elni
REVIEW

No1/2009

ISSN 1618-2502

ENVIRONMENTAL
LAW NETWORK
INTERNATIONAL

RÉSEAU
INTERNATIONAL
DE DROIT DE
L´ENVIRONNEMENT

INTERNATIONALES
NETZWERK
UMWELTRECHT

elni REVIEW

CONTENTS

Editorial

The main topics of this issue are the *enforcement of EU law*, and *criminal law and the environment*. Enforcement of EU law is often prescribed by the national legal framework and therefore depends strongly on national definitions of the findings of the facts. When focusing on criminal environmental law one of the main hurdles to the effectiveness results from the different national implementation practices of European Directives. In this respect, the problems also differ between the different EU Member States.

This issue of elni Review provides valuable insights into selected national law frameworks:

"Environmental penalties in Italy" by Paola Brambilla focuses on the history and actual issues of criminal environmental law in Italy.

"Enforcing EU environmental law outside Europe? The case of ship dismantling" by Thomas Ormond provides a special view on EU law enforcement from an international perspective.

Armelle Gouritin and Paul De Hert critically discuss the recent developments of European environmental criminal law in their article "Directive 2008/99/EC of 19 November 2008 on the protection of the environment through criminal law: A new start for criminal law in the European Community?"

Topics which focus on actual EU-law issues:

The viewpoint of environmental organisations towards the setting of standards of emissions is provided in "Development of harmonised European standards for measuring emissions from construction products in CEN from the perspective of environmental organisations – Part 1" by Michael Riess and Ralf Lottes.

The article "Regulation of nanomaterials under present and future Chemicals legislation - Analysis and regulative options" by Stefanie Merenyi, Martin Führ and Kathleen Ordnung critically reviews REACH under the perspectives of nanomaterials. It also contains information on recent developments on EU level.

Other topics focus on national laws of non-EU countries:

In his article Eugene A. Wystorobets focuses on the "Principle of public participation in environmental law of the Russian Federation" and provides general insights into Russian law.

"A survey of the Vietnamese environmental legislation on water" by Michael Zschiesche and Duong Thanh An focuses on Vietnamese water law and the organisational background of administrative institutions in this context.

The next issue of the *elni review* will focus on the Industrial Emissions Directive (IED). Please send contributions on this topic as well as other interesting articles to the editors by the end of June 2009.

Nicolas Below/Gerhard Roller
March 2009

elni Forum 2009

on 14th May 2009
at FUSL, Facultés universitaires Saint-Louis in Brussels, Belgium.

"The Directive on Industrial Emissions and its implementation in national law - key issues and practical experiences"

The elni Forum 2009 will offer the opportunity to discuss implementation issues of the upcoming European Directive on Industrial Emissions (IED). European and national environmental law experts will comment on this issue.

The **Annual Meeting of the elni Association** 2009 will take place before the elni Forum.

More information is available at:
www.elni.org

Special Announcement

The representative for interested parties of the ECHA Management Board and co-founder of the *Environmental Law Network International* – Marc Pallemaerts – is now member of the ECHA Board of Appeal.

The editors wish him all the best and every success in the future!

In his place Martin Führ, also co-founder of *elni* and editor of the *elni Review* was nominated at 18 December 2008 by the Commission as a new member of the Management Board of the ECHA (European Chemicals Agency) to represent interested parties.

Directive 2008/99/EC of 19 November 2008 on the protection of the environment through criminal law: A new start for criminal law in the European Community?

Armelle Gouritin and Paul De Hert

Setting the framework for the protection of the environment through criminal law at the EC level ultimately leads to the adoption of Directive 2008/99/EC of 19 November 2008 on the protection of the environment through criminal law.[1] *The Directive establishes a minimum set of conducts that should be considered criminal offences throughout the EU when unlawful and committed intentionally (or with at least serious negligence). Inciting, aiding and abetting of such conducts will equally be considered a criminal offence.*

Directive 2008/99/EC must be implemented by Member States by 26 December 2010. Its adoption has been a debated and lengthy process. These debates occurred at the EU level (institutional conflict) and member state level, and were reflected into the legal scholars work.[2] *These debates concerned not as much the specific content of the Directive, but the institutional framework and in particular the use made of criminal law provisions in a first pillar legal instrument, as opposed to the normal use for these purposes of instruments provided for in the third pillar of the EU (police and judicial cooperation on criminal matters). The Directive, therefore, seemingly deviates from the general rule that "neither criminal law nor the rules of criminal procedure fall within the Community's competence". The Directive follows a Court of Justice's decision of 13 September 2005 (Case C-176/03) to annul an EU Framework Decision on the protection of the environment on the grounds that it had been adopted on an erroneous legal basis. In its decision the Court upheld the Commission's submission, holding that the Commission may take measures in relation to the Member States' criminal law where the application of criminal penalties is an essential measure for combating serious environmental offences. Hence, a Directive, a first pillar instrument, including criminal law provisions could be adopted.*

This article discusses the Directive's institutional background (I). Subsequently it looks at the criminal law provisions in the Directive (II). It ends with a critical note on the presumed impact of the Directive (III).

