

Constitutional limits of European Community criminal law

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Abstract

Two recent decisions of the European Court of Justice in the field of criminal sanctions have raised a considerable amount of academic interest. Its decision in *Case C-176/03 Commission v Council (Environmental Legislation Litigation)* confirmed the Community has the implied power to harmonise criminal laws in relation to other Treaty competences. Its earlier decision in *Case C-105/03 Pupino* established a requirement of sympathetic interpretation in relation to Union third pillar framework decisions, furthering the legal impact of instruments which on the basis of the Treaty on European Union were previously thought to be incapable of supranational legal effects. However revolutionary both of these decisions may seem, this paper will consider the limitations inherent in both Community and Union legal orders as well as these and subsequent cases that mitigate the practical effects of these judgments. It will discuss the legal circumstances under which the Communautizing effects of *Case C-176/03* are applicable and proceed to examine the remaining limitations of Union framework decisions in the field of criminal law. Whilst the ECJ has developed the notion of Community criminal competence, this paper will demonstrate that its effects are primarily upon the vertical division of competences in the Union rather than on the criminal law liability of individuals. This is in part because the ECJ has maintained in *Berlusconi* and other recent cases its position that Community directives and Union framework decisions are incapable of detrimentally affecting defendants' legal rights, and in part because a number of developments raise questions as to the feasibility of directly applicable criminal law Regulations.

1. Introduction: Community Criminal Law?

To many Community lawyers, the cases under discussion here will require little introduction. In two seminal judgments examining the ancillary criminal law competence of the Community and the legal effects of Union framework decisions in the field, the European Court of Justice challenged within the span of six months fundamental presumptions about the nature and legal effects of criminal law rules emanating from the Union's institutions in Brussels. In the *Environmental Legislation Litigation* case,¹ the Grand Chamber of the European Court of Justice declared that despite even the Commission's doubts in the matter,² the Community had the competence to require criminal penalties in the field of environmental protection. In *Pupino*,³ the Grand Chamber declared that Framework Decisions were, despite the express denial of direct effect in the Treaty on European Union, capable of indirect effect. The cumulative effect of these judgments is that the Union and the Community are capable of not only positively harmonizing criminal law in many areas thought outside their competence, but that those rules may be capable of having more than a nominal impact on the rights of suspects even without transposition by Member States.

Much scholarship in the field has already been undertaken in the two years that have passed since the first of these judgments.⁴ The purpose of this paper is not primarily to reiterate those findings, but to expound some critical perspectives on the constitutional limits that are either inherent in these two judgments or have been expressed in the Court's prior case law on the relationship of European-level instruments and domestic principles of criminal law. It may be tempting to raise an alarm, signaling the Union's encroachment on yet another core area of national sovereignty as many British publications of record did following the *Environmental Legislation Litigation*.⁵ This examination will instead focus on the limits imposed upon these developments by the formulae within those judgments, the pre-existing corpus of settled doctrines relevant to the field including some general principles of Community law and the foundational doctrines of direct effect and sympathetic interpretation, and the past case law of the Court in areas where the criminal liabilities of individuals are indirectly derived from Community law. However revolutionary both of these judgments may initially seem, there are legal limitations inherent in both Community and Union legal orders that mitigate the practical effects of these decisions. Whilst the ECJ has developed the notion that some Community criminal competence may exist, this paper will demonstrate that its effects are primarily upon

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

² Commission of the European Communities, *Eighth Report of Activities*, 1974 point 145. Guldenmund, R. and Westeroun van Meeteren, L., 'Towards and Administrative Sanctioning System in the Common Agricultural Policy' in Harding, C. and Swart, B., *Enforcing European Community Rules* (Aldershot: Dartmouth, 1996) pp. 103-123 at p. 107.

³ Case C-105/03 *Criminal proceedings against Maria Pupino*.

⁴ See for example Tobler, C., 'Commission v Council, Judgment of the Grand Chamber of September 13, 2005 nyr' (2006) 43(3) *Common Market Law Review* 835-854; Chalmers, D., Editorial: The Court of Justice and the Third Pillar (2005) 30(6) *European Law Review* 773-774; Fletcher, M., 'Extending "Indirect Effect" to the third pillar: The significance of Pupino' (2005) 30(6) *European Law Review* 862-877; White, S., 'Harmonisation of criminal law under the first pillar' (2006) 31(1) *European Law Review* 81-92 and 'Case C-176/03 and Options for the Development of a Community Criminal Law' (2006) 3-4 *EUCrim Forum* 93-100; Vervaele, J., 'The European Community and Harmonisation of the Criminal Law Enforcement of Community Policy' (2006) 3-4 *EUCrim Forum* 87-93.

⁵ For example the London *Times* reported 'Europe Wins the Power to Jail British Citizens' *The Times*, September 14, 2005 p.1.

the vertical division of competences in the Union rather than on the criminal law liability of individuals. This is in part because the ECJ has maintained in its case law the position that neither Community directives nor Union framework decisions are capable of detrimentally affecting defendants' legal rights, and in part because the constitutional Community legal bases for action in most fields preclude the use of Regulations for the establishment of particular criminal offences or penalties even where this is otherwise legally and politically feasible.

2. The Constitutional framework for European criminal law

2.1 'Effectiveness' as a constitutional benchmark for Community law

The Treaty Establishing the European Economic Community originally expressed few of the features that came to distinguish Community law from the body of public international law that regulates the relations of sovereign States and was seen by many as a framework for international relations rather than a binding system of law. Although the preamble expressed a desire for an 'ever closer union', it was the Court of Justice, rather than the Member States through express Treaty provisions that developed principles of supremacy,⁶ direct effect,⁷ sympathetic interpretation⁸ and state liability.⁹ From the outset, the Community was capable of creating regulations that, without further measures by Member States, became directly applicable in national legal systems,¹⁰ supreme even over national constitutional provisions.¹¹ The Court of Justice recognised that '[b]y creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have... created a body of law which binds both their nationals and themselves.'¹² In the nearly fifty years since the establishment of the EEC, the Community has developed a broad set of objectives that extends well beyond the core economic freedoms with which the Community is often identified.¹³ Many of these have been appended through subsequent Treaties, but some, such as the environmental competence, have originally developed through the Court's creative jurisprudence that enabled Member States to establish novel principles ostensibly for the purpose of effectively implementing economic policies.¹⁴ Similar reasoning was employed in the *Environmental Legislation Litigation* case to justify why the Community has the power to require Member States to employ 'effective, dissuasive and proportionate criminal penalties' to protect the environment.¹⁵

⁶ *Costa v ENEL* Case 6/64.

⁷ *Van Gend en Loos* Case 26/62.

⁸ *Von Colson*, Case 14/83.

⁹ State liability now extends to judicial decisions contrary to Community law: *Kobler* Case C-224/01.

¹⁰ Article 189 EEC Treaty, now Article 249 EC.

¹¹ *Internationale Handelsgesellschaft* Case 11/70.

¹² *Costa v ENEL* Case 6/64 paragraph 3.

¹³ In particular, Articles 2 and 3 EC.

¹⁴ *Commission v Italy*, Case 91/79; *ADBHU* Case 240/83. Now Article 3(1)(l)TEC.

¹⁵ *Commission v Council*, Case C-176/03 paragraph 48. 'Effective, dissuasive, and proportionate' has a long-standing history in case law; the innovation in C-176/03 was the insertion of 'criminal' into the formula.

