Chapter 9

The Competence Question: The European Community and Criminal Law

Valsamis Mitsilegas

The question of the existence and extent of Community competence in criminal matters has been the subject of long-standing debate. The Treaty establishing the European Community, TEC, (from its first version in the 1950s to the present day) does not contain provisions expressly attributing to the Community competence in criminal matters—in particular competence to define criminal offences and set criminal sanctions. This silence has led to opposing views regarding the existence of Community competence on the field of criminal offences and sanctions. Those in favor of the existence of Community competence have been arguing that criminal law should not be distinguished from other fields of law and that the Community should have powers to impose criminal offences and sanctions in order to safeguard the integrity of the Community legal order. Those more sceptical argue that the criminal law is a special case, since it is inextricably linked with state sovereignty—any conferral of competence in criminal matters by member states to the Community must be express in the Treaties (see Mitsilegas 2006a; Wasmeier and Thwaites 2004).

These views were reflected in the attitude of EU institutions when asked to adopt measures defining criminal offences and sanctions before, and in particular after, the introduction of the third pillar in the EU constitutional framework by the Maastricht Treaty. The European Commission has been making consistent efforts to establish Community criminal law competence in this context, by tabling first pillar proposals defining criminal offences and imposing criminal sanctions. However, until recently, none of these proposals survived Council negotiations, being met with the resistance by member states to accept express criminal law competence for the Community. The outcome of such clashes has been: first pillar instruments where conduct has been "prohibited" but not criminalized (see the first, pre-Maastricht money laundering directive of 1991, and the subsequent second and third money laundering directives); a combination, after Maastricht, of first pillar instruments defining certain conduct and parallel third pillar instruments criminalizing such conduct (see the directive and framework decision on facilitation of unauthorized entry and ship-source pollution); the adoption of third pillar instead of the (originally proposed by the Commission) first pillar instruments (see the framework decision on environmental crime); and the non-adoption by the Council of first pillar proposals by the Commission (see the 2001 proposal for a fraud directive) (see Mitsilegas 2006a; Vervaele 2006).

Traditionally, the European Court of Justice (while accepting that Community law may have an impact on national criminal law) had not given any express indication regarding the Community competence to adopt criminal offences and sanctions. However, things changed significantly by the recent Court ruling in the so-called environmental crime case (involving the framework decision on environmental crime mentioned above), where the Court looked at the possibility of adopting criminal law on offences and sanctions in the first pillar. This chapter will focus on the impact of this judgment on the Community competence in criminal matters. The content of the judgment will be analysed, and the reactions of the institutions and member states will be highlighted. The analysis will also take into account recent judicial developments in the EU (on the ship-source pollution case which deals with a subject-matter very much similar to the environmental crime case) and explore the potential consequences of the Reform Treaty on the competence of the Community/Union in defining criminal offences and imposing criminal sanctions.

The Environmental Crime Case[1]

The European Commission decided to react to the Council's choice to adopt criminal legislation in matters deemed to be related to the achievement of Community objectives by challenging the legality of the adoption of the relevant third pillar law. This has thus far led to the intervention by the Court of Justice in a landmark judgment regarding the adoption of the framework decision on environmental crime, Case C-176/03, *Commission v. Council*, 13 September 2005, a ruling with major implications for EU criminal and constitutional law (for case commentaries see inter alia Tobler 2006; White 2006; see also Labayle 2006). The parties and intervenants in the case rehearsed to a great extent the two diametrically opposed views on the existence of Community competence in criminal matters. The Commission (supported by the European Parliament), argued that the framework decision should be annulled: it should have been adopted under the first pillar, as the protection of the environment is a first pillar objective. The Commission argued that the Community has competence 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—with the harmonization of national criminal law being designed to be an aid to the Community policy in question.[2] The Commission also supported first pillar criminal law competence in this context on

1 This section is based on the relevant part of Mitsilegas 2006a, op. cit.
2 Paragraph 19 of the judgment.

the basis of member states' duty of loyal cooperation and the general principles of effectiveness and equivalence.[3]

The Council, supported by no fewer than 11 member states,[4] opposed this view. The Council and the vast majority of the member states[5] argued that as the law currently stands, the Community does not have power to require member states to impose criminal penalties in respect of the conduct covered by the framework decision.[6] Not only is there no express conferral of power in that regard, but, given the considerable significance of criminal law for the sovereignty of member states, there are no grounds for accepting that this power can have been implicitly transferred to the Community at the time where substantive competences, such as those exercised under article 175 TEC, were conferred on it.[7] Moreover, articles 135 TEC and 280 TEC, which expressly reserve to the member states the application of national criminal law and the administration of justice, confirm that interpretation, which is also borne out by the fact that the Treaty on European Union (TEU) devotes a specific title to judicial cooperation in criminal matters, which expressly confers on the European Union competence in criminal matters.[8] Finally, the Council argued, the Court has never obliged member states to adopt criminal penalties and legislative practice is in keeping with that interpretation.[9]

