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THE EUROPEAN COMMUNITY AND HARMONIZATION OF THE CRIMINAL LAW ENFORCEMENT OF COMMUNITY POLICY. A CESSIO BONORUM¹ FROM THE THIRD TO THE FIRST PILLAR

I. Introduction

In the spring of 2006, an alarm went through several Member States concerning the (further) European erosion of national criminal law. The direct cause for this was the judgment of the Grand Chamber of the European Court of Justice in Case C-176/03² concerning the harmonization of criminal penalties in environmental cases, in which the European Community (EC) was for the first time considered to be functionally competent to harmonize the criminal law enforcement of Community policy.³ In the Netherlands, politicians and academics even suggested that in the wake of the environmental judgment 'typically Dutch issues', such as drugs, abortion and euthanasia, would now also become subject to European criminal law. In France, the European Affairs Committee of the Assemblée Nationale reproached the Court for acting as a *gouvernement des juges* taking over from the politicians.

The Europeanization of criminal law has developed steadily since the entry into force of the Maastricht Treaty. Where does the fear of harmonization of criminal law through the first pillar spring from? Does it matter that greatly whether national criminal law is harmonized through Directives or through Framework Decisions? Is that no more than just a Brussels institutional issue? The central question in this contribution is what legal and political consequences

1 This article has been translated from J.A.E. Vervaele, *De Europese Gemeenschap en harmonisatie van de strafrechtelijke handhaving van het gemeenschapsbeleid. Een cessio bonorum van de derde aan de eerste pijler, Delikt en Delinkwent*, 2006.

2 Case C-176/03, *Commission v. Council*, judgment of 13 September 2005.

3 Paragraph 48 of the judgment reads as follows: 'As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence (...) However, the last-mentioned finding 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 protection are fully effective'.

may be expected from the Court's judgment.⁴ Answers to this question may only be found by first looking back to the historical context of the uneasy relationship between European integration and national criminal law (section 2); and, second, analyzing the deepening political stalemate on this issue that occurred after the entry into force of the Treaty on European Union (TEU, section 3). Section 4 pays particular attention to the Dutch position in this context.

The Netherlands is the only country which has taken a position with regard to Case C-176/03 that leaves any room for the Community harmonization of criminal law. At the same time the Netherlands is a country that has demanded room for national cultural differences in criminal law policy and has argued in favour of preserving important legal principles and guarantees. In section 5, the implications of the judgment will be analyzed by examining the positions of the Commission, the Justice and Home Affairs Council and certain Member States, respectively, after which conclusions will be drawn in section 6.

2. European Integration and Criminal Law, History of Development⁵

It is no secret that the EC's founding fathers overlooked the importance of the enforcement of Community law to a certain extent. Apart from a few exceptions in primary Treaty law, such as the obligation for Member States to criminalize violations of Euratom confidentiality or perjury in front of the European Court of Justice,⁶ they maintained a resolved silence concerning Community law enforcement. The EC Treaty does not provide for clear legal bases or assign powers for either direct enforcement by the EC (with the exception of the enforcement of European competition rules), or for indirect enforcement of Community law by the Member States. This means that the enforcement of the common agricultural and fisheries policy, the Community Customs Code, the European stock market regulations, EU subsidy fraud rules, European environmental policy, etc. was completely left to the autonomy of the Member States. It is mainly thanks to the Court that this autonomy has been somewhat limited. The Member States are bound by the Court's interpretation of Article 10 EC (the duty of co-operation, the so-called Member State loyalty principle). The Court has established that the Member States have a duty to enforce Community law, whereby they have to provide for procedures and penalties that are effective, proportionate and dissuasive and that offer a degree of protection that is analogous to that offered in the enforcement of provisions of national law of a similar nature and importance (the assimilation principle). It does not only fall for the national legisla-

4 For a thorough analysis of the judgment itself see S. White, 'Harmonisation of criminal law under the First Pillar', *European Law Review*, 2006, in print and P.-Y. Monjal, 'Reconnaissance d'une compétence pénale communautaire pour la CJCE', *Recueil Dalloz* 2005, no. 44, 3064-3067.

5 For a more detailed analysis see J.A.E. Vervaele, *The Europeanisation of Criminal Law and the Criminal Law Dimension of European Integration*, in P. Demaret, I. Govaere & D. Hanf (eds.), *30 Years of European Legal Studies at the College of Europe, Liber Professorum*, P.I.E.-Peter Lang, Brussels, 2005, p. 277-298 and N. Haekkerup, *Controls & Sanctions in the EU Law*, Djoeff Publishing, Copenhagen, 2001.

6 Art. 194(1) Euratom Treaty; Art. 30 of the Statute of the European Court of Justice.

tion to fulfil these requirements: they must also be put into practice in the course of enforcement.⁷

The EC quickly recognized the gap in the EC Treaty where legislation was concerned. Already in 1976 an attempt was made to supplement the EC Treaty with two protocols concerning EC fraud and corruption by EC officials. Neither protocol gained the political approval of the Council of Ministers (Council), however.⁸ In the period between 1975 and 1990 the Commission was therefore forced to explore instead the political and legal boundaries of the EC Treaty. The Commission, supported by the European Parliament, was already then of the opinion that there was a considerable enforcement deficit on the part of the Member States. The Commission therefore submitted various concrete legislative proposals to the Council, with the aim of obliging the Member States to use both (punitive) administrative law and criminal law in the enforcement of Community law.

The Council approved many of the Commission's proposals compelling the Member States to impose punitive administrative sanctions, especially in the field of the common agricultural policy. The Regulations in question provide for fines, forfeiture of financial guarantees, exclusion from subsidy schemes, professional disqualification, etc. This harmonization was not in the least limited to reparatory sanctions, but also expressly concerned punitive sanctions. The Member States were obliged to provide rules for these sanctions and to apply them. Of course the Member States were also free to impose these sanctions entirely or partly by criminal law enforcement means instead of using solely or partly administrative regulation, if this was in conformity with the requirements for enforcement as established by the Court. The growing influence of EU law on the law of punitive sanctions was not received well by all the Member States. Some Member States considered that the EC was applying the EC Treaty quite extensively or, further, that it had imposed obligations lacking a proper legal basis. In 1990 Germany considered that the limit had been reached. Two Regulations on agriculture⁹ formed the perfect excuse to bring an action for annulment before the Court. The Regulations not only prescribed restitution with a surcharge of unjustifiably obtained subsidies, but also punitive exclusion from subsidy schemes. Germany was of the opinion that the EC was not competent to prescribe punitive sanctions. What was remarkable in this case was that none of the other Member States intervened to support Germany in its contentions. Germany received an abrupt awakening when in 1992 the Court in its judgment in Case C-240/90¹⁰ recognized that the EC

⁷ See Case 66/88, *Commission v. Greece*, [1989] ECR 2965 and the Communication from the Commission as a result of this case, OJ C 147/3, 1990.

⁸ J.A.E. Vervaele, *Fraud against the Community. The need for European fraud legislation*, Kluwer, Deventer 1992, 85-96.

⁹ Regulation 1260/90, OJ L 124, 1990, p. 715 and Regulation 1279/90, OJ L 126, 1990, p. 20.

