

**Amended proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law <sup>(1)</sup>**

(2003/C 20 E/26)

COM(2002) 544 *final* — 2001/0076(COD)

*(Submitted by the Commission pursuant to Article 250(2) of the EC-Treaty on 30 September 2002)*

Article 250(2) of the EC Treaty states that as long as the Council has not acted, the Commission may alter its proposal at any time during the procedures leading to the adoption of a Community act.

The Commission hereafter gives its opinion on the amendments adopted by the European Parliament.

**1. BACKGROUND**

Transmission of the proposal to the Council and the European Parliament (COM(2001) 139 *final* — 2001/0076 (COD)) in accordance with Article 175(1) of the EC Treaty: 15 March 2001

Opinion of Economic and Social Committee in Section (The ECOSOC has not been seized for Opinion by the Council in this file): 11 July 2001

Opinion of the European Parliament — first reading: 9 april 2002

**2. OBJECTIVE OF THE COMMISSION PROPOSAL**

EC Environmental law has existed for 25 years. More than 200 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 severe non-observance of environmental law show that the sanctions currently established by the Member States are not sufficient to achieve full compliance with Community law.

The Commission proposal for a Directive requires the Member States to provide for criminal sanctions because only this type of measures seems adequate, and dissuasive enough, to achieve proper implementation of environmental law.

**3. COMMISSION OPINION ON THE AMENDMENTS ADOPTED BY THE EUROPEAN PARLIAMENT**

On 9 April, 2002, the European Parliament adopted 24 amendments out of the 32 that were tabled.

Amendments 2, 5, 7, 15, 16, 22 and 23 have been accepted by the Commission in full.

Amendments 1, 3, 4, 6, 12 and 14 were accepted in principle subject to either rewording and/or movement to another Chapter of the proposal.

The Commission accepted partially amendments 9, 21 and 30.

Amendments 8, 10, 11, 13, 18, 19, 20, 24 and 27 were not accepted by the Commission.

The Commission's position with regard to the amendments of the European Parliament is as follows:

**3.1. Amendments accepted fully by the Commission**

*Amendment 2* is a general reference to the legal basis of the proposal for a Directive (Article 175(1) TEC).

*Amendment 5* states that Community competence may be supplemented by complementary third pillar measures. This is the approach of the Commission and it has supported this viewpoint before the Council.

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<sup>(1)</sup> OJ C 180 E, 26.6.2001, p. 238.

*Amendment 7* makes it clear in the recitals that criminal law provisions are to be deployed at national level and that the Directive is not intended to empower the Community to intervene in national criminal law provisions. Although Articles 3 (offences) and 4 (sanctions) of the Proposal already clearly refer to national criminal law, such a clarification can be useful in the recitals.

*Amendments 15, 22 and 23* strengthen the Commission's text, in line with the relevant Community environmental legislation (mainly Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds <sup>(1)</sup>, Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora <sup>(2)</sup> and Regulation (EC) No 2037/2000 of the European Parliament and of the Council of 29 June 2000 on substances that deplete the ozone layer <sup>(3)</sup>).

*Amendment 16* 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. It is fully in line with the Commission's position concerning the Community competence to oblige Member States to provide for criminal sanctions against breaches of environmental legislation.

### 3.2. Amendments accepted in principle by the Commission

*Amendment 1* refers to the political mandate given by the Tampere European Council, which identifies environmental crime as a priority sector where the Member States should agree common definitions and sanctions in the field of national criminal law. It is a political statement that is not appropriate in the recitals of a legal text. Nevertheless, this Amendment is accepted in principle and the Commission could accept this amendment without rewording it.

*Amendment 3* elaborates on Community competence to provide for criminal sanctions to guarantee the application and effectiveness of Community law. It refers to Article 29 and 47 TUE, which confirm the primacy of the EC Treaty, and to the case law of the Court of Justice. The reference to third pillar provisions is, legally speaking, not appropriate in a first pillar instrument. Nevertheless, the Commission could accept this Amendment without rewording it.