2.2 Legal bases and the common market

It might be inferred that the EC Treaty did not confer competence on matters relating to the positive harmonisation of criminal law. The idea of a European federal criminal law in the context of the European Community is a contentious proposition that has been approached by many Member States with caution if not outright rejection. Their timidity is illustrated by numerous express references in the Treaties attempting to restrict within the supranational corpus of EC law the scope of powers evolved from Member States relating to criminal law. The Court has consistently noted that ‘as a general rule neither criminal law nor criminal procedure fall within Community competence.’¹⁶ The Community competences enumerated in article 3(1) EC Treaty are for the most part clearly linked to the Article 2 task of ‘establishing a common market’. Many of the potentially more expansive ‘activities of the Community’, including the approximation of laws, are limited to the extent to which they are required for the ‘functioning of the common market.’¹⁷ Article 94 requires approximating measures to ‘directly affect the establishment or functioning of the common market.’ Article 95 refers to the objective of ‘establishment and functioning of the common market’ and requires a genuine objective of improving the preconditions of the internal market.¹⁸ Article 308, providing for the creation of further powers necessary to ‘attain, in the course of the operation of the common market, one of the objectives of the Community’ again requires a tie to the objectives of the community that are related to the operation of the common market and can only be invoked where no other Treaty legal base would suffice. Whenever one of these general legal bases is cited, there must be a common market dimension to any approximation of criminal laws under the EC Treaty.

2.3 Crime in the EC Treaty

There is sufficient textual evidence to question whether the approximation of criminal law was intended to fall within the EC Treaty at all. When crime is mentioned in the Community treaty, it is to expressly preclude Community criminal competence. In relation to visa, asylum and immigration policy, originally an area of intergovernmental Union cooperation, Article 61(a) EC precludes the extension of Community competence to measures to prevent and combat crime in relation to external border controls, asylum, and immigration. Article 61(e) expressly reserves ‘measures in the field of police and judicial co-operation in criminal matters aimed at a high level of security by preventing and combating crime within the Union’ to the Union. In the field of customs co-operation, the EC Treaty excludes measures concerning ‘the application of national criminal law or the national administration of justice’¹⁹. Such measures are also excluded from the community competence to fight fraud against its institutions.²⁰ The framers of the treaty may have intended to exclude Community competence in relation to criminal law in the areas where it may otherwise conceivably become contested for the reason that it may be necessary for the effectiveness of the Community legal order. There is no universal express State reservation of criminal competence in the Treaty. However, the limitation of relevant provisions to the common market coupled with express reservations in areas that

¹⁶ Case 203/80 *Casati* paragraph 27; case C-226/97 *Lemmens* paragraph 19. *Commission v Council* case C-176/03 paragraph 47.

¹⁷ Article 3(1)(h) approximation of the laws of Member States.

¹⁸ *Case C-376/98 Tobacco Advertising Directive* paragraphs 83-84.

¹⁹ Article 135 EC.

²⁰ Article 280(4) EC.

extend beyond market liberalisation lead the casual observer to conclude that the Community is intended to have no power to harmonise criminal law. Indeed, in secondary legislation relating to the internal market, including all relevant legislation in areas where the Community has powers of enforcement, express reference is made to preclude any notion of criminal law powers being exercised.²¹ This can be read as a requirement for political agreement in that an express limit in the context of Community law was required to obtain the passage of that secondary legislation.

2.4 Criminal law in the Treaty on European Union

Turning to the Treaty on European Union, the objectives of the Union relevant to criminal law are in relation to providing a ‘high level of safety within the area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters’.²² The ‘approximation, where necessary, of rules on criminal matters in the Member States,’²³ envisages ‘progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking’.²⁴ The approximation of rules on criminal matters prevents and combats ‘crime, organised or otherwise’. Article 29 lists ‘terrorism, trafficking in persons, offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud’ as particular examples but does not expressly preclude the inclusion of others. It is far from clear that offences against children necessarily involve an inter-state element, dismissing any notion that the area of freedom, security and justice must be directly linked to the common market. However, the methods of achieving the area of freedom, security and justice, prescribed as ‘preventing and combating crime’ are further specified in Article 29. Simply any subjectively suitable method will not suffice; closer cooperation between the executive authorities of Member States, judicial authorities and Eurojust are governed ‘in accordance with the provisions of Articles 30 and 32’. Crucially, the third form of action, approximation ‘of rules on criminal matters’, is governed by article 31(1)(e), which lays down rules and limits to the competence of the Union to approximate rules on criminal matters. According to Article 31(1), ‘Common action on judicial co-operation in criminal matters shall include... (e) progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking’. The form of words in Article 31 is somewhat unfortunate in that it is drafted in a permissive tone, rather than as the limiting provision envisaged by article 29. The inclusive ‘shall include’ of the Treaty is hardly a limiting provision, as would be for example ‘shall only include’. If express conferral was to be required in the field, Article 31(1)(e) could be read in at least two substantially different ways. One, more restrictive interpretation, calls for the consideration of ‘in the fields of organised crime, terrorism, and illicit drug trafficking’ as a limiting provision applicable to both ‘minimum rules relating to the constituent elements of criminal acts *and* to penalties’. The other, liberal interpretation, severs ‘minimum rules relating to the constituent elements of criminal acts’ and the penalties in limited fields. In the first example,

²¹ For example, council Regulation 17/62 on the enforcement of competition law; Directive 6/2003 on market abuse refers to purely administrative sanctions (article 14). Regulation 1/2003 replicates the sentiments of Regulation 17/62.

²² Article 29 TEU.

²³ Article 29 TEU.

²⁴ Article 31(1)(e) TEU.

Union powers are limited to three areas which are recognised to pose particular problems within an internal market characterised by the free movement of the factors of production, but the restricted movement of law enforcement authorities and criminal laws. The second, liberal interpretation, permits Union action in penal policy only in so far as it is related to the three listed areas but leaves unfettered an expansive power to enact minimum rules related to the 'constituent elements of criminal acts'. Some Union legislation suggests that neither interpretation of the Treaty limits is observed, and that the list is non-exhaustive.²⁵ In any case, the distinction now seems somewhat academic considering the possibility of powers implied by the EC Treaty.

2.5 Legal distinctions between Union and Community

In the field of civil law rules, there is a legal significance to the distinction between the Community and Union. Beyond the first pillar, the Union has few of the mechanisms of adjudication available within the Community and therefore there is little risk that corresponding legislation with relevance to criminal law in the context of the Union is in itself binding, 'hard' law.²⁶ Substantive developments in the field of criminal law were for the most part consigned to this intergovernmental third 'pillar' of the European Union, currently referred to as the title on Police and Judicial Cooperation in Criminal Matters.²⁷ The Court of Justice generally only has jurisdiction to give rulings on the validity and interpretation of Union legal instruments where a Member State accepts the Court's jurisdiction.²⁸ Secondly, many of the doctrines that have extended the power of Community rules in the past 50 years of economic integration are inapplicable to Union law, having been omitted in or expressly excluded by the Treaty on European Union.²⁹ These limits result in the weaker independent legal standing of policies formulated under the aegis of the Union. Rules created under the first, Community pillar could in principle have created enforceable rights in national courts. Without the active implementation and execution of Union policies by Member States, the legal standing of individuals seemed largely unaffected.

