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CASE LAW

A. Court of Justice

Case C-176/03, *Commission* v. *Council*, judgment of the Grand Chamber of 13 September 2005, nyr

1. Introduction

The case annotated here concerns the relationship between EU and EC law as regards criminal law. In its judgment, the Court of Justice held that criminal enforcement of EC environmental law may fall under European Community law (and thus the EU's first pillar), rather than being reserved in any case for the European Union's third pillar on Police and Judicial Cooperation in Criminal Matters. The decision is of great importance as it concerns a hotly debated issue on which there had been no precedent, namely the distribution of competences between the first and third pillars of the European Union as regards the specification of criminal sanctions in EC law. The importance of the case is made evident by the fact that the judgment was handed down by the Court sitting as the Grand Chamber. A further indication of its importance is the fact that no less than eleven Member States submitted observations (and ten of these actually both in writing and orally). Finally, the Commission issued a Communication on the implications of the Court's judgment,[1] a feature that the case shares with such important cases as *Cassis de Dijon*[2] and *Kalanke*.[3] In this Communication the Commission argues that, even though the case under discussion concerns criminal law in the specific field of environment, the Court's interpretation of the relevant

1. Communication from the Commission to the European Parliament and the Council on the implications of the Court's judgment of 13 September 2005 (Case C-176/03, *Commission* v. *Council*), COM(2005)583 fin.

2. Case 120/78, *Rewe Zentral AG* v. *Bundesmonopolverwaltung für Branntwein* (Cassis de Dijon), [1979] ECR 649; Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 Feb. 1979 in Case 120/78 ("Cassis de Dijon"), O.J. 1980, C 256/2.

3. Case C-450/93, *Eckhard Kalanke* v. *Freie und Hansestadt Bremen*, [1995] ECR I-3051; Communication from the Commission to the European Parliament and the Council on the interpretation of the judgment of the Court of Justice of 17 October 1995 in Case C-450/93, *Kalanke* v. *Freie Hansestadt Bremen*, COM(1996)88 fin.

EC law has in fact implications for all areas of Community law. As a practical consequence, the Commission suggests that a number of instruments already adopted in other fields (both EU third pillar law and Community law) must be corrected.

2. Facts and legal background

On 4 November 1998, the Council of Europe in Strasbourg opened for signature the Convention on the Protection of the Environment through Criminal Law.[4] It was the first international convention to criminalize acts causing or likely to cause environmental damage. Since then, a number of EU Member States have signed the Convention, though only one of them – Estonia – also proceeded to ratify it. Among the earliest EU Member States to sign the Convention was Denmark (which signed the Convention on the first possible day, 4 Nov. 1998). In 2000, Denmark made a proposal for an EU Framework Decision on combating serious environmental crime, based on the main elements of the Council of Europe's Convention.[5] In doing so, Denmark relied on Article 34(2)(b) TEU, according to which it is possible for an EU Member State to propose to the Council the adoption of a Framework Decision falling within the field of application of the EU's third pillar. On 27 January 2003, the Council adopted Framework Decision 2003/80/JHA[6] on the protection of the environment through criminal law.[7] In Articles 2 and 3, the Framework Decision laid down a number of particularly serious environmental offences, committed both intentionally and with negligence (at least serious negligence), in respect of which the Member States were required to prescribe criminal penalties. Under Article 5, the Member States had to ensure that these offences were "punishable by effective, proportionate and dissuasive penalties including, at least in serious cases, penalties involving deprivation of liberty". Article 6 provided for the criminal liability of legal persons. In

4. European Treaty Series No. 172; for the text, see conventions.coe.int/Treaty/EN/cadreprincipal.htm; for the Explanatory Memorandum on the Convention, see conventions.coe.int/Treaty/EN/Reports/Html/172.htm.

5. For the text of the Danish proposal, see Initiative of the Kingdom of Denmark with a view to adopting a Council framework Decision on combating serious environmental crime, O.J. 2000, C 39/4.

6. Even though after the Amsterdam revision the name of the third pillar changed from "Justice and Home Affairs" (JHA) into "Police and Judicial Cooperation in Criminal Matters" (PJCCM), the Council has continued to use the acronym JHA for measures adopted in the framework of the third pillar.

7. Council Framework Decision 2003/80/JHA of 17 Jan. 2003 on the protection of the environment through criminal law, O.J. 2003, L 29/55.

this case, Article 7 required sanctions that are effective, proportionate and dissuasive and that include criminal or non-criminal fines. In both types of cases, other sanctions, of which the Framework Decision gave examples, were also possible. The Framework Decision was adopted on the basis of Articles 29, 31(e) and 34(2)(b) TEU (pre-Nice version).[8] As for the legislative procedure, Article 34(2) TEU required unanimous voting in the Council; the European Parliament was consulted.

However, by acting within the framework of the EU's third pillar the Council disregarded a proposal for a Community Directive on the protection of the environment through criminal law that had been presented by the Commission in 2001. The proposed Directive was based on the EU's first pillar, namely Article 175(1) EC (which provides for the co-decision procedure as described in Art. 251 EC).[9] In the course of the procedure for the adoption of the Framework Decision, the Commission had repeatedly objected to the choice of third pillar provisions as a legal basis and insisted on Article 175 EC instead. In the Commission's view, there was room for a Framework Decision only in the sense of a measure complementing the Directive in respect to judicial cooperation in relation to the protection of the environment through criminal law, but not in relation to Articles 1 to 7 of the Framework Decision as adopted. The same view was taken by the European Parliament when it expressed its opinion on both the proposed Directive and the draft Framework Decision. However, the Council disagreed. In consideration 7 of the preamble to the Framework Decision, the Council states that it did consider the Commission's proposal but that it had "come to the conclusion that the majority required for its adoption by the Council can not be obtained. The said majority considered that the proposal went beyond the powers attributed to the Community by the Treaty establishing the European Community and that the objectives could be reached by adopting a Framework-Decision on the basis of Title VI of the Treaty on European Union. The Council also considered that the present Framework Decision, based on Article 34 of the Treaty on European Union, is a correct instrument to impose on the member States the obligation to provide for criminal sanctions.…". It was thus that the Framework Decision was adopted against the objections of both the Commission and the European Parliament. When this happened, the Commission, supported by the European Parliament, brought an action un-

8. The Nice Treaty entered into force on 1 Feb. 2003 and thus a few days after the adoption of the Framework Decision. Today, the former Art. 31(e) is Art. 31(1)(e) TEU.