1 Institutional background

Directive 2008/99/EC is the first Directive in the history of the EC/EU to contain provisions with regard to criminal law. Its adoption marks the end of a long tradition (going beyond the 1998 Treaty of Amsterdam) of exclusively using Framework Decisions and Decisions with regard to criminal law and this within the institutional context of the third pillar (unanimity voting, no co-decision by the European Parliament and almost no control by the Court of Justice). In search of more efficient enforcement instruments for its environmental law policy, the European Commission decided to end this tradition by adopting a (first pillar) Directive (majority voting, co-decision by the European Parliament, control by the Court of Justice) *with* criminal law provisions. The purpose of this article is not to fully expose, neither to comment on the institutional conflict that then occurred between the European Commission (supported by the European Parliament) and the Council (supported by 11 Member States out of the then 15 Member States).[3] Instead, we recall that the Kingdom of Denmark proposed a third pillar instrument in 2000 ('draft Council Framework Decision on the protection of the environment through criminal law',[4] largely inspired by the Council of Europe Convention on the protection of the environ-

1 Directive 2008/99/EC of 19 November 2008 on the protection of the environment through criminal law, *OJ*, 6 December 2008, L 328, pp. 28-37.

2 See, for example, P.-Y. Monjal, Les compétences pénales communautaires et la CE, REDE, 2/2008, pp. 223-235; Françoise Comte, Criminal Environmental Law and Community Competence, EELR, May 2003, pp. 153-156; Michel Faure, European Environmental Criminal Law: Do we really need it?, EELR, January 2004, pp. 18-29; L. Krämer, Environment, Crime and EC Law, JEL, 2006, Vol. 18, p. 285; Michael Faure, The continuing story of environmental criminal law in Europe after 23 October 2007, EEELR, February 2008, pp. 68-75; Ramu de Bellescize, La communautarisation silencieuse du droit pénal. À propos de l'arrêt de la CJCE, 23 October 2007, Droit pénal - Revue mensuelle Lexisnexis Jurisclasseur, January 2008, pp. 8-11; M. Wasmeier et N. Thwaites, The battle of the pillars: does the European Community have the power to approximate national criminal laws?, ELR, Vol. 29, No. 5, October 2004, p. 164; José F. Castillo Garcia, The Power of the European Community to Impose Criminal Penalties, EIPASCOPE, 2005/3, pp. 27-29; Ricardo Pereira, Environmental criminal law in the first pillar: a positive development for environmental protection in the European Union?, EEELR, October 2007, pp. 254-268; and Martin Hedemann-Robinson, The EU and Environmental Crime: The Impact of the ECJ's Judgment on Framework Decision 2005/667 on Ship-Source Pollution, JEL, Vol. 20, No. 2, pp. 279-292; Françoise Comte and Ludwig Krämer (eds.), Environmental crime in Europe, Rules of Sanctions, Europa Law Publishing, 2004; Françoise Comte, Crime contre l'environnement et police en Europe: panorama et pistes d'action, REDE, 4/2005, pp. 381-447; Xavier Loubert-Davaine, Beaucoup de bruit pour rien: les insuffisances de la décision-cadre No. 2003/80/JAI du Conseil de l'Union Européenne relative à la protection de l'environnement par le droit pénal, REDE, 2/2004, pp. 142-150.

3 Such an in depth study has already been conducted. See *supra* note 2.

4 Hence, having a legal basis connected to the third pillar of the EU: relating to police and judicial cooperation on criminal matters.

ment through criminal law.[5] As a (proposed) Council framework decision, the text had its legal basis in the third pillar of the EU (police and judicial cooperation on criminal matters). The Commission disagreed with the initiative and argued that the correct legal basis for the norm on the protection of the environment through criminal law was to be found in the first pillar. Accordingly, on 13 March 2001 the Commission proposed a Directive on the protection of the environment through criminal law. Despite the Commission's opposition, the Framework Decision was adopted on 27 January 2003. As a consequence, the Commission launched an appeal against the Council before the European Court of Justice on 15 April 2003. In other words, what was at stake here was the competence of the Community legislator to adopt a text on criminal matters in the environmental area.[6]

