European Environmental Criminal Law

European Environmental Criminal Law: Do we really need it?

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Summary: The Commission argues that the criminal law needs to be used to punish offences in breach of Community law protecting the environment. The Commission believes that only by using the criminal law can the implementation deficit effectively be remedied. In this article the author argues that this duty towards criminal enforcement seems ineffective and can potentially even be counter productive. The traditional model for implementation of European legislation is still that European environmental law will draft the norms, but that Member States remain free in their choice of the implementation techniques. European legislation and case law has reacted in various ways with effective remedies to cope with the implementation deficit. However, the idea has never been that the implementation deficit would be cured by forcing Member States to impose a specific type of sanction. This would remove the traditional freedom to choose the correct implementation instrument by the Member State and in that sense it seems non-European. Moreover, the argument that the criminal law would be necessary to guarantee a correct implementation of European environmental law seems to neglect all the instruments that European law has developed so far to force Member States towards compliance. The author opines that the Commission, at least in the directive it proposed in 2001, neglected the important question of a correct theoretical foundation for a European intervention in the area of environmental criminal law. This contribution does not aim to provide a formal institutional-legal basis for a European environmental criminal law, but rather critically addresses whether such a European environmental criminal law would anyway be necessary. The focus is mostly on the proposal for a directive presented by the Commission in 2001. If the European Court of Justice were to adopt arguments concerning the lack of competence of the Council we may assume that one day the initiative taken by the Commission in 2001 will be continued.

I. Introduction

Recently Françoise Comte published an impressive paper on the Community competence for criminal environmental law.1 In this paper she examined the recent initiatives concerning environmental criminal law that have emerged from Europe and more particularly on the one hand the 2001 Commission initiative for a proposal for a directive on protection of the environment through criminal law2 and on the other hand the 2003 Framework Decision on the same topic adopted by the Council.3 In a very precise way Françoise Comte, administrator at the European Commission, explains the competences of the Commission under the so-called “first pillar” and compares them with the

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provisions of the Council under the so-called “third pillar”. As is meanwhile well-known, the fact that two parallel texts exist with respect to the same topic has caused a serious inter-institutional conflict and has even led the European Commission to file a complaint in March 2003 against the framework decision of the Council. In her paper Françoise Comte argues powerfully in favour of the Commission’s competences and provides several arguments to contest the legal basis of the framework decision. Moreover, she argues that the framework decision imposes new conditions on the criminal liability and would therefore violate community environmental law.

In this paper I am not going to discuss the institutional aspects concerning the criminal competence of the community legislator within the first or the third pillar. Since the case has been presented to the European Court of Justice it will have the final say in that matter. However, there is another question which is not explicitly addressed in Françoise Comte’s paper being what anyway the justification would be for any European competence in the field of environmental criminal law. I believe that the arguments provided for a European environmental criminal law as presented, for instance, in the draft directive are relatively weak and do not justify this far reaching measure. Moreover, within (environmental) criminal law there has been a lot of opposition to a European competence in (environmental) criminal matters and within the Member States serious criticism has been formulated e.g. on the draft directive on the protection of the environment to criminal law. Furthermore, law and economics scholars have become increasingly critical of the rather unbalanced European approach towards centralisation and harmonisation also in the area of environmental law. In this economic literature also balanced criteria are advanced for when European powers would make sense, at least from an economic sense.

One has the impression that the Commission, at least in the directive it proposed in 2001, neglected the important question of a correct theoretical foundation for a European intervention in the area of environmental criminal law. This contribution therefore does not aim to provide a formal institutional-legal basis for a European environmental criminal law (as did the one by Françoise Comte), but rather critically addresses whether such a European environmental criminal law would anyway be necessary. The focus will therefore mostly be on the proposal of directive presented by the Commission in 2001, since Françoise Comte argues that the Council would not have been competent to adopt its framework decision. If the European Court of Justice were to adopt these powerful arguments concerning the lack of competence of the Council we may therefore assume that one day the initiative taken by the Commission in 2001 will be continued.

II. Harmonisation of Environmental Criminal Law: Non-European

The proposal for a directive on the protection of the environment through criminal law has as its main aim forcing Member States to use the criminal law when certain activities are a breach of the rules of community law protecting the environment as set out in the annex. Hence, the idea of the Commission is that legislation implementing European environmental law should in the future be enforced through criminal law. Such an initiative seems to run counter to the nature of European (environmental) law and can therefore be qualified as “non-European”. The traditional basis for the harmonisation of environmental law in Europe was traditionally the use of the directive. The main advantage of a directive, so it is held generally in European law, is that it is binding on the Member States as far as the results are concerned, but not as far as the methods and instruments chosen. Member States therefore remained free to choose the instruments that they would wish to use to guarantee that the goals of the directive be achieved. That was equally the case as far as enforcement is concerned. Member States remained traditionally free to choose the legal enforcement instrument which would be optimal in their legal system to guarantee compliance with implementing legislation. This was, for instance, the approach in Council Directive 91/308 of 10 June 1991 concerning the prevention of the use of the financial system for the purpose of money laundering. This Directive provides for clear duties on Member States to ensure that money laundering as defined in the Directive is prohibited and forces Member States to determine the penalties to be applied for infringement of the measures adopted pursuant to this Directive, but it leaves – as usual – Member States free to choose the appropriate methods of implementation.

4 Nevertheless it is of course striking that since the Treaty of Amsterdam enforcement issues are clearly included in the third pillar and hence one can not escape the impression that the Commission with its proposal for a Directive and the case against the Framework Decision is trying to acquire competences in enforcement issues for which the basis seems doubtful.

