EC Competence for Environmental Criminal Law – An Analysis of the Judgment of the ECJ of 13.9.2005 in Case C-176/03, Commission v. Council

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A. Introduction

The judgment of the European Court of Justice (ECJ) of 13.9.2005 in case C-176/03, *Commission v. Council*,[1] is a landmark decision.[2] For the first time in the history of European integration, the ECJ confirmed that the Community has (limited) competence to legislate in the field of criminal law. The ruling ranks accordingly among the most important judgments of the ECJ in the field of division of competences.[3] Furthermore, the ECJ's statement concerns one of the principal objectives of European Integration – the protection of the environment – and relates to one of the main contemporary European and global challenges – the combat against environmental crime. Both the issue of competence for criminal law and the subject-matter of environmental crime make the judgment in case C-176/03 a remarkable decision which merits academic attention.

1 [2005] ECR I-7879.

2 See *Wegener/Greenwalt*, (Umwelt-)Strafrecht in europäischer Kompetenz!, [2005] ZUR 585: "*Das Urteil macht Geschichte*".

3 *Simon*, Compétence en matière pénale, [2005] Revue mensuelle LexisNexis Jurisclasseur-Europe 11.

I. The High Stakes in Case C-176/03

1. Equivalence of Legal Competence and Political Power

The division of competences between different political levels and between different institutions is a cornerstone of institutional law and has a direct effect on political reality. Legal competence equals to political power, which is, in terms of institutional economics, the driving unit of any political process. Accordingly, the litigation before the ECJ in case C-176/03 was politically explosive. This is clearly apparent from the setting of the case. The Commission, who had challenged the unanimously adopted Council Framework Decision 2003/80/JHA on the protection of the environment through criminal law,[4] was supported by the European Parliament whereas the Council was backed by 11 out of then 15 Member States. The fear of a (further) loss of "sovereignty"[5] in the field of criminal law had provoked the intervention of Denmark, Finland, France, Germany, Greece, Ireland, the Netherlands, Portugal, Spain and the United Kingdom. The impressive scenery was completed by the ECJ deciding in a grand chamber composed of 13 judges.

a) Constitutional Background of Case C-176/03

The conflict between the Commission and the Council had its legal origin in the three-pillar structure of the EU as designed in Article 1 (3) TEU. The third pillar (Articles 29 et seq. TEU) provides, *inter alia*, for the competence to establish minimum harmonisation in certain fields of criminal law (Article 31 [e] TEU), notably by way of adopting framework decisions (Article 34 [2] [b] TEU). As far as the EC has some competence to legislate in the field of criminal law too, a conflict between the supranational and the intergovernmental scheme occurs. This renders not only the question of competence for criminal law more difficult by providing it with a third possible answer – besides the Community and the Member States the Union may be competent –[6], it also implies, above all, a big potential for inter-institutional conflict. As the institutional structure of the pillars differs decisively with regard to the horizontal division of powers, the allocation of a certain legislative project to the first or the third pillar is of great interest to the European institutions.[7]

Under the first pillar, the Council's powers are, generally speaking, limited in several respects: The Commission enjoys the monopoly of legislative initiative; mostly,

4 [2003] OJ L 29/55.

5 Concerning the notion of "sovereignty" see infra C.II.2.c).

6 See *Labayle*, Entre désir et réalités: Quelle voie pour une répression pénale des violations du droit communautaire, [2003] Revue du Marché commun et de l'Union européenne 293 (300 et seq.).

7 As regards the following, see *Simon*, supra note 3, at 13; see also *Wegener/Greenwalt*, supra note 2, at 586; *Hefendehl*, Europäischer Umweltschutz: Demokratiespritze für Europa oder Brüsseler Putsch?, [2006] ZIS 161 (162).

the Council cannot legislate without consent from the European Parliament; and its measures are subject to interpretation and review by the ECJ who enjoys all powers provided for in Articles 220 et seq. TEC. From the Member States' perspective, it is important to note that the Council mostly decides by qualified majority so that national governments face the risk of being outvoted. This risk is all the more considerable because Article 175 (1) TEC permits, in principle, the adoption of directly effective regulations[8] and because the ECJ's case law concerning direct effect of directives applies.[9]

In contrast, the third pillar is largely governed by the Council. According to Article 34 (2) TEU, any Member State can initiate legislative proceedings besides the Commission, and the European Parliament is only consulted. Moreover, the powers of the ECJ are restricted pursuant to Article 46 (b) in conjunction with Article 35 TEU. Accordingly, the Commission can bring no enforcement actions; the Court's competence to make preliminary rulings is subject to acknowledgment by the Member States; and annulment actions can only be brought by the Commission and the Member States. As the Council acts by unanimity, the Member States have the power of veto. This comfortable position is strengthened by the fact that Article 34 (2) (b, c) TEU explicitly excludes direct effect of framework decisions and decisions.

Regarding these fundamental differences it is not surprising that in the sensitive field of criminal law the Council and the Member States may prefer to act under the third pillar, while the Commission and the European Parliament may give preference to the supranational track. It was this intrinsic tension in the multi-pillar structure which finally led to an institutional conflict and gave the ECJ the opportunity to clarify the question of EC competence for environmental criminal law.

b) Genesis of Case C-176/03

In February 2000, Denmark presented an "[i]nitiative [...] with a view to adopting a Council framework Decision on combating serious environmental crime" – commonly referred to as the "Danish initiative".[10] The proposal was based on Articles 29, 31 (1) (e) and 34 (2) (b) TEU; its core provision – Article 2 (1) (a) – required the Member States "to ensure that serious environmental crime is punishable under criminal law". However, on 13 March 2001, the Commission presented a "Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law" which was based on Article 175 TEC.[11]

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8 See Article 249 (2) TEC.

9 See in particular case 41/74, *Van Duyn v. Home Office*, [1974] ECR 1337; with respect to the legal effects of directives in general see *Craig/De Búrca*, EU Law, 3rd ed. 2003, p. 202 et seq.

10 [2000] OJ C 39/4.

11 COM/2001/139 final, [2001] OJ E 180/238.

Its key rule – Article 3 – also obliged the Member States to impose criminal penalties for certain environmental offences, which were specified by way of referral to an Annex listing 51 directives and regulations.

The simultaneous initiation of two parallel legislative procedures concerning, in essence, the same substance matter, was an unprecedented phenomenon. The Council subsequently simply refused to take part in the co-decision procedure applicable under Article 175 TEC,[12] even after the European Parliament had adopted two opinions in favour of the Commission.[13] Instead it approximated the content of the framework decision to that of the proposed directive, in particular regarding the referral to infringements of EC environmental legislation.[14] On 27 January 2003 the Framework Decision 2003/80/JHA on the protection of the environment through criminal law was adopted.[15] It has essentially the following content:[16]

Articles 2 and 3 require Member States to establish as criminal offences under their domestic law seven enumerated types of environmentally harmful behaviour, committed intentionally (Article 2) or by (serious) negligence (Article 3). Article 5 (1) specifies the obligation in such a way that national law must provide for effective, proportionate and dissuasive penalties including, at least in serious cases, penalties involving deprivation of liberty. Article 4 requires punishability of participation and instigation, while leaving the Member States free to prescribe penalties other than criminal penalties. The same is true for Articles 6 and 7, which concern liability and punishment of legal persons. For the rest, the framework decision contains rules on jurisdiction (Article 8), extradition and enforcement (Article 9), implementation (Article 10), territorial application (Article 11) as well as the effective date (Article 12).

Soon after the adoption of the framework decision, the Commission brought an action for annulment before the ECJ pursuant to Article 35 (6) TEU.[17] In essence, the Commission challenged the Council's choice of Article 34 (1) (b) TEU, in conjunction with Article 29 and 31 (e) TEU, as the legal basis for Articles 1 to 7 of the framework decision. It submitted that the purpose and content of these provisions were within the scope of the Community's power on the protection of the envi-

12 *Comte*, Criminal Environmental Law and Community Competence, [2003] European Environmental Law Review 147 (151).

13 Only some minor amendments were required – see opinions T5-0147/2002, [2003] OJ C 127/27; T5-0151/2002.

14 See Article 1 (a) of Council Framework Decision 2003/80/JHA.

15 See supra note 4.

16 For a more detailed overview see *Mansdörfer*, Einführung in das Europäische Umweltstrafrecht, [2004] JURA 297 (298 et seq.).

17 Another basis of the action might have been Article 230 (1) TEC – see *Comte*, supra note 12, at 439-440.

ronment as stated in Article 3 (1) and Article 174 to 176 TEC.[18] The European Parliament essentially concurred with this argument.[19]As indicated above, the Commission's action was successful. The ECJ underlined the primacy of the first pillar over the third pillar, and it confirmed the Community's power to take legislative measures in the criminal sphere as far as this is necessary to ensure the effectiveness of EC environmental legislation.[20]

2. Combat against Environmental Crime

The high political sensitivity of the issue of competence for criminal legislation should not make us forget about the significant subject-matter of case C-176/03. Before looking closer into the judgment of the ECJ, it is advisable to provide some exemplary figures in order to demonstrate the actual importance of combating environmental crime.[21]

The global impact of environmental crime is apparent from a report published by the US government in the year 2000. According to this report, criminal networks make an estimated annual profit of 20 to 31 billion USD in this field, the main sections being illegal trade in waste (10-12 billion USD), illegal trade in endangered species (6-10 billion USD), illegal fishing (4-5 million USD), illegal traffic in substances deleting the ozone-layer (1-2 billion USD) as well as illegal cutting of wood (0.5-1 billion USD).[22] To put those – necessarily approximate[23] – figures into context, it suffices to say that trade in endangered species, taken on its own, is considered to be the second biggest illegal market on global scale after the trade in drugs.[24]

Unfortunately, environmental crime is a major European problem too. The Community is notably the second largest marketplace for CITES[25] species after the United States and represents up to one third of the world market.[26] Time and again,

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18 Case C-176/03, *Commission v. Council*, [2005] ECR I-7879 para. 18.

19 Case C-176/03, *Commission v. Council*, [2005] ECR I-7879 para. 25.

20 Case C-176/03, *Commission v. Council*, [2005] ECR I-7879 para. 38 et seq.

21 For a more detailed description see *Comte*, Crime contre l'environnement et police en Europe: panorama et pistes d'action, [2005] 3 RDUE 483 et seq.

22 *USA Government interagency working group*, The International Crime Threat Assessment, 2000.

23 Quantifying environmental crime is especially difficult because of the important dark number in this field and the lack of reliable statistical data – see *Comte*, supra note 21, at 500 et seq.

24 *Comte*, supra note 21, at 504.

25 Convention on International Trade in Endangered Species of Wild Fauna and Flora – see www.cites.org (visited on 10.9.2006).

26 *Wijnstekers*, Protection of Endangered Species of Fauna and Flora, in: Comte/Krämer (eds.), Environmental Crime in Europe: Rules of Sanctions, 2004, p. 15 (18); see also *Albrecht*, The extent of Organized Environmental Crime – A European Perspective, *l.c.*, p. 71 (89).