The Court of Justice released its judgment on the legality of the adopted Framework Decision on 13 September 2005.[7] In this judgment the Court first recalled the general rule: *"neither criminal law nor the rules of criminal procedure fall within the Community's competence"*.[8] The Court then goes on to establish an exception to this rule: the Community legislator is competent *"when the application of effective, proportionate and dissuasive criminal penalties by the competent authorities is an essential measure for combating serious environmental offences"*.[9] The Community legislator has to meet two conditions to use criminal law: necessity (the need to make the community policy in question effective), and consistency (the criminal law measures adopted at sectoral level must respect the overall Union's system of criminal law).[10] Turning its gaze to the Framework Decision on the protection of the environment through criminal law, the Court found that both regarding aim and content this instrument served the purpose of the protection of the environment. Hence, the Framework Decision encroached upon first pillar competences. The proper legal basis should have been Art. 175 of the ECT. Accordingly, the Court annulled the Framework Decision based on third pillar law.

On 9 February 2007, the Commission proposed a second version of a Directive on the protection of the environment through criminal law first pillar based upon Art. 175 ECT.[11] This new version of the Directive was largely inspired by the text of annulled Framework decision, but at a later stage it was shaped differently due to new developments before the Court of Justice. In the aftermath of the Court's ruling dated 13 September 2005, the Commission challenged the legality of another Framework Decision before the European Court of Justice, this time the Council Framework Decision to strengthen the criminal law framework for the enforcement of the law against ship-source pollution.[12] Similarly to the 2005 case, the Commission contended that the proper legal basis for such a text should not be found in the third pillar, but in the first pillar. In its ruling dated 23 October 2007,[13] the Court affirmed its earlier reasoning, but restricted the scope left to the Community legislator. The Court now held that the quantum of sanctions (i.e. rules on the type and level of criminal penalties) does not fall within the Community legislator's competence. For the quantum of criminal penalties, the correct legal basis remains to be found in the third pillar.[14] The Court annulled the above-mentioned Framework Decision (even though the dispositions setting the quantum of criminal penalties had a correct legal basis).

Following this ruling, the Commission modified its new proposed Directive with regard to criminal environmental law, leaving the dispositions setting the quantum of criminal penalties out of its scope.[15] The 2008/99 Directive on the protection of the environment through criminal law was eventually adopted on 19 November 2008 and published on 6 December 2008.

2 The criminal law provisions in the Directive

The major aim of Directive 2008/99 is to oblige Member States to provide for criminal penalties in their national legislation in respect of serious infringements.[16] We have seen that the Community has no competence to set the quantum of criminal penalties. Therefore, it is up to the Member States to set

5 Council of Europe Convention on the protection of the environment through criminal law, CETS No. 172, see: http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=172&CM=1&DF=2/14/2009&CL=ENG.

6 As a consequence, having a legal basis in the first pillar not only regarding the procedure (qualified majority at the Council, and the Parliament being a co-legislator), but also regarding the Commission and Court of Justice enforcement powers (far more stronger in the first pillar; on this point and the latest evolutions in the third pillar, see, for example, Anne Weyembergh, Paul de Hert et Pieter Paepe, L'effectivité du Troisième Pilier de l'UE et l'exigence de l'interprétation conforme: la Cour de Justice pose ses jalons (Note sous l'arrêt Pupino du 16 juin 2005 de la Cour de Justice des Communautés Européennes) », RTr. DH., 69/2007, pp. 269-292) and the role of private parties (even though the direct effect doctrine may be hampered by the nullum crinem sine praevia lege principle in the criminal field).

7 ECJ, Case C-176/03, Commission v Council (Grand Chamber), 13 September 2005, http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en.

8 Ibid. § 47.

9 Ibid. § 48.

10 M. Faure, The continuing story of environmental criminal law in Europe after 23 October 2007, *supra* note 2, p. 72.

11 COM(2007)51 final.

12 Council Framework Decision 2005/447/JHA dated 12 July 2005.

13 ECJ, Case C-440/05, Commission v Council (Grand Chamber), 23 October 2007, http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en.

14 Ibid. § 70.

15 Art. 5-7 of the initial 2007 proposed Directive.

16 Directive, Preamble, recital 10.

criminal penalties provided that they are effective, proportionate and dissuasive (Directive, Art. 5).[17]

The Directive addresses both natural and legal persons. It does not target all environmental wrongs but only the more serious ones, such as the illegal disposal of radioactive substances and illegal waste management and illegal production and use of substances that deplete the ozone layer. Before analysing these crimes, we will first emphasise the offences' common elements. We will then go through the specificities of the offences listed in the Directive. Finally, we will pay a particular attention to the legal persons' legal treatment.

2.1 The offences: common elements

To constitute a criminal offence, all the conducts covered by the Directive must be unlawful. They must also be committed intentionally or with "at least serious negligence" (Directive, Art. 3). Inciting, aiding and abetting of such conducts will also be considered a criminal offence (Directive, Art. 4).