5 Although she briefly advances the argument from the proposal of a directive, being that penalties currently provided for in national law to ensure that community environmental law is properly observed would not be sufficient (Comte, F., op.cit., p. 148-149).


8 Article 249 of the EC Treaty, al. 3 provides: “A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods”.

That seemed a rather smart starting point especially since the enforcement instruments used to guarantee e.g. compliance with emissions standards could be different for every Member State. Traditional European environmental law therefore took all these national differences into account and used the Directive to create a large area of flexibility. The flexibility especially applied to the instruments that the Member States would use to achieve the result that was prescribed by the Directive. Traditionally Europe therefore made (at least in the areas of its competence) the norms in European environmental law, but the enforcement mechanisms were left with the Member States. Europe controlled whether the Member States correctly implemented the directive (and in that sense there is a control of whether the enforcement mechanism chosen can be considered effective), but Member States remained largely free in the choice of instruments to achieve that goal.

A problem that of course arises and is meanwhile well-known in the literature is that there are always Member States that, for a variety of reasons, do not correctly implement (environmental) directives. The lack of implementation is not always linked to the desire to protect the national industry. In some cases the Member States simply could not meet the administrative duties corresponding with the implementation obligation. The contents and causes of this implementation deficit have been well documented. Therefore a major focus of European law during the past 20 years has been on the issue how implementation of European law can be improved by requiring a correct implementation from Member States. The evolution not only in primary legislation, but also in case law is indeed spectacular. Just a brief summary:

- Although Member States remain free in the choice of instruments for implementation of a directive, case law holds that the sanctions in case of a violation of implementing legislation should at least be effective, proportional and dissuasive.
- Case law has also held that the lack of effective prosecution against violators of implementing legislation can be considered as a violation of European law.
- In addition one can obviously point at the case law concerning direct and indirect effect of directives and the obligation of national judges and authorities towards an interpretation of national law in conformity with directives.
- Moreover, primary legislation has increasingly provided for instruments that the Commission can use against Member States that fail to implement directives. Especially the possibilities to force Member States to implement a directive by imposing a penalty payment can prove to be an effective deterrent; recent case law has shown that the European Court of Justice will also use this possibility.
- Finally one can of course mention the important case law on basis of which states can be held liable for damage that results from a wrongful (or lacking) implementation of European directives.

In sum: the traditional model is still that European environmental law will draft the norms, but that Member States remain free in their choice of the implementation techniques. Recent evolutions show that European legislation and case law has reacted in various ways with effective remedies to cope with the implementation deficit. However, the idea has never been that the implementation deficit would be cured by forcing Member States to impose a specific type of sanction. This would remove the traditional freedom to chose the correct implementation instrument by the Member State and in that sense it seems non-European. Moreover, the argument that the criminal law would be necessary to guarantee a correct implementation of European environmental law seems to neglect all the instruments that European law has developed so far to force Member States towards compliance.

III. Why European Environmental Criminal Law?

One has the impression that the use of the criminal law by the European legislator today is fashionable. It is already well known as an instrument to protect the financial

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12 ECJ 9 December 1997, Case C-265/95 (Spanish strawberries).
15 This was introduced by the Maastricht Treaty (see Jans, J.H., European Environmental Law, second edition (Europa Law Publishing: Groningen, 2000) 168 and has been applied inter alia against Greece: imposition of a penalty payment of €20,000, for each day of delay in implementing the measures necessary to comply with an earlier judgment of the Court (ECJ 4 July 2000, Case C-387/97 (Commission v. Hellenic Republic), ECR, 2000, I-5047).
16 For a discussion of this Francisco and Brasseele Pêcheur case law see Van Gerven, W., “Bridge the unbridgeable: community and national tort laws after Francovich and Brasseele”, International Commercial Law Quarterly, 1996, 507.
17 Compare in this respect e.g. Corstens, G. and Pradel, J., European Criminal Law (Kluwer Law International: The Hague, 2002) 532-533: “Such a method requiring Member States to use criminal penalties is compatible with neither the character of a directive, nor the opinion that the Communities do not have authority to require Member States to impose criminal penalties.”
18 A similar criticism was also formulated by Buruma, Y. and Somsen, J., op.cit., NJB, 2001, 795-797 and by Corstens, G. and Pradel, J., see the quote in previous footnote.
interests of the Community,¹⁹ but the interests of the criminal law fit probably also in a hard-to-stop trend towards a further harmonisation of criminal law and criminal procedure. Apparently environmental criminal law cannot escape this tendency. In the recent directive concerning emission trading in greenhouse gases Art.16 even prescribes fixed sanctions that the Member States have to impose in case certain emission limits are violated.²⁰

The reasons for the imposition of a duty towards criminal enforcement by the Member States are clearly presented in the proposal for a directive presented by the Commission on 13 March 2001. The Commission holds: “Experience has shown that the sanctions currently established by the Member States are not always sufficient to achieve full compliance with Community law. Not all Member States provide for criminal sanctions against the most serious breaches of Community law, protecting the environment. There are still many cases of severe non-observance of Community law on the protection of the environment which are not subject to sufficiently dissuasive and effective penalties.”

The Commission, moreover, argues that criminal law is really necessary because other sanctions could not reach the same goal: “In many cases, only criminal penalties will provide a sufficiently dissuasive effect. First, the imposition of criminal sanctions demonstrates a social disapproval of a qualitatively different nature compared to administrative sanctions or a compensation mechanism under civil law. It sends a strong signal, with a much greater dissuasive effect, to offenders. For instance, administrative or other financial sanctions may not be dissuasive in cases where the offenders are impecunious or, on the contrary, financial very strong.