European authorities detect and seize endangered animals and plants or derivative products, which are intended for sale in European states. The profits of such operations can be considerable. For example, in 1997 Spanish authorities discovered an illegal import of 129,397 butterflies from Indonesia having an assumed value of 300,506 EUR. In 1999, German customs authorities seized 1,300 tarantulas whose supposed value amounted to 132,390 EUR.[27]

Another important European sector of environmental crime is the illegal discharge of waste. The contemporary dimension of the problem became apparent when, in 2004, the Commission brought legal actions against several Member States for failing to comply with EC waste legislation.[28] In Italy, at least 4,866 illegal or uncontrolled landfills had been identified on its territory in the year 2002. It was estimated that in 3,836 of those incidents no measures for the protection of ground, water and air had been taken at all, and that 705 landfills involved hazardous waste. Correspondingly, it is assumed that 35 percent of the overall production of 108 million tons of waste per year in Italy are treated incorrectly or illegally.[29] Sure enough, the problem is not limited to Italy. The French authorities acknowledged the existence and operation of approximately 1,400 illegal or uncontrolled landfills on its territory in 2001. In Greece, a report from the ministry for environment from 2003 made reference to a plan for the closure of illegal landfill sites which indicated that in December 2002 1,458 such sites were in operation.

One concrete example may be added to illustrate the criminal background of those figures. In 1990, the Commission commenced legal proceedings against Italy with regard to the situation in Campania.[30] The region produced an annual amount of waste of 1,620,000 tons and wanted to import an additional 500,000 tons of waste from the USA – without having one single official and supervised discharge point.[31] As Italy could not provide any explanation, the ECJ found that it had failed to fulfil its obligations under Community law.[32] Certainly, such incidents indicate the involvement of organised crime.[33]

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27 For more examples see *Comte*, supra note 21, at 504 et seq.

28 See *European Commission*, press release of 15.1.2004, IP/04/52.

29 *Comte*, supra note 21, at 516.

30 The Commission's attention was raised by written question No 426/87 of *Squarcialupi*, Exportation of American Waste to Campania, [1987] OJ C 295/29.

31 Opinion of AG *Darmon* in case C-33/90, *Commission v. Italy*, [1991] ECR I-5987 para. 9.

32 Case C-33/90, *Commission v. Italy*, [1991] ECR I-5987.

33 *Di Lello Finuoli*, Crime environnemental organisé; L'exemple d'Italie, in: Comte/Krämer (eds.), supra note 26, p. 103 (107 et seq.): "*Le cycle des déchets, surtout des 'déchets spéciaux' […] est toujours dans le chaos le plus total. […] La criminalité organisée porte grand intérêt au trafic de déchets en Campania, en Calabre, dans Puglia et en Sicilia. Des organisation criminelles […], spécialisées dans le trafic illicite de déchets, se créent partout en Italie […].*"

The information given above is merely illustrative and does certainly not suffice to assemble an overall picture of environmental crime in Europe.[34] Nevertheless, it becomes apparent that crime against the environment is a real problem which calls for effective legal reaction – be it on European and/or national level, under the third or the first pillar of the EU.

II. Structure of the Article

This article provides a description and analysis of case C-176/03. In order to put the judgment into perspective, an overview is given of the influence that Community law[35] has on national criminal law and the new aspects of case C-176/03 are highlighted (B.) Subsequently, the ruling of the ECJ is examined in detail. The analysis looks into the relationship between the first and the third pillar, scrutinises the existence of EC competence for environmental criminal law and examines the limits of such (potential) competence. This article argues that the ECJ did not exceed its power and made a legally correct decision. However, the judges failed to provide for a sufficiently clear definition of the scope of EC competence in the criminal sphere.[36] Consequently, the article puts special emphasis on that point and tries to define the exact limits of the Community's powers. (C.). The conclusion brings the findings together, sketches a framework for Community action in the field of criminal law and provides a political outlook (D.).

B. The Influence of Community Law on National Criminal Law

For a long time, criminal law was widely imagined as a safe harbour of national sovereignty, shielded against all influences from Community law.[37] However, this image has been a product of misperception at all times.[38] Long ago it became appar-

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34 For more detailed information see *Comte*, supra note 21, at 500 et seq. as well as the articles contained in Comte/Krämer (eds.), supra note 26.

35 For a broader overview encompassing also the influences of Union law (primary Union law, legislative acts and agreements adopted under the third pillar) in the criminal sphere see *Morgan/Faull*, The Role of Criminal Law in the EU, [2006] Journal of European Criminal Law Report 17 et seq.; *Satzger*, The Future of European Criminal Law between Harmonization, Mutual Recognition and Alternative Solutions, [2006] Journal of European Criminal Law Report 27 (28 et seq.).

36 See *Wegener/Greenawalt*, supra note 2, at 588.

37 See *Corstens*, Criminal Law in the First Pillar?, [2003] 11/1 European Journal of Crime, Criminal Law and Criminal Justice, 131 (139): during decades it was assumed "that criminal law was off limits for the EC".

38 *Simon*, supra note 3, at 11, accurately speaks of a "myth".

ent from the case law of the ECJ that the process of Europeanisation of national legal systems does not by-pass the field of criminal law. The evolution of Community law oversteps the borders which are traditionally drawn in some Member States between different categories of law such as private and public, administrative and criminal, substantive and procedural law. European integration aims at the practical realisation of certain political goals and it activates all legal instruments available under the Treaties to achieve its ends – regardless of the classification of the affected area of law under national legal systems.[39]

I. The Special Characteristics of Criminal law

In order to understand the influence of Community law on national criminal law one has to take into account the special characteristics of criminal law. The nature of criminal law is well explained by a theoretical concept which was first developed by *Binding* at the end of the 19th century[40] and further specified by other scholars,[41] notably by *Frisch*.[42] According to this concept, criminal law constitutes a secondary protective layer of rules (*secondary order of norms*) that protects the primary layer consisting of rules of conduct (*primary order of norms*). For example, a legal provision prohibiting the dumping of hazardous waste into the sea is a rule of conduct and thus belongs to the primary order of norms, whereas a provision ordering criminal penalties for such conduct fits in the secondary layer called criminal law. By threatening the imposition of a penalty, criminal law creates an incentive to respect the rule of conduct and thus "armours" the latter.

On closer examination, it becomes apparent that this "armouring" comprises different steps that can be put into the four following categories. Firstly, the rules of conduct, whose infringement are to be punishable, must be chosen from the primary order of norms. Secondly, the additional positive and negative conditions of criminal punishability – for instance special characteristics of the offender, the way of commitment of the crime, mens rea etc. – have to be determined. Thirdly, the penalties have to be specified as to their type and their extent. Fourthly, enforcement of penalties has to be regulated.[43] According to the principle of *nulla poena sine*

39 As regards the Europeanisation of the German legal order see *Schoch*, Impulse des Europäischen Gemeinschaftsrechts für die Fortentwicklung der innerstaatlichen Rechtsordnung, [2003] Verwaltungsblätter Baden-Württemberg 297 et seq.

40 See *Binding*, Handbuch des Strafrechts Vol. 1, 1885, p. 9 et seq.

41 *Bierling*, Prinzipienlehre Vol 1: Wesen und allgemeine Struktur des Rechts, 1894, p. 133 et seq.; *Schünemann*, Grund und Grenzen der unechten Unterlassungsdelikte: zugleich ein Beitrag zur strafrechtlichen Methodenlehre, 1971, p. 221 et seq.; *Günther*, Strafrechtswidrigkeit und Strafunrechtsausschluss, 1983, p. 154 et seq.;

42 *Frisch*, Tatbestandsmäßiges Verhalten und Zurechnung des Erfolgs, 1988, p. 112 et seq.; *idem*, Verwaltungsakzessorietät und Tatbestandsverständnis im Umweltstrafrecht, 1993, p. 5 et seq.

43 Sure enough, this is only one possible categorisation.

lege it is for the legislator to create a legal basis for punishment. However, criminal legislation can and normally does leave considerable interpretative freedom to the judge at any of the four before-mentioned stages of penalisation.

Coming back to the phenomenon of Europeanisation of national criminal law, it should be stated at the outset that, theoretically, the process may affect any element of penalisation.[44] As in other areas of law, the most remarkable feature of Europeanisation lies in the power of Community Law to immediately influence the national legal systems[45] via the principles of *direct effect* and *primacy*[46] as well as the *Marleasing* doctrine.[47]

II. Prior Case Law

The influence of Community law on national criminal law may be negative (1.) or positive (2.) in nature.[48] Both effects are apparent from the case law of the ECJ.

1. Negative Integration

Negative Integration designates the phenomenon of Community Law setting a maximum limit for national criminal law. The restriction may concern the rule of conduct (primary order of norms) or the rule of penal law itself (secondary layer of norms).[49]

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44 For a specific example see *Mansdörfer*, supra note 16, at 298 et seq. who provides an overview of the influence that Community law (especially directives and regulations) have on German environmental criminal law.

45 See *Dannecker*, Das materielle Strafrecht im Spannungsfeld des Rechts der EU (Teil II), [2006] JURA 173 et seq.

46 Case C-26/62, *van Gend* & *Loos*, [1962] ECR 3 (direct effect); case C-6/64, *Costa v E.N.E.L.*, [1964], ECR 1141 (primacy); *Jacqué*, Droit Institutionnel de l'Union Européenne, 3rd ed. 2004, paras. 906 et seq.

47 Case C-106/89, *Marleasing*, [1990] ECR I-4135 paras. 7 et seq.; *Craig/De Burca*, supra note 9, at 211 et seq.

48 The differentiation between negative and positive integration is well established – see in particular *Pradel/Corstens*, Droit pénal européen, 2002, p. 481 et seq.; *Vervaele*, The Europeanisation of Criminal Law and the Criminal Law Dimension of European Integation, in: Demaret/Govaere/Hanf (eds.), 30 Years of European legal studies at the College of Europe: Liber Professorum 1973-74 – 2003-04, 2005, p. 277 (280); *Simon*, supra note 3, at 11 et seq. – Sometimes the same categories are labelled differently – see e. g. *Satzger*, Die Europäisierung des Strafrechts, 2001, p. 295 et seq.: Community law as upper limit ("*Obergrenze*") or lower limit ("*Untergrenze*"); see also already *Hartley*, L'Impact du Droit Communautaire sur le Procès Pénal, in: Universita di Parma, Droit Communautaire et Droit Pénal, 1981, p. 33 et seq.

49 *Satzger*, supra note 48, at 93 et seq.; *Simon*, supra note 3, at 11 et seq.

If a national legal rule of conduct is incompatible with Community law and accordingly cannot be applied, a rule of penal law protecting this rule of conduct cannot be applied either. This may be illustrated by the *Danish re-usable container case*, where the ECJ found that Danish waste legislation obliging economic operators to market certain drinks only in authorised re-usable containers was incompatible with Article 28 TEC.[50] It follows from the ECJ's judgment that both the Danish environmental rules of conduct and potentially existing criminal provisions could not be applied with regard to drinks imported from an EC Member State. Thus, persons importing or selling drinks in unauthorised containers from an EC Member could not be prosecuted for this behaviour in Denmark.

