

The Emerging European Community / Union Competence in Respect of Environmental Crime

Neither the European Commission, nor any other European Union institution, has ever proposed full-scale harmonization of all aspects of national criminal law relating to environmental crime. However, the Commission has for some time advocated the adoption of common minimum standards on environmental crime including, in particular, the identification and definition of common offences and a minimum common level of sanction to apply across all Member States in respect of the most serious culpable breaches of Community environmental legislation. In this regard, the Commission has long expressed its intention to ensure a more coordinated use of criminal law as a means to enhance the enforcement of Community environmental obligations. The recent adoption of an EC Directive on the Protection of the Environment through Criminal Law¹ (PECL Directive) remains controversial in terms of the Community's unclear competence under the existing EC Treaty to legislate in this area. Indeed, achieving political agreement on the adoption of the PECL Directive marks a fundamental shift in the position of Member States in respect of the Community's criminal competence generally, as the Member States had previously taken active steps to clarify that criminal competence remains exclusively with them and had sought assurances during the course of the various amendments to the EC's founding Treaty to confirm that there is no Community competence to approximate national criminal rules. This changed position may reflect the recent findings of the European Court of Justice (ECJ) in this regard. In its landmark judgment from 2005, the ECJ has taken the view, despite the lack of any express Community power, that there is an implied power under Title XIX of the EC Treaty to adopt legislative measures on environmental crime, at least as regards measures requiring Member States to criminalise certain environmental offences where this is deemed essential in order to achieve the Community's environmental protection objectives. Such controversy as persists, and indeed this entire Community legislative initiative, might well be overtaken by events should the Treaty of Lisbon be ratified by Ireland and eventually enter into force. The Treaty would for the first time provide clear EU competence and a detailed legislative process for the adoption of measures for the harmonisation of national criminal law intended to ensure fulfillment of a Community / EU policy objective, including that of environmental protection.

Background

Traditionally, all EU Member States and institutions took the view that the area of criminal policy fell outside of the remit of Community law and of the legislative competence of the Community institutions.² Though Title VI of the Treaty on European

¹ Directive 2008/99/EC of 19 November 2008, OJ L328/28, 6 December 2008.

² For a detailed account of the legislative background to the eventual adoption of the 2008 PECL Directive, see, in particular, M. Hedemenn-Robinson, 'The emergence of European Union environmental criminal law: a quest for solid foundations – Part I', (2008) 3 *Environmental Liability* 71. See also, T. Hitchcock

Union (TEU)³ established an intergovernmental framework for the development of agreements between Member States on certain aspects of police and judicial cooperation on criminal matters, it was generally accepted that supranational Community measures could not be taken in the field of criminal policy. This position could only have been reinforced by the progressive incorporation of the subsidiarity principle into the EC Treaty by virtue of the Single European Act, the TEU and the Treaty of Amsterdam. Also, the widespread use of directives as the standard legislative instrument for the introduction of Community rules on environmental protection generally left it to Member States to determine how national law should transpose Community obligations, and whether to employ civil, administrative or criminal rules. However, Community law was not without some relevance for the development and application of national criminal law. For example, Member States were always obliged to ensure that their criminal laws do not constitute a disproportionate interference with the exercise of the fundamental freedoms guaranteed under the EC Treaty, such as the right to freedom of movement.⁴ Similarly, the equivalence principle developed by the ECJ requires that penalties employed under national law to ensure compliance with Community rules must be comparable to penalties applicable for analogous transgressions of national law.⁵ Also, in a 1992 Opinion Advocate General Jacob had suggested that the Community could have implied powers under the EC Treaty to harmonise Member State criminal laws if that were necessary to attain one of the objectives of the Treaty.⁶ Generally though, the ECJ took the view that ‘in principle, criminal legislation and the rules of criminal procedure are matters for which the Member States are still responsible’.⁷

Though environmental crime was not specifically addressed, the text of Title VI TEU, as revised by the Treaty of Amsterdam and Treaty of Nice, allowed Member States to engage in intergovernmental cooperation in respect of a broad range of criminal policy matters, including the ‘approximation, where necessary, of rules on criminal matters in

and N. Trounson, ‘Green Crimes: The EU Proposal for an Environmental Crimes Directive’, (2007) 19 *Environmental Law and Management* 119; R. Pereira, ‘Environmental Criminal Law in the First Pillar: A Positive Development for Environmental Protection in the EU?’, (2007) *European Environmental Law Review* 255; F. Comte, ‘Environmental Crime and the Police in Europe: a Panorama and Possible Paths for Future Action’, (2006) *European Environmental Law Review* 190; F. Comte, ‘European Environmental Criminal Law – recent developments’, *Yearbook of European Environmental Law* (OUP, 2005) 216; M. Faure, ‘European Environmental Criminal Law: Do We Really Need It?’, (2004) *European Environmental Law Review* 18; F. Comte and L. Kramer (eds.), *Environmental Crime in Europe: Rules of Sanctions* (Europa Publishing, 2004).

