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The Scope of the Community's Competence in the Field of Criminal Law

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1. Introduction

On 13 September 2005, the Court of Justice of the European Communities (hereafter: Court of Justice EC) passed a judgment giving rise to much controversy.¹ In that judgment, the Court found that in some situations, the EC Treaty leaves room to take measures in a directive “which relate to the criminal law of the Member States” (para. 48). The authority to take criminal law measures in the First Pillar exists – concisely stated – if these measures relate to one of the essential objectives of the Community (cf. Articles 2 and 3 EC Treaty), and the use of effective, proportionate and dissuasive criminal penalties by the national authorities is an essential measure to achieve that objective.²

In view of the starting point that provisions of the EU Treaty may not prejudice those of the EC Treaty (Article 47 EU Treaty), actions of the Council within the Third Pillar – which concerns police and judicial cooperation in criminal matters as referred to in Article 29 ff. EU Treaty – may not encroach upon the competences of the Community in the First Pillar.³ This means that in cases

¹) Court of Justice EC 13 September 2005, case C-176/03, [2005] ECR I-7879.

²) The Court adds – also in para. 48 – that the Community legislature must consider the measures necessary, but that condition shows a certain overlap with the requirement of essentiality.

³) Art. 29, first lines, of the EU Treaty means, stated concisely, that the Union must lay down measures in relation to police and judicial cooperation “without prejudice to the powers of the European Community”. Cf. for the supervisory role of the Court of Justice EC in this connection, Court of

where the Community has the competence to take criminal law measures, such measures may not go beyond the First Pillar as its exclusive jurisdiction. Practically speaking, this means that such measures must be taken by means of a directive⁴ and not a framework decision. Consequently, the legislative procedure designated in the EC Treaty has to be followed – usually the co-decision procedure in which decisions can be taken “only” by a qualified majority – and the Court of Justice EC can rule in an infringement action on the way in which the relevant directive is to be implemented, as well as give an interpretation of the rules of that directive in a preliminary ruling procedure.

The reason this judgment of 13 September 2005 caused so much controversy has everything to do with the characteristics of Community law and EU law respectively, relating to police and judicial cooperation in criminal matters. Because, unlike in the First Pillar, decisions in the Third Pillar are taken on the basis of unanimity, while the Court of Justice EC plays a much less prominent role.⁵ Acceptance of the Community’s competence in the field of criminal law has therefore led to the objection among politicians as well as some legal scholars that “Europe” has now acquired too tight a grip on national criminal law. This in turn has resulted (in the Netherlands and elsewhere) in a hefty and not always constructive debate among the practitioners of the various legal disciplines over the desirability of Community intervention in national criminal law. It can be ascertained as well, even apart from the outcome, that the arguments by which the Court of Justice EC has assumed the Community’s competence in relation to criminal law have encountered substantial criticism.

In this paper, we do not want to repeat the debates already held.⁶ Instead, we focus on the issue of what the exact scope of the Community’s competence is in

Justice EC 12 May 1998, Case C-170/96, [1998] ECR I-2763, para. 16 and the aforementioned judgment of the Court of Justice EC of 13 September 2005, Case C-176/03, para. 39. See also para. 53 of the judgment of 23 October 2007 discussed below.

⁴) The adoption of a regulation is not ruled out either.

⁵) Cf. e.g. M.J. Borgers, “Implementing framework decisions”, *Common Market Law Review* (2007) 1362-1371.

⁶) See regarding and further to the judgment in Case C-176/03: P.-Y. Monjal, “Reconnaissance d’une compétence pénale communautaire pour la CJCE”, *Recueil Dalloz* (2005) 3064-3067; K.M. Apps, “Case C-176/03, Commission v. Council: ‘Pillars Askew: Criminal Law EC-Style’”, *Columbia Journal of European Law* (2006) 625-637; M.J. Borgers, “Harmonisatie van het strafrecht in de context van de Eerste Pijler”, *Delikt en Delinkwent* (2006) 76-99; M. Böse, “Die Zuständigkeit der Europäischen Gemeinschaft für das Strafrecht. Zugleich Besprechung von EuGH, Urteil vom 13.9.2006”, *Goltdammer’s Archiv für Strafrecht* (2006) 211-224; P. De Hert, P. Paepe & H. Griffioen, “Europees milieustrafrechtarrest. Minder ruimte voor nationale bevoegdheden”, *Nieuw Juridisch Weekblad* (2006) 482-495; D. Spinellis, “Judgement of 13 September 2005 (Case C-176/03, *Com-*

the field of criminal law, on the basis of a more recent judgment of the Court of Justice EC on the Framework Decision to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution, (Case C-440/05).⁷ For this purpose, we give an outline below of the background and developments leading up to the last-mentioned judgment (section 2). We then summarise this judgment and give a survey of the main grounds of the Advocate General (section 3). Afterwards, we give our commentary on the judgment (section 4), followed by some concluding remarks (section 5).