*Amendments 4 and 14* usefully refer to the principle of subsidiarity. They could possibly be merged into a single Amendment and refer to a standard existing clause. The following rewording is proposed by the Commission, referring to the text of a standard clause as it does exist for example in existing environment legislation (Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste <sup>(4)</sup>):

'In accordance with the principle of subsidiarity and proportionality as set out in Article 5 of the Treaty, there is a need to take action at the level of the Community. This Directive confines itself to minimum requirements the Member States must respect.'

This merged Amendment could usefully replace Amendment 4, at the same place.

*Amendment 6* links the proposal to existing Community environmental law. It already features in recitals 3 and 4 of the original Proposal. Nevertheless, the Commission could accept this Amendment without rewording it.

*Amendment 12* clarifies that the use of criminal sanctions is indispensable for the purpose of enforcing environmental rules and that the EC Treaty provides scope for criminal sanctions. The content of this Amendment is already stated in recital 4 of the proposal. Nevertheless, the Commission could accept this amendment without rewording it.

<sup>(1)</sup> OJ L 103, 25.4.1979, p. 1.

<sup>(2)</sup> OJ L 206, 22.7.1992, p. 7.

<sup>(3)</sup> OJ L 244, 29.9.2000, p. 1.

<sup>(4)</sup> OJ L 332, 28.12.2000, p. 91.

### 3.3. Amendments accepted in part by the Commission

*Amendment 9* refers in the 1<sup>st</sup> sentence (accepted fully) to the fact that the Member States are free to maintain or introduce more stringent protective measures. The second sentence (rejected) refers to the fact that the Directive may be supplemented by complementary third pillar measures. This aspect is already mentioned under Amendment 5 (accepted fully by the Commission). There is no need to repeat it. This Amendment is therefore accepted in full for its 1<sup>st</sup> part and rejected for its 2<sup>nd</sup> part.

The Commission suggests the following rewording:

'This Directive contains only minimum rules, thereby leaving Member States free to introduce or apply more stringent penalties for environmental offences other than those referred to in the Directive.'

*Amendment 21*, in the 1<sup>st</sup> part of the sentence, strengthens the Commission's text, in line with existing Community environmental legislation. The 2<sup>nd</sup> part of the sentence makes a new reference to 'production' of hazardous waste. Community environmental legislation does not provide for a general prohibition against the production of hazardous waste. For this reason, it is impossible to refer to production in the Article 3(b) of the proposal. The Amendment 21 can be accepted by the Commission subject to the following rewording:

'The discharge, emission or introduction of a quantity of materials into air, soil or subsoil or surface or underground water and the treatment, disposal, storage, transport, export or import of hazardous waste.'

*Amendment 30* suggests adding a reference to the fact that prison sentences referred to in the Directive are to be subject to extradition or surrender. Requiring that the penalties be such as to give rise to extradition is in conformity with other UE texts and is accepted in principle. The added reference to the fact that 'this is provided for within national legislation of a Member State' is not clear, and should preferably be deleted. This Amendment is therefore accepted for the 1<sup>st</sup> part in principle and for the other part rejected. The Commission would accept this Amendment with the following rewording:

'As concerns natural persons, Member States shall provide for criminal penalties, involving in serious cases deprivation of liberty, which can give rise to extradition or surrender.'

### 3.4. Amendments rejected by the Commission

*Amendment 8* makes an erroneous reference to Article 31 TEU. The reference to Article 31 (e) TEU focuses on EU ('third pillar') competence to provide for judicial cooperation in the fields of organised crime, terrorism and illicit drug-trafficking under the Title VI of the EU Treaty. This reference cannot pursue the aim indicated by the justification for the Amendment, which is to support Community competence to oblige Member States to provide for criminal sanctions for breaches of Community environmental law. Moreover, Amendment 16 (fully accepted by the Commission) already clarifies that Article 175(1) TEC is the correct legal basis for the protection of the environment through criminal law in the European Community.