Second, the means of criminal prosecution and investigation (and assistance between Member States) are more powerful than tools of administrative or civil law and can enhance effectiveness of investigations. Furthermore, there is an additional guarantee of impartiality of investigating authorities, because other authorities than those administrative authorities that have granted exploitation licences or authorisations to pollute will be involved in a criminal investigation.”

Therefore the Commission argues that the criminal law needs to be used to punish offences in breach of Community law protecting the environment. The Commission therefore believes that only by using the criminal law can the implementation deficit effectively be remedied. This idea, so it seems, is rather naïve and, so I will argue below, this duty towards criminal enforcement seems ineffective and can potentially even be counterproductive.

IV. Naïve Ideas on Criminal Law

The Commission argues that “only criminal penalties will provide a sufficiently dissuasive effect”. The argument apparently is that when Member States would be forced to introduce criminal penalties to back up implementing legislation, this would automatically improve the implementation of European environmental law. This idea shows a rather naïve belief in the effectiveness of the criminal law and constitutes, moreover, a rather outdated vision concerning the various enforcement instruments that can be used to guarantee compliance with (European) environmental law. Today, in many Member States administrative sanctions are used and have often proven to be at least as effective in the “war on environmental crime” as criminal sanctions. Moreover, the European Commission apparently assumes that the simple imposition of criminal penalties in legislation will also guarantee its application, which is, of course, hardly the case.

The idea that only criminal law can provide a sufficiently dissuasive effect was perhaps realistic 20 years ago when environmental criminal law in many European countries had just come into existence. This idea corresponded with the structure of environmental criminal law at that time: environmental law was new and so was environmental criminal law; thus environmental criminal law at that time often consisted merely of sanctions punishing the non-compliance with administrative obligations. Many of these sanctions were disproportionate or did not adequately reflect the protected ecological interests in a differentiated manner. After many years of experience with environmental criminal law legal practice in many Member States showed that the criminal law can be an effective instrument to deter environmental pollution, but then only in those cases where this weighty instrument is indeed really necessary. For other cases other instruments, such as administrative sanctions can be far more effective, differentiated and proportionate.

It is, by the way, striking that the Commission argues in the proposal for a Directive that in many cases only criminal penalties will provide a sufficiently dissuasive effect. The question arises: what is the basis for this strong statement of the Commission? Have they undertaken any empirical research to back up this statement that “only criminal penalties will provide a sufficiently dissuasive effect”? The experience in the past was, to the contrary, that the mere criminalisation of environmental pollution apparently did not prove to be an appropriate remedy.

The result of this generalised criminalisation was that


²⁰ See Art. 16 of the Directive of the European Parliament and of the Council establishing a scheme for green house gas emission allowance trading within the Community of 13 October 2003, OJ 25.10.2003 L275/32: this provides explicitly for an excess emissions penalty of €450 for each tonne of carbon dioxide equivalent emitted by the installation for which the operator has not surrendered allowances.


many felt that the heavy instrument of the criminal law was sometimes inappropriate and, giving the lack of other appropriate sanctions, often enforcement failed altogether. Therefore in criminal legal doctrine it is now held that the criminal law should have a subsidiary role and be used as an *ultimum remedium*. For other, less serious cases, more appropriate administrative sanctions could be used. This differentiated model has led to positive results in Member States, such as the Netherlands, where primarily administrative sanctions are applied. But this tendency towards more administrative enforcement is not only to be seen in the Netherlands, but Europe-wide.

This primary interest today in administrative sanctions can be easily understood. Administrative authorities often have greater expertise and information than traditional law enforcement authorities. The police often lack the necessary information and expertise for effective environmental law enforcement and they are often overburdened with other tasks such as the enforcement of traditional crimes. The Commission apparently still starts from the naïve belief that introducing criminal sanctions in legislation will solve all problems, thereby also totally neglecting the limited capacity of the traditional police forces. Moreover, the costs of criminal procedure can be substantially higher than of administrative procedure. Of course the Commission is right in arguing that the criminal law may provide “an additional guarantee of impartiality of investigating authorities, because other authorities than those administrative authorities that have granted exploitation licences or authorisations to pollute will be involved in a criminal investigation.” But this argument is in fact a false one: in most Member States it is, of course, not the authorities that grant the exploitation licences or authorisations to pollute that will be involved in the criminal investigation, but, precisely to guarantee this impartiality, other administrative authorities.

Of course administrative sanctions cannot be the only enforcement tool in all environmental cases, although I believe that administrative sanctions (for instance relatively high administrative fines or the shut down of an installation or company) can have quite a sufficiently dissuasive effect. For the more serious offences criminal law will of course still be necessary. The problem in the Commission’s proposal is that the Commission now wishes to force Member States to make many breaches of community law criminal offences, without any differentiation. Of course the Commission could respond that the offences for which it wishes to impose criminal sanctions (the ones listed in Art. 3) are not merely administrative violations, but for instance:

a. the discharge of hydrocarbons, waste oils or sewage sludge into water
b. the discharge, emission or introduction of a quantity of materials into air, soil or water . . .
c. the discharge of waste on or into land or into water, including the operation of landfill

as far as they breach the rules of community law protecting the environment. But still it is not made clear why administrative sanctions would not be a sufficient deterrent e.g. in case of an unlawful operation of a landfill.

This overestimation of the role of the criminal law in the enforcement of environmental law is not only naïve because the Commission wrongly assumes that the use of the criminal law would be the only way to guarantee an effective compliance; the Commission apparently also rather naïvely assumes that as soon as a legislator introduces criminal penalties in implementing legislation, this will guarantee an effective enforcement of that particular law. Of course, I have already referred to European case law forcing Member States to take, if necessary, effective, dissuasive and proportionate sanctions in order to enforce Community law. But, in most Member States, the prosecution is still governed through the so-called opportunity principle and there is no duty to prosecute. The mere fact of imposing criminal sanctions in legislation does not of course mean that these criminal sanctions will then be applied effectively in practice. Even if there were prosecution, this will not remove judicial discretion as far as the sanction is concerned. Even if Europe were to harmonise completely the material provisions of environmental criminal law, as well as the sanctions, there would still be differences as far as the prosecution and sanctioning policy in practice is concerned.

