# The Power of the European Community to Impose Criminal Penalties

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This article analyses the judgement delivered by the European Court of Justice on 13 September 2005 establishing that the European Community has the power to require the Member States to impose criminal penalties for the purpose of protecting the environment, and discusses its benefits in the light of the need to ensure the effective and efficient implementation of other Community policies and the freedom of movement of persons, goods, services and capital. In particular, the consequences of the judgement for acts adopted and proposals pending will be considered. Attention is also paid to the costs for national sovereignty and to relevant changes introduced in the Constitutional Treaty.

## *Introduction*

The European Court of Justice (ECJ) gave a crucial judgement on 13 September 2005[1] finally putting an end to a dispute between the European Commission and the Council of the European Union (EU) on the legality of the Framework Decision (FD) on the protection of the environment through criminal law[2] adopted in the framework of the third pillar (title VI of the EU Treaty).[3]

The Commission argued that the European Community (EC) can, under Article 175 EC, require the Member States to prescribe criminal sanctions for infringements of Community environmental protection legislation, considering that it is a necessary means of ensuring the effectiveness of this Community policy.[4] The Council, however, maintained that "the Community does not have power to require the Member States to impose criminal penalties in respect of the conduct covered by the FD, as there is no express conferral of power in that regard".[5] The ECJ, considering that it could have been properly adopted on the basis of Article 175 EC, decided to annul the FD.

As Advocate General Ruiz-Jarabo Colomer explains in his opinion,[6] what lies behind this dispute is a far-reaching issue, as the choice of one position or the other entails completely different legal and institutional consequences. The fact that the EC could have the power to approximate national criminal laws, not only in the field of environmental crime – as the ECJ has ruled – but also in the framework of other policy areas of the Community, would *ipso facto* imply the application of the Community method to the detriment of the intergovernmental rules foreseen in Title VI EU.[7] This is precisely what most of the Member States that have fiercely guarded their sovereignty over criminal law fear.[8]

The issue at stake is not new. Discussions on the competence of the Community to force Member States to impose criminal sanctions have been taking place for a long time, as criminal law has been associated with the implementation of the internal market and related Community policies.[9] However, even if some Community instruments have included provisions on criminal sanctions, the freedom of the Member States to choose between administrative or criminal law was never called into question.[10]

With the entry into force of the Treaty of Maastricht and, more recently, the Treaty of Amsterdam that expressly provides for the approximation of rules on criminal matters[11] and introduces the FD as a legal instrument to achieve this aim,[12] "the question of whether or not the Community was entitled to harmonise national criminal laws did not become less relevant".[13] Indeed, the activity of both the EU and the EC on approximation of criminal law has increased in the last few years[14] and conflicts of competence between the first and third pillars could not be avoided. The case of environmental crime has given to the ECJ for the first time the opportunity to determine the boundaries between both pillars with respect to the harmonisation of criminal law.

## *The legal and institutional constraints of the EU Treaty*

In order to understand what lies behind the dispute, it is important to highlight the reasons why the Commission submitted a proposal for a Community Directive[15] intended to oblige the Member States to provide for criminal sanctions in the environmental field, rather than a proposal for a FD – as Denmark actually did.[16] The difficulties that arise from the current legal and institutional framework of the EU

Treaty – described in the assessment of the Tampere programme[17] – are at the core of the problem. Wasmeier and Thwaites identify three different categories of problem.[18]

First, as regards the legislative procedure, Framework Decisions are to be proposed either by a Member State or by the Commission and adopted unanimously by the Council after having consulted the European Parliament.[19] Directives, however, can only be proposed by the Commission and, in most cases, are adopted by qualified majority following the co-decision procedure. The shared right of initiative between the Commission and the Member States in the framework of the third pillar, the unanimity requirement and the current restrictions on the Parliament's role are widely seen as negatively affecting the Union's ability to act in this sphere.[20]

Second, "the legal effect of third pillar instruments differs from that of Community law instruments". According to Article 34(2)(b) EU, Framework Decisions "shall be binding upon the Member States as to the result to be achieved, but they shall not entail direct effect".[21] This means that citizens can in no circumstances take legal action if a Member State fails to transpose the act. In the context of the first pillar, on the other hand, there is no doubt that Community Directives can have direct effect, as the ECJ has held through its constant jurisprudence.[22]

