I — Introduction

1. The Commission, using Article 35(6) EU, is challenging Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law (hereinafter 'the Framework Decision'). In its view, the legal basis chosen is erroneous, because the legislative enterprise in question should be undertaken in the context of the EC Treaty and not, as has been done, on the basis of Title VI of the Treaty on European Union.  

2. Behind that succinct proposition there is a far-reaching issue, which involves the powers of the Community, since, on the assumption that the protection of the natural environment in the European Union demands concerted action in the form of the criminalisation of the most serious infringements, it is necessary to determine whether approval of the necessary coordinating provisions falls within the third pillar, and is the province of the Council under Article 34(1) (b) EU, in conjunction with Article 31(1)(e) EU, or within the first, on the grounds that it is a Community action, as referred to in Article 175 EC.  

3. The positions set out in the various written submissions and at the hearing seem to be sharply defined, not only as regards the claim advanced in each instance, but also in the arguments deployed. The Commission, the European Parliament and the Economic and Social Committee align themselves with the second of the above propositions, whilst the Council and the 11 Member States which share its view argue for the first.  

4. The choice of one position or the other entails far-reaching consequences. Electing
the 'unionist' option weakens the harmonising effect since, apart from the fact that framework decisions do not have direct effect, failure to transpose them cannot be overcome using an action for infringement, such as that provided for in Article 226 EC, and, in addition, the Court's jurisdiction to give preliminary rulings, in accordance with Article 35 EU, is not binding, since that jurisdiction is subject to acceptance by the Member States. The foregoing considerations explain the Commission's wish to situate competence under the first pillar.

5. Before undertaking an analysis of the action, it is necessary to give an overview of the legislation and the successive stages of the proceedings before the Court.

II — The legal framework

A — Community law

1. The Treaty Establishing the European Community

6. One of the objectives of the Community is to achieve a high level of protection and improvement of the quality of the environment (Article 2 EC), implementing adequate policy in that sphere (Article 3(1)(I) EC) and integrating environmental protection requirements into the definition and implementation of other Community policies, with a view to promoting sustainable development (Article 6 EC).

7. Article 174 EC sets out the aims of environmental policy (Article 174(1) and (2) EC), and the criteria to be taken into account in drawing it up (Article 174(3) EC), whilst Article 175 EC establishes the procedures for adopting the relevant measures (Article 175(1) to (3) EC), which must be financed and implemented by the Member States (Article 175(4) EC), and the latter may, in any event, according to Article 176 EC, introduce more stringent measures, provided that they are not incompatible with the Treaty.

8. In consequence, there is shared responsibility in the environmental sphere, advocates by Article 174(4) EC, which leaves the way open for joint or unilateral cooperation with third countries and with international organisations.

9. As regards the Community, as a general rule it exercises competence through the 'codecision' procedure set out in Article 251

6 — The Spanish legal system reproduces similar arrangements, in which the State approves the basic environmental legislation, without prejudice to the power of the Autonomous Communities, which are responsible for management in that area, to issue additional protective measures (Article 149.1.23 and Article 148.1.9 of the 1978 Constitution).
EC although, in respect of the matters to which Article 175(2) EC refers, the Council can act alone, on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions.

2. Proposal for a Directive on the criminal-law protection of the environment

10. On the basis of Article 175(1) EC, the Commission, in accordance with Article 251 EC, put forward a proposal for a Directive seeking to ensure more robust application of the Community law on the protection of the environment, establishing a minimum set of criminal offences throughout the Community (Article 1).

11. Article 3 of the text submitted classifies as criminal offences certain types of conduct, committed intentionally or with at least serious negligence, and Article 4 gives the Member States responsibility for punishing the commission or instigation of or the participation in such offences by means of 'effective, proportionate and dissuasive sanctions', including the deprivation of liberty. It also provides for other types of corrective measures, for both natural and legal persons, including fines, exclusion from entitlement to benefits and judicial intervention.

B — European Union law

1. The Treaty on European Union

12. The European Union, which embodies a new stage in the process of creating an ever-closer link between the peoples of Europe, is based on the Communities, supplemented by the policies and with the forms of cooperation established in the Treaty on European Union itself (Article 1). Accordingly, there are three distinct pillars:

— The first, or 'Community', pillar.
— The second covers common foreign and security policy (Title V).

— The third concerns police and judicial cooperation in criminal matters (Title VI).

13. The latter aims, without prejudice to the powers of the European Community, to provide citizens with a high level of safety within an area of freedom, security and justice, by means of common action among the Member States in the fields in question, in order to prevent and combat crime, through the approximation, where necessary, of national rules on criminal matters, in accordance with the provisions of Article 31(e) EU (Article 29 EU).

14. Judicial cooperation includes the progressive adoption of measures establishing minimum rules relating to the constituent elements of offences and to penalties in the fields of organised crime, terrorism and illicit drug trafficking (Article 31(1)(e) EU).

15. For such purposes, one of the tools created is the framework decision, which fosters the approximation of national statutory and regulatory provisions. In common with the directives under the first pillar, framework decisions are binding as to the result to be achieved, leaving to the national authorities the choice of form and methods, but, in contrast, never have direct effect (Article 34(2)(b) EU).

16. The powers under the third pillar may be transferred to the Community so that it can exercise them under Title IV of the EC Treaty, in relation to visas, asylum, immigration and other policies associated with the free movement of persons (Article 42 EU).

17. The terms of the Treaty on European Union do not affect the founding treaties of the European Community nor the subsequent Treaties and Acts modifying or supplementing them (Article 47).

2. The Framework Decision

18. Invoking Article 29 EU, Article 31(e) EU and Article 34(2)(b) EU, the Council, with the objective of giving a tough and concerted response to threats to the environment (recitals 2 and 3), approved the Framework Decision which the Commission now contests.
19. Articles 2 and 3 of the Framework Decision require the Member States to establish as criminal offences the intentional or negligent commission of certain conduct,\(^\text{10}\) whilst Article 4 extends liability to the participation in and instigation of such conduct.