There is, moreover, a striking contradiction in the proposal for the Directive itself as far as the environmental crimes that are committed by legal persons are concerned. Article 4 of the proposed directive provides that as far as the

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24 See in this respect the results of the study concerning the sanctions applicable on the non-observance of European directives by Faure, M. and Heine, G., *Criminal Penalties in EU Member States environmental law* (http://www.europa.eu.int/comm/environment/crime/criminal_penalties.pdf).

25 In the Netherlands therefore a project was started granting administrative authorities the right to impose a penalty, referred to as “transaction” for specific environmental offences. For an evaluation of this project see Blomberg, A.B., Verberk, S. en Michiels, F.C.M.A., *Een gunstig aanbod. Een onderzoek naar de werking van het transactiesysteem* (Centrum voor Ongevingsrecht en Beleid: Utrecht, 2003).


29 Frank Easterbrook therefore argued that these kind of mandatory rules forcing judges to apply a certain sanction are always inefficient and will moreover in most cases be circumvented by judges if they consider that the obligatory sanction is not the appropriate one for the particular offence. See Easterbrook, F., “Criminal procedure as a market system”, *Journal of Legal Studies*, 1983, 293-338.
sanctions are concerned, Member States shall provide for criminal penalties, involving in serious cases deprivation of liberty as far as natural persons are concerned. It follows: “as concerns natural and legal persons, where appropriate, Member States shall provide for fines, exclusion from entitlement to public benefits or aid, temporary or permanent disqualification from the practice of commercial activities, placing under judicial supervision or judicial winding of orders”. If sanctions were to be applied against legal persons, it would of course be logical that the Commission would also examine the possibility of introducing the criminal responsibility of legal persons. In the explanatory memorandum, the Commission indeed recognises that “it is essential for effective enforcement of environmental law protecting the environment that legal persons can be held liable and that sanctions against legal persons are taken throughout the Community”. However, the Commission apparently does not want to introduce a generalised obligation to introduce the criminal responsibilities of legal entities yet, because: “for some Member States, it might be difficult to provide for criminal sanctions against legal persons without changing fundamental principles of their national legal systems. Therefore, Member States would be able to foresee sanctions other than of criminal nature, as long as they are effective, proportionate and dissuasive.” This reasoning is rather remarkable: as far as the legal entities are concerned, the Commission is apparently satisfied with the application of non-criminal sanctions, as long as they are effective, proportionate and dissuasive. Does this then not deviate from the original point of view, equally stated in the explanatory memorandum that “only criminal penalties will provide a sufficiently dissuasive effect?”. This shows once more the apparent inconsistencies in the proposal itself.30

V. Ineffective and Disproportionate

An important question that arises when reading the proposal for the Directive of the Commission is whether this duty that will be imposed on Member States to ensure that certain activities will be criminal offences necessarily means that administrative enforcement would hence be excluded in those particular cases. The proposal for a directive is not particularly clear on that point. A Dutch author, de Lange, suggests that administrative enforcement would still be possible.31 But another Dutch scholar, Koopmans, with whom I agree, correctly holds that if that were the case this would remove the whole basis for the initiative of the Commission.32 Indeed, if all Member States could merely introduce criminal offences on paper, but, in practice, would still have the freedom to use administrative enforcement, this would mean that the goals of the Commission’s initiative could never be reached. The Commission suggests that only criminal penalties will provide the necessary dissuasive effects. I therefore fear that one cannot understand the proposal for a directive unless the Commission not only wants to introduce a duty to impose criminal sanctions, but also seeks that in these cases there would effectively be enforcement through the criminal law. This seems a logical consequence of the aforementioned idea of the Commission that only criminal penalties “will provide a sufficiently dissuasive effect”.

Even in this interpretation the proposal for a directive is potentially ineffective because it would mean that in those countries in which there is a lot of experience with (rather successful) administrative enforcement of environmental law, such as in the Netherlands, this would no longer be possible. I would fear that in that case we simply return to the environmental dark ages where one had a formal criminal sanction included at the end of every environmental law, but nothing happened in practice.33 The European Commission would have done better to take a good look at the criteria for criminalisation and the literature on the integrated enforcement of environmental law34 to realise that this rather unbalanced and one-sided focus on criminal law has never been proven effective in actual practice.

The question also arises how the model that the European Commission proposes should function in legal practice. A great deal of Member States’ environmental law does indeed consist of implemented European directives, but that is certainly not the case for all environmental law. A consequence of the proposal for a directive would be that the new “European environmental criminal law” with a primary focus on criminal enforcement would apply for those parts of environmental law that constitute an infringement on implementation legislation, whereas only for environmental crimes that would not constitute an infringement of European implementation legislation could a more differentiated approach (based on a combination of administrative and criminal enforcement) be developed. Some law and economics scholars have defended such a division, whereby European harmonisation efforts (if at all justified in this area) would be limited to transboundary issues and national law would apply to issues which remain confined within the national territories.35 A disadvantage of this approach is, of course, that one would come to a division in enforcement of environmental law. Therefore, one can understand that some would prefer one common enforcement framework that would apply for both the “European” as well as for “national” environmental

33 A similar criticism is also formulated by Buruma, Y. and Somsen, H., NJB, 2001, 796.
34 See Blomberg, A.B., Integrale handhaving van milieurecht, een juridische studie over de handhaving van milieurecht in een democratische rechtstaat (Boom: Den Haag, 2000).
criminal law. But the disadvantage of this approach is that Member States would then be forced to a total change of enforcement strategy as a result of an adaptation to European wishes. In order to avoid these kinds of incongruities it seems better to stick with the old model whereby Member States remain free to choose the form and means for the implementation of European directives.