Third, once the instruments are adopted, "the institutional limits regarding the real possibilities for verifying the implementation of policies by national authorities, given the limited role of the Court of Justice and the restricted powers of the Commission are a real obstacle to ensuring that the instruments and decisions adopted are actually effective".[23] As stated in Article 35(2) and (3) EU, the jurisdiction of the ECJ to give preliminary rulings depends on a declaration of each Member State.[24] According to Art. 35(6), the Court can now review the legality of Framework Decisions and Decisions.[25] However, as Wasmeier points out, "the impact of these actions is limited, as the Commission cannot ask for a ruling on the Member States' implementation of Framework Decisions and Decisions, or for sanctions in cases of non-compliance". In other words, "a major weakness for enforcement of EU law is that there is no infringement procedure as in the first pillar".[26]

This last difficulty was also stressed by the Commission in the action brought on 15 April 2003 against the Council,[27] based on Article 35(6) EU, in which it stated that "the choice of the legal basis is important in this case because of the special institutional features of Title VI EU which, inter alia, does not have any equivalent to the infringement procedure".

## Background

The FD on the protection of the environment through criminal law was formally adopted by the Council on 27 January 2003 on the basis of an initiative presented by Denmark.[28] As the ECJ clearly states in paragraph 3 of its judgement, the FD, based on Articles 29, 31(e) and 34(2)(b) EU, "constitutes the instrument by which the EU intends to respond with concerted action to the disturbing increase in offences posing a threat to the environment". In Articles 2 and 3, it lays down a number of environmental offences, in respect of which the Member States are required to prescribe criminal penalties.[29] Article 5 provides that the penalties must be "effective, proportionate and dissuasive", including, "at least in serious cases, penalties involving deprivation of liberty which can give rise to extradition".

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The Commission was supported in its action by the European Parliament, which on 9 April 2002 expressed its view on both the proposed Directive and on the draft Framework Decision.[30] As established in paragraph 13 of the judgement, Parliament called on the Council "(i) to use the FD as a measure complementing the Directive that would take effect in relation to the protection of the environment through criminal law solely in respect of judicial cooperation and (ii) to refrain from adopting the FD before adoption of the proposed directive".

The Council, considering that the proposal for a Directive did not reach the majority required for its adoption and that it went beyond the powers attributed to the Community by the EC Treaty, decided to adopt the FD on the basis of Title VI EU.[31]

The Commission appended the statement cited below to the minutes of the Council meeting at which the FD was adopted.[32]

## Legal arguments of the parties

As already cited above, the Commission, although it does not claim that the European Community has a general competence in criminal matters, submits that "the Community legislature is competent, under Article 175 EC, to require the Member States to prescribe criminal penalties for infringements of Community environmental-protection legislation if it takes the view that that is a necessary means of ensuring that the legislation is effective. The harmonisation of national criminal laws, in particular of the constituent elements of environmental offences to which criminal

penalties attach, is designed to be an aid to the Community policy in question".[33] It is clear that criminal law is not to be considered as a Community policy, but just as a means to ensure the effectiveness of the environmental policy.

The Commission relies, in support of its argument, on the case law of the Court concerning the duty of loyal cooperation and the principles of effectiveness and equivalence, as well as on two Community Directives which require the Member States to introduce penalties which are necessarily criminal in nature, although that qualification has not been expressly employed.[34] That is the case of Article 14 of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering and also of Articles 1 to 3 of Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence.

Finally, the Commission also puts forward a ground of challenge alleging abuse of process (paragraph 24 of the judgement). "Recitals 5 and 7 in the preamble to the FD show that the choice of an instrument under Title VI EU was based on considerations of expediency, since the proposed directive had failed to obtain the majority required for its adoption because a majority of Member States had refused to recognise that the Community had the necessary powers to require the Member States to prescribe criminal penalties for environmental offences".