In a landmark ruling, the Court annulled the framework decision. The Court began its findings by an examination of the implications of article 47 TEU for the inter-pillar balance concerning the issue in question. It noted that article 47 TEU (and article 29 TEU) dictate that nothing in the TEU is to affect the EC Treaty,[10] adding that it is the task of the Court to ensure that third pillar acts do not encroach upon the powers conferred by the EC Treaty on the Community.[11] The Court then focused on the protection of the environment as a Community objective and noted that environmental protection constitutes one of the essential objectives of the Community.[12] The Court reiterated its case-law according to which the choice of legal basis must rest on objective factors which are amenable to judicial review, including in particular the aim and the content of the measure

3 Paragraph 20.

4 Denmark, Germany, Greece, Spain, France, Ireland, the Netherlands, Portugal, Finland, Sweden and the United Kingdom. This demonstrates the sensitivity that member states (and indeed "old" member states in this case) have towards extending Community competence to criminal law.

5 With the exception of the Netherlands who supported the Council but via a different reasoning.

6 Paragraph 26.

7 Paragraph 27.

8 Paragraphs 28 and 29.

9 Paragraphs 31 and 32.

10 Paragraph 38.

11 Paragraph 39.

12 Paragraph 41.

and stated that the aim is the protection of the environment and the content particularly serious environmental offences.[13]

The essential character of environmental protection as a Community objective is crucial for determining whether criminal law can be used to achieve this objective in the Community pillar. According to the Court, while as a general rule, neither criminal law nor the rules of criminal procedure fall within EC competence, this does not prevent the EC legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the member states which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.[14] The Court found that articles 1 to 7 of the framework decision (which relate to the environmental crime offences) have as their main purpose the protection of the environment and they could have been properly adopted on the basis of article 175 TEC.[15] That finding is not called into question by the existence of articles 135 TEC and 280 (4) TEC.[16] However, the Court added that although articles 1–7 of the framework decision determine that certain conduct which is particularly detrimental to the environment is to be criminal, they leave to the member states the choice of the criminal penalties to apply (although these must be effective, proportionate and dissuasive).[17]

This is a seminal ruling from the Court, which for the first time conferred expressly competence to the Community to adopt measures in the criminal law field. The emphasis of the Court to the effectiveness of Community law and the achievement of Community objectives is striking. Criminal law is viewed as a means to an end, rather as a special field of law where special rules must apply, and falls within Community competence, like any other field of law, if Community objectives are at stake (Mitsilegas 2006a, 307). Beyond establishing Community competence however, the judgment did not provide a precise delimitation of the scope of Community law competence in criminal matters, with a number of issues remaining unclear. As I have noted elsewhere,

> it is not clear whether the judgment has established in principle that the Community may, under certain circumstances, have competence in the field of criminal law in general, or that it is limited to environmental crime only. While the second case is highly unlikely, questions regarding the extent and scope of Community competence in criminal matters still remain. In particular, it is not clear whether Community

13 Paragraphs 45–47.

14 Paragraphs 47–48.

15 Paragraph 51.

16 Paragraph 52. The Court added that it is not possible to infer from those provisions that, for the purposes of the implementation of environmental policy, any harmonization of criminal law, even as limited as that resulting from the framework decision, must be ruled out even where it is necessary in order to ensure the effectiveness of Community law.

17 Paragraph 49.

> competence in criminal law is limited to the definition of criminal offenses or extends also to the imposition and precise definition of criminal sanctions. The Court mentions that, while the annulled framework decision criminalises conduct which is particularly detrimental to the environment, it leaves to the member states the choice of the criminal penalties to apply. It is not clear however if this means that the Community is granted powers to criminalise only or also to impose criminal sanctions, at least in the environmental crime field. It seems paradoxical however—and potentially incoherent—to confer competence to define criminal offenses and impose the criminalisation of certain types of conduct but leave the choice of the sanctions to member states, as sanctions would inevitably be criminal. Moreover, the imposition of a criminalisation requirement to member states in the first place (which, under the qualified majority voting arrangements of the first pillar may be outvoted in such a measure) arguably constitutes a greater challenge to State sovereignty and the exercise of power in the criminal law sphere than the dictation of the imposition of specific criminal sanctions. (Mitsilegas 2006a, 307–8)[18]

Reactions to the Court's Judgment on Environmental Crime

Shortly after the environmental crime judgment, the Commission published a communication arguing for a recasting of a number of existing EU measures and proposals, while also stating that it would apply the Court's test in future legislative proposals it would table (Commission 2005). The Commission interpreted the Court's ruling broadly, arguing that

> from the point of view of subject matter, in addition to environmental protection the Court's reasoning can therefore be applied to all Community policies and freedoms which involve binding legislation with which criminal penalties should be associated in order to ensure their effectiveness. (Commission 2005, para. 8)