It is rather surprising to note that the European Commission does not seem to be affected by the strong criticism which has been formulated inter alia by scholars from criminal law on these harmonisation efforts with respect to (environmental) criminal law. Similar criticisms to the one I formulate in this paper have indeed been formulated by others as well, but those do not seem to disturb the European Commission. One should, however, realise that this duty towards criminal enforcement, as laid down in the proposal for a directive could be quite counter-productive. In this respect one should not forget that in some Member States administrative enforcement allows for the application of an elaborate choice of reparatory sanctions and measures which are not always available in environmental criminal law. The sole focus on criminal enforcement would therefore mean that these reparatory sanctions and measures which are very useful in the area of environmental law (because they focus on the restoration of the pollution caused) might not be available any longer.

Moreover, the approach proposed by the European Commission also seems counter-productive since there are today still considerable differences between the Member States as far as the enforcement of environmental law is concerned. In some Member States, for instance in the UK, administrative sanctions are almost unavailable for environmental offences and the literature has just recently been proposing the introduction of administrative enforcement as being more efficient. The effect of the proposed Directive forcing Member States towards criminal enforcement could be interpreted as a signal that good initiatives towards a more differentiated and balanced approach of environmental law enforcement (as the one now proposed in the UK) would immediately be stifled. In that respect the duty towards criminal enforcement of environmental law is not only naïve, but potentially even ineffective and counter-productive.

VI. Symbolic Legislation?

The tragedy is that one could even wonder whether the initiative of the Commission towards a duty to introduce criminal sanctions should not rather be considered as a desperate effort because fundamental solutions to the implementation problem cannot be achieved. I have argued that if Europe really wished to achieve a uniform environmental quality it should emphasise harmonisation of environmental quality standards and control of those standards. However, this would also mean that Europe would effectively control whether the Member States can indeed achieve the imposed quality standards. In some cases Europe (accidentally) discovered that, on the basis of a violation of quality standards, a procedure could be started. For instance, because of the drinking water quality in Verviers. However, today the Commission does not possess the competences to actually control environmental quality in all the various Member States. Europe is apparently still not ready for a truly federal model whereby the European Commission would receive competences to control environmental quality in the Member States. Arguments based on sovereignty of the Member States are always advanced to oppose this idea. However, I believe that this constitutes the only true solution for European environmental law in the longer term, if one wishes to avoid that European environmental law remains limited to an implementation on paper. A true harmonisation of environmental quality supposes also, of course, that environmental quality can be controlled, in the same way that e.g. an Environmental Protection Agency in the US can do.

That is exactly my objection to the approach of the Commission in the proposed Directive: apparently the only solution one sees for the implementation deficit is the rather simplistic vision that criminal law enforcement should solve everything. One can fear that if such a duty to criminal law enforcement were indeed introduced, this would in no way lead to any improvement of environmental quality in Europe. But one can understand why the European Commission nevertheless introduced such a proposal: the Commission seems courageous and brave since it forces all Member States to the use of the criminal law. As symbolic legislation this proposal for a directive is therefore fine. The tragedy is however, that this shifts the attention away from the real debate, i.e. why the European Commission does not control actual environmental quality in the Member States. If one wishes to improve environmental quality in Europe, that should be the issue at stake, not the symbolic introduction of criminal sanctions.

36 Such a common enforcement framework was advanced e.g. by Bizeveld, G., Report for the Dutch Association of Environmental Law (Vereniging voor Milieurecht), and presented at a meeting in Utrecht on 25 June 2003 (to be published). See also Bizeveld, G.A., Duurzame milieuwetgeving. Over wetgeving en bestuurlijke organisatie als instrument voor behoud en verandering (Boom:The Hague, 2002).

37 See in this respect also Koopmans, I., i.e., p. 8.


VII. Economic Justification for Harmonisation?

Let us now briefly address what kind of arguments could be advanced in favour of a European harmonisation of environmental criminal law. One argument, advanced in the proposed Directive is that criminal law harmonisation would be necessary to improve the implementation of European directives. That argument was extensively discussed above (see III.-VI.) and rejected. However, in the literature other arguments are advanced for this harmonisation. More particularly Biezeveld has regularly argued that harmonisation would be necessary to enable an adequate protection of the environment and for the internal market.44 Let us briefly look at both arguments using the law and economics perspective concerning the subsidiarity principle.45 This literature held that an improvement in environmental quality can at least from an economic perspective, not constitute an argument for harmonisation. Indeed, the mere fact that the environment is considered an interest protectable by law does not explain why Europe should grant this protection instead of national Member States. There are of course serious economic arguments that can be advanced in favour of centralisation, but these are usually limited to a fear of transboundary externalities or the race for the bottom.46 Note, by the way, that these arguments are also advanced by criminal lawyers as conditions for an European Corpus Juris Criminalis.47

In the absence of those, economists have difficulties to see why Europe should paternalistically enforce a high level of protection. Moreover, law and economics scholars also point at the fact that the pleas of so-called green Member States towards increased environmental protection at the European level often merely serve the interests of national industries in those “green Member States”. One can, in that respect, refer to e.g. the German green lobby in Brussels at the occasion of the coming into being of the IPPC Directive in favour of a harmonisation of emission limit values. This seemed to have more to do with the creation of artificial barriers to entry for southern competitors than with truly environmental protection.48 The argument that harmonisation would be necessary to grant a high level of protection is therefore less convincing than it seems at first sight.