The Council, supported by 11 Member States, argues that the Community does not have the power mentioned. Paragraph 27 states that "not only is there no express conferral of power in that regard, but, given the considerable significance of criminal law for the sovereignty of the Member States, there are no grounds for accepting that this power can have been implicitly transferred to the Community at the time when specific substantive competences, such as those exercised under Article 175 EC, were conferred on it". The Council therefore concludes that, given the absence of an explicit provision on criminal law, the parties to the EC Treaty did not envisage harmonisation measures regarding criminal matters.

It is also argued that the Court has never obliged the Member States to adopt criminal penalties, that legislative practice also follows that interpretation[35] and that whenever the Commission has proposed to the Council that a Community measure having implications for criminal matters be adopted, the Council has detached the criminal part of that measure so that it may be dealt with in a FD[36] (see paragraphs 31 to 33).

The position of most of the Member States, with the exception of The Netherlands, mainly follows the arguments of the Council.[37] For example, Denmark considers that Articles 135 EC and 280 EC, which expressly reserve to the Member States the application of national criminal law and the administration of justice, confirm the interpretation of the Council. Germany adds that the establishment of the third pillar, with competence for judicial cooperation in criminal matters (see Articles 29 EU, 31 EU and 34 EU), was a consequence of the absence of a Community competence in this field.[38] According to the French Government, the EC can only act within the limits of the powers conferred upon it by the EC Treaty (Art. 5 EC) and, as no EC provision expressly confers competence to the Community in the field of criminal law, it has to be concluded that the EC cannot oblige the Member States to provide for criminal sanctions. The UK considers that Articles 174 EC and 175 EC do not confer any power to the EC to legislate in the field of criminal law.

The position of The Netherlands is quite interesting as it acknowledges that the Community may require the Member States to provide for criminal sanctions, 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.[39] In this case the Dutch Government considers that the penalties foreseen are not inseparably linked to the environmental provisions of the EC and therefore it concludes that the harmonisation of criminal law in this field can only be operated from the third pillar.

### *The EC Treaty priority*

The Commission, considering that the EC is competent to impose on the Member States the obligation to provide for criminal penalties in the environmental field, also bases its action on the primacy of Community law.

According to Articles 47 and 29 EU,[40] the EU institutions are not free to choose between a first or a third pillar instrument, as it is established that the EC Treaty has priority over the EU Treaty. Therefore, an instrument under Title VI EU can only be adopted so long as it does not affect any Community competence.[41]

It also needs to be kept in mind that "Article 47 EU not only refers to conflicts of existing provisions, but also to competencies as such. In this vein, a third pillar act extending to an area in the Community's competence would violate Art. 47 EU even if its contents did not contradict any Community law provision."[42] In the judgement of the ECJ on airport transit visas,[43] it was made clear that third pillar instruments cannot trespass into the area of Community competence and that they can be declared void in an action for annulment.

> The ECJ found that the EC has the power to require the Member States to impose criminal penalties for the purpose of protecting the environment.

### *The judgement of the ECJ and its consequences*

Much to the regret of the Council and the considerable number of Member States that submitted written observations, the Court ruled in the Commission's favour. Taking into account the aim and the content of the FD, the ECJ found that although "as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence", "the EC, when the application of effective, proportionate and dissuasive criminal penalties

by the competent national authorities is an essential measure for combating serious environmental offences, can take 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" (paragraphs 47 and 48).

It follows that "Articles 1 to 7 of the FD, having as its main purpose the protection of the environment, could have been properly adopted on the basis of Article 175 EC" (paragraph 51). "In those circumstances, the entire framework decision, being indivisible, infringes Article 47 EU as it encroaches on the powers which Article 175 EC confers on the Community" (paragraph 53).

It is interesting to note that the ECJ went further than the proposals of Advocate-General Ruiz-Jarabo Colomer.[44] In his opinion he proposed to annul Articles 1 to 4, Article 5(1) – with the exception of the reference to sanctions involving the deprivation of liberty and extradition –, Article 6 and Article 7(1) of the FD.[45] The ECJ decided to annul the whole FD and more specifically it considered that Articles 1 to 7, dealing with the definition of offences, the principle of the obligation to impose criminal sanctions, the rules on participation and instigation, the level of penalties, accompanying penalties and the specific rules on the liability of legal persons, could have been properly based on Article 175 EC.[46]

In order to explain the conclusions to be drawn from this judgement, the Commission adopted a communication on its implications on 24 November 2005.[47] It includes a list of the instruments affected by the implications of the judgement and suggests a method to correct the situation with regards to texts which were not adopted on the proper legal basis.

