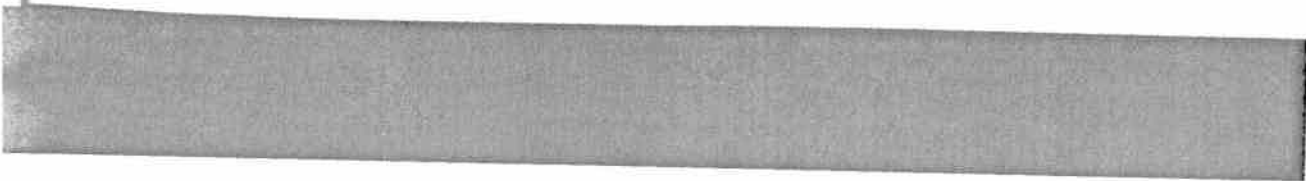


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**EIROPAS SAVIENĪBA UN  
TIESISKA VALSTS:  
LATVIJAS PIEREDZE**

**EUROPEAN UNION AND  
THE RULE OF LAW:  
EXPERIENCE OF LATVIA**

RĪGA, 2009



**THE EUROPEAN COMMUNITY AND HARMONIZATION OF  
THE CRIMINAL LAW ENFORCEMENT OF COMMUNITY  
POLICY: *IGNOTI NULLA CUPIDO?*\***

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**INTRODUCTION**

In the spring of 2006, an alarm sounded in several Member States concerning the (further) European erosion of national criminal law. The direct reason for this was the judgement of the Grand Chamber of the European Court of Justice (ECJ) in case C-176/03<sup>1</sup> concerning the harmonization of criminal penalties in environmental cases, in which the European Community (EC) was, for the first time, considered to be competent to harmonize the criminal law enforcement of Community policy.<sup>2</sup> This competence is further elaborated in the proposed Lisbon Treaty,<sup>3</sup> which is the result of the conclusions of the European Council of 21/22 June 2007 under the German Presidency. The draft Constitutional Treaty has been reshaped into the Lisbon Treaty by which criminal law harmonization and international co-operation in criminal matters fully become part of the Community integration process.

The Europeanization of criminal law has developed steadily since the entry into

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<sup>1</sup> Case C-176/03, *Commission v. Council*, judgement of 13 September 2005.

<sup>2</sup> Paragraph 48 of the judgement 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".

<sup>3</sup> [http://www.consilium.europa.eu/ucDocs/cms\\_Data/docs/pressData/en/ec/94932.pdf](http://www.consilium.europa.eu/ucDocs/cms_Data/docs/pressData/en/ec/94932.pdf)

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 this no more than just a Brussels institutional issue? The central question in this contribution is what legal and political consequences may be expected from the Court's judgements.<sup>4</sup> Answers to this question can 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 (section 3). The implications of the judgement will be analyzed by examining the positioning of the Commission (section 4), the Justice and Home Affairs Council, and certain Member States (section 5) in relation to the judgement. In section 6, we will further explore recent developments with an analysis of the Commission's proposals and the case law of the Court of Justice in related fields. In section 7, we will analyze the second rule of the ECJ in case C-440/06 on criminal enforcement of ship source pollution, subsequently concluding in section 7 with some final remarks.

### EUROPEAN INTEGRATION AND CRIMINAL LAW – HISTORY OF DEVELOPMENT<sup>5</sup>

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,<sup>6</sup> 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

<sup>4</sup> For a thorough analysis of the judgement 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.

<sup>5</sup> 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, pp.277-298 and *N. Haekkerup* *Controls & Sanctions in the EU Law*, Djoef Publishing, Copenhagen, 2001.

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

fall to the national legislation to fulfil these requirements; they must also be put into practice in the course of enforcement.<sup>7</sup>

The EC quickly recognized the gap in the EC Treaty as far as legislation was concerned. An attempt was already made in 1976 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.<sup>8</sup> 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 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 apply them. Of course, the Member States were also free to impose these sanctions entirely or partly by criminal law enforcement means, instead of solely or partly using 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 well received by all the Member States. Some Member States considered the EC to be applying the EC Treaty quite extensively or, further, that it had imposed obligations lacking a proper legal basis.

In 1990, Germany felt that the limit had been reached. Two Regulations on agriculture<sup>9</sup> provided 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 a rude awakening when, in 1992, the Court in its judgement in case C-240/90<sup>10</sup> recognized that the EC 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

<sup>7</sup> 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.

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

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

<sup>10</sup> 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 Gemeinschaftsrecht", *EuZW* 2003, 261-269 and *M. Poelmans* La sanction dans l'ordre juridique communautaire, Bruylant, 2004.

6 European Convention on Human Rights (ECHR). This landmark judgement 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 exploitive 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 this direction. One might think of, for example, environmental law, securities law, tax law, etc. It is my opinion that the Commission has shown insufficient initiative to give any systematic or consistent shape to the harmonization of administrative enforcement. By consistent, I mean that a well 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 is 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 describe 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 were able to 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 it 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 on 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,<sup>11</sup> but that Community law may impose requirements as to the fulfilment and interpretation of this competence within 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 interpretation). Community law also unmistakably establishes requirements which national criminal law

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

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.<sup>12</sup> 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 fight against swine fever or with regard to subsidies granted by the European Social Fund<sup>13</sup> cannot be excused by citing national sovereignty or taking national criminal law insights into consideration. 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.<sup>14</sup>

An airtight 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 Member State autonomy is restricted. The European integration model is not compatible with a restriction of 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 reaches so far as to enable the EC to directly 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.)? As regards these questions, there is and has been plenty of debate in the literature. The majority of criminal law authors<sup>15</sup> in Europe deny that the EC has any power, however minor, to directly harmonize 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 fields of money laundering and insider dealing,<sup>16</sup> 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 provide for a penalty and, in the case of serious offences, a prison

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

<sup>13</sup> J.A.E. Vervaele "Fraude met Europese sociale subsidies in Nederland", *NJB* 2001, 2167-2175.