Even if a national legal rule of conduct is in compliance with Community law, the corresponding rule of penal law may be inapplicable where the provided sanction is disproportionate as regards its nature or its extent.[51] This was made clear by the ECJ in *Banchero*, where it held in the context of the free movement of goods that "control procedures must not […] be accompanied by a penalty which is so disproportionate to the gravity of the infringement that it becomes an obstacle to the exercise of that freedom […]."[52]

2. Positive Integration

The second face of Europeanisation of criminal law is *positive integration*, meaning that Community law aims at mobilising national criminal law for the enforcement of rules of conduct set by the Community legislator.[53] Thus, Community law calls for national sanctions and constitutes a minimum limit.[54] This effect may derive from primary (a) or from secondary (b) Community law.

a) Primary Law

As regards primary law, the ECJ has used the powerful tool of Article 10 TEC to promote positive integration.[55] According to this fundamental provision, "Member States shall take all appropriate measures […] to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. […]". The ECJ condensed this general principle into a more concrete rule, according to which Member States may be required to armour Community law by way of national sanctions. It did so for the first time in 1984 in the case *von Colson*

50 Case C-302/86, *Commission v. Denmark*, [1988] ECR 4607.

51 *Satzger*, supra note 48, at 94 et seq.

52 Case C-387/93, *Banchero*, [1995] ECR I-4663 para. 58.

53 *Simon*, supra note 3, at 12.

54 *Satzger*, supra note 48, at 97 et seq.

55 As regards Article 10 TEC in general, see e. g. *Jacqué*, supra note 46, para. 953 et seq.

and Kamann, which was, however, limited to *civil* sanctions.[56] As regards penal sanctions, the ECJ made a landmark ruling in 1989 in the *Greek maize case*,[57] where it had to decide on an enforcement action brought by the Commission against Greece for not having taken appropriate action including the imposition of sanctions against private parties who had evaded import levies on maize to the detriment of the Community's finances. There was no provision of secondary law which could have given rise to a correspondent obligation. Against this background, the ECJ held:

> "It should be observed that where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 of the Treaty[58] requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law. For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive."[59]

It appears from this judgment that Member States are obliged to take care of actual implementation of Community law. Their autonomy to choose between different sorts of penalties faces a double restriction: They may not discriminate between the protection of national and Community interests. And they must provide an effective, proportionate and deterrent enforcement regime.[60] Soon thereafter, in *Zwartveld*, the ECJ further specified its finding, stating that the Member States are required to provide for criminal penalties, where this is necessary to ensure effective application of Community law.[61]

b) Secondary Law

While it is thus well-established that primary law can induce positive integration, the question of how far secondary law can be the source of criminal law was and – to a certain extent – still is largely open. The problem is multilayered and contains several intricacies.

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56 Case C-14/83, *Von Colson and Kamann*, [1984] ECR 1891.

57 Case C-68/88, *Commission v. Greece*, [1989] ECR 2965. For a detailed analysis of the judgment see *Satzger*, supra note 48, at 328 et seq.

58 = Article 10 according to post-Amsterdam article numbering.

59 Case C-68/88, *Commission v. Greece*, [1989] ECR 2965 paras. 23-25.

60 *Vervaele*, supra note 44, at 278 et seq. There are notably strong parallels to the Europeanisation of national procedural law; see *Satzger*, supra note 48, at 340 et seq.

61 Order of the ECJ in case C-2/88, *Zwartveld and others*, [1990] ECR I-3365 para. 17.

(1) Unproblematic Aspects

Considering the complexity of the issue, it is advisable to first narrow the problem down by weeding out the unproblematic aspects. To start with, there is no doubt that the Community legislator can endorse the general obligation which the ECJ derived from Article 10 TEC in *Greek Maize*. Such provisions serve as mere reminders and are of a pure declaratory nature[62] – practical examples abound[63].

Furthermore, it is already apparent from the judgment in *Greek Maize* that the ECJ assumed some legislative Community competence regarding sanctions. It developed the above-mentioned general principles with special regard to areas "where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws". Thus, the ECJ presupposes Community power at least for non-penal sanctions, examples for which can easily be found in legislative practice.[64] This suggestion is confirmed by specific case law.

In *Germany v. Commission*, which concerned the fraudulent obtainment of agricultural subsidies, the ECJ clearly stated that the Community has the power to impose penalties where this is necessary to ensure the effective application of Community law, and that these penalties may take various forms.[65] By referring to the idea of effectiveness of Community law, the Court transposed the central reasoning of the *Greek Maize* judgment concerning Article 10 TEC to the Community's legislative competence. Insistently, it made clear that sanctions are by no means off-limits for the Community legislator. However, the ECJ avoided answering the question of whether the Community could require the imposition of penal sanctions. It did so by stating that the sanctions in question were not of a penal nature.[66] Thus, the ECJ established a distinction between penal and other sanctions.

(2) The Notion of "Penal/Criminal Sanctions"

While the ECJ introduced this differentiation, it did not specify the notion of "penal sanctions" – which is a synonymous expression for "criminal sanctions". However, this notion is all but clear. Under the national law of the Member States, sanctions are categorised in different ways, and so far Community law has not developed a uniform concept.[67] Finding a Community notion of "penal sanctions" is a highly

62 *Satzger*, supra note 48, at 101.

63 See e. g. Article 33 of Council Directive 2001/18/EC on the deliberate release into the environment of genetically modified organisms, [2001] OJ L 106/1.

64 The most prominent example stem from competition law – see in particular Article 23 et seq. of Council Regulation 1/2003/EC on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L 1/1 (Modernisation Regulation).

65 Case C-240/90, *Germany v. Commission*, [1992] ECR I-5383 paras. 11-12.

66 Case C-240/90, supra note 65, paras. 24-26.

67 *Satzger*, supra note 48, at 58 et seq.

difficult task that cannot be accomplished within the scope of this article. However, it is possible to narrow the problem down a certain extent by highlighting some central aspects.[68]

In general, sanctions can be categorised with reference to their author, form or substance. Starting off with the criterion author, sanctions imposed by administrative bodies could be classified as administrative whereas sanctions imposed by a court after a special criminal procedure could be classified as penal.[69] However, this is obviously not the approach chosen by the ECJ in the before-mentioned case *Germany v. Commission*. Although the Court does not go into a deep analysis, it is clear that it looks rather at the sanction itself than at its author. Furthermore, there is no reasonable explanation why the administrative or judicial origin of a sanction should be decisive for the delineation of Community competence. A formal categorisation does *a priori* not come into question, as such an approach presupposes a closed legal system of sanctions which does not exist at Community level. Consequently the only reasonable approach is to look at the substance of a sanction.

Taking a substantive approach, the purpose and effect of sanctions are key criteria. Sanctions can aim at restitution (meaning the restoration of the *status quo ante*[70]), prevention (meaning the reduction of a future risk[71]) or retaliation/punishment (meaning the "adjustment" of an infringement of law as such[72]).[73] Generally, sanctions are only considered to be of a penal nature if they imply at least an element of retaliation/punishment as regards their purpose or effect.[74] Accordingly, it would be an easy solution to put all punitive sanctions into the "penal box". However, this box can also be construed in a narrower sense. Many national legal systems distinguish between different sorts of punitive sanctions and reserve the "penal box" to some qualified kind(s) of punishment.[75] The Community legislator has apparently adopted this distinction: For example, competition law regulations explicitly provide that competition law fines, which have undoubtedly a punitive character, "shall not be of a criminal law nature".[76] Unfortunately, the ECJ in *Germany v. Commission* elu-

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68 As regards the following, see *Satzger*, supra note 48, at 58 et seq.

69 See the opinion of AG *Colomer* in case C-387/97, *Commission v. Hellenic Republic*, [2000] ECR I-5047 para. 31.

70 E. g. liability for environmental damage.

71 E. g. order to withdraw a dangerous product from the market.

72 E. g. imprisonment for having committed a murder.

73 *Satzger*, supra note 48, at 69 et seq.

74 *Satzger*, supra note 48, at 70.

75 See *Satzger*, supra note 48, at 72 et seq.

76 See Article 23 (5) of the Modernisation Regulation (see supra note 64); Article 14 (4) of the Merger Regulation – Council Regulation 139/2004/EC on the control of concentrations between undertakings, [2004] OJ L 24/1.

ded the question of whether all punitive sanctions were to be regarded as penal sanctions.[77] Thus, it avoided the directly linked and highly difficult question of which features distinguish penal sanctions from other punitive sanctions.[78] Certainly, as the notion of penal/criminal sanctions has made its way into Community law, the ECJ will have to develop a definition sooner or later. Meanwhile, however, the notion of "penal sanctions" remains blurry.[79]

(3) Community Competence to Provide for Penal Sanctions

Despite the vagueness of the terminology, the differentiation between penal and other punitive sanctions has had a determining influence on practice and doctrine for a long time. Until recently, the Community institutions were reticent with respect to the adoption of penal sanctions. The Commission had not proposed such provisions, and there was no case law from the ECJ which would explicitly recognise any competence on the part of the Community to take legislative action in this field.[80] In *Casati*, the Court rather held that "[i]n principle, criminal legislation and the rules of criminal procedure are matters for which the Member States are still responsible".[81] Clearly, these words were chosen carefully: The ECJ spoke of a "principle" which in legal terminology indicates the possibility of deviations. Furthermore it made the whole principle subject to the word "still" thus signalling that the legal situation could change.

In this case law vacuum, doctrine developed different theories.[82] Some scholars held that there is no legislative Community competence for criminal law whatsoever.[83] In contrast, others argued that the Community has far reaching power to harmonise criminal law in order to make the harmonised rules of conduct effective.[84] Between those two outer positions, some authors took intermediary standpoints, assuming a limited power of the Community legislator to require Member States to

77 *Satzger*, supra note 48, at 86.

78 In this respect, see *Satzger*, supra note 48, at 72 et seq.

79 For a more detailed analysis of the notion of "penal sanctions" see *Satzger*, supra note 48, at 58 et seq.

80 Opinion of AG *Colomer* in case C-176/03, *Commission v. Council*, [2005] ECR I-7879 para. 38.

81 Case C-203/78, *Casati*, [1981] ECR 2595 para. 27; confirmed by later case law, notably in case C-226/97, *Lemmens*, [1998] ECR I-3711, para. 19.

82 For an overview of the standpoints see *Satzger*, supra note 48, at 92 et seq./400 et seq.

83 See e. g. *Pradel/Corstens*, supra note 48, at 430 et seq.; more reticent *Corstens*, supra note 37, at 135 et seq.; *Blanco Cordero*, El Derecho Penal y el Primer Pilar de la Unión Europea, [2004] 06-05 Revista Electronica de Ciencia Penal y Criminología, 22.

84 See e. g. *Vogel*, Stand und Tendenzen der Harmonisierung des materiellen Strafrechts in der Europäischen Union, in: Zieschang/Hilgendorf/Laubenthal (eds.), Strafrecht und Kriminalität in Europa, 2003, at 36 et seq.

provide for criminal sanctions.[85] To sum it up, the question of whether and in how far the Community has power to legislate in the penal sphere was highly disputed and entirely open.

III. The New Aspects Added by the Judgment in Case C-176/03

The judgment of the ECJ in case C-176/03 adds two important aspects to the pre-existing case law. Firstly, it clarifies the relationship between the competences that are attributed to the Community under the first pillar and the powers that are allocated to the Union under the third pillar of the EU (1.). Secondly, it confirms that the EC has some legislative competence in the field of criminal law (2.).