One of the main conclusions, according to the Commission, is that the judgement "lays down principles going far beyond the case in question. The same arguments can be applied in their entirety to the other common policies and to the four freedoms (freedom of movement of persons, goods, services and capital)".[48]

It is clear, in any case, that criminal law is not a Community policy and that it can only be used as a means in order to ensure the full effectiveness of a Community policy or the proper functioning of a freedom. In this vein, "the Court's reasoning can therefore be applied to all Community policies and freedoms which involve binding legislation with which criminal penalties should be associated in order to ensure their effectiveness".[49] On a case by case basis, depending on necessity, the Commission will determine the degree of Community involvement in the criminal field when submitting its proposals.

The clarification by the Court judgement of the distribution of powers between the first and third pillar entails therefore that the provisions of criminal law required for the effective implementation of Community law are a matter for the TEC and those on the harmonisation of criminal law not linked to the implementation of Community policies or fundamental freedoms, fall within Title VI of the TEU.[50]

The consequences of the judgement are of crucial importance for the Member States. Most Community policies are implemented following the co-decision procedure and decisions are taken by qualified majority. In this respect, one can understand why 11 Member States have so strongly opposed the position of the Commission and the European Parliament in this case. A Member State that would oppose the adoption of a directive aimed at the harmonisation of a certain criminal offence – linked to the need for ensuring the proper functioning of a Community policy – would still have to introduce it into its internal legislation if a sufficient number of Member States voted for it.

Some analysts and politicians consider that as a consequence of the ECJ's ruling, for the first time in legal history, a Member State government will no longer have the sovereign right to decide what constitutes a crime and what the punishment should be.[51] This analysis can only be understood by taking into account the loss of the Member States' power to block a decision taken by other Member States to impose criminal sanctions on certain offences. It should be noted in this respect that the unanimity requirement – that still applies in the framework of the third pillar – is not necessarily a democratic method. In a national context, as H. Nilsson points out, "there is no parliament that adopts criminal law by unanimity among members of parliament or requires unanimity among political parties".[52] Furthermore, "living under the tyranny of unanimity" has proved to be inefficient and, especially in instruments seeking to approximate criminal law, no real progress can be made.

In the case at hand, the proposal for a Community Directive from the Commission will have to be considered again and the Council and the Parliament will be entitled to adopt it following the co-decision procedure (according to Article 175 EC) and by qualified majority. An eventual reluctance by Member States to assume the new legal regime could only be understood as a rejection of the "Community method" in this field. As already stressed, even those Member States voting against the adoption of the directive could be forced to implement it in their national law if a sufficient number of Member States voted for it. In this respect, the Commission could decide to initiate infringement procedures against those Member States that did not comply with Community legislation and the ECJ could eventually declare non-compliance by certain Member States with the Community Directive, and even impose on them a lump sum or penalty payment, according to Article 228 EC.

The powers of the Commission are not, in any case, unlimited. Every time the Commission decides to propose legislation in the Community framework, checks will have to be carried out in order to establish the necessity of the action to be taken and the observance of the principles of subsidiarity and proportionality. Any use of measures of criminal law must be justified by the need to make the Community policy in question effective.[53]

Concerning the consequences of the judgement for acts adopted and proposals pending, the Commission has already adopted its position in the Communication mentioned above. It is considered that seven framework decisions adopted, apart from the one that has been

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annulled, have been taken on erroneous legal bases.[54] In order to restore legality as soon as possible, the Commission proposes that an agreement should be reached by the three institutions (Commission, EP and Council) on introducing a simple and speedy procedure for the adoption of directives or other Community legislative measures to replace those framework decisions. If this approach is followed, "the Commission's proposals would not contain any provisions which differed in substance from those of the acts adopted, even where the Commission felt that these acts were not satisfactory".[55]

The only case where the Commission already had the possibility to introduce an action for annulment regards the Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal law framework for the enforcement of the law against ship-source pollution. The action was brought on 23 November 2005 and it should be noted that the Commission has already announced that the action will be withdrawn once the proposal aiming at correcting the legal basis for the framework decision in question is adopted.