The European Court of Justice gave the following definition of "serious negligence": *"an unintentional act or omission by which the person responsible commits a patent breach of the duty of care which he should have and could have complied with in view of his attributes, knowledge, abilities and individual situation"*.[18] Such a diligence obligation is considered *in concreto*. The Directive covers acts and omissions.

Two annexes accompany the Directive. Annex A lists environmental Community legislation adopted pursuant to the EC Treaty. Annex B lists Community legislation adopted pursuant to the Euratom Treaty. To fulfil the "unlawfulness" condition and be qualified as an offence in the sense of the Directive, the conduct in question must infringe the Directive or the legislation listed in the annexes, or *"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 the annexes (Directive, Art. 2a).[19]

2.2 The crimes listed in the Directive

The Directive establishes a set of nine conducts that should be considered criminal offences throughout the EU when unlawful and committed intentionally. These conducts can be categorised as either 'concrete endangerment crimes',[20] or 'abstract endangerment crimes', the latter referring to cases where the conduct is "merely" unlawful: the violation of administrative regulations potentially creates danger per se.[21]

- Firstly, there is the unlawful *operation of a plant* in which a dangerous activity is carried out or in which dangerous substances or preparations are used or stored is criminalised (Directive, Art. 3d). What is at stake here is the mere unlawful operation of a plant. As for the damage caused or likely to be caused by the conduct, it is "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" that can occur outside the plant.[22] This notion of damage can lead to criticism: what is meant by "substantial damage"? This brings up the issue of the evaluation, measure and threshold of environmental damage, which is still very controversial. It could lead to difficulties for Member States in the implementation exercise.
- Secondly, the unlawful *"manipulation" of wastes* is criminalised. Unlawful collection, transport, recovery or disposal of waste (including the supervision of such operations and the aftercare of disposal sites and action taken as a dealer or a broker is criminalised if such an unlawful conduct "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" (Directive, Art. 3b). Reference should be made here to the broad interpretation by the European Court of Justice of the notion of waste,[23] and

17 This requirement is in line with the Court of Justice's settled case law with respect to the sanctions of community law to be imposed by member states: see among others the "Amsterdam Bulb" case (2 February 1977, No.°50/67), Van Colson and Kamann (10 April 1984, No.°14/83), Wells (7 January 2004, C-201/02), and Commission v Greece (21 September 1989, No.°68/88)

18 ECJ, The Queen on the application of International Association of Independent Tanker Owners (Intertanko), International Association of Dry Cargo Shipowners (Intercargo), Greek Shipping Co-operation Committee, Lloyd's Register, International Salvage Union v Secretary of State for Transport ("Intertanko" case), ECJ, C-308/06 (Grand Chamber), preliminary ruling, 3 June 2008, § 77, http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en.

19 This way of giving substance to the requirement of "unlawfulness" has been characterised as the "administrative dependence of environmental criminal law". See, among others, M. Faure, The continuing story of environmental criminal law in Europe after 23 October 2007, *supra* note 2, p. 68 and the same author, Vers un nouveau modèle de protection de l'environnement par le droit pénal, REDE, 1/2005, pp. 9-13. The Directive does not contain autonomous or independent crimes in the sense that a conduct is criminalised, even if the unlawfulness condition is not met (i.e. even if the conduct is in line with an administrative authorisation). Both the Framework Decision and the proposed Directive contained an autonomous crime, but it was no longer foreseen after the European Parliament's first lecture of the proposed Directive.

20 M. Faure,The continuing story of environmental criminal law in Europe after 23 October 2007, *supra* note 2, p. 69.

21 Ibid. It should be stressed that this distinction is not a purely theoretical matter: this distinction between abstract and concrete endangerment does have practical consequences for the sanctions. See, for example, M. Faure, Vers un nouveau modèle…, *supra* note 19, pp. 9-13.

22 M. Faure, The continuing story of environmental criminal law in Europe after 23 October 2008, *supra* note 2, p. 69.

23 For example, see ECJ, *Commune de Mesquer* case, C-188-07 (Grand Chamber), preliminary ruling, 24 June 2008, http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en, §§ 38-45, and Marie-Claude Desjardins, La notion de déchet: vers une solution adéquate pour combler les lacunes du droit européen en matière de sols pollués?, REDE, 2/2006, pp. 145-152.

to the recently adopted Waste Framework Directive 2008/98.[24]