20. Article 5(1), for its part, predicates 'effective, proportionate and dissuasive' penalties which must include, at least in serious cases, penalties involving the deprivation of liberty and which can give rise to extradition, without prejudice to the fact that, as set out in Article 5(2), they may be accompanied by other sanctions or measures.\(^\text{11}\)

21. Article 6 governs the liability for acts or omissions by legal persons,\(^\text{12}\) and Article 7, the punishments they can incur.\(^\text{13}\)

22. The foregoing provisions demonstrate that the Framework Decision is practically an exact reproduction of the Proposal for a Directive, as is acknowledged in Recital 5, with an explanation in Recital 7 that the

10 — Article 2 provides that '[e]ach Member State shall take the necessary measures to establish as criminal offences under its domestic law: (a) the discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water which causes death or serious injury to any person; (b) the unlawful discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water which causes or is likely to cause their lasting or substantial deterioration or death or serious injury to any person or substantial damage to protected monuments, other protected objects, property, animals or plants; (c) the unlawful disposal, treatment, storage, transport, export or import of waste, including hazardous waste, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants; (d) the unlawful operation of a plant in which a dangerous activity is carried out 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, soil, water, animals or plants; (e) the unlawful manufacture, treatment, storage, use, transport, export or import of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants; (f) the unlawful possession, taking, damaging, killing or trading of or in protected wild fauna and flora species or parts thereof, at least where they are threatened with extinction as defined under national law; (g) the unlawful trade in ozone-depleting substances ...'.

11 — Article 5(2) enumerates, by way of illustration, the disqualification of a natural person from engaging in an activity requiring official authorisation or approval, or founding, managing or directing a company or a foundation, 'where the facts having led to his or her conviction show an obvious risk that the same kind of criminal activity may be pursued'.

12 — Article 6(1) makes each Member State responsible for adopting 'the necessary measures to ensure that legal persons can be held liable for conduct referred to in Articles 2 and 3 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on: (a) a power of representation of the legal person, or (b) an authority to take decisions on behalf of the legal person, or (c) an authority to exercise control within the legal person, as well as for the involvement as accessories or instigators in the commission of conduct referred to in Article 2'. Article 6(2) adds that '[a]part from the cases already provided for in paragraph 1, each Member State shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission referred to in paragraph 1 has made possible the commission referred to in Articles 2 and 3 for the benefit of that legal person by a person under its authority'.

13 — Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 6 is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such as: (a) exclusion from entitlement to public benefits or aid; (b) temporary or permanent disqualification from the practice of industrial or commercial activities; (c) placing under judicial supervision; (d) judicial winding-up order; (e) the obligation to adopt specific measures in order to avoid the consequences of conduct such as that on which the criminal liability was founded.'
Council considered the Proposal, but did not approve it, because it went beyond the powers granted to the Community by the EC Treaty.\(^{14}\)

23. Article 8 refers to jurisdiction based on territory, whilst Article 9 addresses extradition and prosecution where a Member State does not extradite its nationals.

IV — Analysis of the action

A — Definition of the issues in contention

26. The dispute turns on Articles 1 to 7 of the Framework Decision, whilst Articles 8 to 12 remain tangential. What is in issue is not the power of the Council of the European Union to adopt those provisions,\(^ {15}\) but its

\(^{14}\) From those explanations in the preamble to the Framework Decision and from a number of statements made at the hearing, it emerges that the Proposal for a Directive did not come to fruition because there were differences of opinion amongst the Member States, and no unanimous position was reached.

duty to refrain from adopting them by virtue of the primacy of Community law, established in Article 47 EU, since the Community is said to have power under the Treaty of Rome to require the Member States to give a response in criminal law to certain threats to the environment.

27. The discussion, therefore, has shifted from the third pillar to the first in order to examine whether there is any legal basis for the Community to intervene in the matter, cancelling out the powers of the Union. On that point likewise it is common ground that Community law contains no express or implicit general power to impose criminal penalties.

28. On the other hand, all the parties acknowledge that the Community is entitled, on the basis of the principle of loyal cooperation, referred to in Article 10 EC and intended to ensure the effectiveness of its legal order, to require the Member States to punish conduct which threatens that legal order. The parties and their interveners, however, differ as to whether that power enables the Community to require the Member States to define acts as criminal offences.

29. Resolving that question requires a rigorous examination of the judgments according to which the Community institutions have power to lay down rules imposing punishments.

B — The case-law on the Community's power to establish penalties

30. The judgment in Amsterdam Bulb asserted that, in the absence of any provision in the Community rules for the punishment of individuals who fail to observe those rules, the national legislatures can adopt such sanctions as appear to them to be appropriate (paragraph 33). That assertion is based on the duty of the Member States, under Article 5 of the EC Treaty (now...
Article 10 EC), to ensure fulfilment of their European obligations (paragraph 32).

31. In his Opinion in that case, Advocate General Capotorti sheds light on the reasoning behind the statement in question. In paragraph 4, after pointing out that, according to the case-law, Member States are precluded from taking measures which modify a Community regulation, even for the purpose of ensuring its application, he explains that the prospect of a penal sanction does not change the scope of a rule, since any penal provision related to a substantive rule of conduct is based on the presumption of conduct contrary to that rule and the rule is, therefore, taken for granted, complete with its contents. He later adds that the differentiated protection which the method provides is inherent in the differences between the national regimes, to which regimes Article 5 of the Treaty appeals in order to reinforce the effectiveness of Community law. To complete the picture, he states that the only restriction on the introduction of penal sanctions on the part of a Member State is the possibility that the Community rules have already provided for them.

32. So, *Amsterdam Bulb* turns on three premises: (1) it is for Community law to design the penalty provisions which ensure its effectiveness; (2) where there are none, the Member States apply such penalty measures as they see fit; and (3) they are free to choose the methods which they consider most appropriate, even if variations are inherent in the system.