According to the Commission, the Court's ruling clarified that criminal law provisions required for the effective implementation of Community law are a matter for the first pillar, bringing measures adopted under a dual legal basis THES in both first/third pillars to an end—with the Commission proposing a quick procedure of recasting existing texts it deems affected by the environmental crime judgment; third pillar legislation would only cover measures related to police and judicial cooperation in criminal matters more broadly (Commission 2005, para. 11). The instruments which according to the Commission were candidates for recasting can be found in the annex to the communication and include most categories of failed Commission first pillar action in criminal law referred to in the introduction: parallel first/third pillar instruments such as those on the facilitation of unauthorized entry, transit and residence; measures adopted in the third pillar (obviously the environmental crime instrument); and measures which had not

18 A further issue which is unclear is whether EC competence extends only to the achievement of essential Community objectives and if yes, what constitutes such an objective.

been adopted (such as the fraud directive). However, the reaction by member states to the Commission communication has been rather sceptical, with the February 2006 Justice and Home Affairs Council adopting only a procedure for the examination of future Commission legislative proposals containing provisions on criminal law.[19]

The Commission sought to enhance further the Community's competence in criminal matters by putting forward in 2006—and against the backdrop of the "freezing" of the ratification process of the Constitutional Treaty a proposal for moving third pillar matters to the first pillar by using the so-called "passerelle" provision of article 42 TEU.[20] However, member states again appeared rather sceptical to the Commission's initiative—by the end of 2006 the debate was deemed to be concluded against the use of article 42 TEU.[21]

Following its Communication reacting to the Court's environmental crime ruling, and notwithstanding the cautious reaction by the Council and the passerelle setback, the Commission tabled three major first pillar proposals involving Community action on the definition of criminal offences and the imposition of criminal sanctions—all of which are currently under negotiation. These are:

- A directive on criminal measures aimed at the enforcement of intellectual property rights.[22] The legal basis of the proposal is article 95 TEC (on the internal market) and contains not only detailed provisions on criminal sanctions, but also provisions on confiscation, joint investigation teams and the initiation of criminal proceedings[23]—something that constitutes a very broad interpretation of the scope of Community competence and which arguably falls outside Community criminal law competence as defined by the Court; following the Court's annulment of the Framework Decision
- a directive on the protection of the environment through criminal law.[24] The proposal addresses specifically the Court's ruling on environmental crime, with the Commission aiming at recasting the proposal in the light of its interpretation of the judgment. The legal basis of the proposal is article 175 (1) TEC on environmental protection. The proposal includes detailed definitions of offences and detailed provisions on criminal sanctions, both for natural

19 Doc. 6077/06 (Presse 38), 10. For a summary of reactions in the Council, see also Council doc. 13103/06, Brussels, 22 September 2006.

20 This states that "the Council, acting unanimously on the initiative of the Commission or a Member State, and after consulting the European Parliament, may decide that action in areas referred to in article 29 [the umbrella provision for the third pillar] shall fall under Title IV of the Treaty establishing the European Community, and at the same time determine the relevant voting conditions relating to it. It shall recommend the member states to adopt that decision in accordance with their respective constitutional requirements."

21 See House of Lords European Union Committee, *The Criminal Law Competence of the EC: Follow-up Report*, 11th Report, session 2006–07, HL Paper 63.

22 COM (2006) 168 final, Brussels, 26 April 2006.

23 Articles 6–8 of the Commission proposal.

24 COM (2007) 51 final, Brussels 9 February 2007.

and legal persons (but, unlike the intellectual property rights proposal, no provisions on criminal procedure); and

- a directive on sanctions against employers of illegally staying third-country nationals.[25] The proposed legal basis is article 63 (3) (b) TEC (measures on illegal immigration and illegal residence). The main avenue of enforcement of employers' duties under the directive appear to be administrative sanctions. However, the draft directive also provides for the criminalization of serious cases of non-compliance with its provisions and introduces criminal sanctions for such cases.[26]

In the light of the uncertainty as to the precise extent of Community criminal law competence following the Court's judgment on the environmental crime case, it remains to be seen whether their final form and content will depart substantially from the Commission's proposals. The debate has already been focusing on the content of some of these proposals, in particular the extent of criminalization and the levels of proposed criminal sanctions. It is also interesting to look at the legal bases of the proposals- the protection of the internal market and the environment, and action against illegal immigration- and link them with the relevant objectives of the Community in order to address the question on whether these objectives constitute "essential" objectives justifying the employment of Community criminal law for their achievement. These questions of competence, however, cannot be disassociated with questions of the necessity of criminalization and severity of the criminal sanction envisaged. On both the intellectual property rights[27] and the employers' sanctions proposals (see Carrera and Guild 2007), concerns have been raised regarding the suitability of the criminal law to regulate the matter. Criminalization may not always be necessary, but it may be used to strengthen the case—and create precedents—for a Community criminal law competence.