1. Primacy of the First Pillar over the Third Pillar

As regards the relationship between the first and the third pillar, the Council and the intervening Member States had submitted that the existence of a specific title for judicial cooperation in criminal matters which confers competences in this field onto the European Union shows that the authors of the founding treaties wanted to reserve criminal matters to the third pillar.[86] Former practice had always followed that view, the Council having systematically cut out the penal part of Commission's proposal and transferred it to a third pillar instrument.[87] Accordingly, the framework decision in question was held to concern the harmonisation of criminal law and to merely supplement Community law on environmental protection.[88]

The Commission took the opposite position. Its standpoint had already been clear from a working paper of 7 February 2001[89] as well as from its proposed Directive on the Protection of the Environment through Criminal Law.[90] In the working

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85 See in particular *Satzger*, supra note 48, at 98 et seq./405 et seq.; *idem*, Internationales und Europäisches Strafrecht, 2005, chapter 7 and 8; *idem*, supra note 35, at 30 et seq. Similarly *Jacqué*, La question de la base juridique dans le cadre de la justice et des affaires intérieures, in: de Kerchove/ Weyembergh, L'espace pénal européen: enjeux et perspectives, 2002, p. 249 (255 et seq.); *Vervaele*, supra note 48, at 283; *Labayle*, Entre désir et réalités: Quelle voie pour une répression pénale des violations du droit communautaire, [2003] Revue du Marché commun et de l'Union européenne 293.

86 Case C-176/03, *Commission v. Council*, [2005] ECR I-7879 para. 28.

87 See e. g. Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence, [2002] OJ L 328/17, supplemented by Council Framework Decision 2002/ 946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, [2002] OJ L 328/1.

88 Case C-176/03, *Commission v. Council*, [2005] ECR I-7879 para. 34.

89 *Commission*, Staff Working Paper on the establishment of an *acquis* on criminal sanctions against environmental offences, SEC [2001] 227.

90 See supra note 11, at 2 et seq.

paper, the Commission had submitted that according to Article 29, 47 TEU, "all that can be done within the first pillar, shall be done therein",[91] whereas third pillar competences were to be regarded as subsidiary.

The ECJ shared the view of the Commission. It started from the collision rule enshrined in Article 47 TEU and confirmed that the supranational track enjoys primacy.[92] In addition, the ECJ alluded to Article 29 TEU which confirms this principle with respect to the third pillar. This approach implies the invalidity of the Council's main argument: it is not possible to derive from the existence of the specific title for judicial cooperation in criminal matters which confers powers on the Union that the Community has no such powers; on the contrary, one cannot know the powers of the Union without having examined the powers of the Community in advance. The ECJ stressed its finding further by emphasising its own role as a guardian of the powers conferred on the Community against encroachments by measures adopted under the intergovernmental pillars.[93]

With respect to the facts at hand, the ECJ examined whether Articles 1 to 7 of Framework Decision 2003/80/JHA affect Community powers inasmuch as they could have been adopted on the basis of Article 175 TEC.[94] To that end, it recalls that "the protection of the environment constitutes one of the essential objectives of the Community" citing the pertinent Treaty provisions which are Articles 2, 3 (1) (l) and 6.[95] After having pointed out the scheme of powers contained in Articles 174-176 TEC,[96] the Court refers to its settled case law according to which "the choice of the legal basis for a Community measure must rest on objective factors which are amenable to judicial review, including in particular the aim and the content of the measure".[97] As the Court points out, it is clear from the title and the first three recitals of Framework Decision 2003/80/JHA that its objective is the protection of the environment.[98]

91 See Commission Staff Working Paper, supra note 89, at 7.

92 Case C-176/03, *Commission v. Council*, [2005] ECR I-7879 paras. 38-39, 53.

93 Case C-176/03, *Commission v. Council*, [2005] ECR I-7879 para. 39.

94 Case C-176/03, *Commission v. Council*, [2005] ECR I-7879 paras. 40-52.

95 Case C-176/03, *Commission v. Council*, [2005] ECR I-7879 paras. 41-42.

96 Case C-176/03, *Commission v. Council*, [2005] ECR I-7879 paras. 43-44.

97 Case C-176/03, *Commission v. Council*, [2005] ECR I-7879 para. 45.

98 Case C-176/03, *Commission v. Council*, [2005] ECR I-7879 para. 46.

2. EC Competence for Environmental Criminal Law

With respect to the question of whether the Community could harmonise environmental criminal law on the basis of Article 175 (1) TEC, the Council and the intervening Member States – with the exception of the Netherlands –[99] submitted that the Community did not have the alleged legislative competence. They argued that the TEC contained no explicit conferral of such power and that an implicit attribution could not be assumed, given the "considerable significance of criminal law for the sovereignty of the Member States".[100] In order to confirm this interpretation, reference was made to Articles 135, 280 (4) TEC, which exclude Community measures concerning the application of national criminal law or the national administration of justice in the fields of customs cooperation and the protection of the Community's finances.[101]

The Commission argued that Article 175 (1) TEC contained the power to legislate in the field of criminal law. In the before-mentioned working paper, it had stated that, although the Community does not have general competence in criminal matters, it could require the Member States to prescribe criminal penalties for infringements of EC environmental law where this is necessary to ensure the effectiveness of the Community provisions. Accordingly, it argued that Articles 1 to 7 of the Council could and should have been adopted under Article 175 TEC. The Commission did however not maintain that the whole content of the framework decision was covered by EC competence. In particular, it submitted that the rules on jurisdiction, extradition and prosecution could be adopted under the third pillar. However, as those provisions could not exist independently, the Commission applied for annulment of the framework decision in its entirety.[102]

The ECJ concurred with the view of the Commission. It stated that "Articles 2 to 7 of the decision do indeed entail partial harmonisation of the criminal laws of the Member States, in particular as regards the constituent elements of various criminal offences committed to the detriment of the environment."[103] The Court then first of all confirmed its earlier case law according to which "[a]s a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence […]".[104] Yet, subsequently the ECJ moved ahead and established the first exemption to this principle:

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99 The Netherlands accepted a narrow competence of the Community for harmonisation of criminal law. However, they assumed strict conditions which allegedly were not fulfilled in case of the framework directive at hand; case C-176/03, *Commission v. Council*, [2005] ECR I-7879 para. 36.

100 Case C-176/03, *Commission v. Council*, [2005] ECR I-7879 para. 27.

101 Case C-176/03, *Commission v. Council*, [2005] ECR I-7879 para. 28.

102 Case C-176/03, *Commission v. Council*, [2005] ECR I-7879 para. 23.

103 Case C-176/03, *Commission v. Council*, [2005] ECR I-7879 para. 47.

104 Case C-176/03, *Commission v. Council*, [2005] ECR I-7879 para. 47.

> "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."[105]

In the following paragraphs the Court stressed that Article 5 (1) of the framework decision left considerable discretion to the Member States as regards the choice of different criminal penalties. After having added that the acts listed in Article 2 of the framework decision undisputedly included infringements of a considerable number of Community measures, the ECJ drew the conclusion that

> "[…] on account of both their aim and their content, Articles 1 to 7 of the framework decision have as their main purpose the protection of the environment and they could have been properly adopted on the basis of Article 175 EC."[106]

Lastly, the ECJ rejected the Council's argument based on Articles 135, 280 TEC. It stated, in essence, that the reservation of the application of national criminal law in two special fields of Community policy had no influence on the Community's powers to provide for effective environmental protection.[107] The Court then moved on and annulled the entire framework decision, which it held to be indivisible.[108]

C. Analysis of Case C-176/03

The judgment of the ECJ in *Commission v. Council* certainly brings some clarification to the issue of Community competence for environmental criminal law. However, the problem can hardly be regarded as being settled. The ECJ has confirmed the existence of EC competence for criminal law for the first time. According to insider information, the judgment was moreover given on the basis of a very tight majority of 7 to 6 votes.[109] It is therefore worthwhile looking again into the main issues of the litigation, being the relationship between the first and the third pillar (I.), the

105 Case C-176/03, *Commission v. Council*, [2005] ECR I-7879 para. 48.

106 Case C-176/03, *Commission v. Council*, [2005] ECR I-7879 para. 51.

107 Case C-176/03, *Commission v. Council*, [2005] ECR I-7879 para. 52.

108 Case C-176/03, *Commission v. Council*, [2005] ECR I-7879 para. 55.

109 *Krämer*, Seminar on European and International Environmental Law and Policy of 22.3.2006 at the College of Europe, Bruges.

existence of EC competence in the criminal sphere of environmental law (II.) as well as the extent of such competence (III.)

I. Relationship between the First and the Third Pillar

Before looking at the details of the relationship between the supranational and intergovernmental ways of positive integration of criminal law, two preliminary remarks about the third pillar shall be made.

1. Preliminary Remarks

Firstly, it should be noted that, even supposing the provisions of the third pillar were not blocked by Community competence, it is not certain that Union competence would cover the adoption of Framework Decision 2003/80/JHA. As Advocate General *Colomer* noted,[110] Article 29 TEU, which authorises the Union to approximate national criminal law rules, refers to Article 31 (e) TEU which provides for the establishment of "minimum rules [...] in the fields of *organised crime*, *terrorism* and *illicit drug trafficking*".[111] It is doubtful whether Article 31 (c) TEU – which provides that common action on judicial cooperation in criminal matters shall include "ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation" – can serve as an additional legal basis for approximation. It appears rather that the Union's power to approximate substantive criminal law is restricted to the three sectors of organised crime, terrorism and illicit drug trafficking.[112]

The second remark may be useful in order to understand the attitude of the ECJ towards the intergovernmental method in general. The institutional scheme of the third pillar, which has been outlined in general before,[113] shows considerable deficiencies concerning judicial protection. Notably, the Commission can bring no enforcement actions, the competence of the ECJ to make preliminary rulings is subject to individual acknowledgment by the Member States, and the European Parliament has no standing in annulment actions. It is well known that the resulting deficits of judicial control as to the lawfulness of Union acts, their correct interpretation and effective application, is one of the foremost concerns of the ECJ. As its president put it in a submission to the Future of Europe Convention, the third pil-

110 Opinion of AG *Colomer* in case C-176/03, *Commission v. Council*, [2005] ECR I-7879 endnote 15.

111 Emphasis added.

112 See *Weyembergh*, Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme, [2005] 42 CMLR 1567 (1568-1569).

113 See supra A.I.1.a).

lar system is "not entirely satisfactory" with respect to the rule of law.[114] This may explain why the Court tends to favour the supranational method as much as possible.[115]

2. Analysis of the Findings of the ECJ

In *Commission v. Council* the ECJ makes utterly clear that the supranational method is the main road of European integration whilst the intergovernmental ways of the second and third pillar are mere subsidiary sidewalks. According to the Court's interpretation, Article 47 TEU does not only guarantee primacy of EC law over EU law but also attributes priority to Community competences, be they already exercised or not.[116] Thereby, the ECJ seems to completely endorse the Commission's standpoint according to which "all that can be done within the first pillar shall be done therein".[117] With respect to criminal law, this probably means that even where the harmful conduct (first layer of norms) which is to be penalised (second layer of norms)[118] has not been subject to harmonising measures under the first pillar, the Council cannot act under the third pillar but has to prompt the Commission to make a proposal providing for a harmonisation both of the rules of conduct and of the envisaged penalties.[119] The Council can only act under the third pillar as far as the borders of Community competence are overstepped.