¹⁰ Case C-240/90, *Germany v. Council and Commission*, [1992] ECR I-5383. For a detailed analysis of the EC harmonization of administrative enforcement, see J.A.E. Vervaele, *Administrative Sanctioning Powers of and in the Community. Towards a System of European Administrative Sanctions?*, in: J.A.E. Vervaele (ed.), *Administrative Law Application and Enforcement of Community Law in the Netherlands*, Kluwer, 1994, Deventer-Boston, 161-202., <http://igitur-archive.library.uu.nl/law/2005-0622-155517/4371.pdf>; J. Schwarze, 'Rechtsstaatliche Grenzen der gesetzlichen und richterlichen Qualifikation von Verwaltungssanktionen im europäischen

was competent to adopt the measures including the punitive sanctions which without a doubt fall within the scope of application of the criminal law guarantees of Article 6 ECHR. This landmark judgment finally cleared up the controversy surrounding the EC's competence to harmonize administrative (punitive) sanctions. Some 14 years later it cannot be said that the EC has made explosive use of this power. Quite the contrary, in fact: it is remarkable that in many areas of Community law no initiatives whatsoever have been taken in that direction. One might think of, for example, environmental law, securities law, tax law, etc. It is my opinion that the Commission has demonstrated insufficient initiative to give any systematic or consistent shape to the harmonization of administrative enforcement. By consistent I mean that a considered and horizontal policy should be in place. On the one hand, the Commission has failed to make use of its power to outline an EC enforcement policy from which it can be clearly concluded in which area of policy the harmonization of administrative enforcement by the Member States would be needed. Often, an ad hoc approach is applied by the directorates general (DGs) of the Commission. On the other hand, the Commission cannot justifiably be blamed for all evils. It is also its task not to overwhelm the Council with legislative initiatives that are doomed to fail or will only lead to mounting political tension between the EC and the Member States. It has to be admitted that in some areas, such as financial services, and definitely in taxation, it is still impossible to gain support in the Council for prescribing punitive administrative enforcement.

The EC's competence to harmonize national criminal law is clearly a complex and sensitive issue. To explain this using the terminology of criminal penalties: it is like running the gauntlet. Due to the legislative gap within the EC Treaty, the most widely diverging positions could be adopted. Until recently, many have argued in no uncertain terms that criminal law belonged to the exclusive territory of national sovereignty. Criminal lawyers often do not seem to realize that sovereignty does not prevent international and supranational law from influencing national criminal law. UN law (criminal law treaties and Security Council resolutions), the law of the Council of Europe (the ECHR and criminal law treaties) all exert their influence on national criminal law. Is this interference from the UN and the Council of Europe? Of course it is not, as states have agreed to those treaties and to the political and legal objectives of the organizations in question. The same may be said of the process of European integration. Member States have given this shape and substance by means of the constitutive treaties. Of course, the process of European integration with its divided legal order has its own dynamics. However, here, too, the Member States are constantly involved in these processes. It only takes one glance at the agendas the lawyers are working with in order to draft legislation at the Dutch Ministry of Justice, including those dealing with criminal law, to realize how deeply involved the nation state is in the further definition of policy and legislation from Brussels.

From the case law of the ECJ it is abundantly clear that criminal (procedural) law belongs in the sphere of competence of the Member States,¹¹ but that Community law may impose

Gemeinschaftsrecht', *EuZW* 2003, Heft 09, 261-269 and M. Poelmans, *La sanction dans l'ordre juridique communautaire*, Bruylant, 2004.

11 Case 203/80, *Casati*, [1981] ECR 2595.

requirements as to the fulfilment and interpretation of this competence in the framework of the enforcement of Community law. Criminal law must not only be left aside when the rules to be enforced turn out to be contrary to Community law (negative integration). Community law also unmistakably establishes requirements which national criminal law enforcement has to fulfil if it is applied with the aim of compliance with Community law (positive integration). This duty to enforce in accordance with certain requirements also applies to criminal law if the Member States decide that this is the tool which they will use to enforce Community law.¹² The Netherlands has had past experience with ineffective enforcement of European fisheries policy rules. Furthermore, the Netherlands is very aware of the fact that failing enforcement in the field of the fight against swine fever or of subsidies granted by the European Social Fund,¹³ cannot be excused by citing national sovereignty or national criminal law insights. The requirements which the EC has established for national criminal law enforcement also extend to criminal law policy and practice. This means, for example, shaping policy as to when to dismiss a case or indictment; and the exercise of prosecutorial discretion in cases that are relevant from a Community law perspective where the interests of the EC must also be weighed.¹⁴

An air-tight separation between the criminal law policy of the Member States and that of the EC has never existed. Both *de iure* and *de facto*, the process of indirect EC harmonization of national criminal law, mainly of special criminal law, has been ongoing for decades. The Community legal order and integration also include the criminal (procedural) law of the Member States as a result of which the Member State autonomy is restricted. The European integration model is not compatible with restricting criminal law to national confines where it would remain out of reach of any Community law influence whatsoever. The key question is, however, whether the EC's competence to harmonize stretches so far as to enable the EC directly to oblige the Member States to criminalize violations of Community rules. Is the EC competent to impose requirements as to the nature and severity of the penalty? Does this possible competence also extend to the scope of application *rationae materiae*, *rationae personae* and *rationi loci*, to procedural aspects, to the modalities of application (statute of limitation, dismissal or dismissing charges, etc.)? Concerning these questions there is and has been plenty of debate in the literature. The majority of criminal law authors¹⁵ in Europe deny that the EC has any power, however minor, to harmonize directly criminal law.

The Commission and the European Parliament have for decades been attempting to convince the Council to impose a Community obligation on the Member States to criminally enforce EC policy. The legislative proposals to this end, for example in the field of money-laun-

12 Case 68/88, *Commission v. Greece* [1989] ECR 2965 and Case C-226/97 *Lemmens*, [1999] ECR 195.

13 J.A.E. Vervaele, 'Fraude met Europese sociale subsidies in Nederland', *NJB* 2001, 2167-2175.

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

15 The minority position among criminal lawyers was argued by inter alia Grasso, Tiedemann, Delmas-Marty, Vogel and Vervaele, who all defended a limited functional competence. For an interesting recent discussion between proponents and opponents see *Zeitschrift für die Gesamte Strafrechtswissenschaft*, *Europäisches Strafprozessrecht*, 2004, Heft 2, 332-474 and B. Schünemann (Hrsg), *Alternativentwurf Europäische Strafverfolgung*, Köln 2004.

dering and insider dealing,¹⁶ were functional in their approach and only provided for limited harmonization. By and large these proposals obliged the Member States to criminalize certain intentional acts and thus to provide for a penalty and, in the case of serious offences, for a prison sentence. The proposals did not contain any concrete provisions as to the substance of these penalties and prison sentences. However, even the limited harmonization approach has never been able to win the Council over. The Council, as usual, approved the proposals, but only after amending them in such a way that the obligations were stripped of their criminal law packaging. Any and all references to the criminal law nature of the obligations were systematically deleted. Criminal law prohibitory or mandatory provisions were changed into prohibitory or mandatory provisions, period. Obligations to impose criminal sanctions were replaced by simple sanctions.

The systematic political neutralization of the criminal law harmonization proposals of the Commission could be indicative of a staunch unity on the part of the Member States in the Council. Nevertheless the Member States were internally divided on this question to such an extent that in 1990 the Ministers of Justice assigned a Council working group consisting of public servants with the task of subjecting the relationship between Community law and criminal law into fundamental discussion.¹⁷ The government experts agreed that Community law can set requirements for national criminal law, but could not unite in an unequivocal position concerning the direct criminal law harmonization competence of the EC. Those Member States that were in favour of such a competence – a small majority, among which the Netherlands – nevertheless wished for certain conditions to apply. Such harmonization could only be the criminal law tailpiece of a Community law policy area, i.e. not being criminal law harmonization as such. This harmonization should, furthermore, leave intact a number of starting points or guarantees that were considered by (some of) the Member States to be essential for their own criminal (procedural) law. With regard to this, references were made for the rejection of the criminal liability of legal persons, the rejection of the introduction of minimum penalties, principles that play a role in sentencing (e.g. the ability-to-pay principle) and principles that play a role in the prosecution of offences (e.g. dismissal or dismissing charges and settlement).

The report of the divided working group therefore did not result in a political breakthrough. Within the framework of the EC Treaty in force it was politically impossible to arrive at a workable solution. A fundamental political difference of opinion started to develop.¹⁸ Dutch attempts during the intergovernmental conference for the preparation of the Maastricht Treaty to integrate aspects of criminal justice, including the power of direct harmonization, into EC

16 See COM(90) 106 final, OJ C 106, 1990 for the proposal for a directive, which is the previous history of Directive 91/308 on prevention of the use of the financial system for the purpose of money laundering. See COM(87) 111 final, OJ C 153, 1987 and COM(88) 549 final, OJ C 277, 1988, which is the previous history of Directive 89/592 coordinating regulations on insider dealing.