The Ship-Source Pollution Case

Further clarification on the scope of Community criminal law competence has been expected from the Court of Justice on the ship-source pollution case. The case is very similar to the one on environmental crime, with the Commission challenging the validity of a framework decision on ship-source pollution, arguing that it should have been adopted under the first pillar. It is indicative of the constitutional significance of the case, and the strong views of member

25 COM (2007) 249 final, Brussels, 16 May 2007.

26 Ibid. articles 10–11. See also the specific provisions on the liability of legal persons in articles 12–13.

27 The Justice and Home Affairs Council of 5–6 October 2006 noted in this context that criminal law is considered as a means of last resort, and that further scrutiny is needed regarding the need for criminal measures on the EU level in order to protect intellectual property rights. Council doc. 13068/06 (Presse 258), 22.

states in this context, that no fewer than 20 member states intervened against the Commission and in favor of the Council which argued that the third pillar legal basis was appropriate.[28]

The Opinion of the Advocate General

The views of the parties can be found in the opinion of Advocate General Mazák.[29] The Commission argued that articles 1 to 10 of the framework decision could have been adopted on the basis of article 80 (2) TEC relating to the Community common transport policy and that consequently, the entire framework decision (due to its indivisibility) infringes article 47 TEU.[30] In a broad interpretation of the environmental crime judgment, the Commission is of the view that principles that the Court laid in its environmental crime judgment apply "in their entirety to other Community policies" such as the transport policy, arguing that the importance of environmental protection in the Community and its particular characteristics had in fact no decisive bearing on the environmental crime decision in principle.[31] According to the Commission, the Community legislature may provide for criminal measures in so far as necessary to ensure the full effectiveness of Community rules and regulations. The Community is therefore according to the Commission competent to define the type and level of penalties if and in so far as it is established that this is necessary to ensure the full effectiveness of a Community policy.[32]

The Council on the other hand defended the choice of the third pillar instrument (supported by all intervening member states) and denied that criminal law measures should have been adopted in the first pillar under article 80 (2) TEC. The Council's strategy was primarily to attempt to differentiate between the ship-source pollution and the environmental crime cases. According to the Council, it is undisputed article 80 (2) TEC (on transport) is the correct legal basis for the adoption of the first pillar directive, even if it also pursues objectives related to the environmental protection.[33] The common transport policy lacks the specific characteristics and importance of environmental protection; moreover, the Community powers to act on transport matters depends on the decision of the Council.[34] In the alternative, the Council argued that the provisions of the ship-source pollution framework decision differed from those of the third pillar measure on environmental crime in that they were more detailed in particular

28 Case C-440/05, *Commission v. Council.*

29 Opinion delivered on 28 June 2007.

30 Paragraph 27. A similar view was put forward by the European Parliament, which stressed the similarities with the environmental crime case and argued that the framework decision in question is also concerned with environmental protection (paragraphs 32–35).

31 Paragraph 28.

32 Ibid.

33 Paragraph 36.

34 Paragraph 38.

with regard to the level and type of penalties to be imposed. These provisions could not have been adopted under the first pillar—if the environmental crime case were to be interpreted along the lines advocated by the Commission, Title VI of TEU would largely be deprived of practical effect.[35]

A similarly narrow interpretation of the environmental crime case was provided by the member states. In their view, the implied Community competence to legislate on criminal law matters is confined to measures which are "necessary" or (absolutely) "essential" for combating serious environmental offences—adding that such competence does not extend beyond the field of environmental protection to another common policy such as the transport policy at issue and in any event excludes harmonization of the type and level of penalties as laid down in the framework decision.[36] Member states also put forward a number of arguments indicative of their broader concern of loss of sovereignty in criminal matters related to

> the principles of subsidiarity, attributed powers and proportionality; the particular nature and necessary coherence of criminal law; the margin of appreciation to be left for the member states; and the system set up by the Treaty on the European Union which would be undermined if the arguments of the Commission were upheld.[37]

Member states also argued that article 47 TEU is intended to lay down a clear delimitation of competences between the first and the third pillars but not to establish that the former has primacy over the latter.[38]

The Advocate General recommends that the ship-source pollution framework decision be annulled, as a number of its provisions (those pertaining to the criminalization of ship-source pollution but interestingly not those imposing specific penalties) could have been adopted in the first pillar under a transport legal basis.[39] The reasoning behind this can broadly be divided into four broad themes: his interpretation of article 47 TEU in the context of the case; his interpretation of the contours of Community criminal law competence in the light of the debate post the environmental crime judgment of which objectives of the Community justify first pillar action in criminal matters; his interpretation of the precise scope of Community criminal law competence and in particular whether it includes the imposition of criminal sanctions; and his comments on the relationship between Community law and criminal law.