2. The Background and Developments Leading up to the Judgment in Case C-440/05

Before going into more detail on the Commission's interpretation of the judgment of 13 September 2005, we must mention that Community intervention in the imposition of penalties at Member-State level to enforce Community legislation was already at issue before the pillar structure was introduced. For instance, the Court of Justice EC ruled as early as in 1989 in the Greek maize judgment that where Community legislation does not specifically provide a penalty for infringement or refers for that purpose to national laws, regulations and administrative provisions, the Member States may be required to take all measures based on their general obligation under Article 10 EC to guarantee the effective application of Community law. In doing so, they must "ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of

mission v. Council) annulling the Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law", *European Constitutional Law Review* (2006) 293-302; Ch. Tobler, "Case C-176/03, *Commission v. Council*, judgment of the Grand Chamber of 13 September 2005, nyr", *Common Market Law Review* (2006) 835-854; M.I. Veldt-Foglia, "Toch strafrecht in de Eerste Pijler!", *Nederlands Tijdschrift voor Europees Recht* (2006) 29-34; J.A.E. Vervaele, "De Europese Gemeenschap en harmonisatie van de strafrechtelijke handhaving van het gemeenschapsbeleid", *Delikt & Delinkwent* (2006) 637-668; S. White, "Harmonisation of criminal law under the first pillar", *European Law Review* (2006) 81-92; E. Herlin-Karnell, "*Commission v. Council*: Some Reflections on Criminal Law in the First Pillar", *European Public Law* (2007) 69-84. See also S. Peers, *EU Justice and Home Affairs Law* (Oxford, OUP 2006) 390-397, House of Lords, European Union Committee, *The Criminal Law Competence of the European Community*, 2006, HL-paper 227, and the contributions to *Eu crim, the European Criminal Law Associations' Forum* 2006, issue 3-4.

⁷ See for other discussions of the judgment in Case C-440/04: A. Dawes & O. Lynskey, "The Ever-Longer Arm of EC Law: The Extension of Community Competence into the Field of Criminal Law", *Common Market Law Review* (2008) 131-158, as well as O.F. Essens, "Commissie versus Raad: ronde 2", *Nederlands Tijdschrift voor Europees Recht* (2008) 91-96.

a similar nature and importance and which ... make the penalties effective, proportionate and dissuasive".⁸ Referring to the Greek maize judgment, the Court of Justice EC held in 1999 that the same applies where Community legislation does provide specific penalties for infringement, but does not give an exhaustive list of the penalties the Member States may impose.⁹ Against this background, it is not very surprising that in the judgment of 13 September 2005, the Court of Justice sets the requirements of effectiveness, proportionality and dissuasiveness cited in the introduction on the penalties imposed by the competent national authorities. What makes the latter judgment so special is the (explicit) acknowledgment that this can also concern *criminal* penalties.

Referring to the judgment of the Court of Justice EC of 13 September 2005, the Commission appealed on 8 December 2005 against the Council of the European Union in order to review the validity of the Framework Decision on ship-source pollution.¹⁰ The reason for this action can be found in a Communication by the Commission, defining its position, published just before that action.¹¹ In this Communication, the Commission states that the rules from the Framework Decision on ship-source pollution could have and should have been enacted on the basis of Article 80(2) of the EC Treaty. The reason the Commission brought a second case before the Court of Justice EC so quickly which affects the demarcation of the First and Third Pillars is most likely connected with the need felt by the Commission for further clarification of the grounds of the Court of Justice EC on the following two points.

First, the question is the extent to which the Community can take criminal measures in view of the legal bases provided by the EC Treaty for mutual harmonisation of the laws, regulations and administrative provisions of the Member States in different areas. In the judgment of 13 September 2005, the Court of Justice EC limited itself on this point to Article 175 EC Treaty, thereby ruling that – stated concisely – this provision gives an adequate legal basis for taking criminal measures in relation to the environment. In its Communication, the Commission stated that this judgment was not limited to protection of the environment and that criminal measures were possible in other areas as well. The Commission then pointed out various framework decisions which, in view of the legal bases in the EC Treaty, should be replaced by directives. Because of the time limit for appeal, it was only

⁸) Court of Justice EC 21 September 1989, Case 68/88, [1989] ECR 2965.