17 For the report of the ad hoc working group see J.A.E. Vervaele, *Fraud against the European Community*, Deventer: Kluwer 1992, 313.

18 Where for example the Member States were prepared to criminalize money laundering based on obligations deriving from the international law made by the UN and Council of Europe, but not by the EC. See intergovernmental declaration to Directive 91/308, OJ L 66/77, 1991.

law were doomed to failure. The Luxemburg compromise, now known as the three pillar structure, organized criminal law co-operation and harmonization into a separate semi-intergovernmental pillar which entered into force as part of the Maastricht Treaty in 1993. With the entry into force of the Treaty of Amsterdam in 1999, the third pillar shed its semi-intergovernmental character and thereby became a fully fledged EU policy area.

3. Criminal Law Co-operation and Criminal Law Harmonization in the EU, a Political Stalemate

Structuring the third pillar to include the direct legislative competence of the EU in the field of co-operation in criminal matters and criminal law harmonization¹⁹ has not caused the battle to subside, quite the contrary in fact. After all, the third pillar is a supplementary power that cannot undermine or interfere with the array of EC powers. Both Article 2 EC and Article 47 EC in conjunction with Article 29 EU are clear on this. Whether or not this power exists does not depend on whether prior to the EU Treaty's entry into force any regulation or directive was ever created which imposes a duty to harmonize criminal law. Disuse of power does not lead to its demise, nor does the entry into force of the EU Treaty. It is not the political will that determines the legal competence, at least not without amendment of the Treaty. Nevertheless the third criminal law pillar has been defined by many as exclusive, i.e. excluding any criminal law competence within the first pillar.

It is my belief that it was clear from the outset that the political division of the legal estate between the first and the third pillar would culminate in an institutional battle of competence concerning the position of criminal law within the EU. Furthermore, this division also drove apart administrative law enforcement and criminal law enforcement. My predictions from 1995²⁰ have come true. More and more often the EC and the EU table competing legislative proposals where the main concern is the fundamental question of the power to harmonize criminal law. In the case of many of the legislative initiatives from the period from 1993 to 2005, the Commission came to diametrically oppose the Council. There is no point in repeating every single initiative and counter-initiative here where the EC and the Member States have flagged the issue up in the Council. Two angles are however relevant for the present analysis. First of all, neither the Commission nor the Member States have submitted legislative proposals based on a well-thought enforcement and criminal law policy. In that sense, the Tampere programme²¹ has provided insufficient direction. Even in policy areas of far-reaching integration, such as the

19 See Special Issue of *Delikt en Delinkwent*, 2002, September, Special Issue *Panopticon*, 2004, no. 1; G. Corstens and J. Pradel, *European Criminal Law*, Dalloz, 2002 and B. Hecker, *Europäisches Strafrecht*, Berlin 2005; Groenhuijsen, M.S. (2004) 'Criminal Law in the European Union: a Giant Leap or a Small Step?' in A. Moore (ed.), *Police and Judicial Co-operation in the European Union*, Cambridge, 2004, 221-243.

20 J.A.E. Vervaele, Law Enforcement in Community Law within the first and third pillar: do they stand alone?, *The Finnish Yearbook of International Law*, Vol. VII, 1996 353-369.

21 Most recently updated by COM(2004) 0401.

internal market, the customs union or the monetary union there is no final enforcement element. In none of the institutions a policy plan has been formed to present an integrated vision on the need for harmonization accommodating prevention and punishment, and as part of the latter issue, on the relationship between administrative and criminal law enforcement. Both in the Council and in the Commission the approach has been predominantly ad hoc and eclectic. Striking in this context is that the Commission has not submitted any EC proposal for the criminal protection of the euro,²² which is after all 'hardcore' EC monetary policy, and has gone along completely with the Council in the elaboration of a framework decision.²³ It is also striking that in some policy areas the Commission has failed to develop any initiative for the harmonization of punitive administrative law or criminal law or has only done so sparingly. In this context one might think of financial services and securities regulations. It is true that the recent Market Abuse Directive²⁴ obliges the Member States to enforce the provisions administratively, but no mandatory sanctions have been prescribed. Article 14(2) authorizes the Commission to draw a list of administrative measures and penalties, but this list is merely informative. The lack of any well-contemplated criminal law policy is also reflected in the initiatives for criminal law harmonization. Why, for instance, does the Commission press for the criminal law harmonization of environmental law and criminal law protection of the financial interests of the EC,²⁵ but fails to do the same in the field of competition or fisheries or the financing of terrorism? Why do the Member States urge for the criminal law harmonization of terrorism, xenophobia, the protection of victims of crime, but not for the criminal law harmonization of serious violations of food safety rules, intellectual property infringements or the financial management of businesses?

In addition, it is important to form a clearer picture of the institutional legislative skirmishes between the EC and the EU concerning criminal law harmonization. In sum, three types of legislative conflicts can be distinguished over the period between 1993 and 2005. The first type may be described as 'warding off'. The Commission submits proposals for criminal law harmonization of Community law which the Council subsequently rejects. At best the proposal is neutralized and stripped of its criminal law packaging. The Council here applies an old legislative tactic that was used in the period before the entry into force of the Treaty on European Union. The Commission proposal for a regulation on official feed and food controls²⁶ (2003) is an excellent example. The Commission emphasizes the need to provide for a functional harmonization of criminal law enforcement supplementing the existing harmonization of administrative law enforcement. The Commission claims that a basic list of offences commit-

22 Art. 12 of Regulation 974/98 limits itself to setting out a duty to enforce in wording that does not even reach the level of the minimum formulation as set out by the ECJ. The proposal for a regulation, COM(2000) 492 final, on the protection of the euro against counterfeiting did not contain any criminal law obligations.

23 Framework Decision 2000/383, on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, OJ L 140/1, 2000.

24 Directive 2003/6, OJ L 96/16, 2003.

25 COM(2001)272 final, OJ C 240 E, 2001.

26 COM(2003)52 final, text available in electronic form only through Eur-lex.

ted intentionally or through serious negligence should be drawn up which could threaten feed and food safety and therefore public health, and for which the Member States must provide for criminal sanctions. The list should not be limited to offences related to actual placing on the market, but include all offences which may eventually lead to the placing on the market of unsafe feed or food. For this list of serious offences the Member States according to Article 55 should provide for minimum criminal standards:

- ‘1. Member States shall lay down the rules on penalties applicable to infringements of feed and food law and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. The Member States shall notify those provisions and any subsequent amendment to the Commission without delay.
2. For the purpose of paragraph 1, the activities referred to in Annex VI shall be criminal offences when committed intentionally or through serious negligence, insofar as they breach rules of Community feed and food law or rules adopted by the Member States in order to comply with such Community law.
3. The offences referred to in paragraph 2 and the instigation to or participation in such offences shall, as for natural persons, be punishable by sanctions of criminal nature, including as appropriate deprivation of liberty, and, as for legal persons, by penalties which shall include criminal or non-criminal fines and may include other penalties such as exclusion from entitlement to public benefits or aid, temporary or permanent disqualification from engaging in business activities, placing under judicial supervision or a judicial winding-up order.’

The fact that serious infringements of food safety might threaten public health has been conclusively proven by the various food scandals in numerous European countries which in some cases, for example the rapeseed oil poisoning case in Spain, have resulted in the death of many. Nevertheless, the Member States did not submit a proposal for a Framework Decision, but rather stripped the Commission proposal of its criminal law wrapping in the Council. In the adopted regulation, Article 55 now reads as follows:

- ‘1. Member States shall lay down the rules on sanctions applicable to infringements of feed and food law and other Community provisions relating to the protection of animal health and welfare and shall take all measures necessary to ensure that they are implemented. The sanctions provided for must be effective, proportionate and dissuasive.
2. Member States shall notify the provisions applicable to infringements of feed and food law and any subsequent amendment to the Commission without delay.’²⁷

The second type may be described as ‘hijacking’, whereby the content of a proposal for a regulation or directive is copied into a proposal for a framework decision or vice versa. The Commission and the Member States take turns to hijack the content of each other’s proposals

²⁷ Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules, OJ L 165/97, 2004.

and subsequently package it in a different legal instrument. The clash concerning the harmonization of environmental criminal law is a point in case (framework decision versus directive).²⁸ In a number of cases this has led to a stalemate, whereas in others it has led to the adoption of framework decisions contrary to the opinion of the Commission and the European Parliament.