3. The *Environmental Legislation Litigation* and *Pupino* cases

3.1 *Environmental Legislation Litigation* and *Pupino*

The *Environmental Legislation Litigation* case involved an action for the annulment of Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law on the basis that it encroached on the Community's competence to protect the environment under Articles 174-176 EC.

²⁵ See for example 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, challenged in C-440/05 (awaiting the Advocate General's opinion as of May 9, 2007).

²⁶ The *Environmental Legislation Litigation* case was heard on the basis of an implied jurisdiction in the EC Treaty.

²⁷ Formerly known as 'Justice and Home Affairs', the current moniker reflects the transfer of powers in the fields of visas, asylum, immigration and other measures concerned with securing the free movement of persons to the supranational EC pillar.

²⁸ TEU Articles 35(1), (2) and (3). This 'soft law' character of Union instruments is further complicated by the limited jurisdiction of the ECJ in relation to third pillar secondary legislation. On the (limited) effects of communitising Title IV EU, see Nascimbene, B, 'Community Courts in the Area of Judicial Cooperation' (2005) 54 ICLQ 489-497.

²⁹ TEU Article 34(2)(b) and (c), excluding the direct effects of framework decisions and decisions, the two instruments declared 'binding'.

The substance of the Framework Decision was similar to a previous proposal by the Commission on a Directive that, as the framework decision, would require Member States to establish criminal penalties in relation to defined offences.³⁰ In the *Environmental Legislation Litigation* case, the Court of Justice found that despite the general rule derived from its case law that ‘neither criminal law nor the rules of criminal procedure fall within the Community’s competence,³¹ the Community was nevertheless empowered to take ‘measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective’.³² The EC Treaty was hierarchically superior to the EU Treaty, and therefore if a competence could be implied under the EC Treaty, rules derived from the EU Treaty could not affect the limits or exercise of that competence.³³ In this case, the Court considered the purpose to be the protection of the Environment, a Community competence, rather than the harmonisation of criminal law which without such a link remains outside Community competence.³⁴ The one limit to the ancillary Community criminal competence recognised by the Commission, namely that the Union treaty is ‘the appropriate legal basis for the provisions... which deal with jurisdiction, extradition and prosecutions of persons who have committed offences,’³⁵ relies on provisions within the Treaty on European Union. It may therefore also be subject to challenge on the same basis as the Framework Decision in the *Environmental Legislation Litigation* if it can be shown that these, too are necessary facets of effective Community law.

In the somewhat less well-known case of *Pupino*, the Court of Justice was invited to consider the effects that an unimplemented Framework Decision on the standing of victims in criminal proceedings³⁶ could have on the interpretation of domestic criminal procedural rules. The relevant domestic legislation allowed testimony from minors to be obtained under special evidentiary rules in the case of sexual offences, but made no special dispensation for other types of vulnerable victims.³⁷ However, the framework decision applied irrespective of the types of offence, having instead been drafted to protect ‘particularly vulnerable’ victims,³⁸ and required Member States to obtain testimony from victims ‘where there is a need to protect victims – particularly those most vulnerable – from the effects of giving evidence in open court... by any appropriate means compatible with its basic legal principles’.³⁹ The offences in question were not sexual offences, thereby precluding the domestic procedural exception from the rule requiring adversarial proceedings. In its question, the national court asked whether the Framework Decision required it to authorise young children to give testimony in circumstances that enabled the level of protection

³⁰ Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law COM(2001) 139 of 13 March 2001; amended proposal COOM(2002) 544.

³¹ Paragraph 47, citing Case 203/80 *Casati* paragraph 27 and Case C-226/97 *Lemmens* paragraph 19.

³² Paragraph 48.

³³ Paragraphs 38-39.

³⁴ Paragraph 51.

³⁵ *Environmental Legislation Litigation* paragraph 23.

³⁶ Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings.

³⁷ Paragraphs 10 and 11 Case C-105/03.

³⁸ Article 2 Framework Decision 2001/220/JHA.

³⁹ Article 8(4) Framework Decision 2001/220/JHA.

required by the Framework Decision.⁴⁰ In its answer, the Court stated that despite the general language used,⁴¹ the Framework Decision required a special procedure to be used to protect vulnerable victims.⁴² After some discussion of the protections required for defendants, it concluded nevertheless that the Framework Decision required the national court to be able to ‘authorise young children who... claim to have been victims of maltreatment, to give their testimony in accordance with arrangements allowing those children to be guaranteed an appropriate level of protection, for example outside the trial and before it takes place.’⁴³ Given the apparent conflict between the rights of the defendant and the requirements of the Framework Decision, the court shrewdly left the balancing exercise to the national authorities.

These cases make two significant inroads into the general rule that the legal instruments of the Member States, rather than the Union, regulate the criminal liability of individuals. The *Environmental Legislation Litigation* makes clear that the Community is despite its lack of express criminal competence capable of defining criminal offences and requiring ‘necessary, dissuasive and proportionate criminal penalties’ for those offences. Although the case involved the clash between a directive and framework decision, there may be instances, detailed below, where this could be effected by way of a directly applicable regulation. Where the Union acts by way of framework decisions, the Court of Justice has required in *Pupino* Member States to interpret their pre-existing rules of procedure in accordance with framework decisions. By analogy, the same requirement may be placed on directives creating criminal law or procedural obligations.⁴⁴

3.2 Later cases involving C-176/03

These two cases raise a number of foundational questions, not least of which are the relationship of interpretative requirements and the rights of defendants and the extent of the substantive Treaty competences to which the Community criminal law powers may be applied. Many of these questions will form the subject matter of future litigation before the Court. At the time of writing,⁴⁵ only a handful of subsequent judgments or opinions cite either case. Few of these tackle the more foundational questions; where the cases have been cited as authority, they are often used to support conclusions other than the fundamental propositions of law detailed above. The *Environmental Legislation Litigation* case has thus far been relied by the European Court of Justice to reiterate the importance of Article 6 EC within the Treaty framework,⁴⁶ and that the choice of a legal basis must ‘be based on objective factors which are amenable to judicial review and include in particular the aim and content of the measure’.⁴⁷ The Court of First Instance has relied upon the case to review the

⁴⁰ Paragraph 50.

⁴¹ Paragraph 54.

⁴² Paragraph 56.

⁴³ Paragraph 61.

⁴⁴ Case C-369/04 *Hutchison 3G UK Ltd and Others v HM Commissioners of Customs & Excise*, point 150 of the Opinion of AG Kokott; Case C-303/05 *Advocaten voor de Wereld* footnote 25 to point 43 of the Opinion of AG Kokott.

⁴⁵ As of May 7, 2007.

⁴⁶ Case C-320/03 *Commission v Austria* paragraph 72 (ECJ, Grand Chamber); Case C-86/03 *Greece v Commission* paragraph 96 (ECJ, 1st Chamber).