- Thirdly, the unlawful *shipment of waste* falling within the scope of Art. 2(35) of EC Regulation 1013/2006 is criminalised: "the shipment must be undertaken in a non-negligible" quantity, this quantity can be appraised in a single shipment or in several shipments which appear to be linked (Directive, Art. 3c). No condition related to damage has to be met.
- Fourthly, the unlawful production, processing, handling, use, holding, storage, transport, import, export or disposal of *nuclear materials or other radioactive substances* is criminalised. Such a conduct must be criminalised when it causes or is likely to cause death or serious injury to any person or substantial damage to the quality of the air, the quality of soil or the quality of water, or to animals or plants (Directive, Art. 3e).
- Fifthly, the unlawful discharge, emission or introduction of a quantity of *materials or ionising radiation* into air, soil or water is criminalised when the conduct 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 (Directive, Art. 3a).
- Sixthly, the unlawful production, importation, exportation, placing on the market or use of *ozone-depleting substances* is criminalised, independently of any damage. Only the unlawful conduct is criminalised (Directive, Art. 3i).
- Seventhly, the killing, destruction, possession or taking of *specimens of protected wild fauna or flora species* is criminalised (Directive, Art. 3f). The protected wild fauna or flora species into question are defined in Art. 2b(i): Annex IV of the "habitat" directive,[25] Annex I and Art. 4(2) of the "birds" Directive.[26] The condition for such a conduct to be criminalised is that it must concern a non-negligible quantity of such specimens and have a non-negligible impact on the conservation status of the species (Directive, Art. 3f *a contrario*). Such a "non-negligible" criterion can turn out to be problematical, not only in the light of the vagueness of the terminology, but also because the mere establishment of quantitative and qualitative thresholds can be controversial.[27]
- Eighthly, the unlawful *trading in specimens of protected wild fauna or flora species* or parts or derivatives thereof is criminalised (Directive, Art. 3g). The notion of protected wild fauna and flora species are the species listed in Annex A or B to the Regulation on the protection of species of wild fauna and flora by regulating trade therein[28] (Directive, Art. 2b(ii)). Similarly to the above, the condition for such a conduct to be criminalised is that it must concern a non-negligible quantity of such specimens and have a non-negligible impact on the conservation status of the species (Directive, Art. 3g *a contrario*), calling for the same comments.
- Ninthly and finally, any conduct causing the significant *deterioration of a habitat within a protected site* is criminalised (Directive, Art. 3h). The notion of habitat within a protected site refers to the special protection area according to the "birds" Directive, or any natural habitat or a habitat of species for which a site is designated as a special area of conservation according to the EC Habitats Directive (Directive, Art. 2c). Once again, the notion of "significant" deterioration can lead to difficulties of appraisal.[29]

2.3 Legal persons: definition, liability and sanctions

The Directive applies to both natural and legal persons. The latter are rightly included since they play a prominent role in environmental criminal offences. The impact assessment accompanying the Directive refers to a study conducted in 2003. It found that in 73 % of the cases enterprises or "corporate-like structures" were implied.[30]

Art. 2d of the Directive defines 'legal person' as "any legal entity having such status under the applicable national law, except for States or public bodies exercising State authority and for public international organizations." Therefore, public organisations do not fall within the scope of the Directive. Such an exclusion can be criticised.

The criminal liability of legal persons is foreseen in Art. 6 of the Directive. Art. 6(1) enumerates three conditions:

---

24 Waste Framework Directive 2008/98/CE, 19 November 2008, OJ L 312, 22 November 2008, pp. 3-30.

25 Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22 July 1992, p. 7.

26 Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, OJ L 103, 25 April 1979, p. 1.

27 In this respect and on the transformation of "absolute" prohibitions in community legislation into "relative" prohibitions, see Françoise Comte, Criminal Environmental Law and Community Competence, *supra* note 2, pp. 153-156.

28 Council Regulation No. 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, OJ L 61, 3 March 1997, p. 1.

29 It should be noted here that the offences relying on the "birds" and "habitat" Directives could prove to lead to distinct approaches between member States since those Directives call for administrative measures (cf. above on the dependence of environmental criminal law to administrative law). But it should be stressed that The Court of Justice's settled case law limits the Member States margin of appreciation in implementing the Directives into question. See, for example, ECJ, Case C-508/04, Commission v Austria, 10 May 2007, §§ 76-89, http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en.

30 Impact Assessment SEC (2007) 160, http://ec.europa.eu/environment/crime/pdf/com_2007_0051_impactassess_en.pdf (accessed 4 August 2008), p. 11.

- Firstly, an offence according to Art. 3 or 4 of the Directive must have been committed.
- Secondly, the offence must have been committed "for their benefit".
- Thirdly, the offence must have been committed "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", based on a power of representation of the legal person (a), an authority to take decisions on behalf of the legal person (b), or an authority to exercise control within the legal person (c).