It is true that the ECJ's construction of Article 47 TEU is not the only conceivable interpretation. Especially the German wording of the provision[120] would allow a more flexible view, according to which only the exclusive Community competences and exercised concurrent competences take precedence over Union competences.[121] Other linguistic versions of the TEU, notably the English,[122] the French[123] and the Spanish[124] one, are however (slightly) more distinct. Further-

114 Oral presentation by *Rodriguez Iglesias* to the "discussion circle" on the Court of Justice, CONV 572/03, 1-2.

115 See *Chalmers*, The Court of Justice and the Third Pillar, [2005] 30 E.L.Rev. 773 (774).

116 This was not undisputed in doctrine; see for example *Böse*, in: Schwarze (ed.), EU-Kommentar, Article 29 TEU, para. 9.

117 See supra note 89, at 7.

118 See supra B.I.

119 See supra note 89, at 5.

120 [*Der vorliegende Vertrag*] "*lässt [...] die Verträge zur Gründung der Europäischen Gemeinschaften [...] unberührt.*"

121 See *Böse*, Die Zuständigkeit der Europäischen Gemeinschaft für das Strafrecht, [2006] GA 211 (222 et seq.).

122 "[N]othing in this Treaty shall affect the Treaties establishing the European Communities".

123 "[*A*]*ucune disposition du présent traité n'affecte les traités instituant les Communautés européennes*".

more, Article 1 (3) TEU, according to which the European Communities are (merely) "supplemented" by the intergovernmental scheme, points to the ECJ's interpretation. As regards the standing of the case law, it should be noted that the Court had taken its position already in case C-170/96, *Commission v. Council*.[125] At that time, the ECJ followed the opinion of Advocate General *Fenelly* who had stated that Article 47 had been inserted in the TEU "with the very purpose of ensuring that, in exercising their powers under Titles V and VI of that Treaty, the Council and the Member States do not encroach on the powers attributed to the Communities".[126]

Certainly, as long as the borders of EC Competence for criminal law are not exactly defined by the ECJ practical problems will arise. Things become particularly delicate when considering the wide scope of Article 95 TEC as well as the existence of Article 308 TEC[127] which provides for a subsidiary legal basis covering, in principle, Community action with regard to all Community objectives. It appears thus that a large field of material criminal law comes potentially within the range of the first pillar. Consequently it can be noted that the intergovernmental method will mostly come into play where harmonisation of criminal law reaches a depth lying qualitatively beyond Community competence. With regard to the different levels of criminal law outlined above, such depth will mostly not be reached before the second stage of penalisation.[128]

It remains unclear, however, how far harmonisation under the first pillar can go exactly. Suppose the European legislator envisages a measure requiring the Member States to penalise a certain environmental offence with a minimum deprivation of liberty of five years: It is not apparent from *Commission v. Council* whether Article 175 TEC covers the imposition of such a specific sanction. If the answer was in the negative, the European legislator would have to adopt two measures: a directive requiring penalisation as such and a framework decision specifying the sanction – provided the latter would be covered by Union competence. It appears that approximation of criminal laws on European level is quite a tricky task.[129] For the future, the ECJ will have to shed more light on the limits of EC competence.[130] As long as there is no specific case law, it is for doctrine to provide guidance.

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124 "[*N*]*inguna disposición del presente Tratado afectará a los Tratados constitutivos de la Comunidad Europea*".

125 [1998] ECR I-2763 para. 15-16.

126 Opinion of AG *Fennelly* in case 170/96, *Commission v. Council*, [1998] ECR I-2763 para. 8. Approvingly *Jour-Schröder/ Wasmeier*, in: von der Groeben/Schwarze (eds.), Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft, 6th ed. 2003, Vorbem. zu den Artikeln 29 bis 42 EU, para. 50 et seq.

127 *Chalmers*, supra note 115.

128 See supra B.I.

129 See *Chalmers*, supra note 115.

130 *White*, Harmonisation of criminal law under the first pillar, [2006] 31 E.L.Rev. 86 (91).

II. Existence of EC Competence for Environmental Criminal Law

Taking into account that the ECJ's judgment in *Commission v. Council* has no completely settled standing, it is worthwhile taking a broad approach when looking at EC competence for environmental criminal law. As a starting point, it is interesting to compare the new case law with the corresponding provisions of the Treaty establishing a Constitution for Europe (TC).

1. Comparison with the Treaty Establishing a Constitution for Europe

Article III-271 (2) TC contains a legal basis for the approximation of national criminal laws based on and limited by the same fundamental idea as the ECJ's case law, which is the need to ensure the effectiveness of Community law. Consequently, one might conclude that the ECJ has anticipated the coming into force of the TC. On closer inspection, it appears even that Article III-271 (2) TC is drafted more restrictively than the ECJ's reasoning. It limits the Community's power explicitly to the approximation of laws through the adoption of minimum rules where this proves essential. What is more, Article III-271 (3) TC provides for an "emergency brake" procedure[131] pursuant to which a member of the Council, fearing that fundamental aspects of its criminal justice system are compromised, may request the proposal to be referred to the European Council, which can block the procedure. Thus, the ECJ's case law is altogether more pro-integrative than the TC.

One can raise the question whether the ECJ being part of the European *pouvoir constitué* has gone too far by anticipating the coming into force of the TC and pushing integration even further than the *pouvoir constituant* would probably be ready to do.[132] However, as the TC is not in effect, it can neither legitimise nor impede the evolution of the ECJ's case law. In order to evaluate whether the ECJ took a legally correct decision in *Commission v. Council* we must analyse the primary law currently in effect.

2. Analysis of Effective Primary Law

a) No Explicit Exclusion of EC Competence for Environmental Criminal Law

Looking at the current Treaties, there is no provision which generally excludes EC competence for environmental criminal law. As the ECJ correctly stressed, the special rules in Articles 135, 280 (4) TEC are no conclusive argument for a general exclusion.[133] They might just as well serve as the basis for an *argumentum e contrario*,

131 See *Comte*, supra note 21, at 564.

132 See *Satzger*, supra note 35, at 33; *Hefendehl*, supra note 7, at 165.

133 See however the annotation to case C-176/03 by *Heger*, [2006] JZ 310 (312) who argues in favour of an *argumentum a maiore ad minus*; *Satzger*, supra note 35, at 31 interprets Articles 135, 280 (4) TEC

saying that the exclusion of EC competence for criminal law in two limited fields of EC policy shows that such competence is *not* excluded in general.[134] Advocate General *Colomer* went even one step further and stated that the exclusions in Articles 135, 280 (4) TEC did not allude "to the power to create rules, but to the power to apply them".[135] Accordingly, they would be of no importance in this context whatsoever.

b) Analysis of the Pertinent Legal Bases

As regards the possible legal bases for the harmonisation of environmental criminal law, we first have to look at Article 175 TEC. The wording of this provision is very wide. It covers any action for the achievement of the objectives listed in Article 174 TEC, while Article 174 (2) TEC clarifies that Community policy shall aim at a high level of environmental protection.[136] The same is true for the second important legal basis for environmental law, Article 95 TEC, as follows from the third paragraph of the provision. Taking account of the functional structure of these provisions, it becomes clear that harmonising measures in the field of criminal law cannot be excluded as a point of principle. As has been explained before,[137] the notion of criminal law does not stand for a set of rules regulating a certain sector of reality such as the protection of the environment or the establishment of the internal market. Criminal law rather designates a secondary layer of norms that can potentially be found in all sectors of reality which are governed by law, because it is sometimes indispensable to ensure effective application of fundamental rules of conduct. Consequently, a functionally structured legal basis like Article 175 TEC that attributes powers to the Community for the achievement of certain policy goals conceptually comprises legislative power for criminal law. One may call this power a "secondary competence" – criminal law constituting a secondary layer of norms. This logic becomes utterly clear in environmental law: How could a high level of environmental protection be achieved if the Community was not empowered to require the imposition of criminal penalties for crimes which do serious harm to the environment and cannot be impeded by other means than penalisation?[138]

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as a confirmation of the fact that the Community has no competence to create supranational criminal law by way of adopting directly applicable regulations.

134 *Böse*, supra note 139, at 214.

135 Opinion of AG *Colomer* in case C-176/03, *Commission v. Council*, [2005] ECR I-7879 para. 78.

136 See *Mansdörfer*, supra note 16, at 298 et seq. who states – in another context – that the obligation to provide for deterrent penalties corresponds to the Community's objective of ensuring a high level of environmental protection.

137 See supra B.I.

138 To this point see infra C.III.2.c)(2)(b). This is however not generally accepted; see e. g. the annotation to case C-176/03 by *Heger*, supra note 133, at 312; *Hefendehl*, supra note 7, at 163 et seq.

In this regard, it should be added that on the level of competence, the EC institutional system does not make the distinction between the power to create directly applicable criminal law and the power to require Member States to provide for criminal sanctions.[139] This differentiation, which has been developed by doctrine,[140] does not concern the existence of EC competence but the legal form which the Community may use to exercise existing competence.[141] The Protocol on the Application of the Principles of Subsidiarity and Proportionality[142] provides for specific rules in this respect, which will be dealt with later.[143]

Of course, literal and teleological analyses are not the only aspects of legal interpretation. From a historical point of view, it could be argued that the exclusion of criminal law from EC competence was for a long time traditionally assumed.[144] However, Community law accompanies the process of European integration. It is thus necessarily of an evolving, not a static nature.[145] As seen before, Community law has caused positive and negative integration in the field of criminal law since long ago. The new judgment sits comfortably within the preceding line of case law, whose most important representatives are the above mentioned judgments in *Greek Maize*, *Zwartveld* and *Germany v. Commission*.[146] Notably, when the ECJ stated, in judgments such as *Casati* and *Lemmens*, that criminal legislation is a matter for which the Member States are responsible, it did so with care, speaking of a "principle" and indicating a possible change ("still").[147] *Commission v. Council* is consequently not an abrupt movement within the evolution of the ECJ's case law.

c) Member States' Sovereignty

Another objection refers to Member States' sovereignty. The difficulty of this argument lies in the vagueness of the term.

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139 *Wegener/Greenawalt*, supra note 2, at 586; *Böse*, Die Zuständigkeit der Europäischen Gemeinschaft für das Strafrecht, [2006] GA 211 (220 et seq.).

140 In German doctrine, one can find the distinction between "*Strafrechtsetzungskompetenz*" and "*Anweisungskompetenz*" (see supra note 85) – this is misleading: both the adoption of regulations and directives is legislative action (Rechtssetzung), only the legal form differs.

141 *Wegener/Greenawalt*, supra note 2, at 586: „Die Kompetenzfrage ist der Frage nach der Wahl der richtigen Rechtsform nachgelagert."

142 Attached to the Treaty of Amsterdam, [1997] OJ C 340.

143 See infra C.III.2.d) (2).

144 See the submissions of the Council and the Member States in case C-176/03, *Commission v. Council*, [2005] ECR I-7879 para. 31 et seq.