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

<sup>15</sup> The minority position among criminal lawyers was argued, inter alia, by *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, 332-474 and *B. Schünemann* (ed.) *Alternativentwurf Europäische Strafverfolgung*, Cologne 2004.

<sup>16</sup> See COM(90) 106 final, OJ C 106, 1990 for the proposal for a Directive, which is the travaux préparatoires 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 travaux préparatoires of Directive 89/592 coordinating regulations on insider dealing.

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 of an administrative nature. 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 to the task of subjecting the relationship between Community law and criminal law to fundamental discussion.<sup>17</sup> The government experts agreed that Community law can set requirements for national criminal law, but could not agree on 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, including 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 intention, 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 effective EC Treaty, it was politically impossible to arrive at a workable solution. A fundamental political difference of opinion started to develop.<sup>18</sup> During the intergovernmental conference for the preparation of the Maastricht Treaty, Dutch attempts to integrate aspects of criminal justice, including the power of direct harmonization, into EC 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 full-fledged EU policy area.

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

<sup>18</sup> 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.

## 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 harmonization<sup>19</sup> 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 EU and Article 47 EU, 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 that imposes a duty to harmonize criminal law. Neither disuse of power, nor the entry into force of the EU Treaty leads to the demise of this power. It is not political will that determines legal competence, at least not without amendment of the Treaty. Nevertheless, the third criminal law pillar has been defined by many as being 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 regime 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 1995<sup>20</sup> 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 during 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 raised the issue in the Council. Two angles are relevant however 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 programme<sup>21</sup> has provided insufficient direction. Even in policy areas of far-reaching integration, such as the internal market, the customs union, or the monetary union, there is no final enforcement element. In none of the institutions has a policy plan 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. What is striking in this context is that the Commission has not submitted any EC proposal for the criminal protection of the Euro,<sup>22</sup> which is after all 'hardcore' EC monetary policy, and has gone along completely with

<sup>19</sup> 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.

<sup>20</sup> *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.

<sup>21</sup> Most recently updated by COM(2004) 0401.

<sup>22</sup> 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.



the Council in the elaboration of a Framework Decision.<sup>23</sup> 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 Directive<sup>24</sup> 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,<sup>25</sup> but fails to do the same in the field of competition or fisheries or the financing of terrorism? Why do the Member States press 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. Altogether three types of legislative conflicts can be distinguished over the period from 1993 to 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. Here, the Council 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 controls<sup>26</sup> (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 committed intentionally or through serious negligence which could threaten feed and food safety and therefore public health, and for which the Member States must provide criminal sanctions, should be drawn up. 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 should provide for minimum criminal standards according to Article 55 according to the Commissions proposal:

*"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."*

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

<sup>24</sup> Directive 2003/6, OJ L 96/16, 2003.

<sup>25</sup> COM(2001)272 final, OJ C 240 E, 2001.

<sup>26</sup> COM(2003)52 final, text available in electronic form only through Eur-Lex.

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 wrappings 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."<sup>27</sup>

The second type of legislative conflict 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 hijacking the content of each other's proposals 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).<sup>28</sup> In a number of cases, this approach 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 into 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

<sup>27</sup> 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.

<sup>28</sup> 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.

illegal immigration.<sup>29</sup> 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 minimum maximum duration of at least a certain period of deprivation of liberty are made mandatory. The Framework Decision further regulates the liability of and penalties for legal persons,<sup>30</sup> 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 proposals<sup>31</sup> were drafted by the Commission.<sup>32</sup> Article 6 of the proposal for a directive includes the obligation to provide for criminal penalties regarding the illegal discharge of pollutants as defined in the Marpol International Convention for the prevention of pollution from ships, including cases of serious infringements, and 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 investigation teams, judicial mutual legal 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 were 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 is the combined Commission proposal for a directive *and* a framework decision concerning criminal measures to combat intellectual property infringements of 12 July 2005.<sup>33</sup> This proposal is the continued development from Directive 2004/48 concerning the enforcement of intellectual property rights,<sup>34</sup> 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,

<sup>29</sup> 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.

<sup>30</sup> Not, however, the *criminal* liability of legal persons.

<sup>31</sup> 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.

<sup>32</sup> Often, this involves interinstitutional co-operation between the Directorate General responsible for the specific subject and the Directorate General for the third pillar.

<sup>33</sup> 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.

<sup>34</sup> OJ L 157/45, 2004.

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 that the Council is only prepared to impose such an obligation through an EU framework decision. The Member States are not primarily concerned with the enforcement of Community policy, but with the fight against terrorism, organized crime, etc. It has already been evident to the Commission for some time that the Council will continue to claim the exclusive rights to criminal law harmonization for the third pillar, even contrary to the opinion of its own Legal Service.<sup>35</sup> The 'cohabitation' approach also did not lead to the desired result. 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 an unbiased 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, resulting in greater democratic legitimacy. It is therefore far more difficult to reach a decision in the JHA Council than by using the first pillar procedure. Furthermore, as opposed to framework decisions, regulations as well as 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 initiate infringement proceedings against a Member State. The Member States may be held financially responsible for non-compliance by means of enforcement duties, and the Member States can even be fined for failing to comply with Court rulings. The Community way approach 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 in provoking such a ruling by raising objections under Article 35(6) EU against the legality of the Framework Decision approved

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<sup>35</sup> In a number of opinions, amongst other items 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 providing 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.

by the Council on 27 January on the criminal enforcement of environmental law.<sup>36</sup> With this Decision, the Council set aside a proposal submitted by the Commission for a Directive on the criminal enforcement of environmental law.<sup>37</sup> On 13 September 2005, the Court delivered its long-awaited judgement in Case C-176/03. This judgement is a second landmark ruling concerning the enforcement of Community law as the Court recognized the 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 States<sup>38</sup> supported the position of the Council. The Netherlands was the only Member State to argue in favour of a combined criminal harmonization competence under EC 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 (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”.*<sup>39</sup>

### 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 judgement makes the Commission the driving force behind legislative policy in the EC regarding the presentation of 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 communication<sup>40</sup> to the European Parliament and the Council concerning the implications of the Court's judgement in case C-176/03.