³ Articles 29-42 TEU. Generally, intergovernmental decisions taken under Title VI require unanimous agreement among Member States at Council level, under Article 34(2) TEU, and have a legal status similar to international agreements under the rules of international law. For example, such measures are not capable of producing direct effect, though the ECJ has held that the doctrine of indirect effect applies with respect to framework decisions adopted under the third pillar, see Case C-105/03 *Criminal Proceedings against M. Pupino* [2005 ECR I-5285].

⁴ See, for example, Case C-193/94 *Criminal Proceedings against S. Skanavi and K. Chryssanthakopoulos* [1996] ECR I-929.

⁵ See, for example, Case C-326/88 *Anklagemyndigheden v. Hansen & Soen* [1990] ECR I-291.

⁶ Case C-240/90 *Germany v. Commission* [1992] ECR I-5383, see AG Opinion, para. 12.

⁷ Case 203/80 *Criminal Proceedings against G. Casati* [1981] ECR 2595, para. 27.

the Member States'.⁸ Significantly, however, the relevant provisions in the TEU clearly state that the second and third pillars are without prejudice to the scope and application of the provisions of the first pillar,⁹ which would include the Community environmental policy under Title XIX of the EC Treaty.

The first European initiative on environmental crime took place under the auspices of the Council of Europe, which in 1998 adopted the Convention on the Protection of the Environment through Criminal Law (CPECL).¹⁰ The Convention provided a common understanding of what conduct, at a minimum, would be expected to constitute an environmental crime but, with only one State ratification, it never entered into force. It has, however, been influential in shaping later proposals for measures on environmental crime.

In February 2000, the Danish government attempted to move things forward by introducing a proposal for a Council framework decision, to be adopted under the third pillar, on combating serious environmental crime.¹¹ This intergovernmental measure was intended to complement the CPECL, strengthening a number of the commitments made therein, and the Danish proposal required Member States to ensure ratification of the Convention by the beginning of 2001. However, while there had appeared to be broad agreement on the Danish proposal, the Commission published its own first pillar legislative initiative on environmental crime in early 2001, based on Article 175 of the EC Treaty (the First Draft PECL Directive).¹² The Commission submitted that the EC Treaty was the appropriate legal basis for a measure setting out minimum core offences and sanctions. It asserted that the key aim of the measure was that of enhancing the effectiveness of EC environmental protection legislation in practice,¹³ in line with established ECJ jurisprudence under Article 10 EC Treaty. Clearly, the adoption of such a measure would require qualified majority voting (QMV) within the Council and could be enforced far more effectively¹⁴ than a third pillar, intergovernmental framework decision. Generally, the First Draft PECL Directive adopted a stricter position than that set out under the CPECL, as it did not allow for options or derogations for example, and criminal liability was predicated fundamentally on the breach of specified Community legislation. Therefore, its scope was deliberately limited so as to focus on harmonizing aspects of national criminal law considered essential for the attainment of Community environmental objectives.

Despite its carefully limited scope, and contrary to the advice of its own legal service, the Council refused to accept that Article 175 EC Treaty would be the correct legal basis for

⁸ Article 29 TEU.

⁹ Articles 29 and 47 TEU.

¹⁰ 1998 CETS 72.

¹¹ OJ C39/4 (2000).

¹² COM(2001)139, Commission Proposal for a Directive on the Protection of the Environment through Criminal Law (13 March 2001).

¹³ First Draft PECL Directive, Article 1.

¹⁴ Under Articles 226 and 228 EC Treaty.

the measure and decided not to participate in the co-decision procedure for its adoption. With the support of the European Parliament and the advisory European Economic social Committee, the Commission pressed ahead and issued a revised version of the First Draft PECL Directive in late 2002.¹⁵ Nevertheless, in March 2003 the Council decided to adopt an intergovernmental framework decision on environmental crime under the third pillar,¹⁶ which led to an annulment action being brought before the ECJ by the Commission under Title VI TEU.¹⁷

The 2005 European Court of Justice decision in the *Environmental Crimes* case¹⁸ provided the ECJ with its first opportunity to consider the existence and extent of Community legislative competence in the field of environmental crime and, more generally, of its competence in respect of criminal law relevant to other areas of Community policy under the EC Treaty. Taking a broad view of the scope of the Community's implied powers, the Court upheld the Commission's submission that the PECL Framework Decision should be annulled on the basis that it encroached upon the Community's powers contrary to Article 47 TEU. It felt that many of the key provisions of the Framework Decision, on common environmental offences for example, should have been adopted under Article 175 EC Treaty. Despite the contrary Opinion of the Advocate General,¹⁹ the Commission also understood the decision as having confirmed that it also enjoyed competence to prescribe the nature and level of criminal penalties to be applied.²⁰ It believed, therefore, that the decision marked the end of the 'double text' mechanism requiring a combination of first and third pillar measures. Generally, while the Court confirmed that, as a general rule, neither criminal law nor the rules on criminal procedure fall within the Community's competence, this

'does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.'²¹

The first three recitals of the Framework Decision had indicated that criminal penalties were necessary for combating serious environmental offences.

In the light of the Court's 2005 decision, the Commission published a new proposal for a PECL Directive in February 2007,²² which reflected the Commission's understanding of

¹⁵ COM(2002) 544 final (30 September 2002).