145 See *Jacqué*, supra note 46, paras. 24 et seq.: "Le dynamisme communautaire"; *Böse*, supra note 139, at 213 et seq.

146 See supra B.II.2.

147 See supra B.II.2.b)(3).

If sovereignty means the state's exclusive right to exercise power on its territory, the Member States lost their sovereignty at the latest when the ECJ gave its judgments in *van Gend* & *Loos* and *Costa v. E.N.E.L.*[148] If one conceives sovereignty as a synonym for competence – as the ECJ did in the judgments just mentioned – raising sovereignty against the attribution of competence is an obviously circular argument.[149] Finally, if sovereignty is – more convincingly – understood as a political entity's autonomy to determine its constitutional order, the Member States' sovereignty is not affected by the EC having legislative power for criminal law.[150]

From the above follows that the sovereignty objection cannot justify a total exclusion of EC competence in the field of criminal law.[151] However, the reference to sovereignty indicates that criminal law is a particularly sensitive field of state power. As we will see later, this aspect is endorsed by the principles of subsidiarity and proportionality and can thus limit the exercise of Community competence.

d) Nulla Poena Sine Lege

Finally, EC competence could be impeded by the principle of *nulla poena sine lege*. In *Könicke*, the ECJ hold that "a penalty, even of a non-criminal nature, cannot be imposed unless it rests on a […] legal basis".[152] Like the German Federal Constitutional Court stated for the equivalent provision in the German constitution, the principle *of nulla poena sine lege* has two roots: As an emanation of the rule of law, it aims at ensuring that the individual can recognize *ex ante* with sufficient certainty what conduct the law prohibits and which sanctions can be imposed in case of infringement (*nulla poena sine lege preaevia, certa et stricta*); as a materialisation of the principle of democracy, *nulla poena sine lege* aims at securing a sufficient democratic legitimacy of penal laws (*nulla poena sine lege parlamentaria*).[153] Both the rule of law as well as democracy are principles on which the EU – and thus the EC (see Article 1 [3] TEU) – is founded pursuant to Article 6 (1) TEU. Consequently, the two aspects of *nulla poena sine lege* must be respected on Community level too, though the ECJ in *Könicke* stressed only the first one related to the rule of law.[154]

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148 See supra note 46.

149 Opinion of AG *Colomer* in case C-176/03, *Commission v. Council*, [2005] ECR I-7879 para. 76.

150 Pertinent issues on European level are rather the procedure according to which the Founding Treaties can be altered as well as the question of if and how the Member States can leave the Union – see *Hanf*, The Treaty Establishing a Constitution for Europe: A Flexible Constitution?, in: Demaret/Govaere/Hanf (eds.), supra note 48, at 483 (484).

151 *Böse*, supra note 139, at 212 et seq.

152 Case C-117/83, *Könicke*, [1984] ECR 3291 para. 11.

153 BVerfGE 78, 374 (382).

154 See the opinion of AG *Colomer* in case C-176/03, *Commission v. Council*, [2005] ECR I-7879 para. 77; *Satzger*, supra note 48, at 115.

As regards first the root in the rule of law, legislative action of the Community in the field of criminal law is not necessarily in conflict with the principle *nulla poena sine lege*. In case of adoption of a directive, an implementing national law is indispensable to establish criminal liability,[155] so that legal certainty depends primarily on the national legislator. In case of adoption of a regulation – supposing this is possible[156] – sufficient legal certainty depends on the design of the measure and is not a competence issue.

The second root in the principle of democracy might be more problematic, because it is often argued that the Community suffers from a democratic deficit. However, a certain level of democratic legitimacy cannot be denied.[157] In their entirety, the EU and the Community are institutionally legitimised through the Member States' ratifications of the Founding Treaties. The exercise of Community powers is based on a double legitimacy.[158] While the Council functions as a transmitter of legitimacy founded in the Member States' own constitutional systems, the European Parliament – as far as it is involved – provides for an element of direct democratic legitimacy. Whether *nulla poena sine lege* hinders Community competence for criminal law depends on how the principle is conceived and which level of democratic legitimacy is demanded. In this respect it is interesting to look at existing comparative legal analyses which show that the Member States have very different concepts of *nulla poena sine lege*, and that many of them even allow to a very large extent the setting of criminal law through administrative bodies.[159] Hence, it is submitted that the alleged democratic deficit of the Community is not a sufficient basis to totally deny its competence for criminal law.[160]

It may be remarked in this context that Union action under the third pillar is by no means of higher democratic legitimacy than Community action taken pursuant to the co-decision procedure.[161] It is true that, under the third pillar, the Council decides by unanimity so that the element of indirect legitimacy is enhanced. However, the European Parliament is not (decisively) involved so that the element of direct legitimacy fades to zero.[162] It should be remembered moreover that, under

155 See case C-152/84, *Marshall*, [1986] ECR 723 para. 48.

156 See infra C.III.2.d)(2).

157 See notably *Jacqué*, supra note 46, paras. 98 et seq.

158 See the "*Maastricht*" judgment of the German Federal Constitutional Court, BVerfGE 89, 155 (185 et seq.).

159 *Satzger*, supra note 48, at 129 (with indication of further references).

160 *Satzger*, supra note 48, at 133; *Wegener/Greenawalt*, supra note 2, at 586 et seq.; *Böse*, supra note 139, at 214. This is however not common ground; see e. g. the annotation as to case C-176/03 by *Heger*, supra note 133, at 313: *Die Zustimmung des Europäischen Parlaments* "*ist kein Ersatz*".

161 See *Böse*, supra note 139, at 218: "*Im Hinblick auf die parlamentarische Legitimation erweist sich die Ansiedlung strafrechtlicher Kompetenzen allein in der dritten Säule* […] *als ausgesprochen kontraproduktiv*"; *Satzger*, supra note 35 at 32: "remarkable deficiency".

the third pillar, the Member States' representatives vote in the Council – mostly after very short negotiations – without the need for the involvement of national parliaments.[163] Therefore the decisions of the Council are often not discussed in public and the far-reaching *acquis* of the Union in the domain of criminal law[164] is widely unknown – even amongst parliamentarians and lawyers.

III. Limits of EC Competence for Environmental Criminal Law

From the above follows that the Community has some competence for environmental criminal law. However, its power is not unrestricted. The pertinent legal bases have inherent limits (1.); in addition, the principles of subsidiarity and proportionality set outer borders (2.).

1. Inherent Limits of the Available Legal Bases

In *Commission v. Council* the ECJ states that "as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence […]".[165] This finding implies two consequences. Firstly, it is clear that the Community cannot create a global system of criminal law, but is restricted to impose penalties in the sectors of reality – such as environmental protection – for which legislative power is attributed to the Community by the pertinent legal bases. Secondly, where the EC has such sectoral competence, its power to intervene in the field of criminal law is qualitatively restricted. Lacking a general competence for criminal law the EC cannot establish a universal scheme of basic categories of criminal law. As the Commission puts it "Community law will not be able to oblige Member States to change their fundamental system of criminal law, comprising, for instance, the doctrine of criminal responsibility, the general definitions of guilt, of commission of an offence, of mens rea or of complicity".[166] While it might be theoretically conceivable that the Community harmonises those basic categories of penal law separately in the different fields of Community policy, this would certainly go beyond the scope of sectoral competences like those of Articles 175, 95 TEC. Even if such harmonisation could perhaps somehow contribute to the realisation of

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162 See *Commission*, press release of 23.11.05, MEMO/05/437.

163 See *Perron*, Perspectives of the Harmonization of Criminal Law and Criminal Procedure in the European Union, in: Husabø/Strandbakken (eds.), Harmonization of Criminal Law in Europe, 2005, p. 5 (20): "The respective conventions, framework decisions etc. are mainly negotiated within short periods […] without any adequate parliamentary process, because the national parliaments later have no choice but to accept the Council's decisions […]".

164 See supra note 35.

165 Case C-176/03, *Commission v. Council*, [2005] ECR I-7879 para. 47.

166 *Commission*, supra note 89, at 4.

Community objectives – and notably to environmental protection – it would have its centre of gravity in the improvement of judicial cooperation.[167]

However, it is submitted that Community competence is not necessarily limited to the approximation of the constituent elements of criminal acts but can, within the limits set by Article 5 (3) TEC, also specify the envisaged sanction. This aspect has to be particularly stressed with regard to the opinion submitted by Advocate General *Colomer* which differs in this respect from the judgment of the ECJ. He considered – in line with prominent scholars[168] – that the Community has no power to design penalties at all and submitted therefore that the provision in Article 5 (1) Framework Decision 2003/80/JHA according to which the most serious conduct should be punished with the deprivation of liberty, was not covered by Article 175 TEC.[169] In my opinion, this is not a question of the legal basis which does not provide for such a clear cut borderline, but has to be judged by applying the standards of Article 5 (2, 3) TEC.[170]

2. Subsidiarity and Proportionality

Beyond the inherent restrictions of Community competence, Article 5 (2, 3) TEC sets further conditions. As the pertinent legal bases for environmental criminal law, notably Articles 175 and 95 TEC, do not provide for exclusive Community competences the Community legislator has to respect both the principle of subsidiarity (Article 5 [2] TEC) and the rule of proportionality (Article 5 [3] TEC).

a) Meaning with regard to Legislation in the Criminal Sphere

Applied literally in the present context, the principle of subsidiarity provides that the Community may only harmonise criminal law where a high level of environmental protection cannot be sufficiently achieved by the Member States and can therefore by reason of the scale or effects of the harmonising measure be better achieved on Community level. The principle of proportionality adds the condition that where the Community decides to harmonise criminal law, it may not go beyond what is necessary to achieve a high level of environmental protection.[171]

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167 *Commission*, supra note 89, at 4.

168 *Jacqué*, supra note 85; *Labayle*, supra note 85 at 303.

169 Opinion of AG *Colomer* in case C-176/03, *Commission v. Council*, [2005] ECR I-7879 paras. 84-87, 94.

170 See *Labayle*, supra note 85, at 302: "*La regulation par le principe de proportionnalité et de subsidiarité devient alors l'axe central*".

171 For a general description of Article 5 (2, 3) TEC see *Calliess*, Subsidiaritäts- und Solidaritätsprinzip in der Europäischen Union, 2nd ed. 1999; *Craig/De Búrca*, supra note 9, at 135 et seq.

Traditionally, the ECJ does not go into an in-depth analysis of subsidiarity issues[172] and tends to carry out only a soft proportionality test as far as the principle serves as a barrier to the competences of the EC legislator.[173] This reticence is partially due to the difficult operability and the somewhat political character of the principles. However, (at least) in the sensitive field of criminal law, which the Member States consider to belong to the core of their "sovereignty", closer scrutiny is required. In my view, the ECJ has already taken the first step in this direction by making EC competence for environmental criminal law subject to a necessity test, according to which the Community may only take measures "which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective".[174] While it is true that the ECJ did not explicitly refer to Article 5 (2, 3) TEC when establishing this condition, the necessity test can clearly be considered as a manifestation of subsidiarity and proportionality. In the following, it will be analysed from this perspective.

b) Effectiveness as Legitimising Reason for Community Action

From the necessity test follows, first of all, that the objective of ensuring effectiveness is both the legitimising and the limiting reason for EC competence in the criminal sphere.

