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Hanna Goeters

New Criminal Law Developments in the Community Legal Order

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FOREWORD

This working paper aims at providing a systematic overview over the development of criminal law within the European Union. In a growing number of situations, Community law has exercised an indirect influence on national criminal laws. However, in case C-176/03, Commission v. Council, the Court went a step further and declared that the Community has to some extent competence of its own in criminal matters. In this judgement the Court acknowledged that the Community has power to require Member States to lay down criminal penalties for certain forms of conduct detrimental to the environment, when there is a Community directive containing the provisions protecting the environment in this regard. This development raises interesting questions of inter alia constitutional nature.

This working paper is part of a broader analysis of the constitutional implications of the development of criminal law in Community law, which has been initiated within the research programme A Constitution for Europe.

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Jörgen Hettne, February 2007
Acting Director
SIEPS

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1 INTRODUCTORY REMARKS

On September 13, 2005 the European Court of Justice (hereinafter referred to as the "the Court") gave its judgment in Case C-176/03 by which Council Framework Decision 2003/80 of 27 January 2003 on the protection of the environment through criminal law (hereinafter referred to as the "Framework Decision") was annulled. This legal instrument had been based on Title VI of the Treaty of the European Union (hereinafter referred to as "EU"), in particular on Articles 29, 31 (e) and 34 (2) (b) EU, as worded prior to the entry into force of the Treaty of Nice.[1] According to the findings of the Court the aim and content of the Framework Decision were however within the scope of the European Community's powers on the environment, as provided for in the EC Treaty (hereinafter referred to as "EC"). Consequently, the entire Framework Decision infringed Article 47 EU[2] as it encroached on the powers that Article 175 EC already confers on the Community.

In the judgment, the Court began its reasoning by reaffirming the general rule that neither criminal law nor the rules of criminal procedure fall within Community competence.[3] However, it then went on to state that "when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environment offences," nothing prevents the Community legislature, "from taking measures related 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."[4] Thereby, the Court explicitly acknowledged that the "Community has the power to require Member States to lay down criminal penalties"[5] and from

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[1] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 3.

[2] Art 47 of the Consolidated Version of the Treaty on European Union (Official Journal C 325 of 24 December 2002) reads as follows:
"Subject to the provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community, and to these final provisions, nothing in this Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them."

[3] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 47.

[4] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 48.

[5] See Press Release No 75/05 of 13 September 2005 – Judgment of the Court of Justice in Case C-176/03.

the judgment's wording it can thus be concluded that the Community does indeed possess certain competences related to criminal law.

This finding seems to imply quite a significant move away from the previous understanding of the Community's competences that the Court has relied upon. Even though Member States are under a general obligation to ensure that infringements of Community law are penalized, prior to this judgment the Court had not acknowledged the existence of any competence held by the Community to harmonize national criminal laws. Instead, the Court has consistently emphasized that the choice of penalties is an exclusive matter for the Member States. In line with this view the Court has also frequently stated that the penalties Member States are generally prescribed by Community law to impose in the event of infringements are of a non-criminal nature. In addition, when discussing the relationship of Community law and national criminal laws in general terms, the Court has previously referred only to, either, the possible supportive role national criminal law provisions can play for the achievement of Community policies, or, certain restrictive effects Community law, and in particular, the fundamental freedoms and rights, can have on their adoption or application. Thereby, the Court has evidently confirmed the notion that Community law can only have certain indirect effects on the criminal laws of the Member States.[6]

This apparently new development in the jurisprudence of the Court thus calls for a closer analysis of the judgment in question, and, in particular, of the methodology and reasoning applied by the Court, in light of the already existing case-law. Such an assessment should then make it possible to decide whether the Court, while interpreting the relevant treaty provisions, has paid due attention to the general principles of Community law, most notably the principle of attributed powers. In addition, the judgment in question might implicitly reveal more about the Court's own attitude towards its designated role within the European legal order, and thereby provide an answer to the more general question of whether the Court is again taking up a more activist stance in its jurisprudence[7].

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[6] Case C-176/03 03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 38 – Opinion of AG Ruiz-Jarabo Colomer.

[7] For such conclusion with regard to the Court's judgment in Case C-105/03 *Criminal Proceedings against Maria Pupino* [2005] ECR I-5285 see only Fletcher, *Extending "Indirect Effect" to the Third Pillar: The Significance of Pupino*, in: E.L.Rev. 2005, 30 (6), 826 (877); Chalmers, *The Court of Justice and the Third Pillar*, in: E.L.Rev. 2005, 30 (6), 773 (773).

Furthermore, assuming that in accordance with the Court's reasoning in Case C-176/03 the Community has indeed competences related to criminal law it is still necessary to define the legal nature of this competence and its limitations more clearly. In light of the possible implications for Member States' sovereignty as well as for the rights and interests of individual citizens, it is quite obvious that the legitimacy of the Community to adopt measures in such a sensitive area must be closely scrutinized. The wording of the Court's judgment in Case C-176/03 implies an ancillary nature of the Community's competences related to criminal law which translates itself in the existing competence system of the European legal order into the notion of shared competences within the meaning of Article 5 (2) EC[8]. In accordance with this provision, the notion of subsidiarity is the determining means to solve competence conflicts between the Community and the Member States with regard to the exercise of their shared responsibilities.[9] In light of the somewhat limited role this constitutional principle has so far played in the jurisprudence of the Court[10], a closer analysis of the actual application of the subsidiarity principle in Case C-176/03 might thus provide some answers to the more fundamental question of to which extent this principle of Community law is indeed an effective means to protect the national interests of the Member States.

Finally, the conclusions reached by the Court in Case C-176/03 must also be assessed in their relation to those provisions under the EU Treaty which provide the basis for police and judicial cooperation in criminal matters. The decision as to whether a legal act is adopted under the first or third

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[8] Article 5 (2) EC reads as follows:
"In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community."

[9] For a general discussion of the notion of subsidiarity see only Case C-376/98 *Federal Republic of Germany v. European Parliament and Council of the European Union* [2000] ECR I-8419, paras. 131 to 145 – Opinion of AG Fennelly; Emiliou, *Subsidiarity: An Effective Barrier against " the Enterprises of Ambition"?,* in: E.L.Rev. 1992, 17 (5), 383 (402); Toth, *The Principle of Subsidiarity in the Maastricht Treaty*, in: (1992) 29 C.M.L.Rev. 1079 (1103); Gutknecht in: FS Schambeck, 921 (929); see also the "Protocol on the Application of the Principles of Subsidiarity and Proportionality".

[10] For an assessment of the Court's jurisprudence in this regard see only Weatherill, *Better Competence Monitoring,* in: E.L.Rev. 2005, 30 (1), 23 (27); Craig/de Búrca, *EU Law*, at p. 137, with further reference to Case C-84/94 *United Kingdom of Great Britain and Northern Ireland v. Council of the European Union* [1996] ECR I-5755, para. 47; Case C-233/94 *Federal Republic of Germany v. European Parliament and Council of the European Union* [1997] ECR I-2405, paras. 26 to 28; Case C-377/98 *Kingdom of the Netherlands v. European Parliament and Council of the European Union* [2001] ECR I-7079, para. 32.

pillar does not only have implications for the choice of available legal instruments.[11] It also affects the decision-making process, the allocation of power among the different organs, and, consequently the role of the Member States in the overall integration process and the possibility for them to exercise influence on the actual content of a legal act. As a consequence, any analysis of Case C-176/03 must also address the issue of whether the judgment given by the Court provides sufficient guidance for future decisions related to the question as regards under which pillar a criminal law related legal act should be adopted and what the possible consequences of the suggested approach are for the existing pillar structure.

[11] See for this aspect only Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 4 – Opinion of AG Ruiz-Jarabo Colomer; Wasmeier/Thwaites, *The "Battle of the Pillars": Does the European Community have the Power to Approximate National Criminal Laws?,* in: E.L.Rev. 2004, 29 (5), 613 (615).

2 THE RELATIONSHIP OF COMMUNITY LAW AND CRIMINAL LAW IN THE COURT'S JURISPRUDENCE

On quite a number of occasions the Court has made statements concerning the overall relationship of Community law and the national criminal laws of the Member States. In particular, the Court has acknowledged several different possibilities for Community law to have an indirect effect on the adoption, interpretation and application of national criminal law.[12] At the same time, the Court has consistently upheld the notion that, as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence.[13] As the question of whether and to what extent the Community does actually posses any competences in the field of criminal law is closely related to the question of the overall relationship of these two different fields of laws, any assessment of Case C-176/03 also needs to take account of the more general developments in the Court's jurisprudence in this regard.

A possible way to deal with these very different cases that address the general relationship of Community law and criminal law is to identify specific categories in accordance with the various points made by the Court as this is a natural response to any case-law. Having said this it is still important to point out the existing and considerable limitations of such an approach. As cases can be explained in various ways depending on the perspective taken, which can be either criminal law or community law influenced, the underlying understanding of fundamental concepts as well as general ideas about the functions of the European integration process, quite different categories can be devised. In the following analysis, an attempt to categorize the case-law in this particular field from a Community law perspective will nevertheless be made as different systems of categorization might still prove useful in the overall discussion and assessment of the topic presented.

2.1 Possible Influences of Community Law on the National Criminal Law Systems

As an introduction to the following classification of possible influences Community law might exercise on the national criminal law systems of the

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[12] Corstens/Pradel, *European Criminal Law,* at p. 462; Zuleeg, *Der Beitrag des Strafrechts zur europäischen Integration,* in: 47 JZ 1992, 761 (762); Lensing, *The Federalization of Europe: Towards a Federal System of Criminal Justice,* in: European Journal of Crime, Criminal Law and Criminal Justice 1 (1993) 212 (223).

[13] See only Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 47.

Member States, different terms and their meaning within this paper should be clarified first. Generally speaking, the effect Community law might have on the national criminal law systems of the Member States can be described as being either of a direct or an indirect nature. A direct effect presupposes that the Community has the competence to require Member States to classify as criminal offences certain patterns of behavior which prove to be detrimental to the achievement of the objectives laid down in the Treaty. In contrast, an indirect effect of Community law on the national criminal law systems can be the result of other rules and principles of European law which national authorities need to respect while exercising their powers.[14] Such indirect influence, which is thus independent from the overall distribution of powers between the Community and the Member States, can then be further characterized in accordance with the role national criminal law can play in relation to Community law. On the one hand, national criminal law provisions can hinder the exercise of individual Community rights. As a consequence, Community law can restrict the Member States in their possibilities to adopt and apply their respective criminal law provisions in order to ensure the free and undisturbed exercise of these rights. On the other hand, Community law can also assign a supportive role to national criminal law provisions as they are a means to ensure its uniform application and thus its effectiveness.

2.1.1 Direct Effects of Community Law

Before turning to the different indirect effects Community law might have on the national criminal law systems of the Member States it seems reasonable to briefly discuss the possibility of any direct effect.[15] In the absence of any treaty provision explicitly providing for a Community criminal competence[16], the Court has nevertheless been faced with the question of whether the Community can expressly require Member States to enforce certain provisions by means of sanctions of a criminal nature on a general basis. This particular question has arisen with regard to refer-

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[14] See for this aspect only France, *The Influence of European Community Law on the Criminal Law of the Member States,* in: European Journal of Crime, Criminal Law and Criminal Justice 2 (1994) 324 (324); Sevenster, *Criminal Law and EC Law,* in: 29 C.L.Rev. 1992, 29 (39); Corstens/Pradel, *European Criminal Law,* at p. 505 and 506.

[15] At this point, no reference will yet be made to Case C-176/03; for an analysis of this judgment see the assessment of this judgment in this paper under Point C.

[16] France, *The Influence of European Community Law on the Criminal Law of the Member States,* in: European Journal of Crime, Criminal Law and Criminal Justice 2 (1994) 324 (354); Dannecker, *Strafrecht in der Europäischen Gemeinschaft,* in: 51 JZ 1996, 869 (869).

ences to criminal law which can be found in treaty provisions[17] and as regards which sanctions Member States are obliged to impose in the event of infringements of secondary legislation. In particular, the specific manner the Court has chosen to deal with this issue in relation to the sanctions to be imposed with regard to the Common Agricultural Policy can be regarded as an implicit negation of such a direct effect. Against this background it seems especially important to not give further indirect effects of Community law on the criminal laws of the Member States such a broad meaning that they actually do amount to a direct influence.

a) Reference to Criminal Law in the Treaty

An explicit reference to the national criminal legal systems of the Member States is made at least in two provisions of the EC Treaty, Articles 135 and 280 EC.[18] Article 135 EC serves as the legal basis for the Community to take measures in order to strengthen customs cooperation between the Member States. It also provides that these measures "shall not concern the application of national criminal law or the national administration of justice." Article 280 EC concerns the protection of the Community's own financial interests against fraud and other illegal activities. In addition to the measures the Community can take in the field of the prevention of and fight against such activities with a view to affording effective and equivalent protection in the Member States, this provision also imposes on Member States the obligation to take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own interests.[19] With regard to the measures taken by the Community, the provision then also states that they "shall not concern the application of national criminal law or the national administration of justice." In accordance with these two provisions, the application of national criminal law and the administration of justice are thus reserved to the Member States in the spheres of customs cooperation and the protec-

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[17] These references must be differentiated from those provisions which serve as a basis for sanctions the Community itself can impose; see with regard to the non-penal nature of these sanctions only Case C-356/97 *Molkereigenossenschaft Wiedergeltingen eG v. Hauptzollamt Lindau* [2000] ECR I-5461, para. 50 - Opinion of the AG Saggio; Joined Cases C-100 to 103/80 *SA Musique Diffusion française and others v. Commission of the European Communities* [1983] ECR 1825, para. 2; see also Harding, *Exploring the Intersection of European and National Criminal Law,* in: E.L.Rev. 2000, 25 (4), 374 (378).

[18] Due to its somehow ambiguous wording, Article 61 (e) EC will not be discussed in this regard.

[19] In this regard see also Case C-2/88 *Criminal proceedings against J. J. Zwartveld and others* [1990] ECR I-4405, para. 10; for a critical view on Article 280 EC see only Albrecht, *Europäischer Strafrechtsraum: Ein Albtraum?,* in: 37 ZRP 2004, 1 (2).

tion of the Community's financial interests respectively.[20] Further interpretation of these two explicit references gives rise however to two possible different meanings. On the one hand, they can be understood as an exception to the general rule that there is no Community competence to directly influence, or, in other words, harmonize, the criminal laws of the Member States. On the other hand, they can be also regarded as a reaffirmation of the assumption that the Community does indeed have certain criminal law related competences by explicitly stating them in relation to two areas one might find most likely to be influenced by Community law. As these two differing interpretation possibilities were also brought up in Case C-176/03, a discussion of this issue will follow in relation to the later assessment of this judgment.

b) Reference to Criminal Law in Secondary Legislation

Prior to the contested Framework Decision the Community had not attempted to require Member States to define acts as criminal offences. However, it has been quite common that secondary legislation contains provisions according to which Member States are obliged to impose some kind of sanction in the event of a breach of the rules concerned.[21] As the actual choice of penalties is thus left to the discretion of the Member States they are also free to adopt administrative sanctions on condition that such sanctions are adequate means to ensure the effectiveness of the Community rules in question. In addition, even in the absence of such specific provisions, Member States are already generally compelled by the loyalty principle to sanction any infringement of Community law.[22] The further problem whereby under certain circumstances Member States were not left

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[20] Kaiafa-Gbandi, *The Development towards Harmonization within Criminal Law in the European Union – A Citizen's Perspective,* in: European Journal of Crime, Criminal Law and Criminal Justice 9 (2001) 239 (257).

[21] For this practice see only Article 6 of Directive 68/151/EEC; furthermore Article 11 of Regulation (EEC) No 3665/87; see also Case C-356/97 *Molkereigenossenschaft Wiedergeltingen eG v. Hauptzollamt Lindau* [2000] ECR I-5461, para. 34 - Opinion of the AG Saggio; Case C-354/95 *The Queen v. Minister for Agriculture, Fisheries and Food, ex parte, National Farmers' Union and Others* [1997] ECR I-4559, para. 51; Case C-240/90 *Federal Republic of Germany v. Commission of the European Communities* [1992] ECR I-5383, para. 11; Wasmeier/Thwaites, *The "Battle of the Pillars": Does the European Community have the Power to Approximate National Criminal Laws?,* in: E.L.Rev. 2004, 29 (5), 613 (614).

[22] See in this regard only Case C-50/76 *Amsterdam Bulb BV v. Produktschap voor Siergewassen* [1977] ECR 137, para. 32; Temple Lang, *The Duties of Cooperation of National Authorities and Courts under Article 10 EC: Two more reflections,* in: E.L.Rev. 2001, 26 (1), 84 (86).

with an actual choice but had to adopt penalties of a criminal nature[23] will be discussed at a later point, more precisely in the section concerning the possible indirect effects of Community law.

c) Negation of any Direct Effect of Community Law: The Court's Jurisprudence regarding the Administrative Nature of Sanctions

Most frequently, the Court has been confronted with claims that the Community unlawfully exercises a direct influence on the criminal laws of the Member States by requiring them to impose penalties which are in fact of a criminal nature with regard to the secondary legislation adopted in relation to the Common Agricultural Policy. Its jurisprudence regarding the nature of these sanctions can be understood as demonstrating that the Court itself has refrained from affirming the existence of any direct effects of Community law on the national criminal laws of the Member States.[24] Among others, this issue was discussed in Case C-210/00 which concerned a reference by the Bundesfinanzhof (Germany) for a preliminary ruling in the proceedings pending before the court between Käserei Champignon Hofmeister GmbH & Co. KG (hereinafter referred to as "KCH") and Hauptzollamt Hamburg-Jonas. In 1996 KCH exported cheese spread manufactured by a third party and at its request received an export refund as an advance payment from the Hauptzollamt.[25] As a later examination revealed that the goods in question contained products which were not listed in the then Annex II to the EC Treaty and thereby did not give rise to entitlement to an export refund, the Hauptzollamt demanded from KCH the payment of a penalty under point (a) of the first subparagraph of Article 11 (1) of Regulation (EEC) No 3665/87.[26] In this regard, KCH took the view that the penalty in question was of a criminal nature and as it allowed for the imposition of the penalty even in the absence of any fault,

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[23] Lensing, *The Federalization of Europe: Towards a Federal System of Criminal Law,* in: European Journal of Crime, Criminal Law and Criminal Justice 1 (1993) 212 (224); Hugger, *The European Community's Competence to Prescribe National Criminal Sanctions,* in: European Journal of Crime, Criminal Law and Criminal Justice 3 (1995), 241 (247); Harding, *Exploring the Intersection of European Law and National Criminal Law,* in: E.L.Rev. 2000, 25 (4), 374 (381).

[24] See in this regard Tiedemann, *Europäisches Gemeinschaftsrecht und Strafrecht,* in: 46 NJW 1993, 23 (27); Lensing, *The Federalization of Europe: Towards a Federal System of Criminal Law,* in: European Journal of Crime, Criminal Law and Criminal Justice 1 (1993) 212 (222).

[25] Case C-210/00 *Käserei Champignon Hofmeister GmbH & Co. KG v. Hauptzollamt Hamburg-Jonas* [2002] ECR I-6453, para. 9.

[26] Regulation (EEC) No 3665/87 of November 1987 laying down common detailed rules for the application of the system of export refunds on agricultural products (Official Journal 1987 L 351, at p. 1).

the provision was in breach of the general principle of nulla poena sine culpa.[27]

In response to this line of argument, the Court first pointed out that, when previously asked about the criminal nature of sanctions laid down in rules under the Common Agricultural Policy, it had regularly concluded that such penalties were not of a criminal nature.[28] It then went on to state that in the context of a Community aid scheme, "in which the granting of the aid is necessarily subject to the condition that the beneficiary offers all guarantees of probity and trustworthiness, the penalty imposed in the event of non-compliance with those requirements constitutes a specific administrative instrument forming an integral part of the scheme of aid and intended to ensure the sound management of Community public funds."[29] Thereby, the Court followed the reasoning suggested by the Advocate General in her Opinion in which she first described the role of the exporter with regard to the competent authority as "a partner in the administration of benefits".[30] She then concluded that "seen against this background, the penalty rule in question is the legal consequence of his status as guarantor of the correctness of the refund application, which would appear to be more akin to the civil law institution of a contractual penalty than to a penal sanction."[31]

Such an approach which judges the nature of a sanction by reference to the underlying relationship of the persons concerned runs the risk of arriving at arbitrary results. However, as the Advocate General also pointed out in her Opinion "the Court of Justice has never found it necessary to define the precise legal nature of the European Communities' power to impose sanctions, thereby avoiding having to concern itself with the distinction

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[27] Case C-210/00 *Käserei Champignon Hofmeister GmbH & Co. KG v. Hauptzollamt Hamburg-Jonas* [2002] ECR I-6453, para. 29.

[28] Case C-210/00 *Käserei Champignon Hofmeister GmbH & Co. KG v. Hauptzollamt Hamburg-Jonas* [2002] ECR I-6453, para. 36; with reference to Case C-137/85 *Maizena Gesellschaft mbH and others v. Bundesanstalt für landwirtschaftliche Marktordnung (BALM)* [1987] ECR 4587, para. 13; and to Case C-240/90 *Federal Republic of Germany v. Commission of the European Communities* [1992] ECR I-5383, para. 25.

[29] Case C-210/00 *Käserei Champignon Hofmeister GmbH & Co. KG v. Hauptzollamt Hamburg-Jonas* [2002] ECR I-6453, para. 41; see also Case C-240/90 *Federal Republic of Germany v. Commission of the European Communities* [1992] ECR I-5383, para. 26 – Opinion of the AG Jacobs; Case C-385/03 *Hauptzollamt Hamburg-Jonas v. Käserei Champignon Hofmeister GmbH & Co. KG* [2005] ECR I-2997, para. 66 – Opinion of the AG Stix-Hackl.

[30] Case C-210/00 *Käserei Champignon Hofmeister GmbH & Co. KG v. Hauptzollamt Hamburg-Jonas* [2002] ECR I-6453, para. 41 – Opinion of the AG Stix-Hackl.