⁹) Court of Justice EC 8 July 1999, Case C-186/98, [1999] ECR I-4883.

¹⁰) 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, *OJEU* 2005, L 255/164.

¹¹) Communication from the Commission on the implications of the Court's judgment of 13 September 2005 (Case C 176/03 *Commission v. Council*), COM(2005) 583 final of 23 November 2005.

possible for the Commission to have the validity reviewed of the Framework Decision on ship-source pollution.¹² This case centres on the question whether rules pertaining to harmonisation for the purpose of combating ship-source pollution under criminal law can be part of the common transport policy of Title V of the EC Treaty. This specifically concerns the legal basis in Article 80(2) EC Treaty, under which “appropriate provisions may be laid down for sea and air transport”.

The second part on which the Commission wanted to obtain clarity is the meaning of the phrase “measures which relate to the criminal law of the Member States”.¹³ As we will determine forthwith, the Court of Justice EC does not provide much clarity in the judgment of 13 September 2005 as to what these measures can or may entail. In its Communication, the Commission gives a broad interpretation to that phrase. It supposedly relates to the definition of the constituent elements of offences, the type and level of the criminal penalties applicable and “other elements relating to criminal law”.¹⁴ It is clear that the Commission wants to keep all options open. In the action on the Framework Decision on ship-source pollution, this is expressed in the statement that, according to the Commission, practically all¹⁵ provisions of this Framework Directive can be considered as such measures. In addition to defining certain acts as offences, this concerns, *inter alia*, rules relating to the types of penalties, the level of the minimum custodial sentence, jurisdiction, coordination of prosecution and obligations of the Member States to notify information.

In this outline of the run-up to Case C-440/05, we will not deal further with the issue of the legal grounds.¹⁶ For a good understanding of the Commission’s position on the (broad) interpretation of “measures which relate to the criminal law of the Member States”, it is advisable to deal somewhat longer with what can be concluded in this regard from the judgment of the Court of Justice EC of 13 September 2005. It is important to note that the legality of the provisions of the Framework Decision on the protection of the environment through criminal law relating to jurisdiction, surrender and (coordination of) prosecution *were not* up for discussion in that action. The relevant provisions were not part of the appeal brought by the Commission.¹⁷

¹² Cf. Article 230(5) EC Treaty and Article 35(6) EU Treaty.

¹³ Court of Justice EC 13 September 2005, Case C-176/03, para. 48.

¹⁴ COM(2005) 583 final, p. 4.

¹⁵ The Commission’s appeal does not affect Article 11 on the period for transposing the framework decision and Article 12 on its entry into force.

¹⁶ Cf. the survey by Dawes & Lynskey (2008), pp. 140–144.

¹⁷ Court of Justice EC 13 September 2005, Case C-176/03, para. 18.

The fact that the Court of Justice EC did indeed pronounce the annulment of the entire Framework Decision has to do with the indivisibility of the Framework Decision. Its illegality is assumed specifically in relation to the minimum rules pertaining to the constituent elements of offences – including the rules on participation, instigation and the liability of legal persons – and in relation to penalties, including the type of penalty.¹⁸ The Court of Justice EC thus seems to have sought a connection with the measures referred to in Article 31(1)(e) of the EU Treaty.¹⁹ In doing so, the Court appears to have departed from the opinion of Advocate General Ruiz-Jarabo Colomer. His position entails that the Community can prescribe only that certain acts must carry criminal penalties (and must be criminalised as such), but that the discretion regarding the types of penalties rests with the Member States. It might be possible for the Member States to specify the types of penalties in the Third Pillar in more detail.

It is striking that in the case that resulted in the judgment of 13 September 2005, the Commission left out of its appeal the provisions from the Framework Decision on the protection of the environment through criminal law relating to jurisdiction, extradition and (coordination of) prosecution, while almost immediately after this judgment, it appeared to be of the opinion that such subjects could indeed be considered as measures that could be adopted within the Community. That the Commission wants to give a broad interpretation to “measures which relate to the criminal law of the Member States” is evident in three ways.

First of all, it can be pointed out that in the aforementioned Communication, the Commission proposed that a substantial number of framework decisions be replaced by directives. The Commission seems to be in favour of *total* replacement, as no mention is made of the fact that on some parts – such as jurisdiction *et cetera* – Community legislation is not possible.²⁰

Secondly, the Commission’s appeal against the Framework Decision on ship-source pollution is important. It is aimed, as already stated above, against virtually all provisions of the Framework Decision.