The Advocate General started with a comment-response to member states' views regarding the relationship between the first and the third pillar. He interpreted article 47 TEU in a manner affirming the importance of Community law, noting that article 47 TEU is not designed merely to ensure that nothing under the EU Treaty affects or runs counter to existing substantive provisions

35 Paragraph 39.
36 Paragraph 41.
37 Paragraph 42.
38 Paragraph 43.
39 Paragraphs 128–139.

of Community law—it is intended rather also to preserve the powers conferred on the Community as such.[40] The TEU "meant only to add" to the fields of Community activity.[41] He categorically stated that

> Contrary to the view expressed by certain Governments, article 47 EU thus establishes the "primacy" of Community law or, more particularly, the primacy of Community action under the EC Treaty over activities undertaken on the basis of Title V or Title VI of the EU Treaty, in that the Council and, as the case may be, the other institutions of the Union *must* act on the basis of the EC Treaty if and in so far as it provides an appropriate legal basis for the purposes of the action envisaged.[42]

The Advocate General went on to examine specifically the relationship between criminal law and Community law. He noted that the Court's ruling on environmental crime was qualitatively significant but not incomprehensible[43]—motivated fundamentally by the need to ensure the full effectiveness of Community law.[44] The Advocate General then proceeded to examine the question of the nature of the Community objective whose attainment justifies Community action in criminal matters—in particular whether EC criminal law competence is limited to the protection of the environment. He interpreted Community competence broadly, starting from the premise that

> environmental protection is not the only essential objective or policy area of the Community and it is difficult to distinguish it on that account from the other Community objectives and activities referred to in articles 2 EC and 3 EC, such as the establishment of an internal market characterised by the fundamental freedoms, the common agricultural policy or the common rules on competition.[45]

According to the Advocate General, since criminal law is a barometer of the importance attached by a community to a legal good or value, to single out environmental protection in such a way would not do justice to the identity of the Community.[46] Moreover, environmental protection is not the only "horizontal" Community matter—gender equality, non-discrimination or public health are further examples.[47] Furthermore, the Advocate General held that it is not feasible to argue that competence should be limited to the area of the environment since it is a corollary of the effectiveness of Community law.[48] To reserve competence in

40 Paragraph 50, emphasis added. According to the AG, that is confirmed by article 29(1) TEU which expressly provides that third pillar provisions are "without prejudice to the powers of the European Community" (paragraph 51).

41 Paragraph 55.

42 Paragraph 53.

43 Paragraph 77.

44 Paragraph 89.

45 Paragraph 94.

46 Paragraph 95.

47 Paragraph 96.

48 Paragraph 97.

the field of environmental protection would thus be arbitrary; since Community competence in criminal matters is necessary to ensure the effectiveness of all Community law, "it must in principle also exist in relation to any other Community policy area (such as transport), subject, of course, to the limits set by the Treaty provisions providing the substantive legal basis in question."[49] Using effectiveness, but also alluding to the special nature of criminal law, the Advocate General thus argues for the extension of Community criminal law competence not only to achieve any Community objective, but to ensure the effectiveness of all Community policy areas within the limits set out by the Treaty.

THES

He then went on to comment on the scope of Community criminal law competence, an issue that was also central in the environmental crime case. The Advocate General follows the Court's approach in the latter case that while the Community is entitled to constrain member states to impose criminal penalties and to prescribe that they be effective, proportionate and dissuasive, but beyond that, it is not empowered to specify the penalties to be imposed.[50] The Community does not have the power to impose criminal penalties itself, but rather the power to require member states to provide, within their respective penal systems, for certain forms of conduct to be classified as criminal offences as a means of upholding the Community legal order.[51] The limits to the Community's powers in this context are justified on the grounds of subsidiarity and preserving the coherence of the national penal systems.[52]

this is the second step in qualifying Community criminal competence, after the ship-source pollution case.

While having emphasized the foundation of Community criminal law competence on the need to ensure the effectiveness of Community law, the Advocate General concludes that part of his opinion with a discussion of the potential subordination of criminal law to the effectiveness of Community law.[53] He accepts that effectiveness is an imprecise criterion on the basis of which to establish criminal law competence and does not encapsulate entirely the essence of criminal law.[54] Having broadened Community competence in criminal matters by extending it potentially to any Community policy, he now tries to place some limits by stating that the necessity of Community criminal law does not stem only from the objective criterion of the existence of a legal basis in the EC Treaty, but also from a degree of judgment by the institutions involved.[55] Moreover, the Advocate General accepts that it is not ideal for Community criminal law to be

---

49 Paragraph 99. However, the Advocate General further adds in a different part of the opinion that the Community has criminal law competence whenever criminal law measures are necessary to ensure the full effectiveness of Community law and essential to combat serious offences in a particular area, paragraph 112.