[31] Case C-210/00 *Käserei Champignon Hofmeister GmbH & Co. KG v. Hauptzollamt Hamburg-Jonas* [2002] ECR I-6453, para. 41 – Opinion of the AG Stix-Hackl.

between administrative and penal sanctions."[32] This reluctance on behalf of the Court to develop generally applicable definitions for deciding such cases can be partly attributed to the existing wide variations in the legal orders of the Member States regarding the differentiation between administrative and criminal sanctions. At the same time, it must be noted that this choice made by the Court has also widened its margin of appreciation considerably. From the various cases in which the Court has excluded the criminal nature of the disputed penalty it is nevertheless possible to deduce certain features as being characteristic for criminal law provisions.[33] As Advocate General Saggio summarized in his Opinion in Case C-356/97 "among these characteristics, (…) the Court has included the dissuasive nature of the penalty, that is the capacity of the penalty to constitute a valid deterrent against infringement of the obligation linked to this penalty."[34] In particular, the existence of very high penalties does not have any effect on the nature of the penalty itself.[35] As the Court thus assigns to criminal sanctions the deterrent effect as their main purpose, a relative criminal law theory emerges as the underlying theme of the jurisprudence of the Court which coincides with the prevailing understanding also relied upon in the Member States.[36]

The fact that the Court, while refraining from defining clearly the legal nature of the Community's power to impose sanctions, has still consistently precluded the penal nature of the sanctions it was asked to rule upon, can be interpreted in two very different ways. On the one hand, it can be

[32] Case C-210/00 *Käserei Champignon Hofmeister GmbH & Co. KG v. Hauptzollamt Hamburg-Jonas* [2002] ECR I-6453, para. 37 – Opinion of the AG Stix-Hackl; with further reference to Case C-356/97 *Molkereigenossenschaft Wiedergeltingen eG v. Hauptzollamt Lindau* [2000] ECR I-5461, para. 49 – Opinion of the AG Saggio; see also Case C-240/90 *Federal Republic of Germany v. Commission of the European Communities* [1992] ECR I-5383, paras. 24 and 25; Case T-83/91 *Tetra Pak International SA v. Commission of the European Communities* [1994] ECR II-755, para. 235; Case C-117/83 *Karl Könecke GmbH & Co. KG, Fleischwarenfabrik, v. Bundesanstalt für landwirtschaftliche Marktordnung* [1984] ECR 3291, para. 13; Harding, *Exploring the Intersection of European Law and National Criminal Law,* in: E.L.Rev. 2000, 25 (4), 374 (379).

[33] Case C-356/97 *Molkereigenossenschaft Wiedergeltingen eG v. Hauptzollamt Lindau* [2000] ECR I-5461, para. 50 - Opinion of the AG Saggio.

[34] Case C-356/97 *Molkereigenossenschaft Wiedergeltingen eG v. Hauptzollamt Lindau* [2000] ECR I-5461, para. 50 - Opinion of the AG Saggio; see also C-240/90 *Federal Republic of Germany v. Commission of the European Communities* [1992] ECR I-5383, para. 11 – Opinion of the AG Jacobs.

[35] Case C-356/97 *Molkereigenossenschaft Wiedergeltingen eG v. Hauptzollamt Lindau* [2000] ECR I-5461, para. 50 - Opinion of the AG Saggio; see also C-240/90 *Federal Republic of Germany v. Commission of the European Communities* [1992] ECR I-5383, para. 11 – Opinion of the AG Jacobs.

[36] See in this regard in general Stella, *The Purpose and Effects of Punishment,* in: European Journal of Crime, Criminal Law and Criminal Justice 9 (2001) 56 (60); Tiedemann in: FS Pfeiffer, 107 (117).

emphasized that the question of a Community competence to require Member States to impose sanctions of a criminal nature has been deliberately left open by the Court.[37] On the other hand, it can also be argued that the Court, by consistently finding the penalties being of an administrative nature, has not only indirectly reaffirmed the close interrelationship between the notion of national sovereignty and criminal law but in fact recognized that the Community lacks the competence to harmonize the criminal laws of the Member States.[38]

Regarding the former view, it must be stated that in light of the respective case-law it seems quite difficult to establish that the Court has nevertheless relied upon a general understanding of the distribution of powers between the Community and the Member States as that there is a Community competence to directly influence the criminal laws of the Member States. Instead, the Court seems to have tried to enable the Community to exercise an indirect influence on criminal law by assigning a very broad meaning to the autonomous term "administrative sanctions". Moreover, it must be noted that on a number of occasions the Court itself reaffirmed that criminal law in principle belongs to the sphere of competence of the Member States and the Community thus lacks in general the competence to harmonize the criminal laws of the Member States.[39] This has found a particularly clear expression in the fact that the Court prior to its judgment in Case C-176/03 has never made use of the idea of applying the *implied powers* doctrine in this regard as suggested by the Advocate General in Case C-240/90. In his Opinion, the Advocate General in particular argued that the Community does indeed have the competence to encompass criminal law related measures if such measures are necessary for the achievement of a Community objective.[40] As a conclusion it seems therefore more

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[37] Hugger, *The European Community's Competence to Prescribe National Criminal Sanctions,* in: European Journal of Crime, Criminal Law and Criminal Justice 3 (1995), 241 (246); with reference to Case C-240/90 *Federal Republic of Germany v. Commission of the European Communities* [1992] ECR I-5383, para. 24; Pache, *Zur Sanktionskompetenz der Europäischen Wirtschaftsgemeinschaft,* in 28 EuR 1993, 173 (179).

[38] Sevenster, *Criminal Law and EC Law,* in: 29 C.L.Rev. 1992, 29 (64); Dannecker, *Strafrecht in der Europäischen Gemeinschaft,* in: 51 JZ 1996, 869 (869); Zuleeg, *Der Beitrag des Strafrechts zur europäischen Integration,* in: 47 JZ 1992, 761 (762).

[39] See only Case C-203/80 *Criminal proceedings against Guerrino Casati* [1981] ECR 2595, para. 27; Case C-299/86 *Criminal proceedings against Rainer Drexl* [1988] ECR 1213, para. 17; Case C-186/87 *Ian William Cowan v. Trésor public* [1989] ECR 195, para. 19.

[40] 240/90 *Federal Republic of Germany v. Commission of the European Communities* [1992] ECR I-5383, para. 12 – Opinion of the AG Jacobs; see also Wasmeier/Thwaites, *The "Battle of the Pillars": Does the European Community have the Power to Approximate National Criminal Laws?,* in: E.L.Rev. 2004, 29 (5), 613 (618); Hugger, *The European Community's Competence to Prescribe National Criminal Sanctions,* in: European Journal of Crime, Criminal Law and Criminal Justice 3 (1995), 241 (262).

reasonable to adopt the latter view regarding the jurisprudence of the Court. It must be stressed that taking this view does not preclude the possibility that a Community competence to harmonize criminal law could nevertheless be established by virtue of the *implied powers* doctrine under certain circumstances in the future.

2.1.2 Indirect Effects of Community Law

Attention should be now drawn to the possible indirect effects Community law might exercise on the national criminal laws of the Member States. As already mentioned earlier, these differing effects can take place with relation to the adoption, interpretation and application of national criminal law provisions and can either acknowledge the Member States' respective powers or restrict the exercise of these rights

a) Necessary Preconditions for any Indirect Influences

Before Member States need to take Community law into consideration with regard to their respective criminal law systems, certain preconditions for the existence of any such influence must be fulfilled.

1) The Situation in question must fall within the Scope of Community Law

The question of whether a given situation falls within or outside the scope of Community law is decisive for the admissibility of any proceedings brought before the Court. In case the Court comes to the conclusion that the situation in question does not fall within the scope of Community law, the case in question is declared inadmissible on the grounds of lack of jurisdiction.[41] The notion of the scope of Community law does however not only have a jurisdictional meaning as the quite recent Order given by the Court in Case C-328/04 illustrates. Beyond its obvious jurisdictional dimension this concept also has important implications for the question to which extent Member States can freely exercise their competences, among others, in the field of criminal law.

Case C-328/04 concerned a preliminary reference made by the Hungarian FŒvárosi Bíróság (Metropolitan Court, Budapest) by order of that court of 24 June 2004 in the criminal proceedings against Attila Vajnai, received at

[41] See in this regard only Case C-12/86 *Meryem Demirel v. Stadt Schwäbisch Gmünd* [1987] ECR 3719, para. 28; Case C-144/95 *Criminal proceedings against Jean-Louis Maurin* [1996] ECR I-2909, para. 12; Case C-299/95 *Friedrich Kremzow v. Republik Österreich* [1997] ECR I-2629, para. 16.

the Court Registry on 30 July 2004.[42] By its reference, the court sought an answer to the question of whether Article 269/B, first paragraph, of the BüntetŒ Törvénykönyv (Hungarian Criminal Code)[43] is compatible with the principle of non-discrimination and whether Article 6 EU, Directive 2000/43/EC, and Articles 10, 11 and 12 of the Charter of Fundamental Rights allow a person who wishes to express his political convictions through a symbol representing them to do so in any Member State.[44] Thus, the Hungarian court not only sought clarification of the general principle of non-discrimination but also an answer to the more fundamental question of to which extent the European Union has already developed into a legal order founded on common values and principles that can be invoked by an individual in any circumstances. As the general notion of the Community as a "community of values"[45] has found a particular clear expression in relation to the requirements every new Member State needs to fulfill in order to be eligible to join the European Union, it is hardly surprising that such a reference was made by a court of one of the states that have acceded to the Union during the last enlargement round.

In their submissions to the Court, the Commission, the Hungarian government, and the Dutch government all expressed doubts as to whether the Court had any jurisdiction regarding this question at all.[46] This issue was then itself taken up by the Court which began its assessment by stating the general rule that "where national provisions fall within the field of application of Community law the Court, on a reference for a preliminary ruling, must give the national court all the guidance as to interpretation necessary to enable it to assess the compatibility of those provisions with the fundamental rights whose observance the Court ensures."[47] At the same time, the jurisdiction of the Court must be denied "with regard to national provisions outside the scope of Community law and when the subject-matter of the dispute is not connected in any way with any of the situations con-

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[42] Official Journal C 262 of 23. 10. 2004, at p. 15.

[43] Article 269/B, para. (1) of the Hungarian Penal Code of 1993 incriminates to "utilize or exhibit in public swastika, a badge descriptive SS, an arrow-cross, hammer and sickle, a five pointed red star."

[44] Case C-328/04 *Criminal proceedings against Attila Vajnai* [2005] ECR I-8577, para. 8.

[45] The notion of a "community of values" (Wertegemeinschaft) is in particular prominent in discussions about the European Integration process in the German literature, see only Calliess, *Europa als Wertegemeinschaft – Integration und Identität durch europäisches Verfassungsrecht?,* in: 59 JZ 2004, 1033 (1038).

[46] Case C-328/04 *Criminal proceedings against Attila Vajnai* [2005] ECR I-8577, para. 9.

[47] Case C-328/04 *Criminal proceedings against Attila Vajnai* [2005] ECR I-8577, para. 12; with further reference to Case C-299/95 *Friedrich Kremzow v. Republik Österreich* [1997] ECR I-2629, para. 15.

templated by the treaties."[48] As the Court then found that Mr. Vajnai's situation was of the latter kind it came to the conclusion that on the basis of Article 92 (1) of the Rules of Procedure[49] it had no jurisdiction to answer the question referred to it by the Hungarian Court.[50]

As a consequence, in accordance with the more general jurisdictional rules, provisions of national criminal law can only come under scrutiny to the extent that they might coincide with the application of Community law. Member States are thus not only free to exercise their legislative powers in the field of criminal law within the boundaries set by Article 7 EC but they can also apply their respective rules without any Community-related considerations as long as the given situations fall outside the scope of Community law. Thus, this judgment shows not only the generally limited scope of application for fundamental rights, but also that a reference to only a purely hypothetical prospect of the exercise of any of the fundamental freedoms is not a sufficient ground to establish the jurisdiction of the Court[51]. Moreover, the judgment reflects a more restrictive view regarding the European Union's overall development towards a "community of values" as the fundamental principles listed in Article 6 EU do not give rise to individual rights that can be relied upon by an individual against a Member State in any circumstances. Instead, the role of Article 6 EU is for the most part limited in its relation to the accession of new Member States to the Union in accordance with Article 49 EU[52] and the sanc-

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[48] Case C-328/04 *Criminal proceedings against Attila Vajnai* [2005] ECR I-8577, para. 11; with reference to Case C-299/95 *Friedrich Kremzow v. Republik Österreich* [1997] ECR I-2629, paras. 15 and 16; see also Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v. Stephen Grogan and others* [1991] ECR I-4685, para. 31; Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* [1991] ECR I-2951, para. 42.

[49] Art. 92 (1) of the Rules of Procedure of 19 June 1991 (Official Journal L 176 of 4.7.1991, at p. 7, and Official Journal L 383 of 29.12.1992 (corrigenda)) and the amendments (the latest dated of 18 October 2005 Official Journal L 288 of 29.10.2005, at p. 51) resulting from the following measures reads as follows:
"Where it is clear that the Court has no jurisdiction to take cognisance of an action or where the action is manifestly inadmissible, the Court may, by reasoned order, after hearing the Advocate General and without taking further steps in the proceedings, give a decision on the action."

[50] Case C-328/04 *Criminal proceedings against Attila Vajnai* [2005] ECR I-8577, para. 15.

[51] In this regard see also Case C-180/83 *Hans Moser v. Land Baden-Württemberg* [1984] ECR 2539, para. 18.

[52] Article 49 (1) EU reads as follows:
"Any European State which respects the principles set out in Article 6 (1) may apply to become a member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members."

tion mechanism foreseen by Article 7 EU[53], both being procedures that primarily touch upon the relationships among Member States. In the case in question, Hungary is therefore free to maintain its strict criminal prohibition of the public display of any totalitarian symbol, even though no other Member State has similar rules regarding traditional symbols of the workers' movement.

(a) Sufficient Connection with Community Law

As the discussion of Case C-328/04 shows, there is an obvious need to determine the actual scope of Community law more clearly and thereby to identify the situations in which the fundamental freedoms and rights are applicable at all. Quite obviously, Member States cannot restrict the actual exercise of any fundamental freedom by an individual EU citizen beyond the possibilities outlined in the Treaty itself. However, it seems reasonable to also respect the potential exercise of fundamental freedoms to some extent in order to not deter any actual exercise. In light of these considerations, it is hardly surprisingly that there have been several attempts to extend the applicability of Community rights and thereby to define the possible scope of Community law more broadly.[54] In this regard it is necessary to point out that any change in the jurisprudence of the Court towards such a broader view on the scope of Community law could severely restrict the sovereignty of the Member States as it finds expression in their respective legislative powers, among others, in the field of criminal law. In addition, it could change the general relationship of the Court and the national courts in proceedings for a preliminary ruling in

[53] Article 7 (1) EU reads as follows:
"On a reasoned proposal by one third of the Member States, by the European Parliament or by the Commission, the Council, acting by a majority of four fifths of its members after obtaining the assent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of principles mentioned in Article 6 (1), and address appropriate recommendations to that State. Before making such a determination, the Council shall hear the Member State in question and, acting in accordance with the same procedure, may call on independent persons to submit within a reasonable time limit a report on the situation in the Member State in question."

[54] For different views regarding the actual scope of Community law see only on the one hand Case C-168/91 *Christos Konstantinidis v. Stadt Altensteig* [1993] ECR I-1191, paras. 24 and 46 – Opinion of AG Jacobs; on the other hand see Case C-168/91 *Christos Konstantinidis v. Stadt Altensteig* [1993] ECR I-1191, para. 17; Case C-177/94 *Criminal proceedings against Gianfranco Perfili* [1996] ECR I-161, para. 20; Case C-291/96 *Criminal proceedings against Martino Grado and Shahid Bashir* [1997] ECR I-5531, para.13; in general see also Jacobs, *Human Rights in the European Union: The Role of the Court of Justice,* in: E.L.Rev. 2001, 26 (4), 331 (336).

such manner that the compatibility of a national measure with Community law might in fact be decided by the Court.[55]

Another opportunity to discuss the circumstances under which national legislation does in fact come under the scrutiny of Community law was given to the Court in Case C-299/95. In this case a reference to the Court was made by the Oberster Gerichtshof (Supreme Court, Austria) for a preliminary ruling on the interpretation of Article 220 EC and a number of provisions of the Convention of Human Rights and Fundamental Freedoms.[56] The national proceedings concerned a claim for compensation against the Republic Österreich (Austria) for the damage the plaintiff Mr. Kremzow claimed to have sustained as a result of a sentence to life imprisonment after a trial which had been found by the European Court of Human Rights to be in breach of Article 6 of the Convention.[57] In this regard, Mr. Kremzow argued that, among others, as a citizen of the European Union he enjoys the right to freedom of movement in the territory of the Member States without any specific intention to reside. Consequently, a Member State which infringes this fundamental right by executing an unlawful penalty of imprisonment should be held liable for damages by virtue of Community law.[58]

In its legal assessment, the Court however found that the situation of Mr. Kremzow "is not connected in any way with any of the situations contemplated by the Treaty provisions on freedom of movement for persons."[59] In particular, the Court stated that "a purely hypothetical prospect of exercising that right does not establish a sufficient connection with Community law". As the application of Community law was thus not justified, the situation in question had to be viewed as falling outside the scope of Community law.[60] On this ground, the jurisdiction of the Court was precluded.[61]

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[55] For the established case-law in this regard see only Case C-177/94 *Criminal proceedings against Gianfranco Perfili* [1996] ECR I-161, para. 9, with reference to Case C-62/93 *BP Soupergaz Anonimos Etairia Geniki Emporiki-Viomichaniki kai Antiprossopeion v. Greek State* [1995] ECR I-1883, para. 13.

[56] Case C-299/95 *Friedrich Kremzow v. Republik Österreich* [1997] ECR I-2629, para. 1.

[57] Case C-299/95 *Friedrich Kremzow v. Republik Österreich* [1997] ECR I-2629, para. 2; with reference to the ECHR Judgment of 21 September 1993 in *Kremzow v. Austria*, Series A, No 268-B.

[58] Case C-299/95 *Friedrich Kremzow v. Republik Österreich* [1997] ECR I-2629, para. 13.

[59] Case C-299/95 *Friedrich Kremzow v. Republik Österreich* [1997] ECR I-2629, para. 16.

[60] Case C-299/95 *Friedrich Kremzow v. Republik Österreich* [1997] ECR I-2629, para. 18; for a further discussion of Case C-299/95 see only Jacobs, *Human Rights in the European Union: The Role of the Court of Justice,* in: E.L.Rev. 2001, 26 (4), 331 (335).

[61] Case C-299/95 *Friedrich Kremzow v. Republik Österreich* [1997] ECR I-2629, para. 19.

In light of this judgment, it is thus possible to argue that in order to establish a sufficient connection with Community law, the individual exercise of a fundamental freedom, or at least an actual prospect of such an exercise, must be involved. However, for Community law to have an effect on national law, the national provisions must also directly hinder an individual to rely on his Community rights.

(b) Relation to an Economic Activity

That the protection an individual enjoys while exercising his Community rights is not absolute was in a more general manner also highlighted in the judgment given by the Court in Case C-168/91. This case concerned a Greek national living and working in Germany who objected to his name being registered in accordance with a system of transliteration developed by the International Organization for Standardization (ISO).[62] During the national proceedings, the main question arose as to whether the mere fact that Mr. Konstantinidis was exercising his freedom of establishment under Article 52 of the Treaty was sufficient to bring the case within the sphere of Community law for these purposes, i.e. whether Member States are in general required, as a matter of Community law, to respect the fundamental rights of persons who exercise their rights of free movement under the Treaty.

In this regard, the Advocate General took the view that the exercise of any fundamental freedom should provide the person concerned with a wide protection against any form of discrimination that also applies in situations that are not immediately related to the economic activities carried out.[63] Moreover, he argued that a citizen of the European Union should also be able to oppose any violation of his fundamental rights.[64] These quite far-reaching ideas regarding the possible scope of Community law were however not taken up by the Court in its final judgment. Instead, the Court relied on a more traditional understanding of the protection already ensured by Article 52 and stated "that it is contrary to that provision for a Greek national to be obliged, under the applicable national legislation, to use, in the pursuit of his occupation, a spelling of his name whereby its

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[62] See in this regard only Case C-168/91 *Christos Konstantinidis v. Stadt Altensteig* [1993] ECR I-1191, paras. 29 and 30 - Opinion of AG Jacobs.

[63] Case C-168/91 *Christos Konstantinidis v. Stadt Altensteig* [1993] ECR I-1191, para. 24 – Opinion of AG Jacobs.

[64] Case C-168/91 *Christos Konstantinidis v. Stadt Altensteig* [1993] ECR I-1191, para. 46 – Opinion of AG Jacobs.

pronunciation is modified and the resulting distortion exposes him to the risk that potential clients may confuse him with other persons."[65]

As a consequence, it seems reasonable to assume that an individual can rely on his fundamental freedoms and fundamental rights whose observance the Court ensures in other situations such as criminal proceedings only under the condition that the alleged infringements show a clear and immediate relation to activities carried out by that individual which are protected by Community law.

2) Sufficient Protection of the Sovereign Rights of the Member States

In more general terms, it is also necessary to point out that any influence of Community law on the national criminal law systems of the Member States can only be established after the respective sovereign rights of the Member States have been sufficiently taken into consideration. In accordance with Article 6 (3) EU, the Union is under an obligation to "respect the national identities of its Member States." With regard to legislative action taken by the Community, this obligation has found, among others, expression in the principles of attributed powers and subsidiarity. Moreover, it should be noted that any questions related to the relationship between Community law and the national criminal legal systems and the possible influence Community law might exercise in this regard are of a very sensitive nature. Advocate General *Ruiz-Jarabo Colomer* himself stated in his Opinion in Case C-176/03 that Member States "use criminal codes as a last resort in defending themselves against threats to the values which sustain coexistence".[66] Accordingly, it can be easily argued that criminal law is one of the fields of law where the underlying beliefs and values commonly held in one society and thus the national identity of a state find a particularly clear expression. Therefore, it is not completely surprising that despite increasing efforts to establish an International Criminal Law Order, to a certain extent[67], criminal law is still most commonly considered to be inseparably linked to the concepts of national sovereignty and the

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[65] Case C-168/91 *Christos Konstantinidis v. Stadt Altensteig* [1993] ECR I-1191, para. 17.

[66] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 72 – Opinion of AG Ruiz-Jarabo Colomer; see also Case C-432/04 *Commission of the European Communities v. Edith Cresson* para. 98 – Opinion of the AG Geelhoed, delivered on 23 February 2006.