The same is true, however, for the second argument which is often advanced, being that the internal market would be endangered without a harmonisation of environmental (criminal) law. This beautiful, seemingly economic, argument has been used very often by the Commission to justify harmonisation. The basic idea was that differences in legislation would lead to differing marketing conditions, which would in turn endanger the internal market. Economists have, however, indicated that there will indeed often be differences in market conditions, but these are not only related to differences in legislation, but also to totally different circumstances, such as climate, infrastructure and social and fiscal regimes. These differences are, moreover, not undesirable per se.49 It is indeed as a result of these differences in market conditions that interstate trade exists. These differences only endanger the internal market when differences in legal rules endanger the free movement of services, goods or persons. That argument, hence, justifies a harmonisation of e.g. product safety standards because sometimes pointless incompatibilities that are not linked to differing preferences of citizens can indeed endanger interstate trade.50 However, whereas this argument may justify the standardisation of e.g. electric wires (which will facilitate a toaster made in the UK to be marketed in Germany) this argument is not valid for a harmonisation in the area of private law or criminal law. Differences in that respect do not necessarily jeopardise interstate trade. This would only be the case if one Member State were e.g. to refuse or restrict the import of products or services from other states as a result of differing legislation. In that case differences would endanger interstate trade and a transaction cost argument in favour of harmonisation could be made. In such a case this would, however, merely be an argument in favour of harmonisation of technical standards and not an argument for a general harmonisation of criminal law.

In sum, although there can of course be European legal arguments in favour of either Commission or Council competences in the area of environmental criminal law,51 from an economic perspective there is no clear reason why environmental criminal law within Europe should be harmonised.

VIII. And the Subsidiarity Principle?

Although the Commission argues strongly in favour of a legal basis for its competence in the area of environmental

51 The proposal for the directive of 13 March 2001 explicitly discusses the legal basis as does the Council Framework Decision of 27 January 2003.
criminal law the question still arises how this relates to the subsidiarity principle. As I mentioned above, many law and economics scholars have tried to provide an interpretation of the subsidiarity principle in accordance with principles of economic efficiency. One of their arguments is that in the absence of a race to the bottom or transboundary externalities flexible solutions should be preferred whereby differing preferences between citizens of the Member States are respected. This argument is particularly strong in the area of criminal law where the link with national preferences and legal culture is probably even stronger than in the area of private law. Many criminal lawyers have strongly resisted a general harmonisation of criminal law. This is understandable since preferences of the citizens in this area seem to be quite different. As a result of these differences in legal culture, also in the area of environmental law enforcement, one can note, as mentioned above, that in one Member State criminal law enforcement will be more developed than in another, which may rely more strongly on administrative law enforcement. That obviously does not mean that enforcement efforts are necessarily more successful in one Member State than in the other. Hence it seems more sensible to take into account these existing differences and merely control the end result, being that, no matter what instrument is used by a Member State, a uniform environmental quality (if that were the goal to be reached) can be achieved. In this respect Pierre Legrand has rightly pointed at the difficulties of harmonising private law, given the differing legal cultures. Some argue that he overstates these differences and underestimates the potentials for harmonisation. On the other hand the differences as far as legal culture are concerned are probably even stronger in the area of criminal law than in private law. Thus one should not be overly optimistic with respect to the potential for harmonisation in this area.

Moreover, taking the subsidiarity principle seriously in this area also means that a serious cost/benefit analysis should take place as well. The costs of harmonisation of environmental criminal law can be huge. In this respect one should consider not only the resistance from specific interest groups involved, but also that differences today are still very large, which would make an attempt towards harmonisation quite costly. The benefits of such a harmonisation are moreover, quite doubtful. If the improvement of the implementation of European (environmental) legislation were the goal to be achieved the appropriate instrument is not (as I indicated above in IV-V) a harmonisation of environmental criminal law. Other instruments may well achieve this goal at lower costs.

IX. Council Framework Decision or Proposal for a Directive?

The criticism I have formulated so far is mainly addressed at the proposal for a directive launched by the Commission on 13 March 2001. This Directive contains in its Art. 3 an obligation for Member States to create criminal offences if certain conditions are met and community environmental law is violated. That technique is, so I have argued above, highly objectionable. There are, however, other solutions and techniques possible. One could for instance wish to achieve an equal minimum standard for the protection of the environment through the criminal law. In this respect the recommendations formulated by the International Association of Penal Law could serve as a useful example.

Another interesting example worth mentioning is the Convention on the Protection of the Environment through Criminal Law adopted by the Council of Europe on 4 November 1998. If one compares the approach followed in the Convention with the approach proposed by the Commission, the contents of the Convention seems far more balanced. One indeed has the impression that this

52 The arguments are very well presented in the paper by Comte, F. [2003] EELR 147-156.


Convention follows the dogmatic literature on environmental criminal law which has proposed a differentiated and balanced use of the criminal law.\(^5^9\) The Convention focuses on certain infringements or endangerments with respect to ecological interests of a very specific nature. Only in those cases the convention accepts criminal sanctions.\(^6^0\) In all other cases Art. 4 of the Convention stipulates that each party “shall adopt such appropriate measures as may be necessary to establish as criminal offences or administrative offences, liable to sanctions or with measures under its domestic law...”. Hence, the Convention clearly also sees the potential of administrative sanctions. Note that e.g. the unlawful discharge or emission of certain substances into air, soil or water can be an administrative offence under Art. 4 of the Convention whereas according to the proposal for a directive this should be a criminal offence.\(^6^1\) Moreover, the Convention on the Protection of the Environment through Criminal Law obviously does not limit itself to violations of European environmental law, so that the danger for a division in environmental criminal law is avoided.