⁴⁷ Case C-178/03 *Commission v Parliament and Council* paragraph 41 (ECJ, 2nd Chamber) and Case C-94/03 *Commission v Council* paragraph 34, both referring to Case C-176/03 Paragraph 45. See also

compatibility of an EU instrument with the EC Treaty notwithstanding the lack of an express declaration of jurisdiction by the Member State in question.⁴⁸ Advocates General have made more use of the case in their opinions. The legal basis formula in paragraph 45 of the case has also been cited by AG Léger in the *PNR Agreement* case.⁴⁹ Advocate General Colomer, the Advocate General in the *Environmental Legislation Litigation* case, has relied on the case to reiterate that the proper legal basis for environmental protection measures is within the EC Treaty.⁵⁰ Advocate General Geelhoed has relied on paragraph 42 of the case, which restates the embedded environmental protection requirements of Article 6 EC in all other Community policy fields.⁵¹ Of somewhat greater interest are Advocate General Colomer's opinion in *Placanica* and the application for annulment of the Ship-Source pollution Framework Decision in Case C-440/05. In his opinion in *Placanica*, AG Colomer refers to point 48 of his opinion in C-176/03, restating that the Member State, rather than the European institutions, are 'in the best position to assess the feasibility, appropriateness and effectiveness of a punitive response' to breaches of Community rules.⁵² Whilst the *Ship-Source Pollution Framework Decision* case⁵³ has yet to reach the Advocate General, this case holds some potential for the clearer delimitation of the Community's ancillary criminal competences as it involves another annulment action of a criminal law environmental protection measure with an EU legal basis.⁵⁴ This application will be considered in greater detail below.

3.3 Later Cases Involving C-105/03

Most subsequent references to *Pupino* are of modest constitutional significance. The Court of Justice has relied on *Pupino* to restate the limits of the Court's Jurisdiction in relation to Title VI EU⁵⁵ and the conditions of exercising Article 234 jurisdiction where a Member State has accepted the Court's jurisdiction in relation to a Union instrument.⁵⁶ The Court of First Instance has relied on *Pupino* to note the existence

AG Colomer's opinion of 30. May 2006 in Case C-486/04, *Commission v Italy*, referring in point 38 to a substantially similar point 59 in his opinion in C-176/03.

⁴⁸ Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council* paragraph 59, referring to C-176/03 paragraph 39.

⁴⁹ Joined Cases C-317 and 318/04 *Parliament v Council (PNR Agreement)*, Opinion of AG Léger of 22. November 2005, footnote 62 to point 126.

⁵⁰ Case C-303/05 *Advocaten voor de Wereld VZ v Leden van de Ministerraad*, Opinion of AG Colomer of 12. September 2006, footnote 86 to point 85.

⁵¹ Case C-161/04 *Austria v Parliament and Council*, Opinion of AG Geelhoed of 26 January 2006, footnote 21 to point 44.

⁵² Joined Cases C-338/04 *et seq.*, *Procuratore della Repubblica v Massimiliano Placanica, Christian Palazzese and Angelo Sorrichio*, Opinion of AG Colomer of 16. May 2006, footnote 104 to point 135, referring to point 48 of his opinion in Case C-176/03.

⁵³ Case C-440/05, *Commission v Council (Ship Source Pollution Framework Decision)*, Application of 8. December 2005, OJ C 22, 28.01.2006, p. 10. Assuming a time-frame comparable to C-176/03, an opinion might be expected around January 2008, with a judgment falling on either side of summer the judicial vacation in 2008.

⁵⁴ 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.

⁵⁵ Case C-354/04 P, *Gestoras pro Aministia and others v Council* (ECJ Grand Chamber) paragraph 50 and Case C-355/04 P, *Segi and others v Council* paragraph 50, both referring to paragraph 35 Case C-105/03.

⁵⁶ Case C-150/05 *Van Straaten v Netherlands and Italy* (ECJ First Chamber) paragraph 31 and Case C-467/04 *Criminal Proceedings against Gasparini and others*, paragraph 41, both referring to paragraph 28 Case C-105/03.

of an obligation of loyal cooperation within Title VI EU.⁵⁷ In *Advocaten voor de Wereld*, AG Colomer has referred to *Pupino* as a ‘suitable starting point’ to the analysis of third pillar instruments’ relationships with Community law, in particular the European Arrest Warrant.⁵⁸ In *i21 Germany*, he made a passing reference to the *Pupino* requirement of sympathetic interpretation⁵⁹ in coming to the conclusion that the sympathetic interpretation of Directive 97/13/EC on Telecommunications licencing required a Member State to reopen an assessment where a legal challenge to its validity was time-barred.⁶⁰ Of more interest are AG Kokott’s opinions in *Hutchinson 3G* and *Adeneler* and the Court’s judgment in *Adeneler*. In *Hutchinson 3G*, AG Kokott notes that paragraph 47 of *Pupino*, namely the lack of an obligation to interpret national law *contra legem* in line with Union framework decisions, also applies to directives.⁶¹ In her opinion to *Adeneler*, she equates the requirement of sympathetic interpretation between framework decisions and directives.⁶² In *Adeneler*, the Grand Chamber of the Court of Justice following AG Kokott revisited in some detail the limits to the obligation of sympathetic interpretation of framework decisions in paragraphs 44 and 47 of *Pupino*.⁶³ These are both discussed below in greater detail.

4. Limits to individual criminal liability under European instruments

Article 7 of the European Convention on Human Rights provides that other than trials for offences that are ‘criminal according to the general principles of law recognised by civilised nations’,⁶⁴ no one should be held guilty of an offence ‘which did not constitute a criminal offence under national or international law at the time it was committed’.⁶⁵ The principle of legality has been applied in a series of cases by the European Court of Justice as a general principle of Community law,⁶⁶ and applies *mutatis mutandis* to criminal obligations created by framework decisions.⁶⁷ It can be seen to guide the Court’s views as to the direct effect and the sympathetic interpretation of criminal law rules under both first and third pillar instruments.

4.1 The Scope of Community criminal competence⁶⁸

⁵⁷ Case T-228/02 *Organisation des Modjahedines du peuple d’Iran v Council* paragraph 123, referring to C-105/03 paragraph 42. See also the footnote 54 to point 106 of the Opinion of Advocate General Mengozzi in C-354/04 P and footnote 54 to point 106 of the same Advocate General’s Opinion in C-355/04 P.

⁵⁸ Case C-303/05 *Advocaten voor de Wereld v Leden van de Ministerraad*, point 4 of the Opinion of AG Colomer.

⁵⁹ Joined Cases C-392/04 and C-422/04, *i21 Germany and ISIS Multimedia net v Germany*, Point 119 of the opinion of AG Colomer.

⁶⁰ *Ibid*, point 121 of the opinion of AG Colomer.

⁶¹ Case C-369/04 *Hutchison 3G UK Ltd and Others v HM Commissioners of Customs & Excise*, point 150 of the Opinion of AG Kokott.

⁶² Case C-212/04, *Adeneler and others v Elog*, footnote 25 to point 43 of the Opinion of AG Kokott.

⁶³ Case C-212/04, *Adeneler and others v Elog* (ECJ Grand Chamber), paragraph 110.

⁶⁴ Article 7(2) European Convention on Human Rights.

⁶⁵ Article 7(1) European Convention on Human Rights.

⁶⁶ Case 14/86 *Pretore di Salo*; Case 80/86 *Kolpinghuis Nijmegen*; Case C-168/95 *Arcaro*; Joined Cases C-74/95 and C-129/95 *Criminal proceedings against X*; Case C-60/02 *X/Rolax*; Cases C-387/02 *et seq. Berlusconi and others*. Peers, S., *EU Justice and Home Affairs Law*, 2nd ed. (Oxford: Oxford University Press, 2006) p. 389.