[67] This general development in the field of International Law is evidenced most prominently by the Developments leading to the Establishment of the International Criminal Court; see only the Preamble of the Rome Statute which reads as follows:
"(…) Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation (…)."

state[68]. As a result, even in such an integrated international organization as the European Union, the notion of any substantive powers of a non-state actor in the field of criminal law is most likely to be viewed as an encroachment on the powers held by the sovereign states[69]. In addition, concerns about the European Community exercising criminal law related competences also arise due to the limited democratic legitimacy of the European decision-making process and the very immediate effect that criminal law can have on the individual exercise of rights and freedoms.[70] As a consequence, while defining the scope of Community law and thereby assessing possible effects of Community law, among others, on the criminal laws of the Member States the Court is each time called upon to balance the respective national interests against the common interests regarding the achievement of Community objectives.[71]

3) Compatibility with other Principles of Community Law

In addition to being asked to rule upon possible influences Community law might have on national criminal law, the Court also has to take into consideration other rules and principles of Community law. In this regard, it must be noted that, firstly, a number of principles of criminal law, such as the prohibition of retroactivity[72]and the requirement of legality[73],

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[68] Harding *Exploring the Intersection of European Law and National Criminal Law,* in: E.L.Rev. 2000, 25 (4), 374 (380); Wasmeier/ Thwaites *The "Battle of the Pillars": Does the European Community have the Power to Approximate National Criminal Laws?,* in: E.L.Rev.2004, 29 (5), 613 (613); for a realistic assessment see also Sevenster, *Criminal Law and EC Law,* in: 29 C.M.L.Rev. 1992, 29 (64); Vogel, *Wege zu europäisch-einheitlichen Regelungen im Allgemeinen Teil des Strafrechts,* in 50 JZ 1995, 331 (332).

[69] See in general only Jung, *"L'Etat et moi": Some Reflections on the Relationship between the Criminal Law and the State,* in: European Journal of Crime, Criminal Law and Criminal Justice 6 (1998) 208 (211).

[70] For the latter effect see only Case C-240/90 *Federal Republic of Germany v. Commission of the European Communities* [1992] ECR I-5383, para. 25 – Opinion of the AG Jacobs; and Kaiafa-Gbandi, *The Development towards Harmonization within Criminal Law in the European Union – A Citizen's Perspective,* in: European Journal of Crime, Criminal Law and Criminal Justice 9 (2001) 239 (262); for a differentiated view see Sieber, *Europäische Einigung und Europäisches Strafrecht,* in: 103 ZStW (1991), 957 (972).

[71] See only Stiebig, *Strafrechtsetzungskompetenz der Europäischen Gemeinschaft und Europäisches Strafrecht: Skylla und Charybdis einer europäischen Odyssee?,* in: 40 EuR 2005, 466 (493).

[72] See only Case C-63/83 *Regina v. Kent Kirk* [1984] ECR 2689, para. 22; Case C-331/88 *The Queen v. Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others* [1990] ECR I-4023, para. 6; Lewis, *Remedies and the Enforcement of European Community Law,* at p. 207.

[73] See only Case C-172/89 *Vandemoortele NV v. Commission of the European Communities* [1990] ECR I-4677; para. 9; Joined Cases C-74/95 and C-129/95 *Criminal proceedings against X* [1996] ECR I-6609, para. 31.

have been acknowledged as general principles of Community law by the Court which can thus have a limiting effect on any Community law related influence. Secondly, the nature and effect of legal instruments as developed by the Court must also be respected. The latter aspect became particularly evident with regard to the role of directives in criminal proceedings[74] in the judgment given by the Court in Joined Cases C-387/02, C-391/02 and C-403/02.

These cases concerned requests for a preliminary ruling made by the Tribunale di Milano, Prima sezione penale (Milan District Court, First Criminal Chamber) of 26 October 2002, received at the Court registry on 31 October 2002. In particular, the Italian court sought an interpretation of Article 6 of the First Council Directive 68/151/EEC of 9 March 1968[75] against the background of criminal proceedings brought against Silvio Berlusconi (Case C-387/02), Sergio Adelchi (case C-391/02), Marcello Dell'Utri and others (Case C-403/02), alleging breach of the provisions governing false information on companies (false accounting) set out in the Codice civile ("the Italian Civil Code")[76].

Based on Article 54 (3) (g) EC a number of directives have been adopted, among them Directive 68/151/EEC (hereinafter referred to as "the First Companies Directive") which aims at protecting third parties dealing with companies by requiring the compulsory disclosure of certain business-related information[77] and making non-compliance with this obligation punishable under law. Due to a change in the Italian Civil Code which occurred after the alleged offences had been committed and the respective

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[74] See in this regard in general France, *The Influence of European Community Law on the Criminal Law of the Member States,* in: European Journal of Crime, Criminal Law and Criminal Justice 2 (1994) 324 (340).

[75] Art. 6 of Directive 68/151/EEC reads as follows:
"Member States shall provide for appropriate penalties in case of:
failure to disclose the balance sheet and profit and loss account as required by Article 2 (1) (f); omission from commercial documents of the compulsory particulars provided for in Article 4."

[76] Joined Cases C-387/02, C-391 and C-403/02 *Criminal proceedings against Silvio Berlusconi, Sergio Adelchi, Marcello Dell'Utri and others* [2005] ECR I-3565, para.1; for the factual background of the proceedings in question see also Chalmers, *The European Rule of Law and National Misgovernance*, in: E.L.Rev. 2005, 30 (2), 163 (163).

[77] Art. 2 (1) (f) of Directive 68/151/EEC reads as follows:
"Member States shall take the measures required to ensure the compulsory disclosure by companies of at least the following documents and in particular:
…
(f) The balance sheet and the profit and loss account for each financial year. The document containing the balance sheet shall give particulars of the persons who are required by law to certify it. (…)"

court proceedings had been initiated[78], the national court was faced with the question of whether the cases should be ruled upon in accordance with the new provisions or previous national provisions. As the application of the new provisions would have in fact made a criminal prosecution of these acts no longer possible[79], the national court asked whether or not the new penalties were appropriate "when considered in the light of, either, Article 6 of the First Companies Directive, (…), or Article 5 of the Treaty, from which (…) it follows that penalties for infringements of provisions of Community law must be effective, proportionate and dissuasive."[80]

In their argument, the defendants relied upon the general rule that "a directive cannot, by itself, give rise to obligations on the part of an individual and for that reason cannot be relied on as such against that individual."[81] In contrast, the Commission tried to establish that the situation in question did not so much raise the issue of the direct effect of directives but simply involved the maintenance of the effects of the previous national legislation. Thus, the Commission argued that it would not be the Community legislation which finally determined the issue of criminal liability but the application of national law in accordance with the principle of the primacy of Community law.[82]

In its judgment, the Court reaffirmed the general rule that within the context of criminal proceedings "a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive."[83]

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[78] Joined Cases C-387/02, C-391 and C-403/02 *Criminal proceedings against Silvio Berlusconi, Sergio Adelchi, Marcello Dell'Utri and others*, [2005] ECR I-3565, para. 28 – Opinion of AG Kokott.

[79] Joined Cases C-387/02, C-391 and C-403/02 *Criminal proceedings against Silvio Berlusconi, Sergio Adelchi, Marcello Dell'Utri and others*, [2005] ECR I-3565, para. 31.

[80] Joined Cases C-387/02, C-391 and C-403/02 *Criminal proceedings against Silvio Berlusconi, Sergio Adelchi, Marcello Dell'Utri and others* [2005] ECR I-3565, para. 36.

[81] Joined Cases C-387/02, C-391 and C-403/02 *Criminal proceedings against Silvio Berlusconi, Sergio Adelchi, Marcello Dell'Utri and others* [2005] ECR I-3565, para. 44.

[82] Joined Cases C-387/02, C-391 and C-403/02 *Criminal proceedings against Silvio Berlusconi, Sergio Adelchi, Marcello Dell'Utri and others* [2005] ECR I-3565, para. 51.

[83] Joined Cases C-387/02, C-391 and C-403/02 *Criminal proceedings against Silvio Berlusconi, Sergio Adelchi, Marcello Dell'Utri and others* [2005] ECR I-3565, para. 74; see also Case C-152/84 *M. H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECR 723, para. 48; Case C-168/95 *Criminal proceedings against Luciano Arcaro* [1996] ECR I-4705, paras. 36 and 37; Drake, *Twenty Years After Von Colson: The Impact of "Indirect Effect" on the Protection of the Individual's Community Rights,* in E.L.Rev. (2005) 30 (3), 329 (340); Curtin/Mortelmans in: Institutional Dynamics Of European Integration II, 423 (444).

Moreover, the Court precluded any reliance on Article 6 of the First Companies Directive by the national court for the purpose of assessing the compatibility of the new Italian provisions as such assessment could lead to results contrary to the essential nature of any directive, more precisely the application of a manifestly more severe criminal penalty which was in force at the time when the acts in question were committed.[84] In this way the Court did not only considerably restrict the role of directives in any assessment of national criminal provisions, but, in addition, the Court acknowledged under the circumstances in question the possibility for a Member State to apply newly introduced, more lenient national criminal provisions which might not even be in accordance with Community law.

In particular, the Court did not follow the idea suggested by the Advocate General who had argued in her Opinion that the reliance on the general principle of Community law regarding the application of the more lenient penalty[85] is only justified where the primacy of Community law is preserved, namely "where the value judgments of the Community legislature are also taken into account and the (revised) opinion of the national legislature is in conformity with the provisions laid down by the Community legislature."[86]

Against the background of these very different views it is necessary to point out that prior to this judgment the Court had never addressed possible indirect effects of a directive in relation to the determination of penalties in national criminal proceedings. Instead, it had only ruled that in the absence of any implementation measure a Member State could not rely directly on a directive in order to determine the penalty in question.[87] Consequently, this judgment can be regarded as demonstrating the clear limitations of any possible effects Community law – in the form of directives – can have on national criminal law.

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[84] Joined Cases C-387/02, C-391 and C-403/02 *Criminal proceedings against Silvio Berlusconi, Sergio Adelchi, Marcello Dell'Utri and others* [2005] ECR I-3565, para. 76.

[85] Joined Cases C-387/02, C-391 and C-403/02 *Criminal proceedings against Silvio Berlusconi, Sergio Adelchi, Marcello Dell'Utri and others* [2005] ECR I-3565, para. 68.

[86] Joined Cases C-387/02, C-391 and C-403/02 *Criminal proceedings against Silvio Berlusconi, Sergio Adelchi, Marcello Dell'Utri and others* [2005] ECR I-3565, para. 162 – Opinion of AG Kokott.

[87] See only Case C-14/86 *Pretore di Salò v. Persons unknown* [1987] ECR 2545, para. 20; Case-C-80/86 *Criminal proceedings against Kolpinghuis Nijmegen BV* [1987] ECR 3969, para. 13; Joined Cases C-74/95 and C-129/95 *Criminal proceedings against X* [1996] ECR I-6609, para. 24; Case C-168/95 *Criminal proceedings against Luciano Arcaro* [1996] ECR I-4705, para. 36.

b) The Adoption of National Criminal Law Provisions

Moving now to the issue in which ways Community law actually does influence criminal law, it should be noted that there are many provisions in each Member State with a basis in Community law that are enforced by criminal law. As the adoption of national criminal law provisions is the earliest possible stage Community law can exercise an influence it should be discussed first. In this regard, it is necessary to point out that the wide discretion originally left to the Member States with regard to the penalties they impose in the event of infringements of Community law has been quite considerably narrowed down.

1) The Choice of Penalties as a Matter of the Member States

In accordance with the established case-law of the Court, where Community legislation does not specifically provide any penalty for an infringement, the choice of penalties remains within the discretion of the Member States. Among others, this point was made in Case C-326/88. In this case a reference was made by the Vestre Landsret (Western Regional Court) for a preliminary ruling regarding the interpretation of Regulation (EEC) No 543/69 of the Council of 25 March 1969 on the harmonization of certain social legislation relating to road transport.[88] In particular, Article 18 (1) of this Regulation stated that Member States were to adopt such laws, regulations or administrative provisions providing for penalties applicable in case of breach of the rules laid down.[89] With regard to the respective rules implementing the regulation, the question then arose as to whether the strict liability introduced by the Danish legislator was compatible with Community law.[90]

In its legal assessment, the Court firstly stressed that the criminal liability introduced by the Danish rules in question constituted a means to ensure compliance with the Community rules concerned and thus did not extend the scope of that regulation.[91] The Court then emphasized the fact that the

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[88] Case C-326/88 *Anklagemyndigheden v. Hansen & S n I/S, in the person of Hardy Hansen* [1990] ECR I-2911, para. 1; for an assessment of this ruling see only France, *The Influence of European Community Law on the Criminal Law of the Member States,* in: European Journal of Crime, Criminal Law and Criminal Justice 2 (1994) 324 (349); Corstens/Pradel, *European Criminal Law,* at p. 520; Zuleeg, *Der Beitrag des Strafrechts zur europäischen Integration,* in: 47 JZ 1992, 761 (766).

[89] Case C-326/88 *Anklagemyndigheden v. Hansen & S n I/S, in the person of Hardy Hansen* [1990] ECR I-2911, para. 2.

[90] Case C-326/88 *Anklagemyndigheden v. Hansen & S n I/S, in the person of Hardy Hansen* [1990] ECR I-2911, para. 6.

[91] Case C-326/88 *Anklagemyndigheden v. Hansen & S n I/S, in the person of Hardy Hansen* [1990] ECR I-2911, para. 11.

regulation in question indeed left it to the Member States to determine the nature and severity of the penalties to be imposed in the event of a breach.[92] Therefore, the Member States were in general free to take such measures they thought to be necessary to guarantee the application and effectiveness of Community law.[93] Still, in accordance with the Court's further reasoning, while exercising their legislative freedom, Member States are under an obligation to ensure that "infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive."[94] As these requirements were met by the Danish rules, the Court came to the conclusion that no rule of Community law precluded the application of such national provisions.[95]

The exercise of the Member States' remaining legislative freedom was also acknowledged by the Court in Case C-203/80 in which a reference for preliminary ruling was made by the Tribunale (District Court), Bolzano in the criminal proceedings pending before that court against Guerrino Casati on the interpretation of provisions mainly related to the fundamental freedom of capital and to transfers of currency.[96] The national proceedings concerned a case of an attempt of undeclared and thus unauthorized re-export of currency previously imported but not used, an offence punishable by imprisonment and fines under Italian law in force at that time.

Regarding the question of whether Community law was setting possible limits to national rules of criminal law and procedure in this field, the Court firstly reaffirmed the general rule that criminal legislation and the rules governing criminal procedure are matters for which the Member

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[92] Case C-326/88 *Anklagemyndigheden v. Hansen & S n I/S, in the person of Hardy Hansen* [1990] ECR I-2911, para. 14; see in this regard also Case C-7/90 *Criminal proceedings against Paul Vandevenne, Marc Wilms, Jozef Mesotten and Wilms Transport NV* [1991] ECR I-4371, para. 18; Eisele, *Einflussnahme auf nationals Strafrecht durch Richtliniengebung der Europäischen Gemeinschaft,* in: 56 JZ 2001, 1157 (1161).

[93] Case C-326/88 *Anklagemyndigheden v. Hansen & S n I/S, in the person of Hardy Hansen* [1990] ECR I-2911, para. 17; see also Pache, *Zur Sanktionskompetenz der Europäischen Wirtschaftsgemeinschaft,* in 28 EuR 1993, 173 (179).

[94] Case C-326/88 *Anklagemyndigheden v. Hansen & S n I/S, in the person of Hardy Hansen* [1990] ECR I-2911, para. 17; see also Case C-7/90 *Criminal proceedings against Paul Vandevenne, Marc Wilms, Jozef Mesotten and Wilms Transport NV* [1991] ECR I-4371, para. 11.

[95] Case C-326/88 *Anklagemyndigheden v. Hansen & S n I/S, in the person of Hardy Hansen* [1990] ECR I-2911, para. 20.

[96] Case C-203/80 *Criminal proceedings against Guerrino Casati* [1981] ECR 2595, para. 7; for an assessment of this judgment see only Tridimas, *The General Principles of EC Law,* at p. 157.

States are still responsible. However, it then moved on to identify two different situations in which the Member States are limited in their exercise of legislative freedoms due to the influences Community law can exercise on national legal systems in general. More precisely, the national administrative measures or penalties must not be conceived in such a manner as to restrict the fundamental freedoms, and they must also comply with the proportionality principle.[97] As the Member States were not obliged to liberalize capital movements and transfers of currency under Community law at the time of the reference the Court then came to the conclusion that Member States were not restricted in adopting "control measures and to enforce compliance therewith by means of criminal penalties."[98] Consequently, this ruling of the Court reaffirms the general notion that Member States enjoy a wide margin of appreciation regarding the measures they adopt in criminal matters.

Another opportunity to reaffirm this general rule was given to the Court in Case C-186/98. In this case a reference was made by the Tribunal de Circulo do Porto, Portugal regarding the interpretation of the provisions of Community law governing the improper use of financial assistance granted from the European Social Fund.[99] As Community legislation only laid down sanctions of a civil nature for the improper use of Community funds by private individuals, the defendants argued that, therefore, neither the national legislature nor the national court could classify the conduct as a criminal offence.[100] Faced with such claim, the national court decided to ask the Court whether a Member State is nevertheless empowered to impose criminal penalties for conduct which is harmful only to Community financial interests.[101] In its reply to this question, the Court firstly emphasized that even though the Community law in question laid down particular penalties for infringement, it did not exhaustively list the penalties that Member States might impose.[102] The Court then went on to state that by virtue of Article 10 EC Member States are under a general obligation to take all effective measures to sanction conduct which affects the financial interests of the Community. These effective measures may also

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[97] Case C-203/80 *Criminal proceedings against Guerrino Casati* [1981] ECR 2595, para. 27.
[98] Case C-203/80 *Criminal proceedings against Guerrino Casati* [1981] ECR 2595, para. 29.
[99] Case C-186/98 *Criminal proceedings against Maria Amélia Nunes and Evangelina de Matos* [1999] ECR I-4883, para. 1.
[100] Case C-186/98 *Criminal proceedings against Maria Amélia Nunes and Evangelina de Matos* [1999] ECR I-4883, para. 5.
[101] Case C-186/98 *Criminal proceedings against Maria Amélia Nunes and Evangelina de Matos* [1999] ECR I-4883, para. 6.
[102] Case C-186/98 *Criminal proceedings against Maria Amélia Nunes and Evangelina de Matos* [1999] ECR I-4883, para. 12.

include criminal penalties. Thus, the Court found that Member States enjoyed a wide margin of discretion regarding possible penalties under their respective national laws and were consequently not precluded from taking criminal measures.[103]

In a number of cases, the Court has, then, while relying on the fundamental principle of loyalty as laid down in Article 10 EC, identified certain situations where Member States are not free to adopt any national provisions they see fit to ensure the effectiveness of Community law, but, instead, are under an obligation to adopt and apply criminal provisions.[104] In Case C-68/88 an action was brought by the Commission against Greece for a declaration that Greece had failed to fulfil its obligations under Community law. After having carried out a detailed investigation the Commission had come to the conclusion that two consignments of maize were exported from Greece to Belgium which were declared to be of Greek origin but which in fact were of Yugoslavian origin. Due to this wrongful declaration the agricultural levy payable to the Community own resources had not been collected.[105] In particular the Court was called upon to discuss the possible influences Community law could have on the application of national criminal law provisions as the Commission claimed that Greece had failed to initiate the necessary criminal or disciplinary proceedings provided for by national law against the perpetrators of the fraud and all those who collaborated in its commission and concealment.[106]

In its reasoning, the Court firstly reaffirmed the general duty of the Member States as laid down in Article 10 EC to take all measures necessary, whether general or particular, to ensure the full effectiveness and application of Community law. With regard to the situation that Community legislation does not specifically provide any penalty, the Court stated that, even though the choice of disciplinary measures was in the discretion of the Member States, they were still under an obligation to ensure in particular that breaches of Community law "are penalized under conditions, both

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[103] Case C-186/98 *Criminal proceedings against Maria Amélia Nunes and Evangelina de Matos* [1999] ECR I-4883, para. 14.

[104] In this regard see France, *The Influence of European Community Law on the Criminal Law of the Member States,* in: European Journal of Crime, Criminal Law and Criminal Justice 2 (1994) 324 (339); Tiedemann, *Europäisches Gemeinschaftsrecht und Strafrecht,* in: 46 NJW 1993, 23 (25); Dannecker, *Strafrecht in der Europäischen Gemeinschaft,* in: 51 JZ 1996, 869 (873); Eisele, *Einflussnahme auf nationals Strafrecht durch Richtliniengebung der Europäischen Gemeinschaft,* in: 56 JZ 2001, 1157 (1158).

[105] Case C-68/88 *Commission of the European Communities v. Hellenic Republic* [1989] ECR 2965, para. 2.

[106] Case C-68/88 *Commission of the European Communities v. Hellenic Republic* [1989] ECR 2965, para. 22.

procedural and substantive, which are analogous to those applicable to infringements of national law of similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive."[107]

Regarding the application of such national rules, the Court finally stressed that "the national authorities must proceed, with respect of infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws."[108] Consequently, this case exemplifies the importance of the obligation to fully cooperate with the Community as laid down in Article 10 EC. Member States are obliged to strictly comply with this fundamental duty in such manner that they also have a real duty to take the initiative themselves with regard to the prosecution of infringements of Community law which prejudice its effectiveness.[109]

Even though Case C-68/88 primarily concerned the obligations imposed on Member States with regard to the actual application of their respective criminal provisions, this judgment also demonstrates certain limiting effects that Community law can have already at the stage of the adoption of such rules. In particular, with regard to the protection of the Community's own financial interests, Member States are thus not only under an obligation to apply their respective provisions with due diligence but to provide for such provisions in the first place. Given the difficulties that can arise while applying existing rules to cases related to fraud in a Community context, Member States are quite likely to find themselves obliged to introduce new provisions into their respective legal orders. Such an influence of Community law on the national legal systems of the Member States can easily be regarded as an encroachment on Member States' sovereign rights. The reasoning the Court relies upon to nevertheless justify such influences is indirectly evident in the Opinion of the Advocate General in Case C-50/76, even though he was primarily concerned to establish that Member States are not precluded from taking criminal measures as they do not modify the scope of a Community regulation. In

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[107] Case C-68/88 *Commission of the European Communities v. Hellenic Republic* [1989] ECR 2965, para. 24; see also C-240/90 *Federal Republic of Germany v. Commission of the European Communities* [1992] ECR I-5383, para. 15 – Opinion of the AG Jacobs.