(1) Relationship between Effectiveness and Subsidiarity/Proportionality

Indeed, effectiveness can serve as an autonomous basis for the justification of Community measures in the light of subsidiarity and proportionality.[175] Article 5 (2) TEC explicitly refers to the "effects" of Community action. Moreover, effectiveness is a key principle of Community law. It is reflected in the overall institutional structure of the EC, which has been modelled differently from that of classical international organisations in order to ensure that European integration does not remain wishful thinking but becomes an effective and speedy process;[176] correspondingly, effectiveness has soon become a *leitmotif* in the evolution of the ECJ's case law.[177]

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172 See e. g. case C-377/98, *The Netherlands v. Parliament and Council*, [2001] ECR I-7079 para. 30 et seq.

173 See e. g. case C-434/02, *Arnold André*, [2004] ECR 11893 para. 46: lawfulness of a measure can only be affected in case of manifest disproportionality.

174 Similarly *Braun*, Europäische Strafgesetzgebung: Demokratische Strafgesetzlichkeit oder administrative Opportunität, [2006] wistra 121 (124).

175 *Krämer*, in: von der Groeben/Schwarze (eds.), supra note 126, Artikel 174 EG para. 116.

176 Features making the supranational structure of the EC effective are notably: existence of a supranational authority protecting the Community interest; majority voting in the Council; installation of an obligatory supranational jurisdiction; primacy and direct effect of Community law. Com-

Sure enough, effectiveness is not an absolute value of Community law. It conflicts notably with the principles of subsidiarity and proportionality. Corresponding to the last mentioned principles, enforcement of Community law relies largely on a decentralised system of administration and judicial protection, in which it is for the Member States to ensure that Community law is respected on their territory. The principle of effectiveness may however considerably limit national autonomy. It sets the objective and condition that effective implementation of Community law must be ensured.[178]

(2) Modes of Operation of Effectiveness

According to the case law of the ECJ effectiveness operates directly as a principle of primary law enshrined in Article 10 TEC (*Greek Maize; Zwartveld*[179]) as well as *indirectly* by justifying, with respect to Article 5 (2, 3) TEC, the adoption of secondary law (*Commission v. Germany*;[180] *Commission v. Council*[181]). One might raise doubts as to whether effectiveness may really justify the adoption of secondary law regarding the fact that, pursuant to Article 10 TEC, Member States are in any case under the general obligation to provide for effective sanctions. Yet, the two ways of limiting Member States' autonomy are not equivalent. While it is true that Article 10 TEC may require Member States to armour Community rules of conduct with national penal law (*Zwartveld*), this obligation remains vague. It needs to be specified on a case-by-case basis by the ECJ, which can mostly only be reached via a cumbersome enforcement procedure (Art. 226, 227 TEC), or – rarely – via an action for damages against a Member State before the national courts in combination with a request for a preliminary ruling (Article 234 TEC). In both cases, the Member State will enjoy some discretion as to the need for criminal penalties. In contrast, where the Community legislator adopts a provision requiring Member States to impose certain penal sanctions, the obligation is clear and unconditional. Moreover, discretion as to which sanctions are necessary will be attributed to the Community legislator. Accordingly, the second way is more effective than the first one.

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plementary elements providing for legitimacy and judicial protection are in particular: representation of the citizens in the European Parliament; citizens' access to supranational jurisdiction (Article 230 [4], 234 TEC).

177 See *Craig/De Búrca*, supra note 9, at 234 et seq.

178 *Craig/De Búrca*, supra note 9, at 234 et seq.

179 See supra B.II.2.a).

180 See supra B.II.2.b).

181 See supra B.II.2.b).

(3) Effectiveness and Criminal Law

Having concluded that effectiveness can justify legislative Community action, we can now deal with the legitimacy of such action in the criminal sphere. Effectiveness and criminal law are linked by the fact that threatening to impose criminal penalties increases the probability of compliance with environmental rules of conduct. The correlation can be specified by adopting an economic approach. The economic rational presupposes the behaviour of profit-maximising actors who regard sanctions as cost factors. Such actors will only refrain from an infringement of EC environmental legislation if they estimate that the amount of profit (or saved costs) they can derive from non-compliance is lower than possible negative effects (notably sanctions) – taking into account the occurrence probability of both possible consequences.[182] From this perspective, EC environmental standards may be "non-existent" in the Member States where sanctions (and/or their enforcement) are too lenient. As will be demonstrated in a moment, there are situations in which the imposition of criminal penalties is the only sanction capable of creating a deterrent effect.[183]

(4) Excursus: Accomplishment of the Internal Market

The economic perspective reveals another important aspect which is closely associated to the objective of effective enforcement and should be mentioned in this context. Economically speaking, differences between national regimes of sanctions alter the costs of non-compliance with environmental standards. They are thus liable to distort competition. Accordingly, harmonising penalties contributes to the creation of a level playing field for competitors[184] and thus to the realisation of the Internal Market (Article 14 TEC).[185]

c) Prerequisites for the Exercise of EC Competence for Environmental Criminal Law

Having analysed the issue of "effectiveness", the limits of EC competence for environmental criminal law become apparent.

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182 See the fundamental essay of *Becker*, Crime and Punishment: An economic approach, [1968] 76 Journal of Political Economy, p. 169 et seq.

183 See infra C.III.2.c)(2)(b).

184 See *Vogel*, supra note 84 at 36, 37; *Dannecker*, supra note 198 at 97.

185 It is well established that the concept of an Internal Market comprises the creation of a level playing field for competitors – see e. g. case C-300/89, *Commission v. Council (titanium dioxide)*, [1991] ECR I-2867 para. 15; case C-350/92, *Spain v. Council*, [1995] ECR I-1985 para. 32.

(1) Harmonisation of the Corresponding Environmental Rules of Conduct

First of all, making effectiveness the centre of reference of the necessity test implies a functional link between the competence for environmental criminal law (secondary layer of norms) and the competence for environmental rules of conduct (primary layer of norms).[186] It follows from this link that the Community can only legislate in the field of environmental criminal law where the adoption of the corresponding environmental rules of conduct itself is covered by the pertinent legal basis and complies with the principles of subsidiarity and proportionality.[187] In short, the EC cannot penalise conduct which it cannot harmonise.

(2) Necessity of Criminal Law

A further crucial aspect of the ECJ's case law is that the EC legislator may only take measures in the criminal sphere where this is necessary.

(a) Criminal Law as Ultima Ratio of Environmental Regulation

The condition of necessity imports the well established principle according to which criminal law is the *ultima ratio* of regulation by public power. The EC legislator may use the heavy weapon of criminal law only as a last resort where less severe legal means are not sufficient to ensure full effectiveness of Community rules of conduct. It is important to remember that criminal law is only *one* instrument in the toolbox of environmental protection. Other means – like civil liability for environmental damages, administrative control schemes and penalties, the potentially powerful tool of information policy or the creation of economic incentives – can sometimes be sufficient and enjoy, in so far, legal priority.

Interestingly, the prudential use of criminal law is not only legally demanded but corresponds also to the regulatory objective of effectiveness: First of all, other legal means can imply regulatory advantages: They may be easier to handle because of less strict procedural or substantive requirements (e. g. civil/administrative liability); they may create a large incentive in some situations (e. g. withdrawal of the authorisation to run a factory; information of the public about the violation of environmental standards) or they may be particularly well enforceable (e. g. payment of subsidies only if compliance with environmental standards is proved). Moreover, where prosecution authorities feel that criminal penalties are inappropriate, they will be reluctant to apply the pertinent provisions and try to find some way out.[188] It is true

186 See supra B.I.

187 In this respect, see *Krämer*, in: von der Groeben/Schwarze (eds.), supra note 126, Vorbem. zu den Artikeln 174 bis 176 EGV, paras. 106 et seq.

188 *Faure*, European Environmental Criminal Law: Do we really need it?, [2004] European Environmental Law Review 18 (21-22).

that, on the other hand, the public in general often underestimates the seriousness of environmental offences[189] and that penalisation can contribute somewhat to improve public sensitivity. However, such an approach should be handled with utmost care in order not to run the risk of purely symbolic legislation.

(b) Indicators for the Necessity of Criminal Law

Of course, assessing the effectiveness of different legal means is a complex task which requires determining the probable impact of legal provisions on human behaviour. Within the scope of this paper it is only possible to spotlight some crucial points.

Generally speaking, whether the use of criminal law is indispensable depends on the nature of the respective behaviour, notably on its (potentially) harmful consequences for the environment as well as the reasons for which it is carried out. Thus, some types of offences such as, for instance, trade in endangered species and illegal dumping of hazardous waste, clearly call for a criminal law reaction. They do serious harm to the environment and, moreover, are mostly carried out to make profit or save costs. The latter point merits special emphasis: The higher the profit or amount of saved costs is that an infringement of environmental law promises, the more likely it is that non-criminal enforcement measures will not suffice. As mentioned before, rational, profit-maximising actors will only refrain from an offence if they estimate that the amount of profit (or saved costs) they can derive from non-compliance is lower than possible negative effects (notably sanctions) – taking into account the occurrence probability of both possible consequences.[190] Infringements of environmental law can result in huge profits while the risk of prosecution is typically low.[191] A case from the U.K. may illustrate the problem:[192]

In April 2005, two men from the Shetland Islands admitted to be responsible for the illegal landing of 7,600 tons of fish, worth about 3.4 million GBP. Here, civil liability does not work as there is no personalised damage. Administrative penalties cannot create a sufficiently deterrent effect, either: The exclusion from fishing for the future is only a suitable penalty if the fishermen had been allocated a license/quota before. As regards administrative fines, the maximum would have to reach a considerable sum in order to have a deterrent impact on a profit-maximising actor. This may be illustrated by a model calculation: Let us suppose the fishermen had expected a net profit of 3 million GBP and presumed a 20 per cent prob-

189 *Comte/Krämer*, "Preface", in: Comte/Krämer (eds.), supra note 26, 2004, p. V.

190 See supra C.III.2.b)(3).

191 *Comte*, supra note 21, at 495 et seq.

192 See *Watson*, Environmental Crime in the United Kingdom, [2005] European Environmental Law Review 186 (187).

ability of prosecution which would lead to the confiscation of the fish respectively the gained profit. In that situation, the additional fine would have to reach at least 12 million GBP (80 per cent of 3 million = 20 per cent of 12 million); supposing a 10 per cent probability of prosecution the fine would have to reach even 27 million GBP (90 per cent of 3 million = 10 per cent of 27 million). However, the actually available maximum fine in Scotland for breaking EU fishing quota restrictions was 50,000 GBP. What is more, even if a fine of 12 respectively 27 million GBP could be imposed, its deterrent effect would depend on the wrongdoers' ability to pay this sum. The risk that the money cannot be collected calls for the possibility to substitute the pecuniary fine by deprivation of liberty. Here though, we enter the criminal sphere at the latest: Even if the notion of penal/criminal law is not totally clear, the deprivation of liberty for the purpose of punishment is clearly a sanction of penal/criminal character.[193]

Thus, it turns out that in some cases, notably where the two elements of severe (potential) harmfulness to the environment and high profitability can be found, the sharp weapon of criminal law, especially the stigma attached to criminal penalties, is indispensable.[194] To sum it up: criminal law is a necessary tool of environmental protection, but must be handled prudentially.[195]

(c) Level of Judicial Scrutiny

The fact that assessing the necessity of criminal penalties implies a complex factual prognosis has implications for the level of judicial scrutiny the ECJ should apply. It is clear from the judgment in *Commission v. Council* that the ECJ is not willing to substitute the assessment of the EC legislator by carrying out a full evaluation on its own, but rather acknowledges a margin of appreciation. This approach is principally correct as it leads to a fair division of tasks between the legislating Community institutions and the judiciary. However, the ECJ should apply Article 253 TEC seriously and require the EC legislator to provide rigorous reasoning as to the need for a criminal sanction. Otherwise, the condition of necessity is mere window dressing.