Hence, the ability to engage the legal persons' liability is restricted by the requirement that the natural person susceptible to engaging the legal person's liability must have "a leading position" within the legal person. Nevertheless, the possibility to identify such a leading position "either individually or as part of an organ of the legal person" could mean that such a leading role could be determined by relying on law (e.g. the statutes of the legal person) or by identifying a *de facto* leading role. This could attenuate the obstacle of the "leading position" requirement. Art. 6(2) covers the liability of legal persons on the grounds of a lack of supervision or control by the natural person having a leading position when this lack of supervision or control "has made possible the commission of an offence referred to in articles 3 and 4". Finally, Art. 6(3) allows for the aggregation of liabilities, i.e. the possibility to engage in criminal proceedings against both legal persons and natural persons "who are perpetrators, inciters or accessories in the offences referred to in Articles 3 and 4".

The penalties to be applied are provided for in Art. 7 of the Directive: "legal persons held liable pursuant to Article 6 are punishable by effective, proportionate and dissuasive penalties". What was at stake here was whether or not Member States could be bound to impose criminal penalties to legal persons. Indeed, some Member States' legal orders do not foresee such a possibility (e.g. Germany). In this article, the Directive leaves the choice of the sanctions' nature (criminal or administrative) to the Member States.

3 Critical assessment of the Directive's impact

From the above, it can be said that the Directive does constitute progress. In the past, the Community and the Member States have adopted numerous acts of legislation aiming at protecting the environment. However, various studies show that the sanctions currently in place in the Member States are not always sufficient to effectively implement the Community's policy on environmental protection. Criminal sanctions are not in force in all Member States for all serious environmental offences, whereas it can rightly be held that only criminal penalties will have a sufficiently dissuasive effect.[31] The Directive, which is the first of its kind, is a Community instrument which provides for harmonised criminal provisions that, contrary to Framework Decisions, does not allow the Member States any derogation. The implementation of directives is supervised by the Commission and the Court of Justice. It should also be stressed that the European Court of Justice has elaborated a solid body of case law that restricts the Member States' margin of discretion (e.g. in the waste and fauna and flora protection fields).[32] Moreover, the Directive, as a first pillar instrument, can rely on the first pillar institutional mechanisms regarding enforcement and the involvement of private parties.

However, there are internal and external limits to what can be expected of the adopted Directive. In terms of the "internal elements", i.e. the limits of the Directive itself, it should be underlined that the Directive provides for minimum rules. Also, the Directive was largely inspired by the annulled Framework Decision, i.e. a third pillar instrument adopted under the unanimity rule at the Council, thereby implying a smaller room for manoeuvre (even though the Court of Justice recognised the competence of the Community legislator to enact an instrument in the first pillar). Finally, some shortcomings have been outlined above, e.g. that the Member States are left to choose the nature of the sanctions to be applied to legal persons, and the use of rather vague terms ("significant damage", etc). There are other shortcomings, too. For example, regarding the notion of environmental damage, the European Parliament had proposed a much more comprehensive definition in its amendment 3, which included landscape and bedrock, with the following justification: "In connection with environmentally harmful activities, no mention is made of bedrock (the lithosphere). Soil (where it exists) is merely an outer layer – up to 1.5 meters deep – which forms on the parent rock. Rubbish dumps and waste stockpiles (which may contain hazardous or radioactive waste) can be found in old mines or quarries (and therefore in the bedrock itself)."[33] Similarly, the proposed Directive (9 February 2007) contained some dispositions on evaluation: the Member States were required to submit a report to the European Commission every 3 years on the implementation and enforcement of the Directive.

---

31 Commission, Proposal for a directive of the European Parliament and of the Council on the protection of the environment through criminal law, COM(2007)51 final 2007/0022 (COD), Brussels, 9. February 2007, p. 2-3.

32 On the effectiveness and appropriateness of using criminal law to better protect the environment, see Ricardo Pereira, Environmental criminal law in the first pillar: a positive development for environmental protection in the European Union?, *supra* note 2, pp. 256-259.

33 Report of the European Parliament, Rapporteur: Hartmut Nassauer, see amendments 3, 22, 23, 24 and 26: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2008-0154+0+DOC+PDF+V0//EN (accessed 12 February 2009).

Such reports were to be analysed by the Commission and sent to the Parliament and Council. The European Parliament chose to delete such a mechanism and to rely instead on the "traditional" implementation disposition (Directive, Art. 8).[34] This choice can be criticised not only in light of the evaluation objective set in recital 13 and the means awarded in Art. 8, but also because if the Council is to adopt an instrument setting the quantum of sanctions (*"the double-taxed mechanism of using both a Directive or Regulation and a Framework Decision"*[35]), the evaluation of the third pillar instrument could prove to be difficult if it does not have similar information on the implementation of the Directive.