9. The proposal was much criticized; in the Dutch literature, see e.g. Buruma and Somsen, "Een strafwetgever te Brussel inzake milieubescherming?", (2001) NJB, 795–797, and M.I. Veldt Folgia, "(Nog) geen strafrecht in de Eerste Pijler?", (2002) SEW, 162–169.

der Article 35 TEU[10] to the Court of Justice for the annulment of the main provisions of the Framework Decision (i.e. Arts. 1–7).[11] In its role as defendant, the Council also received support, from eleven Member States, all of them "old" Member States (in fact, all the former "EU 15" except Austria, Belgium, Italy and Luxembourg, but none of the new Member States).

3. Advocate General Ruiz-Jarabo Colomer's Opinion

According to Advocate General (henceforth: A.G.) Ruiz-Jarabo Colomer, what was in issue in the case under discussion was the Council's duty to refrain from adopting the contested provisions "by virtue of the primacy of Community law, established in Article 47 TEU, 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" (para 26). The A.G. therefore started from the (general) question of whether the power of the Community to require the Member States to punish conduct which threatens the Community legal order enables the Community to define acts as criminal offences. The A.G. came to the conclusion that "the case-law does not explicitly recognize 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 on the Treaties" (para 38). He found that the same applies in relation to secondary legislation addressing the issue of penalties for infringements of the law. However, here the A.G. observed that on occasion, a criminal penalty becomes imperative because it is the only sanction which fulfils the requirements of being effective, proportionate and dissuasive (para 43). The A.G.'s conclusion at the general level was that if the legal interests protected in certain offences are objectives of the Community, no one would dispute the ability of the Community's law-making bodies to require the Member States to prosecute in criminal law (para 50).

Turning to the specific field of environmental law, the A.G. then posed the question whether environmental protection, as a Community matter, "re-

10. Under Art. 35(6) EU, the ECJ has jurisdiction to review the legality of Framework Decisions and Decisions in actions brought by a Member State or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the EU Treaty or of any rule of law relating to its application, or misuse of powers. Different from Art. 230 EC which is the corresponding provision in the framework of EC law, there is no possibility under Art. 35(6) EU for individuals to bring an action for annulment.

11. The remaining Articles (9–12) concern the issues of jurisdiction, extradition and prosecution, implementation, territorial application and the effective date.

quires the shield of criminal law" (para 51). He concluded that given the Court's case law on Community authority to impose sanctions, the development of Community environmental law 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", an outcome that is supported by democratic considerations (para 75 and 77). According to the A.G., Article 29 TEU does not change this analysis, since it does not give the EU a universal competence to harmonize criminal law, but rather only a power limited to certain offences of transnational scope. Given that there is neither any general power of the Community in criminal matters under the first pillar, nor any "natural capacity" of the EU in this field under the third pillar, the decisive issue is the lawful scope of the power of the Community to impose penalties as means of protecting the Community legal order (para 82). In the A.G.'s view, the Community can constrain the Member States to impose criminal penalties for uniform offences, but it cannot go further. Rather, the choice of penalty to admonish conduct which seriously harms the environment and to ensure the effectiveness of Community law is the province of the Member States. In other words, the choice of the penalty *model* (criminal, administrative or civil) is a matter for the Community and the choice of the *specific form* of penalties is for the Member States. The reason for this is, according to the A.G., that the Community at present lacks the information necessary to assess the best way to protect the environmental interests in each Member State. Turning to the Framework Decision at hand, the A.G. concluded that the offences mentioned in Articles 2 and 3 are very grave and, that being so, "it is evident that power to decide that such acts should be subject to criminal penalties lies with the Community" (para 92). In the A.G.'s analysis, the same applies to the other provisions at issue, with the exception, however, of Article 5(1) and the second part of Article 7 of the Framework Decision. Applying his distinction between the choice of a penalty model and the specific penalties themselves, the A.G. found that Article 5(1) and the second part of Article 7 transgress the boundaries of the first pillar because they specify certain types of sanctions.[12] Against this background, the A.G. concluded 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 depriva-

12. Under Art. 5(1) the Member States, in serious cases, are obliged to provide for penalties involving deprivation of liberty which can give rise to extradition. Art. 7 concerns sanctions for legal persons. It gives a list of specific sanctions which may (note: not "must") be provided for under national law.

tion of liberty and extradition – Article 6 or 7(1) of the Framework Decision" (para 97). In consequence, the A.G. suggested that the Court of Justice should uphold the Commission's action and annul the provisions in question.

4. The judgment of the Court

The Court followed the main lines of A.G. Ruiz-Jarabo Colomer's Opinion, but departed from his conclusion in two respects. First, whilst the A.G. suggested the annulment only of certain provisions of the Framework Decision, the Court annulled the entire Framework Decision. Second, the Court did not find that Article 5(1) and the second part of Article 7 are outside Community competences.