⁶⁷ C-105/03 *Pupino*. Peers, S., *EU Justice and Home Affairs Law*, 2nd ed. (Oxford: Oxford University Press, 2006) p. 389.

⁶⁸ I am grateful to comments received on ideas I explored at the Europeanised Criminal Justice forum at Helsinki University in April 2007, in particular Professors Kimmo Nuotio and Raimo Lahti, Dr.

The constitutional significance of the *Environmental Legislation Litigation* judgment is difficult to overstate. However, as with many pronouncements of similar gravity, its doctrinal developments are founded on a number of significant caveats. In its judgment, the Grand Chamber recognised that in certain circumstances, a Community power to take ‘measures which relate to the criminal law of the Member States which [the Community legislature] considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.’⁶⁹ A pre-requisite of this is that the ‘application of effective, proportionate and dissuasive criminal penalties by the competent national authorities’ must be ‘an essential measure for combating serious environmental offences’.⁷⁰ The strict sectoral scope of the judgment is limited to environmental offences.⁷¹ Since the subsequent dispute over the *Ship-Source Pollution* case involves a conflict between Union criminal competence and the Community environmental competence, it is not thought likely that the Court will expressly consider other sectors in its forthcoming judgment in *C-440/05* except perhaps in so far as a legal base of the Ship-Source Pollution Framework Decision⁷² is also found within the transport sector. However, in its communication of November 24, 2005 and subsequent practice, the Commission has interpreted the expansion of its powers and discretion broadly.⁷³ According to the Commission, Community powers to require criminal penalties may be invoked in any EC Treaty policy sector that requires in the opinion of the Commission criminal penalties to ensure the effectiveness of those policies.⁷⁴ This included the adoption of a proposal on the basis of Article 95⁷⁵ alone and even more controversially, Article 280(4) which itself precludes measures related to the application of national criminal law.⁷⁶ A sectoral criminal law power could in principle be implied in other areas, a case could be made that this is limited to those areas of Community policy that in the Court’s words are ‘one of the essential objectives of the Community’.⁷⁷ It will be recalled that Article 6 is indeed special in that it requires all Community policies within the Treaty framework to be evaluated from the perspective of environmental

Matti Joutsen, Dr. Helena Raulus, and Annika Suominen, LL.M. The interpretation in the section below and any associated errors remain this author’s sole responsibility.

⁶⁹ Paragraph 48. This is despite arguments against requiring criminal penalties in paragraphs 31-33.

⁷⁰ Paragraph 48.

⁷¹ Paragraph 48.

⁷² 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.

⁷³ 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*) COM(2005) 583 final/2, 24. November 2005.

⁷⁴ See the table on pp. 7-9, citing as appropriate legal bases Articles 47(2), 57(2), 123(4), 61(a), 63(3)(b), 80(2) 95, and 280(4).

⁷⁵ This involved the review of Council Framework Decisions 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, 2005/222/JHA of 24 February 2005 on attacks against information systems, and the pending proposal for a directive on criminal measures aimed at ensuring the enforcement of intellectual property rights and an accompanying framework decision proposal, both in COM(2005) 276, all to be based on Article 95 EC Treaty. Commission communication, *op cit*, pp. 7 and 8.

⁷⁶ Proposal for a Directive of the European Parliament and of the Council on the criminal-law protection of the Community’s financial interests, OJ C240E 28.8.2001 p.125. Commission Communication, p. 8. See point 1.3.2 of the explanatory notes to the Commission’s 2001 proposal COM(2001)272 final, where the Commission considers that the application of national criminal law clause is avoided because the rules must be transposed by national instruments and therefore do not directly affect national criminal law.

⁷⁷ Paragraph 41 Case C-176/03.

protection. Whilst there are some other foundational themes which recur within the Treaty such as the principle of non-discrimination on the basis of nationality in Article 12, no other provision expressly requires a similar impact assessment within the general legislative procedure relevant to another sector. A case could be made by those wishing to restrict Community criminal law powers that this is a foundational requirement of ancillary criminal law competence which is therefore limited exclusively to environmental protection objectives. Finally, the invocation of Community criminal law competence requires a demonstrated necessity for such action.⁷⁸ The reference in the Court's judgment only refers to the perception of such a necessity by the Community legislature. This has in practice translated into extensive background documentation in relation to the first directive proposal formulated after the case. On the same date that the Commission published that proposal, it also published an extensive working paper that detailed, *inter alia*, an empirical case for Community-level criminal measures based on the lack of effect and fragmentary content of relevant national rules.⁷⁹

4.2. Proposed Directives with criminal law implications

Whatever the Commission's view as to the extent of its powers, only five directive proposals with explicit criminal law elements have ever been transmitted to the European Parliament for consideration. Of these, three were submitted prior to the Court's judgment. The first led to the *Environmental Legislation Litigation* case,⁸⁰ the second was never discussed by Council owing to considerable opposition amongst Member States, and the third is now under dispute in a pending case. The last two took into account the effects of the *Environmental Legislation Litigation* case.⁸¹ The Commission's original proposal for a directive establishing criminal penalties for defined environmental offences was hijacked by the Council, which reincorporated its substance into the framework decision contested in case *C-176/03*. The Directive on infringements and penalties for Ship-Source Pollution⁸² fared better, in part because it left to Member States the discretion of whether to criminalise those infringements.⁸³ It also relied on the so-called dual text approach where the obligation to impose penalties is embedded within a directive but the criminal law elements are separated into a framework decision.⁸⁴ Following the judgment in *C-176/03*, the Commission has initiated proceedings in Case *C-440/05* to annul the framework decision on the grounds that its contents are properly within the competence of the Community and therefore ought to be embedded into a directive.⁸⁵ The proposed directive on the protection of the financial interests of the Community, transmitted in 2001, would

⁷⁸ Paragraph 48 Case C-176/03.

⁷⁹ Commission staff working document - Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law - Impact assessment {COM(2007) 51 final} {SEC(2007) 161} and the summary in Commission staff working document - Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law - Summary impact assessment [COM(2007) 51 final SEC(2007) 160].

⁸⁰ COM (2001) 139 Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law.

⁸¹ COM (2001) 272 Proposal for a Directive of the European Parliament and of the Council on the criminal law protection of the Community's financial interests;

⁸² Directive 2005/35/EC; Original proposal COM(2003)92.

⁸³ Article 8(1) Directive 2005/35/EC.

⁸⁴ Article 4 defines an infringement broadly, but leaves the specifics and the penalties to Framework Decision 2005/667/JHA.