For pending proposals, the Commission will make the necessary changes and they will follow the full decision-making procedure applicable to their legal basis.[56]

### *The Constitutional Treaty[57] and the harmonisation of criminal law*

The entry into force of the Constitutional Treaty, in its current form, would be crucial for the completion of the Area of Freedom, Security and Justice. One has to acknowledge, however, that its future is now very much in doubt, mainly after the blows received from the French and Dutch referenda.[58]

As Wasmeier explains,[59] "the Constitution merges the first and third pillars into a single legal framework. This entails that there will no longer be different legal procedures for the Community and the Union. The same legal instruments (European laws and European framework laws) and the co-decision procedure will apply to both areas, and the infringement procedure will be extended to criminal matters".[60]

As a consequence of the unification of both pillars the need for artificially splitting up instruments would be gone. This is particularly acknowledged by Article III-271(2), which foresees the approximation of criminal legislation in a single European framework law if that proves essential for ensuring the effective implementation of a harmonised Union policy. In the light of this Article of the Constitutional Treaty, it is difficult to understand the reluctance of the Member States to assume the Community method.[61]

Regarding the legal nature, the instruments foreseen in the Constitution, both Europeans laws and European framework laws would have direct effect, being able, therefore, to be invoked by individuals before national courts.

Transparency of the decision-making system would also be enhanced thanks to the new role that the Parliament would play as co-legislator in the framework of the co-decision procedure.

Last but not least, the Commission would be entitled to initiate infringement procedures against those Member States that do not transpose into their national legislation Union legislation in the field of harmonisation of criminal law. They could be brought before the European Court of Justice, which would benefit from the general jurisdiction that currently applies only in the framework of the first pillar.

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### *Conclusions*

The judgement of the ECJ of 13 September 2005 expressly gives the European Community, for the first time, the power to impose on the Member States the obligation to provide for criminal sanctions in the framework of environmental policy, as it is considered that criminal penalties are necessary in order to ensure its effectiveness.

Furthermore, this judgement will not only affect Community environmental policy. As the Commission has already expressed, in its Communication of 24 November 2005, the Community will have the power to approximate/harmonise national criminal laws if it proves essential to ensure the effectiveness of any other Community policy or the proper functioning of a freedom (freedom of movement of persons, goods, services or capital).

However, so long as the current pillar structure remains, criminal law will only be considered as a means of approximating national criminal laws in the framework of the first pillar. Therefore, Title VI EU will still play a crucial role in the field of harmonising the criminal laws of the Member States in those areas that do not encroach upon a Community policy.

The benefits from the new judgement can be qualified as colossal with respect to the new legislative procedure that will apply, the legal effects of the measures adopted and the jurisdiction of the ECJ. The Community method will apply in its entirety: the Commission will have the exclusive right of initiative, the Parliament will participate in the decision-making process as co-legislator; the directives adopted will be able to entail direct effect; and the ECJ will have full jurisdiction to control the Member States' implementation of legal instruments and, eventually, to impose penalty payments in cases of non-compliance.

> The application of the Community method is what most of the Member States fear.

Those Member States that are currently reluctant to give power to the Community in the field of harmonisation of criminal laws will have to transpose into their internal legislation Community directives if they have been supported by a sufficient number of Member States – qualified majority voting applies from now on. The Commission could eventually decide to initiate an infringement procedure against those Member States that do not comply with EC legislation.

This judgement of the ECJ corroborates the changes introduced by the Constitutional Treaty as foreseen in Article III-271(2): European framework laws may approximate national criminal laws if it proves essential to ensure the effective implementation of a Union policy. Furthermore, the suppression of the pillar structure of the EU would avoid the need for artificially splitting up legal instruments.