The starting point for the Court's considerations is Article 47 TEU, according to which nothing in the EU Treaty shall affect the Community Treaties and subsequent Treaties and Acts modifying or supplementing them. As regards criminal law specifically, the Court added that the same requirement is found in Article 29(1) TEU, under which the European Union, by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters *inter alia*, will provide citizens with a high level of safety within an area of freedom, security and justice. From this starting point, the Court embarked on an analysis of the question of whether Articles 1 to 7 of the Framework Decision affect the powers of the European Community under Article 175 EC "inasmuch as those articles could, as the Commission maintains, have been adopted on the basis of the last-mentioned provision" (para 40). In answering this question, the Court proceeded in two steps. First, it emphasized the importance of the protection of the environment in the framework of Community law as an essential objective of the Community. In this context, the Court mentioned specifically the duty of mainstreaming under Article 6 EC and the fact that the legal basis provision in the field of environment, namely Article 175 EC, includes measures in fields for which the Community either does not enjoy a specific legislative competence at all or only on the basis of unanimity within the Council (e.g. fiscal policy, energy policy and town and country planning policy; paras. 41 et seq.). Second, the Court recalled its settled case law concerning the correct choice of a legal basis under Community law (the choice must be based on objective factors which are amenable to judicial review, including in particular the aim and the content of the measure)[13] and applied it to Article 175

13. The Court refers to Case C-300/89, *Commission* v. *Council* (*Titanium Dioxide*), [1991] ECR I-2867 and to Case C-336/00, *Huber*, [2000] ECR I-7699.

EC in view Articles 1 to 7 of the contested Framework Decision (para 45 et seq.). The Court found that the aim of the Framework Decision is the protection of the environment, whilst the context of the contested provisions brings about partial harmonization of the criminal laws of the Member States, in particular as regards the constituent elements of various criminal offences committed to the detriment of the environment. The Court recalled that, as a general rule, neither substantive nor procedural criminal law fall within the Community's competence. However, the Court immediately added that this "does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental policy are fully effective" (para 48). In relation to Articles 1 to 7 of the Framework Decision, the Court observed that they leave the Member States a choice of the measures to apply, as long as these measures are effective, proportionate and dissuasive. The Court, pointing to the preamble of the Framework Decision, found that criminal penalties are indeed essential for combating serious offences against the environment. The Court's conclusion was, therefore, that, on account of both their aim and their content, Articles 1 to 7 of the Framework Decision could have been properly adopted on the basis of Article 175 EC. This finding means that, because it is indivisible, the entire Framework Decision "infringes Article 47 EU as it encroaches on the powers which Article 175 EC confers on the Community" (para 53). Finally, the Court added that Articles 135 and 280(4) EC are immaterial in the present context since they concern very specific issues only (namely customs cooperation in the case of Art. 135 EC and the protection of the Community's financial interests in the case of Art. 280(4) EC; para 53). As a result of these considerations, the Court of Justice held that the contested Framework Decision must be annulled.

5. Comments

At the legal level the outcome in the judgment under discussion hinges on two elements, namely, first, the primacy of EC law over EU law as stated in Article 47 TEU and, second, the reach of the legislative powers of the Community in relation to criminal law under the legal basis provision for the field of environmental law, Article 175 EC.

5.1. *Article 47 TEU*

The judgment under the discussion is the first to find that an EU measure infringes Article 47 TEU. In the earlier *Airport transit visa* case,[14] the Court held that the Joint Action on airport transit arrangements[15] was lawfully adopted on the basis of what was then Article K.3 of the EU Treaty (now, after amendment, Art. 31 TEU), as it did not fall under Article 100c EC (since repealed). Further, none of the cases so far decided in which Article 47 TEU or its predecessor Article M TEU, was mentioned contains elaborations on the meaning of this provision.[16] However, at the time of writing, a new case is pending before the Court of Justice[17] where the Commission argues that Council Decision 2004/833/CFSP[18] infringes Article 47 TEU, since it affects Community powers in the field of development aid. The Court's judgment in this case may shed further light on the meaning of Article 47 TEU, as explained in the judgment under discussion.

Article 47 TEU has to be seen against the background of the final part of Article 1 TEU, where it is stated that the European Union "shall be founded on the European Communities, *supplemented* by the policies and forms of cooperation established by this Treaty" (emphasis added). Article 47 TEU accordingly provides that "nothing in this Treaty shall affect the Treaties establishing the European Communities". The same approach is reflected by the first provision in the title on Police and Judicial Cooperation in Criminal Matters, Article 29 TEU, which explicitly reserves "the powers of the European Community". In the judgment annotated here, the Court emphasizes the role of Article 47 TEU as a preserver of the powers of the Communities: the competences enjoyed by the Union in the areas of the Common Foreign and Security Policy and Police and Judicial Cooperation in Criminal Matters are subject to the competences of the two remaining Communities (since the expiry of the ECSC, these are Euratom and the European Community). Thus, whenever the EU institutions[19] contemplate action under a legal basis

14. Case C-170/96, *Commission* v. *Council*, [1998] ECR I-2763.

15. Joint Action 96/197/JAI of 4 March 1996 on airport transit arrangements, O.J. 1996, L 63/8.

16. See Joined Cases C-64 & 65/96, *Land Nordrhein-Westfalen* v. *Kari Uecker and Vera Jacquet* v. *Land Nordrhein-Westfalen*, [1997] ECR I-3171, para 23, further *Airport transit visa* (*supra* note 14), para 14, and, after the judgment under discussion, Case T-299/04 *Abdelghani Selmani* v. *Council and Commission*, judgment of 18 Nov. 2005, nyr, paras. 49 and 57.

17. Case C-91/05, *Commission* v. *Council*, pending.

18. Decision implementing Joint Action 2002/589/CFSP with a view to a European Union contribution to ECOWAS in the framework of the Moratorium on Small Arms and Light Weapons, O.J. 2004, L 359/65.