The Commission starts off by analyzing the contents 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 holds 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

<sup>36</sup> 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 did not, however, 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 on criminal law harmonization without questioning the legal validity of the Conventions. The proposal for a directive was provoked, however, by the slow ratification procedures and incomplete ratifications of the PIF protocols.

<sup>37</sup> 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 standpoint: *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, R. Widdershoven and C. Backes*, et al., *Lex Dura, Sed Lex. Opstellen over de handhaving van omgevingsrecht* 2005, Kluwer, Deventer, 159-176.

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

<sup>39</sup> From consideration 36 in the Court's judgement in case C-176/03.

<sup>40</sup> COM(2005) 583 final.

penalties, and the rules on participation and instigation. The Court goes further than the Advocate General in his Opinion by not only accepting that the EC may oblige the Member States to enforce measures 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 judgement. The Commission highlights the fact that the judgement does not mean that the Court has hereby recognized criminal enforcement as an area of Community policy. Criminal enforcement is merely the tailpiece of a substantive policy area. However, the Commission does find that the Court's judgement may potentially impact all policy areas of negative integration (the four freedoms) and positive integration, possibly making criminal law methods 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 does impose any restrictions there. Here too, the approach is functional. The Commission does not elaborate further, but we may conclude that the Commission obviously wishes to leave the door open where necessary for 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 judgement puts an end to the double-text approach, i.e., adopting directives and regulations for substantive policy and its administrative enforcement in addition to 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 judgement 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 of 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 Community competence under the heading '*Consistency of the Union's criminal law policy*'. The Commission clearly indicates that criminal harmonization under 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 is called 'other criminal-law measures appropriate to the area concerned'. It is clear that the Commission, from the start, does not wish to pin itself down to merely the harmonization of offence definitions and 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 judgement for actual legislative practice. In this discussion, 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 in which it has become apparent, after this judgement, that it was adopted or proposed on the wrong legal basis. The EU institutions have a duty to restore the legislation's 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 enforcement of ship-source pollution.<sup>41</sup> The Commission envisages two strategies to perform the corrections in accordance with the Court's judgement. Strategy number one is to identify specific criminal law measures, 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 this case, the Commission would make use of its legislative initiative, not only to restore the legal basis, but, at the same time, also to 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 in need of amendment. The adopted secondary legislation concerns the criminal enforcement of environmental protection;<sup>42</sup> the Euro<sup>43</sup> and non-cash means of payment;<sup>44</sup> money laundering, freezing, seizing and confiscation;<sup>45</sup> unauthorized entry, transit and residence;<sup>46</sup>

<sup>41</sup> Case C-440/05, at that time pending. See *infra* in this text: "The second ruling of the ECJ: Case C-440/05 on criminal enforcement of ship source pollution."

<sup>42</sup> 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.

<sup>43</sup> 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.

<sup>44</sup> Framework Decision combating fraud and counterfeiting of non-cash means of payment, OJ L 149/1, 2001.

<sup>45</sup> 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.

<sup>46</sup> 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.

corruption in the private sector;<sup>47</sup> attacks against information systems,<sup>48</sup> and serious ship-source pollution.<sup>49</sup> The Commission indicates the legal basis in the EC Treaty which should be used in each case. In some cases, 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. In others, the legal foundation is based on the general power laid down in Article 95 EC, as is the case for 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 fails 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.

As to the pending proposals, the Commission limits itself to two issues, namely the criminal-law protection of the Community's financial interests<sup>50</sup> and the criminal-law enforcement of intellectual property rights.<sup>51</sup> 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 tissues<sup>52</sup> 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.<sup>53</sup> For this analysis, the Commission has not yet put all its cards on the table. Notably, no insight is provided into 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.

<sup>47</sup> Framework Decision 2003/568 on combating corruption in the private sector, OJ L 192/54, 2003.

<sup>48</sup> Framework Decision 2005/222 on attacks against information systems, OJ L 69/67, 2005.

<sup>49</sup> Directive 2005/35 on ship-source pollution and on the introduction of penalties for infringements, OJ L 255, 2005 and Framework Decision 2005/667 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution, OJ L 255/11.

<sup>50</sup> 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.

<sup>51</sup> 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.

<sup>52</sup> Proposal for a Framework Decision of 26 April 2003, OJ C 100/27, 2003.

<sup>53</sup> Proposal for a Framework Decision of 4 September 2000, OJ C 253/3, 2000.



## THE JUDGEMENT 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 judgement was greeted with amazement and disbelief by many governments. It is hardly surprising that the Court decision was not embraced by the Member States given their numerous interventions in the proceedings in favour of the Council. However, the governments mainly focused their criticism on the Communication of the Commission and introduced this into the JHA Council. In Denmark, the Minister of Justice wasted no time informing Parliament of the judgement and submitting a reservation.<sup>54</sup> The Ministry maintained the view that no legal basis could be found in the EC Treaty, even though it expressed awareness that the Court judgement 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*.<sup>55</sup> The Commission is of the opinion that the Court acted beyond its competence and demonstrated a certain *fédéralisme judiciaire*. The Commission also states that it is high time to end the *gouvernement des juges* and restore power to the entities to 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 into the European Council.<sup>56</sup> The European Affairs Commission is not terribly pleased with the EU Commission's communication in response to the judgement either. It rejects what it considers 'its excessive interpretation'. According to its view, it is impossible to conclude from this judgement 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 Inter-Departmental Commission on European Law (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 2006<sup>57</sup> as presented to Parliament. The Senate of Parliament established a special commission for JHA matters, reporting on the criminal law-related proposals of the European Commission. This commission checks whether proposals comply with the principles of subsidiarity and necessity.