33. The first notion rests on the supposition that the Community penalty has the force inherent to the legal instrument used, be it a regulation or a directive. However, since the Community has no powers to impose criminal penalties, it must confine itself to regulating civil and administrative penalties. The foregoing is implicit in the words of Advocate General Capotorti when he concludes the same paragraph of his Opinion, observing that the fact that a Member State supplements Community legislation by penal sanctions, in order to ensure compliance with it, does not infringe the principles which inspire Community law, with the proviso, I should add, that it respects the safeguards which govern the exercise of any power to impose penalties and, in particular, of the *ne bis in idem* principle. 20

34. In the ‘Greek Maize’ case, 21 the Court of Justice reiterated the formula in paragraph


21 — Case 68/88 *Commission v Greece* [1989] ECR 2965. According to the judgment in the case, the Member State in question failed to fulfil its obligations because, amongst other reasons, it failed to bring disciplinary or criminal proceedings against those who participated in committing and concealing a number of operations which enabled the evasion of payment of agricultural levies due on certain consignments of maize imported from a non-member country in May 1986.
32 of the judgment in Amsterdam Bulb (paragraph 23), without specifically citing that case. It added two requirements for the legitimacy of national disciplinary measures intended to uphold Community law: (1) infringements must be penalised under procedural and substantive conditions which are analogous to those applicable to infringements of national law of a similar nature and importance; and (2) the conditions must make the penalty effective, proportionate and dissuasive (paragraph 24). In his Opinion in that case, Advocate General Tesauro had already stated that Article 5 of the Treaty entails a duty on Member States to impose appropriate penalties on those who infringe Community law in such a way as to prejudice its effectiveness (paragraph 12, second unnumbered paragraph).

35. Accordingly, the way is open for Member States to put an end to conduct which contravenes Community law, both where that law is silent on the matter and where it contains express provisions. The national rules entail additional protection but, as already suggested in paragraph 17 of the judgment in Drexl, Community law sets certain limits, and demands that the penalty be equivalent to that used in respect of infringements of domestic law (the principle of equal treatment or proportionality) and, furthermore, that it be effective.

36. The order in Zwartveld and Others, delivered in a request for judicial cooperation by the Rechter-commissaris at the Arrondissementsrechtbank Groningen, attributed to Greek Maize a statement which does not appear in the text of the judgment in that case, but which pervades its spirit and that of the Amsterdam Bulb ruling: the Member States can and must guarantee compliance with the Treaty, resorting, if necessary, to criminal penalties (paragraph 17).

37. The tour of the case-law appears to conclude with Nunes and de Matos, which addressed a question referred for a preliminary ruling by the Tribunal de Círculo, Oporto, seeking to ascertain whether a Member State is entitled to classify as a criminal offence conduct harmful to the financial interests of the Community, where the Community legislation only affords it a civil penalty. The Court of Justice held that

22 — The legal thinking in that judgment is reproduced in Case C-326/88 Hansen [1990] ECR I-2911, paragraph 17, ruling on a question referred for a preliminary ruling in criminal proceedings taking place in Denmark against an employer for infringement of Council Regulation (EEC) No 543/69 of 25 March 1969 on the harmonisation of certain social legislation relating to road transport (Of English Special Edition, 1969 (1), p. 170). The judgment held that neither that regulation nor the general principles of Community law preclude the application of national provisions under which an employer whose driver has failed to observe the maximum daily driving period and the compulsory daily rest period may be the subject of a criminal penalty, on condition that the penalty is similar to that imposed in the event of infringement of provisions of national law and is proportionate to the seriousness of the infringement committed (operative part of the judgment).

the actions available under the auspices of Article 10 EC include criminal responses, and stated that:

— if Community law contains no measures to ensure compliance with its provisions, the Member States have a duty to establish such measures; if it does include them, the Member States acquire a complementary role concerned with reinforcing those provisions;

— the choice of the type of penalty lies with the national authorities, although the penalty must be comparable with that imposed for infringements of domestic law of similar nature and importance, and must in addition be effective, appropriate and dissuasive.

38. In short, neither the Council nor those who share its view are wrong to argue that the case-law does not, explicitly, recognise any power on the part of the Community to require the Member States to classify as criminal offences conduct which hinders achievement of the objectives laid down in the Treaties.

39. Taking the route of secondary Community legislation brings us to the same place.

40. Article 1(2) of Council Regulation (EEC) No 2241/87 of 23 July 1987 establishing certain control measures for fishing activities, 26 and Article 31(1) of Council Regulation (EEC) No 2847/93 of 12 October 1993 establishing a control system applicable to the common fisheries policy, 27 which has replaced the former, leave within the discretion of Member States the choice of the penalty for infringements of the provisions governing that policy. That interpretation is confirmed, as regards the first of those regulations, in Commission v France, 28 which examined whether actions, some administrative and some criminal, available in domestic law, complied with Community commitments in the field of conservation and monitoring of fishery resources.

41. For its part, Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, 29 after stating that the phenomenon must be combated mainly by penal means (fourth recital), merely requires Member States to ensure full application of all its provisions, and to determine the

penalties in the event of infringement (Article 14), subject to any stricter provisions to prevent such conduct (Article 15).

42. Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence merely requests Member States to punish, with 'effective, proportionate and dissuasive sanctions' persons who commit, instigate, are accessories to or who attempt to commit certain acts (Articles 1 to 3), and the criminal nature of those sanctions is qualified in Council Framework Decision 2002/946/JHA of 28 November 2002.\(^31\)

43. On occasions, a criminal penalty becomes imperative because it is the only sanction which fulfils the requirements outlined in the judgment in Greek Maize of being 'effective, proportionate and dissuasive'.

D — The undefined legal concept of an 'effective, proportionate and dissuasive penalty'

44. The notion in question, when looked at in the abstract, appears not to be precisely delineated, but, as with all such notions, is amenable to definition when applied to actual situations, most particularly if one bears in mind its intended purpose.

45. The expression which the Court of Justice employs is not accidental, since, by referring to the effectiveness, proportionality and the dissuasive nature of the penalty, it alludes to the basic requirements for achieving full application of a Community rule, notwithstanding its infringement. Furthermore, in the light of the fact that any punishment pursues the dual objective of general and specific deterrence, punishing the infringer with the appropriate legal mechanism and threatening society with the same kind of punishment if similarly culpable conduct occurs, the range of possible sanctions appearing very broad.

46. In some instances it is sufficient to restore the situation existing prior to the contravention. That outcome, however, which is not a punishment in the strict sense and which is usually referred to as a 'civil penalty', frequently requires, in order to attain the deterrent objectives referred to, the addition of punishments in the true meaning of the word, which must be more or less severe according to the importance of the legal interest under threat and the degree of social disapproval of the infringing behaviour.

47. Depending on the extent of the response, there are criminal penalties — those of greater severity — and administrative penal-
ties. Both categories are manifestations of the penalising authority of the State and obey the same ontological principles.  

32 However, the less stringent nature of the second type entails a relaxation of the safeguards which must accompany their imposition, without prejudice to the fact that, as I stated in my Opinion in Greece v Commission, 33 in both situations similar principles must be observed.  