[108] Case C-68/88 *Commission of the European Communities v. Hellenic Republic* [1989] ECR 2965, para. 25.

[109] See for this particular aspect also Case C-68/88 *Commission of the European Communities v. Hellenic Republic* [1989] ECR 2965, para. 9 – Opinion of the AG Tesauro; Corstens/Pradel, *European Criminal Law,* at p. 512; Eisele, *Einflussnahme auf nationals Strafrecht durch Richtliniengebung der Europäischen Gemeinschaft,* in: 56 JZ 2001, 1157 (1158).

accordance with this Opinion, the prospect of a penal sanction does not change the scope of a rule, since any penal provision related to a substantive rule of conduct is based on the presumption of conduct contrary to that rule.[110] Acknowledging the very context of this statement, the same reasoning could still be also applied with regard to the question of whether the Community itself can prescribe Member States to impose penalties, even of criminal nature.[111] Moreover, it is possible to argue in general that even under such circumstances the choice of penalties is still a matter for the Member States as Community law only determines the nature of the offences.

2) The Court's General Acknowledgment of the Supportive Role of National Criminal Law in the Community Context

While the Court has regularly stated that the choice of penalties is a matter left to the discretion of the Member States, it has at the same time acknowledged the supportive role of national criminal law provisions for the achievement of Community objectives as they find expression in the legal acts of the Community, among others, in Case C-50/76.

In this case, which concerned a reference for a preliminary ruling made by the College van Beroep voor het Bedrijfsleven, the question was raised as to whether any provisions of Community law in force at the time of the proceedings or principles of European law forbid the adoption by a competent national organization of rules fixing export prices for flower bulbs. The adopted national rules were partly in conformity with the relevant Community regulations, but they also contained provisions which did not appear in those regulations at all and therefore had no legal foundation therein.[112] In particular, these provisions provided for penal sanctions in the event of infringements of the national rules.

In its reasoning, the Court firstly reaffirmed the fundamental duty of the Member States not to obstruct the direct effect inherent in regulations and other rules of Community law. In particular, Member States are prohibited

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[110] Case C-50/76 *Amsterdam Bulb BV v. Produktschap voor Siergewassen* [1977] ECR 137, para. 4 – Opinion of the AG Capotorti; see also in this regard Case C-77/81 *Zuckerfabrik Franken GmbH v. Federal Republic of Germany* [1982] ECR 681, para. 19; Case C-326/88 *Anklagemyndigheden v. Hansen & S n I/S, in the person of Hardy Hansen* [1990] ECR I-2911, para. 11; and C-240/90 *Federal Republic of Germany v. Commission of the European Communities* [1992] ECR I-5383, para. 44 – Opinion of the AG Jacobs.

[111] For a discussion of the notion of *implied powers* in this regard see the later assessment of Case C-176/03 in this paper under Point C.

[112] Case C-50/76 *Amsterdam Bulb BV v. Produktschap voor Siergewassen* [1977] ECR 137, para. 2.

from either adopting or allowing national organizations having legislative powers to adopt rules which would conceal the Community nature and effect of any legal provision from the person to whom it applies.[113] As a consequence, Member States will not be limited in their ability to adopt rules if such rules apply in areas not covered by Community law and they do not contravene the scope and aims of the existing Community regime.[114] With regard to the national provisions laying down sanctions in respect of an infringement of Community law, the Court then concluded that "in the absence of any provision in the Community rules providing for specific sanctions to be imposed on individuals for a failure to observe those rules, the Member States are competent to adopt such sanctions as appear to them to be appropriate."[115] The Court based this conclusion on the fundamental duty of the Member States, under Article 10 EC, to ensure the fulfillment of the obligations resulting from their membership of the European Union.[116] Moreover, the Court stressed the fact that the national organizations had introduced criminal provisions which were meant to deter infringements of Community law and they did not change the scope of rules rooted in Community law[117].

Thus, in this judgment, the Court implicitly reaffirmed the notion that under certain circumstances the imposition of criminal penalties is the most effective means to ensure the effective application of Community rules. At the same time, due to the fact that the Court also stressed the fact that there was no Community legislation in force at all which could have been adversely affected, it becomes clear that the Court regards the design of penalty provisions as falling primarily under the competences of the Community which is responsible for ensuring the effectiveness of Community law in general.[118]

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[113] Case C-50/76 *Amsterdam Bulb BV v. Produktschap voor Siergewassen* [1977] ECR 137, para. 7; see in genral in this regard also Curtin/Mortelmans in: Institutional Dynamics Of European Integration II, 423 (440).

[114] Case C-50/76 *Amsterdam Bulb BV v. Produktschap voor Siergewassen* [1977] ECR 137, para. 30.

[115] Case C-50/76 *Amsterdam Bulb BV v. Produktschap voor Siergewassen* [1977] ECR 137, para. 33.

[116] Case C-50/76 *Amsterdam Bulb BV v. Produktschap voor Siergewassen* [1977] ECR 137, para. 32; see for a further discussion Case C-176/03 *Commission v. Council* Opinion of the Advocate General Ruiz-Jarabo Colomer of 26 May 2005, para. 30; Zuleeg, *Der Beitrag des Strafrechts zur europäischen Integration,* in: 47 JZ 1992, 761 (762).

[117] See for the latter aspect only Case C-176/03 *Commission v. Council* [2005] ECR I-7879, para. 31 – Opinion of the AG Ruiz-Jarabo Colomer ; with reference to Case C-50/76 *Amsterdam Bulb BV v. Produktschap voor Siergewassen* [1977] ECR 137, para. 4 – Opinion of the AG Capotorti.

[118] See Case C-176/03 *Commission v. Council* [2005] ECR I-7879, para. 32 – Opinion of the AG Ruiz-Jarabo Colomer.

In Joined Cases C-58/95, C-75/95, C-112/95, C-119/95, C-123/95, C-135/95, C-140/95, C-141/95, C-154/95 and C-157/95 the Court was asked to give a preliminary ruling by the Pretura Circondariale di Roma, Sezione Distaccata di Tivoli and Sezione Distaccata di Castelnuovo di Porto regarding the interpretation of Council Directive 91/156/EEC.[119] In particular, the Court was asked to rule upon the question as to what extent Member States possess the power to impose criminal penalties for breaches of Community law, even though the directive in question did not impose any specific obligation on Member States as regards systems of controls and penalties.[120] This question was a clear reflection of the Pretore's interpretation of the directive as restricting criminal-law controls only to serious cases, which was contrary to the one previously adopted by the Italian legislator.[121]

In line with the Advocate General's reasoning the Court however did not agree with the interpretation of the permit system in Directive 91/156 as argued by the Pretore.[122] After having established that the directive itself did not preclude Member States from imposing criminal sanctions, the Court then went on to state that where a directive does not contain any specific obligation requiring Member States to introduce a particular system of controls and penalties, they are, as far as they regard criminal sanctions an effective means to ensure the effectiveness and application of Community law, free to impose such penalties.[123]

3) Substantive Guidance of Community Law

With regard to the actual exercise of the Member States' margin of appreciation while taking all measures necessary to guarantee the application and effectiveness of Community law, the Court has also formulated certain

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[119] Council Directive 91/156/EEC of 18 March 1991 amending Directive 75/442/EEC on waste (Official Journal 1991 L 78, at p. 32).

[120] Joined Cases C-58/95, C-75/95, C-112/95, C-119/95, C-123/95, C-135/95, C-140/95, C-141/95, C-154/95 and C-157/95 *Criminal proceedings against Sandro Gallotti and others* [1996] ECR I-1435, paras. 1 and 2.

[121] Joined Cases C-58/95, C-75/95, C-112/95, C-119/95, C-123/95, C-135/95, C-140/95, C-141/95, C-154/95 and C-157/95 *Criminal proceedings against Sandro Gallotti and others* [1996] ECR I-1435, para. 12.

[122] Joined Cases C-58/95, C-75/95, C-112/95, C-119/95, C-123/95, C-135/95, C-140/95, C-141/95, C-154/95 and C-157/95 *Criminal proceedings against Sandro Gallotti and others* [1996] ECR I-1435, para. 13.

[123] See with regard to this requirement also Case C-54/81 *Firma Wilhelm Fromme v. Bundesanstalt für landwirtschaftliche Marktordnung* [1982] ECR 1449, para. 6; Joined Cases C-205 to 215/82 *Deutsche Milchkontor GmbH and others v. Federal Republic of Germany* [1983] ECR 2633, para. 23; Tiedemann, *Europäisches Gemeinschaftsrecht und Strafrecht,* in: 46 NJW 1993, 23 (23).

substantive requirements that the national provisions in question need to fulfil.[124]

In the above-mentioned judgment in Joined Cases C-58/95, C-75/95, C-112/95, C-119/95, C-123/95, C-135/95, C-140/95, C-141/95, C-154/95 and C-157/95 the Court stated that while exercising their regulatory freedom Member States must respect the following two conditions: firstly, such national provisions must ensure that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance;[125] and, secondly, they must in any event, make the penalty effective, proportionate and dissuasive.[126]

These requirements were also restated in Case C-40/04. In this case a reference for a preliminary ruling was made by the Finnish Korkein oikeus in the criminal proceedings against Syuichi Yonemoto, in his capacity as representative of the importer of a machine which caused an accident at work resulting in serious injuries to a user of that machine, concerning the interpretation of Directive 98/37/EC[127], and of Articles 28 EC and 30 EC.[128] In particular, the Finnish court requested the Court to specify the penalties which a Member State may impose on account of failure to comply with the obligations as laid down in Directive 98/37/EC.[129]

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[124] France, *The Influence of European Community Law on the Criminal Law of the Member States,* in: European Journal of Crime, Criminal Law and Criminal Justice 2 (1994) 324 (350); Wasmeier/Thwaites, *The "Battle of the Pillars": Does the European Community have the Power to Approximate National Criminal Laws?,* in: E.L.Rev. 2004, 29 (5), 613 (621).

[125] See with regard to this requirement also Case C-54/81 *Firma Wilhelm Fromme v. Bundesanstalt für landwirtschaftliche Marktordnung* [1982] ECR 1449, para. 6; Joined Cases C-205 to 215/82 *Deutsche Milchkontor GmbH and others v. Federal Republic of Germany* [1983] ECR 2633, para. 23; Tiedemann, *Europäisches Gemeinschaftsrecht und Strafrecht,* in: 46 NJW 1993, 23 (23).

[126] Joined Cases C-58/95, C-75/95, C-112/95, C-119/95, C-123/95, C-135/95, C-140/95, C-141/95, C-154/95 and C-157/95 *Criminal proceedings against Sandro Gallotti and others* [1996] ECR I-1435, para. 14; with further reference to Case C-382/92 *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* [1994] ECR I-2435, para. 55; see also Case C-79/83 *Dorit Harz v. Deutsche Tradax GmbH* [1984] ECR 1921, para. 15; Case C-217/88 *Commission of the European Communities v. Federal Republic of Germany* [1990] ECR I-2879, para. 16; Eisele, *Einflussnahme auf nationals Strafrecht durch Richtliniengebung der Europäischen Gemeinschaft,* in: 56 JZ 2001, 1157 (1162).

[127] Directive 98/37/EC of the European Parliament and of the Council of June 1998 on the approximation of the laws of the Member States relating to machinery (Official Journal 1998 L 207, at p. 1).

[128] Case C-40/04 *Criminal proceedings against Syuichi Yonemoto* [2005] ECR I-7755, paras. 1 and 2.

[129] Case C-40/04 *Criminal proceedings against Syuichi Yonemoto* [2005] ECR I-7755, para. 28.

In response to this question the Court firstly pointed out that the Community legislation in question did not impose any specific obligations on the Member States as regards the system of penalties. At the same time, the Court also stressed that this finding however did not imply that national provisions nevertheless providing for criminal penalties in case of infringements must be automatically viewed as incompatible with Directive 98/37/EC.[130] Instead, the Court emphasized that under such circumstances Member States have a wide margin of discretion regarding the "most appropriate forms and methods"[131] while adopting national measures in order to ensure the effectiveness of a directive, only limited by the third paragraph of Article 249 EC itself.[132] The Court then went on to state that regardless of this margin of appreciation regarding the implementation of a directive into their respective national legal systems Member States are also bound by Article 10 EC to ensure that possible infringements of Community law are penalized. While exercising their legislative freedom in this regard, Member States have to pay special attention to the fact that the adopted penalties are both in their procedural and substantive meaning "analogous to those applicable to infringements of national law of similar nature and importance"; furthermore the penalties must be of an effective, proportionate and deterrent nature.[133] As a result the Court openly acknowledged that Member States are entitled to impose penalties, even of a criminal nature, for the failure to comply with legislation intended to implement Directive 98/37/EC, if they consider that to be the most appropriate manner of ensuring its effectiveness and have paid due attention to the general requirements formulated by the Court that must be fulfilled by such national legislation.[134]

4) Restrictive Effects of Community Law

The Court has not only frequently stressed the important supportive role national criminal law provisions can play for the achievement of Community objectives and the effective and uniform application of Community law in general and has thus acknowledged a wide margin of appreciation

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[130] Case C-40/04 *Criminal proceedings against Syuichi Yonemoto* [2005] ECR I-7755, para. 57; with reference to Joined Cases C-58/95, C-75/95, C-112/95, C-119/95, C-123/95, C-135/95, C-140/95, C-141/95, C-154/95 and C-157/95 *Criminal proceedings against Sandro Gallotti and others* [1996] ECR I-1435, para. 14.

[131] See Case C-48/75 *Jean Noël Royer* [1976] ECR 497, para. 75.

[132] Case C-40/04 *Criminal proceedings against Syuichi Yonemoto* [2005] ECR I-7755, para. 58.

[133] Case C-40/04 *Criminal proceedings against Syuichi Yonemoto* [2005] ECR I-7755, para. 59; see also in this regard Case C-68/88 *Commission of the European Communities v. Hellenic Republic* [1989] ECR 2965, paras. 23 and 24; Case C-7/90 *Criminal proceedings against Paul Vandevenne, Marc Wilms, Jozef Mesotten and Wilms Transport NV* [1991] ECR I-4371, para. 11.

[134] Case C-40/04 *Criminal proceedings against Syuichi Yonemoto* [2005] ECR I-7755, para. 60.

of the national authorities while exercising their legislative powers in the field of criminal law. It has also identified several situations in which Community law can exercise a clearly restrictive influence on the adoption and application of criminal law in the Member States. In addition to the above-mentioned substantive requirements any national provision needs to fulfill, these influences can in particular result from the incompatibility of national rules with provisions and principles of either the primary law or the secondary law of the Community.[135]

(a) Primary Law

In particular, the exercise of individual Community rights, such as the fundamental freedoms, can have a restrictive effect on the national criminal laws of the Member States.[136] In this regard, it should also be noted that in the situation where an individual claims an infringement of its fundamental freedoms, fundamental rights can become an accessory standard of review, among others as a mandatory requirement. As a consequence, even though an individual cannot rely directly upon its fundamental rights against a purely national measure taken by the Member State, as soon as fundamental freedoms are applicable, fundamental rights need to be taken into account as well. In addition, general principles of Community law, such as the principles of proportionality and the prohibition on discrimination[137] can give rise to such restrictive effects.

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[135] Sevenster, *Criminal Law and EC Law,* in: 29 C.M.L.Rev. 1992, 29 (39); Corstens/Pradel, *European Criminal Law,* at p. 491; for the underlying notion of the supremacy of Community Law see only Case C-6/64 *Flaminio Costa v. E.N.E.L.* [1964] ECR 1141; C-11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, para. 3.

[136] See in this regard only Case C-83/78 *Pigs Marketing Board v. Raymond Redmond* [1978] ECR 2347, para. 58; Case C-152/78 *Commission of the European Communities v. French Republic* [1980] ECR 2299, para. 18; Case C-27/80 *Criminal proceedings against Anton Adriaan Fietje* [1980] ECR 3839, para. 15; Case C-16/83 *Criminal proceedings against Karl Prantl* [1984] ECR 1299, para. 38; Case C-121/85 *Conegate Limited v. HM Customs & Excise* [1986] ECR 1007, para. 15; see also Zuleeg, *Der Beitrag des Strafrechts zur europäischen Integration,* in: 47 JZ 1992, 761 (765); Lewis, *Remedies and the Enforcement of European Community Law,* at p. 207; Wasmeier/Thwaites, *The "Battle of the Pillars": Does the European Community have the Power to Approximate National Criminal Laws?,* in: E.L.Rev. 2004, 29 (5), 613 (620).

[137] See in this regard only Case C-61/77 *Commission of the European Communities v. Ireland* [1978] ECR 417, para. 80; and in particular Case C-186/87 *Ian William Cowan v. Trésor public* [1989] ECR 195, para. 19, where the Court stated:
"Although in principle criminal legislation and the rules of criminal procedure, among which the national provision in issue is to be found, are matters for which the Member States are responsible, the Court has consistently held that Community law sets certain limits to their power. Such legislative provisions may not discriminate against persons to whom Community law gives the right to equal treatment or restrict the fundamental freedoms guaranteed by Community law."

The limiting effect of general principles was one of the main issues the Court had to deal with in Case C-299/86. In this case, a reference was made by the Corte d'Appelo di Genova for a preliminary ruling concerning the interpretation of Article 90 EC in order to determine the compatibility with the Italian provision on the charging of value-added tax on products imported from another Member State by a private individual, in force at that time.[138] In particular, the national court sought an answer to the question concerning whether provisions of Community law which subject imports and domestic sales of a product to the same rate of tax preclude the application of national rules laying down, in the event of non-payment of the tax upon importation, penalties differing in nature and severity from those imposed for non-payment on domestic transactions.[139]

In its assessment the Court firstly referred to the general rule that "a system of penalties should not have the effect of jeopardizing the freedoms" provided for under Community law.[140] In accordance with the Court's further statements, such a situation is in particular the case where a penalty is so disproportionate with regard to the gravity of the offence that it becomes an obstacle to the freedom guaranteed.[141] As the Court then found that such different penalties as established under Italian law were indeed disproportionate to the dissimilarity between the two categories of offences, the Court ruled that such penalties were incompatible with Article 90 EC.[142] This judgment of the Court thus illustrates effectively that individuals, while facing criminal proceedings, can come under the additional protection of Community law as far as the exercise of fundamental freedoms is concerned.[143]

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[138] Case C-299/86 *Criminal proceedings against Rainer Drexl* [1988] ECR 1213, para. 1; for an assessment of this judgment see only Tridimas, *The General Principles of EC Law,* at p. 159.

[139] Case C-299/86 *Criminal proceedings against Rainer Drexl* [1988] ECR 1213, para. 3.

[140] Case C-299/86 *Criminal proceedings against Rainer Drexl* [1988] ECR 1213, para. 18.

[141] Case C-299/86 *Criminal proceedings against Rainer Drexl* [1988] ECR 1213, para. 18; with further reference to Case C-157/79 *Regina v. Stanislaus Pieck* [1980] ECR 2171, para. 19; see also Corstens/Pradel, *European Criminal Law,* at p. 510; and Case C-193/94 *Criminal proceedings against Sofia Skanavi and Konstantin Chryssanthakopoulos* [1996] ECR I-929; para. 36.

[142] Case C-299/86 *Criminal proceedings against Rainer Drexl* [1988] ECR 1213, para. 25.

[143] See for possible other restrictive effects of Community law also Joined Cases C-358/93 and C-416/93 *Criminal proceedings against Aldo Bordessa, Vicente Marí Mellado and Concepción Barbero Maestre* [1995] ECR I-361, para. 31; Case C-88/77 *Minister for Fisheries v. C.A. Schonenberg and others* [1978] ECR 473, para. 16; Case C-82/71 *Ministère public de la Italian Republic v. Società agricola industria latte (SAIL)* [1972] ECR 119, para. 5; Case C-269/80 *Regina v. Robert Tymen* [1981] ECR 3079, para. 16; Case C-186/87 *Ian William Cowan v. Trésor public* [1989] ECR 195, para. 19; Case C-203/80 *Criminal proceedings against Guerrino Casati* [1981] ECR 2595, para. 27; Case C-274/96 *Criminal proceedings against Horst Otto Bickel and Ulrich Franz* [1998] ECR I-7637, para. 26; Case C-100/01 *Ministre de l'Intérieur v. Aitor Oteiza Olazabal* [2002] ECR I-10981, para. 42.

In the same context, account should however also be taken of the considerable differences in scope of the various fundamental freedoms as interpreted by the Court. The Court's interpretation,, for example, of Article 28 ECT, especially the *Keck* Judgment, must be considered as a distinct move away from the wide interpretation of the term of "measures having equivalent effect" as it was originally laid down under the *Dassonville-Formula*[144]. Accordingly, the scope of this provision was limited in such manner that selling arrangements had to be regarded as falling outside of it.[145] At the same time the Court started interpreting the other freedoms more broadly, among them Article 49 ECT.[146] In addition, the Court explicitly denied the analogous application of the *Keck rule* to the freedom of services in the *Alpine Investment* Case[147]. Consequently, the actual determination as to which fundamental freedom is applicable in a given situation can have considerable implications for the legal protection an individual concerned can claim under Community law.

The consequent possible substantive limitations of the role of fundamental freedoms in criminal proceedings were in particular illustrated in Case C-20/03. This reference for a preliminary ruling from the Rechtbank van eerste aanleg te Brugge (Belgium) concerned the interpretation of Articles 28, 39 and 49 EC. It was made in the course of criminal proceedings against three Dutch nationals who were charged with having sold in public, without having obtained prior authorization, subscriptions to periodicals on behalf of the German company Alpina GmbH.[148] According to Belgian legislation, the exercise of an itinerant activity without possession of such an authorization is punishable by imprisonment and a fine.[149] Against this legal background, the national court inquired whether Article 28 EC, 39 EC or 49 EC precludes a national regime, such as that laid down by the law on itinerant activities, which makes an offence of the itinerant sale in Belgium, without prior authorization, of subscriptions to periodicals.[150]

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[144] Case C-8/74, *Procureur du Roi v. Dassonville* [1974] ECR 837, para. 5.