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 urgent need to enact rectifying legislation. Many adopted Framework Decisions have by

<sup>54</sup> Memorandum of 13 October 2005, [http://www.euo.dk/upload/application/pdf/a16a3e79/2005\\_sv21.pdf](http://www.euo.dk/upload/application/pdf/a16a3e79/2005_sv21.pdf).

<sup>55</sup> <http://europapoort.cerstekamer.nl/9345000/1/j9vvgy6i0ydh7th/vgbwr4k8ocw2/f=/vh7rdrlf7yxv.pdf>.

<sup>56</sup> This refers to 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.

<sup>57</sup> DIE-402/06, <http://europapoort.cerstekamer.nl/9345000/1f/j9vvgy6i0ydh7th/vh61mhl1t9ua>.

now been implemented in national law. It also became apparent 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 agreed on the following three principles as the basis for considering the impact of the Court's case law on other Community policies:

*"1. As a general rule, criminal law as well as the rules of criminal procedure fall outside the Community's competence (see paragraph 47 of the judgement) The Community must therefore interpret and apply any exception to this general rule in a narrow sense.*

*2. The Community legislator is entitled to take legislative 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 are fully effective (see paragraph 47 of the judgement). This implies that the Community legislator cannot oblige Member States to provide for criminal penalties for violations of rules which the Community has not or not yet, established or which have been established pursuant to national law only.*

*3. The Community legislator must leave to the Member States the choice of the criminal penalties to apply, as long as they are effective, proportionate and dissuasive (see paragraph 49). Consequently, Community acts cannot determine in detail and exclusively the level of penalties to be introduced, they should leave a discretion to the Member States".*

It remains to be seen, of course, if these common principles will be held up by the Court of Justice in its upcoming judgements. Moreover, during the formal JHA Council of February 2006,<sup>58</sup> the Ministers elaborated a procedure to be followed with regard to legislative files containing proposals relevant to the development of criminal law policy. This procedure requires the Presidency to draw the attention of COREPER II to such proposals. After seeking COREPER II's guidance, the Presidency refers the proposal to an appropriate working party for consultation, taking into account all relevant factors, such as content, aim and the expertise required. The procedure furthermore requires the Article 36 Committee (CATS) to be kept informed, ensuring an opportunity for JHA experts to offer views on criminal law provisions from an early stage of the negotiations, which can then be conveyed to the relevant working party. The JHA experts consulted will, as a rule, be the national delegates of the Justice Department in the Article 36 Committee's Working Party on Substantive Criminal Law (DROIPEN). The Presidency can also submit the proposal to COREPER II with the aim of submitting any relevant question to the JHA Council. The substantive EC Council of Ministers remains fully responsible for the entire content of the proposal. In this way, consultations can be held between the JHA Council and the other Community Councils in the areas concerned, and the JHA Ministers can ensure the consistency of the Union's criminal law system.<sup>59</sup> 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. In June 2007, the application of this procedure was evaluated under the German Presidency. In practice, proposals with

<sup>58</sup> See document 7876/06 of the Presidency, Procedural consequences of the judgement of the Court of Justice in case C-176/03, 16 February 2006.

<sup>59</sup> Point 3.3.2 of the Hague Programme of 24 November 2005.

dominant criminal law content have been referred to a JHA working party. For proposals in which the criminal law content is only a small part of a larger content, only an opinion has been asked of a JHA working party. The German Presidency proposed consolidating this procedure.

### THE ACTORS INVOLVED: THE EUROPEAN COMMISSION'S AND JHA COUNCIL'S REALISM AND THE ECJ'S CASE LAW

From the analysis of the positions of the Member States and that of the JHA Council of Ministers, it is clear that the Commission overplayed its hand with its communication concerning the Court's judgement in case C-176/03. The Commission has acknowledged this and clearly opted for a cautious strategy whereby a number of concrete harmonization proposals are submitted to the Council.

The Commission has meanwhile published a new proposal for a directive on the environment through criminal law,<sup>60</sup> replacing the annulled Framework Decision<sup>61</sup> and the proposal for a directive of 2001.<sup>62</sup> In this area, we can speak of a legal vacuum to be filled. The new proposal is still based on the idea of minimum harmonization, but goes slightly beyond the offence included in the proposal directive of 2001 by imposing in Article 3(a) that discharge, emission, or introduction of a quantity of materials or ionising radiation into air, soil, or water, which causes death or serious injury to any person, constitutes a criminal offence, independent of the unlawfulness of the action (*Verwaltungsaksezorität*). Secondly, the new proposal clearly goes much further as far as the harmonization of sanctions is concerned. Regarding imprisonment, the proposed approximation is based on a three-step scale, depending on the *mens rea* (serious negligence or intent) and the respective aggravating circumstances. The system of fines for legal persons, which can be administrative or criminal, also follows a three-step approach. The proposal also includes alternative sanctions (such as placing the offender under judicial supervision, a ban on engaging in commercial activities, or the publication of judicial decisions) for both natural and legal persons.