The reason I referred to this Convention on the Protection of the Environment through Criminal Law is that the Council Framework Decision of 27 January 2003 refers in its Preamble explicitly to the Convention and goes a far way in the direction of the Convention.\(^6^2\) The Council Framework Decision originated from a strange initiative taken by the Kingdom of Denmark for a Council Framework Decision with respect to serious environmental criminality.\(^6^3\) The original text was rather curious and focused merely on “serious criminality”. That would, according to the text, be environmental criminality where there are:

“acts or omissions, under aggravating circumstances and in breach of national environmental legislation consisting in:
(a) pollution of air, water, soil or subsoil resulting in substantial damage to the environment or presenting an obvious risk thereof; or
(b) storage or disposal of waste or similar substances resulting in substantial damage to the environment or presenting an obvious risk thereof.”

This formulation was of course, with a view on the lex certa principle, which requires sufficient specificity of criminal provisions, not very well chosen, to say the least. The final version of the Council Framework Decision is substantially better. Moreover, the Council was so wise to take into account the work already done by the Council of Europe and more or less copied the most important provisions of the Convention. The Commission in its proposal for a directive, however, does not refer to the existence of the Convention what so ever, which seems, to say the least, strange. The Council Framework Decision e.g. also has intentional offences in Art. 2 and negligence offences in Art. 3, just as the Convention of the Council of Europe. The Council Decision did not copy Art. 4 of the Convention that deals with “other criminal offences or administrative offences”. But the fact that the Council decision limits itself to the Art. 2 and Art. 3 offences implicitly means that only in those (rather limited) cases criminal offences have to be established, which leaves more flexibility to the Member States. Moreover, it is definitely not the intention of the drafters of the Framework Decision to have criminal prosecution and sanctioning in every case of an offence as described in the Framework Decision. The Framework Decision still seems to leave the possibility open of administrative sanctioning, just as the Council of Europe Convention does.

Coming back to the contribution of Françoise Comte it is remarkable that she argues against the Council Framework Decision not only on the grounds of institutional competences (an area that I will not discuss), but also because she holds that the Framework Decision by the Council does not substantially contribute to the protection of the environment in the European Union.\(^6^4\)

There are a few specific points that Françoise Comte makes concerning the contents of the Framework Decision that merit a reaction. First of all it is striking that Françoise Comte sees, just as the proposal of the Commission, the protection of the environment through criminal law merely as a means to improve implementation of European environmental law. She, for instance, argues that “the penalties currently provided for in national law to insure that community environmental law is properly observed are clearly not sufficient”.\(^6^5\) This is a surprising statement. It is unclear whether she refers in that respect to the administrative or criminal sanctions that would actually be provided for. Moreover, together with Heine we undertook research for the Commission in which we identified the available sanctions in case of violation of implementing legislation concerning certain directives. The conclusion of that study was definitely not that the penalties currently provided for in national law would be “clearly not sufficient”.\(^6^6\) Hence, the empirical backing for this statement seems rather weak. Moreover, this argument neglects that penalties which are “clearly sufficient” cannot only be found in the criminal law.

Françoise Comte further asserts that the Council Framework Decision would introduce new conditions for the implementation of Community law. She argues that there only be criminal liability if certain specific conditions are met, such as “unlawful” serious injury to any person and/or “substantial damage”. This would, so she holds, constitute a violation of community environmental law, since this


\(^{6^0}\) Articles 2 and 3 provide for intentional and negligent offences, but there is a lot of flexibility with respect to the punishment of negligent offences. Only in those cases Art. 6 provides that criminal sanctions will apply.

\(^{6^1}\) See Art. 3, a and b of the proposal for a directive.

\(^{6^2}\) See for a more general discussion of the importance of Framework Decisions for Criminal Law, Kirsten, F.G.H., L. and Corstens, G. and Pradel, J., European Criminal Law, 461-587.


\(^{6^5}\) See Comte, F. [2003] EELR 149.

would provides for absolute prohibitions. Here I have the impression that the argument suffers from a serious misunderstanding concerning the Council Framework Decision. The Commission has typically argued that criminal law would be necessary as an instrument to improve implementation of European (environmental) law. Hence, this neglects that neither the Convenant of the Council of Europe, nor the Council Framework Decision are seen as instruments for the implementation of European environmental law. That is a totally different debate. In other words: the duty of Member States to implement environmental directives and impose effective, dissuasive and proportionate sanctions remains in existence notwithstanding the Council Framework Decision of 27 January 2003. This Council Framework Decision does not present the use of criminal law as an instrument to improve compliance. Indeed, it only aims at establishing minimum standards for the protection of the environment trough the criminal law. But there is no discussion of whether that for acts that fall below this minimum standard (and hence where no criminal law should be applied) the duty for Member States to implement correctly European directives still exists. Hence, the arguments made by Françoise Comte that the Council Framework Decision would introduce additional conditions for implementation can be seriously questioned. The Council Framework Decision, just as the Convention on the Protection of the Environment through Criminal Law try to do something completely different, being to establish that certain environmental violations (whether they constitute a violation of implementing legislation or not) having serious consequences must be established as criminal offences subject to appropriate sanctions.68

There could have been other arguments, not discussed yet, in favour of such a common frame of reference for environmental criminal law. This relates to the simple fact that many conventions on the international cooperation in the field of criminal affairs (e.g. with respect to extradition) used to have a requirement of “double incrimination”.69 Hence, the attempt to come to a common formulation of the most important environmental crimes seemed to make sense from a perspective of international cooperation in criminal affairs. This argument can be found in the Preamble preceding the Convention on the Protection of the Environment through Criminal Law70 as well as in the Council Framework Decision.71 However, even this argument is not particularly strong since more recent conventions on mutual assistance do no longer require a double incrimination. In this respect I can, for instance, also point at the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.72 For a large number of offences listed in the Framework Decision a European arrest warrant may be issued and a surrender procedure applies without the necessity of having a double incrimination. This is particularly important since Art. 2, 2 lists among the offences that give rise to surrender pursuant to a European arrest warrant “without verification of the double criminality of the act” also:

- Environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties.”