¹⁶ Council Framework Decision 2003/80/JHA on the protection of the environment through criminal law, OJ L29/55 (2003).

¹⁷ Article 35(6) TEU.

¹⁸ Case C-176/03 *Commission v. Council* [2005] ECR I-7879.

¹⁹ Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-176/03, paras. 83, 94 and 95.

²⁰ COM(2005) 583, Commission Communication to the EP and Council on the Implications of the Court's Judgment of 13 September 2005 (Case C-176/03 *Commission v. Council*) (23 November 2005).

²¹ *Ibid.*, para. 48.

²² COM(2007)51, Commission Proposal for a Directive on the Protection of the Environment through Criminal Law (9 February 2007).

the 2005 ECJ judgment and which also took account of the various preceding legislative initiatives. In addition to detailed provisions on the definition of common environmental offences, it included detailed provisions on minimum and maximum penalties applicable to offences by natural and legal (corporate) persons of various types and levels of severity.²³ As outlined below, this draft was substantially amended in the light of subsequent case law which clarified the position of the ECJ in respect of the Community's competence in this area.

2008 PECL Directive

The definitive version of the PECL Directive was finally adopted in November 2008 and Member States are required to bring into force the legislative measures necessary for its transposition by 26 December 2010.²⁴

Offences

Article 3 of the Directive lists and defines common offences and requires that:

Member States shall ensure that the following conduct constitutes a criminal offence, when unlawful and committed intentionally or with at least serious negligence:

- (a) the discharge, emission or introduction of a quantity of materials or ionising radiation into air, soil or water, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants;
- (b) the collection, transport, recovery or disposal of waste, including the supervision of such operations and the aftercare of disposal sites, and including action taken as a dealer or a broker (waste management), which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants;
- (c) the shipment of waste, where this activity falls within the scope of Article 2(35) of Regulation (EC) No. 1013/2006 ...on shipments of waste and is undertaken in a non-negligible quantity, whether executed in a single shipment or in several shipments which appear to be linked;
- (d) the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used 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, the quality of soil or the quality of water, or to animals or plants;
- (e) the production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any

²³ See further, *infra*.

²⁴ PECL Directive, Article 8.

- person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants;
- (f) the killing, destruction, possession or taking of specimens of protected wild fauna or flora species, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species;
 - (g) trading in specimens of protected wild fauna or flora species or parts or derivatives thereof, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species;
 - (h) any conduct which causes the significant deterioration of a habitat within a protected site;
 - (i) the production, importation, exportation, placing on the market or use of ozone-depleting substances.

Article 4 also requires that criminal liability should extend to those acting as accessories to the commission of environmental crimes covered by the PECL Directive and provides that

Member States shall ensure that inciting, aiding and abetting the intentional conduct referred to in Article 3 is punishable as a criminal offence.

Article 6 provides for corporate criminal liability by providing that

... legal persons can be held liable for offences referred to in Articles 3 and 4 where such offences have been committed for their benefit by any person who has a leading position within the legal person, acting either individually or as part of an organ of the legal person ...²⁵

A 'legal person' is defined under Article 2(d) to mean

Any legal entity having such status under the applicable national law, except for States or public bodies exercising State authority and for public international organisations.

Article 6(2) makes it clear that such corporate liability must include situations

where the lack of supervision or control, by a [natural] person referred to in paragraph 1, has made possible the commission of an offence ... for the benefit of the legal person by a person under its authority.

Thus, the natural person in a position of authority needs only to be guilty of an omission in respect of supervision or control for corporate criminal liability to arise. Article 6(3) in turn makes it quite clear that both corporate and personal criminal liability can arise simultaneously, stating that

Liability of legal persons under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, inciters or accessories in the offences referred to in Articles 3 and 4.

²⁵ Article 6(1) goes on to provide that such a leading position would be based on

- (a) a power of representation of the legal person;
- (b) an authority to take decisions on behalf of the legal person; or
- (c) an authority to exercise control within the legal person.

It is quite clear from the opening paragraph of Article 3 that the offences listed only include ‘unlawful’ conduct and thus must involve an infringement of Community environmental legislation or of Member State legislative measures adopted to give effect to such Community legislation. Article 2 defines ‘unlawful’ as meaning conduct infringing

- (i) the legislation adopted pursuant to the EC Treaty and listed in Annex A; or
- (ii) with regard to activities adopted pursuant to the Euratom Treaty, the legislation adopted pursuant to the Euratom Treaty and listed in Annex B; or
- (iii) a law, an administrative regulation of a Member State or a decision taken by a competent authority of a Member State that gives effect to the Community legislation referred to in (i) or (ii).

Hedemann-Robinson contends that the inclusion of infringements of *Community environmental protection rules* within the definition of ‘unlawful’, ‘is intended to avoid the risks of defendants relying upon instances of defective transposition of Community legislation at national level’, which was a fundamental weakness of previous European intergovernmental instruments on environmental crime.²⁶ Further, Recital 9 to the Directive makes it quite clear that

The obligations under this Directive only relate to the provisions of the legislation listed in the Annexes to this Directive which entail an obligation for Member States, when implementing that legislation to provide for prohibitive measures.