48. It seems patent that, in keeping with what the Council and some of those supporting it have implied, no one is in a better position to assess the feasibility, appropriateness and effectiveness of a punitive response than the national legislating authorities. That has been my position when the issue was to determine, in the light of the principle of effectiveness, the adequacy of certain national procedural time-limits for bringing actions to enforce rights under Community law, 35 although with the proviso that there are well-publicised exceptions to that general rule 36 in which, because they are so manifest, the Community may lawfully make the assessment.

49. It must be recalled that upholding Community law is the responsibility of the Community institutions, although nothing prevents them from urging the Member States to penalise conduct which contravenes that law. It is only in so far as the most appropriate response cannot be provided — because the institutions do not have the information necessary to take a decision — that the task falls to the national legislatures. Conversely, if there are self-evident criteria for determining the 'effective, proportionate and dissuasive penalty', there is no substantive reason preventing the party which has competence in that sphere from making the decision. 37

---

32 — The Contentious-Administrative Division of the Spanish Tribunal Supremo (Supreme Court) has, of old, denied any metaphysical difference between the two categories. In that vein, see the judgment of 9 February 1972, which was delivered at a time when the Spanish legal system lacked many of the means characteristic of the rule of law and which made use of the equivalence in question in order to subject the imposition of administrative penalties to many of the safeguards required for criminal penalties. García de Enterría, E. and Fernández, T.R., Curso de derecho administrativo, Vol. II, No 7, Madrid, 2000, p. 163, report that there was an unprecedented increase in the use of administrative sanctions during the dictatorship of General Primo de Rivera, the Second Republic and the Franco era, regimes which used them as a routine means of combating political opposition.


34 — The Spanish Tribunal Constitucional (Constitutional Court) is of the view that the formal requirements of criminal proceedings operate in administrative proceedings which impose sanctions, to the extent necessary to uphold the essential values which underpin the right to a fair trial (judgments 18/1981 (BOE 143 of 16 June 1981) and 181/1990 (BOE 289 of 3 December 1990)), subject to the appropriate adaptations according to their particular nature (judgments 2/1987 (BOE 35 of 10 February 1987), 29/1990 (BOE 50 of 18 February 1989), 181/1990, cited above, 3/1999 (BOE 48 of 25 February 1999) and 276/2000 (BOE 399 of 14 December 2000)).

35 — See my Opinions in Case C-255/00 Grundig Italiana [2002] ECR I-8003 (points 27 to 29) and in Case C-30/02 Recheio [2004] ECR I-6051 (points 23 to 35), in which judgment was delivered on 17 June 2004.

36 — Point 27 of the Opinion in Grundig Italiana and points 29 of the Opinion in Recheio.

37 — The holder of that competence must, in theory, have instrumental competence. The representative of the Finnish Government stressed at the hearing that criminal law is not a tool, since it is substantive in its own right, although that proposition smacks of mere semantics, since, like any provision imposing punishment, a criminal provision exists for the sake of, and serves, a more far-reaching end. Case C-240/90 Germany v Commission [1992] ECR I-5383, drawing support from other authorities, attributes to the Community, in the field in which it has competence (the case concerned the common agricultural policy), power to determine the penalties to be imposed by the national authorities on traders guilty of fraud (paragraphs 11 to 13).
50. In other words, there is no sign of any obstacle to the view that the appropriate punishment for, for example, attempted murder or the corruption of minors, must be criminal, and, consequently, if the legal interests protected in such offences were one of objectives of the Community, no one would dispute the ability of its law-making bodies to require the Member States to prosecute in criminal law.

51. The next step, therefore, is to ascertain whether environmental protection, which is, in view of the statements in points 6 to 9 above, indisputably a Community matter, requires the shield of criminal law. That analysis must include the process by which environmental protection has been brought within the Community framework.

52. In the Opinion which I delivered on 30 November 2004 in Case C-6/03 Deponiezweckverband Eiterköpfe, in which judgment was delivered on 14 April 2005, I stated that, although the natural environment and its preservation were not a matter of great concern to the drafters of the Treaties, it was not long before, in 1972, the Conference of Heads of State and Government, held in Paris, resolved to establish a specific policy in the area, 38 with the suggestion that use should be made of the legal basis afforded by Articles 100 and 235 of the EC Treaty 39 (now Articles 94 and 308 EC).

E — Environmental protection in the Community

53. The Court of Justice took up that suggestion and based the rules in the area in question on Article 100, 40 holding, in ADBHLL, 41 that environmental protection should be 'one of the Community's essential objectives' (paragraph 13), a notion reiterated years later, after approval of the Single European Act, 42 in the judgment in Commission v Denmark (paragraph 8). 43

38 — That initial lacuna in the legislation led to serious uncertainties in the quest for a legal basis for Community environmental law, which has been described in Spanish legal academic writing by Bravo-Ferrer Delgado, M., 'La determinación de la base jurídica en el derecho comunitario del medio ambiente', Gaceta Jurídica, Nos B-92 and B-93, March and April 1994, pp. 13 to 20 and 5 to 13, respectively. Another writer has also addressed the issue: Géradin, D., 'Les compétences respectives de la Communauté et des États membres dans le domaine de l'environnement: base juridique, subsidiarité et proportionnalité', Le droit communautaire de l'environnement. Mise en œuvre et perspectives, Paris 1998, pp. 33 to 55.

39 — Article 100 emerged as the mechanism for harmonising rules which directly affect the establishment or operation of the common market, and Article 235, which was broader in scope, provided the basis for adoption of the appropriate measures to attain Community objectives not expressly articulated in the Treaty.

40 — According to Case 91/79 Commission v Italy [1980] ECR 1099, paragraph 8, it is not inconceivable that environmental provisions might be based on Article 100 of the Treaty, since such provisions are capable of being a burden on the undertakings to which they apply and, in the absence of the harmonisation of national provisions, there would be an appreciable distortion of competition.


54. That Act inserted into the EC Treaty a specific part — Title VII (now Title XIX) —, consisting of Articles 130r and 130s (now, after amendment, Articles 174 EC and 175 EC) and of Article 130t (now Article 176 EC), with the addition also of Article 100a(3) (now, after amendment, Article 95 (3) EC), which obliges the Commission to ensure that the proposals referred to in Article 95(1) seek to achieve 'a high level of protection' of the environment.