The third type may be termed 'cohabitation forcée', whereby two proposals are elaborated alongside each other and in harmony with each other. The substantive provisions and, as the case may be, provisions concerning administrative harmonization are included in a proposal for a directive or a regulation, while the criminal law harmonization aspects are incorporated in a framework decision. A good example of what is known as a double text approach is Directive 2002/90 coupled with Framework Decision 2002/946 concerning illegal immigration.²⁹ The package as finally approved is an excellent example of 'cohabitation forcée'. The Directive limits itself to defining the prohibited acts and participation and to imposing the obligation to provide for effective, proportionate and dissuasive sanctions. The Framework Decision further substantiates the criminal law repertoire by means of a direct reference to the prohibitory provisions in the Directive. It is made compulsory to provide for criminal sanctions. For some infringements committed for financial gain custodial sentences of a maximum duration of at least a certain period are made mandatory. The Framework Decision further regulates the liability of and penalties for legal persons,³⁰ jurisdiction, extradition, stepped up judicial assistance, etc. The provisions of the Directive thus function as the substantive and moral substrate for the criminal law obligations laid down in the Framework Decision. Another good example concerns environmental pollution from ships where both proposals³¹ were drafted by the Commission.³² Article 6 of the proposal for a directive includes the obligation to provide for criminal penalties for the illegal discharge of polluting substance as defined in the Marpol International Convention for the prevention of pollution from ships, including in case of serious infringements, custodial sentences, also for natural persons. The proposal for a framework decision directly refers to Article 6 of the Directive and further defines the forms of criminal sanctions. The proposal for a framework decision further includes provisions concerning joint

28 Framework Decision 2003/80 of 27 January 2003 on the protection of the environment through criminal law (OJ L 29, 2003) which was annulled by the Court of Justice and the Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law, COM(2001), 139 of 13 March 2001, OJ C 180, 2001, as amended by COM(2002) 544, OJ C 020 E, 2003.

29 Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorized entry, transit and residence, OJ L 328/17, 2002, and Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence, OJ L 328, 2002.

30 Not, however, the criminal liability of legal persons.

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

32 Often this involves interinstitutional cooperation between a directorate-general responsible for the specific subject and the directorate-general for the third pillar.

investigation teams, judicial assistance, etc. Here too the criminal law provisions in the proposal for a directive proved ultimately unpalatable to the Council. In the approved Directive all references to criminal law obligations have been eliminated. It is moreover common knowledge that the negotiations on this package progressed with great difficulty. Certain Member States with major interests at stake in this sector were extremely wary of criminal law obligations which could be assessed and enforced by the Commission.

In the proposals concerning migration and pollution at sea the Commission has had to accept its loss, but it has not yet given up. A recent example of 12 July 2005 is the combined Commission proposal for a directive *and* a framework decision concerning criminal measures to combat intellectual property infringements.³³ This proposal is the further development from Directive 2004/48 concerning enforcement of intellectual property rights,³⁴ which imposes the obligation on the Member States to provide for private law and administrative law measures and to implement the obligations following from the international TRIPs agreement which makes criminal enforcement mandatory. In the proposal for a directive the Commission clearly claims a direct power to impose criminal law harmonization, but in doing so restricts itself to the obligation for the Member States to criminalize intentional offences, to provide for certain methods of criminal participation and to impose criminal penalties, including custodial sentences. The further determination of the sanctions (level, etc.), the question of jurisdiction and some aspects of criminal procedure, such as the initiation of criminal proceedings independently of a complaint, are all regulated under the Framework Decision.

This further analysis brings to light several issues. There is no coherent European criminal law policy present where all or any actors are involved. The Commission, as the keeper of the Community's interests, considers it its duty to compel the Member States to provide for criminal sanctions for serious infringements of common interests in European integration, and it finds its efforts completely blocked by the Council or it finds that the Council is only prepared to impose such an obligation through an EU framework decision. The Member States are not concerned in the first place about the enforcement of Community policy, but about the fight against terrorism, organized crime, etc. It has already been evident to the Commission for some time that the Council would continue to claim the exclusive rights to criminal law harmonization for the third pillar, even contrary to the opinion of its own Legal Service.³⁵ The 'cohabita-

³ Proposal for a directive on criminal measures aimed at ensuring the enforcement of intellectual property rights and the proposal for a framework decision to strengthen the criminal law framework to combat intellectual property offences, COM(2005) 276 final, only available in electronic form through EUR-Lex.

⁴ OJ L157/45, 2004.

⁵ In a number of opinions, amongst other things concerning the criminal enforcement of environmental law, the Council's Legal Service has made clear that EC law provides a legal basis for a limited harmonization of criminal law, restricted to the obligation to criminalize infringements of mandatory and prohibitory provisions and to provide for criminal sanctions. The modalities of the criminal sanctions and other aspects should, according to the Legal Service, be regulated in third-pillar framework decisions. With respect to the proposal for a framework decision on the retention of the traffic data of service providers the Legal Service of the Council was of the opinion that these matters could only be regulated under an EC instrument. The opinions are confidential.

tion' did not lead to the desired result either. The Commission has had to let go of its ambitions in the field of criminal law and acknowledge the exclusivity of the third pillar in these matters, even in clear EC law policy areas. The fact that the obligation for the Member State to achieve criminal law harmonization is not imposed through a directive or a regulation is not a neutral conclusion. Framework decisions require unanimity. Directives and regulations are usually adopted by means of co-decision and qualified majority. This means that the European Parliament is competent to co-decide which results in greater democratic legitimacy. It is therefore far more difficult to reach a decision in the JHA Council than using the first pillar procedure. Furthermore, as opposed to framework decisions, regulations and unconditional and clear provisions of directives have direct effects. In the first pillar the Commission also has many more trumps up its sleeve to oblige the Member States to comply with criminal law harmonization. The Commission may start infringement proceedings against a Member State. The Member States may be held financially responsible for non-compliance with enforcement duties and the Member States can even be fined for failing to comply with Court rulings. The Community way therefore has many advantages, both in terms of legitimacy and in terms of efficiency.

The political stalemate could only be broken by a ruling on the principle from the Court. The Commission has therefore succeeded well to provoke such a ruling by raising objections under Article 35(6) EU against the legality of the Framework Decision approved by the Council on 27 January on the criminal enforcement of environmental law.³⁶ With this Decision, the Council set aside a proposal submitted by the Commission for a directive on the criminal enforcement of environmental law.³⁷ On 13 September 2005 the Court delivered its long-awaited judgment in Case C-176/03. This judgment is a second landmark ruling concerning the enforcement of Community law as in it the Court recognized the functional competence of the EC to harmonize the enforcement by criminal law of Community law. No less than eleven Member States intervened in the proceedings. Ten Member States³⁸ supported the position of the Council. The Netherlands was the only Member State to argue in favour of a combined criminal

36 That the Commission did not start proceedings before the Court in the matter of EC fraud may be explained by legal reasons. At the time of the approval of the 1995 PIF Convention under the Maastricht third pillar, approval of a criminal law harmonization directive would only have been possible on the basis of Article 209A. This provision however did not constitute a legal basis for harmonization. This was only introduced by Article 280 of the Amsterdam Treaty on European Union. On that basis the Commission in 2001 submitted a proposal for a directive for criminal law harmonization, but without questioning the legal validity of the Conventions. The proposal for a directive was however provoked by the slow ratification procedures and the incomplete ratifications of the PIF protocols.