Thirdly, it can be pointed out that various proposals which the Commission has recently made for Community legislation contain diverse rules of criminal law. Those rules pertain to defining specific acts as offences, the types of the penalties,

¹⁸ Court of Justice EC 13 September 2005, Case C-176/03, para. 51, in which reference is made to Articles 1 to 7 of the Framework Decision on environmental criminal law.

¹⁹ According to Art. 31(1), first lines and under e. EU Treaty, common action on judicial cooperation in criminal matters shall relate to 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.

²⁰ Cf. also Peers (2006), p. 397.

the level of the penalties, confiscation of the proceeds of crime, deploying Community investigation teams and not being allowed to consider criminal acts as offences only subject to prosecution on complaint.²¹

The broad interpretation that the Commission gives to “measures which relate to the criminal law of the Member States” seems to be based on a specific interpretation of the grounds of the Court of Justice EC in the judgment of 13 September 2005. In its Communication, the Commission notes:

The Court makes no distinction according to the type of the criminal law measures. Its approach is functional. The basis on which the Community legislature may provide for measures of criminal law is the necessity to ensure that Community rules and regulations are complied with.²²

In other words: in the Commission’s view, all criminal law measures can be allowed, provided those measures are necessary with a view to achievement of one of the Community’s objectives. In line with this, the Commission establishes that the double-text mechanism (combinations of directives and framework decisions), which was previously not uncommon, is no longer necessary, because “the provisions of criminal law required for the effective implementation of Community law” can and should be adopted on the basis of the EC Treaty.²³

Questions can be raised regarding the Commission’s interpretation of the grounds of the Court of Justice EC in the judgment of 13 September 2005. Although it is correct that the Court does not literally make a distinction according to the type of the criminal measure, it should be borne in mind that the Court ruled only on the rules of the Framework Decision on the protection of the environment through criminal law relating to the constituent elements of offences and to penalties. This is also expressed by the fact that the Court of Justice EC found that the measures which relate to the criminal law of the Member States

²¹) The most varied on this issue is the amended proposal for a Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights, COM(2006) 168 final. See also the proposal for a Directive amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons, COM(2006) 93 final; the proposal for a Council Regulation setting up a Community regime for the control of exports of dual-use items and technology, COM(2006) 829 final; the proposal for a Directive on the protection of the environment through criminal law, COM(2007) 51 final; the proposal for a Directive providing for sanctions against employers of illegally staying third-country nationals, COM(2007) 249 final.

²²) COM(2005) 583 final, p. 3. In this context also European Parliament resolution on the consequences of the judgment of the Court of 13 September 2005 (C-176/03 *Commission v. Council*), document P6_TA(2006)0260, para. 16.

²³) COM(2005) 583 final, p. 4.

could be allowed when “the application of effective, proportionate and dissuasive *criminal penalties* by the competent national authorities is an essential measure”.²⁴ Viewed in this light, it cannot be said that this judgment of the Court has already legitimised other types of measures. Doubts have arisen in the literature as well as to which measures related to the criminal law of the Member States must be considered as allowed.²⁵

It is important as well that the question was raised of the extent to which the Community has the competence to prescribe the type of a criminal penalty. The Court of Justice EC determined that the rule from the Framework Decision on the protection of the environment through criminal law prescribing that in certain cases conduct is punishable by “penalties involving deprivation of liberty which can give rise to extradition” (Article 5(1)), is one of the articles which, on account of their aim and content, have as their main purpose the protection of the environment and could have been adopted on the basis of Article 175 EC. Proportionately, this Article 5(1) of the Framework Decision on the protection of the environment through criminal law is not a very detailed rule, which, for example, does not contain a determination of the minimum maximum duration of a custodial sentence, now common in Europe. It is not automatically evident from this that in the judgment of 13 September 2005, the Court of Justice EC wanted to consider every form of specification by the Community of the type of the criminal penalty possible.²⁶ At the same time, various authors argue that it is in line with this judgment to consider a specification of the type of the criminal penalty possible if it must be considered necessary with a view to enforcing Community law.²⁷ On the basis of the same arguments, other types of measures – relating to jurisdiction²⁸ and prosecution policy²⁹ – are considered possible. In short: there are some doubts in the literature regarding the scope of the Community’s competence in the field of criminal law.

²⁴ Court of Justice EC 13 September 2005, Case C-176/03, para. 48 (italics added).

²⁵ Cf. e.g. Spinellis (2006), pp. 300–301, Veldt-Foglia (2006), p. 33, White (2006), p. 91, and the survey of opinions in House of Lords (2006), pp. 20–23.

