The Power of the European Community to Impose Criminal Penalties

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

Introduction

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

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

As Advocate General Ruiz-Jarabo Colomer explains in his opinion, what lies behind this dispute is a far-reaching issue, as the choice of one position or the other entails completely different legal and institutional consequences. The fact that the EC could have the power to approximate national criminal laws, not only in the field of environmental crime – as the ECJ has ruled – but also in the framework of other policy areas of the Community, would ipso facto imply the application of the Community method to the detriment of the intergovernmental rules foreseen in Title VI of the Treaty of Maastricht.

The legal and institutional constraints of the EU Treaty

In order to understand what lies behind the dispute, it is important to highlight the reasons why the Commission submitted a proposal for a Community Directive intended to oblige the Member States to provide for criminal sanctions in the environmental field, rather than a proposal for a FD – as Denmark actually did. The difficulties that arise from the current legal and institutional framework of the EU...
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has held through its constant jurisprudence. That Community Directives can have direct effect, as the ECJ context of the first pillar, on the other hand, there is no doubt action if a Member State fails to transpose the act. In the means that citizens can in no circumstances take legal intentions to respond with concerted action to the disturbing increase in offences posing a threat to the environment. In articles of the legal basis is important in this case because of the special institutional features of Title VI EU which, inter alia, does not have any equivalent to the infringement procedure.

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

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

The Council, considering that the proposal for a Directive did not reach the majority required for its adoption and that it went beyond the powers attributed to the Community by the EC Treaty, decided to adopt the FD on the basis of Title VI EU. The Commission appended the statement cited below to the minutes of the Council meeting at which the FD was adopted.

Legal arguments of the parties

As already cited above, the Commission, although it does not claim that the European Community has a general competence in criminal matters, submits that “the Community legislature is competent, under Article 175 EC, to require the Member States to prescribe criminal penalties for infringements of Community environmental-protection legislation if it takes the view that that is a necessary means of ensuring that the legislation is effective. The harmonisation of national criminal laws, in particular of the constituent elements of environmental offences to which criminal
penalties attach, is designed to be an aid to the Community policy in question".33 It is clear that criminal law is not to be considered as a Community policy, but just as a means to ensure the effectiveness of the environmental policy.

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

Finally, the Commission also puts forward a ground of challenge alleging abuse of process (paragraph 24 of the judgement). “Recitals 5 and 7 in the preamble to the FD35 and that whenever...”42 In the judgement of the ECJ on airport transit visas,43 it was made clear that the choice of an instrument under Title VI EU was based on considerations of expediency, since the proposed directive had failed to obtain the majority required for its adoption because a majority of Member States had refused to recognise that the Community had the necessary powers to require the Member States to prescribe criminal penalties for environmental offences’.

The Council, supported by 11 Member States, argues that the Community does not have the power mentioned. Paragraph 27 states that “not only is there no express conferral of power in that regard, but, given the considerable significance of criminal law for the sovereignty of the Member States, there are no grounds for accepting that this power can have been implicitly transferred to the Community at the time when specific substantive competences, such as those exercised under Article 175 EC, were conferred on it”. The Council therefore concludes that, given the absence of an explicit provision on criminal law, the parties to the EC Treaty did not envisage harmonisation measures regarding criminal matters. It is also argued that the Court has never obliged the Member States to adopt criminal penalties, that legislative practice also follows that interpretation44 and that whenever the Commission has proposed to the Council that a Community measure having implications for criminal matters be adopted, the Council has detached the criminal part of that measure so that it may be dealt with in a FD36 (see paragraphs 31 to 33).

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

The position of The Netherlands is quite interesting as it acknowledges that the Community may require the Member States to provide for criminal sanctions, provided that the penalty is inseparably linked to the relevant substantive Community provisions and that it can actually be shown that imposing penalties under criminal law in that way is necessary for the achievement of the objectives of the Treaty in the area concerned.39 In this case the Dutch Government considers that the penalties foreseen are not inseparably linked to the environmental provisions of the EC and therefore it concludes that the harmonisation of criminal law in this field can only be operated from the third pillar.

The EC Treaty priority

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

According to Articles 47 and 29 EU,45 the EU institutions are not free to choose between a first or a third pillar instrument, as it is established that the EC Treaty has priority over the EU Treaty. Therefore, an instrument under Title VI EU can only be adopted so long as it does not affect any Community competence.46 It also needs to be kept in mind that “Article 47 EU not only refers to conflicts of existing provisions, but also to competencies as such. In this vein, a third pillar act extending to an area in the Community’s competence would violate Art. 47 EU even if its contents did not contradict any Community law provision.”47 In the judgement of the ECJ on airport transit visas,48 it was made clear that third pillar instruments cannot trespass into the area of Community competence and that they can be declared void in an action for annulment.