37 See F. Comte, 'Criminal environmental law and Community Competence', *European Environmental Law Review* 2003, 147-156 in defence of the Community approach. Argued from the contrary: Y. Buruma and J. Somsen, 'Een Strafwetgever te Brussel inzake milieubescherming', *NJB* 2001, 795-797 and I.M. Koopmans, 'Europa en de handhaving van het milieurecht: een pijler te ver?', *NTER*, 2004, 127-132. For a balanced position, see R. Ortlep and R. Widdershoven, C. Backes, et al., *Lex Dura, Sed Lex. Opstellen over de handhaving van omgevingsrecht* 2005, Kluwer, Deventer, 159-176.

38 Denmark, Germany, Greece, Spain, France, Ireland, Portugal, Finland, Sweden and the United Kingdom.

harmonization competence under EC law. For this reason, the Dutch position is especially interesting.

4. Community Criminal Law and the Dutch Position³⁹

The Netherlands has always been engaged with the enforcement of Community law in the Member States. In the ad-hoc working group concerning Community law and criminal law,⁴⁰ set up in the framework of the European Political Cooperation at the Council, the Netherlands was one among the majority of the Member States to recognize a legal basis in EC law for the functional harmonization of criminal law.⁴¹ In the IGC in preparation of the Maastricht Treaty, the Netherlands even – unsuccessfully – tried to integrate certain aspects of criminal law policy, including aspects of the Schengen acquis, into the EC. In 1992 the government devoted a first specific memorandum to the relationship between Community law and criminal law. The content of this document which was also expressly subscribed to by then the Minister of Justice, Mr Hirsch Ballin, coincided with the Dutch opinion in the ad hoc working group. The harmonization of criminal law by means of Community law was possible provided that it acted as the functional tailpiece of Community policy and the criminal (procedural) law starting points considered as important by the Member States were guaranteed. The Netherlands also managed to block the harmonization of the minimum penalties by means of a Declaration to the Treaty of Amsterdam. In 1999, just after the entry into force of the Treaty of Amsterdam and the recalibrated third pillar, the then Minister of Justice, Mr Korthals, submitted a memorandum concerning European criminal law to the Parliament. The memorandum exclusively discussed third-pillar criminal law and the Corpus Juris proposal.⁴² The Minister proposed a list of criteria for the assessment of initiatives for the harmonization of rules in the third pillar, again referring to the principles of necessity and subsidiarity and the guarantees that are typical of the Dutch criminal law system. Nowhere did the Minister touch upon the theme of harmonization of criminal law by means of the first Community pillar. However, to conclude from this that the Dutch government had radically changed course does not seem justified.⁴³ In 2001, the Dutch government confirmed that it was striving towards the further communitarization of JHA cooperation⁴⁴ and that it considered that the Treaty as it stood already offered scope for the Community harmonization of criminal law. In fact, the government was of the opinion that criminal law harmonization was actually the preferred approach under Community law provisions relating

39 See in detail, E.A.M Verheijen, *Nederlandse strafrechtelijke waarden in de context van de Europese Unie*, Nijmegen 2006.

40 See supra note 10.

41 Kamerstukken II 1991/92, 22300 VI, no. 39.

42 M. Delmas-Marty, *Corpus Juris*, Parijs 1997 and M. Delmas-Marty and J.A.E. Vervaele, *The implementation of the Corpus Juris in the Member States*, 2000-2001, IV volumes, Antwerp.

43 Argued from the contrary M.I. Veldt Foglia, '(Nog) geen strafrecht in de Eerste Pijler', *SEW* 2002, 166.

44 *Nota Toekomst van de Europese Unie*, Kamerstukken II 2000/01, 27407, no. 9, p. 6.

to environmental law and the fight against EC fraud.⁴⁵ In 2001, the Inter-Departmental Commission on European Law (ICER) published its report titled *EG-eisen aan de handhaving* [EC requirements for enforcement].⁴⁶ The report contained an extensive analysis of the Court's case law, but, however, did not entertain the possibility of direct criminal law harmonization. In 2002, the government still defended the view that the choice between the first or the third pillar depends on '(...) the nature of the subject at hand, the circumstances at European level or the fact that specifically national matters – possibly even the interests of the Netherlands – are at stake.'⁴⁷ It is clear that the Dutch government left all options open, albeit with a wider array of criteria for assessment than provided by the Commission. For the Commission, the nature of the subject at hand and the objective of the rules in question were decisive.

The recent institutional battle between the Commission and the Council has not left the Netherlands unaffected. On 31 August 2001, the Council of State [*Raad van State*] advised the Cabinet on the proposals for the directives on environmental protection through criminal law and the protection of the financial interests of the EC through criminal law.⁴⁸ The Council of State underlined the fact that Articles 29 and 47 EU pose an obstacle to exclusive criminal law competence for the third pillar. The Council was further of the opinion that the exclusion of criminal law from the EC Treaty as a matter of principle was not provided for and that it was possible that, even with due regard for the principle of subsidiarity, the Community harmonization of national provisions of criminal law and national penalties could be necessary in order to realize the EC's objectives. The Council of State thus largely subscribed to the views of the Commission. In September 2001, the working group for the assessment of new Commission proposals [*Werkgroep Beoordeling Nieuwe Commissievoorstellen (BNC)*] by means of the *BNC* slips submitted what was in fact the government position to Parliament.⁴⁹ In the case of the environmental directive, the working group had its doubts concerning compliance with the principle of subsidiarity, but did subscribe to the possibility of the Community harmonization of criminal enforcement of Community law. In April 2002, the ICER also submitted an opinion to the Minister of Justice. The Minister raised a number of additional questions in reply to the opinion of the Council of State. The Minister was mainly interested in the consequences of Community criminal law. Would the Member States become obliged to enforce exclusively through criminal law? Would administrative enforcement become an impossibility? The ICER remained somewhat non-committal. The Court's case law on this point was yet unclear. However, based on this case law the possibility could not be ruled out either. Nevertheless, in case of such a proposal the Commission would have to provide elaborate reasoning as to why exclu-

45 Kamerstukken II 2000/01, 2150220, no. 176, p. 6 and Kamerstukken II 2001/02, 22112, 207, p. 23-25.

46 ICER 2001-01/06.

47 Kamerstukken II 2002/03, 28604 and 28473, no. 3, p. 12.

48 The Cabinet rightly increasingly asks the Council of State for its opinion on European legislative proposals. Council of State opinion, 31 August 2001, reference W03.01.0420/1/A, annex to Kamerstukken II 2001-2002, 22 112, no. 207.

49 Kamerstukken II 2001/02, 22112, p. 23.

sive criminal law enforcement is necessary and proportionate to bring about the Treaty objectives in that particular area. That the Commission would be able to demonstrate this did not seem likely to the ICER.⁵⁰ The ICER replied more boldly to the question of whether Community criminal law had to take account of the legal principles on which the Dutch criminal law system is based. National principles and systems could certainly be affected by EC harmonization. For this reason the ICER advised the departments dealing with the various relevant fields to ensure the timely involvement of the Minister of Justice in case of proposals of criminal law relevance.

The present Minister of Justice, Mr Donner, has yet to commit to a specific memorandum on the relationship between Community law and criminal law, but from various interventions made by him since 2003 some reluctance or a distancing from the earlier government position may be read. The Minister fears that the harmonization of criminal law in respect of international and cross-border crime would bring too much influence on the functioning of the criminal law systems of the Member States. For this reason, the Minister argues in favour of supranational European criminal law (investigation, prosecution and trial) for typical EC interests (the Euro, EC fraud) and for cross-border crime.⁵¹ In the Convention and in the IGC in preparation for the European Constitutional Treaty, the Netherlands warned against one-sided focus on the legislative harmonization of criminal law. The Netherlands also argued in favour of including a legal basis within the Treaty for the creation of a supranational criminal justice system,⁵² however unsuccessfully.