⁸⁵ Case C-440/05, application of 8. December 2005.

have harmonised the definitions of certain offences⁸⁶ and required the Member States ‘take the necessary measures to transpose the provisions of this Chapter into their national criminal law in such a way that the conduct referred to therein constitutes criminal offences’.⁸⁷ The proposal expressly required criminal penalties⁸⁸ and custodial sentences in the case of ‘serious fraud’⁸⁹ but did not specify the exact penalties required. It was never discussed by the Council and was abandoned before 2002. The Proposal for a Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights⁹⁰ has been discussed at the JHA Council⁹¹ and has recently received a first reading in the EP.⁹² The EP and Commission concur on the competence of the Community to criminalise offences and harmonise penalties, but differ as to the scope of the directive⁹³ and the criminalisation of mere attempts.⁹⁴ The proposal, amended after *C-176/03*⁹⁵ requires Member States to criminalise intentional infringements of intellectual property rights⁹⁶ and penalties including custodial penalties,⁹⁷ but leaves the specific penalties to the discretion of Member States except for a provision laying down guidelines for minimum maximum custodial penalties where the offence is committed under the certain aggravating circumstances.⁹⁸ Finally, the Commission has transmitted a proposal or a directive similar to the framework decision in the *Environmental Legislation Litigation*.⁹⁹ This is likely to reinvigorate the debate as to the precise extent of the Community criminal power, because it both defines offences and, crucially, lays down detailed sentencing guidelines in respect of many of those offences.¹⁰⁰ This is a key question at the heart of the competence debate, because whilst the Court has recognised the Community’s power to require Member States to enact specified criminal offences and take ‘measures which relate to the criminal law of the Member States which [the Community] considers necessary in order to ensure that the rules... on environmental protection are fully effective’,¹⁰¹ it stressed that the framework decision that infringed on the Community’s competence only defined conduct as criminal, but left ‘to the Member States the choice of the criminal penalties to apply’ so long as these fit the tripartite test of effectiveness, dissuasiveness and proportionality.¹⁰² This is not the case with the 2007 proposal, which specifies in some detail the framework for criminal law sanctions. The Court has been presented with an opportunity to review

⁸⁶ Fraud, corruption and money laundering in Articles 3,4 and 6 respectively.

⁸⁷ Article 7 Proposed PIF Directive.

⁸⁸ Article 10 proposed PIF Directive.

⁸⁹ Article 10 proposed PIF Directive

⁹⁰ COM(2005)276/1.

⁹¹ Item B on the Agenda for Session 2752, October 5, 2006.

⁹² Report A6-0073/2007, March 27, 2007.

⁹³ See for example amendments 1, 15 and 16, expressly removing patents, parallel imports and legitimate non-commercial uses from the scope of the offences.

⁹⁴ Amendment 14.

⁹⁵ COM/2006/0168 final.

⁹⁶ Article 3 amended proposal.

⁹⁷ Article 4(1)(a) of the proposed directive. This is misnumbered ‘6’ in the original CELEX document 52005PC0276(01).

⁹⁸ Article 5(1) of the amended proposal, mislabeled 5(3) in that amended proposal CELEX reference 52006PC0168, referring to criminal organisations and acts carrying ‘a health and safety risk’.

⁹⁹ Com(2007)51, Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law of February 9, 2007.

¹⁰⁰ Article 5 of the proposed Directive regulates sanctions for individuals.

¹⁰¹ Paragraph 48 Case C-176/03.

¹⁰² Paragraph 49.

in detail its position in the pending *Ship-Source Pollution Framework Decision* case,¹⁰³ which involves a dual text system similar to that in the proposed directive on environmental crime. Advocate General Colomer has recently repeated the relevant point of his opinion in the *Environmental Legislation Litigation* case in the recent opinion in *Placanica*, where he notes that Member States, rather than European institutions, are ‘in the best position to assess the feasibility, appropriateness and effectiveness of a punitive response’.¹⁰⁴ If the Court chooses this route of analysis and follows it to its logical conclusion, namely that the precise determination of criminal penalties must be an exclusively national competence, this may preclude the use of Regulations in those fields where the Community might otherwise be competent to do so.

4.3 Direct effect

In the field of criminal law, whether a measure falls within Union or Community competence is not as of yet material from the point of view of its subjects. Criminal law is, by definition, a system designed to penalise the infractions of individuals against state authority. A power to create and enforce independent rules of criminal law in the form of directives would present the Community with a clear break from historical boundaries drawn by the Court of Justice to the doctrines of direct effect and primacy.¹⁰⁵ In the terminology of ECJ doctrine, this could be described as an extreme form of horizontal direct effect. Community rules can generally be enforced against Member States, but in the absence of national law implementing those provisions, they are rarely capable of restricting the rights of individuals in national legal systems.¹⁰⁶ Under the doctrine of direct effect, individuals can rely on Community provisions against Member States, but except in the exceptional cases of some Treaty rules¹⁰⁷ and one isolated case where the Court considered a directive to enunciate ‘general principles of Community law’,¹⁰⁸ of are unable to rely directly on Community law to the detriment of other individuals.¹⁰⁹ In its leading cases on the question, the Court derived this limit from the Treaty text itself, which states that directives are binding on Member States (but not individuals).¹¹⁰ Unsurprisingly, Member States are unable to rely on unimplemented EC rules to the detriment of their citizens.¹¹¹ When a Member State fails to fulfill its obligations, it can be held liable in damages under the doctrine of state liability. Since state liability is inapplicable to individuals, the punitive aspects of Community criminal law are effective only against individuals where Member States implement Community policies in the national legal

¹⁰³ Case C-440/05, Application of December 8, 2005.

¹⁰⁴ Joined Cases C-338/04 *et seq*, *Procuratore della Repubblica v Placanica and others*, opinion of AG Colomer, point 135.

¹⁰⁵ For a contrary view based on a distinction between direct and indirect effect, see Biondi, A. and Mastroianni, R., ‘Joined Cases C-387/02, C-391/02 and C-403/02, *Berlusconi and others*, Judgment of the Court (Grand Chamber) of 3 May, 2005, not yet reported’ (2006) 43 CMLRev pp. 553-569 at pp. 568-569.

¹⁰⁶ One notable exception being the enforcement of Community competition law, originally entrusted to the Commission under Regulation 17/62. Treaties and Regulations are in principle capable of horizontal direct effect: See Bray, R (ed), *Constitutional Law of the European Union* (Sweet and Maxwell, London, 2005) pages 765 *et seq*.

¹⁰⁷ Article 39 is one such rule: See Case C-281/98 *Angonese*.

¹⁰⁸ Case C-144/04 *Mangold vHelm* paragraphs 74-77.

¹⁰⁹ *Marshall v Southampton Area Health Authority* Case 152/84 regarding directives.

¹¹⁰ *Marshall and Faccini Dori v Recreb* Case C-91/92. Arnall, A., *The European Union and Its Court of Justice* 2nd ed. (Oxford: Oxford University Press, 2006) p. 608.

¹¹¹ *Officer van Justitie v Kolpinghuis Nijmegen* Case 80/86.

system. As a system for regulating the behaviour of individuals, there are few areas outside competition law where the sanctions provided by Community law are effective without Member State compliance, either by way of enforcement or the transposition of EC rules into national legal systems.¹¹² The Treaty on European Union recognises explicitly that framework decisions are incapable of direct effect.¹¹³ Whilst the Court of Justice has noted the possibility of state liability where those obligations are not adhered to,¹¹⁴ the picture in relation to current and proposed measures in the form of directives or framework decisions is therefore overwhelmingly one of a system that restricts the discretion of Member States, but fails to effectively penalise individuals without the intervention of those Member States.