55. The new approach placed environmental protection at the heart of Community activity, inspiring and informing that activity, as the Court pointed out in Commission v Council (paragraphs 22 and 24), and, with signature in Maastricht of the Treaty on European Union, it became a Community objective.

56. Today, attainment of a high level of conservation and improvement of the environment, and improving the quality of life, have been confirmed as Community objectives (Article 2 EC), and call for specific action (Article 3(1)(l) EC). Furthermore, environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development' (Article 6 EC). The same concern is discernable in other provisions of the Treaty: Article 95 EC, already cited, or Article 161 EC, which addresses the setting up of a Cohesion Fund to provide 'a financial contribution to projects in the fields ... of environment ...'.

57. The preservation of the environment has provided an avenue for embodying in legislation principles such as the precautionary principle and that of preventive action (first subparagraph of Article 174(2) EC), which inform broad swathes of Community law in which nature, life and personal integrity have acquired a universal dimension as a result of the globalisation of the threats inherent in technological and industrial progress.

58. The Treaty establishing a Constitution for Europe continues the same approach. According to Article II-97, which is based on Article 2 EC, 'a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'; Article III-119

44 — Title VII was inserted in Part Three of the Treaty by Article 25 of the Single European Act, and Article 100a by Article 18. With the Treaty on European Union (Article G.28) it became Title XVI.


46 — On the precautionary principle, see González-Vaqué, L., 'La definición del contenido y ámbito de aplicación del principio de precaución en el derecho comunitario', Gaceta Jurídica de la Unión Europea, No 221, September and October 2002, pp. 4 to 20. Also, my El desarrollo comunitario del principio de precaución, pending publication.

reiterates Article 6 EC. Articles III-233 and III-234, for their part, substantially reproduce Articles 174 to 176 EC.

59. It is therefore beyond doubt, as I stated in point 51 of this Opinion, that the 'environment' is a matter of Community competence, and has also come to represent a legal interest the protection of which inspires its other policies, a protective activity which may be clarified, furthermore, as an essential objective of the Community system.

60. Environmental concern is not exclusive to Europe, and has acquired a universal dimension.

61. Numerous international pacts and agreements seek responses to combat the constant deterioration of ecosystems and life on our planet.

62. One example is the process occurring within the United Nations starting with the Conference held in Stockholm between 5 and 16 June 1972 and marked by significant milestones. That meeting turned into a major event, because it drew world attention to the seriousness of the environmental situation in a Declaration on the Human Environment, which established 26 principles for the preservation of natural resources.

63. The 1982 World Charter for Nature went further in the same direction, increasing commitment to the terms of the guidelines for behaviour and to their inclusion in national legal systems.

64. The Rio Declaration, adopted by the governments participating in the Conference on Environment and Development, held in Rio in June 1992, represented a decisive step forward. The high profile of the context from which it emerged and the broad consensus achieved for its approval have given it special meaning, as a universal agreement, the product of a shared awareness of the need to preserve the planet for future generations.

F — *The globalisation of 'environmental policy'*

61. Numerous international pacts and agreements seek responses to combat the constant deterioration of ecosystems and life on our planet.

48 — In that forum the starting point was the Universal Declaration of Human Rights (proclaimed by the General Assembly of the United Nations in Resolution 217 A (III) of 10 December 1948), in so far as it declares the existence of a right to a quality of life which ensures health and well-being (Article 25(1)). More far reaching, the International Pact on Economic, Social and Cultural Rights (approved by the same General Assembly in Resolution 2200 A (XXIII) of 16 December 1966, which came into force on 3 January 1976), refers to the need to improve the environment as one of the requisites of the adequate development of the person (Article 12(2)(b)).

49 — The Charter was agreed in Resolution 37/7 of 28 October 1982.
65. The 1992 United Nations Framework Convention on Climate Change and the Kyoto Protocol of 1997, which implements the former with a view to reducing emissions of greenhouse gases, represent two further significant links in that unstoppable chain of events, which includes also the Protocol on Biosafety, signed in Montreal on 28 January 2000, at the Conference of the signatories of the Convention on Biological Diversity, which likewise emerged from the Rio Summit.

66. The concepts 'sustainable development' and 'quality of life' used in the EC Treaty occur closely linked with that of the 'environment', alluding to a human dimension which cannot be overlooked when mention is made of protecting and improving the environment. In the geophysical medium which our natural surroundings represent, quality of life asserts itself as a citizenship right emanating from various factors, some of them physical (the rational use of resources and sustainable development) and some more intellectual (progress and cultural development). It is a matter of attaining dignity of life in qualitative terms, once the quantitative threshold sufficient for subsistence has been passed.

67. There thus emerges a right to enjoy an acceptable environment, not so much on the part of the individual as such, but as a member of a group, in which the individual shares common social interests. A number of constitutions of Member States of the Community at the time the contested Framework Decision was approved recognise that right. Accordingly, Article 20a of the Basic Law of the Federal Republic of Germany provides that 'the State, assum-


51 — Mendizábal Allende, R., 'Pasado, presente y futuro de la jurisdicción contencioso-administrativa', Actualidad Administrativa, No 19, 1994, p. 289. Loperena Rota, D., 'Los derechos al medio ambiente adecuado y a su protección, Revista Electrónica de Derecho Ambiental, No 3, November 1999, states that an acceptable environment is not the product of social development, but a prerequisite for it to exist, and is a right bound up with human life, without which there is neither mankind nor society nor law.

52 — The procedural embodiment of the phenomenon takes the form of conferring standing to bring actions on the holders of 'diffuse interests', that is to say, of extensive rights pertaining to groups which are loosely defined as to their composition and as a rule anonymous and indeterminate, although capable, with difficulty, of being determined. That type of mechanism, which has proved useful as a remedy for consumers and end users, operates in common law jurisdictions through what are known as 'class actions', which offer a solution to situations in which there are many injured parties, in such a way that, by the bringing of such an action, common aspirations, with implications for all, can be asserted individually and with no express formal grant of powers.


54 — Grundgesetz für die Bundesrepublik Deutschland, approved on 23 May 1949 in the Rhineland city of Bonn by the Parliamentary Council (Parlamentarischer Rat).
ing responsibility for future generations, shall also protect the natural conditions of life in the framework of the constitutional order. In Spain, amongst the principles governing social and economic policy, Article 45 of the Constitution declares the right of all to enjoy an environment appropriate for personal development. Article 66(1) of the Portuguese Constitution reads similarly. In Sweden, Article 18(3) of Chapter II of the Law of 24 November 1994, amending the Instrument of Government, reiterates the right of access to nature.