(3) Necessity of Harmonised Criminal Law

Even where the imposition of criminal penalties is indispensable to ensure the effectiveness of harmonised environmental standards, it does not necessarily follow that

193 See *Satzger,* supra note 48, at 58 et seq.

194 *Watson*, supra note 192, at 190-191.

195 See *White*, supra note 130, at 90. This his however not generally accepted; see e. g. the annotation as to case C-176/03 by *Heger*, supra note 133, at 312, who argues that the objective of effective implementation of EC directives can only legitimise the order to provide for sanctions, not for penal sanctions.

the Community may exercise its competence. In fact, the Community legislator can only take harmonising measures in the criminal sphere where there is an actual need for coordination. However, such a need can hardly be negated at present. First of all, the significance of environmental protection is still rated very differently in the Member States. The absence of coordinating measures does not only lead to disparities between environmental standards but also to a different assessment as to the appropriate kind and extent of sanctions that shall be imposed in case of infringement of environmental law.[196] In its proposal for a directive on the Protection of the Environment through Criminal Law, the Commission states that "not all Member States provide for criminal sanctions against the most serious breaches of Community law protecting the environment" and that "there are still many cases of severe non-observance of Community law […] which are not subject to sufficiently dissuasive and effective penalties."[197] One must take into account that environmental criminals will try to find and use the "gaps" in the Member States' enforcement regimes, a process which is facilitated through the liberalising of national markets and the abolition of border controls.[198] Accordingly, there is an actual need for coordination in this field.

d) Limits of the Exercise of EC Competence for Environmental Criminal Law

Beyond these prerequisites for the exercise of EC competence for environmental criminal law, the necessity test limits the power of the Community with respect to the content and the form of the envisaged measure.

(1) Content of the Envisaged Measure

Concerning the content of the envisaged measures, Article 7 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality[199] gives useful guidance. It provides that Community measures "should leave as much scope for national decision as possible" and should respect "well established national arrangements and the organisation and working of Member States' legal systems." Thus, harmonisation may not go further than necessary and must take account of the sensitivity of the matters in question. As regards judicial scrutiny, it is submitted again that the ECJ should not substitute the EC legislator's assessment by its own evalu-

196 *Krämer*, in: von der Groeben/Schwarze (eds.), supra note 126, Vorbem. zu den Artikeln 174 bis 176 EG, paras. 113-114.

197 See supra note 11.

198 See *Mansdörfer*, supra note 16, at 298; *Perron*, supra note 163 at 17; *Dannecker*, Das materielle Strafrecht im Spannungsfeld des Rechts der EU (Teil I), [2006] JURA 95.

199 See supra note 142.

ation, but should require a rigorous reasoning under Article 253 TEC. The greater the degree of interference with national systems of criminal law, the higher the standard of reasoning required should be; consequently, a particularly high standard should be applied as regards the harmonisation of the nature and extent of penal sanctions. Where the EC legislator wants to restrict the Member States' discretion as to the kind and extent of the criminal penalty, it must give a consistent justification as to why requiring the imposition of any criminal penalties is not sufficient to ensure effectiveness of the corresponding rules of conduct.

In this respect the judgment of the ECJ in *Commission v. Council* is not entirely satisfactory. The Court does not address the aspect whether the Community legislator could have adopted a provision such as Article 5 (1) of Framework Decision 2003/80/JHA which requires, at least in serious cases of environmental crime, the imposition of penalties involving deprivation of liberty. It rather confines itself to the statement that Article 5 (1) of the framework decision leaves considerable discretion to the Member States as regards the choice of criminal penalties. This is particularly remarkable considering that Advocate General *Colomer* had not only discussed the problem but had come to the conclusion that the Community has no competence to harmonise sanctions.[200] As stated before, I do not share the Advocate General's view: harmonisation of criminal sanctions in the field of environmental law is not categorically off-limits to the EC. On the other hand however, such competence is subject to the principle of proportionality. Taking this principle seriously means requiring rigorous reasoning as to why an approximation of criminal penalties is necessary.

(2) Form of the Envisaged Measure

Finally, as regards the form of the envisaged measure account has to be taken of Article 6 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality.[201] Pursuant to this provision, directives should be preferred to regulations and framework directives to detailed measures. With respect to the sensitive nature of criminal law, which is undeniably regarded as forming part of the core of national "sovereignty",[202] the ECJ should make clear that measures in this field may only be adopted in the form of directives. This would ensure the possibility of the Member States to maintain (or establish) a formally coherent scheme of penal law and would thus enhance legal certainty.[203]

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200 See supra C.III.1.

201 See supra note 142.

202 As to the notion of sovereignty see supra C.II.2.c).

203 *Satzger*, supra note 48, at 90 et seq./393 et seq., comes to the same result, but already denies Community competence for the adoption of directly effective criminal law; *idem*, supra note 35, at 29 et seq.

IV. Scope of the New Case Law

The judgment of the ECJ in case C-176/03 applies directly to Community action in the field of environmental protection on the basis of Article 175 TEC. However, the statement with regard to the relationship between the first and the third pillar is universally valid. The reasoning of the ECJ, which is based on the objective of rendering the Community rules of conduct effective, holds equally for all fields of EC policy.[204] Consequently, the considerations as to the primacy of the supranational over the intergovernmental track of European Integration, the reflections in respect of the existence of EC competence in the field of criminal law and the examination of the limits of such consequences can be transferred to other fields of European policy as far as Community competences are defined by making reference to a certain political objective and primary law does not provide otherwise.

The Commission underlined the broad scope of the new case law in a communication on the implications of the Court's judgment.[205] It pointed out that, as a result of the judgment, several framework decisions listed in the annex to the communication are entirely or partly incorrect. In order to quickly restore legality the Commission proposed to transform the framework decisions into directives without changing the substance of the acts. Should the Council and the Parliament not agree to this procedure, the Commission "threatened" to make use of it power of proposal which would include substantive changes.[206] In one case, where the procedural deadlines had not expired, the Commission brought another annulment action against the Council.[207] Thus it appears that the struggle for legal competence and political power continues.

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204 *Heger*, supra note 133, at 313.

205 COM (2005) 583 final/2, "Communication from the Commission to the European Parliament and the Council on the implications of the Court's judgment of 13 September 2005 (Case C-176/03 Commission v. Council)", para. 6 et seq.

206 COM (2005) 583 final/2, para. 14 et seq.

207 Registered as case C-440/05, *Commission v. Council* (see [2006] OJ C 22 p. 10); the Commission challenges 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, [2005] OJ L 255 p. 164; it argues that the measures provided in Art. 1 to 10 of this framework decision should have been adopted under the chapter on Community transport policy.

D. Conclusion

In *Commission v. Council* the ECJ confirmed the power of the EC legislator to take measures in the field of environmental criminal law for the sake of environmental protection. Looking at the ECJ's prior case law reveals that the decision is a major step but not an abrupt movement within the evolution of Community law. Moreover, an analysis of the Community's system of division of competences shows that the ECJ did not exceed its powers and took a legally correct decision.

I. The Legal Framework for Community Action in the Sphere of Criminal Law

In line with the functional logic of Community law, the pertinent legal bases (Articles 175, 95 TEC) define the conferred competence by making reference to the objective of environmental protection. Consequently, the conferred power is not limited to the harmonisation of (environmental) rules of conduct but equally comprises the adoption of measures which ensure the effectiveness of the harmonised rules.

In the field of criminal law, this "secondary competence" encompasses, in principle, the selection of those rules of conduct which are to be armoured by criminal law, the harmonisation of the constituent elements of criminal acts as well as the approximation of criminal penalties. However, as the Community legislator only has sectoral power for the harmonisation of criminal law, it cannot establish a universal scheme of basic categories of criminal law. Moreover, the exercise of its competence must respect the principles of subsidiarity and proportionality that are reflected in the ECJ's necessity test. Accordingly, the Community legislator can only act, as far as Community action is necessary to ensure the effectiveness of harmonised rules of conduct. This ruling can be fanned out into several prerequisites and conditions. Firstly, the Community can only require the penalisation of conduct which it can harmonise. Moreover, the exercise of EC competence is subject to the condition that the EC legislator gives a decent reasoning as to the necessity of criminal penalties as well as to the necessity of a coordinated approach. Likewise the Community legislator must convincingly justify the depth of the envisaged harmonisation. Finally, in the sensitive field of criminal law the principle of proportionality implies that the Community legislator may only act in the form of a directive.

Although the ECJ made its judgment in case C-176/03 with respect to environmental criminal law, the ruling and the before-mentioned considerations can be transferred to other fields of European policy as far as Community competences are defined by making reference to a certain political objective and as far as primary law does not provide otherwise.

II. Political Outlook

While the judgment of the ECJ in case C-176/03 is legally correct, it may cause factual problems.[208] It has now been a year since the ECJ delivered its ruling, and the Council has still not dealt with the Commission's proposal for a directive on the protection of the environment through criminal law. Thus, it appears that the struggle for political power proves to be more important to the policy makers than the objective of environmental protection.[209] The combat against environmental crime is severely hampered, if the intergovernmental lane is legally blocked and the supranational road is factually jammed. For the sake of environmental protection the Council should accept the new case law and should not block legislative procedures under the first pillar. The coordinated use of criminal law as a last resort of legal enforcement is to some extent indispensable in order to ensure effective environmental protection. The Member States have acknowledged this fact by unanimously adopting the annulled Framework Decision 2003/80/JHA. They should not argue differently under the first pillar. Moreover, those Member States who have approved the Treaty establishing a Constitution for Europe have also consented to the use of the supranational method for the approximation of criminal laws,[210] so that their resistance against the ECJ's judgment is even more inconsistent. Lastly, it should be noted that case C-176/03 has once again revealed the deficiencies of the present institutional system of division of competences and the need for institutional reform.[211] In order to ensure that political struggle does not hinder the realisation of essential policy goals, the European *pouvoir constituant* should adhere to the goal of clarifying the system of division of competences and of unifying the different pillars as envisaged in the Treaty Establishing a Constitution for Europe.

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208 See *Heger*, supra note 133, at 313; *Böse*, supra note 139, at 223 et seq.

209 See *Heger*, supra note 133, at 311 who speaks of a potential virtual victory of Euro-sceptics; see also Hefendehl, supra note 7, at 166.

210 See supra C.II.1.

211 See *Chaltiel*, Arrêt CJCE Commission c./Conseil, du 13 Septembre 2005 – une nouvelle avancée de l'idée de souveraineté européenne: la souveraineté pénale en devenir, [2006] 494 Revue du Marché commun et de l'Union européenne 24.