²⁶ See Peers (2006), p. 396. He points out para. 49 in Court of Justice EC 13 September 2005, Case C-176/03, in which the Court emphasises that the Framework Decision on the protection of the environment through criminal law leaves the choice of the criminal penalties to the Member States to a certain extent. Cf. also Barents (2006), p. 371, Tobler (2006), p. 847, and Mok in his case note under Court of Justice EC 23 October 2007, *Nederlandse Jurisprudentie* (2008) 48, under 1.

²⁷ Barents (2006), p. 371, Peers (2006), p. 396, and Tobler (2006), p. 849. This necessity criterion is expressed at the end of para. 48 in Court of Justice EC 13 September 2005, Case C-176/03.

²⁸ Barents (2006), p. 371, and Peers (2006), 397.

²⁹ Barents (2006), p. 371.

With this state of affairs, it should be clear that further clarification of the scope of the Community's authority in the field of criminal law is desired in the action brought by the Commission against the Framework Decision on ship-source pollution. It was presumed that such clarity could be created in the judgment in Case C-440/05. We therefore summarise this judgment here.

3. The Opinion of the Advocate-General and the Decision of the Court of Justice EC

3.1. Introduction

The judgment of the Court of Justice EC is linked to an extensive and interesting opinion by Advocate General Mazák (hereafter: the AG). To be able to assess the judgment of the Court on its merits, it is advisable to view it in the light of the AG's opinion. For this reason, we deal with the latter's main grounds and discuss the grounds and decision of the Court of Justice EC in connection therewith.

3.2. Does the Competence of the Community in the Field of Criminal Law Only Extend to Protection of the Environment?

In the first place, the AG deals with the question whether the Community's competence in the field of criminal law, as accepted in the judgment of the Court of Justice EC of 13 September 2005, only relates to the Community objective of environmental protection, or whether it is not *a priori* restricted to this.³⁰ The AG takes the position that, although the circumstance that in the judgment of 13 September 2005 reference is frequently made to the protection of the environment and its place in the EC Treaty can be taken to mean that the Court of Justice EC had only the specific area of the environment in mind, it does not necessarily follow from this that the power to provide for criminal measures is restricted to the protection of the environment.

Notwithstanding the fact that the protection of the environment is of vital importance worldwide, environmental protection – as is evident from the objectives and activities referred to in Articles 2 and 3 EC Treaty – is not the only essential objective or policy area of the Community. As criminal law functions “as a barometer of the importance attached by a community to a legal good or value”, an exclusive link of the Community's competence in the field of criminal law to environmental protection would not do justice to the nature – or, in the AG's terms, the *identity* – of the Community. Another important argument put

³⁰⁾ Points 91-99 of the opinion.

forward by the AG concerns the effectiveness of Community law. This effectiveness is the basis of the Community's competence in the field of criminal law. As this concerns a general principle of Community law, for that reason as well, it is not logical to make an exclusive link.

Regarding this first point of the Court of Justice EC summarises the case law in which, concisely stated, it is ruled that in the cases in which the Community has the competence to take criminal measures, it may not go beyond the First Pillar as its exclusive jurisdiction.³¹ Next, the Court of Justice EC holds in a rather general sense that the common transport policy "is one of the foundations of the Community". In doing so, the Court of Justice EC makes a link on the basis of Article 6 EC Treaty between environmental protection on the one hand and the common transport policy on the other.³² Environmental protection must also be considered as an objective of the common transport policy. Reasoning in this way, the Court of Justice EC establishes in so many words that the area covered by the Framework Decision on ship-source pollution is within the exclusive jurisdiction of the First Pillar. Unlike the AG, the Court of Justice EC does not hold *in express terms* that the competence of the Community in the field of criminal law is not exclusively linked to protection of the environment and that such competence therefore in principle relates to the various policy areas referred to in the EC Treaty.³³

In a certain sense, the Court's grounds are confusing precisely because an explicit link is made to the protection of the environment in para. 60. In our opinion, however, the Court of Justice EC did not mean to say that the Community has the competence to take criminal intervention measures only if the relevant policy area is also coloured by environmental protection requirements. This turn of phrase seems to be intended only for the purpose of determining that measures to combat ship-source pollution can be taken on the basis of Art. 80(2) of the EC Treaty, which pertains to the common transport policy.³⁴ Although at first sight, environmental protection and transport policy seem to have little to do with each other, the Court of Justice wanted to express precisely that these policy areas are as closely connected on the basis of Art. 6 EC Treaty.³⁵ Viewed in this light, the judgment

³¹) Paras 52–60.

³²) Art. 6 EC Treaty: "Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development."

³³) Criticism of the unclear argumentation of the Court of Justice EC can also be found in Dawes & Lynskey (2008), pp. 143–144. Cf. also Essens (2008), pp. 93–94.