68. Supplementing that right are the correlative duties on public authorities. One has already seen the terms of the Bonn Basic Law. Article 45(2) of the Spanish Constitution requires the public authorities to ensure the rational use of natural resources, 'in order to protect and improve the quality of life and to protect and restore the environment, relying on the necessary support of collective solidarity'. In the same vein, the Finnish Charter of Government refers to a common responsibility for the care of nature and diversity, and of the environment (Article 20), whilst the Greek (Article 24(1)), Netherlands (Article 21) and Portuguese (Article 9(e)) Constitutions impose a duty on the authorities to preserve the environment. In Italy, the obligation on the Republic to safeguard the landscape, contained in Article 9(2) of the Constitution, has been extended to include custody of the environment and of land.

69. The human dimension of that environmental concern is implicitly enshrined in the European Union, whose Charter of Fundamental Rights, of 7 December 2000, after declaring in the preamble that the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity, includes, in the Chapter devoted to the latter, alongside employment and welfare rights, a provision explaining that its policies include and ensure a high level of environmental protection and the improvement of the quality of the environment, in accordance with the principle of sustainable

55 — Emphasis added.
56 — Ratified by referendum on 6 December 1978 (BOE 311-1 of 29 December 1978).
57 — The Spanish Tribunal Constitucional has emphasised that the provision in question reflects the ecological concern which has arisen in recent decades in broad sectors of opinion, embodied also in numerous international documents (judgment 64/1982 of 4 November (BOE 296 of 22 October 1982)).
58 — Approved by the Constituent Assembly, sitting in plenary session, on 2 April 1976.
60 — This basic law, which replaced that of 1919, entered into force on 1 March 2000 (Suomen Perustuslaki 731/1999).
62 — The Fundamental Law of the Kingdom of the Netherlands, revised text of 19 January 1983 (Staatsblad Nos 15 to 51).
development (Article 37). That provision, as indicated, forms part of the Treaty establishing a Constitution for Europe (Article II-97).

70. I do not want to conclude the present section without emphasising that, irrespective of how the notion of the right to enjoy an appropriate natural environment is couched, it is easy to discern its link with the content of certain fundamental rights. Two rulings of the European Court of Human Rights suffice to corroborate that view. López Ostra v Spain, held it to be obvious that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as adversely to affect their private and family life (paragraph 51). Guerra and

---

66 — Jordano Fraga, J., *La protección del derecho a un medio ambiente adecuado*, José María Bosch Editor, S.A., Barcelona, 1995, looks at the various academic views on the characterisation of that right (pp. 453 to 499). According to the classification devised by Vasak, K., *Le droit international de droits de l'homme*, 1972, it is one of the solidarity or third generation rights.


68 — Huelin, J., *Intimidad personal y familiar, domicilio y medio ambiente*, *Perfiles del derecho constitucional a la vida privada y familiar*, Consejo General del Poder Judicial, Madrid 1996, pp. 257 to 273, is of the view that the axiomatic statement of the nine judges who, on that occasion, comprised the European Court of Human Rights, carries great weight. It means that, in the light of the factual circumstances of the case, passivity on the part of the public authorities in prevailing situations in which one, some or many persons in their homes suffer noxious smells, emissions of fumes and repetitive noise from a water and other waste treatment plant which, although they do not seriously damage their health, impair their quality of life, can infringe Article 8 of the European Convention on Human Rights. That finding by the European Court of Human Rights was first stated in Powell and Rainer v. United Kingdom (Eur. Court H.R., judgment of 21 February 1990, Series A, 172), which held that noise generated by aircraft using an airport, to the extent to which it adversely affected the quality of life and enjoyment of the home, gave rise to an obligation to take into account Article 8 of the Convention (paragraph 49).

72. States use criminal codes as a last resort in defending themselves against threats to the values which sustain coexistence, and have in recent years determined that certain types of conduct which damage the natural environment are to be criminal. If the aim is to attain a high level of protection and to improve the quality of life (Article 2 EC), it seems reasonable that Community law, through the powers entrusted to the institutions in order to achieve those ends, must in certain cases avail itself of criminal penalties as the only 'effective, proportionate and dissuasive' response.

74. Administrative responses are often sufficient, but do not ensure appropriate protection in all instances of serious damage. Criminal penalties, conversely, represent an additional pressure, capable on a good number of occasions of inducing compliance with the requirements and a proliferation of statutory prohibitions on the carrying out of activities which are highly dangerous to the environment. The advent of ecology in criminal codes seeks also, in addition to enhancing the general deterrent effect, to raise public awareness of the social 'harmfulness' of offences against nature, reaffirming the recognition of environmental interests as autonomous rights ranking alongside the traditional values protected by the criminal law. The ethical dimension of criminal punishment must not be overlooked. When an act is sanctioned in criminal terms, it is held to merit the most severe reproach because it transgresses the fundamental tenets of the legal system.

73. In academic legal thinking a degree of consensus has emerged that ecosystems should be regarded as particularly important legal interests, and that their protection is vital for the very existence of humankind, with the consequence that their conservation and maintenance fully justify the intervention of criminal law with a specific safeguard.

75. Having regard, therefore, to the essence of the case-law conferring on the Community authority to impose sanctions, with scope to harmonise national provisions, to the continuous process in which the Community is assuming competence for protection of the physical environment and to

70 — Article 45(3) of the Spanish Constitution provides for criminal prosecution of offences against the environment. On the basis of that provision, the Second Chamber of the Spanish Tribunal Supremo has rejected the suggestion that, in protecting the environment, criminal law has a role ancillary and secondary to that of administrative law (judgment of 29 September 2001, cassation appeal 604/2000).


73 — A reading of the annex to the Proposal for a Directive on the protection of the environment through criminal law reveals the breadth of the Community powers in the field.
the importance and the fragility of environmental interests, there are sufficient grounds for acknowledging the Community's power to require from Member States a response in criminal law to certain kinds of conduct which harm the planet.  