50 Paragraph 103.

51 Paragraph 104.

52 Paragraphs 108 and 106 respectively.

53 Paragraphs 114–121. On the issue of the subordination of criminal law to Community law see Mitsilegas 2008.

54 Paragraphs 105 and 108 respectively.

55 Paragraph 119.

considered a mere accessory to the specific Community competences and only a single aspect of the policies involved.[56]

Advocate General Mazák was faced with the delicate task of balancing the fundamentally different views regarding the extent of Community criminal law competence. In this context, and in the light of the Court's reasoning in the environmental crime judgment, he had to reconcile the demands of Community law with the special characteristics of criminal law, and to clarify the Court's ruling in the light of the various competing interests, in particular the very strong reaction against the expansion of Community criminal law competence by an impressive number of member states. The result has been an opinion where, on many occasions, two separate and quite distinct narratives not only co-existed, but also merged: the narrative of the primacy and centrality of Community law and the need to ensure its effectiveness on the one hand; and the narrative of the special features of criminal law and its close link with national sovereignty and societal reality on the other. This symbiotic relationship has not always produced crystal-clear results. The opinion started with the unambiguous declaration of the primacy of the first over the third pillar in interpreting article 47 TEU, and continued in equally straightforward and bold fashion in accepting that the Community does have competence in criminal law—not only on environmental matters, as the Court ruled earlier, but on any Community policy within the limits set out by the Treaty. Effectiveness of Community law is used as a central justification for this view. However, the Community law reasoning is then coupled with argumentation based on the logic of (domestic) criminal law, in particular of the use of criminal law in order to protect "legal goods" or interests that a community merits being worthy of protection by the invasive criminal law mechanism. Applying this logic at Community level, it appears that such legal interests may include the effectiveness of any Community policy, which is deemed as an interest to be protected by criminal law at the national level equivalent to other protected interests (such as the protection of human life, property and so on. However, such an application may extend to an over-criminalization, with the expansion of Community criminal law competence leading potentially to the introduction of new, extended criminal offences and sanctions. The Advocate General tried to temper such expansion by stressing that along with the formal existence of competence there needs to be some level of political justification for such a choice. He also stressed, towards the end, the view that criminal law should not be viewed as subordinate to the various Community policies it seeks to enhance and that effectiveness does not always fit with criminal law. However, it is exactly the recourse to effectiveness which formed the background of his recommendation to annul the framework decision on ship-source pollution and to opt for a broad interpretation of the scope of Community criminal law competence.

56 Paragraph 120.

The Court's Ruling

Like the Advocate General, the Court focused on article 47 TEU as a starting point affirming that it is its task to ensure that acts which, according to the Council, fall within the scope of Title VI do not encroach upon the powers conferred by the EC Treaty on the Community—the Court would thus have to look at whether the framework decision affected the Community's competence on transport under article 80 (2) TEC.[57] The Court noted first that the common transport policy is one of the foundations of the Community, with the latter having broad legislative powers under this article including powers in the field of maritime transport.[58] The existence of the legislative competence conferred to the Community by article 80 (2) TEC is not dependent on a decision by the legislature to actually exercise this competence.[59] Secondly, the Court linked Community transport policy with the objective of environmental protection. The latter is, according to the Court, one of the essential objectives of the Community which must, according to article 6 TEC "be integrated into the definition and implementation of [...] Community policies and activities" including transport policy.[60]

The Court then examined the framework decision in this light, asserting that the latter's provisions relate to conduct which "is likely to cause particularly serious environmental damage as a result, in this case, of the infringement of the Community rules on maritime safety."[61] According to the Court, it is also clear that the Council took the view that criminal penalties were necessary to ensure compliance with Community rules on maritime safety.[62] In the light of these two considerations and the Court's earlier ruling on the environmental crime case,[63] the Court took the view that articles 2, 3 and 5 of the framework decision on ship-source pollution, which "are designed to ensure the efficacy of the rules adopted in the field of maritime safety, non-compliance with which may have serious environmental consequences, by requiring member states to apply criminal penalties to certain forms of conduct" are essentially aimed at improving maritime safety as well as environmental protection and could have been validly adopted on the basis of article 80 (2) TEC.[64] However, the Court noted that Community competence in the field does not extend to the determination of the type and level of criminal penalties—therefore it does not extend to provisions such as articles 4 and 6 of the framework decision determining specific levels of

57 Judgment of 23 October 2007, paragraphs 53 and 54 respectively.

58 Paragraphs 55 and 58 respectively.

59 Paragraph 59.

60 Paragraph 60.

61 Paragraph 67. The Court also noted that the purpose of the framework decision, according to its preamble, was to enhance maritime safety and improve protection of the marine environment against ship-source pollution (paragraph 62).

62 Paragraph 68.

63 See also paragraph 66 of the judgment.

64 Paragraph 69.

criminal sanctions.[65] However, these sets of provisions being inextricably linked to each other, the Court annulled the framework decision as a whole.