19. As defined through the relevant legal basis provisions in the EU Treaty. Regarding the Union's single institutional framework, see Arts. 3–5 TEU.

provision in the second or the third EU pillar, they must first analyse whether or not the matter is covered by a Community (first pillar) competence, and if so, in how far. In order to find out whether a given matter is covered by a Community competence that excludes action at the level of the second and/or third EU pillar, the institutions have to analyse the reach of the Community legal basis provisions, following the well-known principles set out by the Court in its long-standing case law (see below). Only if and in so far as this analysis reveals no Community competence, can the EU institutions act within the framework of the second and/or third pillar of EU law.

Seen in this way, the relationship between first pillar and second and third pillar law could be said to be comparable to the relationship between Article 308 EC and other legal basis provisions in the EC Treaty, in particular Articles 94 and 95 EC. Just as Article 308 EC can be relied on only if the matter at issue is not covered by another legal basis provision in the EC Treaty, the legal basis provisions in the second and third pillar can be relied on only if the matter does not fall under an EC legal basis provision. Alternatively, one could speak about some sort of subsidiarity principle on the horizontal level (namely on the level of the various EU pillars): if and insofar as action can be taken under the first pillar, there is no room for action under the second or the third pillar. Regulation within the framework of these pillars will therefore always be subsidiary to action under the first pillar.[20] However, from a practical perspective it should be added that it might not always be easy to draw a clear line between first and second or third pillar matters, especially when a given issue might be seen as falling under more than one pillar at once. This may be particularly tricky in the context of second pillar issues.[21]

Returning to criminal law, which was at issue in the case under discussion: given the framework just described it is not possible to argue that Articles 29 and 31 TEU create a "derogation" from any supposed EC competence. Also, it would be a mistake to assume that every issue mentioned in the second and

20. There is, however, an important difference with the EC subsidiarity principle under Art. 5 EC in that Art. 47 TEU does not contain an element relating to the *suitability* of the level (Member State or Community) of the envisaged regulation. Whenever there is a competence under the first pillar, action under the second or third pillar is automatically cancelled out. The suitability of the level of regulation had been relied on by A.G. Ruiz-Jarabo Colomer when he argued that the Community at present lacks the information necessary to assess the best way to protect the environmental interests in each Member State (para 48).

21. In a roundtable discussion held at the Europa Institute of Leiden University, in the Netherlands, in March 2006, Prof. Alan Dashwood mentioned the example of clearing landmines that can be put in the context of both development cooperation (first pillar) and common foreign and security policy (second pillar).

third pillars of the EU Treaty is actually covered by competences given to the Union under the relevant provisions. As A.G. Ruiz-Jarabo Colomer points out, the reference in Article 29 TEU to "approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 31(e)"[22] does not mean that criminal law is intrinsically a matter for the third pillar. The Union's competences are limited to specific fields (though it seems that the Council has not always taken this seriously).[23] But even within the field of application of Article 31(1)(e) TEU, there is still precedence of EC law insofar as there is a Community competence in criminal matters. In the words of A.G. Ruiz-Jarabo Colomer, such a competence "cancel[s] out the powers of the Union" (para 27). Against this background, the decisive question in the case under discussion was whether and in how far there is an EC competence in criminal matters in relation to the protection of the environment.

5.2. *"EC criminal law" in general*

As A.G. Ruiz-Jarabo Colomer's many references to academic writing show, the discussion of the influence of EC law on national criminal law has a longer history than one might expect.[24] The same is true for the Commission's argument that the EC enjoys competences in the criminal field, which was made already in the 1980s.[25] In approaching the question of

22. Since the Nice revision, there are two distinct sections of this provision, so that the reference in Art. 29 TEU should read "Article 31(1)(e) TEU"; see already *supra* note 8.

23. Art. 31(1)(e) TEU refers to the task of "progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties *in the fields of organized crime*, *terrorism and illicit drug trafficking*" (emphasis added). Weyembergh notes that this has not hindered the Council from adopting measures going beyond the limited field of application of Art. 31(1)(e) TEU: Weyembergh, "Approximation of criminal law, the Constitutional Treaty and the Hague Programme", 42 CML Rev. (2005), 1567–1597, at 1569, with further references. Corstens and Pradel speak about a double limitation (namely in that the provision relates to three specific fields and to two aspects – facts of the case and penalties – only); Corstens and Pradel, *European Criminal Law* (Kluwer Law International, 2002), at p. 515.

24. See already H.G. Sevenster, Criminal law and EC law, 29 CML Rev. (1992), 29–70. Besides much recent writing, the A.G. mentions in particular a symposium on the relationship between Community law and criminal law, held at the University of Parma in 1979. In contrast, it may be interesting to note that in the proceedings of a conference held at the *Institut d'études européennes* of the *Université libre de Bruxelles* in the year 1968 (*Droit penal européen. Europees strafrecht. European Criminal Law*, Brussels, Presses universitaires de Bruxelles, 1970), none of the contribution focuses on what was then EEC law. Rather, attempts at harmonization are discussed in relation to certain smaller groups of European States only.

25. See Weyembergh, op. cit. *supra* note 23, at 1572.

whether and in how far there can be EC criminal law, it may be helpful to rely on one of the leading textbooks on European criminal law such as Corstens and Pradel[26] (chosen for the present purposes because it is available in French and Dutch[27] as well as English). When discussing the influence of EC law on national criminal law, Corstens and Pradel distinguish between the positive and negative effects of Community legislation, a distinction that according to them is closely connected with the concepts of positive and negative integration.[28] The negative effects concern the incompatibility of provisions of national law with Community law, such as for example in the *Skanavi* case[29] where the Court held that excessive sanctions for infringements of national law implementing EC law on driver licences[30] are incompatible with EC law on the free movement of persons. It is well known that since the origin of the Community, there have been numerous cases where individuals tried to use EC law as a shield to fence off accusations of criminal offences or heavy criminal sanctions which they were facing on the basis of national law.