76. The Council and those who support it in these proceedings reject that proposition, arguing that it undermines the sovereignty of the Member States. Their complaint is in my view unfounded. First of all, it should be recalled that, as posited in Van Gend & Loos, the Community constitutes a new legal order, for the benefit of which the Member States have limited their powers, with the effect that the 'sovereignty' argument adds nothing new to the discussion, even in the field of criminal law. Ample evidence of that fact is that Community law has decriminalised many acts which are offences in the national criminal codes, which 'interference' has not alarmed anyone. Here a long list of situations could be added, familiar to all, in which, not solely in the context of criminal law, Community law has restricted the legislative powers of the States: tax law and procedural law are two good illustrations.

77. The present dispute brings into play another issue, which affects not so much the Member States as their citizens: their right
that it be democratically elected representatives who determine criminal offences, which translates in legal terms as the principle of the legality of criminal law, with its dual dimension — a substantive dimension, that criminal conduct must be predetermined by legislation, and a formal aspect, embodied in an absolute reservation in favour of the holder of legislative power. With the position which I advocate, the *nullum crimen sine lege* rule remains intact, since Community harmonisation requires the intervention of the national parliaments for the final incorporation of the external provisions into their legal systems. 77

78. Nor is that proposition shaken when Articles 135 EC and 280 EC, in the fields of customs activity and measures to counter fraud against Community interests, in which State cooperation has to be closer and more intense, exclude from their provisions 'the application of ... criminal law' and 'the ... administration of justice', both of which expressions allude not to the power to create rules, but to the power to apply them, an issue not in dispute in these proceedings and which relates to competence which lies, quite undoubtedly, with the judges who exercise criminal jurisdiction.

79. It could be argued that, since cooperation in criminal matters has been placed within the third pillar, any initiative in the field, including any by the Community, must take place within the context of Title VI of the Treaty on European Union, but that syllogism is lacking its major premiss.

80. Article 29 EU outlines coordinated activity to prevent and combat crime via three courses of action. The first two take the form of police and judicial cooperation, whilst the last aims to approximate legislation 'in accordance with the provisions of Article 31(e)', which refers to the progressive adoption of minimum rules relating to 'the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking'. There is therefore, as I have already suggested, 78 no 'universal competence' on the part of the European Union to harmonise the criminal law of the Member States, using the framework decisions to which Article 34(2)(b) refers, but, rather, a power limited to certain offences of transnational scope.

81. The third pillar predicates operational assistance by the police and judiciary in order to combat crime more effectively, but the approximation of laws, which goes beyond the notion of cooperation and implies a more radical step towards integra-

77 — For Grasso, G., op. cit., p. 218, if the national assemblies were to reject the Community rule, they would trigger the corresponding infringement proceedings, but not the replacement of the non-compliant internal provisions by the Community rules. Eisele, I., 'Einflussnahme auf nationales Strafrecht durch Richtliniengebung der Europäischen Gemeinschaft', Juristenzeitung, 2001, p. 1160, n. of the view that rules of criminal law, deriving from the transposition of a directive, are approved in accordance with the procedures indicated with sovereign authority by each Member State, and therefore, to that author's mind, have sufficient legitimacy in democratic terms.

78 — See footnote 15.
tion, is confined to those elements which, by reason of their 'internationalisation', merit a uniform response.

82. Just as the Community lacks any general power in criminal matters, it likewise does not have any 'natural capacity' under the third pillar either, which would act as a magnet attracting all issues of that type which arose in the European Union. The solution must be reached via a different path, along the lines intimated by the case-law when it develops the power to impose penalties as a means of protecting the Community legal order.

83. The objections outlined by the Council and the Member States having been refuted, the line of argument must move forward. Leaving aside the reasons which militate in favour of a coordinated response, since the benefits of harmonisation are not disputed, it is necessary to clarify its scope. The objective, as has been seen, is to afford an 'effective, proportionate and dissuasive' penalty in response to serious contraventions of Community environmental policy. Criminal punishment fulfils those conditions, and the Community, in order to ensure the effectiveness of its activity in the field, can therefore constrain the Member States to impose such penalties, but it is not entitled, in my view, to go further. That statement has its basis, on the one hand, in the tenets of the case-law which confirms that authority and, on the other, in the nature of the Community's power in environmental matters.

84. The power to impose civil, administrative or criminal sanctions must be classified as an instrumental power in the service of the effectiveness of Community law. Where the integrity of that legal system requires a correctional dimension, the Member States must define the mechanisms required to that end, and their nature must be determined by the Community, provided that it is in a position to analyse how useful they are for the aim pursued, since otherwise the task falls to the national legislative authorities. In relation to the environment, it seems clear that the response to conduct

79 — Grasso, G., sets out those reasons in op. cit, pp. 223 and 224. Appel, L., Kompetenzen der Europäischen Gemeinschaft zur Überwachung und sanktionsrechtlichen Gestaltung des Lebensmittelstrafrechts und Verwaltungs sanktionen in der Europäischen Union, Trier 1994, p. 165, is of the view that only a uniform system of penalties engenders the confidence necessary for the process of European integration to continue.

80 — Both the Council of the Union and the Commission endorse the desirability of a coordinated response in criminal law.

81 — In German legal academic circles it is thought that the power to approve a directive on environmental criminal law is 'an adjunct' to Article 175 EC. Accordingly, Schmalemberg, F., op. cit., p. 29. Vogel, I., cited above in footnote 17, pp. 37 and 47, Appel, L., op. cit., pp. 175 and 178; and Zeder, F., Auf dem Weg zu einem Strafrecht der EU?, Juridikum, 2001, p. 51. See footnote 37.

82 — Zulleg, M., op. cit., p. 762, argues that the Member States should steer their legal systems in the direction of integration, which would be impaired if areas as important as criminal law were to be simply removed from the scope of application of Community law.
which seriously harms the environment must be a criminal one, but, in terms of punishment, the choice of the penalty to admonish that conduct and to ensure the effectiveness of Community law is the province of the Member States.

85. Once Community harmonisation has introduced uniform offences, the national legal systems must penalise that proscribed conduct, indicating the specific methods of punishment associated with the offence, to restore in that way the physical and legal positions which have been disturbed. In that enterprise, no party seems to be in a better position than the national legislature which, since it has first-hand knowledge of the legal and sociological particularities of its arrangements for coexistence, must opt, within the framework previously defined by the Community, for the response most apt to uphold Community law.\(^{83}\)

86. Criminal law affords the only ‘effective, proportionate and dissuasive’ response to conduct, such as the acts described in Article 2 of the Framework Decision, which seriously affects the environment but, once they have been placed within the criminal context, the exact admonishment can be determined only in the national legal system, which has access to the criteria necessary for that task, since the Community, at present, lacks the information necessary to assess the best way to protect the environmental interests in each Member State, deciding between the deprivation of liberty, other restrictions on rights or a financial liability.