³⁴) Art. 80(2) EC Treaty is cited as a legal basis in the preamble of Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements, *OJEU* 2005, L 255/11.

³⁵) See also points 126–129 of the opinion.

of the Court of Justice EC is in line with the arguments of its AG. This means that the competence of the Community in the field of criminal law may therefore extend to all essential policy areas referred to in the EC Treaty.

3.3. *The Specific Scope of the Competence to Lay Down Measures Related to the Criminal Law of the Member States*

The question then arises regarding the specific scope of the competence to lay down measures which are related to the criminal law of the Member States.³⁶ Together with AG Ruiz-Jarabo Colomer in his opinion on the judgment of 13 September 2005, AG Mázak is of the opinion that the Community legislature may require the Member States to impose criminal penalties and may prescribe that these penalties must be effective, proportionate and dissuasive, but does not have the power to specify the penalties to be imposed. This opinion is based on a clear view which essentially concerns a demarcation of powers between the Community and the Member States. The AG notes in this regard:

It must be borne in mind that the issue here is not a possible power on the part of the Community to impose criminal penalties itself, but rather the power to require the Member States to provide, *within their respective penal systems*, for certain forms of conduct to be classed as criminal offences as a means of upholding the Community legal order. Clearly, therefore, that raises not only concerns as to the internal consistency of the criminal law of the Union (...) but also as to the coherence of each national penal system.

In this context, not only the diverse opinions existing among the Member States on the position that criminal law takes as an enforcement instrument play a part. The AG emphasises that community rules on the type and level of the penalties to be imposed affect the coherence of the criminal law systems of the Member States. This is connected with the fact that the Community's competence in relation to criminal law exists "only" in specific policy areas referred to in the EC Treaty and that, consequently, more than a partial harmonisation of national criminal legislation can never be effected. At national level, this can result in fragmentation because differences will exist or arise between the harmonised and nationally determined parts of criminal legislation.

Relying on the subsidiarity principle, the AG is therefore of the opinion that the Member States can best judge themselves what form should be given to the prescribed (effective, proportionate and dissuasive) criminal penalties in their national law. On this point, the AG sees no obstacle in the fact that the Court of Justice EC ruled in the judgment of 13 September 2005 that the rule from the

³⁶⁾ Points 100–113 of the opinion.

Framework Decision on the protection of the environment through criminal law which prescribes that in certain cases, conduct must be punishable by “penalties involving deprivation of liberty which can give rise to extradition” (Article 5(1)) falls within the scope of the Community’s competence in the field of criminal law. This ruling was allegedly not based on a specific examination by the Court of the validity of the rule in question.

Against this background, the AG comes to the conclusion that the Framework Directive on ship-source pollution – because of its indivisibility – may well be annulled in its entirety, but that this is based only on the provisions of the Framework Decision relating to the constituent elements of the offences, which prescribe that those offences must be punishable by effective, proportionate and dissuasive penalties.³⁷ The Court of Justice comes to the same conclusion, but it cannot be determined whether the Court also endorses the underlying arguments of its AG. The Court of Justice EC establishes first of all that the rules in which the punishable acts are defined, and the related rules pertaining to the punishability of participation and instigation as well as the liability of legal persons fall within the Community’s sphere of competence and therefore cannot be laid down in a framework decision. This is different with respect to the rules relating to the type and level of the criminal penalties to be imposed. The Court of Justice EC rules concisely in this respect:

By contrast, and contrary to the submission of the Commission, the determination of the type and level of the criminal penalties to be applied does not fall within the Community’s sphere of competence.

Regarding the other provisions of the Framework Decision, which pertain *inter alia* to jurisdiction, notification of information and the designation of contact points, the Court of Justice EC refrains from giving an opinion. Because these provisions, like the provisions relating to the type and level of the penalties, are inextricably linked to the rules laid down in the Framework Decision in conflict with the Community’s competence, the Court of Justice EC annuls the Framework Decision on ship-source pollution in its entirety.³⁸

³⁷) Points 130-139 of the opinion. The – in the AG’s view – contested provisions are Articles 2, 3 and 5, as well as parts of Art. 4(1) and Art. 6(1) of the Framework Decision on ship-source pollution.

³⁸) The Commission has meanwhile made a proposal for a Directive amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements. COM(2008) 134 final.

3.4. *The Effectiveness of the Measures Problematicised*

Before commenting on the opinion of the Court of Justice EC, we cannot allow part of the AG's opinion to go unnoticed.³⁹ In this part, "certain conceptual flaws" are indicated regarding the competence of the Community in relation to criminal law. That competence exists, as ruled in the judgment of 13 September 2005, when "the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure" to achieve the relevant Community objective. In addition, the Community legislature must "consider [those measures] necessary in order to ensure that the rules which it lays down ... are fully effective".