The link between the first and third pillar instruments leads us to the "external" elements, i.e. the factors calling for the Directive's impact to not be overemphasised. It would be too exaggerated to see the Directive as the starting point of a "Community environmental criminal area." The centre of gravity for environmental criminal law remains in the third pillar for two key reasons:

- Firstly, there is the central role of the cooperation mechanisms belonging to the third pillar. They guarantee the practical effectiveness of criminal law in EU Member States.[36]
- Second, as seen above, the quantum of sanctions remains a competence of the third pillar.

The Directive impact assessment itself mentions the crucial role of sanctions.[37] They are crucial both at the national level and at the level of cooperation between Member States. On the national level, the quantum of sanctions can be of great importance to the techniques of investigations available for the authorities in charge of the investigation and repression of the infractions. When light sanctions are chosen by Member States it might then be the case that not all investigative measures can be used against environmental wrongs. As for the cooperation between Member States, sanctions are crucial with respect to mutual confidence and judicial cooperation (e.g. with regard to the European Arrest Warrant). Indeed, penalty thresholds (e.g. 2 years) can be a condition to be met for judicial cooperation to occur between Member States.

4 Conclusion

The very heated criticism of the Directive 2008/99/EC of 19 November 2008 may not be completely deserved. Clearly, the Directive can be seen as a sign of consolidation of criminal law and "Europeanization" of the protection of the environment and is, as such, a very positive sign. Nevertheless, the controversy about the adopted Directive may be excessive for reasons inherent to the Directive itself (i.e. its very content) or in terms of the broader framework of the EU criminal law.

What may have a far greater impact are the seeds that were sown through the European Court of Justice's case law recognising (as an exception to the rule) the competence of the Community legislator in the criminal area.

---

34 Ibid. amendment 34.

35 See M. Faure, The continuing story of environmental criminal law in Europe after 23 October 2007, *supra* note 2, pp. 71-72.

36 See, for example, Georges Kellens, Quelle utilité pour l'harmonisation des sanctions au niveau européen?, in: L'espace pénal européen: enjeux et perspectives, p. 149 (Gilles de Kerchove et Anne Weyembergh eds, Bruxelles, Editions de l'Université Libre de Bruxelles, 2002). The cooperation agencies, data bases, European policie and judicial networks can be mentioned in this context.

37 Impact assessment, *supra* note 30, pp. 13-14.

The Öko-Institut (Institut für angewandte Ökologie - Institute for Applied Ecology, a registered non-profit-association) was founded in 1977. Its founding was closely connected to the conflict over the building of the nuclear power plant in Wyhl (on the Rhine near the city of Freiburg, the seat of the Institute). The objective of the Institute was and is environmental research independent of government and industry, for the benefit of society. The results of our research are made available of the public.
The institute's mission is to analyse and evaluate current and future environmental problems, to point out risks, and to develop and implement problem-solving strategies and measures. In doing so, the Öko-Institut follows the guiding principle of sustainable development.
The institute's activities are organized in Divisions - Chemistry, Energy & Climate Protection, Genetic Engineering, Sustainable Products & Material Flows, Nuclear Engineering & Plant Safety, and Environmental Law.

The Environmental Law Division of the Öko-Institut:
The Environmental Law Division covers a broad spectrum of environmental law elaborating scientific studies for public and private clients, consulting governments and public authorities, participating in law drafting processes and mediating stakeholder dialogues. Lawyers of the Division work on international, EU and national environmental law, concentrating on waste management, emission control, energy and climate protection, nuclear, aviation and planning law.

Contact
Freiburg Head Office:
P.O. Box 50 02 40
D-79028 Freiburg
Phone +49 (0)761-4 52 95-0
Fax +49 (0)761-4 52 95 88

Darmstadt Office:
Rheinstrasse 95
D-64295 Darmstadt
Phone +49 (0)6151-81 91-0
Fax +49 (0)6151-81 91 33

Berlin Office:
Novalisstrasse 10
D-10115 Berlin
Phone +49(0)30-280 486 80
Fax +49(0)30-280 486 88
www.oeko.de

The University of Applied Sciences in Bingen was founded in 1897. It is a practiceorientated academic institution and runs courses in electrical engineering, computer science for engineering, mechanical engineering, business management for engineering, process engineering, biotechnology, agriculture, international agricultural trade and in environmental engineering.

The *Institute for Environmental Studies and Applied Research* (I.E.S.A.R.) was founded in 2003 as an integrated institution of the University of Applied Sciences of Bingen. I.E.S.A.R carries out applied research projects and advisory services mainly in the areas of environmental law and economy, environmental management and international cooperation for development at the University of Applied Sciences and presents itself as an interdisciplinary institution.