The judgement of 13 September 2005 sets, no doubt, a crucial precedent and represents another important step forward in the process towards the necessary communitarisation of the third pillar in order to accomplish a monumental objective … the establishment of a European Area of Freedom, Security and Justice. ::

NOTES

* The author would like to thank Professor Dr Edward Best for his useful comments.

1 Case C-176/03 *Commission v Council*.

2 Council Framework Decision on the protection of the environment through criminal law [2003] OJ L 29/55. See also Denmark's initiative with a view to adopting a Council framework Decision on combating serious environmental crime [2000] C 39/4.

3 See, in particular, Articles 29, 31(e) and 34(2)(b) EU. The pillar structure of the EU was introduced by the Maastricht Treaty, which entered into force in November 1993. The third pillar included the bulk of Justice and Home Affairs cooperation. The Amsterdam Treaty transferred immigration, asylum and civil cooperation to the first pillar (title IV EC); police and judicial cooperation in criminal matters remains in the third pillar.

4 The European Commission's position is clearly indicated in the judgement of 13 September 2005, cited above at n.1, para. [19]. See also proposal for a Directive on the protection of the environment through criminal law [2001] OJ C 180E/238; and amended Proposal [2003] C 020E/284.

5 See paras. [26] and [27] of the judgement cited above at. n.1.

6 Opinion delivered on 26 May 2005, Case C-176/03, paras. [2] and [4].

7 It is remarkable that 11 Member States – Denmark, Germany, Greece, Spain, France, Ireland, the Netherlands, Portugal, Finland, Sweden and the UK – have submitted written observations to support the position of the Council of the EU. The European Commission has been supported by the European Parliament.

8 See, for example, the reaction of the British press on 14 September 2005. Editorial from *The Times*: "Legal trespass: The European Court has gravely undermined the sovereignty of EU States", page 19; also in *The Times*: "Europe wins the power to jail British citizens"; *The Guardian*: "Brussels wins right to force EU countries to jail polluters"; *The Independent*: "Europe may impose criminal penalties for breaching EU law"; *The Daily Telegraph*: "Criminal sanctions to enforce EU law". The articles can be downloaded from the corresponding websites.

9 For more detailed explanations see S. Peers, *EU Justice and Home Affairs Law* (London, 2000), pp. 141-145.

10 See, for example, Art. 31 of Council Regulation No. 2847/93 establishing a control system applicable to the common fisheries policy, OJ L 261 of 20/10/1993. Paragraph 1 establishes that: "Member States shall ensure that the appropriate measures be taken, including of administrative action or criminal proceedings in conformity with their national law, against the natural or legal persons responsible where common fisheries policy have not been respected, in particular following a monitoring or inspection carried out pursuant to this Regulation". Similar provisions can be found in the framework of the common agricultural policy and transport policy.

11 Art. 31(e) EU establishes that: "common action on judicial cooperation in criminal matters shall include progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking". See also Art. 29 EU.

12 See Art. 34(2)(b) EU.

13 M. Wasmeier and N. Thwaites, "The battle of the pillars: does the European Community have the power to approximate national criminal laws?", *European Law Review*, Vol. 29, No. 5, October, p. 614 (2004).

14 Mainly after the adoption of the Tampere conclusions (European Council of 15-16 October 1999). The Tampere summit was devoted to the creation of an area of freedom, security and justice in the EU, an objective that was put at the very top of the political agenda.

15 Cited above at n. 4.

16 Cited above at n. 2. This proposal was finally adopted by the Council after appropriate modifications.

17 See Commission Communication on "The Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations". COM(2004) 401 final, pp. 4-5. See also the annex to the Communication, SEC(2004) 693, pp. 9-10.

18 See M. Wasmeier and N. Thwaites, cited above at n. 14, p. 615; see also E. Guild and S. Carrera, "No Constitutional Treaty? Implications for the Area of Freedom, Security and Justice", CEPS Working Document No. 231, (2005), pp. 2-8. The distinctions between the first and the third pillar are also highlighted by S. Peers, cited above at n. 9, pp. 13-15.