Of course, such ‘prohibitive measures’ need not necessarily involve criminal sanctions *per se*.

Annex A lists a very wide range of Community environmental legislation, consisting of a total of 69 measures, including the Wild Birds²⁷ and Habitats²⁸ Directives, the Waste Framework²⁹ and Hazardous Waste³⁰ Directives, the Water Framework Directive,³¹ and the IPPC Directive.³² Indeed, Annex A includes all of the most significant Community measures creating binding obligations relating to such area as waste management,³³ water

²⁶ M. Hedemann-Robinson, ‘The emergence of European Union environmental criminal law: a quest for solid foundations – Part II’, (2008) 4 *Environmental Liability* 111, at 121.

²⁷ Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, OJ L103/1, 25 April 1979.

²⁸ Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L206/7, 22 July 1992.

²⁹ Directive 2006/12/EC of 5 April 2006 on waste, OJ L114/9, 27 April 2006, (since replaced by Directive 2008/98/EC, OJ L312/3, 22 November 2008).

³⁰ Directive 91/689/EEC of 12 December 1991 on hazardous waste, OJ L377/20, 31 December 1991.

³¹ Directive 2000/60/EC of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L327/1, 22 December 2000.

³² Directive 2008/1/EC of 15 January 2008, OJ L24/8, 29 January 2008.

³³ Directive 75/439/EEC on the disposal of waste oils, OJ L194/23, 25 July 1975; Directive 78/176/EEC on waste from the titanium dioxide industry, OJ L54/19, 25 February 1978; Directive 86/278/EEC on the use of sewage sludge in agriculture, OJ L181/6, 4 July 1986; Directive 92/112/EEC on reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry, OJ L409/11, 31 December 1992; Directive 94/62 on packaging and packaging waste, OJ L365/10, 31 December 1994; Directive 99/31/EC on the landfill of waste, OJ L182/1, 16 July 1999; Directive 2000/53/EC on end of life vehicles, OJ L269/34, 21 October 2000; Directive 2000/76/EC on the incineration of waste, OJ L332/91, 28 December 2000; Directive 2002/96/EC on waste electrical and electronic equipment (WEEE), OJ L37/24,

pollution,³⁴ air pollution,³⁵ nature conservation,³⁶ dangerous substances,³⁷ and the use and deliberate release of GMOs.³⁸ Recital 8 to the PECL Directive explains that

The legislation listed in the Annexes to this Directive contains provisions which should be subject to criminal law measures in order to ensure that the rules on environmental protection are fully effective.

Therefore, it is abundantly clear that adoption of the Directive represents the latest initiative in the ongoing Community campaign intended to strengthen compliance with the requirements of EC environmental law,³⁹ a campaign that has included, *inter alia*, the adoption of the 2004 Environmental Liability Directive.⁴⁰ The removal of any autonomous offences, *i.e.* offences including conduct which would not necessarily

13 February 2003; Directive 2006/21/EC on the management of waste from extractive industries, OJ L102/15, 11 April 2006; Directive 2006/66/EC on waste batteries and accumulators, OJ L266/1, 26 September 2006; Regulation 1013/2006 on shipments of waste, OJ L190/1, 12 July 2006; Regulation 1418/2007 on the export for recovery of certain waste, OJ L316/6, 4 December 2007.

³⁴ Directive 76/160/EEC on the quality of bathing water, OJ L31/1, 5 February 1976; Directive 91/271/EEC on urban waste-water treatment, OJ L135/40, 30 May 1991; Directive 91/676/EEC on the protection of waters against pollution caused by nitrates from agricultural sources, OJ L375/1, 31 December 1991; Directive 94/25/EC on recreational craft, as amended by Directive 2003/44/EC, OJ L214/18, 26 August 2003; Directive 98/83/EC the quality of water intended for human consumption, OJ L330/32, 5 December 1998; Directive 2006/7/EC on bathing water quality, OJ L64/37, 4 March 2006; Directive 2006/11/EC on certain dangerous substances discharged into the aquatic environment, OJ L64/52, 4 March 2006; Directive 2006/44/EC on the quality of fresh waters in order to support fish life, OJ L264/20, 25 September 2006; Directive 2006/118 on the protection of groundwater, OJ L372/19, 27 December 2006.

³⁵ Directive 70/220/EEC on air pollution by emissions from motor vehicles, OJ L76/1, 6 April 1970; Directive 72/306/EEC on emission of pollutants from diesel engines in vehicles, OJ L190/1, 20 August 1972; Directive 84/360/EEC on air pollution from industrial plants, OJ L188/20, 16 July 1984; Directive 85/203/EEC on air quality standards for nitrogen dioxide, OJ L87/1, 27 March 1985; Directive 96/62/EC on ambient air quality assessment and management, OJ L296/55, 21 November 1996; Directive 97/68 on emission of gaseous and particulate pollutants from non-road mobile machinery, OJ L59/1, 27 February 1998; Directive 98/70/EC the quality of petrol and diesel fuels, OJ L350/58, 28 December 1998; Directive 1999/30/EC on limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air, OJ L163/41, 29 June 1999; Directive 2000/69 on limit values for benzene and carbon monoxide in ambient air, OJ L313/12, 13 December 2000; Directive 2001/80/EC on emissions of certain pollutants into the air from large combustion plants, OJ L309/1, 27 November 2001; Directive 2002/3/EC on ozone in ambient air, OJ L67/14, 9 March 2002; Directive 2004/107/EC on arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air, OJ L23/3, 26 January 2005; Directive 2005/55/EC, OJ L275/1, 20 October 2005 and Directive 2005/78, OJ L313/1, 29 November 2005 on emission of gaseous and particulate pollutants from compression-ignition engines.