Despite the cautious strategy mentioned above, the Commission has submitted a varied set of proposals with criminal law substance, most of which are related to the further implementation and execution of international law instruments, including criminal law enforcement obligations. The Commission further submitted an amended proposal for a directive on criminal measures aimed at ensuring the enforcement of intellectual property rights.<sup>63</sup> This proposal is related to the WTO Agreement on Trade-Related Aspects of Intellectual Property (the "TRIPS Agreement") which was approved by means of Council Decision 94/800/EC.<sup>64</sup> The criminal law substance of the proposal is in accordance with that of the proposal for the environmental directive to a high extent.

The Commission for the first time also included criminal law-related provisions in a

<sup>60</sup> COM (2007) 51 final.

<sup>61</sup> Council Framework Decision 2003/80/JHA, OJ L 29/55, 09.02.2003.

<sup>62</sup> COM (2001) 139 final.

<sup>63</sup> COM (2006) 186 final.

<sup>64</sup> OJ L 336, 23.12.1994, p.1.

proposal for a regulation (proposal of 18 December 2006 for a new Council Regulation setting up a Community regime for the control of exports of dual-use items and technology).<sup>65</sup> Article 15(2) provides for the exchange of information between the competent authorities concerning convictions for criminal offences related to the export of dual-use items or technologies, as well as other intelligence. Under Article 21, Member States are to lay down criminal penalties for at least serious infringements of the provisions of the regulation, especially for the unauthorized export of items that are to, or can be, used in connection with the development or manufacture of chemical, biological, or nuclear weapons, or of missiles capable of their delivery, as well as for the falsification or omission of information with a view to obtaining an authorization that would otherwise have been denied. The obligation to lay down criminal penalties is based on the objective of strengthening the EU regime on the export of dual-use items, on a call made in UN Security Council Resolution 1540 for the imposition of civil or criminal penalties for infringements of provisions to control exports, as well as on the European Strategy against the proliferation of WMD. The Commission also submitted a proposal for a directive amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons.<sup>66</sup> The Commission, on behalf of the EC, signed the Protocol on the Illicit Manufacturing and Trafficking of Firearms, their Parts, Components and Ammunition as annexed to the UN Convention against Transnational Organized Crime.<sup>67</sup> Article 16 of the Commission proposal imposes upon Member States the obligation to define as criminal offences a set of conduct linked to the manufacturing and trafficking of firearms. The proposal does not contain any references to the possible harmonization of the sanctions to be imposed.

The Commission very recently submitted a proposal for a directive providing for sanctions against employers of illegally residing third-country nationals.<sup>68</sup> The proposal contains a general prohibition on the employment of third-country nationals who reside illegally. Serious infringements must be sanctioned by criminal penalties. Article 10 defines which conduct must be defined as a criminal offence at national level. Factors include the significance of the quantity of illegal migrants employed, the time-frame during which the offences occurred, repeat offending, etc. The proposal does not harmonize the sanctions to be imposed under criminal law. Under the Portuguese presidency, there will be a joint session of the Council of Justice Ministers and the Council of Employment, Social Affairs, Public Health and Consumer protection on this proposal. It is interesting to note that, in other proposals, such as the one for a new regulation on the Community Customs Code,<sup>69</sup> which is one of the most harmonized areas of EC law, the Commission did not include any criminal offences or criminal sanctions at all in Article 22 on penalties, even though recital 12 of the regulation underlines the need for dissuasive sanctioning: *"It is necessary to ensure an appropriate level of effective, dissuasive and proportionate sanctions throughout the Internal Market in order to discourage any serious infringements of the customs rules and thus reduce risk of fraud, of threats to safety and security, and to protect the financial interests of the Community"*.

<sup>65</sup> COM (2006) 829 final.

<sup>66</sup> COM (2006) 93 final.

<sup>67</sup> OJ L 280, 24.10.2001, p.5.

<sup>68</sup> COM (2007) 249 final.

<sup>69</sup> COM (2005) 608.

The same can be said of the draft regulation concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas.<sup>70</sup> Article 29 of the Presidency proposal<sup>71</sup> seems to go beyond the Commission proposal.<sup>72</sup> However, both stop short of imposing criminal sanctions for the misuse of data. The least that can be said is that it is not very clear from the proposals when and by which criteria the Commission does in fact opt for criminal law obligations.

The proposals on environmental protection, protection of intellectual property rights, and weapons were forwarded to the Working Party on Substantive Criminal Law (DROIPEN) for further discussion by COREPER II. It is clear from the meetings of the Working Party that the Member States are calling for the clarification of some fundamental issues. Under debate, for instance, is whether the Community legislator should confine itself to ensuring, by criminal law means, the enforcement of Community law or of such national law that transposes Community law, or whether the directive should also apply to purely national environmental law. Quite a number of Member States are of the opinion that only violations of Community environmental legislation should be covered by the directive. The original proposal for a Directive on the protection of the environment through criminal law<sup>73</sup> was indeed limited to the criminal law enforcement of Community environmental legislation as listed in the annex. The new 2007 proposal for a Directive<sup>74</sup> does indeed define *unlawful* as "infringing Community legislation or a law, an administrative regulation or a decision taken by a competent authority in a Member State aiming at the protection of the environment" in Article 2. As a consequence, the new proposal does not include an annex of Community legislation. This could be considered as a widening of the scope of application of Community harmonization in this field, but this is not the case, in fact, if one bears in mind that, in the Council Framework Decision on the protection of the environment through criminal law,<sup>75</sup> the Member States defined *unlawful* in Article 1 (a) in a similar way as in the proposed new directive, namely as: "*infringing a law, an administrative regulation or a decision taken by a competent authority, including those giving effect to binding provisions of Community law aiming at the protection of the environment*". Thus, the Commission did nothing other than taking over the agreed upon need for the criminal protection of the environment on the part of 27 Member States. Member States that are now watering down the scope of application of the proposed directive are evidently applying a double standard.