In these two strongly overlapping requirements, the effectiveness of the measures taken is the central point. In his opinion, however, the AG puts forward some reservations to the effect that it is difficult to determine whether prescribing criminal penalties is necessary to enforce Community law. He points out, for instance, that criminological debate continues over the cases and matters in which the application of criminal penalties is the most appropriate manner of enforcement. Although the AG acknowledges that the Court of Justice EC leaves the determination of that necessity mainly to the Community legislature, this does not affect the fact that the core of the Community's competence in relation to criminal law is based on a subjective assessment of such necessity.

Another conceptual problem identified by the AG is the fact that the competence of the Community to take criminal measures is accessory to the Community's competence to take action in a certain area. As different legislative procedures apply to the various legal bases in the EC Treaty, there is no uniform procedure for determining criminal measures. The AG considers the absence of a specific legal basis in relation to the enforcement of Community law under criminal law a deficiency in that respect. In addition, the AG shows some doubt as to whether it is indeed desirable for the Community to pursue policy along those lines, which involves more than prescribing criminal sanctions. The AG apparently has in mind the importance of the inner coherence of the criminal law systems of the Member States.

4. **Commentary on the Judgment of the Court of Justice EC**

The first question that arises on the basis of the judgment of the Court of Justice EC on the Framework Decision on ship-source pollution is whether the Court of Justice EC provided the clarity that the Commission intended to obtain. Or,

³⁹⁾ Points 114-122 of the opinion.

in other words: to what extent did the Court of Justice EC actually give further substance to the phrase “measures which relate to the criminal law of the Member States”? Beyond discussion is that the Court of Justice considers these measures to include at any rate prescribing acts that are to be made punishable. It is also clear that the criminal penalties to be imposed for those acts may not be specified by prescribing the type and level of those penalties. For the rest, the Court of Justice EC does not delimit in more detail the scope of the “measures which relate to the criminal law of the Member States”. A different interpretation of the judgment can be found in Mok, who assumes that the rules in Articles 7 to 12 of the Framework Directive on ship-source pollution, relating *inter alia* to jurisdiction, notification of information and the designation of contact points, fall within the sphere of competence of the Community in relation to criminal law.⁴⁰

In our opinion, this interpretation is based on an incorrect reading of the judgment. In para. 73, the Court of Justice EC states that “it is not necessary to rule on the question whether they [Articles 7–12; MJB/TK] fall within the sphere of competence of the Community legislature”. The phrase “that these articles are also inextricably linked to the provisions of the Framework Decision” that do fall within the sphere of competence of the Community serves only to enable annulment of the entire Framework Decision. This is also evident from the fact that the same inextricable link was expressed by the Court in relation to the rules of Articles 4 and 6 of the Framework Decision, regarding the extent to which they relate to the types and level of the criminal penalties, explicitly do not fall within the scope of the Community’s competence in relation to criminal law. All in all, it can therefore be ascertained that the Court of Justice EC only provided a limited degree of the clarity on this point which the Commission had hoped to obtain.

The Court of Justice EC even seems to have mitigated its position with respect to the judgment of 13 September 2005 to the extent it concerns the scope of the Community’s competence in the field of criminal law. It has already been indicated above that, in the last-mentioned judgment, the Court of Justice EC determined that the rule from the Framework Decision on the protection of the environment through criminal law, which prescribes *inter alia* that in certain cases, conduct must be punishable by “penalties involving deprivation of liberty which can give rise to extradition” falls within the scope of the Community’s competence in relation to criminal law. Together with AG Mazák, one may presume that this ruling was not based on a specific examination by the Court of the validity of that rule,⁴¹ but

⁴⁰ See his case note under Court of Justice EC 23 October 2007, *Nederlandse Jurisprudentie* (2008) 48, under 2 (third paragraph).

⁴¹ In that sense, see Dawes & Lyskey (2008), p. 139, and Essens (2008), p. 94.

reading of the judgment of 13 September 2005 does not automatically necessitate this. The Court of Justice EC held in para. 49 of that judgment that the rules of the Framework Decision on the protection of the environment through criminal law “leave to the Member States the choice of the criminal penalties to apply, although, in accordance with Article 5(1) of the decision, the penalties must be effective, proportionate and dissuasive”.