In contrast, the positive effect of Community law on national criminal law concerns active obligations of Member States flowing from Community law with respect to criminal law. Here, a further distinction can be made between general and specific obligations of the Member States. The latter concerns requirements in relation to criminal law imposed on the Member States through explicit EU or EC law, such as for instance in the context of the Fisheries Policy.[31] In the framework of the former, Corstens and Pradel[32] re-

26. Corstens and Pradel, op. cit. *supra* note 23.

27. Pradel and Corstens, *Droit pénal européen* (Paris, Dalloz, 2002); Corstens and Pradel, *Het Europese strafrecht* (Deventer, Kluwer, 2003), resp.

28. Corstens and Pradel, op. cit. *supra* note 23, at pp. 505 et seq. On the terms negative and positive integration as coined by the Dutch economist Jan Tinbergen, see Kapteyn, VerLoren van Themaat, Geelhoed, Mortelmans and Timmermans (Eds), *Kapteyn/VerLoren van Themaat. Het recht van de Europese Unie en van de Europese Gemeemschappen*, 6th ed. (Kluwer, Deventer, 2003), at p. 97.

29. Case C-193/94, *Criminal proceedings against Sofia Skanavi and Konstantin Chryssanthakopoulos*, [ECR] 1996 I-929.

30. Then First Directive 80/1263/EEC on the introduction of a Community driving licence, O.J. 1980, L 375/1. The Directive itself did not address the issue of sanctions. As there was no harmonization, general primary law applied (here: free movement of persons).

31. See Art. 31 of Regulation 2847/93/EEC establishing a control system applicable to the common fisheries policy (O.J. 1993, L 261/1) and Arts. 24 and 25 of Regulation 2371/2002/EC on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (O.J. 2002, L 358/59). On international cooperation in the field of fisheries policy and the protection of the environment, see del Vecchio, "Politica comune della pesca e cooperazione internazionale in materia ambientale", (2005) Dir. Un. Eur., 529–544.

32. Corstens and Pradel, op. cit. *supra* note 23, at p. 513.

fer to the Member States' duty under Article 10 EC as described by the Court of Justice in particular in the *Greek Maize* case.[33] As an example, they mention the *Strawberries* case,[34] where the Court found that France had infringed Article 28 EC by not effectively prosecuting and punishing individuals having hindered the import of vegetables and fruit from Spain into France for years. It is clear that the case under discussion falls within the category of specific requirements imposed on the Member States through the EU or the EC in the field of criminal law. In this context, it raised the question of whether, in the framework of the division of competences both between the EC and its Member States and between the first and the third EU pillar, specific requirements in relation to criminal sanctions could lawfully be imposed through EC legislation.

5.3. *Community competence to require specific criminal sanctions*

Strictly speaking, an analysis of the above question must begin with the principle of attribution of powers under Article 5 EC. It is well known that nowhere in the Community Treaty is criminal law mentioned as a Community competence, hence the statement by the Court in the judgment under discussion that, as a general rule, neither substantive nor procedural criminal law fall within the Community's competence. However, this is no more than a general rule. Indeed, it is undisputed that this rule does not mean that Community law is irrelevant for the purposes of national criminal law. The question is rather one of degree.[35] As was stated earlier, the A.G. thought that the Community's competences extend only to the choice of the penalty model but not to the determination of specific penalties. The Court, however, confirmed the Commission's and the European Parliament's view that these

33. Case C-68/88, *Commission* v. *Greece*, [1989] ECR 2965. In this case, the Court explained in relation to the Member States' duties under Art. 10 EC that, "whilst the choice of penalties remains within their [i.e. the Member States'] discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive".

34. Case C-265/95, *Commission* v. *France*, [1997] ECR I-6959.

35. On the different views concerning Community competences in the criminal field, see the literature indicated by A.G. Ruiz-Jarabo Colomer, and more recently e.g. Weyembergh, op. cit. *supra* note 23, at 1571; Stiebig, "Strafrechtsetzungskompetenz der Europäischen Gemeinschaft und Europäisches Strafrecht: Skylla und Charybdis einer europäischen Odyssee?", (2005) EuR, 466–493; Gleß, in Schomburg, Lagodny, Gleß and Hackner, *Internationale Rechtshilfe in Strafsachen*, 4th ed. (Munich, Beck, forthcoming, 2006), vor Hauptteil III, para 9a.

competences may include a (certain) specification of the type of penalty to be imposed. It should be noted that on the general level of its analysis there is no explicit statement by the Court to that effect and neither does the Court expressly address the distinction made by A.G. Ruiz-Jarabo Colomer. Instead, the Court only very generally states that the Community legislature may, under certain circumstances, "take measures which relate to the criminal law of the Member States". That this includes the specification of the type of penalty or penalties becomes clear only on the basis of the later statement that Articles 1 to 7 of the Framework Decision could have been properly adopted on the basis of Article 175 EC. Also, it is not entirely clear from the judgment how far the competence to specify penalties goes. In particular, the Court's reference to the choice that is still left to Member States might be read as meaning that the Community must indeed leave a certain room for action to the Member States and cannot ultimately determine which specific penalty must follow a specific offence.[36]

This raises the question of whether perhaps the arguments used by the Court when speaking about Community competence in the criminal field can explain the extent of the Community's competence in this field. It is submitted that they do not explain it, or at least not in a clear manner that would rule out all doubts and questions. The Court bases its finding on two general and very important concepts of Community law, namely the full effectiveness (or *effet utile*) of this law and the concept of effective, proportionate and dissuasive sanctions: where such sanctions are essential for combating serious environmental offences, then criminal law measures of the Community are possible if the Community legislature considers them necessary in order to ensure that its rules are fully effective. The proud history of the argument of effectiveness in EC law is well known.[37] Under the Court's judgment, it is sufficient that the Community institutions *consider* criminal measures necessary for the purposes of the effectiveness of EC law, not that they prove it to be necessary. Though this undoubtedly means that the institutions must *reasonably* consider such measures necessary, it would nevertheless seem that it

36. If so, this would mean that the Community could not adopt a measure containing a provision such as Art. 4(2) of Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, O.J. 2003, L 192/54. Under Art. 4(2), the Member States are obliged to "take the necessary measures to ensure that the conduct referred to in Article 2 is punishable by a penalty of a maximum of at least one to three years of imprisonment". Framework Decision 2003/568/JHA is on the Commission's list of measures that are either entirely or partly incorrect in view of their wrong legal basis and should be corrected; see note 55 *infra*.