³⁶ Regulation 338/97 on the protection of species of wild fauna and flora by regulating trade therein, OJ L61/1, 3 March 1997; Directive 2006/40/EC on emissions from air conditioning systems in motor vehicles, OJ L161/12, 14 June 2006; Regulation 715/2007 on emissions from light passenger and commercial vehicles, OJ L171/1, 29 June 2007.

³⁷ Directive 76/769/EEC on the marketing and use of certain dangerous substances and preparations, OJ L262/201, 27 September 1976; Directive 79/117/EEC on the marketing and use of plant protection products, OJ L33/36, 8 February 1979; Directive 82/176/EEC, OJ L81/29, 27 March 1982, and Directive 84/156/EEC, OJ L 74/49, 17 March 1984, on mercury discharges; Directive 83/513/EEC on cadmium discharges, OJ L291/1, 24 October 1983; Directive 84/491/EEC on discharges of hexachlorocyclohexane, OJ L274/11, 17 October 1984; Directive 86/280/ Directive 91/414/EEC on the placing of plant protection products on the market, OJ L230/1, 19 August 1991; Directive 94/63/EC on volatile organic compound emissions resulting from the storage of petrol, OJ L365/24, 31 December 1994; Directive 96/49/EC on the transport of dangerous goods by rail, OJ L235/25, 17 September 1996; Directive 96/59/EC on the disposal

involve an infringement of Community legislation or national implementing measures, which had been included in previous drafts,⁴¹ strongly suggests how central the role of ensuring compliance is to the aims of the PECL Directive. This of course corresponds with the ECJ's understanding of the Community's competence in this regard under the EC Treaty.

Indeed, the PECL Directive is clearly intended to apply alongside the Environmental Liability Directive, or its national transposing measures, as Recital 11 provides that

This Directive is without prejudice to other systems of liability for environmental damage under Community law or national law.

This point is aptly illustrated by the definitions provided under the PECL Directive for 'protected wild fauna and flora species' and 'habitat within a protected site' which, as is the case with the Environmental Liability Directive, correspond to the 1979 Wild Birds Directive and 1992 Habitats Directive.⁴² Similarly, the Community environmental measures listed under Annex III of the Environmental Liability Directive,⁴³ which dictate the scope of the activities for which civil liability is established thereunder, correspond broadly to Annex A of the PECL Directive. Therefore, many situations are likely to arise where a serious infringement of Community environmental legislation or of national implementing legislation, which results in damage to the environment, or imminent threat of such damage, could simultaneously give rise to civil liability under the Environmental Liability Directive and criminal liability under the PECL Directive.

of PCBs and PCTs, OJ L243/31, 24 September 1996; Directive 96/82/EC on control of major accident hazards involving dangerous substances, OJ L10/13, 14 January 1997; Directive 98/8/EC on the placing of biocidal products on the market, OJ L123/1, 24 April 1998; Directive 99/13/EC on emissions of volatile organic compounds, OJ L85/1, 29 March 1999; Directive 99/32/EC on reduction in the sulphur content of certain liquid fuels, OJ L121/13, 11 May 1999; Regulation 2037/2000 on substances that deplete the ozone layer, OJ L244/1, 29 September 2000; Directive 2002/95/EC on restriction of the use of certain hazardous substances in electrical and electronic equipment, OJ L37/19, 13 February 2003; Regulation 648/2004 on detergents, OJ L104/1, 8 April 2004; Regulation 850/2004 on persistent organic pollutants, OJ L158/7, 30 April 2004; Regulation 842/2006 on certain fluorinated greenhouse gases, OJ L161/1, 14 June 2006;

³⁸ Directive 90/219/EEC on the contained use of genetically modified micro-organisms, OJ L117/1, 8 May 1990; Directive 2001/18/EC on the deliberate release into the environment of genetically modified organisms, OJ L106/1, 17 April 2001.

³⁹ For example, Recital 3 to the PECL Directive explains that

Experience has shown that the existing systems of penalties have not been sufficient to achieve complete compliance with the laws for the protection of the environment. Such compliance can and should be strengthened by the availability of criminal penalties, which demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law.

⁴⁰ Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage, OJ L142/56. See generally, O. McIntyre, 'The New European Community Directive on Environmental Liability: Substantive Content and Practical Implications', (2004) 11/3 *Irish Planning and Environmental Law Journal* 99.

⁴¹ See the 2007 Second Draft PECL Directive, *supra*, n. 22, Article 3(a) of which listed as a criminal offence without requiring that the conduct in question be 'unlawful':

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

⁴² PECL Directive, Article 2(b) and (c).

⁴³ See, McIntyre, *supra*, n. 40, at 101.