87. The configuration described assigns to the Community the power to define precisely the legal interest protected and the nature of the offence, whilst the Member States are responsible for designing the penalty provisions,\(^{84}\) either individually, or working in coordination through intergovernmental cooperation regulated under the third pillar of the Treaty on European Union.

88. The Community shares its powers in the environmental field with the Member

---

\(^{83}\) Grasso, G., op cit., p. 219, recommends rules with a degree of flexibility, defining the conduct reproved and the classification of offences and sanctions, but without amounting to a rigorous quantification.

84 — Amongst legal writers, Jacque, J.P., ‘La question de la base juridique dans le cadre de la justice et des affaires intérieures’, L’espace penal européen : enjeux et perspectives, Institut d’études européennes, Brussels, 2002, pp. 255 and 256, concurs with that suggestion. Eeckh., op. cit., p. 1162, takes the view that the Community legislature should set a minimum standard when it defines the sanctionable conduct, whilst the national legislature must indicate the punishment. Grasso, G., op cit., p. 218, is of the view that the Community bodies have power to procure the harmonisation of criminal provisions or to insist on the introduction of uniform offences, provided that it is necessary, where the Treaties grant those bodies specific powers for the purpose of achieving the Community objectives. At the same time, Community law must be transposed into the legal system of each Member State, embracing supranational criminal offences and determining their punishment within the framework previously defined. See also, Comte, F., op cit., p 781.
States,\textsuperscript{85} and national legislation is permitted to be stricter.

89. Article 176 EC, as already indicated, authorises the Member States to maintain or enact measures affording greater protection, provided that they are compatible with the Treaty and are notified to the Commission. At the same time, Article 95 EC gives them power to maintain (Article 95(4)) or introduce (Article 95(5)) their own provisions, even where harmonisation measures exist, where justified on the grounds of concern for the environment, which they are to notify to the Commission. Lastly, Article 174(2) EC, second subparagraph, provides for 'a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons', subject to inspection.

90. In my Opinion in \textit{Deponiezweckverband Eiterköpfe}, cited above, I posited that the Member States are, therefore, called upon to perform an important role, with the effect that European provisions coexist with other, internal, rules which nuance Community legislation or create exceptions to it in order to afford extra protection, and it therefore seems completely consistent that, once the Community has indicated the minimum threshold (the criminal law response to infringements), the national legal systems should particularise that legislation, clarify it and instil it with the vigour necessary for it to serve its stated purpose.

91. In the light of the foregoing considerations, it is desirable to express a view on Articles 1 to 7 of the Framework Decision, analysing whether their terms fall within the purview of Community law, because, if they do, since they were approved by the Council under Article 29 EU, Article 31(e) EU and Article 34(2)(b) EU, they contravene Article 47 EU and are therefore null and void.

92. Articles 2 and 3 require the punishment under criminal law, when committed intentionally, or at least with serious negligence, of seven categories of offences detrimental to the environment, described according to their severity, either by reason of their capacity to cause death or serious injury to persons or substantial damage to elements of the natural and cultural environment, or because they affect protected species or the ozone layer. That being so, it is evident that

\textsuperscript{85} — Article I-14(2)(e) of the Treaty establishing a Constitution for Europe expressly determines the nature of those powers, which is discernable from the rules currently in force, with the effect that, in accordance with the wording of Article I-12 (2), 'when the Constitution confers on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence.'
power to decide that such acts should be subject to criminal penalties lies with the Community. Article 4 establishes something similar, in so far as it calls for the classification as offences of forms of participation other than their commission, and of instigating offending conduct. Both provisions are part of the ‘Community harmonising minimum’ because, by defining the persons who can incur criminal liability, they affect its nature.

93. Article 5(1), by requiring that the conduct described in Articles 2 and 3 be punished by effective, proportionate and dissuasive penalties, warrants the same assessment as the preceding provisions since, for the reasons set out, in such situations the choice of the penalty model — criminal, administrative or civil — is a matter for the Community.

94. However, the requirement, in Article 5(1) itself, that the most serious conduct should be punished with the deprivation of liberty, giving rise to extradition, transgresses the boundaries of the first pillar, since, within the criminal law context, it is for the State to choose the appropriate penalty. By the same token, the inclusion of accompanying penalties in Article 5(2) deserves no criticism whatsoever.

95. Article 6 refers to the liability of legal persons for the conduct described in Articles 2 to 4, by act or omission, whilst Article 7 regulates their punishment with ‘effective, proportionate and dissuasive sanctions’, but does not specify the nature of those sanctions. Both provisions suffer from the same defect as Articles 2 to 4 and Article 5(1). The requirement to prosecute not only natural persons but also legal persons goes to the design of the basic model of response to offences against the environment, which is a Community task. Article 7, none the less, since it enumerates five specific punishments, lies outside the preserve of Community law.

96. Lastly, Article 1 confines itself to defining three concepts used in Articles 2 and 6.

97. I am of the view, accordingly, that by virtue of the fact that the choice of the criminal law response to serious offences against the environment is the responsibility of the Community, the Council has no power to approve Articles 1 to 4, Article 5(1) — with the exception of the reference to sanctions involving the deprivation of liberty and extradition —, Article 6 or Article 7(1) of the Framework Decision. In consequence, the Commission’s action is well founded, and
should be upheld, with annulment of the provisions in question. Union must be ordered to pay the costs of the proceedings, in accordance with Article 69(2) of the Rules of Procedure.

V — Costs

98. Since the Commission's application has been successful, the Council of the European Union must be ordered to pay the costs of the proceedings, in accordance with Article 69(2) of those Rules.

99. The Member States, the European Parliament and the Economic and Social Committee, who have participated as interveners, are to bear their own costs, in accordance with Article 69(3) of those Rules.

VI — Conclusion

100. In the light of the foregoing considerations, I propose that the Court should:

(1) uphold the action for annulment brought by the Commission of the European Communities against Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law, and annul that Framework Decision to the extent indicated by point 97 above;

(2) order the Council of the European Union to pay the costs of the proceedings, and declare that the interveners should bear their own costs.