Finally, as mentioned, the importance which the Netherlands attaches to this matter is readily apparent. The Netherlands defends the position that there is indeed room for harmonization of criminal law through the EC

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 (see Case C-240/90 *Germany v Commission* [1992] ECR I-5383). That could be the case if the enforcement of a harmonizing rule based, for example, on Article 175 EC gave rise to a need for criminal penalties.⁵³

50 During the recent parliamentary debate sparked by the judgment in case C-176/03 the State Secretary for Foreign Affairs and the Minister of Justice also took this position. See Kamerstukken II 2005/06. Aanhangsel van Handelingen, no. 679.

51 See for example Minister Donner's speech on the occasion of the opening of Eurojust in The Hague, http://www.justitie.nl/pers/speeches/archief/archief_2003/060503speechdonner-eurojust.asp.

52 <http://www.grondweteuropa.nl/9310000/d/bijdreu/nlreg733.pdf>.

53 From ground 36 in the Court's judgment in Case C_176/03.

5. A Closer Inspection of the ECJ Judgment and the Future Criminal Law Harmonization Policy

5.1 *The Commission's View on the Harmonization of Criminal Enforcement after Case C-176/03*

Commissioner Frattini, responsible for the European Area of Freedom, Security and Justice, is aware that the judgment places the Commission as the driving force behind legislative policy in the EC to present a systematic or consistent, horizontal vision for all policy areas. After consultations between the various Directorate-Generals the Commission in November 2005 submitted a specific communication⁵⁴ to the European Parliament and the Council concerning the implications of the Court's judgment in case C-176/03.

The Commission starts off by analyzing the content and scope of the Court's decision. Article 47 EU provides that EC law has priority over Title VI EU, i.e. the first pillar prevails over the third. The Court further held that Article 175 EC constitutes a proper legal basis for the matters regulated in Articles 1-7 of the Framework Decision. The Commission subtly points out that Articles 1-7 are criminal law provisions dealing with the definition of offences, the principle of the obligation to impose criminal penalties, the level of penalties, accompanying penalties and the rules on participation and instigation. The Court went further than the Advocate General in his Opinion by not only accepting that the EC may oblige the Member States to enforce by means of criminal law, but may also lay down in detail what the arrangements should be. The Commission then turns to the scope of the Court's judgment. The Commission highlights the fact that the judgment does not mean that the Court has hereby recognized criminal enforcement as an area of Community policy. Criminal enforcement is merely a tailpiece of a substantive policy area. However, the Commission does find that the Court's judgment may potentially impact all policy areas of negative integration (the four freedoms) and positive integration, for which criminal law methods may be necessary to ensure effective enforcement. This test of necessity must be defined functionally, on an area-by-area basis. For some policy areas no criminal enforcement is required, but for others it is. The necessity test also determines the nature of the criminal measures to be taken. The Court did not impose any restrictions there. Here too the approach is functional. The Commission does not elaborate further, but we may conclude from this that the Commission obviously wishes to leave the door open where necessary to harmonization of aspects of the general part of criminal law or of criminal procedural law. The Commission further indicates its preference for horizontal measures where possible, i.e. transcending specific policy areas. Here we might think of horizontal criminal measures for the agricultural sector and the structural funds in connection with fighting EC fraud or terrorism or organized crime. The Commission also believes that the judgment puts an end to the double-text approach, i.e. adopting directives and regulations for substantive policy

54 COM(2005) 583 final.

and its administrative enforcement; and framework decisions for the criminal enforcement of that same policy. From now on, all this can be laid down in one single directive or regulation.

In the second part of the communication the Commission discusses the consequences of the judgment more specifically. The Commission first of all indicates that criminal law provisions concerning police and judicial co-operation, including measures on the mutual recognition of judicial decisions and measures based on the principle of availability, fall within the area of competence of the third pillar. This is also true for the harmonization *per se* of the general part of criminal law or criminal procedural law in the framework of co-operation and mutual recognition. The criminal harmonization of policy areas that are not part of the EC Treaty, but that are nevertheless necessary for the objectives of the Area for Freedom, Security and Justice are placed within the third pillar. An interesting point is that in this second part the Commission further defines the conditions for criminal harmonization using the Community competence under the heading '*Consistency of the Union's criminal law policy*'. The Commission clearly indicates that criminal harmonization under the EC competence is only possible if there is a clear need to make the policy in question effective. Furthermore, the requirements of the principles of subsidiarity and proportionality have to be met. This means that there is a strict obligation to provide grounds and reasons. The harmonization may concern the definition of offences, the criminal penalties, but also what are called 'other criminal-law measures appropriate to the area concerned'. It is clear that the Commission does not from the start wish to pin itself down to merely the harmonization of the offence definitions and the criminal penalties. The Commission continues by stating that: 'The criminal-law measures adopted at sectoral level on a Community basis must respect the overall consistency of the Union's system of criminal law, whether adopted on the basis of the first or the third pillar, to ensure that criminal provisions do not become fragmented and ill-matched'. Both the Commission on the one hand and the Council and the European Parliament on the other must take care to ensure this consistency, and also prevent that Member States or the persons concerned are required to comply with conflicting obligations. This is an interesting requirement, but it also presupposes that the EU has a consistent criminal law policy in place. However, this is clearly not yet the case. Much is still to be done and gained here.

In the third part of the communication the Commission discusses the consequences of the Court's judgment for actual legislative practice. In this, the Commission distinguishes between secondary legislation that has already been approved in the Council and pending proposals. The Commission considers it necessary to correct legislation of which it has become apparent after this judgment that it was adopted or proposed on the wrong legal basis. The EU institutions have a duty to restore their legality, and to provide legal certainty with respect to implementation in the Member States. In this context, the Commission also refers to its recent appeal to the Court for the annulment of Framework Decision 2005/667 of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution.⁵⁵ The Commission envisages two strategies to perform the corrections in accordance with the Court's

⁵⁵ Case C-440/05, pending.

judgment. Strategy number one is to identify specific criminal law measures from a list of adopted framework decisions and to transfer them into Community legislation, without any discussion as to content or scope. This is a formal and technical operation which requires a prior agreement between the European Parliament and the Council. The Commission also clearly indicates its own strategy, in case such an agreement would fail. In that case, the Commission will make use of its legislative initiative, not only to restore the legal basis, but also to at the same time prioritize substantive solutions in line with Community interests and needs. For the pending proposals it is clear that the ordinary legislative procedure applies allowing the Commission to amend its proposals where necessary. Finally, the Commission annexes a list of adopted secondary legislation and pending proposals which it considers need to be amended. The adopted secondary legislation concerns the criminal enforcement of the environmental protection;⁵⁶ the Euro⁵⁷ and non-cash means of payment;⁵⁸ money laundering, freezing, seizing and confiscation;⁵⁹ unauthorized entry, transit and residence;⁶⁰ corruption in the private sector;⁶¹ attacks against information systems⁶² and serious ship-source pollution.⁶³ Every time the Commission indicates the legal basis in the EC Treaty which should be used. At times the legal basis is specific, such as Article 123(4) EC for the criminal enforcement of the Euro or Article 80(2) EC for the criminal enforcement of ship-source pollution rules. Other times, the legal basis is based on the general power laid down in Article 95 EC, such as in the case of corruption in the private sector. In a number of cases, for example money laundering, a specific legal basis (*in casu quo* Article 47(2) EC) is combined with the general legal basis of Article 95 EC. Remarkably, however; the Commission omits to indicate which specific provisions or topics should be transferred to Community law. I believe that the Commission clearly wished to leave this point open for possible negotiations between the Council and the European Parliament.