[145] Joined Cases C-267/91 and 268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097, para. 16.

[146] Biondi, *Advertising alcohol and the free movement principle: The Gourmet Decision*, in: E.L.Rev. 2001, 26 (6), 616 (620); Barnard, *Fitting the remaining pieces into the goods and persons jigsaw*, in: E.L.Rev. 2001, 26 (1), 35 (56).

[147] Case C-384/93 *Alpine Investments v. Minister van Financien* [1995] ECR I-1141, para. 36.

[148] Case C-20/03 *Criminal proceedings against Marcel Burmanjer, René Alexander Van der Linden, Anthony De Jong* [2005] ECR I-4133, para. 2.

[149] Case C-20/03 *Criminal proceedings against Marcel Burmanjer, René Alexander Van der Linden, Anthony De Jong* [2005] ECR I-4133, para. 15 – Opinion of AG Léger.

[150] Case C-20/03 *Criminal proceedings against Marcel Burmanjer, René Alexander Van der Linden, Anthony De Jong* [2005] ECR I-4133, para. 12.

In its judgment, the Court decided to deal with the issues presented exclusively under Article 28 EC[151] and then found that as the Belgian rules could be viewed as "selling arrangements" within the meaning of the *Keck* jurisprudence[152] they did fall outside of the scope of this provision.[153] Consequently, the Court concluded that Article 28 EC does not preclude national rules under which a Member State makes an offence of the itinerant sale within its territory, without prior authorization, of subscription to periodicals, where such rules apply to all economic operators in a non-discriminatory manner and do not hinder access to the market in question.[154]

In contrast to these findings of the Court, the Advocate General had suggested quite a different line of argumentation in his Opinion. He decided to deal with the case primarily under the fundamental freedom of services. In support of this view, he stressed that the aspect of the Belgian legislation related to the freedom of goods was "not of direct or actual concern to the defendants in the main proceedings."[155] He then moved on to state that national legislation such as the one in question should be considered as constituting a restriction falling within the scope of the prohibition laid down in Article 49 EC[156] and finally concluded that the requirement of prior administrative authorization to exercise the contested itinerant activity went beyond what is necessary in order to attain the objective of consumer protection and was thus disproportionate. After finding the national legislation concerned as being incompatible with Article 49 EC[157] he further pointed out that the same conclusion was likely to be reached if the national legislation were tested against the fundamental freedom of goods. In this regard he relied on the assumption that an impediment of access to the Belgian market was created by the prior authorization obligation.[158] As an

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[151] Case C-20/03 *Criminal proceedings against Marcel Burmanjer, René Alexander Van der Linden, Anthony De Jong* [2005] ECR I-4133*, p*aras. 21 and 34.

[152] Joined Cases C-267/91 and 268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097, para. 16.

[153] Case C-20/03 *Criminal proceedings against Marcel Burmanjer, René Alexander Van der Linden, Anthony De Jong* [2005] ECR I-4133*,* para. 31.

[154] Case C-20/03 *Criminal proceedings against Marcel Burmanjer, René Alexander Van der Linden, Anthony De Jong* [2005] ECR I-4133*,* para. 37.

[155] Case C-20/03 *Criminal proceedings against Marcel Burmanjer, René Alexander Van der Linden, Anthony De Jong* [2005] ECR I-4133, para. 54 – Opinion of the AG Léger.

[156] Case C-20/03 *Criminal proceedings against Marcel Burmanjer, René Alexander Van der Linden, Anthony De Jong* [2005] ECR I-4133, para. 64 – Opinion of the AG Léger.

[157] Case C-20/03 *Criminal proceedings against Marcel Burmanjer, René Alexander Van der Linden, Anthony De Jong* [2005] ECR I-4133, para. 82 – Opinion of the AG Léger.

[158] Case C-20/03 *Criminal proceedings against Marcel Burmanjer, René Alexander Van der Linden, Anthony De Jong* [2005] ECR I-4133, para. 88 – Opinion of the AG Léger.

answer to the national court he therefore proposed that Community law is to be interpreted as precluding a national rule which makes "the exercise of an itinerant activity involving the offer or conclusion of contracts for subscriptions to periodicals subject to the acquisition of prior administrative authorization, and which at the same time prohibits, on pain of criminal penalties, the exercise of such an activity by a person not having the required authorization."[159]

This argument put forward by the Advocate General thus illustrates to what extent Member States, while exercising their legislative powers in the field of national criminal law, could indeed find themselves in the situation that they have to take the fundamental freedoms into consideration. Where the provisions in question do have a restrictive effect on the exercise of any fundamental freedoms and are also viewed as being disproportionate, the Member States are under an obligation not to apply the provisions in a given case and can also not adopt measures of such effect[160]. Therefore, Member States, even while exercising their sovereign rights, can still be highly influenced by Community law, and any view regarding criminal law as an area of Member States' exclusive competence would thus appear to not reflect the existing and strong interdependencies between these two fields of law.

At the same time, the final reasoning relied upon by the Court points to the existing and considerable limitations on any influence the fundamental freedoms can have in criminal proceedings. Due to the differences in scope, the determination as to which fundamental freedom is applicable in a particular situation matters. Moreover, any such influence depends on the application of the principle of proportionality which can be also an effective means to safeguard the Member States' margin of appreciation regarding the exercise of their legislative powers and thereby their national competences regarding criminal law.

(b) Secondary Law

Community law related influences on criminal law at the stage of the adoption of such rules can also be the result of secondary legislation enacted by the Community. In a general manner, Article 249 EC lists the available legal instruments, among them most notably directives and

[159] Case C-20/03 *Criminal proceedings against Marcel Burmanjer, René Alexander Van der Linden, Anthony De Jong* [2005] ECR I-4133, para. 92 – Opinion of the AG Léger.

[160] For the latter obligation imposed on the Member States see only Article 10 (2) EC which reads as follows:
"They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty."

regulations, which the Community can adopt in order to attain the objectives laid down in the Treaty.

According to Article 249 EC, regulations are binding in their entirety and are directly applicable in all Member States. Consequently, Member States are under an explicit obligation to refrain from taking any actions that could modify the scope of a regulation. In this regard the Court has found however that criminal law provisions applicable in the event of infringements are not to be considered as such modifying measures. Member States are therefore not precluded from adopting criminal provisions in order to ensure the effective application of a regulation.[161]

At the same time, Member States cannot introduce criminal provisions that penalize a certain conduct which has been explicitly permitted under a Community regulation. This particular effect of Community legislation was at issue, among other in Case C-63/83 which concerned a reference made by the Newcastle-upon-Tyne Crown Court regarding the interpretation of the Community law on fisheries against the background of the British "Sea Fish Order 1982" which prohibited vessels registered in Denmark from fishing within the 12-mile coastal zone.[162] In its reasoning, the Court firstly pointed to Council Regulation (EEC) No 101/76[163] which provides that rules applied by the Member States in respect of fishing in maritime waters must not lead to differences in treatment, and, thus access to the fishing grounds must be ensured for all fishing vessels under equal conditions.[164] From Articles 100 and 103 of the 1972 Act of Accession the Court then inferred that measures derogating from general principles of Community law such as the principle of non-discrimination were permissible only during the transitional period laid down.[165] As the national rules also did not constitute a response to concerns regarding the conservation of fishery resources, the Court finally came to the conclusion that rules such as the British ones were not compatible with Community law and Member States were therefore precluded from adopting them.[166] In a more general manner, this judgment consequently illustrates the existing possibility for

[161] Eisele, *Einflussnahme auf nationals Strafrecht furch Richtliniengebung der Europäischen Gemeinschaft,* in: 56 JZ 2001, 1157 (1159); see also Case C-50/70 *Amsterdam Bulb BV v. Produktschap voor Siergewassen* [1977] ECR 137, para. 4 – Opinion of the AG Capotorti.
[162] Case C-63/83 *Regina v. Kent Kirk* [1984] ECR 2689, para. 1.
[163] Council Regulation (EEC) No 101/76 laying down a common structural policy for the fishing industry, which replaced Regulation (EEC) No 2141/70 of the Council of 20 October 1970 (Official Journal, English Edition 1970 III, at p. 703).
[164] Case C-63/83 *Regina v. Kent Kirk* [1984] ECR 2689, para. 7.
[165] Case C-63/83 *Regina v. Kent Kirk* [1984] ECR 2689, para. 7.
[166] Case C-63/83 *Regina v. Kent Kirk* [1984] ECR 2689, para. 19.

individuals to oppose national proceedings which are carried out on the basis of national rules that are incompatible with Community law, namely, the content of Community regulations.[167]

According to Article 249 EC, directives are by their nature only binding as to the result to be achieved. Consequently, the choice of forms and methods regarding the actual implementation is left to the Member States which can therefore in general choose between adopting provisions of either a criminal or administrative nature in order to ensure the effective application of the rules in question. However, while exercising their regulatory freedom, they also have to take the aims pursued by the Community legislature into due consideration. As a result of this obligation, they can find themselves in the situation where they actually have no choice but to adopt criminal provisions.

It has already been mentioned earlier that in its case-law the Court has, with regard to the possible direct effects of a directive, consistently held that a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining the criminal liability of private individuals.[168] At the same time, the Court has also acknowledged that an individual can rely on a directive in the event that a Member State goes beyond the prohibition stated in the Community legal act in question and where the general requirements for any direct effect of this legal instrument are fulfilled.[169]

This particular role directives can play in national proceedings has been discussed by the Court among others in Case C-5/83 which concerned a reference made by the Pretore (Magistrate), Lodi on the interpretation of Council Directives 78/1026 and 78/1027 of 18 December 1978, both concerning the mutual recognition of diplomas in veterinary medicine and the coordination of provisions in respect of that profession.[170] The national proceedings in question were initiated against a Dutch national who had been

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[167] For further cases in which the Court has discussed the role of regulations in national proceedings and their possible influences at the stage of the adoption of national law see only Case C-128/78 *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* [1979] ECR 419, para. 12; Case C-116/91 *Licensing Authority South Eastern Traffic Area v. British Gas plc.* [1992] ECR I-4071, para. 21.

[168] Sevenster, *Criminal Law and EC Law,* in: 29 C.L.Rev. 1992, 29 (42); see also Case C-168/95 *Criminal proceedings against Luciano Arcaro* [1996] ECR I-4705, paras. 36 and 37.

[169] See in this regard only France, *The Influence of European Community Law on the Criminal Law of the Member States,* in: European Journal of Crime, Criminal Law and Criminal Justice 2 (1994) 324 (328).

[170] Case C-5/83 *Criminal proceedings against H.G. Rienks* [1983] ECR 4233, para. 1.

refused the necessary enrolment in the respective register and was subsequently charged with the improper exercise of the profession of a veterinary surgeon.[171] In light of the fact that Italy had not implemented the two directives, the national court sought in particular an answer to the question of whether criminal penalties as prescribed by Italian law were compatible with Community law at all.

In its reply to this question, the Court firstly stressed that enrolment on a professional register cannot be refused on grounds which fail to take into consideration the validity of qualifications obtained in other Member States as, in this regard, the two directives impose clear, complete, precise and unconditional duties on the Member States which therefore leave them with no discretion.[172] As a consequence, national legislation which provides for the bringing of criminal proceedings against an individual lawfully exercising his rights as guaranteed in the two directives is also incompatible with Community law. In support of this view, the Court particularly stressed that the result of the application of such national sanctions is to deprive Community law of any of its effectiveness.[173] Therefore, this judgment exemplifies in general the important role directives can play for the protection of individuals against criminal proceedings. Where a directive gives rise to direct effect, an individual can claim his respective rights relying directly on this Community legal act before the national court, among others, against any following unlawful application of national criminal provisions.[174] In this regard, Member States are thus also restricted in the exercise of their legislative powers from adopting such rules in the first place.

c) The Application of National Criminal Law Provisions

Indirect effects of Community law can also take place at the stage of the actual application of national criminal law provisions. In light of the possible supportive role criminal law can play for the overall achievement of Community objectives, the Court has in particular stressed the Member

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[171] Case C-5/83 *Criminal proceedings against H.G. Rienks* [1983] ECR 4233, para. 4.

[172] Case C-5/83 *Criminal proceedings against H.G. Rienks* [1983] ECR 4233, paras. 8 and 9.

[173] Case C-5/83 *Criminal proceedings against H.G. Rienks* [1983] ECR 4233, para. 10.

[174] See in this regard also Case C-271/82 *Vincent Rodolphe Auer v. Ministère public* [1983] ECR 2727, para. 19; and Case C-148/78 *Criminal proceedings against Tullio Ratti* [1979] ECR 1629, para. 24, where the Court stated:
"Therefore the answer to the first question must be that after the expiration of the period fixed for the implementation of a directive a Member State may not apply its internal law – even if it is provided with penal sanctions – which has not yet been adapted in compliance with the directive, to a person who has complied with the requirements of the directive."
For possible effects before the expiry of the implementation period see only Case C-88/79 *Criminal proceedings against Siegfried Grunert* [1980] ECR 1827, para. 14; Case C-169/89 *Criminal proceedings against Gourmetterie Van den Burg* [1990] ECR I-2143, para. 15.

States' obligation to apply their respective rules with due diligence. At the same time, Member States can be precluded from applying criminal law provisions due to Community law. In addition to the above-mentioned individual exercise of Community rights, such as the fundamental rights and the general principles of Community law, the Court has also clarified the relationship of criminal convictions and the right of residence in this regard.

1) The Member States' Obligation to apply National Criminal Law Provisions

As an example of the Member States' obligation to apply national criminal law provisions reference should be made to Case C-64/88 in which the Court expressly stated a positive influence of Community law on national criminal law in the form of a necessity to apply the respective rules, and thereby developed its case-law regarding the general obligation of Member States to take appropriate measures in case of infringements of Community law even further.[175] In this case the Commission applied for a declaration that the French Republic had failed to fulfil its obligations under Community law with respect to the Common Fisheries Policy[176], including an obligation of a punitive nature requiring the Member States to take penal or administrative action against the skipper of a vessel or other responsible persons infringing the technical measures of conservation of fishing resources.[177] In its final judgement, the Court agreed with the Commission that the French Republic had indeed failed to fulfil its obligations. In particular, the Court found that "since infringements which the national authorities could have found to exist were not recorded and since the offenders were thus not charged, the French Government also failed to fulfil its obligation to take action as required by the control regulations".[178]

By expressly acknowledging an independent obligation to take sufficient action against the fishermen who infringed the provisions of the technical conservation measures, the Court followed a distinction introduced by the Advocate General in his Opinion. He had differentiated between the organization of the monitoring, the actual conduct of monitoring, and

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[175] See in this regard also Case C-2/88 *Criminal proceedings against J. J. Zwartveld and others* [1990] ECR I-4405, para. 10; Zuleeg, *Der Beitrag des Strafrechts zur europäischen Integration,* in: 47 JZ 1992, 761 (767).

[176] Case C-64/88 *Commission of the European Communities v. French Republic* [1991] ECR I-2727, para. 1.

[177] Case C-64/88 *Commission of the European Communities v. French Republic* [1991] ECR I-2727, para. 3.

[178] Case C-64/88 *Commission of the European Communities v. French Republic* [1991] ECR I-2727, para. 24.

finally the imposition of penalties.[179] Regarding the latest obligation he then stated in particular that "only the imposition of penalties, with their individual and general dissuasive effects, ensure, in accordance with the concept underlying Regulations No 2057/82 and 2241/87, compliance with those provisions."[180]

Closely linked to this case is the follow-up judgment given by the Court in Case C-304/02, in which it was found that the French Republic had not implemented all the necessary measures to comply with the judgment of 11 June 1991 in Case C-64/88, and thus had failed to fulfill its obligations under Article 228 EC. In particular, the Court stated that "the obligation on the Member States to make sure that penalties which are effective, proportionate and a deterrent are imposed for infringements of Community rules is of fundamental importance"[181].

2) Restrictive Effects of Community Law

Finally, Community law can also have restrictive effects on the application of national criminal law provisions.[182] Among others, Community law can limit the Member States' possibility of relying on infringements of national criminal law as a ground of expulsion from their respective territories. Quite commonly, criminal law convictions are a main reference point for expulsion decisions taken by the competent national authorities. However, as the Court has held on several occasions there are certain influences Community law also has on the administrative procedure leading up to the final expulsion decision. Such indirect influences of Community law can be in particular the result of the right of residence citizens of the European Union enjoy by virtue of Article 18 (1) EC[183].

In this regard, Joined Cases C-482/01 and C-493/01 should be mentioned in which a reference for preliminary ruling was made by the Verwaltungsgericht (Administrative Court) Stuttgart regarding the interpretation of

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[179] Case C-64/88 *Commission of the European Communities v. French Republic* [1991] ECR I-2727, paras. 13 to 17 – Opinion of the AG Lenz.

[180] Case C-64/88 *Commission of the European Communities v. French Republic* [1991] ECR I-2727, para. 17 – Opinion of the AG Lenz.

[181] Case C-304/02 *Commission of the European Communities v. French Republic* [2005] ECR I-6263, para. 69.

[182] See in general for this effect only Case C-21/81 *Criminal proceedings against Daniël Bout and BV I. Bout en Zonen* [1982] ECR 381, para. 11; Case C-103/88 *Fratelli Costanzo SpA v. Comune di Milano* [1989] ECR 1839, para. 31.

[183] Article 18 (1) EC reads as follows:
"Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect."

Article 39 (3) EC and Article 9 (1) of Council Directive 64/221/EEC[184] (Case C-482/01) and of Article 39 EC and Article 3 of the same Directive (C-493/01).[185] In accordance with paragraph 47(1) (2) of the Ausländergesetz (German law on aliens)[186], in the version of 16 February 2001[187], an alien is to be expelled if he has been finally sentenced, under the Betäubungsmittelgesetz (Law on narcotics) or for a breach of the public peace, to a term of youth custody of at least two years or to a term of imprisonment, and the sentence has not been suspended.[188] In the main proceedings in which the respective plaintiffs appealed against the expulsion decision taken by the competent national authority in accordance with this provision, the question of its compatibility with Community law was raised. As the proceedings concerned a measure which clearly restricted the freedom of an EU citizen, the national court was primarily interested in clarification of the margin of discretion enjoyed by the Member States in respect of public policy.

In its reply, the Court, while referring to the wording of Article 18 EC, firstly stressed that the right of every Union citizen to travel and reside in another Member State is not granted unconditionally.[189] In particular, obstacles to the freedom of movement for workers, a fundamental freedom which assumedly was applicable in one of the proceedings, such as the expulsion of nationals of other Member States, can be justified under Article 39 (3) EC on grounds of public policy.[190] The Court then acknowledged that Member States were also free to consider that the use of narcotics constitutes a danger for society such as to justify special measures against foreign nationals who contravene their laws on drugs.[191] At the same time, the Court then however stated that in the Community

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[184] Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (Official Journal, English Special Edition, 1963-1964, at p. 117).

[185] Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, para. 1.

[186] BGBl. 1990 I, at p. 1354.

[187] BGBl. 2001 I, at p. 266.

[188] Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, para. 15.

[189] Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, para. 47.

[190] Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, para. 62.

[191] Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, para. 67.

context Member States are precluded from adopting provisions which order the deportation of a national of a Member State based on reasons of a general preventive nature, that is, one which has been ordered for the sole purpose of deterring others.[192]

Consequently, while deciding such cases, national authorities must strike a fair balance between the rights of the person concerned and the public interest and should in particular take notice of the personal conduct of the offender or of the danger which that person in fact represents for the maintenance of public order. Furthermore, while making the necessary assessment, national authorities must also on a case-by-case basis take into consideration the fundamental rights whose observance the Court ensures as reasons of public interest can only be invoked to justify certain national measures if they do not infringe fundamental rights or the principle of proportionality.[193]

In accordance with these findings, Member States in their administrative procedures cannot rely on criminal law convictions as clear indicators for certain decisions anymore, at least not in the Community context. Thus, this judgment not only illustrates possible influences Community law might exercise on national administrative law, but also its impact on the overall role criminal law is assigned with regard to other fields of law in the legal order of a Member State. As a consequence, any form of reliance on standardized criteria which automatically leads to the expulsion of the person concerned is likely to raise doubts regarding its compatibility with Community law.[194] Moreover, the overall importance of administrative procedures for the protection of substantive rights was clearly stressed by the Court on this occasion. As a result, this judgment also illustrates that Member States are under the additional obligation to introduce such

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[192] Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, para. 68; see also Case C-67/74 *Carmelo Angelo Bonsignore v. Oberstadtdirektor der Stadt Köln* [1975] ECR 297, para. 6; Case C-30/77 *Régina v. Pierre Bouchereau* [1977] ECR 1999, para.30; Lewis, *Remedies and the Enforcement of European Community Law,* at p. 209.

[193] Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, para. 100; see also Case C-41/76 *Suzanne Criel, née Donckerwolcke and Henri Schou v. Procureur de la République au tribunal de grande instance de Lille and Director General of Customs* [1976] ECR 1921, para. 38; Case C-363/89 *Danielle Roux v. Belgian State* [1991] ECR I-273, para. 11; Case C-299/86 *Criminal proceedings against Rainer Drexl* [1988] ECR 1213, para. 25; Case C-210/91 *Commission of the European Communities v. Hellenic Republic* [1992] ECR I-6735, para. 19.

[194] See in this regard also Case C-383/03 *Ergül Dogan v. Sicherheitsdirektion für das Bundesland Vorarlberg* [2005] ECR I-6237, para. 24; and Case C-373/03 *Ceyhun Aydinli v. Land Baden-Württemberg* [2005] ECR I-6181, para. 32; Lewis, *Remedies and the Enforcement of European Community Law,* at p. 209.

administrative rules and procedures as to efficiently safeguard the rights which individuals derive from Community law.[195]

Regarding the possible indirect influences of Community law on the national criminal law of the Member States, it can consequently be concluded that the Community generally tends to increasingly predetermine the applicability and the regulatory content of national criminal law. This result can be reached, either by explicitly outlining obligations of the Member States to pass certain sanctions, or, by demanding in a general manner the adoption and application of "necessary measures". In the latter case, raising the standards applicable to the effective and proportionate enforcement of Community law has proven a particular powerful means to strengthen the indirect influences of Community law on the national law of the Member States[196] and thereby the Court has made full use of the obligation imposed on the Member States to fully cooperate in the achievement of the objectives laid down in the Treaty.