The Court's ruling offers a degree of clarification regarding the delimitation of Community criminal law competence. For supporters of first pillar criminal law, the judgment will be seen as a further affirmation of the existence of Community competence in criminal matters and as an expansion of such competence in the field of ship-source pollution. However, the Court has by no means given *carte blanche* to the adoption of a wide range of first pillar criminal law measures. First of all, the relative vagueness of the environmental crime ruling on the extent of first pillar criminal law competence has been remedied to some extent in this case, with the Court stating that while criminalization in this case would fall within the first pillar, the imposition of precise sanctions (such as levels of custodial sentences) still falls within the third pillar. Moreover, the Court embarked on a delicate balancing act regarding the question of whether Community criminal law competence is limited to the achievement of "essential" Community objectives, or whether it extends to all Community objectives and/or policies. The Court certainly refrained from doing the latter. While it accepted that a first pillar measure with a transport legal basis may include criminal law provisions, this appears to be justified on the grounds of the strong link between the measure in question with the protection of the environment—an essential Community objective whose protection may necessitate criminal law. The extent of Community criminal law competence in this context remains thus still contested.

The Impact of the Reform Treaty

in other words: the Lisbon Treaty

The Reform Treaty, which would bring about the collapse of the pillars could lead to the view that the current debate over the extent of Community criminal law competence would be settled. However, there are a number of questions arising from the wording of the Reform Treaty when combined with the Court's case-law on environmental crime. According to the Reform Treaty,[66] the Union (succeeding the Community as a single pillar organization with legal personality) will have competence to establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.[67] According to the Treaty, these areas of crime are the following: Terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime.[68] The list of these offences

65 Paragraphs 70–71. Similarly, the Court noted that provisions on jurisdiction and information exchange are third pillar matters (paragraph 73).

66 Document CIG 1/1/07, REV 1, Brussels, 5 October 2007.

67 New article 69f (1) first indent.

68 Ibid., second indent.

may be expanded "on the basis of developments in crime" by the Council acting unanimously after obtaining the consent of the European Parliament.[69]

check where it is provided in the LIsbon Treaty!

It appears thus that the Reform Treaty—like the Constitutional Treaty—expands criminal law competence (for what is now the Community) in granting the Union powers to adopt (albeit minimum) rules on criminal sanctions (and not merely to require member states to adopt proportionate, effective and dissuasive penalties). However, the scope of competence regarding criminal offences and sanctions appears to be narrower than its interpretation by the Court in the environmental crime case, and the ship-source pollution cases. Rather than granting the Union criminal law competence in order to achieve effectiveness in Community objectives or policies, the Treaty delimits competence on the basis of an exhaustive list of offences, which must also fulfil a number of conditions set out in the first indent of new article 69f (1) (seriousness, cross-border dimensions, impact or the need to combat on a cross-border basis). The list of these areas of crime can only be extended by a unanimous decision by the Council.

It is not clear how the wording of Article 69f(1) will co-exist with the Court's case-law. If the Court's case-law remains along the current lines (justifying Community criminal law action under non-criminal law legal bases in order to achieve Community objectives), the narrow framing of Community competence in substantive criminal law in article 69f(1) may be undermined by criminal law proposals justified on the basis to ensure the effectiveness of a Union objective or policy. This conclusion is reinforced by the insertion in the Reform Treaty of article 69f(2), which provides an express legal basis for EU substantive criminal law when approximation is essential to ensure the effective implementation of a Union policy.[70] To take the example of environmental crime: if the Treaty provision on the protection of the environment is deemed an adequate legal basis for the adoption of defining criminal offences and imposing, in one form or other, criminal sanctions, even after the entry into force of the Reform Treaty, article 69f (1) will be undermined as Union criminal law competence will extend to offences other than those exhaustively enumerated therein. Article 69f(2) on the other hand may be read as allowing in fact the Court to expand Union criminal law competence when deciding that criminal law approximation is essential to ensure the effective implementation of any Union policy in an area where harmonization has taken place.

A development that may imply that the Union's criminal law competence may extend beyond the offences enumerated in article 69f is that the Reform Treaty also provides that the sentence in article 280 (4) TEC stating that measures to combat fraud and article 135 TEC on customs cooperation (areas which is not listed in article 69f) will not concern the application of national criminal law and the national administration of justice will be deleted.[71] Without this sentence, the Union will have competence under article 280 (4) TEC to adopt "the necessary

69 Ibid., third indent.

70 Article 69f (2) in doc. CIG/1/1/07 REV 1 allows for such approximation if it "proves" essential to ensure effective implementation.

