

AN EU “WATERSHED DECISION”
Anthony Coughlan

The power of the EU over our lives has been dramatically extended by a recent judgement of the European Court of Justice (ECJ) in Luxembourg that has got remarkably little attention in Ireland.

In September the Court ruled that the EU had the right to create pan-European criminal offences for breaches of EU law, which Member States would have to implement even if they are opposed to such criminal sanctions.

This ECJ judgement opens the door to the creation of a body of supranational EU criminal law for the first time. This had been proposed in the EU Constitution which the French and Dutch rejected last summer, but the September judgement brings it into being anyway. It signals a major shift of power from national capitals to the EU.

For the first time in legal history this judgement permits the EU rather than its Member States to lay down sanctions such as prison sentences and fines for citizens violating EU laws. As a consequence Member States lose their exclusive power to decide what constitutes a crime, and when their citizens may be fined, imprisoned or given criminal records. Member States are thereby deprived of one of the classical prerogatives of all independent sovereign States.

“This is a watershed decision,” said Commission President Manuel Barroso in greeting the ECJ judgement. The Commission lost no time in jumping in with a document on 23 November that listed seven areas which it said should become EU crimes immediately: private sector corruption, credit card and cheque fraud, counterfeiting euro notes and coins, money laundering, people trafficking, computer crime and marine pollution.

The Commission suggested that possible future EU crimes could be corruption in awarding public contracts, racial discrimination and incitement, intellectual property theft and trafficking in human organs and tissues. Legal commentators have suggested that financial services, consumer protection law, health and safety rules for factories and offices, the CAP, fisheries policy, transport and trademarks could become further fields of application for EU crimes and penalties in time and require significant harmonization of national criminal codes in these areas.

At present it is up to Member States to decide whether to use criminal sanctions to enforce EU laws or not, and what those sanctions should be. Thus Ireland decides that if fishermen violate EU fisheries laws they may be fined, have nets confiscated and so on. The ECJ judgement permits the EU to decide what will be EU crimes in future, and how Irish and other citizens should be punished for committing them.

It is surely remarkable that 50 years after the Treaty of Rome the Court of Justice should claim such a power for the EU. Although the ECJ judgement related to environmental matters, it means that the EU can in principle attach supranational criminal penalties henceforth to breaches of EU law going back to the original Treaty of Rome, so long as the Commission proposes and the Council of Ministers agrees by majority vote that cross-EU criminal penalties are necessary and should apply.

The ECJ judgement was given in a dispute between the Commission, supported by the European Parliament, and the Council of Ministers as regards their respective powers. The Commission contended that it could propose criminal sanctions for breaches of EU law and have them agreed by majority Council vote. The majority of the “old Europe” 15 on the Council of Ministers, including the Irish Government, contended that imposing criminal sanctions for breaches of EU law required unanimity, so that each Member State retained a veto. Eoin Fitzsimons SC represented Ireland in the case.

The Court came down on the Commission’s and Parliament’s side, as it generally does as regards anything that expands EU powers. One of the ECJ’s own judges, Pastorino, once characterised the ECJ as a “court with a mission” – that mission being to increase the powers of the EU to the utmost by means of its interpretation of the European treaties.

The Commission, Court and Parliament share this common aim, for all increases in EU power increase the powers of these supranational institutions and the power of the judges, bureaucrats and MEPs that compose them. The EU Member States, their governments, parliaments and citizens lose power correspondingly.

Henceforth a Member State that opposes a breach of a particular EU law being made into a crime, or opposes the level of EU penalty attached, will still have to introduce it if a sufficient number of other EU States vote for it. In principle the new legal position would allow the EU to compel Ireland to jail or fine its citizens for doing things that the Irish Government and Oireachtas did not consider a crime – improbable though that may seem at present.

Commission officials are reported as saying that in future they will draft tests to decide if offences against EU laws are civil, administrative or criminal.

In this way 25 non-elected EU judges, together with the 25 non-elected EU Commissioners, have increased their power over all of us in what amounts to a judicial coup d’état against democratic national governments and the citizens that elect them.