2.2 International Law related Influences of Community Law

Another manner in which Community law might have an indirect influence on national criminal law systems is through against the background of international law. As the Community increasingly adopts legal measures in order to ensure the uniform application of UN resolutions throughout the European Union, Member States are not only bound by their Membership in the United Nations but also by their Membership in the European Union to ensure the effectiveness of these measures.

Among others, this aspect of the overall relationship between Community law and national criminal laws was discussed in Case C-371/03. This case concerned a reference for a preliminary ruling made by the Oberlandesgericht Köln in the proceedings between Siegfried Aulinger v. Bundesrepublik Deutschland and concerned the interpretation of Council Regula-

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[195] Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, para. 130 – Opinion of the AG Stix-Hackl; see also Temple Lang, *The Duties of Cooperation of National Authorities and Courts under Article 10 EC: Two more reflections,* in: E.L.Rev. 2001, 26 (1), 84 (87); for such obligation with regard to judicial proceedings see only Case C-265/78 *H. Ferwerda BV v. Produktschap voor Vee en Vlees* [1980] ECR 617, para. 10; Hirsch, *Der EuGH im Spannungsverhältnis zwischen Gemeinschaftsrecht und nationalem Recht,* in: 53 NJW 2000, 1817 (1821); Curtin/Mortelmans in: Institutional Dynamics Of European Integration II, 423 (447).

[196] White, *Harmonisation of Criminal Law under the First Pillar,* in: E.L.Rev. 2006, 31 (1), 81 (87).

tion (EEC) No 1432/92[197] (hereinafter referred to as the "Embargo Regulation").[198] Siegfried Aulinger was a bus operator transporting individuals traveling to Serbia and Montenegro. After criminal proceedings were brought against him for infringement of the Embargo Regulation, Mr. Aulinger was obliged to give up his business activities on the basis of what he considered to be an incorrect interpretation of the Embargo Regulation. After the Bundesgerichtshof (Federal Court of Justice) came to the conclusion that in accordance with the view held by Mr. Aulinger Resolution 757 (1992) did not prohibit the carriage of private individuals to or in the territory covered by the embargo[199], Mr. Aulinger sued the Bundesrepublik Deutschland for compensation on the basis of the national rules governing state liability. In this regard, the Landgericht Bonn (Regional Court Bonn) found in favour of the Bundesrepublik Deutschland based on the argument that there could be no fault concerning the extensive interpretation of the Embargo Regulation in question applied by the national authorities.[200] The Appeals Court, the Oberlandesgericht Köln (Higher Regional Court Cologne) then made a reference to the Court and raised in addition to the questions related to the interpretation of the Council measure the issue of whether Member States, on the basis of Article 10 EC, were obliged to consult each other first about possible manners matters of interpretation.

Regarding this issue, Advocate General Jacobs firstly stressed the obligation on Member States by virtue of Article 10 EC to ensure the implementation of Community regulations in their respective territories. Furthermore, in cases where Community law does not include general rules to that effect, it is for the Member States to conduct the implementation in accordance with the procedural and substantive rules of their national laws.[201] While relying on their national rules, they are however obliged to take the need to apply Community law uniformly into due consideration so

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[197] Regulation (EEC) No 1432/92 of 1 June 1992 prohibiting trade between the European Economic Community and the Republics of Serbia and Montenegro (Official Journal 1992 L 151, at. p. 4).

[198] Case C-371/03 *Siegfried Aulinger v. Bundesrepublik Deutschland* para. 2, delivered on 9 March 2006.

[199] Case C-371/03 *Siegfried Aulinger v. Bundesrepublik Deutschland* para. 10, delivered on 9 March 2006.

[200] Case C-371/03 *Siegfried Aulinger v. Bundesrepublik Deutschland* para. 13, delivered on 9 March 2006.

[201] Case C-371/03 *Siegfried Aulinger v. Bundesrepublik Deutschland* para. 45 – Opinion of the AG Jacobs, delivered on 19 November 2005; with further reference to Joined Cases C-205/82 to 215/82 *Deutsche Milchkontor GmbH and others v. Federal Republic of Germany* [1983] ECR 2633, para. 17.

as to avoid unequal treatment of persons subject to Community law.[202] The Advocate General pointed out that the Embargo Regulation did not include any provisions regarding its further implementation in the Member States, in particular no special obligation requiring prior consultation between the Member States before the application of this directly applicable Community measure in their domestic legal orders, so they were only under the obligation to do so in good faith.[203]

This quite interesting case does not only illustrate the evolving relationship between the United Nations system and the European Union, a relationship in which the European Union while acting on behalf of all its Member States is willing to take up more and more responsibility[204]. This case can also be regarded as another example of how Community law might exercise an active influence on the national criminal legal systems in such a manner that national law is assigned a supportive role in the enforcement of Community law against an international law related background, or, in general, is a means to ensure the effectiveness of Community law provisions.

2.3 Independent Status of Community Proceedings

The above-mentioned cases illustrate that the Court has on various occasions, while acknowledging that the actual choice of penalties is in general a matter for the Member States, stressed the notion of national sovereignty with regard to criminal law related matters. At the same time, the Court has also identified several situations in which Community law can exercise a clearly restrictive influence on national criminal law. Concerning the status of Community proceedings in their relation to any national criminal prosecution, reference should now be made to the still pending Case C-432/04 as it deals with the relationship of national criminal proceedings

[202] See only Case C-94/71 *Schlüter & Maack v. Hauptzollamt Hamburg-Jonas* [1972] ECR 307, para. 11.

[203] Case C-371/03 *Siegfried Aulinger v. Bundesrepublik Deutschland* para. 48 – Opinion of the AG Jacobs, delivered 19 November 2005.

[204] See for this general development also Case T-306/01 *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [2005] ECR I-0000; and Press Release No 79/05 of 21 September 2005 – Judgments of the Court of First Instance in Case T-306/01 and Case T-315/01.

and Article 213 (2) ECT.[205] As this case is the first of its kind[206], the Court has also been provided with a unique opportunity to clarify the legal obligations every Member of the Commission needs to respect in accordance with Article 213 EC and thereby to establish common standards for people holding positions of power within Community institutions and their accountability.[207]

In its application, the Commission requested the Court to find that in recruiting and benefiting two of her personal acquaintances during her term in office as a Member of the Commission, Mrs. Edith Cresson was guilty of favoritism, or at least, of gross negligence. Consequently, the Commission tried to establish that Mrs. Cresson had thereby acted in violation of her obligations under Article 213 (2) EC and Article 126 (2) EA[208] and thus requested the Court to impose an appropriate financial sanction as provided for in the final paragraph of these Treaty provisions.[209]

While the Commission was conducting an investigation, the matters in question were also the subject of a criminal investigation by the Belgian criminal authorities in which the Commission intervened as a civil

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[205] Article 213 (2) ECT reads as follows:
"The Members of the Commission shall, in the general interest of the Community, be completely independent in the performance of their duties.
In the performance of these duties, they shall neither seek nor take instructions from any government or from any other body. They shall refrain from any action incompatible with their duties. Each Member State undertakes to respect this principle and not to seek to influence the Members of the Commission in the performance of their tasks.
The Members of the Commission may not, during their term of office, engage in any other occupation, whether gainful or not. When entering upon their duties they shall give a solemn undertaking that, both during and after their term of office, they will respect the obligations arising therefrom and in particular their duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits. In the event of any breach of these obligations, the Court of Justice may, on application by the Council or the Commission, rule that the Member concerned be, according to the circumstances, either compulsorily retired in accordance with Article 216 or deprived of his right to a pension or other benefits in its stead."
Article 216 EC reads as follows:
"If any Member of the Commission no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct, the Court of Justice may, on application of the Council or the Commission, compulsorily retire him."

[206] Case C290/99 *Council of the European Union v Martin Bangemann*, was removed from the Court's register by Order of 3 February 2000 (Official Journal 2000 C 122, at p. 17).

[207] Case C-432/04 *Commission of the European Communities v. Edith Cresson* para. 2 – Opinion of the AG Geelhoed delivered on 23 February 2006.

[208] As both provisions are identical, throughout the rest of this text reference will be made to Article 213(2) EC only.

[209] Case C-432/04 *Commission of the European Communities v. Edith Cresson* para. 1 – Opinion of the AG Geelhoed delivered on 23 February 2006.

party.[210] In the end, the national court, however, came to the conclusion that there were no grounds for continuing the criminal proceedings against the accused.[211] Based on this finding of the national court, the defendant tried to establish an inadmissibility claim before the Court. In particular, she argued that because of the intervention of the Commission in the parallel national criminal proceedings, the principle 'le pénal tient le disciplinaire en l'état' according to which disciplinary proceedings arising out of the same facts must await the outcome of the criminal trial must apply. Where the facts in both sets of proceedings are identical, the disciplinary proceedings lose their raison d'être if the same complaints are rejected in the context of the criminal procedure. Because such is the case in question, the application made by the Commission should therefore be considered inadmissible, in the view of the defendant.[212] Contrary to this, the Commission held that as the decision in the criminal proceedings did not relate to the facts which are at issue in the present proceedings, it does not thus constitute a legal barrier to the present disciplinary action.[213]

The Advocate General began his reasoning by stressing the overall importance of an efficient and working sanction mechanism in the case of Community law infringements by Members of Community institutions in order to avoid any significant damage to the public image of these political bodies.[214] Moreover, he pointed out that the application of such constitutional arrangements does not preclude the application of other corrective mechanisms in respect of the same conduct of public office holders, among them, proceedings initiated and carried out in a Member State. In support of this view, he made the point that "all these mechanisms serve different purposes and are therefore not mutually exclusive."[215]

He then moved on to state that in accordance with Article 213 (2) EC which serves as a general description of the obligations imposed on Members of the Commission they must perform their duties in complete

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[210] Case C-432/04 *Commission of the European Communities v. Edith Cresson* para. 26 – Opinion of the AG Geelhoed delivered on 23 February 2006.
[211] Case C-432/04 *Commission of the European Communities v. Edith Cresson* para. 29 – Opinion of the AG Geelhoed delivered on 23 February 2006.
[212] Case C-432/04 *Commission of the European Communities v. Edith Cresson* para. 53 – Opinion of the AG Geelhoed delivered on 23 February 2006.
[213] Case C-432/04 *Commission of the European Communities v. Edith Cresson* para. 43 – Opinion of the AG Geelhoed delivered on 23 February 2006.
[214] Case C-432/04 *Commission of the European Communities v. Edith Cresson* para. 70 – Opinion of the AG Geelhoed delivered on 23 February 2006.
[215] Case C-432/04 *Commission of the European Communities v. Edith Cresson* para. 72 – Opinion of the AG Geelhoed delivered on 23 February 2006.

independence and in the general interest of the Community.[216] Regarding the defendant's claim that following the decision taken by the national court the present action has been deprived of its substance, the Advocate General finally stressed the differences between judicial proceedings and the constitutional procedure provided for in Article 213 (2) EC[217] and thereby denied palpable effects of the decision of the Belgian criminal court. In particular, he stated that

> "as the Court is the authority which ultimately must impose a sanction at the request of either the Commission or the Council, it must also be in a position to establish whether the conduct of which a Commissioner is accused is such as to constitute a breach of obligations within the meaning of Article 213 EC. Although the Court, for this purpose, may take into account of the findings of fact by a national judicial body, it has its own responsibility in this context which cannot be fettered in any way. Thus, where a national court has established in a national criminal procedure against a (former) Member of the Commission that certain facts have not been proven or that they have been proven, but do not incur criminal liability, this cannot restrict the Court's powers to establish and qualify the same facts in the different and specific context of the procedure of Article 213(2) EC, which is a matter of Community law."[218]

In his rejection of the argument that the decision by the national court deprived the Commission's application of all substance and that as a result the present proceedings should be viewed as being inadmissible, the Advocate General has thus primarily stressed the independent status of proceedings under Article 213 EC while taking the different purposes of the various proceedings into account. Any effect of national law on Community law related proceedings is consequently excluded, or at least left to the discretion of the Court as the findings of the national court in question are not binding at all. In a more general manner, this argumentation can therefore be regarded as an expression of the limitations of any interactions between the two different legal fields of Community law and national criminal law.

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[216] Case C-432/04 *Commission of the European Communities v. Edith Cresson* para. 76 – Opinion of the AG Geelhoed delivered on 23 February 2006.

[217] See in this regard also the Press Release No 19/06 of 23 February 2006 – Advocate General's Opinion in Case C-432/04.

[218] Case C-432/04 *Commission of the European Communities v. Edith Cresson* para. 95 – Opinion of the AG Geelhoed, delivered on 23 February 2006.

3 THE QUESTION OF COMMUNITY COMPETENCES IN THE FIELD OF CRIMINAL LAW: CASE C-176/03

After having described the previous developments regarding the overall relationship of Community law and the national criminal law systems, the issue of a possible Community competence in the field of criminal and thus the recent judgment of the European Court of Justice in Case C-176/03 should be discussed now.

3.1 Factual Background to the Dispute

Based on Title VI EU, in particular Articles 29 EU, 31 (e) EU and 34 (2) EU as worded prior to the entry into force of the Treaty of Nice, the Council adopted a Framework Decision[219] which laid down a number of environmental offences, in respect of which the Member States were required to prescribe criminal penalties. A list of the offences was included into Article 2, which covered them when committed intentionally[220], and, Article 3 expanded the scope of these offences further to negligent conduct.[221] Article 4 imposed on the Member States the additional obligation

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[219] Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law (Official Journal 2003 L 29, at p. 55).

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

[221] Article 3 "Negligent offences" reads as follows:
"Each Member State shall take the necessary measures to establish as criminal offences under its domestic law, when committed with negligence, or at least serious negligence, the offences enumerated in Article 2."

"to take the necessary measures to ensure that participating in or instigating the conduct referred to in Article 2 is punishable." Article 5 (1) laid down more specific requirements related to the actual nature of the penalties which had to be "effective, proportionate and dissuasive" including, "at least in serious cases, penalties involving deprivation of liberty which can give rise to extradition" Moreover, Article 5 (2) stated that criminal penalties "may be accompanied by other penalties or measures."

During the legislative procedure, the Commission expressed its view that Title VI was not the correct legal basis. Instead the Commission argued with reference to the aim and content of the legal act in question for Article 175 as the appropriate legal basis[222], a view which the European Parliament concurred with.[223] Regardless of these views held by the other institutions, the Council decided to adopt the Framework Decision, in which a number of substantive provisions defining the conduct Member States are obliged to treat as criminal offences were incorporated.[224] By its application to the Court, the Commission then sought the annulment of the Framework Decision on the ground that the Council had relied on an incorrect legal basis to adopt this measure and had thereby breached in general the rules governing the division of powers between the First and Third Pillar.

3.2 Reasoning of the Commission and the European Parliament

In support of its action, the Commission brought forward two main grounds of challenge, one of a substantive, and the other of a procedural nature. Firstly, the Commission challenged the choice of legal basis as made by the Council. In this regard, the Commission began its reasoning

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[222] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 11; see also Eisele, *Einflussnahme auf nationals Strafrecht durch Richtliniengebung der Europäischen Gemeinschaft,* in: 56 JZ 2001, 1157 (1164); White, *Harmonization of Criminal Law under the First Pillar,* in: E.L.Rev. 2006, 31 (1), 81 (83).

[223] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 13.

[224] See in this regard the Fifth Recital of the Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law (Official Journal 2003 L 29, at p. 55) which reads as follows:
"The Council considered it appropriate to incorporate into the present Framework decision a number of substantive provisions contained in the proposed Directive, in particular those defining the conduct which Member States have to establish as criminal offences under their domestic law."

by reaffirming the generally accepted rule that the Community legislature does not have a general competence in criminal matters. This said, it then went on to state that the Community is competent to require Member States to impose criminal penalties under the condition that this is a necessary means of ensuring the effectiveness of the Community legislation in question.[225] In support of this view, the Commission referred to the established case-law of the Court concerning the duty of loyal cooperation and the principles of effectiveness and equivalence.[226] Moreover, the Commission made reference to a number of regulations which implicitly require the Member States to bring criminal proceedings or impose restrictions on the types of penalties which may in fact be imposed.[227]

The Commission then tried to establish a ground for annulment at least in relation to Articles 5 (2), 6 and 7 of the Framework Decision, which left the choice of penalties to the Member States and thus had to be considered a measure which the Community was able to adopt.[228] Furthermore, even though the Commission acknowledged that the procedural rules should have been adopted under the respective provisions under the EU Treaty, it argued that as these rules were inseparably linked to the substantive rules laid down in the Framework Decision, the whole legal instrument needed to be annulled.[229]

Secondly, the Commission also claimed alleged abuse of process. In support of this view, the Commission referred to the fifth and seventh recital

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[225] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 19; see also Comte, *Criminal Environmental Law and Community Competence,* in: European Environmental Law Review 2003, 147 (156); for quite a critical assessment of the argumentation of the Commission see only Faure, *European Environmental Criminal Law: Do we really need it?,* in: European Environmental Law Review 2004, 18 (21).

[226] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 20; with further reference to Case C-50/76 *Amsterdam Bulb BV v. Produktschap voor Siergewassen* [1977] ECR 137, para. 33; Case C-186/98 *Criminal proceedings against Maria Amélia Nunes and Evangelina de Matos* [1999] ECR I-4883, paras. 12 and 14; and Case C-2/88 *Criminal proceedings against J. J. Zwartveld and others* [1990] ECR I-3365, para. 17.

[227] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 21; with particular reference to Article 14 of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (Official Journal 1991 L 166, at p. 77) and Articles 1 to 3 of Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorized entry, transit and residence (Official Journal 2002 L 328, at p. 17).

[228] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 22.

[229] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 23.

in the preamble of the Framework Decision.[230] In this regard, the Commission tried to establish that the choice made by the Council to adopt a legal instrument under the EU Treaty was the solemn result of considerations of expediency.[231] Thereby, the Commission accused the Council of having based its choice of the legal basis on irrelevant considerations and not having carried out a sufficient assessment of the legal act in question in accordance with its content and aim.

In its reasoning, the Commission was supported by the European Parliament. In particular, the European Parliament stated that the Council had "confused the Community power to adopt the proposed directive and the power, not claimed by the Community, to adopt the Framework Decision in its entirety."[232] Thereby, the European Parliament also acknowledged that with regard to the procedural rules contained in the Framework Decision, this legal instrument had indeed been appropriate.

3.3 Reasoning of the Council and the Member States

In its reasoning, the Council addressed both grounds made by the Commission in its plea for annulment. With regard to the claim that the wrong legal basis had been used, the Council firstly stated that under the current European legal framework the Community does not have any competence to exert a direct influence on the national criminal laws of the Member States and thus cannot require the Member States to treat the conduct governed by the Framework Decision as constituting criminal offences.[233] In support of this understanding of the underlying competence structure and distribution of powers between the Community and the Member

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[230] The Seventh Recital of the Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law (Official Journal 2003 L 29, at p. 55) reads as follows:
"The Council has considered this proposal but has come to the conclusion that the majority required for its adoption by the Council cannot be obtained. The said majority considered that the proposal went beyond the powers attributed to the Community and that the objectives could be reached by adopting a Framework Decision on the basis of Title VI of the Treaty on European Union. The Council also considered that the present Framework Decision based on Article 34 of the Treaty on the European Union, is a correct instrument to impose on the member States the obligation to provide for criminal sanctions. The amended proposals submitted by the Commission was not of a nature to allow the Council to change its position in this respect."

[231] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 24.

[232] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 25.

[233] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 26.

States, the Council then made several points. While relying on a systematic interpretation, the Council firstly referred to Articles 135 and 280 EC. In the view of the Council, these two treaty provisions had to be viewed as a reaffirmation of the notion that such competence has neither explicitly nor implicitly been transferred to the Community.[234] Moreover, the Council also referred to the existing title under the EU Treaty which specifically provides for police and judicial cooperation in criminal matters.[235] In the view of the Council, this express attribution of a criminal-law related competence to the European Union had to be understood as precluding any implicit conferral of competences of a similar nature to the Community.[236]

Moreover, the Council rejected the notion that anything in the secondary legislation or the established case-law relating to the possible influences Community law might exercise on national criminal laws suggests that the Community does indeed have the competence to harmonize the respective national provisions. Instead, the existing legislation should be seen as a reaffirmation of the actual freedom Member States enjoy in relation to the choice of penalties.[237] In addition, the Council also referred to the former legislative practice which regularly detached criminal parts from Community measures so that they could be dealt with in a framework decision.[238] Finally, the Council also justified its decision to adopt the Framework Decision under the EU Treaty by stressing that both the content and purpose of this legal instrument was the harmonization of criminal laws. As it merely supplemented the Community's policy concerning the protection of the environment it had thus been rightfully adopted as a Framework Decision.

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[234] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 28; see in this regard also Kaiafa-Gbandi, *The Development towards Harmonization within Criminal Law in the European Union – A Citizen's Perspective,* in: European Journal of Crime, Criminal Law and Criminal Justice 9 (2001) 239 (257).

[235] For a number of activities carried out under this Title see only Alegre/Leaf, *Criminal Law and Fundamental Rights in the European Union: Moving towards Closer Cooperation,* in: E.H.R.L.R. 2003, 3, 326 (327).

[236] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 29; for a similar reasoning see also Stiebig, *Strafrechtsetzungskompetenz der Europäischen Gemeinschaft und Europäisches Strafrecht: Skylla und Charybdis einer europäischen Odyssee?,* in: 40 EuR 2005, 466 (467); for a rejection of such an argument see only Comte, *Criminal Environmental Law and Community Competence,* in: European Environmental Law Review 2003, 147 (153).

[237] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 31; see also in this regard Faure, *European Environmental Criminal Law: Do we really need it?,* in: European Environmental Law Review 2004, 18 (20).

[238] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 33.

With regard to the second procedural plea alleging abuse of process made by the Commission, the Council finally stated that the argument supporting this claim was the result of an incorrect reading of the preamble to the contested Framework Decision.[239]

In its argument, the Council was supported by a considerable number of Member States who had decided to participate as interveners in the proceedings. Among them, the Kingdom of the Netherlands adopted a slightly different argument to the Council in that it acknowledged the possibility for the Community to require Member States to punish certain conduct under national criminal law under the condition that an inseparable link exists between the penalty and the relevant substantive Community provisions.[240]

3.4 Reasoning of the Advocate General

In his Opinion, the Advocate General firstly outlined the determination of the relationship of the First and Third Pillar with regard to the protection of the natural environment in the form of the criminalization of the most serious infringements as the main underlying issue that had to be addressed.[241] He then referred to the notable differences between the First and Third Pillar, including the nature of the legal instruments available under the respective treaties and the differing possibilities of judicial review.[242]

Regarding the environmental protection that can be achieved under the EC Treaty he then gave an overview of the objectives, the legislative procedures provided for and the overall distribution of powers between the Community and the Member States.[243] In addition, he clarified the relationship between the different pillars while focusing on the provisions as provided for under the EU Treaty.[244] In particular, he stressed the importance of the rule laid down in Article 47 EU which prescribes that nothing in the

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[239] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 35.