In addition, Member States are of the unanimous opinion that the discussion on the insertion of criminal sanctions in the directive should be postponed until the ECJ has ruled in case C-440/05 on the Commission's action for annulment of the Framework Decision to

<sup>70</sup> COM (2004) 835.

<sup>71</sup> Art.29 of the Presidency Proposal : "Member States shall take the necessary measures to ensure that any misuse of data entered in the VIS is punishable by penalties, including administrative and /or criminal penalties in accordance with national law, that are effective, proportionate and dissuasive".

<sup>72</sup> Art.29 of the Commission Proposal : "The Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation relating to data protection and shall take all measures necessary to ensure that they are implemented (...)".

<sup>73</sup> COM (2001) 139 final.

<sup>74</sup> COM (2007) 51 final.

<sup>75</sup> Framework Decision 2003/80/JHA, OJ 2003, L 29/55.

strengthen the criminal law framework for the enforcement of the law against ship-source pollution, the ruling being expected to be handed down towards the end of 2007. This judgement should offer more insight into the scope of harmonization competence in the EC for criminal law enforcement by providing answers to such questions as: "Is such harmonization also possible in areas such as transport?" and: "Does it also concern sanctions?", etc.

Speculation about this is rife as the Court of Justice and the Court of First Instance have not yet handed down clearly crystallized case law on the distribution of competence between the pillars, apart from the criminal law aspects. This is especially clear in matters which not only have a primordial law enforcement aspect (without being of a purely criminal law character), but also links to the internal market. In joint cases C-317/04 and 318/04, the European Parliament and the European Data Protection Supervisor challenged the Agreement between the EC and the USA on the data processing and forwarding by the air carriers of passenger name records (PNR) to the USA Bureau of Customs and Border Protection<sup>76</sup> because of lack of sufficient data protection. In its judgement, the Court takes into account that PNR data are initially collected by airlines in the course of an activity which falls within the scope of Community law, namely the sale of an aeroplane ticket which provides entitlement to a supply of services. However, the Court emphasizes that the data processing aspect is quite different in nature. Data processing is not necessary for a supply of services, but regarded as necessary for safeguarding public security and for law enforcement purposes. In other cases of double objectives, the Court had been willing to accept a Community legal basis, but not in this case. It annulled both Council Decisions, which means that this matter has to be regulated under the third pillar.<sup>77</sup> Taking into account this judgement, Ireland challenged Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or public communications networks, as the main or predominant purpose of the Directive is to facilitate the investigation, detection and prosecution of serious crime, including terrorism.<sup>78</sup>

The Commission, however, challenged a Council Decision in the second pillar (title V of the EU Treaty) by which a European Union contribution was allocated to ECOWAS in the framework of the Moratorium on Small Arms and Light Weapons Directive on the control of the acquisition and possession of weapons.<sup>79</sup> In the eyes of the Commission, the CFSP decision is an infringement of Article 47 TEU since it affects Community powers in the field of development aid.

In Cases T-306/01, *Ahmed Ali Yusuf Al Bakaraat* and T-315/01, *Abdullah Kadi*, the Court of First Instance construed 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, combining provisions from the EC Treaty with Article 2 EU, the objective being

<sup>76</sup> Joint cases C-317/04 and C-318/04, <http://curia.europa.eu>.

<sup>77</sup> The absurd consequence is that less data protection will be provided, as there is no general regime for data protection in the third pillar and as the proposal for a data protection regime has meanwhile excluded application to data transfer to third countries.

<sup>78</sup> Case C-301/06, <http://curia.europa.eu>.

<sup>79</sup> Case C-91/05, <http://curia.europa.eu>.

the realization of a common foreign and security policy.

This diverging case law of the Court of First Instance and the Court of Justice does not immediately warrant the conclusion that the Court of Justice will decide differently in case C-440/05 than it did in case C-176/03. After all, this does not involve competences which have links to both Community policy and third pillar policy. Initially, this concerns the question of whether the approximation of criminal law is an essential measure by which to ensure the effectiveness of a Community policy. This will require a file-by-file review.

### THE SECOND RULING OF THE ECJ: CASE C-440/05 ON CRIMINAL ENFORCEMENT OF SHIP SOURCE POLLUTION

Is the long awaited judgement offering more insight into the scope and the depth of the harmonization competence in the EC for criminal law enforcement, as the framework decision 2005/667 deals with maritime transport issues (and its environmental effects) and contains very specific rules on harmonization of criminal sanctions? Both the Member States and the Court of Justice did indeed consider this case to be a landmark case. In the proceedings before the Grand Chamber of the Court of Justice no less than 19 Member States intervened, all in support of the Council of Ministers.<sup>80</sup>

Advocate General (AG) Mazák in his opinion in case C-440/05 stresses that, contrary to the view expressed by certain governments, Article 47 EU establishes the primacy of Community action and law under the EC Treaty over activities undertaken on the basis of Title V or Title VI of the EU Treaty<sup>81</sup> and that it does not make a difference if the Community, at the time of the adoption of the Framework Decision, had already or not yet adopted legislation with regard to the matters covered.<sup>82</sup> Second, he points out that, if the Court were to find that, for one reason or another, there is no such competence under the policy on transport, this finding would not, strictly speaking, be the end of the story. There can be alternatives for the legal basis in the EC Treaty. The AG does, however, reject the argument of the Member States that EC criminal competence should be limited to the environment or to substantial matters with a horizontal approach in the EC Treaty. His approach is mainly that criminal law competence should be a corollary to the general principle of effectiveness of Community law (*effet utile* principle). For this reason, he accepts that Art. 80 (2) EC indeed provides the legal basis for the criminal law enforcement of ship-source pollution, instead of Art. 31 (1) (e) and Art. 34 (2) (b) EU, and he proposes that the Court should annul Framework Decision 2005/667/JHA. However, he also agrees with the opinion of AG Ruiz-Jarabo Colomer in the C-176/03 case: "*the Community legislature is entitled to constrain the Member States to impose criminal penalties and to prescribe that they be effective, proportionate and dissuasive, but beyond that, it is not empowered to specify the penalties to be imposed*".<sup>83</sup> He believes that this could

<sup>80</sup> The following countries were granted leave to intervene: Portugal, Belgium, Finland, France, Slovakia, Malta, Hungary, Denmark, Sweden, Ireland, Czechia, Greece, Estonia, United Kingdom, Latvia, Lithuania, The Netherlands, Austria, and Poland.