The judgement of the ECJ and its consequences

Much to the regret of the Council and the considerable number of Member States that submitted written observations, the Court ruled in the Commission’s favour. Taking into account the aim and the content of the FD, the ECJ found that although “as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community’s competence”, “the EC, when the application of effective, proportionate and dissuasive criminal penalties
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annulled, have been taken on erroneous legal bases. In order to restore legality as soon as possible, the Commission proposes that an agreement should be reached by the three institutions (Commission, EP and Council) on introducing a simple and speedy procedure for the adoption of directives or other Community legislative measures to replace those framework decisions. If this approach is followed, “the Commission’s proposals would not contain any provisions which differed in substance from those of the acts adopted, even where the Commission felt that those acts were not satisfactory”.

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

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

The Constitutional Treaty and the harmonisation of criminal law

The entry into force of the Constitutional Treaty, in its current form, would be crucial for the completion of the Area of Freedom, Security and Justice. One has to acknowledge, however, that its future is now very much in doubt, mainly after the blows received from the French and Dutch referenda. As Wasmeier explains, “the Constitution merges the first and third pillars into a single legal framework. This entails that there will no longer be different legal procedures for the Community and the Union. The same legal instruments (European laws and European framework laws) and the co-decision procedure will apply to both areas, and the infringement procedure will be extended to criminal matters”.

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

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

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

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

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

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

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

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

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

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

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

See, in particular, Articles 29, 31(e) and 34(2)(b) EU. The pillar structure of the EU was introduced by the Maastricht Treaty, which entered into force in November 1993. The third pillar included the bulk of justice and Home Affairs cooperation. The Amsterdam Treaty transferred immigration, asylum and civil cooperation to the first pillar (title IV EC); police and judicial cooperation in criminal matters remains in the third pillar. The European Commission’s position is clearly indicated in the judgement of 13 September 2005, cited above at n.1, para. [19]. See also proposal for a Directive on the protection of the environment through criminal law [2001] O J C 180E/238; and amended Proposal [2003] C 020E/284.

See paras. [26] and [27] of the judgement cited above at n.1. Opinion delivered on 26 May 2005, Case C-176/03, paras. [2] and [4].

It is remarkable that 11 Member States – Denmark, Germany, Greece, Spain, France, Ireland, the Netherlands, Portugal, Finland and the UK – have submitted written observations to support the position of the Council of the EU. The European Commission has been supported by the European Parliament. See, for example, the reaction of the British press on 14 September 2005. Editorial from The Times: “Legal trespass: The European Court has gravely undermined the sovereignty of EU States”, page 19; also in The Times: “Europe wins the power to jail British citizens”; The Guardian: “Brussels won’t shut down criminal activity it is necessary to stress that direct effect remains, for the time being, excluded from the third pillar, as explicitly established in Art. 34 EU.

For detailed information in this respect, see P. Craig and G. de Búrca, EU Law: Text, Cases and Materials, [2003], pp. 178-229. See Communication cited above at n. 18, pp. 4-5.

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

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

See Arts. 226-228 EC. In the framework of the first pillar, the ECJ can even impose a penalty payment on those Member States that have not complied with a previous judgement. OJ C 135/21 of 7/6/2003.

Cited above at n. 2.

Article 2 provides that “each Member State shall take the necessary measures to establish as criminal offences under its domestic law: (a) the discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water which causes death or serious injury to any person; (b) the unlawful discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water which causes or is likely to cause their lasting or substantial deterioration or death or serious injury to any person or substantial damage to protected monuments, other protected objects, property, animals or plants; (c) the unlawful disposal, treatment, storage, transport, export or import of waste, including hazardous waste, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants; (d) the unlawful operation of a plant in which a dangerous activity is carried out and which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants; (e) the unlawful manufacture, treatment, storage, use, transport, export or
import of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants; (f) the unlawful possession, taking, damaging, killing or trading of or in protected wild fauna and flora species or parts thereof, at least where they are threatened with extinction as defined under national law; (g) the unlawful trade in ozone-depleting substances ....


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

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

Paragraph 39 of the judgement cited above at n. 1.

See paragraph 301 and [21] of the mentioned judgement.

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


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

See also paragraph 29 of the judgement.

See paragraph 36 of the judgement.

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

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


See n. 6.

Paragraph 97.

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


Paragraph 6 of the mentioned Communication.

Paragraph 8 of the mentioned Communication.

Paragraph 11 of the mentioned Communication.

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

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

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


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


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

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

Constitution, Arts. I-32 et seq., III-171 et seq., and III-302. However, the approach of the Constitution is not finally so integrationist, as the UK succeeded by the end of the political negotiations in introducing a mechanism for the suspension of the co-decision procedure in those cases where a Member State considers that a draft European framework law would affect fundamental aspects of its criminal justice system (Art. III-271, paragraphs 3 and 4).