37. See e.g. Snyder, "The effectiveness of European Community Law: Institutions, processes, tools and techniques", (1993) MLR, 19–54, and Hinton, "Strengthening the effectiveness of Community law: Direct effect, Article 5 EC, and the European Court of Justice", (1999) *NYU Journal of Int. Law & Politics*, 307–348.

is very easy to pass this test. In the case under discussion the Court simply states that the acts listed in Article 2 of the Framework Decision include a considerable number of Community measures that were listed in the proposed Directive. It is not entirely clear what this implies and, in particular, whom the Court sees as the Community legislature in this specific context: the Commission and the Parliament, who had agreed on the necessity of Community action, or perhaps the Council which, even though acting in the framework of the second pillar, in doing so nevertheless showed in a general sense that it considered action necessary in order to ensure the effectiveness of the Community legislation? Whatever the correct interpretation, the fact remains that under Article 175 EC the Community legislature certainly includes the Council – which, in the case under discussion, was, precisely, not acting in its capacity of Community institution.

As for the concept of effective, proportionate and dissuasive sanctions,[38] it does not really clarify matters either, at least not as defined in the case law hitherto handed down by the Court of Justice. A.G. Ruiz-Jarabo Colomer rightly speaks about an "undefined legal concept" (the title of the section starting with para 44). Where this concept applies independently of written law specifying its meaning, its interpretation depends on the specific circumstances of each individual situation. Nevertheless, there are certain concrete elements in the Court's case law, for example in relation to discriminatory dismissals in the context of social law.[39] Further, it is submitted that at least

38. The concept of effective, proportionate and dissuasive penalties was originally developed through the Court's case law on individuals' rights under EC sex discrimination law, namely in the framework of the interpretation of Art. 6 of Directive 76/207/EEC in its original version (Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, O.J. 1976, L 39/40; the Directive has since been amended through Directive 2002/73/EC amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, O.J. 2002 L 269/15. In the amended version, the right to effective, proportionate and dissuasive sanctions is explicitly stated in Arts. 6 and 8d.). Later, the concept of effective, proportionate and dissuasive penalties became a general feature of EC law; see Tobler (for the European Commission's European Network of Legal Experts in the non-discrimination field), *Remedies and Sanctions in EC non-discrimination law* (Luxembourg, Office for Official Publications of the European Communities, 2005), at pp. 12 et seq., with further references.

39. For this particular situation, the Court has held that one of two alternative remedies must be adopted, namely either reinstatement of the victim of discrimination, or financial compensation for the loss and damage sustained (Case C-271/91, *Marshall* v. *Southampton and South-West Hampshire Area Health Authority (Marshall II)*, [1993] ECR I-4367, para 25). This is a mere minimum, and other remedies may be necessary in addition; see Tobler, op. cit. *supra* note 38, at pp. 11 and 33 (stating that this case law applies also outside the area of sex equality law).

since *von Colson and Kamann*[40] it has been clear that the Member States' duty to provide for effective, proportionate and dissuasive sanctions in the event of infringements of Community law may include the duty to impose criminal sanctions even where there is no explicit written Community law on the matter.[41] However, so far there had been no statement in the Court case law that, if applied at the level of Community legislation itself, the need for effective, proportionate and dissuasive sanctions may require specification of the penalties by the Community, rather than by the Member States. Very importantly, the judgment under discussion implies that the requirements of effectiveness, proportionality and dissuasiveness may indeed require such action. It is submitted that whilst this may appear to be a circular conclusion, it is in reality simply a new element established by the Court in approaching the otherwise largely "undefined concept" of effective, proportionate and dissuasive sanctions. Even though this development may be somewhat surprising at first sight – at least for those who are, perhaps, more familiar with national criminal law than with general features of Community law –, in that sense the new element fits well in the general picture as just described and as such is convincing.

The question that remains is when precisely effective, proportionate and dissuasive sanctions are *essential* for combating serious environmental offences. The Court's answer to this question is extremely short, namely that it is apparent from the preamble to the Framework Decision that the Council "took the view that criminal penalties were essential". It is submitted that it is here that the Court's approach is least convincing. After all, the Court itself had previously established an objective test under which the penalties *must in fact* be an essential measure for combating serious environmental offences.[42] In fact, one may have some sympathy for the argument put forward by the Dutch Government, according to which the Community may require the Member States to provide for the possibility of punishing certain conduct

40. Case 14/83, *von Colson and Kamann* v. *Land Nordrhein Westfalen*, [1984] ECR 1891.

41. In *Marshall II* (*supra* note 39), para 18, the Court gave examples of appropriate remedies for the discriminatory refusal to hire a candidate under EC sex equality law (namely offering the post or granting adequate financial compensation) which must be "backed up where necessary by a system of fines". Though the Court did not specify the nature, administrative or criminal, of the fines, it seems obvious that penal sanctions may be required in the context of the requirement of dissuasiveness of the sanctions chosen; see Tobler, op. cit. *supra* note 38), at p. 11, with further references.