<sup>81</sup> Paragraph 53 of the opinion.

<sup>82</sup> Paragraph 57 of the opinion.

<sup>83</sup> Paragraph 103 of the opinion.

otherwise lead to fragmentation and compromise the coherence of national penal systems and that Member States are, as a rule, better equipped than the Community to translate the concept of effective, proportionate and dissuasive criminal penalties into their respective legal systems and societal context. The ECJ first follows the same reasoning as in case C-176/03. It considers it as its task to ensure that acts which, according to the Council fall within the scope of Title VI do not encroach upon the powers conferred by the EC Treaty on the Community. The ECJ underlines that the common transport policy is one of the foundations of the Community and that the Council under Article 80 (2) EC may decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea transport. Since Article 80 (2) contains no explicit limitations, the Community legislature has broad legislative powers under Article 80 (2) and is competent to take measures to improve transport safety. Moreover, environmental protection forms part of the common transport policy.

Concretely, the ECJ takes a careful look at the objectives and substance of framework decision 2005/667. Its main purpose is indeed to enhance maritime safety and to improve the protection of the maritime environment. The Council took the view that criminal penalties were necessary to ensure compliance with the Community rules on maritime safety.

The ECJ comes to a double conclusion. Articles 2, 3 and 5 of the framework decision must be regarded as being essentially aimed at improving maritime safety, as well as environmental protection, and could have been validly adopted on the basis of Article (80) 2. This means that the definition of the offences (*actus reus* and *mens rea*), the liability issues and the prescription of the obligation to provide for criminal sanctions for natural persons and the obligation to provide for criminal or administrative sanctions for legal persons must be dealt with under EC law. However, the ECJ comes to the conclusion that the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence. The Community legislator may not adopt provisions as Articles 4 and 6 of the framework decision. This last point comes as quite a surprise. Many EC instruments do in fact contain concrete penalty provisions, including on the type and level, on the liability of legal persons, including the prescription of administrative or criminal sanctions, defined as administrative penalties or prescribed as administrative *or* criminal penalties. Member States remain free to choose between administrative or criminal sanctions when defining the type and level of sanctions. Nevertheless, the ECJ considers the prescription of the type and level of administrative *or* criminal sanctions a third-pillar competence.

This ruling has several consequences. The EC functional criminal law competence has been confirmed, also outside the horizontal field of environmental protection. If the EC policy is an important policy of the EC, than functional competence can be included in the discretionary powers to take all appropriate measures. However, criminal law harmonization must be necessary and the only way to achieve the objective (i.e. enforcement of that policy). In other words, also in EC law, criminal law is *ultima ratio* and must be necessary for the *effet utile*. The functional criminal law competence has therefore been broadly extended, but it is still not clear which EC policies are actually included and which are actually excluded. Concerning the scope of the competence, the ECJ has clearly stipulated that the nature of the criminal sanction can be prescribed under EC law, but that the type of criminal sanction and



the level of the sanction must be prescribed under EU law. This means that in the near future, the double text approach is mandatory. Several complications can arise here. It can be easy to adapt a directive under the co-decision procedure, but it can be very complicated to adapt the corresponding framework decision under the unanimity rule or to determine the substance of which it can be stripped. Further the Commission cannot act against Member States under the infringement procedure if they fail to transpose or if they incorrectly or tardily transpose the framework decision. The Commission can only act upon part of the double text package. Finally, the new proposal for a directive on the protection of the environment through criminal law<sup>84</sup> which is currently being negotiated has to be revised, as it also concerns detailed provisions related to the type and level of criminal sanctions. Besides this, a proposal framework decision must be elaborated.

The ECJ judgement explicitly does not deal with other possible EC criminal law related issues, such as for instance jurisdiction and the designation of contact points for transnational cooperation. We shall have to await further case law on these points. As Articles 2, 3 and 5 of the framework decision must have been validly adopted on the basis of Article (80) 2, the framework decision infringes Article 47 EU and, being indivisible, must be annulled in its entirety.

### CONCLUSION

Although the Commission has tempered its ambitions after the judgements of the Court in case C-176/03 and in case C-440/05, there is no doubt as to the consequences of the Court's judgements 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 has induced the financial wrath of the Commission and the Court by ignoring the Court's findings against it in the case concerning fisheries enforcement.<sup>85</sup> The Court has also taken painstaking care in this recent judgement: it has opted to sit in full chamber and has taken its time with the case. In my view, the judgement 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

<sup>84</sup> COM (2007) 51 final.