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- 56 Framework Decision 2003/80 of 27 January 2003 on the protection of the environment through criminal law (OJ L 29, 2003) which was annulled by the Court of Justice and the Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law, COM(2001), 139 of 13 March 2001, OJ C 180, 2001, as amended by COM(2002) 544, OJ C 020 E, 2003.
- 57 Framework Decision on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the Euro, OJ L 140/1, 2000 as amended by Framework Decision OJ L 329/3, 2001.
- 58 Framework Decision combating fraud and counterfeiting of non-cash means of payment, OJ L 149/1, 2001.
- 59 Directive 91/308 on prevention of the use of the financial system for the purpose of money laundering, OJ L 166, 1991 meanwhile replaced by Regulation 2005/60 and the Framework Decision on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, OJ L 182/1, 2001.
- 60 Directive 2002/90 defining the facilitation of unauthorized entry, transit and residence, OJ L 328, 2002 and Framework Decision 2002/946 on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence, OJ L 328/17, 2002.
- 61 Framework Decision 2003/568 on combating corruption in the private sector, OJ L 192/54, 2003.
- 62 Framework Decision 2005/222 on attacks against information systems, OJ L 69/67, 2005.
- 63 Directive 2005/35 on ship-source pollution and on the introduction of penalties for infringements, OJ L255, 2005 and Framework Decision 2005/667 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution, OJ L255/11.

As to the pending proposals, the Commission limits itself to two issues, namely the criminal-law protection of the Community's financial interests⁶⁴ and the criminal-law enforcement of intellectual property rights.⁶⁵ However, in a footnote the Commission also refers to a number of specific additional areas. It qualifies the proposal for a framework decision on combating racism and xenophobia as being in conformity with the Treaty, but adds that any future legislative initiative for the purpose of criminal-law enforcement should occur through a directive based on Article 13 EU. The Commission also points out two proposals whose preparation is currently stalled, namely the Greek proposal concerning the fight against trafficking in human organs and tissues⁶⁶ and the German proposal concerning criminal-law protection against fraudulent or other unfair anti-competitive conduct in relation to the award of public contracts in the common market.⁶⁷ For this analysis the Commission has not yet put all its cards on the table. Notably, no insight is provided in potential proposals for harmonization of policy based on which the Commission has not yet undertaken any action. One could think of for example the common agricultural or fisheries policy or financial services. Moreover, a number of failed proposals, such as that on feed and food controls, are not mentioned.

With this communication the Commission has taken a clear stance and provided an outline for the future. It has also opted to adopt a selective approach which it also consistently follows in its legislative agenda.⁶⁸ Whether the green light has hereby been given to an avalanche of proposals for Community criminal law remains to be seen, however. Both the Member States and the Council are still working out their strategies.

5.2 *The Judgment in Case C-176/03: Reception in the Member States and in the JHA Council*

Despite the unanimous opinions of the various legal services of the EU organs, including that of the Council itself, the Court judgment has been greeted with amazement and disbelief by many governments. That the Court decision would not be embraced by the Member States is hardly surprising given their numerous interventions in the proceedings in favour of the Council. However, the governments have mainly focused their criticism on the Communication of the Commission and introduced this in the JHA Council. In Denmark the Minister of Justice wasted no time informing Parliament of the judgment and submitting a reservation.⁶⁹ The Min-

⁴ Proposal for a Directive of the European Parliament and of the Council on the criminal-law protection of the Community's financial interests, OJ C 240E/125, 2001.

⁵ Proposal for a directive on criminal measures aimed at ensuring the enforcement of intellectual property rights and the proposal for a framework decision to strengthen the criminal law framework to combat intellectual property offences, COM(2005) 276 final, only available in electronic form through EUR-Lex.

⁶ Proposal for a framework decision of 26 April 2003, OJ C 100/27, 2003.

⁷ Proposal for a framework decision of 4 September 2000, OJ C 253/3, 2000.

⁸ See the Commission's legislative schedule for 2006 for JHA matters, <http://www.statewatch.org/news/index.html>.

⁹ Memorandum of 13 October 2005, http://www.euo.dk/upload/application/pdf/a16a3e79/2005_sv21.pdf.

ister maintained the view that no legal basis could be found in the EC Treaty, even though expressed an awareness that the Court judgment is not limited to environmental law. In France, the initiative came from Parliament itself. On 25 January 2006 the European Affairs Commission of the French *Assemblée Nationale* informed the Speaker of the *Assemblée*.⁷⁰ The Commission is of the opinion that the Court has acted beyond its competence and has demonstrated a certain *fédéralisme judiciaire*. The Commission also states that it is high time to end the *gouvernement des juges* and restore the power to the entities for whom it belongs, namely the governments of the Member States. The Commission therefore proposes to apply the bridging provision of Article 42 EU and thereby build an emergency brake procedure in the European Council.⁷¹ The Commission is not terribly pleased with the EU Commission's communication in response to the judgment either. It rejects what it considers 'its excessive interpretation'. According to the Commission, it is impossible to conclude from this judgment that there is a Community competence for criminal harmonization in all common policy areas of the EC and the four freedoms of the internal market. Instead, the Court limited this power to essential, cross-sector and fundamental objectives.

In the Netherlands the ICER has examined the judgment in order to establish whether its previous views need adjusting. The ICER⁷² considers that its 2002 opinion⁷³ needs no substantial amendment. The ICER underlines that the judgment impacts all policy areas referred to in Articles 2 and/or 3 EC, i.e. not the areas of employment, social policy, culture and public health, or sensitive issues such as drugs, euthanasia, abortion and prostitution. The ICER also finds that the answer to the question of the competence to harmonize criminal sanctions has been made insufficiently clear. It remains unclear whether the Community is competent to prescribe for *specific* criminal sanctions and what their level would be. The ICER argues in favour of care being taken to preserve the mix of instruments, i.e. the choice in practice between the application of administrative sanctions or criminal sanctions, and thus argues against making the competence of the EC in the field of the specific definition of criminal sanctions too exclusive. The ICER's opinion was taken over in its entirety in the Cabinet position of April 2006⁷⁴ as presented to Parliament by Ministers Nicolaï and Donner.

In January 2006 in Vienna the JHA Council during informal consultations examined the Commission's communication for the first time. The Council is of the opinion that there is no urgency to enact rectifying legislation. Many adopted framework decisions have by now been implemented in national law. It also emerged that the Council is not prepared to conclude a transfer agreement in favour of the first pillar. The Commission indicated on the spot that it was prepared to run through the legislative process on a case-by-case basis. The Ministers deter-

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- 70 <http://europapoort.eerstekamer.nl/9345000/1/j9vvgy6i0ydh7th/vgbwr4k8ocw2/f=/vh7rdrlxyv.pdf>.
- 71 This is the emergency brake procedure provided for in the European Constitutional Treaty in case of criminal law harmonization which poses a threat to essential interests of a Member State.
- 72 Report on criminal law and the first pillar II, 2006, end of March 2006.
- 73 See section 4 of this contribution.
- 74 DIE-402/06, <http://europapoort.eerstekamer.nl/9345000/1/f/j9vvgy6i0ydh7th/vh61mhl1tt9ua>.

mined their position during the formal JHA Council of February 2006.⁷⁵ It is clear to them that the harmonization of criminal (procedural) law is *in principle* not a Community competence. Exceptions have to be interpreted restrictively. Such exceptions should moreover be no more than the tailpiece of detailed Community policy. The Ministers were also of the opinion that in the harmonization of criminal sanctions the Community must leave room for the Member States to define the requirements of effectiveness and proportionality and should thus not regulate everything in detail and exclusively. Procedurally, it was decided that in the case of Community proposals with a (partially) criminal law content the Commission should expressly indicate this to the COREPER. In this way, consultations could be held between the JHA Council and the other Community Councils in the areas concerned and the JHA Ministers could ensure the consistency of the Union's criminal law system.⁷⁶ The position of the JHA Council is clearly more moderate than the views of some of the national Ministers of Justice. The competence to harmonize, including the harmonization of criminal sanctions and possibly aspects of criminal procedural law, is recognized. Reference is also made to a procedure of consultations between the Councils in the various policy areas and the JHA Council, rather than a power for the JHA Council to co-decide.⁷⁷

6. Conclusion

The judgment of the Court in Case C-176/03 has formally abolished the legal basis for implementation in national law. That the Member States will shortly have to launch a major legislative operation in the framework of a voluntary *cessio bonorum* from the third to the first pillar seems highly unlikely. This does not mean that the Court's judgment will not have far-reaching consequences for the Europeanization of criminal law and therefore also for the criminal law dimension of European integration.