The Institute fulfils its assignments particularly by:
- Undertaking projects in developing countries
- Realization of seminars in the areas of environment and development
- Research for European Institutions
- Advisory service for companies and know-how-transfer

Main areas of research:
- **European environmental policy**
  - Research on implementation of European law
  - Effectiveness of legal and economic instruments
  - European governance
- **Environmental advice in developing countries**
  - Advice for legislation and institution development
  - Know-how-transfer
- **Companies and environment**
  - Environmental management
  - Risk management

Contact
Prof. Dr. jur. Gerhard Roller
University of Applied Sciences
Berlinstrasse 109
D-55411 Bingen/Germany
Phone +49(0)6721-409-363
Fax +49(0)6721-409-110
roller@fh-bingen.de
www.fh-bingen.de

The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.
The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.
The sofia team is multidisciplinary: Lawyers and economists are collaborating with engineers as well as social and natural scientists. The theoretical basis is the interdisciplinary behaviour model of *homo oeconomicus institutionalis*, considering the formal (e.g. laws and contracts) and informal (e.g. rules of fairness) institutional context of individual behaviour.

The areas of research cover
- Product policy/REACh
- Land use strategies
- Role of standardization bodies
- Biodiversity and nature conversation
- Water and energy management
- Electronic public participation
- Economic opportunities deriving from environmental legislation
- Self responsibility

sofia is working on behalf of the
- VolkswagenStiftung
- German Federal Ministry of Education and Research
- Hessian Ministry of Economics
- German Institute for Standardization (DIN)
- German Federal Environmental Agency (UBA)
- German Federal Agency for Nature Conservation (BfN)
- Federal Ministry of Consumer Protection, Food and Agriculture

Contact
Darmstadt Office
Prof. Dr. Martin Führ – sofia
University of Applied Sciences
Haardtring 100
D-64295 Darmstadt/Germany
Phone +49(0)6151-16-8734/35/31
Fax +49(0)6151-16-8925
fuehr@sofia-darmstadt.de
www.h-da.de

Göttingen Office
Prof. Dr. Kilian Bizer – sofia
University of Göttingen
Platz der Göttinger Sieben 3
D-37073 Göttingen/Germany
Phone +49(0)551-39-4602
Fax +49(0)551-39-19558
bizer@sofia-darmstadt.de
www.sofia-research.com

Öko-Institut e.V.
Institut für angewandte Ökologie
Institute for Applied Ecology

I·E·S·A·R
Institute for Environmental Studies and Applied Research
FH Bingen

sofia

elni

In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. Since then, elni has grown to a network of about 350 individuals and organisations from all over the world.

Since 2005 elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

The Coordinating Bureau was originally set up at and financed by Öko-Institut in Darmstadt, Germany, a non-governmental, non-profit research institute.

Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

elni Review

The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focussing on European and international environmental law as well as recent developments in the EU Member States. It is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt). The Coordinating Bureau is currently hosted by the University of Bingen. elni encourages its members to submit articles to the Review in order to support and further the exchange and sharing of experiences with other members.

elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researches, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

Publications series

- Access to justice in Environmental Matters and the Role of NGOs, de Sadeleer/Roller/Dross, Europa Law Publishing, 2005.
- Environmental Law Principles in Practice, Sheridan/Lavrysen (eds.), Bruylant, 2002.
- Voluntary Agreements – The Role of Environmental Agreements, elni (ed.), Cameron May Ltd., London, 1998.
- Environmental Impact Assessment – European and Comparative; Law and Practical Experience, elni (ed.), Cameron May Ltd., London, 1997.
- Environmental Rights: Law, Litigation and Access to Justice, Deimann/Dyssli (eds.), Cameron May Ltd., London, 1995.
- Environmental Control of Products and Substances: Legal Concepts in Europe and the United States, Gebers/Jendroska (eds.), Peter Lang, 1994.
- Dynamic International Regimes: Institutions of International Environmental Governance, Thomas Gehring; Peter Lang, 1994.
- Environmentally Sound Waste Management? Current Legal Situation and Practical Experience in Europe, Sander/Küppers (eds.), P. Lang, 1993
- Licensing Procedures for Industria Plants and the Influence of EC Directives, Gebers/Robensin (eds.), P. Lang, 1993.
- Civil Liability for Waste, v. Wilmowsky/Roller, P. Lang, 1992.
- Participation and Litigation Rights of Environmental Associations in Europe, Führ/Roller (eds.), P. Lang, 1991.

Elni Website: elni.org

On the elni website www.elni.org one finds news of the network and an index of articles. It also indicates elni activities and informs about new publications. Internship possibilities are also published online.

elni, c/o Institute for Environmental Studies and Applied Research
FH Bingen, Berliner Straße 109, 55411 Bingen/Germany

www.elni.org