*Amendment 10* underlines that the European Parliament favoured the Commission's approach in a previous Recommendation <sup>(1)</sup>. Such a reference to the Recommendation does not provide legal grounds for the enacting part of the proposal for a Directive and should not be kept in the recitals.

*Amendment 11* is a political statement inviting account to be taken of the opinion of the competent Section of the Ecosoc, that the Commission supports on the substance. This reference cannot be kept in the recitals because the proposal for a Directive, when adopted, will refer in the citations to the Ecosoc Opinion given in plenary. Such a reference does not provide legal grounds for the enacting part of the proposal for a Directive and should not be kept in the recitals.

<sup>(1)</sup> European Parliament Recommendation on criminal sanctions and Community law, B-0707/2001, 15.11.2001.

*Amendment 13* is a political statement that the Commission fully supports on the substance, as it gives priority to the adoption of the Commission proposal for a Directive over the adoption of the Council draft Framework Decision. Such a reference does not provide legal grounds for the enacting part of the proposal for a directive and should not be kept in the recitals.

*Amendment 18* adds a reference to instigation in the definition of 'activities' (Article 2 of the proposal). Such a reference features already in Article 4 of the proposal, dealing with sanctions. According to Article 4 of the proposal, the offences (as defined in Article 2 and referred to in Article 3) and 'the participation in or instigation of such offences' are punishable. A new reference to instigation in Article 2 would not add anything.

*Amendments 19 and 27* refer to the deletion of the Annex to the proposal.

The Commission decided to adopt the proposal for a Directive with an Annex for reasons of legal certainty. Annex to Article 3 covers the whole of the Community environmental legislation and selects, on an exhaustive basis, those obligations stemming from Community law (51 such Directives and Regulations) which constitute serious impairment of the environment.

This Annex has been considered as necessary as the Directive will oblige the Member States to provide for criminal sanctions within their national legal systems and that it would be impossible to provide for such criminal sanctions without them to be clearly defined.

*Amendment 20* refers first to 'harmful substances' and second to nuclear materials.

#### 1. 'harmful substances'

##### — 'substance'

The word 'substance' is a restrictive notion. It is, for instance, used in the 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<sup>(1)</sup>. The Amendment intends to give the largest possible scope of application to Article 3. The use of a restrictive notion would not serve this purpose. The proposal for a Directive, in the Article 3b refers to 'material' (English version). This large formulation must be kept.

##### — 'harmful'

This Amendment adds a new condition to the enforcement of the environmental Directives referring to the discharge, emission or introduction of a quantity of materials into air, soil or water. This is useless as these Directives constitute already a full consequent set of rules. This is dangerous because it would impose a new element to be proven before these Directives can be enforced.

#### 2. 'Nuclear materials'

The Amendment intends to cover nuclear materials. It is legally impossible to provide for criminal sanctions against unauthorised activities dealing with nuclear materials under the legal basis of the proposal for a Directive, Art. 175 TEC. This matter may have to be dealt with under the Treaty establishing the European Atomic Energy Community.

*Amendment 24* adds the word 'criminal' in the introduction of Article 4 of the proposal. This amendment has not been put to vote because it has been considered a linguistic one by the European Parliament.

However, the Commission considers that this amendment alters substantially the original text of the Commission's proposal.

<sup>(1)</sup> OJ L 262, 27.9.1976, p. 201.

In the context of the proposal for a Directive, most sanctions referred to are criminal ones. However, in some Member States, the distinction between administrative and criminal sanctions is sometimes, legally speaking, difficult to make, particularly regarding legal persons. This is the reason why the 'criminal' character of the sanctions is only referred to under letter a), referring to natural persons. Letter b), referring both to natural and to legal persons does not contain such a precision. The addition of the word 'criminal' to the text of Art. 4 could therefore create a problem of implementation of the Directive in these Member States.

### 3.5. Amended proposal

Having regard to Article 250, paragraph 2, of the EC Treaty, the Commission modifies its proposal as indicated above.

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