<sup>85</sup> Case C-304/02, *Commission v. France*, judgement of 12 July 2005, not yet reported, text available through the European Court of Justice's website.

for dozens of years and by taking a functional approach, namely realizing the objectives of European integration.<sup>86</sup>

However, I agree with those who are critical of the judgement that the Court would have done well to provide more extensive reasoning for its decision. This would have prevented a number of doubts from emerging in the first place. First of all, the Court does not expressly discuss the material scope of the judgement. 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 consideration 42 in case C-176/03 (cross-sector and fundamental nature of the objective) that this is the ultimately decisive criterion or that the harmonization of criminal law would be out of the question with regard to, e.g., guaranteeing food safety, tackling EC fraud, or protecting the Euro. After all, would it not be odd if harmonization were possible for supporting policies, but not for areas of exclusive Community policies? A second problem in connection with the material scope concerns the way in which Articles 135 and 280 EC have been worded to 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 opinion<sup>87</sup> believes that criminal law harmonization is inherent in Article 280 and that the restrictions mentioned do not stand in the way of Community obligations to criminalize and harmonization of the definitions of the offence. The principles, on which the national criminal justice systems are based, such as the choice of whether to prosecute, discretion in sentencing, etc., were excluded. The judgement of the Court in case C-440/05 has certainly shed more light on the harmonization of criminal sanctions, but the provisions from the challenged framework decision on combating ship-source pollution that concern the type and level of criminal sanctions does not fall within the Community competence. We shall have to await the entry into force of the Lisbon Treaty to set aside the combined pillar approach and to elaborate instruments of integrated enforcement of community policies, including prevention, administrative enforcement and criminal enforcement.

The discussion concerning the legal interpretation of the judgements is one thing; converting this legal competence into political currency in the Council is another. It is true that the co-decision procedure offers greater chances 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 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,

<sup>86</sup> In Case T-306/01, *Ahmed Ali Yusuf Al Bakaraat v 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 being the realization of a common foreign and security policy.

<sup>87</sup> 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. Rightly, the Cabinet increasingly asks the Council of State for its opinion on European legislative proposals.

etc.), to unite the substantive rules and administrative and criminal law enforcement into one Community instrument and, in this way, prescribe an integrated enforcement model.

Criminal law enforcement should furthermore remain the tailpiece of policy, based on the idea of *ultima ratio* and *ultimum remedium*. The Communitarization of criminal law thus does 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.

Does all this mean that we can now sit back and relax and return to the business of the day? I should think not. The Member States are required to think about a European criminal policy more than ever, both as concerns the enforcement of Community policy and 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 national legal culture and 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 co-operate in the creation of a common legal culture, including 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 judgements by the introduction of the enforcement of Community law.

The Court's judgements transcend the institutional debate and forces us to take up the discussion of the role of criminal law in 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 may we 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 which conditions. *Ignoti nulla cupido* must not convert into *Omne ignotum pro magnifico*. We will need this to fill in the criminal law agenda of the future EU Lisbon Treaty of the EU and to strike the right balance in enforcing Union policies and also realize the *ultima ratio* in EU criminal policies.

### **ABSTRACT**

The author analyses the harmonization of criminal law enforcement in the EU. Case C-176/03 concerning criminal penalties in environmental cases was the first time that the European Community (EC) was considered competent to harmonize criminal law enforcement of Community policy. The author examines the positioning of the Commission, the Justice and Home Affairs Council, and certain Member States in relation to the judgement and analyzes the second ruling of the European Court of Justice in case C-440/06 on criminal enforcement of ship source pollution. Harmonization of criminal law enforcement is elaborated in the proposed Lisbon Treaty. The article traces the historical context of the uneasy relationship between European integration and national criminal law and the political stalemate on this issue after the entry into force of the European Union Treaty. The EC Treaty does not provide for clear legal bases or assign powers for either direct enforcement by the EC (with few exceptions) or for indirect enforcement of Community law by the Member States, thus making enforcement a weak link in the Community legislation. The ECJ has to some extent remedied this through its case law but there is no coherent European criminal law policy present where all or any actors are involved. The author feels that, instead of focusing on the national protection of criminal law values, it is high time to focus on a European agenda in order to give substance to mutual trust between the Member States. The object of the debate is no longer whether we want European criminal law, but what we want it for and under which conditions.

### **KOPSAVILKUMS**

Autors analizē krimināltiesību harmonizācijas īstenošanu Eiropas Savienībā. Lieta C-176/03 attiecībā uz kriminālsodiem par pārkāpumiem pret vidi ir pirmā lieta, kad Eiropas Kopiena (EK) tika atzīta par kompetentu harmonizēt Kopienas politikas krimināltiesību īstenošanu. Autors apskata Komisijas, Tieslietu un iekšlietu padomes un atsevišķu dalībvalstu skatījumu saistībā ar spriedumu, kā arī analizē otro Eiropas Kopienas tiesas spriedumu lietā C-440/06 par krimināltiesību piemērošanu kuģa radītā piesārņojuma gadījumā. Krimināltiesību harmonizācijas ieviešana ir iestrādāta ierosinātajā Lisabonas līgumā. Autors izseko vēsturiskajam kontekstam no nebūt ne vieglajām attiecībām starp Eiropas integrāciju un nacionālajām krimināltiesībām – un politiskajam strupceļam šajā jautājumā pēc Līguma par Eiropas Savienību stāšanās spēkā. Eiropas Kopienas dibināšanas līgums nenodrošina skaidru tiesisko pamatu un nepiešķir pilnvaras tiešai Eiropas Kopienas (ar dažiem izņēmumiem) kompetences īstenošanai vai netiešai Eiropas Kopienas tiesību īstenošanai, tādējādi padara ieviešanu par vājo posmu Kopienas likumdošanā. Eiropas Kopienas tiesa līdz zināmai pakāpei šo stāvokli ir labojusi ar savu judikatūru, tomēr šobrīd nav saskaņotas Eiropas krimināltiesību politikas, kur būtu iesaistīti visi vai atsevišķi faktori. Autors uzskata, ka tā vietā, lai koncentrētos uz krimināltiesību vērtību nacionālo aizsardzību, ir pēdējais laiks koncentrēties uz Eiropas mērogu, lai iedotu saturu savstarpējai uzticībai starp dalībvalstīm. Debates vairs nav par to, vai mēs vēlamies Eiropas krimināltiesības, bet gan – ar kādu nolūku mēs tās vēlamies un ar kādiem nosacījumiem.