It is also worth noting that the scheme for defining offences under the 2008 PECL Directive would appear to be somewhat less anthropocentric than the 2007 Second Draft PECL Directive. The autonomous offence included under the draft Directive had purported to criminalise any conduct, whether lawful or unlawful, whereby death or serious personal injury are caused by discharge of pollutant materials into environmental media, thus creating a hierarchy of anthropocentric interests over ecological interests. Removal of this offence suggests that human health and environmental protection concerns are equally valued.⁴⁴ However, some uncertainty in respect of the scope of the offences created under the PECL Directive is likely to persist. For example, several offences are delimited by means of the concepts of ‘serious injury’ to any person or ‘substantial damage’ to the environment,⁴⁵ which are nowhere elaborated upon under the Directive and will thus require interpretation by national judicial authorities. However, this is unlikely to seriously threaten the validity of the Directive in light of the recent decision of the ECJ in the *Intertanko* case.⁴⁶

It is important to note that the PECL Directive continues to allow Member States complete discretion as to whether to impose criminal liability upon legal (corporate) persons, or to apply any specific types of sanction thereto, subject to the basic requirement that they be ‘effective, proportionate and dissuasive’.⁴⁷ Discussing earlier proposals, one commentator notes that

‘Instead the proposals require Member States to ensure that their national laws include the possibility of certain types of sanction being made applicable in respect of dealing with certain defined environmental offences. The decision as to what type of sanction, criminal or non-criminal, is to be selected ... was always to be a matter for national authorities, and not determined by EC legislation.’⁴⁸

This contrasts with the situation in respect of natural persons, where the Directive requires Member States to ensure that the conduct listed under Article 3 ‘constitutes a *criminal offence*’⁴⁹ and such offences ‘are punishable by effective, proportionate and dissuasive *criminal penalties*’.⁵⁰ This Member State discretion on whether to criminalise the unlawful conduct of corporate offenders sits uneasily with Recital 3, which emphasizes the Directive’s role in improving compliance with laws for the protection of the environment and states in part that

Such compliance can and should be strengthened by the availability of criminal penalties, which demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law.

⁴⁴ See, Hedemann-Robinson, *supra*, n. 26, at 125-126.

⁴⁵ PECL Directive, Article 3(a), (b), (d) and (e).

⁴⁶ See further, *infra*, n. 56.

⁴⁷ PECL Directive, Article 7.

⁴⁸ Hedemann-Robinson, *supra*, n. 26, at 132, citing the *Explanatory Memorandum of the Commission’s First Draft PECL Directive*, COM(2001) 139, s. 3(c).

⁴⁹ PECL Directive, Article 3, para. 1 (emphasis added).

⁵⁰ PECL Directive, Article 5 (emphasis added).

It is not immediately clear why the Directive should not give voice to such stronger social disapproval of corporate environmental crime, given that corporate crime constitutes a very significant source of serious breaches of environmental legislation.

Penalties

Unlike the 2007 Second Draft PECL Directive, which contained detailed provisions on sanctions, including the minimum and maximum sanctions to be made available to courts to punish both natural and legal persons depending on the relative level of gravity of an offence,⁵¹ the 2008 PECL Directive merely requires that Member States ‘take the necessary measures to ensure that the offences referred to in Articles 3 and 4 are punishable by effective, proportionate and dissuasive criminal penalties’.⁵² This position reflects the decision of the ECJ in the *Ship-Source Pollution* case, where the Court found that decisions over the type and level of criminal penalties imposed do not fall within the Community’s competence, but within that of the third pillar of the EU’s constitutional framework.⁵³ This case involved a challenge by the Commission, in the light of the *Environmental Crimes* judgment, to the validity of a third pillar instrument⁵⁴ adopted as an accompanying measure to a Community Directive on combating environmental pollution generated by the marine transport sector,⁵⁵ which addressed the issue of applying criminal law to this area. Summarising the significance of the *Ship-Source Pollution* judgment for the development of Community competence in respect of environmental crime, Hedemann-Robinson explains that

⁵¹ Article 5 of the Second Draft PECL Directive set out maximum and minimum criminal penalties to be imposed on natural persons according to three general levels of gravity: (i) certain intentionally committed offences causing death or serious personal injury, punishable by maximum sanction of at least 5-10 years’ imprisonment; (ii) certain offences committed with serious negligence and resulting in death or serious personal injury, committed with the intention of causing substantial environmental damage or committed by way of organised crime, punishable by a maximum sanction of at least 2-5 years’ imprisonment; (iii) certain offences causing substantial environmental damage through serious negligence, punishable by a maximum sanction of at least 1-3 years’ imprisonment. However, the draft Directive deferred to Member States as to whether to apply a range of non-criminal sanctions to natural persons, including exclusion from public financial assistance, winding-up orders, disqualification from activities, publication of judicial decisions imposing convictions or sanctions, judicial supervision or environmental reinstatement. Article 7 of the draft Directive adopted a similarly detailed and prescriptive approach to the sanctioning of corporate offenders, setting minimum and maximum scales for financial penalties payable in respect of offences falling within each of the three general levels of gravity, namely €750,000 - €1.5m, €500,000 - €750,000 and €300,000- €500,000 respectively. However, the draft Directive allowed Member States the option of applying a different system of fines calculated on the basis of other factors, such as the offending company’s turnover or the financial gain attained or envisaged by commission of the offence, provided that such fines were at least equivalent to the minimum levels set by the draft Directive. See further, Hedemann-Robinson, *supra*, n. 26, at 121-122.