42. Similarly, the Commission in its Communication on the implications of the judgment under discussion (note 1, *supra*) speaks of the requirement that "there is a clear need to combat serious shortcomings in the implementation of the Community's objectives and to provide for criminal law measures to ensure the full effectiveness of a Community policy or the proper functioning of a freedom". On the Commission's Communication, see below.

under national criminal law, provided that the penalty is inseparably linked to the relevant substantive Community provisions and that it can actually be shown that imposing penalties under criminal law in that way is necessary for the achievement of the objectives of the Treaty in the area concerned. The Dutch Government argued that the required necessity had not been shown in the present case (paras. 36 et seq.). It is submitted that rather than simply referring to the Council's view on this matter, the Court of Justice might have referred to the Council of Europe's Convention on the protection of the environment through criminal law[43] and its background materials. There are also recent studies on the subject that underline the necessity of tough action.[44] However, from a practical perspective it might have been better for the Court not to state a strictly objective test (which may be very difficult if not impossible to pass) but rather a test requiring that the application of effective, proportionate and dissuasive criminal penalties *appears* an essential measure for combating serious environmental offences.

5.4. *Overall conclusions and the judgment's practical consequences*

In the end, the Court's finding that the Community competences under Article 175 EC would indeed have covered action such as provided for by Articles 1 to 7 of the Framework Decision logically led to the conclusion that, given the primacy of EC law over EU law, there is no room for corresponding action under Article 31 TEU. It is submitted that on the whole (that is, with the above reservation in relation to the objective test) the Court's judgment is convincing, in particular in relation to the implications of the concept of effective, proportionate and dissuasive sanctions and in relation to the general meaning of the primacy of Community law over EU law under Article 47 TEU.[45] In the present writer's view, the Council's objection that, in

43. See note 4 *supra*.

44. Faure and Heine (Eds.), *Criminal Enforcement of Environmental Law in the European Union* (The Hague, Kluwer Law International, 2005). This study found that the use of criminal sanctions other than fines is relatively rare and that corporate crimes are often only punished through administrative sanctions. See also Faure and Heine (Eds.), *Environmental criminal law in the European Union. Documentation of the main provisions with introductions* (Freiburg i.Br.: Max Planck Institut für ausländisches und internationales Strafrecht, 2000).

45. It is clear that the relationship between EC and EU law will continue to be an important issue in the Court's case law. Thus, a recent judgment concerned the rules on the Schengen Information System which have to interpreted and applied in conformity with EC law on free movement of persons (Case C-503/03, *Commission* v. *Spain*, judgment of 31 Jan. 2006, nyr). Another example: Ireland has announced that it will contest EC law on data retention, based on the argument that such law should be adopted under the second pillar of the EU ("Ireland to contest data retention law at EU Court", eu*observer* of 15 Dec. 2005).

view of its considerable significance for the sovereignty of the Member States, there can be no implicit transfer through Article 175 EC of the Member States' powers in criminal law (para 26), seems to forget that the EC Treaty does not contain a catalogue of negative competences. In other words, there are no fields where Community action or the influence of Community law would be ruled out absolutely and categorically. Rather, the past has repeatedly shown that the lack of such a "black list" may lead the Court to find that a "delicate" area hitherto considered a matter for the Member States is indeed within the reach of Community law.[46]

The judgment under discussion has important practical consequences, which concern, first, the differences between first pillar and third pillar legislative instruments. Weyembergh[47] in this context rightly notes that the Court's decision strengthens the laws and methods of the Community (though in her opinion the Constitutional Treaty would have provided for an even better approach).[48] A.G. Ruiz-Jarabo Colomer mentioned the relevant differences at the very beginning of his Opinion, when pointing out that, under the present law, Community legislative instruments are much stronger than Framework Decisions (para 4). Not only do the latter not have direct effect (Art. 34(2)(b) EC),[49] failure to transpose them cannot be overcome using an action for infringement and, in addition, the Court's jurisdiction to

46. An example is provided by the application of the rules on free movement in the field of direct taxation outside the field of free movement of workers (where Art. 7(2) of Regulation 1612/68/EEC on freedom of movement for workers within the Community, (O.J. 1968, L 257/2), early on indicated the relevance of EC law for direct taxation). After the first taxation case (Case 270/83, *Commission* v. *France* (*Avoir Fiscal*), [1986] ECR 273), the Court's case law on indirect discrimination on grounds of nationality in the context of differentiations made on the basis of tax or fiscal residence was of particular importance; see Tobler, *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law* (Antwerp, Intersentia, 2005), at pp. 175 et seq. Another example concerns the application of EC non-discrimination law to employment in the Member States military forces (beginning with Case C-273/97, *Angela Maria Sirdar* v. *The Army Board and Secretary of State*, [1999] ECR I-7403); see Tobler, "Kompetenzanmassung der EG via den EuGH? Zur Rechtsprechung des EuGH über die Anwendbarkeit des EG-Gleichstellungsrechtes auf Arbeitsverhältnisse in den Streitkräften der Mitgliedstaaten", (2000) *Aktuelle Juristische Praxis*, 577–587.

47. Weyembergh, op. cit. *supra* note 23 at 1573.

48. On the Constitutional Treaty, see also Stiebig, op. cit. *supra* note 35, at 487 et seq., and Klip, "The Constitution for Europe and Criminal Law: a step not far enough", (2005) MJ, 115–123.