[240] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 37.

[241] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 2 – Opinion of the AG Ruiz-Jarabo Colomer.

[242] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 4 – Opinion of the AG Ruiz-Jarabo Colomer; see in this regard also Douglas-Scott, *The Rule of Law in the European Union – Putting the Security into the Area of Freedom, Security and Justice,* in: E.L.Rev. 2004, 29 (2), 219 (221).

[243] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, paras. 6 to 9 – Opinion of the AG Ruiz-Jarabo Colomer.

[244] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, paras. 12 to 17 – Opinion of the AG Ruiz-Jarabo Colomer.

EU Treaty affects the founding treaties of the Community nor the subsequent Treaties and Acts modifying or supplementing them.

Against this background, he then addressed the issue of whether the Council of the European Union was under the obligation to refrain from adopting the Framework Decision by virtue of the primacy of Community law.[245] After restating the general rule that Community law contains no express or implicit general power to impose criminal penalties, he analyzed the respective case-law[246] in order to establish the actual scope and content of the principle of loyal cooperation as expressed in Article 10 EC. The particular relevance of this general principle in the proceedings concerned is such that the Community is in general entitled to require Member States to punish infringements of Community law.[247]

The first case the Advocate General referred to in this regard was the judgment given by the Court in Case C-50/76. From this ruling, he deduced two main points. Firstly, that it is in general for Community law to design the penalties which ensure the effectiveness of the rules in question, and, secondly, that in the absence of such prescriptions the choice of penalties is a matter for the Member States.[248]

The next two cases the Advocate General discussed were Case C-68/88 and Case C-299/86 in which the Court formulated substantive requirements the penalties a Member State chooses to adopt must meet.[249] Moreover, he pointed to Case C-2/88 as evidence for the assumption that by virtue of the loyalty principle Member States can under certain circumstances be obliged to adopt penalties which are of a criminal nature.[250]

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[245] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 26 – Opinion of the AG Ruiz-Jarabo Colomer.

[246] For an assessment of the cases discussed by the Advocate General see also Comte, *Criminal Environmental Law and Community Competence,* in: European Environmental Law Review 2003, 147 (150).

[247] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 28 – Opinion of the AG Ruiz-Jarabo Colomer; see in general Case C-36/94 *Siesse – Soluções Integrais em Sistemas Software e Aplicações Ld^{a} v. Director da Alfândega de Alcântara* [1995] ECR I-3573, para. 20; Case C-213/99 *José Teodoro de Andrade v. Director da Alfândega de Leixões, intervener: Ministério Público* [2000] ECR I-11083, para. 19.

[248] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 32 – Opinion of the AG Ruiz-Jarabo Colomer; for a critical assessment of the Court's judgment in Case C-50/76 see only Oeler in: FS Jeschek, 1399 (1405).

[249] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, paras. 34 to 35 – Opinion of the AG Ruiz-Jarabo Colomer.

[250] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 36 – Opinion of the AG Ruiz-Jarabo Colomer.

The last case the Advocate General mentioned was Case C-186/98 which once more reaffirmed the notion that the choice of penalties is primarily a matter for the Member States.[251] As a result, even in the situation where a legal instrument only provides for penalties of a civil nature the Community itself can take in the event of infringements, Member States are not precluded from adopting additional penalties of a criminal nature.

In summary, the Advocate General concluded that the "case-law does not, explicitly, recognize any power on the part of the Community to require the Member States to classify as criminal offences conduct which hinders achievement of the objectives laid down in the Treaties."[252] This conclusion was then also reaffirmed by the following analysis carried out with regard to the secondary legislation.[253]

The next issue the Advocate General took up in his Opinion was the concept of an "effective, proportionate and dissuasive penalty" which the Court relies on with regard to the actual exercise of the legislative freedom enjoyed by the Member States to impose penalties for infringements of Community law. The wide meaning that can be assigned to this concept allows for a flexible response to the very different situations following contravention of Community rules. According to the Advocate General, the question as to which response is necessary in a given situation is in general best left to the competent national authorities.[254] However, on condition that the Community has either access to all the relevant information, or, the choice to be taken with regard to the "effective, proportionate and dissuasive penalty" is so obvious, nothing prevents the Community from making the necessary assessment and consequently requiring the Member States to prosecute infringements under criminal law.[255]

Based on this assumption, the Advocate General then established with regard to environmental protection the necessity of imposing criminal penalties for the most serious infringements and thereby the possibility for the Community to prescribe such actions.[256] In support of this view, he

[251] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 37 – Opinion of the AG Ruiz-Jarabo Colomer.
[252] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 37 – Opinion of the AG Ruiz-Jarabo Colomer.
[253] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, paras. 39 to 43 – Opinion of the AG Ruiz-Jarabo Colomer.
[254] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 48 – Opinion of the AG Ruiz-Jarabo Colomer.
[255] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 49 – Opinion of the AG Ruiz-Jarabo Colomer.
[256] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, paras. 71 to 75 – Opinion of the AG Ruiz-Jarabo Colomer.

referred to the overall importance of the attainment of a high level of conservation and improvement of the environment.[257] In this context and in direct reply to the Council's reasoning, the Advocate General strongly dismissed any notion that the "sovereignty" argument could add anything to the overall discussion, not even in relation to criminal law. In support of this view, he pointed to the landmark ruling of the Court in Case C-26/62 in which the idea had been developed that the Community constitutes a new legal order of international law.[258] He then also rejected the relevance of the "democracy deficit" argument as he pointed to the necessary participation of the national parliaments in the adoption process of the respective provisions. In relation to the two systematic interpretation made by the Council, he concluded that firstly Articles 135 and 280 only referred to the application of national rules and thus were not relevant in the discussion in question[259], and that secondly the argument regarding the provisions of the EU Treaty was based on an erroneous understanding.[260]

After having refuted the objections raised by the Member States and the Council, the Advocate General then described the power to impose, among others, criminal penalties as an "instrumental power in the service of the effectiveness of Community law."[261] Consequently, it is sufficient to assign to the Community the power to define precisely the legal interests protected and the nature of the offence. In accordance with this division of responsibilities, Member States are still in charge of designing the penalty provisions.[262]

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[257] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, paras. 52 to 70 – Opinion of the AG Ruiz-Jarabo Colomer; in this regard see also Dannecker, *Strafrecht in der Europäischen Gemeinschaft,* in: 51 JZ 1996, 869 (879).

[258] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 76 – Opinion of the AG Ruiz-Jarabo Colomer; with reference to Case C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration* [1962] ECR 1, where the Court stated: "(…) the Community constitutes a new legal order of International Law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage."

[259] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 78 – Opinion of the AG Ruiz-Jarabo Colomer.

[260] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, paras. 79 to 81 – Opinion of the AG Ruiz-Jarabo Colomer.

[261] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 84 – Opinion of the AG Ruiz-Jarabo Colomer.

[262] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 87 – Opinion of the AG Ruiz-Jarabo Colomer.

With regard to the Framework Decision, the Advocate General thus finally concluded that as the substantive provisions outlining criminal offences should have been adopted under the EC Treaty, the Framework Decision should be annulled.[263]

3.5 Findings of the Court

In its legal assessment the Court mainly addressed three different issues: firstly, the general relationship of EU and EC provisions; secondly, the determination of the right legal basis, and thirdly the meaning of the notion of "full effectiveness of Community law" for the interpretation of treaty provisions. The Court began its reasoning by clarifying the general relationship of provisions under the EU Treaty and Community law. In direct reply to the systematic interpretation suggested by the Council in this regard, the Court restated Article 47 EU. In accordance with this provision, nothing in the Treaty on the European Union is to affect the EC Treaty and thereby the competences already conferred on the Community.[264] Consequently, any view that tries to argue against the existence of a Community competence in relation to criminal law by making reference to the express attribution of such competence under the EU Treaty must be regarded as erroneous. Instead, any determination of the correct legal basis needs to start with the interpretation of provisions under Community law as the powers under the EU Treaty can only be exercised when no such powers are provided for under the EC Treaty.

In this regard, the Court then interpreted Article 175 EC quite broadly by stressing the overall importance of environmental protection for the integration process, and also in relation to the achievements of other Community objectives.[265] After briefly mentioning the possible measures that can be taken under the respective Community provisions and the legislative procedure leading to the adoption of such rules, the Court then made reference to the established case-law regarding the determination of the correct legal basis for a Community measure. In this regard, the Court restated the necessity to rest the choice on objective factors which are open

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[263] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, paras. 91 to 97 – Opinion of the AG Ruiz-Jarabo Colomer.

[264] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, paras. 38 and 39; see in general Wasmeier/Thwaites, *The "Battle of the Pillars": Does the European Community have the Power to Approximate National Criminal Laws?,* in: E.L.Rev. 2004, 29 (5), 613 (619).

[265] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, paras. 41 and 42; see also Krämer, *Europäisches Umweltrecht in der Rechtsprechung des EuGH dargestellt anhand von 50 Urteilen,* at p. 123.

to judicial review, including in particular the aim and content of the contested measure.[266] In relation to the contested Framework Decision, the Court then found that the title of the legal measure as well as the first three recitals could be relied upon in order to establish protection of the environment as its main objective.[267] In the view of the Court, this legal instrument thus clearly reflected the common intention of the Member States to respond at the European Union level with concerted action to the disturbing increase in offences posing a threat to the environment.

Concerning the content of the Framework Decision, the Court then went on to acknowledge that it indeed entails the partial harmonization of the criminal laws of the Member States. This finding however did not preclude the application of Article 175 EC. Instead, the Court stated that "when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environment offences," nothing prevents the Community legislature, "from taking measures related 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."[268] In this regard, the Court also rejected the systematic argumentation brought forward by the Council in relation to Articles 135 and 280 EC as reaffirming a general rule that the Community lacks the competence to harmonize the criminal laws of the Member States.[269]

The Court therefore came to the conclusion that on account of both the aim and the content of the contested Framework Decision, this legal act should have indeed been adopted under Article 175 EC. As a consequence, the plea for annulment made by the Commission was successful.

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[266] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 45; with further reference to Case C-300/89 *Commission of the European Communities v. Council of the European Communities* [1991] ECR I-2867, para. 10; Case C-336/00 *Republik Österreich v. Martin Huber* [2002] ECR I-7699, para. 30.

[267] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 46.

[268] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 48; see for such view also Commission Staff Working Paper: Establishment of an *acquis* on criminal sanctions against environmental offences SEC (2001) 227 under Point 1.2.

[269] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 52.

3.6 Assessment of the Judgment

Prior to its judgment in Case C-176/03 the Court had frequently ruled on possible indirect effects Community law might exercise in relation to criminal law and in particular on the nature of sanctions Member States are obliged to impose by virtue of Community law. An assessment of the respective case-law seems to indicate that the Court itself has precluded the existence of any direct effects of Community law in criminal matters. At least, the Court seems to have carefully avoided the question of whether the harmonization of criminal law could fall under the competences of the Community.[270] By finding that the Community legislature can expressly require the Member States to enforce certain provisions by means of sanctions of a criminal nature, the Court has now answered this question in the affirmative. Thus, the Court's judgment in Case C-176/03 does provide evidence for a new development in its jurisprudence. Against this background, the following assessment of this judgment will address two main issues. Firstly, the reasoning and methodology relied upon by the Court in order to establish a Community competence in criminal matters will be analyzed. Secondly, the impact of this judgment on the existing pillar structure will be discussed. As the Court in its judgment widely followed the Advocate General's Opinion, there will be also a few remarks made with regard to his reasoning.

Regarding the first issue, it must be initially stated that the mere fact that the EC Treaty does not explicitly provide the Community with a competence in criminal matters does not already by itself preclude the existence of any such competence. However, as this point was in particular made by the Council and the Member States, the question arises whether such a finding could nevertheless be established by a systematic interpretation, more precisely by reference to Title VI of the EU Treaty and Articles 135 and 280 EC.

For logical reasons, the explicit mention of criminal matters under the EU Treaty seems to strongly imply that measures taken in this field can indeed only be taken in accordance with those provisions. Such a view however does not take sufficient account of: firstly, the substantially limited scope

[270] See in this regard only Case C-11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, para. 18; Case C-137/85 *Maizena Gesellschaft mbH and others v. Bundesanstalt für landwirtschaftliche Marktordnung (BALM)* [1987] ECR 4587, para. 12; Case C-288/85 *Hauptzollamt Hamburg-Jonas v. Plange Kraftfutterwerke GmbH & Co* [1987] ECR 611, para. 11; Case C-199/90 *Italtrade SpA v. Azienda di Stato per gli interventi nel mercato agricolo (AIMA)* [1991] ECR I-5545, para. 13.

of the Title VI; and, secondly, the general rule laid down in Article 47 EU with regard to the general relationship of Community law and provisions under the EU Treaty. In accordance with Article 29 EU, Title VI of the EU Treaty generally aims at providing citizens with a high level of safety through police and judicial cooperation in criminal matters and the prevention and combating of racism and xenophobia. In addition, the progressive adoption of measures establishing rules relating to the constituent elements of criminal acts and penalties and thereby the approximation of criminal law provisions is provided for with regard to organized crime, terrorism and illicit drug-trafficking. Thus, with reference to Title VI, it is not possible to deduce that the Community is precluded from taking measures with regard to other forms of criminal conduct. Moreover, the general rule laid down in Article 47 EU explicitly prohibits precluding the existence of any Community competence with reference made to the EU Treaty.

As regards Articles 135 and 280 EC, it must be noted that their relevance for answering the underlying competence question was strongly rejected by the Advocate General who had argued in his reasoning that both provisions only refer to the application but not the creation of rules.[271] Such a literal understanding of the meaning of the reservation contained in the two provisions must however be regarded as hardly convincing. Just as the Court's jurisprudence concerning possible restrictive effects of Community law on the application of national criminal law provisions must be taken into account by the Member States already at the stage of adopting such rules in the first place, the references made in Article 135 and 280 EC must also be understood in a broader sense. If the exclusion only had significance for the power to apply criminal law provisions, these two provisions would only reaffirm the very general and well-established notion that the actual application of Community law is primarily carried out by the Member States in accordance with their respective laws. In particular, in the absence of Community rules governing criminal law and the administration of justice the need for such an explicit reservation does not become clear in the first place. Consequently, Articles 135 and 280 EC can indeed be viewed as relevant for a systematic interpretation in order to establish the division of powers concerning the creation of criminal law rules.

Having said this, it must still be stressed that Articles 135 and 280 EC do not necessarily support the notion that they must be understood as reaffirming a general rule according to which the Member States are

[271] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 78 – Opinion of AG Ruiz-Jarabo Colomer.

exclusively responsible for criminal law. Quite the contrary, it seems more logical to assume that the explicit reference to criminal law made in these two provisions should be understood as stating an exception rule. As a consequence, in line with the reasoning relied upon by the Advocate General and the Court, the possibility of interpreting existing treaty provisions in such manner as to give the Community competences in criminal matters can also not be excluded on the systematic grounds referred to by the Council.[272]

Against this background, it is now important to turn to the methods of interpretation the Court makes most use of while determining the actual scope of treaty provisions under the EC Treaty. In its jurisprudence, the Court has most notably relied on a teleological interpretation method, as the *effet utile* of the rule concerned is regularly emphasized.[273] In addition to this general guiding interpretative principle the Court has also frequently relied on the *implied powers* doctrine in order to determine the actual scope of competence norms. This doctrine, which also finds application in national legal systems and International Law, can be understood in two different ways. In accordance with a more narrow understanding, the existence of a competence implies any further competence indispensable for the exercise of the former.[274] A broader view can be also taken with the effect that where a treaty provision confers a specific task to the Community legislature, it should be regarded as conferring all the competences related to the achievement of the goals set.[275] The relevance of this latter view has largely been increased as a fundamental change in the manner competence norms are formulated has occurred. Instead of outlining specific areas in which the Community can become active, a large number of provisions are now primarily defined in regard to certain objectives to be

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[272] See in this regard only Hugger, *The European Community's Competence to Prescribe National Criminal Sanctions,* in: European Journal of Crime, Criminal Law and Criminal Justice 3 (1995), 241 (262); Wasmeier/Thwaites, *The "Battle of the Pillars": Does the European Community have the Power to Approximate National Criminal Laws?,* in: E.L.Rev. 2004, 29 (5), 613 (618).

[273] See only Craig/de Búrca, *EU Law,* at p. 98; Joined Cases C-281, 283, 284, 285 and 287/85 *Federal Republic of Germany and others v. Commission of the European Communities* [1987] ECR 3203, para. 28; Eisele, *Einflussnahme auf nationals Strafrecht durch Richtliniengebung der Europäischen Gemeinschaft,* in: 56 JZ 2001, 1157 (1160); Douglas-Scott, *Constitutional Law of the European Union,* at p. 210.

[274] Case C-165/87 *Commission of the European Communities v. Council of the European Communities* [1988] ECR 5545, para. 8; see also Communication from the Commission to the European Parliament and the Council COM (2005) 583 final, para. 7.

[275] See Joined Cases C-281, 283, 284, 285 and 287/85 *Federal Republic of Germany and others v. Commission of the European Communities* [1987] ECR 3203, para. 25; Douglas-Scott, *Constitutional Law of the European Union,* at p. 160.

achieved.[276] Such a functional formulation of treaty provisions is also evident in Title XIX of the EC Treaty on environment. In this regard, Article 174 EC states, among others, the preservation, protection and improvement of the quality of the environment as an objective to be pursued. Given this range of broadly formulated objectives, the overall importance of environmental protection and the disturbing increase of offences in this field, the Court thus came in its reasoning to the conclusion that on the basis of a broad understanding of the *implied powers* doctrine, criminal law should not so much be seen as a policy field completely separate from other Community policies but instead as a means to achieve them.[277] Moreover, as the Court also found that the application of effective, proportionate and dissuasive criminal penalties is an essential measure for combating serious environmental offences, the existence of a Community competence in criminal matters was acknowledged under the given circumstances.

From a methodological point of view, it is first of all interesting that the Court has now affirmed that the choice regarding the "effective, proportionate and dissuasive penalties" which was previously to be made by the Member States[278] can also already be decided at the Community level. Thereby, the Court has finally made use of the idea proposed by the Advocate General in his Opinion in Case C-240/90 in which he had argued that the Community should be regarded as having the competence even to harmonize criminal law provisions under the condition that such action was necessary for the attainment of Community objectives.[279] However, the actual manner of how the Court has made use of this "new" line of argumentation in its judgment in Case C-176/03 must still be tested, firstly, for its compatibility with the general principles of Community law, and, secondly, against the specific background of the treaty provisions on environmental protection.

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[276] For an assessment of this general development see only Verhoeven, *The European Union in Search of a Democratic and Constitutional Theory*, at p. 151.

[277] See for such view also Commission Staff Working Paper: Establishment of an *acquis* on criminal sanctions against environmental offences SEC (2001) 227 where under Point 2.1 it is stated:
"As concerns criminal sanctions the Community cannot purport to act in the criminal are in isolation – as there is no substantive Community competence in relation to criminal matters per se. However, to the extent that this is necessary for the achievement of Community objectives, the Community can oblige Member States to provide for criminal sanctions."

[278] See only Curtin/Mortelmans in: Institutional Dynamics Of European Integration II, 423 (459).

[279] C-240/90 *Federal Republic of Germany v. Commission of the European Communities* [1992] ECR I-5383, para. 12 – Opinion of the AG Jacobs.

One of the fundamental principles underlying the Community legal order is the principle of attributed powers. In accordance with Article 5 (1) EC the "Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein" and it becomes thus quite evident that the Community is not meant to have any *Kompetenz-Kompetenz*, in other words a competence to create new legislative competences by itself.[280] The role of this principle has however been obviously restricted by the application of Article 308 EC[281], and the Court's reliance on the notion of the *effet utile* and the *implied powers* doctrine while interpreting treaty provisions. At the same time, as the principle of effectiveness of Community law, which can, among others, be secured by acknowledging implied powers of the Community and the notion of attributed powers are both underlying general principles of the Community legal order, neither of these two principles takes precedence over the other. Thus, the Court, while relying on the *implied powers* doctrine in order to determine the actual scope of a Community competence still needs to take the principle of attributed powers into due consideration. In particular, the Court should, in the future consequently be called upon to make a full assessment of the necessity for the implied power in question.

In the judgment in Case C-176/03 the Court however does not seem to have carried out any such an assessment. Instead, the Court only reaffirmed the assumption already relied upon by the Commission that the prescription of criminal penalties for certain forms of conduct by the Community is the most effective means to ensure the effectiveness of Community rules on the protection of the environment. Undisputedly, as a result of the previous sovereignty-friendly approach to leave the actual choice of penalties to the Member States, enforcement deficits frequently arose. Such deficits also seem to have become evident in the field of environmental protection as a disturbing increase in offences posing a threat to the environment has occurred. Such a finding however cannot be the sole ground for establishing an essential need for the Community to be able to require Member States to introduce criminal sanctions.

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[280] See only Verhoeven, *The European Union in Search of a Democratic and Constitutional Theory*, at p. 315; Douglas-Scott, *Constitutional Law of the European Union,* at p. 518.

[281] Article 308 EC reads as follows:
"If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures."

As, in accordance with general rules, neither criminal law nor the rules of criminal procedure fall within the Community's competence[282], the establishment of possible exceptions to this rule clearly needed further clarification reasoning. In addition, it is a given fact that the imposition of criminal penalties has by no means proven to always be the most effective manner to enforce compliance with rules.[283] Finally, it must also be noted that the previous approach provided the Community with the unique possibility of monitoring different enforcement mechanisms as adopted by the Member States with regard to their respective effectiveness. Consequently, in light of the Court's reasoning, which in fact amounts to only a statement that the application of effective, proportionate and dissuasive criminal penalties was an essential means for the protection of the environment n the given circumstances[284], it can be argued that the Court has disregarded the principle of attributed powers. In particular, the practice of extensively interpreting Community competences and thereby broadening the possible content of legal acts adopted under these provisions takes away most of the meaning formerly assigned to this principle.