Since environmental crime is therefore explicitly listed as being excluded from the double criminality requirement even that argument could not help the justification of a harmonisation of environmental criminal law in Europe.

In sum, Françoise Comte seems to overlook the fact that the Commission proposal of 31 March 2001 considers criminal law as an instrument to improve implementation of European environmental directives, whereas the Convention of the Council of Europe and the Council Framework Decision are not (directly) aiming at remedying the implementation deficit, but at another goal. These instruments seem to aim at the constitution of a minimum common frame of reference for the most serious environmental crimes, which may facilitate the international cooperation concerning (transboundary) environmental crimes.73 Hence, the arguments which consider the Framework Decision as an implementation instrument74 seem neither correct, nor fair. It is, of course, not excluded that Member States can do more (or take other measures) than provided for in the Council Framework Decision if this were necessary to guarantee an effective implementation of European environmental directives. That is simply a different issue.

X. Concluding Remarks

I took the highly interesting and challenging article of Françoise Comte concerning criminal environmental law and community competence as cause for formulating some further thoughts on European environmental criminal law. In this paper I have tried to show that the arguments advanced by the Commission in its proposal for a directive on the protection of the environment through criminal law for the use of criminal sanctions are not very convincing. If one wishes to remedy the implementation deficit other


68 See the Preamble to the Convention on the protection of the environment through criminal law and Art. 5 of the Council Framework Decision.

69 For an overview of these conventions see Van der Wilt, H., “Instruments of international cooperation in the field of criminal affairs”, in Faure, M. and Heine, G., Environmental criminal law in the European Union. Documentation of the main provisions with introductions (Max Planck Institute for foreign and international criminal law: Freiburg im Breisgau, 2000) 429-443 as well as Corstens, G. and Pradel, J., European Criminal Law, 41-215.

70 “Wishing to take effective measures to ensure that the perpetrators of such acts do not escape prosecution and punishment and desirous of fostering international co-operation to this end”.

71 See Consideration 9: “Member States should establish wide-ranging jurisdiction with respect to the said offences in such a way as to avoid that physical or legal persons would escape prosecution by the simple fact that the offence was not committed in their territory”.

72 OJ 18.07.2002 L190/1.


74 And hence argue that new preconditions would be formulated, see Comte, F. [2003] EELR 156.
instruments seem to be better to reach that goal. A mere focus on criminal sanctions can even be considered counter-productive. Experiences in Member States have shown that a more balanced approach, based on an optimal combination of various enforcement techniques may lead to far better results than a blind trust in the criminal law.

The European tendency to make more use of the criminal law in the enforcement of European law is certainly not limited to the 2001 Commission’s proposal for a directive or the 2003 framework decision. Indeed, the Commission presented similar initiatives in the aftermath of the Erika/Prestige disasters in the field of oil pollution. For instance on 5 March 2003, a proposal for a directive on ship-source pollution and on the introduction of sanctions, including criminal sanctions, for pollution offences was presented by the Commission and, on 2 May 2003, a proposal for a council framework decision to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution was presented by the Commission.

Although these documents do still pose many other problems, it shows that the introduction of a duty on member states to introduce criminal offences and sanctions is certainly not a one time event. The analysis may therefore have importance for these other areas as well.

Although there are very few arguments to plead in favour of a European intervention in the area of environmental criminal law as far as improving implementation is concerned, there may be good reasons to try to come to an agreement on the most important environmental violations which have serious consequences. The argument for a (minimum) harmonisation of these serious environmental crimes would not be an economic one (based on a fear for a race to the bottom or internal market considerations), but might be either pragmatic or based on principle. The pragmatic argument could be that trying to come to a common formulation of serious environmental crimes may foster international cooperation in the area of (transboundary) environmental crime. The principle argument would be that it would be useful that a common standard exists as far as the formulation of the most important environmental crimes. These goals are precisely achieved through the Convention of the Council of Europe and the Council Framework Decision of 27 January 2003.

Of course I am aware that the Council Framework Decision of 27 January 2003 led to a lot of nervousness in Brussels and even to a formal challenge by the Commission before the European Court of Justice. I have not discussed the arguments powerfully presented by Françoise Comte in her article that the Council would have lacked competences in this area and should have respected the Commission’s proposal. Soon the European Court of Justice will have the final say in this area. I merely looked at the contents of on the one hand the Commission’s proposal for a directive and on the other hand the Council of Europe Convention and the subsequent Council Framework Decision of 27 January 2003. Comparing those I am, from the perspective of environmental criminal legal doctrine, much more in favour of the approach taken in the Council Framework Decision. One may therefore hope that even if the Commission were to win its case before the European Court of Justice it would afterwards seriously reconsider its position. Perhaps it could then come to the sensible conclusion to use its competences to simply copy the contents of the Council Framework Decision. That seems to be a far better instrument which would in the end probably make the environment much better off.

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77 Although that pragmatic argument is not particularly strong since I indicated the increasing tendency to facilitate international cooperation, also in the area of environmental crime, even without a double incrimination requirement.
78 Nevertheless it is not at all clear on what legal grounds the Commission wants to base its competence to force Member States to the introduction of criminal penalties. This legal basis is especially doubtful now that enforcement issues have been explicitly included in the third pillar.