71 Point 279 and points 44 and 109.

measures in the fields of the prevention and fight against fraud affecting the financial interests of the [Union] with a view to affording effective and equivalent protection in the member states," and under article 135 TEC to "take measures in order to strengthen customs cooperation between member states and between the latter and the Commission." It is not clear whether the exhaustive wording of article 69f in fact excludes the adoption of measures defining criminal offences and sanctions under articles 280 (4) and 135 TEC or whether the deletion of the current exception means that the road is open for such legislation.[72]

Finally, it must be reminded that the Reform Treaty also introduces significant changes with regard Union competence on criminal procedure. Currently, there is a controversy regarding the existence and extent of such competence in the third (and not the first) pillar, vividly demonstrated by the ongoing negotiations for a framework decision on the rights of the defendant in criminal proceedings. New article 69e (2) of the Reform Treaty expressly confers to the Union the competence to adopt, under the legislative procedure, minimum rules concerning mutual admissibility of evidence between member states, the rights of individuals in criminal procedure and the rights of the victims of crime—with further areas potentially added after a unanimous decision by the Council and the consent of the European Parliament. However, Union competence in the field of criminal procedure applies only to the extent necessary to facilitate mutual recognition of judgments and police and judicial cooperation in criminal matters. Criminal procedure measures—and the human rights implications which they may have—are thus subordinated to the efficiency logic of mutual recognition, which is according to the Reform Treaty, the basis for judicial cooperation in criminal matters in the EU.[73]

Conclusion: Criminal Law as a Means to an End?

While the Court's ruling in the environmental crime case put an end to the debate regarding the existence of Community competence to define criminal offences and require member states to impose criminal sanctions, the debate regarding the precise extent of such competence is on-going. The demands for effectiveness of Community law clash with the scepticism of member states regarding ceding sovereignty to the Community in the sensitive area of criminal law. The stance of the overwhelming majority of member states, as witnessed in their reactions to

72 It should also be noted here that in the case of fraud, the Reform Treaty provides for a separate legal basis for the determination of offences affecting the financial interests of the Union—new article 69i which envisages the future establishment of a European Public Prosecutor's Office from Eurojust. Such Office will be established following unanimous decision by the Council and the consent of the European Parliament via a regulation, which will also determine the offences for which the EPP will have a mandate. It is not clear however whether the term "determine" will cover definition of criminal offences or merely enumerate offences on the basis of other Union instruments or national law.

73 Article 69e (1). For this argument Mitsilegas 2006b.

the environmental crime judgment and their interventions ship-source pollution case, cannot be ignored, and will pose a significant challenge for the Court if it tries to accommodate it while at the same time ensuring the effectiveness of Community law. In its judgments on the ship-source pollution and environmental crime cases, the Court appeared reluctant to accept the specificity of criminal law in the big picture of Community law—however the Court appears to have tried to accommodate member states' skepticism in setting limits to the first pillar criminal law competence in the ship-source pollution judgment. However, given the sensitivity of the issues concerned, the Court may have to look again at the relationship between Community law and criminal law and the view that criminal law is merely a means to an end towards the achievement of Community objectives. Guidance to these questions is immensely important, even if the Reform Treaty eventually comes into force. The abolition of the pillars does not solve immediately all the issues regarding the extent of (Union this time) competence in criminal matters. In the light of the (albeit somewhat diluted in comparison with the Constitutional Treaty) emergency brake provisions in the Reform Treaty, concerns by member states as regards the extent and quality of Union intervention in criminal matters have to be taken into account if a fragmented Union criminal justice policy is to be avoided.

References

Carrera, S. and Guild, E. (2007), *An EU Framework on Sanctions against Employers of Irregular Immigrants*, CEPS Policy Brief no.140 (Brussels: Centre for European Policy Studies).

Commission of the European Communities (2005), 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, 24 November 2005.

House of Lords European Union Committee (2007), *The Criminal Law Competence of the EC: Follow-up Report*, 11th Report, session 2006–07, HL Paper 63 (London: The Stationery Office).

Labayle, H. (2006), "L'Ouverture de la Jarre de Pandore, Réflexions sur la Compétence de la Communauté en Matière Pénale," *Cahiers de Droit Européen*, vol. 42 nos 3–4, 379–428.

Mitsilegas, V. (2006a), "Constitutional Principles of the European Community and European Criminal Law," *European Journal of Law Reform*, vol. 8 no. 2/3, 301–24.

Mitsilegas, V. (2006b), "Trust-building Measures in the European Judicial Area in Criminal Matters: Issues of Competence, Legitimacy and Inter-institutional Balance," in Carrera, S. and Balzacq, T. (eds), *Security versus Freedom? A Challenge for Europe's Future* (Aldershot: Ashgate), pp. 279–89.

Mitsilegas, V. (forthcoming 2008), "The Transformation of Criminal Law in an Area of Freedom, Security and Justice," *Yearbook of European Law 2007*.

Tobler, C. (2006), "Case C-176/03, Commission v. Council, Judgment of the Grand Chamber of 13 September 2005," *Common Market Law Review*, vol. 43 no. 3, 835–54.

Vervaele, J.A.E. (2006), "The European Community and Harmonization of the Criminal Law Enforcement of Community Policy," *eucrim*, nos 3–4, 2006, 87–93.

Wasmeier, M. and Thwaites, N. (2004), "The 'Battle of the Pillars:' Does the European Community Have the Power to Approximate National Criminal Laws?," *European Law Review*, vol. 29 no. 5, 613–34.

White, S. (2006), "Harmonisation of Criminal Law under the First Pillar," *European Law Review*, vol. 31 no.1, 81–92.