⁵² PECL Directive, Article 5. Article 7 introduces a similar requirement in respect of penalties for legal persons, though it only refers to ‘effective, proportionate and dissuasive penalties’, thus allowing Member States to determine whether penalties for legal persons should be criminal or non-criminal in nature.

⁵³ Case C-440/05 *Commission v. Council* (23 October 2007), para. 70.

⁵⁴ Council Framework Decision 2005/667/JHA to Strengthen the Criminal Law Framework for the Enforcement of the Law Against Ship-Source Pollution, OJ L255/164 (2005).

⁵⁵ Directive 2005/35/EC on Ship-Source Pollution, OJ L255/11 (2005).

‘The ECJ had confirmed that the Community may, where it deems this to be essential to fulfil one or more of its policy objectives, require Member States to criminalise certain conduct and for that purpose determine in broad terms the parameters of liability such as defining common offences and requiring Member States to apply their criminal laws to enforce against offenders effectively, proportionately, and dissuasively. However, Community competence does not appear to reach beyond these elements, so that in particular matters relating to criminal procedure and specification of type and intensity of sanction should be agreed upon under the legal basis and decision-making arrangements foreseen in Title VI TEU on police and judicial cooperation in criminal matters.’

In addition, in a June 2008 preliminary ruling on a challenge to the validity of the Ship-Source Pollution Directive on grounds of legal uncertainty, the ECJ held that the use of undefined legal concepts, such as intent, recklessness, and serious negligence, to determine the extent of criminal liability under the Directive, did not breach the Community legal principle of legal certainty or the closely related principle of *nullem crimen nulla poena sine lege* (no crime or punishment without law to cover the offence in question).⁵⁶ The Court recognized that it was impossible to provide a comprehensive definition of such concepts, but understood that they are familiar to all national legal systems of the EU Member States and pointed out that the Directive must anyway be transposed into national law, which could be expected to provide appropriately detailed definitions.⁵⁷ Clearly, this judgment further supports the approach taken to the definition of offences under Article 3 of the PECL Directive.

The PECL Directive does not make reference to any prospective third pillar instrument which would address related issues in more detail, including the type and level of penalties, jurisdictional issues, or inter-State cooperation in criminal investigations and judicial procedures. However, in light of the ECJ case law on the matter it seems likely that the European Union institutions intend to introduce a ‘double text’ package of EU measures, including adoption of a complementary framework decision under Title VI TEU. It seems reasonable to assume that such a framework decision would be based on 2007 Second Draft PECL Directive, at least as regards the type and level of penalties.

Lisbon Treaty Amendments

The amendments which would be introduced to the legal framework of the European Union by the Treaty of Lisbon,⁵⁸ should it eventually enter into force, would impact

⁵⁶ Case C-308/06 *R. v. Secretary of State for Transport, ex parte International Association of Independent Tanker Owners (Intertanko) et al* (3 June 2008).

⁵⁷ *Ibid.*, at paras. 71-78.

⁵⁸ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed on 13 December 2007, OJ C306/1 (2007). See the consolidated versions of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), OJ C115/1, (May 2008). Under the Lisbon Treaty amendments, the European Union is to be founded on the TEU and the TFEU, with the two treaties having the same legal value (see Art. 1 TEU and Art. 1(2) TFEU, as

significantly on how the EU enacts future measures on environmental crime. The Lisbon Treaty would create for the first time express procedures for the adoption of European Union⁵⁹ measures designed to harmonise the criminal law of the Member States. Article 83 of Chapter 4 (Judicial Cooperation in Criminal Matters) of Title V (Area of Freedom, Security and Justice) of the proposed Treaty on the Functioning of the European Union, which would replace the current EC Treaty, would provide the appropriate legal bases for the adoption of EU measures on environmental crime. Indeed, Article 296 TFEU makes it quite clear that the Union must refrain from adopting measures not provided for by the relevant legislative procedure, thus preventing Article 192, the successor provision to Article 175 EC Treaty, being used as an alternative legal basis.

First of all, Article 83(1) TFEU would provide a possible legal basis for the adoption of Union measures on environmental crime. It would permit the adoption of directives by way of ordinary legislative procedure⁶⁰ to establish minimum rules concerning the definition of certain criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension, resulting from the nature or impact of such offences or from a special need to combat them on a common basis. Though a specific list of areas of crime covered by this provision is provided, none of which specifically refers to or directly addresses environmental crime, Article 83(1) further provides that, ‘on the basis of developments in crime’, the Council may decide on the basis of unanimity and after gaining the consent of the European Parliament to expand the list to identify other areas of crime. However, it does not seem very likely that this legislative power would be used to legislate for environmental crime given the broad and flexible mandate that would be provided under Article 83(2) TFEU.