19 Art. 39 EU.

20 See W. Bogensberger, "The Area of Freedom, Security and Justice after the Draft Constitution for Europe as concerns criminal matters", paper presented at the conference on "EU Reform and Enlargement: Implications for the Schengen Regime" organised by EIPA in Luxembourg on 1-2 April 2004. See also H. Nilsson, "Decision-Making in EU Justice and Home Affairs: Current Shortcomings and Reform Possibilities", S*EI Working Paper* No. 57 (2002).

21 The notion of direct effect, according to which individuals may invoke Community legislation before national courts if it is clear, precise and unconditional, has been developed by the case-law of the ECJ, primarily in the context of the Community legal system. See, in particular, Van Gend en Loos judgement, C-26/62 [1963] ECR 1. In the framework of the third pillar it is interesting to mention the recent judgement of the ECJ delivered on 16 June 2005, Case C-105/03, Maria Pupino. In the context of the interpretation of the FD on the standing of victims in criminal proceedings, OJ L 82/1 of 22/3/2001, the ECJ has confirmed that the principle that national law must be interpreted in conformity with Community law also applies in the third pillar. By urging national courts to read domestic law in such a way as to conform to the provisions of framework decisions, the ECJ ensures that these instruments will be given some effect despite the absence of proper domestic implementation. The ECJ has therefore also introduced the notion of indirect effect in the third pillar. In the context of the first pillar see, for example, Case 14/83, Von Colson and Kamann v. Land Nordrhein-Westfalen [1984] ECR 1891. In any case, it is necessary to stress that direct effect remains, for the time being, excluded from the third pillar, as explicitly established in Art. 34 EU.

22 For detailed information in this respect, see P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials,* [2003], pp. 178-229.

23 See Communication cited above at n. 18, pp. 4-5.

24 See, in this respect, E. Guild and S. Carrera, cited above at n. 19, p. 11.

25 It needs to be added that an important limitation of the action for annulment is that the European Parliament and individuals are not allowed to bring it before the ECJ.

26 See Arts. 226-228 EC. In the framework of the first pillar, the ECJ can even impose a penalty payment on those Member States that have not complied with a previous judgement.

27 OJ C 135/21 of 7/6/2003.

28 Cited above at n. 2.

29 Article 2 provides that "each Member State shall take the necessary measures to establish as criminal offences under its domestic law: (a) the discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water which causes death or serious injury to any person; (b) the unlawful discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water which causes or is likely to cause their lasting or substantial deterioration or death or serious injury to any person or substantial damage to protected monuments, other protected objects, property, animals or plants; (c) the unlawful disposal, treatment, storage, transport, export or import of waste, including hazardous waste, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants; (d) the unlawful operation of a plant in which a dangerous activity is carried out and which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants; (e) the unlawful manufacture, treatment, storage, use, transport, export or

import of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants; (f) the unlawful possession, taking, damaging, killing or trading of or in protected wild fauna and flora species or parts thereof, at least where they are threatened with extinction as defined under national law; (g) the unlawful trade in ozone-depleting substances …".

30 References of the Parliament's opinions: A5-0099/2002 and A5-0080/2002

31 The Council also considered that the present FD, based on Article 34 EU, is a correct instrument to impose on the Member States the obligation to provide for criminal sanctions.

32 "The Commission takes the view that the Framework Decision is not the appropriate legal instrument by which to require Member States to introduce sanctions of a criminal nature at national level in the case of offences detrimental to the environment. As the Commission pointed out on several occasions within Council bodies, it considers that in the context of the competences conferred on it for the purpose of attaining the objectives stated in Article 2 of the Treaty establishing the European Community, the Community is competent to require the Member States to impose sanctions at national level – including criminal sanctions if appropriate – where that proves necessary in order to attain a Community objective. This is the case for environmental matters which are the subject of Title XIX of the Treaty establishing the European Community. Furthermore, the Commission points out that its proposal for a Directive on the protection of the environment through criminal law has not been appropriately examined under the co-decision procedure. If the Council adopts the Framework Decision despite this Community competence, the Commission reserves all the rights conferred on it by the Treaty."

33 Paragraph 19 of the judgement cited above at n.1.

34 See paras. [20] and [21] of the mentioned judgement.

35 The various pieces of secondary legislation do not call into question the freedom of the Member States to choose between proceeding under administrative or criminal law.