Even though the Court of Justice EC apparently refers only to Article 5(1) of the Framework Decision on the protection of the environment through criminal law, in so far as it contains the requirement for Member States to provide for penalties that are effective, proportionate and dissuasive, the Court would not have failed to notice that the same provision also prescribes more specifically that in serious cases, those penalties must involve deprivation of liberty. If the Court of Justice EC had already considered such specification problematic at the time of the judgment of 13 September 2005, it would have been logical for it to express this. It is then stated once again in para. 51 that “on account of both their aim and their content, Articles 1 to 7 of the framework decision” – thus also Article 5(1) – “have as their main purpose the protection of the environment and they could have been properly adopted on the basis of Article 175 EC”. This at least gives the impression that a certain degree of prescription of the type and level of the criminal penalties would be allowed if this must be considered necessary to enforce Community law. This gives the idea that a certain change of course did indeed take place in the judgment of 23 October 2007.

In another respect as well, it can be argued that the Court of Justice EC started to follow a different course. It is generally assumed that in the judgment of 13 September 2005, the Court was seeking to anticipate the European Constitution.⁴² Along those lines, the Court of Justice EC could once again have sought a connection with Article III-271(2) Constitution and its current counterpart, Article 69b(2), as included in the Treaty of Lisbon.⁴³ In that case, prescription of the type and level of the criminal penalties could have fallen within the sphere of the Community’s

⁴² Cf. *inter alia* Apps (2006), p. 631 (“a calculated attempt by the Court to flatten the pillar structure and introduce the institutional changes of the Constitution through the back door”), Borgers (2006), p. 99, De Hert, Paepé & Griffioen (2006), p. 495, House of Lords (2006), p. 17, and Dawes & Lynskey (2008), pp. 156–157.

⁴³ *OJEU* 2007, C 306. Art. 69b(2) (can be found in *OJEU* 2007, C 306/65) reads: “If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 61 I.”

competence, provided such specification must be deemed necessary for the purpose of enforcing Community law. The Court of Justice EC could have substantiated this choice from the point of view, compelling in European law, of the effectiveness of Community law.

In line with that, the Court of Justice would also have had the possibility to assess the prescription of other types of criminal measures, such as rules relating to jurisdiction, in more detail in the light of the necessity of such measures. Instead of this, the Court of Justice EC now states resolutely that prescription of the type and level of criminal penalties is outside the competence of the Community, while no further definition is given either of the “measures which relate to the criminal law of the Member States”.

5. Conclusion

We conclude that two explanations can be given for this changed attitude of the Court of Justice EC.

First of all, it is conceivable that the Court of Justice EC has been convinced by the opinion of AG Mazák, who put forward as the main argument against an extensive interpretation of the competence of the Community in relation to criminal law that with all the diversity of criminal law systems in Europe, it is not really possible to decide in detail at a central level the most appropriate penalty. Apart from the differences existing in the framing of prosecution policy, one must consider variations in the increasing degree of discretion given to criminal court judges in deciding on the sentencing in actual cases, as well as the ways of enforcing criminal penalties, for example where modalities of conditional or early release are concerned. In the light of the subsidiarity principle, this constitutes a strong argument. At the same time, one must ascertain that in the Third Pillar, the diversity of criminal law systems of the Member States is not considered as an obstacle to more detailed specification of criminal penalties, nor to laying down other types of rules of criminal law. The Member States apparently accept the fact that the effect of European rules can vary in the national criminal law systems.⁴⁴

The second explanation is more political in nature. At the time the judgment of 13 September 2005 was passed, it was still uncertain whether the European Constitution would enter into effect in any form. At that time, the Court of Justice EC apparently wanted to contribute actively towards European approximation of criminal law. At the time the judgment on the Framework Decision on ship-source

⁴⁴) Which does not mean that no attention is paid to the pursuit of more uniformity. Cf. in this connection the Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union, COM(2004) 334 final.

pollution was passed, however, the Treaty of Lisbon was almost ready. This Treaty all but abolishes the pillar structure, “European criminal law” is modelled (nearly) on Community law and a clearer demarcation is given of the competences in the field of criminal law. Consequently, for that reason, one could presume that the Court of Justice EC has chosen a *low-profile* version of the competence of the Community in the field of criminal law accepted in the judgment of 13 September 2005. If this presumption is correct, we consider this a wise choice. An extensive interpretation of the competence of the Community in the field of criminal law would have resulted in too much discussion, and would not have been of much practical use either. With the entry into effect of the Treaty of Lisbon, which is foreseen on 1 January 2009, the competence of the Community in the field of criminal law will be governed by the then applicable provisions of the Treaty on the Functioning of the European Union (being the successor to the EC Treaty), and the judgment of 13 September 2005, as well as that of 23 October 2007, will only have significance as legal history.