Article 83(2) TFEU employs the same broad reasoning to justify Union legislation on environmental crime as that used by the ECJ in the *Environmental Crimes* judgment, namely that of essential need in relation to policy implementation. Article 83(2) provides:

If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonization measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the areas concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonization measures in question without prejudice to Article 76.⁶¹

amended).

⁵⁹ The Lisbon Treaty amendments would discontinue usage of the term ‘European Community’, leaving the European Union as the sole legal entity with responsibility for discharging treaty provisions formerly applying to the EC.

⁶⁰ The ‘ordinary legislative procedure’, described under Art. 294 TFEU, would replace the co-decision procedure currently used in Community legislative decision-making under Art. 251 EC Treaty.

⁶¹ Under Article 76 TFEU, legislative proposals to be adopted under either the Article 83(1) or 83(2) procedures could be introduced either by a quarter of Member States or by the European Commission, thereby ending the monopoly of the latter in proposing legislative initiatives.

Whereas both Articles 83(1) and (2) TFEU involve Council decision-making based principally on qualified majority voting (QMV), there are a number of possible derogations requiring unanimity including, notably, the special ‘emergency break’ procedure under Article 83(3), by which any Member State can require suspension of QMV. This procedure is intended to offer additional safeguards for the preservation of national sovereignty and provides that where a Council member considers that a draft directive based on either Article 83(1) or (2) ‘would affect fundamental aspects of its criminal justice system’ the member may request that the proposal be referred to the European Council, whereupon the ordinary legislative procedure is to be suspended. If no agreement is reached among Member States within four months, the proposal will not be considered any further. However, if at least nine Member States wish to pursue its adoption, then the measure may be adopted by those Member States alone on the basis of enhanced cooperation and related decision-making procedures under Article 20(2) TEU and Art. 329 TFEU. Therefore, a core of Member States could adopt EU environmental criminal measures as binding among themselves alone, with the other Member States remaining unaffected, unless and until they might wish to adopt the measure in question.⁶² Therefore, individual Member States would retain a very considerable degree of control over the legislative process in relation to Union policy on crime.

In addition, Ireland, the UK and Denmark enjoy additional safeguards, in that their special ‘opt-in’ arrangements, negotiated in relation to Title IV of the EC Treaty are carried over so as to apply to the whole of Title V TFEU.⁶³ Consequently, Ireland would have to provide specific notification from the outset if they wish to participate in the adoption of any measure under Article 83 TFEU. Further, the Lisbon Treaty would create specific powers for any Member State national parliaments to issue reasoned opinions if they consider an EU legislative proposal to be in breach of the principle of subsidiarity.⁶⁴ If a majority of reasoned opinions delivered are against a proposal, the Commission would have to take steps to justify it and the European Council and Parliament would be required to review the proposal’s compatibility with the principle. If either 55 per cent of the Council members or a majority of the votes cast in the European Parliament should consider the proposal to conflict with the principle of subsidiarity, the legislative initiative would be given no further consideration.

Conclusion

It is quite clear that the legislative requirements existing under the current EU legal framework for the adoption of measures on environmental crime are unwieldy and potentially anomalous. The current arrangement for a ‘double text’ package of measures

⁶² See Hedemann-Robinson, *supra*, n. 26, at 129-130.

⁶³ See Protocol (No. 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, OJ C115/295 (2008); OJ C306/185 (2007) and Protocol (No. 22) on the position of Denmark, OJ C115/299 (2008); OJ C306/187 (2007), annexed to the TEU and TFEU as amended by the 2007 Lisbon Treaty.

⁶⁴ See the Protocol on the Application of the Principles of Subsidiarity and Proportionality, as adopted by the Lisbon Treaty in order to replace the existing 1997 Protocol.

is cumbersome, requiring a Community directive, adopted under the first pillar on the basis of QMV, providing a broad outline of the offences identified, and a framework decision, adopted on the basis of unanimity under the third pillar, providing detail on, *inter alia*, the type and level of penalties to be applied. Clearly, there is considerable scope for inconsistencies and anomalies to arise. For example, in the current situation, where a Community directive has been adopted in the absence of an accompanying framework decision, it would fall to the courts to determine whether a Member State's criminal code provides for 'effective, proportionate and dissuasive penalties', as required under Article 5 and 7 of the PECL Directive. There is little clear guidance to inform such a determination⁶⁵ and this situation does little to advance the Directive's aim of providing for 'minimum rules' in this area.⁶⁶

The Lisbon Treaty amendments would, if adopted, provide a more coherent legislative basis for the introduction of EU measures on environmental crime and would improve considerably on the procedural safeguards in place to protect the vital interests of individual Member States when compared with the current legal framework, which bases the Community's power to legislate in this area on the somewhat nebulous doctrine of implied powers.

⁶⁵ Though basic guidelines for sentencing rules have been agreed in the conclusions adopted by the EU Justice and Home Affairs Council in April 2002, on which the scheme of penalties set out under the 2007 Second Draft PECL Directive would appear to have been based. See *Explanatory Memorandum of the Second Draft PECL Directive*, COM(2007)51, at 8. See further, Hedemann-Robinson, *supra*, n. 26 at 121.

⁶⁶ See Recital 12 to the PECL Directive.