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

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Background to PECL Directive

- Traditional view – no EC competence re criminal law / environmental crime
- Relevance of EC law:
  - Fundamental freedoms;
  - Principle of equivalence; *etc.*
- Title VI TEU – intergovernmental cooperation re broad range of criminal matters, without prejudice to scope of EC Treaty (Arts. 29 & 47)
• 2000 Danish proposal for third pillar framework decision
• 2001 First Draft PECL Directive, based on Art. 175 EC Treaty:
  – Qualified majority voting
  – More effective enforcement
• 2002 revised First Draft PECL Directive
• 2003 Council Framework Decision 2003/80/JHA on PECL
Background (cont. 2)

- Case C-176/03 Commission v. Council [2005] (Environmental Crimes case)
- 2007 Second Draft PECL Directive
- Case C-440/05 Commission v. Council (Oct. 2007) (Ship-Source Pollution case)
- Case C-308/06 Intertanko case (June 2008)
Offences

• Art. 3 – conduct when unlawful and committed intentionally / with serious negligence:
  – Discharge / emission causing death / serious injury or substantial damage to environment
  – Waste management operation causing …
  – Shipment of waste
  – Operation of dangerous plant causing …
  – Management of nuclear materials causing …
  – Destruction / taking / trading protected fauna / flora
  – Conduct causing deterioration of a protected habitat
  – Production / import / export / marketing ozone-depleting subs.
Offences (cont.)

• Art. 4 – inciting, aiding, abetting
• Art. 6 – liability of legal (corporate) persons, incl. lack of supervision / control by a natural person (not necessarily criminal sanctions – effective, proportionate and dissuasive, Art. 7)
• Recital 15 – inclusion of breaches of subsequent legislation under Art. 3
Annex A

• Infringements of 69 Community legislative instruments on:
  – Waste management
  – Water pollution
  – Air pollution
  – Nature conservation
  – Dangerous substances
  – Use and deliberate release of GMOs
Penalties

• Art. 5 – natural persons: effective, proportionate and dissuasive criminal penalties

• Contrasts with 2\textsuperscript{nd} Draft PECL Directive:
  – Three general levels of gravity / penalties re natural and legal persons

• Art. 7 – legal persons: effective proportionate and dissuasive penalties

• No reference in PECL Directive to any third pillar framework decision
Lisbon Treaty Amendments

- Title V (Area of Freedom, Security and Justice), Chapter 4 (Judicial Co-op. in Criminal Matters), Art. 83
- Art. 296 prevents use of Art. 192 (Env.)
- Art. 83(1) particularly serious crime with a cross-border dimension (list may be expanded)
- Art. 83(2) min. rules on offences/sanctions if essential need re policy implementation
- Safeguards for national sovereignty:
  - QMV but ‘emergence beak’ procedure in Art.83(3)
  - National Parls. reasoned opinions – subsidiarity
  - Ireland, UK and Denmark – ‘opt-in’ re Title V TFEU
Conclusions

- Current arrangements – ‘double text’ package of measures is cumbersome
  - Considerable scope for anomalies to arise
  - Undermines objective re ‘minimum rules’
  - ‘implied powers’ legal basis not ideal
- Lisbon Treaty amendments would provide more coherent legislative basis and additional national safeguards, but