4.4 Sympathetic interpretation

The principle of loyal cooperation in Article 10 EC has often been used to explain the requirement of sympathetic interpretation. While this is well established in the field of Community internal market law, no similar principle is enunciated in the Treaty on European Union. In *Pupino*, the ECJ found that despite the lack of an this type of express Treaty article establishing a principle of loyal cooperation within the Union legal framework, it not only existed within the Union's third pillar framework,¹¹⁵ but required Member States' judicial authorities to interpret domestic criminal and procedural law in line with the requirements of that principle. This is potentially at odds with the principle of legality and analogous rules that have developed in relation to directives. In *Pupino*, the Court noted three guiding principles relevant to the sympathetic interpretation of Community and Union criminal law measures. Firstly, the obligation of sympathetic interpretation 'is limited by general principles of law, particularly those of legal certainty and non-retroactivity'.¹¹⁶ This precludes a European-level obligation in either a directive or a framework decision from 'leading to the criminal liability of persons who contravene [those provisions] being determined or aggravated on the basis of [those instruments] alone, independently of an implementing law.'¹¹⁷ Secondly, the national court's obligation 'ceases when the [provision of national law] cannot receive an application which would lead to a result compatible with [a framework decision or directive and can not require] an interpretation of national law *contra legem*.'¹¹⁸ Finally, whether such an interpretation can be achieved given these rules is for the national court.¹¹⁹ In *Adeneler*, the Grand Chamber of the Court of Justice reiterated its brief observations in *Pupino* on the limits of the requirement for sympathetic interpretation.¹²⁰ After noting the existence of that requirement to 'ensure the full effectiveness of

¹¹² The direct involvement of the Commission in enforcement is envisaged in the TEC in article 83, expressly justifying the departure from the general rule. See further, Von Boganday, A and Bast, J, 'The European Union's Vertical Order of Competences: The Current Law and Proposals for Reform' (2002) 39 CMLRev 227-268.

¹¹³ Article 34(2)(b) Treaty on European Union.

¹¹⁴ Case C-212/04 *Adeneler and others v ELOG* paragraph 112.

¹¹⁵ Case C-105/03 paragraphs 42 and 43.

¹¹⁶ Paragraph 44.

¹¹⁷ Paragraph 45.

¹¹⁸ Paragraph 47, emphasis added.

¹¹⁹ Paragraph 48.

¹²⁰ Case C-212/04 *Adeneler and others v ELOG*, Judgment of the Grand Chamber, 4. July, 2006. Whilst the case involved Directive 1999/70/EC, it is clear from cases cited above that the rules apply *mutatis mutandis* to framework decisions. Indeed, the Court made reference to this aspect of *Pupino* in paragraph 110.

Community law'¹²¹ and the general requirements of legal certainty and non-retroactivity,¹²² it stated that national courts must 'do whatever lies within their jurisdiction, taking the *whole body of domestic law* into consideration and applying the interpretative methods recognised by domestic law' when interpreting national law in conformity with Union instruments.¹²³ Two observations arise from these requirements. The first is that the factual assessment of whether a given method of interpretation is contrary to the fundamental rights of defendants in criminal proceedings is left to the Member States. In *Pupino*, the Court suggested that the relevant national procedural regulations could be extended to categories of victims recognised as vulnerable under its interpretation of the framework decision, but not under national law.¹²⁴ This seems to border on an interpretation *contra legem* and calls into question whether the Court of Justice can be trusted to interpret the compatibility of Union law with fundamental rights as the European Court of Human Rights has recently suggested,¹²⁵ but nevertheless signals the great degree of latitude available to national courts under the requirements of sympathetic interpretation. One wonders whether a similar margin of appreciation would be extended where the framework decision seeks to provide positive rights.¹²⁶ Secondly, in *Pupino*, the Court also suggested that it was prepared to uphold a rather formalistic delimitation between criminal law and criminal procedure to the detriment of defendants. The rights of defendants were to be protected in so far as the principle of legality applied to the former, but were not according to the Court under assault where the rules applied merely to 'the conduct of proceedings and the means of taking evidence'.¹²⁷ Amending the rules of criminal procedure by way of a sympathetic interpretation in accordance with a framework decision was not deemed to affect the rights of the defendant. However, taking this analytical framework to one logical extreme, it could be argued on this basis that the amendment or repeal of a statute of limitations on the basis of a Union rule could also constitute a procedural, rather than a substantive change to the detriment of the defendant.¹²⁸ Whilst the greater elaboration of this is beyond the scope of this paper,¹²⁹ it is very difficult to accept that this does not materially affect defendants' rights, or pose the possibility of an infringement of the relevant ECHR rules on the fairness of the criminal process despite rulings of the European Court of Human Rights that draw analogous distinctions¹³⁰ particularly since the application of the Convention principles is dependent not on the criminal

¹²¹ Paragraph 109 *Adeneler*.

¹²² Paragraph 110 *Adeneler*.

¹²³ Paragraph 111 *Adeneler*.

¹²⁴ Paragraph 48 *Pupino*.

¹²⁵ *Bosphorus Hava Yollari Turizm ve Ticaret AS v Ireland* No. 25036/98, 30 June 2005. Cameron, I.,

¹²⁶ COM (2004) 328 2004/0113/CNS Proposal for a COUNCIL FRAMEWORK DECISION on certain procedural rights in criminal proceedings throughout the European Union, last discussed by the JHA Council in session 2794 on April 19, 2007. At the same session, general agreement was reached on a Framework decision on combating xenophobia and racism, suggesting the dual text approach in relation to areas potentially covered by the EC Treaty, in this case Article 13(1) EC, is alive and well in the opinion of the Member States of the Council. Following the EP Report in 2002 (A5-0189/2002), the Commission refused amendments and the process languished in the JHA Council chamber.

¹²⁷ Paragraph 46 *Pupino*.

¹²⁸ For a contrary view, see Joined Cases C-387/02 *et seq.*, *Berlusconi*.

¹²⁹ See Langford, P., and Miettinen, S., 'Extradition, the European Arrest Warrant and Fundamental Rights: The Perspectives of the European Court of Justice and the European Court of Human Rights' (forthcoming September 2007, UACES Annual Conference, Portsmouth, UK).

¹³⁰ See for example the opinion of AG Colomer in Case C-303/05 *Advocaten voor de Wereld VZW* at point 105, reiterating the ECtHR distinction between extradition as a process and substantive rights.

law designation of those rules but on their punitive nature. At the very least, this could invite litigation raising the spectre of primacy in the EU pillars where a framework decision requires a sympathetic interpretation that could be seen as contrary to domestic procedural rights but does not fall within the Court's demonstrably restrictive notion of what constitutes *contra legem*. In conclusion, the broad, principled requirement that neither directives nor framework decisions may in themselves 'determine or aggravate' an individual's liability under criminal law¹³¹ must be taken with the substantial caveat that the substantive scope of an individual's criminal law liability is interpreted rather strictly by the European Court of Justice.