Is the reproach that the Court has exceeded its competence justified? Is this really an example of a *gouvernement des juges*? Where have we heard this before? When in 1963 and 1964 the Court in *Van Gend en Loos* and *Costa v Enel* established the priority and direct effect of Community law as constitutional principles, the Member States were also united in their outrage. Since then, however, these principles have been considered as the basic pillars upon which European integration rests and furthermore it is generally accepted that European integration would have failed without the autonomy of the Court. Moreover, some Member States are hardly in a position to take the Court to task or to appeal for the autonomy of the Member States. France, for example, has built up an impressive list of cases of failed enforcement, and as induced the financial wrath of the Commission and the Court by ignoring the Court's find-

⁷⁵ See document 6466/06 of the Presidency, Procedural consequences of the judgment of the Court of Justice in case C-176/03, 16 February 2006.

⁷⁶ Point 3.3.2 of the Hague Programme of 24 November 2005.

⁷⁷ Several Ministers had defended this view.

ings against it in the case concerning fisheries enforcement.⁷⁸ In this recent judgment the Court has also taken painstaking care: it has opted to sit in full chamber and it has taken its time with the case. In my view, the judgment is consistent with the Court's approach in the past. The Court has never subscribed to the exclusive powers of the Member States or the third pillar in the field of criminal law. The Court does indeed apply an extensive interpretation of the EU Treaty, but has been doing so for dozens of years and by taking a functional approach, namely realizing the objectives of European integration. This approach is not only visible in this judgment, but also for example in the field of the financing of terrorism.⁷⁹ However, I agree with those who are critical of the judgment that the Court would have done well to provide more extensive reasoning for its decision, which would have prevented a number of present doubts from arising. First of all, the Court does not expressly discuss the material scope of the judgment. In my view, the Commission of the French *Assemblée* has got hold of the wrong end of the stick. Of course the EU Commission will have to provide grounds to demonstrate that the objective in question is essential to European integration and that the harmonization of criminal law is effective and necessary. However, I find it impossible to conclude from ground 42 (cross-sector and fundamental character of the objective) that that is the ultimately decisive criterion or that the harmonization of criminal law would be out of the question for, for example, guaranteeing food safety, tackling EC fraud or protecting the Euro. After all, would it not be odd if harmonization were possible for supporting policy, but not for areas of exclusive Community policy? A second problem in connection with the material scope concerns the way in which Articles 135 and 280 EC are worded where they exclude *the application of national criminal law* and *the national administration of justice* from the power to adopt measures. The Court limits itself to observing that these provisions do not stand in the way of criminal law harmonization in environmental matters. However, this has not clarified what the scope of these provisions actually is for possible criminal law harmonization. It is interesting that the Dutch Council of State in its opinion⁸⁰ considers that criminal law harmonization is inherent in Article 280 and that the restrictions mentioned do not stand in the way of the Community obligations to criminalize and the harmonization of the definitions of the offence. The principles on which the national criminal justice systems are based, such as the choice whether to prosecute, discretion in sentencing, etc., are excluded. It is also to be hoped that the judgment of the Court in Case C-440/05 will shed more light on the harmonization of criminal sanctions. In this case, the Commission after all expressly states that the provisions from the challenged

78 Case C-304/02, *Commission v. France*, judgment of 12 July 2005, not yet reported, text available through the European Court of Justice's website.

79 In Case T-306/01, *Ahmed Ali Yusuf Al Bakaraat – T-315/01, Abdullah Kadi*, the Court construes a legal basis in the EC Treaty for the lists of sanctions against organizations and persons who are suspected of being involved in the financing of terrorism, by combining provisions from the EC Treaty with Article 2 EU, the objective of realizing a common foreign and security policy.

80 Opinion of the Council of State, 31 August 2001, reference no. W03.01.0420/I/A, annex to TK II 2001-2002, 22 112, no. 207. The Cabinet rightly increasingly asks the Council of State for its opinion on European legislative proposals.

framework decision on combating ship-source pollution that concern the type and level of criminal sanctions also fall within the Community competence.

The discussion concerning the legal interpretation of the judgment is one thing; converting this legal competence into political currency in the Council is another. It is true that the co-decision procedure offers more chance of success than the unanimity procedure and that the Council will have to guard against being reprimanded again by the Court. Despite the Council's and the Member States' sceptical attitude it would still be the logical thing for some policy areas, such as serious infringements of stock market rules (insider dealing, market abuse, etc.) to unite the substantive rules and administrative and criminal law enforcement into one Community instrument and in this way prescribe for an integrated enforcement model. Were those who claimed that this judgment would cause many aspects of national criminal law policy to be brought under the direction of European criminal law right after all? It is obvious that the impact of the Court's judgment must not be underestimated. Shortly after the judgment the Commission proposed a directive concerning the duty to retain traffic data of service providers.⁸¹ Meanwhile, the Member States had been negotiating on a proposal for a framework decision since the spring of 2004.⁸² Both the Legal Affairs Commission of the European Parliament and the legal services of the Commission and the Council had issued a negative opinion concerning the legal basis of the proposal for a framework decision. As a result of the Court's judgment the Member States were finally prepared to change tack on this file. At the end of February 2006, the Directive was approved. It is therefore to be expected that the Commission will make initiatives for proposals of directives and regulations with a criminal law dimension. On the other hand, the judgment's impact must not be overestimated either. It is nonsense to claim that abortion or euthanasia will now fall under Community direction. Criminal-law enforcement can only be harmonized in areas of EC policy. Criminal-law enforcement is furthermore the tailpiece, based on the idea of an *ultimum remedium*. Communitarization of criminal law does thus not mean the end of administrative enforcement law. The European Commission also attaches great value to administrative enforcement. Moreover, the duty of criminal-law enforcement based on a regulation or a directive does not automatically mean that all cases must also be criminally investigated and prosecuted. The Member States are and remain competent to determine after thorough consideration which enforcement system (private law, administrative law or criminal law) is best used in a given case. The national legislator can thus continue to use models whereby certain actions can be curtailed both administratively and under criminal law (mix of instruments). Even in the case of a duty to enforce through criminal law, the Member States still retain the power to decide whether to prosecute or not. However, this choice must be based on appropriate considerations, including the European interests at stake.

81 COM (2005) 438 def, 21 September 2005, only available electronically.

82 Initiative proposal for a framework decision, 28 April 2004, 8958/04 and explanation of the initiative, 20 December 2004, 8958/04 ADD1.

Does all this mean that we can now sit back and relax and go back to the business of the day? I should think not. More than ever the Member States are required to think about a European criminal policy, both as concerns the enforcement of Community policy and as concerns the further definition of the area of freedom, security and justice. Discussions will have to take place in the Member States concerning the common interest in effective enforcement of Community policy and the internal market, the realization of the common area and the connected common rule of law guarantees. Criminal law undeniably reflects a piece of the national legal culture and it is therefore a symbol of state sovereignty. In the development of a European integration model based on shared sovereignty it is only logical that the Member States cooperate in the creation of a common legal culture, also in the area of criminal law. The Member States and the European Union need a commonly supported criminal law policy. The Hague programme is too one-sidedly focused on the area of freedom, security and justice. This programme has to be recalibrated as a result of the Court's judgment by the insertion of the enforcement of Community law. The Court's judgment also offers a perfect opportunity to re-examine the part on criminal law harmonization in the Constitutional Treaty. Article III-2721(2) for example offers the perfect basis for an integrated enforcement policy in the EU.⁸³

The Court's judgment transcends the institutional debate and forces us to take up the discussion of the position of criminal law in the European integration. Instead of exclusively focusing on the *national* protection of criminal law values it is high time to focus on a *European* agenda of criminal law values. Only in this way we may give substance to mutual trust between the Member States and the enforcement bodies and instil faith in the citizen in criminal justice in Europe. The object of the debate is no longer whether we want European criminal law, but what we want it for and under what conditions.

83 Vogel, J., 'The European integrated criminal justice system and its constitutional framework', *Maastricht Journal of European and Comparative Law*, 2005, 125-147.