36 See, for example, Directive 2002/90, supplemented by Council FD 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, OJ 2002, L 328, p. 1.

37 A summary of the position of the countries that have submitted observations can be found in the *Rapport d'audience* (only available in French) of the Case C-176/03 prepared by Judge Romain Schintgen.

38 See also paragraph 29 of the judgement.

39 See paragraph 36 of the judgement.

40 Article 47 EU establishes that "... nothing in this Treaty shall affect the Treaties establishing the European Communities". Article 29 EU states that "Without prejudice to the powers of the European Community ...".

41 Statement corroborated by the ECJ in paragraph 38 of its judgement.

42 See M. Wasmeier and N. Thwaites, cited above at n. 14, p. 619.

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

44 See n. 6.

45 Paragraph 97.

46 See paragraph 4 of the Communication cited below at n. 47.

47 Communication from the Commission to the European Parliament and the Council on the implications of the Court's judgement of 13 September 2005 (Case C-176/03 *Commission v Council*). COM(2005) 583 final/2.

48 Paragraph 6 of the mentioned Communication.

49 Paragraph 8 of the mentioned Communication.

50 Paragraph 11 of the mentioned Communication.

51 See the article published in Euobserver.com on 25.11.2005: "Commission stakes new claim in European criminal law".

52 See H. Nilsson, cited above at n. 20, pp. 7-8.

53 Paragraph 12 of the Communication from the Commission mentioned at n. 47.

54 Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro (OJ L 140, 14.6.2000, p. 1) and Council Framework Decision of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro (OJ L 329, 14.12.2001, p 3); Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (OJ L 166, 28.6.1991 p. 77) and Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (OJ L 182, 5.7.2001, p. 1); Council Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment (OJ L 149, 2.6.2001, p. 1); Directive defining the facilitation of unauthorised entry, transit and residence and Council framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (OJ L 328, 5.12.2002, pp. 17 and 1); 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 and Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution (OJ L 255, 30.9.2005, pp. 11 and 164); Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (OJ L 192, 31.7.2003 p. 54); Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems (OJ L 69, 16.3.2005, p. 67).

55 Paragraph 16 of the Communication from the Commission mentioned at n. 47.

56 Proposal for a Directive of the European Parliament and of the Council on the criminal-law protection of the Community's financial interests (PIF) (OJ C 240E, 28.8.2001, p. 125); Proposal for a European Parliament and Council Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights and for a Council framework decision to strengthen the criminal law framework to combat intellectual property offences (COM (2005) 276 final); Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the prevention and control of trafficking in human organs and tissues (OJ C 100, 26.4.2003, p. 27), currently stalled; Initiative of Germany with a view to the adoption of a Council Framework Decision on criminal law protection against fraudulent or other unfair anti-competitive conduct in relation to the award of public contracts in the common market (OJ C 253, 4.9.2000, p. 3), also currently stalled. If in the context of the proposal for a Council framework decision on combating racism and xenophobia (COM proposal of 29.11.2001, OJ C 75 E, 23.6.2002, p. 269), currently drafted in conformity with the distribution of powers between the pillars as set out in the Court judgement, criminal penalties were to be introduced in future amendments to combat discrimination, a Directive on the basis of Article 13 EC would be necessary.

57 Politically agreed at the European Council of 17-18 June 2004 and signed in Rome on 29 October 2004. OJ C 310/1 of 16.12.2004.

58 For more detailed information on the implications for the area of justice, freedom and security of the Constitutional Treaty, see E. Guild and S. Carrera, cited above at n. 19.

59 See M. Wasmeier and N. Thwaites, cited above at n. 14, p. 632-634. See also W. Bogensberger, cited above at n. 21.

60 Constitution, Arts. I-32 et seq., III-171 et seq., and III-302.

61 However, the approach of the Constitution is not finally so integrationist, as the UK succeeded by the end of the political negotiations in introducing a mechanism for the suspension of the co-decision procedure in those cases where a Member State considers that a draft European framework law would affect fundamental aspects of its criminal justice system (Art. III-271, paragraphs 3 and 4).