4.4 Regulations: Prospects for directly applicable Community criminal laws

The expansion of positive Community criminal law powers to the first pillar and the possible limits of the *Environmental Legislation Litigation* and *Pupino* cases raise the question of whether the Community is competent to embed criminal law obligations into directly applicable Regulations rather than other secondary instruments that in a criminal context depend upon Member State implementing measures. If it is accepted that the Community competence extends beyond the scope of the Article 6 integrated environmental protection objective, it could be argued that some fields of exclusive Community competence and others where the Community has a lead regulatory role may necessitate the introduction of criminal penalties. For example, specified penalties and defined offences are already derived from Regulations, albeit in a 'civil' or 'administrative' form, in the fields of fisheries, agriculture and competition law. As the *Environmental Legislation Litigation* judgment clarifies, the express denial of the criminal law nature of those penalties is not derived from Treaty principles but is inserted into the Community measures for other reasons.¹³² The Court of Justice has had the opportunity to declare unequivocally that Regulations establishing Community criminal obligations are constitutionally suspect. It has failed to do so, and instead formulated its judgment in a way which enables this subsequent to the judgment in *C-176/03*. In *Criminal proceedings against X*¹³³, the Court considered a regulation insufficient without national implementing measures to aggravate or determine the liability of persons contravening regulations. However, in *X*, the regulation called for national measures establishing penalties and therefore failed the test for direct effect.¹³⁴ Whilst recognising the rights of individuals in criminal matters, the ECJ noted that the regulation in question¹³⁵ was dependent on national implementing measures, '...thereby making it possible to transpose... the Court's reasoning in respect of directives'. It follows that later judgments, by implication, may diverge on their conclusions if the Court is presented with a regulation that both defines offences and specifies penalties and fails to require implementing measures by Member States. Two practical counterclaims might be made here. The first is that while the Court has recognised the margin of appreciation available to the Community legislature in determining the appropriate response to infringements, the promulgation of a Regulation will require broad political agreement within the Council that in practice represents Member State views. To date no proposal for a directive which specifies offences and penalties to a level of detail that might all other things being equal entail direct effect has survived that legislative process. The only current

¹³¹ Paragraph 45 *Pupino*.

¹³² See for example Article 23(5) Regulation 1/2003.

¹³³ *Criminal Proceeding Against X*, Case C-60/02.

¹³⁴ *Criminal Proceedings Against X* Case C-60/02, paragraphs 62-64.

¹³⁵ Regulation 3295/94 Article 11 refers to Member States adopting penalties.

proposal that even departs from the dual text practice where specific criminal offences and penalties have been removed from the Community instrument in favour of a sister Framework Decision has not yet been considered by either the European Parliament or by the Council. The second is that even if such a proposal survived codecision, it would be open to the Court to review the direct applicability of Community criminal law instruments from the point of view of the principle of legality or other general principles of Community law. In sum, whilst the Court's judgment in *X* leaves open in principle the possibility of directly applicable criminal law regulations in support of other substantive Community policies, other considerations may prevent the exercise of this possibility in practice. It is interesting to note in this respect that the draft Constitutional Treaty provided for the legal equivalent of directives to be used in the establishment of criminal penalties, precluding effects similar to those of Regulations under article 249 EC.¹³⁶

5. Conclusions

The established criteria for Community penalties, derived from the Treaty¹³⁷ and found both in secondary legislation and judgments of the ECJ, required 'effective, dissuasive and proportionate penalties'.¹³⁸ Later judgments recognised the power of individual Member States to enact criminal law in support of Community action even where it was not required as a common standard across the Union and required Community obligations to be enforced with standards analogous to similar but purely national obligations.¹³⁹ The test became 'effective, dissuasive, and proportionate administrative *or* criminal penalties' to reflect this discretion of Member States to legislate beyond a common minimum level of protection. With little explanation as to the legal basis for removing this discretion, the *Environmental Legislation Litigation* produced a new standard of 'effective, dissuasive and proportionate criminal penalties', removing in areas within the scope of that judgment the discretion of Member States to choose between administrative and criminal sanctions and therefore transferring this discretion to the Community legislature.¹⁴⁰ Having established a Community power to require criminal penalties, the question becomes to what extent the Community is entitled to prescribe specific penalties. It is clear that where it is entitled to require criminal penalties, it must also have defined relevant offences. The a distinction between requiring penalties of a criminal nature and providing binding, specific sentencing rules is substantial from the point of view of state sovereignty such as it is in the contemporary European context. The guidance offered by the court in the *Environmental Legislation Litigation* extends only as to appropriate Treaty legal bases. The framework decision on the whole was considered to have as its main purpose the protection of the environment, therefore falling within Community competence. Although it defined offences and required Member States to establish criminal penalties, it did not provide sentencing guidelines similar to some other framework decisions adopted under the Union criminal law approximation competence such as those on narcotic substances or counterfeiting of the Euro.¹⁴¹

¹³⁶ Article III-271(1), referring to European Framework Laws.

¹³⁷ Article 5 EC principle of proportionality; article 10 EC provides a foundation for the principles of effectiveness, dissuasiveness and loyal co-operation.

¹³⁸ Paragraphs 31-33.

¹³⁹ Case 68/88 *Greek Maize*.

¹⁴⁰ Paragraphs 48.

¹⁴¹ Article 5(1) Council Framework Decision 2003/80/JHA on the Protection of the Environment through Criminal Law.

Whilst the commission considers many of these rules also to be within its legislative competence, only the litigation that is sure to follow the Commission's programme of legislative adjustment to its newly discovered criminal competence will provide an answer. To date, no such Community instrument has survived the codecision process to provide a basis for such a judgment. The framework decision in the *Environmental Legislation Litigation* was promulgated after the Council, comprised of representatives of Member States' governments, refused to assent to an identical directive. A sufficient number of Member States were opposed to the directive on the grounds that they felt the Community had no competence to prescribe specific criminal penalties to preclude its passage.¹⁴² If this is based on domestic political concerns, there is nothing to prevent them from thwarting Community legislation on the grounds that despite that Competence having been implied by the ECJ, they are unwilling on principle to promulgate Community criminal legislation. This conclusion is supported by the difficulties encountered by recent first pillar legislative proposals rejected or substantially amended during the legislative process as well as the continuation of the legislative process for a framework decision containing criminal law measures combating xenophobia and racism. Where this is the case, the ECJ has effectively ruled out any Union acts aimed at formally setting common standards for protecting the environment through criminal law. Whenever the Community is unable to agree on relevant criminal law measures, enhanced co-operation in the form of Union rules would contravene the reasoning in the *Environmental Legislation Litigation*. In this way, the Court of Justice may inadvertently have limited, rather than extended, the prospects of European of criminal law harmonisation in the short term. At the very least, the opportunity for expressing non-binding political agreement in a Union act is precluded wherever a Community competence for creating binding rules exists. Returning to the dichotomy between vertical effects on Member States and horizontal effects on individuals, some pre-existing legal limits bind the Community in its eventual exercise of the criminal competence. The rule against direct effect for dependent legislation such as all directives and some relevant regulations is strong in civil law matters and appears even stronger where the criminal law is concerned. There are human rights implications such as the rules against retrospective criminalisation which the ECJ and national courts are bound to take into account when considering the direct effect of non-dependent regulations. Therefore it is not clear that even Regulations defining penalties could have direct effects on individuals notwithstanding the Commission's thus far unconsummated power to prescribe a detailed criminal law obligation for Member States to implement. The Court has in the past rejected an opportunity to give indirect effect to criminal law obligations derived from Community law. Sympathetic interpretation is limited by general principles of Community law and its feasibility is ultimately left to the determination of national courts. In its current state of development, the only recognised sanctions for breaching Community criminal law rules are against the State, not the individual. Political disagreements during Community criminal legislative processes have in practice thwarted the development of real dialogue between the legislature and the Court of Justice on precisely where the balance between effectiveness and the principled limits of Community criminal rules lies, and how these fundamental constitutional limits of Community criminal law translate into practice.

¹⁴² *Environmental Legislation Litigation*, paragraph 24.