and much more in keeping with the stated aim.

The new text also goes against the position Parliament adopted on the first draft framework decision as regards penalties, given that it contains no mention of making good the damage, rehabilitating the environment or the seizure and confiscation of the movable and immovable property used to cause environmental damage.