49. Though in *Pupino* (Case C-105/03, *Maria Pupino*, judgment of 16 June 2005, nyr), para 38 et seq., the Court emphasized the right of individuals to invoke a Framework Decision in order to obtain a conforming interpretation of national law before the courts of the Member States. Weyembergh, op. cit. *supra* note 23 at 1595, speaks about a "palliative measure" created by the ECJ.

give preliminary rulings in accordance with Article 35 TEU is not binding, since that jurisdiction is subject to acceptance by the Member States. In other words, in terms of enforcement, an EU Framework Decision is a considerably weaker instrument than an EC Directive. Later in his opinion, the A.G. also mentioned an argument of a democratic nature, namely that, depending on the legislative procedure, the influence of the European Parliament in adopting a Directive can be much stronger than in the case of a Framework Decision where it has in any case only a consultative function. The A.G. argued – convincingly, in my opinion – that in the framework of the *nulla poena sine legem* rule, citizens have a right that criminal offences are determined by democratically elected representatives (para 77).[50]

Secondly, the Commission in its Communication[51] has suggested that the Court's judgment has practical consequences that go far beyond the specific area of environmental law. According to the Commission, the same arguments can be applied in their entirety to the other common policies and to the four freedoms (para 6). In other words, the provisions of criminal law required for the effective implementation of Community law are generally a matter for the Community Treaty, though with the exception of what the Commission calls "horizontal criminal law provisions" aimed at encouraging police and judicial cooperation in the broad sense, which fall within the second pillar of the EU (para 11). In fact, the Commission argues that every EC law competence also implies a potential competence in the criminal field, an approach that might be seen as a new type of doctrine of implied powers.[52] It should be noted that this broad interpretation is not based on the wording of the Court's judgment, which in the key paragraph 48 specifically and only refers to the protection of the environment. However, if one considers the background of the Court's statement, namely the two generally applicable concepts of full effectiveness of EC law and of effective, proportionate and dissuasive sanctions, it appears only logical that the Court's reasoning in relation to environmental protection may also apply in other contexts.[53] In ad-

50. See also Weyembergh, *supra* note 23, at 1593 et seq., and Stiebig, *supra* note 35, at 482. It should be remembered that here the argument of democratic representation is made in the framework of a discussion between the relationship of first pillar and second pillar EU law, and not in the framework of the relationship between EC/EU law and national law. In the latter context, it might easily be argued that, given that under the EC Treaty the European Parliament is usually no more than a co-legislator, the democratic representation would be stronger on the national level.

51. See *supra*, note 1.

52. The term is normally used in the context of the Communities powers in the field of external relations (*ERTA* doctrine); see recently Case C-433/03, *Commission* v. *Germany*, judgment of 14 July 2005, nyr, and Opinion 1/03 of 7 Feb. 2006 nyr.

53. In the same sense, Douma and Hartmanova, "EC or EU Pillar – Criminal enforcement

dition, other issues covered by EC law will also belong to the Community's essential objectives, just like environmental protection. It can therefore not be said that the Court's judgment is due only to the special importance of EC environmental law. However, even though the Commission does not mention this in its Communication, it should be added that Community competence in criminal law is ruled out in two provisions for two specific areas, namely Art. 280(4) EC (concerning the prevention of and fight against fraud affecting the financial interests of the Community) and Article 135 EC (concerning the strengthening of customs cooperation).[54]

Interestingly, the Commission in stating the conditions for Community action in the criminal field mentions not only the necessity for such action but also an element that does not appear in this form in the Court's judgment, namely consistency (para 13). The Commission rightly emphasizes that the Community action must respect the overall consistency of the European Union's system of criminal law to ensure that criminal provisions do not become fragmented and ill-matched. Against this background, the Commission then states that a number of Framework Decisions adopted by the Council are either entirely or partly incorrect in view of their wrong legal basis and should be corrected (paras. 14 et seq.).[55] The Commission now plans to

of European environmental law", 11 *European Law Reporter* (2005), at 417.

54. Though Stiebig (*supra* note 35), at 483 et seq., argues that Art. 280(4) EC does indeed include a competence of the Community to adopt criminal law provisions.

55. The relevant measures are listed in the annex to the Communication. Besides the Framework Decision annulled in the judgment under discussion, this list includes the following four Framework Decisions presently in force:

– Framework Decision of 6 Dec. 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, O.J. 2001, L 329/3, as amended;

– Framework Decision of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment, O.J. 2001, L 149/1;

– Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, O.J. 2003, L 192/54;

– Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems, O.J. 2005, L 69/67.

In the framework of the "double-text mechanism", the list further includes the following three combinations of Directives and Framework Decisions:

– Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, O.J. 1991, L 166/77, and Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, O.J. 2001, L 182/1;

– Directive 2002/90/EC of 28 Nov. 2002 defining the facilitation of unauthorized entry, transit and residence, O.J. 2002, L 328/17) and Framework Decision of 28 Nov. 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence, O.J. 2002, L 328/1;

present proposals aiming at correcting the legal basis in such cases. (In one case and pending the adoption of such a proposal, the Commission has decided to ask the Court for an annulment.)[56] On the practical level, therefore, the effect of the Court's judgment as interpreted by the Commission would appear to be a major shift in the legislative approach to criminal matters under EC and EU law. In the words of the Commission, it "brings to an end the double-text mechanism" that has been used in the past, meaning a mechanism whereby the substance of a given policy was regulated in the framework of EC law and criminal law aspects in the framework of EU law (para 11). Whether the approach announced by the Commission will work remains to be seen in the reactions of the Member States (through the Council) to the Commission's proposals. Should these be negative, it may be expected that the Commission, again, will try to take the matter to the Court of Justice. However, in a situation where the two months period under Article 230 EC has expired, the only possibility would seem to be an action under Article 232 EC, concerning the individual Member State's failure to act (namely the failure to agree to a measure that in view of the effectiveness of EC law needs to be adopted). Surely, this in turn would provide EC lawyers with yet another type of new and interesting case law on the enforcement of EC law.

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– Directive 2005/35/EC of the European Parliament and of the Council of 7 Sept. 2005 on ship-source pollution and on the introduction of penalties for infringements, O.J. 2005, L 255/11, and Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution, O.J. 2005, L 255/164.

56. This concerns Framework Decision 2006/667/JHA, as mentioned in note 55.

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