Moreover, the Court also does not seem to have taken sufficient account of the principle of proportionality. From this principle which the Court has in its jurisprudence acknowledged as a general principle of Community law[285] it can be inferred that any legislator is obliged to refer to means of criminal law only as the *ultimo ratio*. Even though the other institutions, while exercising their legislative powers, enjoy a margin of discretion which corresponds to their political responsibilities thereby limiting judicial review to some extent[286], the Court should determine whether there exists a reasonable relationship between the measures provided for and the aims pursued by the Community[287]. As the Court – while emphasizing the aim to ensure the effective protection of the environment – has not suf-

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[282] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 47.

[283] See only White, *Harmonisation of Criminal Law under the First Pillar,* in: E.L.Rev. 2006, 31 (1), 81 (90).

[284] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 48.

[285] See only Craig/de Búrca, *EU Law,* at p. 373; de Witte in: Snyder, 83 (90); Case C-44/79 *Liselotte Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727, paras. 23 to 30; Case C-356/97 *Molkereigenossenschaft Wiedergeltingen eG v. Hauptzollamt Lindau* [2000] ECR I-5461, para. 36.

[286] Case C-331/88 *The Queen v. Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others* [1990] ECR 4023, para. 14.

[287] Case C-44/79 *Liselotte Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727, para. 23.

ficiently taken account of the different interests of individuals possibly concerned by the measures in question and the interests of the Member States, it has not established the need for an approximation of criminal law by the Community. In the light of this inadequate manner of review, this judgment seems in general to pave the way to a Community which indeed will eventually have a *Kompetenz-Kompetenz*.

In addition to the concerns that can be raised in general by the manner the Court has dealt with the underlying competence issue, the results reached become even more surprising when seen against the background of the actual provisions of the EC Treaty governing the protection of the environment. From the judgment of the Court in Case C-176/03 and the respective Opinion of the Advocate General it seems hard to imagine an organization more dedicated to the environment than the European Community. In this regard, it must be acknowledged that in European law there is a large amount of declaratory statements on the overall importance of the preservation of the environment in existence. However, in accordance with Article 175 EC, Community measures in the field of environmental protection are only meant to contribute to the achievement of the objectives listed in Article 174 EC.[288] This merely supplementary role of Community activities is also stressed in Article 176 EC which provides the Member States with the possibility of maintaining and introducing more stringent protective measures. Thereby, the notion of a shared responsibility between the Community and the Member States in this policy field is clearly expressed, which makes the subsequent observance of the subsidiarity principle necessary[289].

In its judgment, the Court has however not made any explicit reference to this principle. In this regard, it could be argued that the conditions formulated by the subsidiarity principle have already been answered in the affirmative by the considerations made regarding the interpretation of the treaty provisions on the basis of the *implied powers* doctrine. However, it must be pointed out that the necessary justification for the Community to take action is much more easily reached by relying on the *implied powers*

[288] For a further assessment of the nature of this competence see only Schutze, *Cooperative Federalism Constitutionalised: The Emergence of Complementary Competences in the EC Legal Order,* in: E.L.Rev. 2006, 31 (2), 167 (172).

[289] See only Faure, *European Environmental Criminal Law: Do we really need it?,* in: European Environmental Law Review 2004, 18 (26); for a critical assessment of the subsidiarity test to be applied by the Community courts in general see only Douglas-Scott, *Constitutional Law of the European Union,* at p. 180.

doctrine rather than on the subsidiarity principle as these two legal instruments have been assigned quite differing functions in the European legal order. More specifically, one is an interpretative method through which competences of the Community not explicitly provided for can be established, whilst the other is a general principle meant to solve competence conflicts between the Community and the Member States with regard to their shared responsibilities. Moreover, as already mentioned earlier, the increasing number of treaty provisions defined only with regard to certain aims and objectives also favours reliance on a broad understanding of the *implied powers* doctrine. The inherent risks related in such an approach becomes quite obvious when the further assumption is made that "within a given Community existence, powers to approximate national criminal laws can be implied from the power to regulate human behaviour, even in the absence of an express reference to the criminal aspects."[290] Any limiting effect of the subsidiarity principle on the exercise of powers by the Community is thereby considerably restricted.

In this regard, it is particularly interesting that the Advocate General in his Opinion introduced the question at which level the effectiveness in relation to penalties adopted by the Member States in the field of environmental protection could best be assessed as being of decisive importance.[291] Thus, instead of a further assessment of whether the common aim of taking effective action against the increasing number of offences against the environment could not be sufficiently achieved by the Member States, the Advocate General reaffirmed the alleged need for criminal harmonization. Against this background, it is hardly surprising that he fully rejected the relevance of any sovereignty argument in the following discussion. In summary, seen against the specific provisions governing the protection of the environment under the EC Treaty and the actual effectiveness of Com-

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[290] Wasmeier/Thwaites, *The "Battle of the Pillars": Does the European Community have the Power to Approximate National Criminal Laws?,* in: E.L.Rev. 2004, 29 (5), 613 (618).

[291] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, para. 49 – Opinion of AG Ruiz-Jarabo Colomer where he stated:
"It must be recalled that upholding Community law is the responsibility of the Community institutions, although nothing prevents them from urging the Member States to penalize conduct which contravenes that law. It is only in so far as the most appropriate response cannot be provided – because the institutions do not have the information necessary to take a decision – that the task falls to the national legislatures. Conversely, if there are self-evident criteria for determining the effective, proportionate and dissuasive penalty, there is no substantive reason preventing the party which has competence in that sphere from making the decision."

munity action already taken[292], the reasoning used by the Court and the Advocate General in his Opinion loses quite a lot of its persuasiveness.

Finally, an assessment of this judgment needs to be made regarding the guidance the Court has actually provided for the further determination of the dividing line between the First and Third Pillar. In accordance with the Court's reasoning, measures harmonizing criminal law that are essential for the effective implementation of Community rules can be adopted under the EC Treaty. In contrast, measures on the approximation of national criminal law not linked to the implementation of any Community policy fall within Title VI of the EU Treaty.[293] Even though, it can thus be argued that the judgment indeed gives sufficient guidance to the question as to under which pillar a criminal law related act should be adopted in the future[294], any actual application of the rule given by the Court is likely to result in several difficulties.

Due to the large number and very broad formulation of the objectives pursued by the Community[295] it is hard to imagine any legal act that is not linked to a Community policy. Consequently, the only limiting effect on Community activities in criminal matters that could arise would be through a restrictive interpretation of the requirement "essential". In this regard, the Court has however not made any further clarifying statements in its judgment.[296] Moreover, due to the discretion left to the other institutions while exercising their legislative powers, which the Court is bound to respect by virtue of the principle of institutional balance, it is not very likely that the Court will be acting as a constraining factor.

In addition, the question remains under which pillar procedural rules related to criminal law which are meant to accompany substantive criminal law provisions already enacted by the Community should be adopted.

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[292] As in particular the timely transposition and proper implementation of EU environment legislation often result in difficulties for Member States, leading to a less than optimal level of environmental protection, the Commission must regularly resort to bring actions before the Court. See in this regard only the quite recent applications made by the Commission in Case C-186/06 against the Kingdom of Spain; C-137/06 against the Republic of Malta; C-137/06 against Ireland; and C-138/06 against the United Kingdom of Great Britain and Northern Ireland.

[293] Communication from the Commission to the European Parliament and Council COM (2005) 583 final, at para. 11.

[294] See for the strong expression of the opposite view only Chalmers, *The Court of Justice and the Third Pillar*, in: E.L.Rev. 2005, 30 (6), 773 (774).

[295] See only the Articles 2 and 3 of the EC Treaty.

[296] See in this regard also White, *Harmonisation of Criminal law under the First Pillar,* in: E.L.Rev. 2006, 31 (1), 81 (91).

At first glance, raising such a question seems far-fetched, as, in their argument before the Court, the Commission and the European Parliament both explicitly reaffirmed the notion that the provisions of the Framework Decision dealing with the jurisdiction, extradition and prosecution of offenders should have indeed been adopted under the EU Treaty[297]. This said, in a more general manner such a partition of legal rules can be viewed under any circumstances as artificial. If it were possible to establish an inseparable link between the two sets of rules and the harmonization of certain procedural rules could be proven as an essential means to ensure the overall effective enforcement of the provisions concerned, there is nothing that could prevent the Community from addressing both needs. In particular, even though Article 31 EU[298] provides the legal basis for judicial cooperation in criminal matters, the general rule of Article 47 EU could also be relied upon to justify the establishment of an implied power of the Community in this regard. Frequent occurrence of such a situation could then not only take away most of the meaning formerly assigned to Title VI under the EU Treaty, but it could also mean the implicit transferal of a general competence in criminal matters to the Community.

As a final point in this regard, the Court's judgment in Case C-176/03 can in general terms be regarded as a new attempt to solve the underlying difficulties caused by the pillar structure in the first place. After the Court most notably in its judgment in Case C-105/03 tried to transfer certain aspects formerly characteristic only for Community law to the Third Pillar[299], it now seems to favour an interpretation of Community provisions at the cost of provisions under the EU Treaty. As any such broad interpretation is at risk of disregarding other legal principles fundamental to this legal order, it becomes quite evident that a new development of such

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[297] Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879, paras. 23 and 25.

[298] Art 31 (1) EU reads as follows:
"Common action on judicial cooperation in criminal matters shall include:
facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States, including, where appropriate, cooperation through Eurojust, in relation to proceedings and the enforcement of decisions;
facilitating extradition between Member States;
ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation;
preventing conflicts of jurisdiction between Member States;
progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organized crime, terrorism and illicit trafficking."

[299] Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285, para. 61; see only Fletcher, *Extending "Indirect Effect" to the Third Pillar: The Significance of Pupino,* in: E.L.Rev. 2005, 30 (6), 862 (877).

importance should not be initiated by a judicial body like the Court, but instead agreed upon by the Member States.[300] The referendums held in France and the Netherlands on the future Constitution for Europe have quite clearly shown that there is no current willingness to coherently develop the European legal order further. This current state of affairs is regrettable, in particular as the Treaty establishing a Constitution for Europe aimed at abolishing the existing pillar structure.[301] Nevertheless, this does not justify a form of judicial activism that shifts the balance of general principles of fundamental meaning to the overall functioning of this legal order and thereby changes the underlying relationship between Member States and the Community, formerly characterized by the principle of loyal cooperation[302], towards a more and more exclusively determining role of the Community institutions.

[300] For a comment of a more general nature in this regard see only Douglas-Scott, *Constitutional Law of the European Union,* at p. 219, where she states: "Perhaps the real complaint is not that the ECJ engages in judicial activism but that it fails to express the sources and grounds of its activism."

[301] See only Article I-1 (1) of the Treaty establishing a Constitution for Europe which states: "Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common. The Union shall coordinate the policies by which the Member States aim to achieve these objectives, and shall exercise on a Community basis the competences they confer on it."

[302] See only De Witte in: Snyder, 83 (88); with further reference to Case C-230/81 Grand Duchy of Luxembourg v. European Parliament [1983] ECR 255, para. 37.

4 CONCLUDING REMARKS

The judgment given by the Court in Case C-176/03 profoundly changes the understanding of the distribution of powers between the Community and the Member States. In particular, through its strong reliance on the *implied powers* doctrine which finally led to the acknowledgment of Community competence to directly influence the national criminal laws of the Member States, the Court has diminished the role of the principle of attributed powers to a large extent. In light of this judgment, the question thus arises to which extent the harmonization of criminal law could also occur in relation to other policy areas.

Not very surprisingly, the Commission has taken quite a broad view in this regard, as can be seen from its statements in the Communication published in the aftermath of the judgment. In this document, the Commission not only stressed that the arguments in favour of the approximation of criminal laws with regard to the environmental protection could be applied in their entirety to all Community policies and freedoms which involve binding legislation[303], but it also expressed its willingness to make full use of the newly established opportunities to ensure the effectiveness of Community law by resorting to criminal penalties. The Commission also provided for a list of framework decisions which it viewed as entirely or partly based on the wrong legal basis and are thus in need of being rectified.[304]

Taking account just of these statements made by the Commission, the further implications of the Court's judgment in Case C-176/03 seem to be of a very far-reaching nature. However, in this regard, it must be also emphasized that the further meaning of this judgment still clearly depends on the willingness of the Member States to allow the Commission to actually make use of the newly established opportunities to approximate criminal law. That the Commission will enjoy such support in the near future does not seem very likely, given the fact that the Council in the proceedings in Case C-176/03 was supported by eleven out of fifteen Member States. In addition, the judgment in Case C-176/03 could even prove to be a deterrent to the support the European integration process enjoys in the Member States as there are quite differing views in the Member States on the actual possibilities of exercising an active influence on people's behavior by means of criminal law. In addition, there are also notable differences regarding the values viewed as so fundamental that certain forms of

[303] Communication from the Commission to the European Parliament and Council COM (2005) 583 final, at para. 8.

[304] Communication from the Commission to the European Parliament and Council COM (2005) 583 final, at para. 14 and Annex.

conduct should be penalized by criminal law. Surely, these differences could somehow be overcome by the exercise of criminal competences by the Community as the necessary value judgments would then be made jointly in the Community context.[305] Furthermore, Member States could still preserve part of their identity as the Community would only specify the type of conduct constituting a criminal offence and the type of penalty to be applied.[306] Thus, it is in this regard necessary to point out that on the basis of the judgment in Case C-176/03 a general competence of the Community to determine all matters of criminal law can still not be established. Nevertheless, assuming that in the future the Community will indeed increasingly exercise its now affirmed competences related to criminal law, the question then arises as to which developments and under which circumstances Member States will cease to be willing members of a "community of values" established in such a manner.

[305] See in general Calliess, Europa als Wertegemeinschaft – Integration und Identität durch europäisches Verfassungsrecht?, in: 59 JZ 2004, 1033 (1042).

[306] Case C-176/03 Commission of the European Communities v. Council of the European Union [2005] ECR I-7879, para. 48.

5 REFERENCES

Treaties and Protocols

Treaty on European Union, Consolidated Version (Official Journal C 325 of 24 December 2002).

Treaty establishing the European Community, Consolidated Version (Official Journal C-325 of 24 December 2002).

Treaty establishing a Constitution for Europe (Official Journal C-310 of 16 December 2004).

Protocol on the Application of the Principles of Subsidiarity and Proportionality.

Community Legislation and Other Materials

Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law (Official Journal L 29, at p. 55).

Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (Official Journal, English Special Edition, 1963-1964, at p. 117).

First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (Official Journal L 065 of 14 March 1968, at p. 8).

Council Directive 91/156/EEC of 18 March 1991 amending Directive 75/442/EEC on waste (Official Journal 1991 L 78, p. 32).

Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (Official Journal 1991 L 166, at p. 77)

Directive 98/37/EC of the European Parliament and of the Council of June 1998 on the approximation of the laws of the Member States relating to machinery (Official Journal 1998 L 207, at p. 1).

Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorized entry, transit and residence (Official Journal 2002 L 328, at p. 17).

Regulation (EEC) No 3665/87 of November 1987 laying down common detailed rules for the application of the system of export refunds on agricultural products (Official Journal 1987 L 351, at p. 1).

Regulation (EEC) No 1432/92 of 1 June 1992 prohibiting trade between the European Economic Community and the Republics of Serbia and Montenegro (Official Journal 1992 L 151, at. p. 4).

Commission Staff Working Paper: Establishment of an *acquis* on criminal sanctions against environmental offences, Brussels, 07.02.2001 SEC (2001) 227.

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), Brussels, 23.11.2005 COM (2005) 583 final.

Press Release No 75/05 of 13 September 2005 – Judgment of the Court of Justice in Case C-176/03.

Press Release No 79/05 of 21 September 2005 – Judgments of the Court of First Instance in Case T-306/01 and Case T-315/01.

Press Release No 19/06 of 23 February 2006 – Advocate General's Opinion in Case C-432/04.

Rules of Procedure of 19 June 1991 (Official Journal L 176 of 4.7.1991, at p. 7, and Official Journal L 383 of 29.12.1992 (corrigenda)) and the amendments (the latest dated 18 October 2005 Official Journal L 288 of 29.10.2005, at p. 51).

The European Court of Justice

Judgments

Case C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration* [1962] ECR 1.

Case C-6/64 *Flaminio Costa v. E.N.E.L.* [1964] ECR 1141.

C-11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

Case C-82/71 *Ministère public de la Italian Republic v. Società agricola industria latte (SAIL)* [1972] ECR 119.

Case C-94/71 *Schlüter & Maack v. Hauptzollamt Hamburg-Jonas* [1972] ECR 307.

Case C-8/74 *Procureur du Roi v. Dassonville* [1974] ECR 837.

Case C-67/74 *Carmelo Angelo Bonsignore v. Oberstadtdirektor der Stadt Köln* [1975] ECR 297.

Case C-48/75 *Jean Noël Royer* [1976] ECR 497.

Case C-41/76 *Suzanne Criel, née Donckerwolcke and Henri Schou v. Procureur de la République au tribunal de grande instance de Lille and Director General of Customs* [1976] ECR 1921.

Case C-50/76 *Amsterdam Bulb BV v. Produktschap voor Siergewassen* [1977] ECR 137.

Case C-30/77 *Régina v. Pierre Bouchereau* [1977] ECR 1999.

Case C-61/77 *Commission of the European Communities v. Ireland* [1978] ECR 417.

Case C-88/77 *Minister for Fisheries v. C.A. Schonenberg and others* [1978] ECR 473.

Case C-83/78 *Pigs Marketing Board v. Raymond Redmond* [1978] ECR 2347.

Case C-128/78 *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* [1979] ECR 419.

Case C-148/78 *Criminal proceedings against Tullio Ratti* [1979] ECR 1629.

Case C-152/78 *Commission of the European Communities v. French Republic* [1980] ECR 2299.

Case C-265/78 *H. Ferwerda BV v. Produktschap voor Vee en Vlees* [1980] ECR 617.

Case C-44/79 *Liselotte Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727.

C-88/79 *Criminal proceedings against Siegfried Grunert* [1980] ECR 1827.

Case C-157/79 *Regina v. Stanislaus Pieck* [1980] ECR 2171.

Case C-27/80 *Criminal proceedings against Anton Adriaan Fietje* [1980] ECR 3839.

Joined Cases C-100 to 103/80 *SA Musique Diffusion française and others v. Commission of the European Communities* [1983] ECR 1825.

Case C-203/80 *Criminal proceedings against Guerrino Casati* [1981] ECR 2595.

Case C-269/80 *Regina v. Robert Tymen* [1981] ECR 3079.

Case C-21/81 *Criminal proceedings against Daniël Bout and BV I. Bout en Zonen* [1982] ECR 381.

Case C-54/81 *Firma Wilhelm Fromme v. Bundesanstalt für landwirtschaftliche Marktordnung* [1982] ECR 1449.

C-77/81 *Zuckerfabrik Franken GmbH v. Federal Republic of Germany* [1982] ECR 681.

Case C-230/81 *Grand Duchy of Luxembourg v. European Parliament* [1983] ECR 255.

Joined Cases C-205/82 to 215/82 *Deutsche Milchkontor GmbH and others v. Federal Republic of Germany* [1983] ECR 2633.

Case C-271/82 *Vincent Rodolphe Auer v. Ministère public* [1983] ECR 2727.

Case C-5/83 *Criminal proceedings against H.G. Rienks* [1983] ECR 4233.

Case C-16/83 *Criminal proceedings against Karl Prantl* [1984] ECR 1299.

Case C-63/83 *Regina v. Kent Kirk* [1984] ECR 2689.

Case C-79/83 *Dorit Harz v. Deutsche Tradax GmbH* [1984] ECR 1921.

Case C-117/83 *Karl Könecke GmbH & Co. KG, Fleischwarenfabrik, v. Bundesanstalt für landwirtschaftliche Marktordnung* [1984] ECR 3291.

Case C-180/83 *Hans Moser v. Land Baden-Württemberg* [1984] ECR 2539.

Case C-152/84 *M. H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECR 723.

Case C-121/85 *Conegate Limited v. HM Customs & Excise* [1986] ECR 1007.

Case C-137/85 *Maizena Gesellschaft mbH and others v. Bundesanstalt für landwirtschaftliche Marktordnung (BALM)* [1987] ECR 4587.

Joined Cases C-281, 283, 284, 285 and 287/85 *Federal Republic of Germany and others v. Commission of the European Communities* [1987] ECR 3203.

Case C-12/86 *Meryem Demirel v. Stadt Schwäbisch Gmünd* [1987] ECR 3719.

Case C-14/86 *Pretore di Salò v. Persons unknown* [1987] ECR 2545.

Case C-80/86 *Criminal proceedings against Kolpinghuis Nijmegen BV* [1987] ECR 3969.

Case C-299/86 *Criminal proceedings against Rainer Drexl* [1988] ECR 1213.

Case C-165/87 *Commission of the European Communities v. Council of the European Communities* [1988] ECR 5545.

Case C-186/87 *Ian William Cowan v. Trésor public* [1989] ECR 195.

Case C-2/88 *Criminal proceedings against J. J. Zwartveld and others* [1990] ECR I-4405, para. 10.

Case C-64/88 *Commission of the European Communities v. French Republic* [1991] ECR I-2727.

Case C-68/88 *Commission of the European Communities v. Hellenic Republic* [1989] ECR 2965.

Case C-103/88 *Fratelli Costanzo SpA v. Comune di Milano* [1989] ECR 1839.

Case C-217/88 *Commission of the European Communities v. Federal Republic of Germany* [1990] ECR I-2879.

Case C-326/88 *Anklagemyndigheden v. Hansen & S n I/S, in the person of Hardy Hansen* [1990] ECR I-2911.

Case C-331/88 *The Queen v. Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others* [1990] ECR I-4023.

Case C-169/89 *Criminal proceedings against Gourmetterie Van den Burg* [1990] ECR I-2143.

Case C-172/89 *Vandemoortele NV v. Commission of the European Communities* [1990] ECR I-4677.

Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* [1991] ECR I-2951.

Case C-300/89 *Commission of the European Communities v. Council of the European Communities* [1991] ECR I-2867.

Case C-363/89 *Danielle Roux v. Belgian State* [1991] ECR I-273.

Case C-7/90 *Criminal proceedings against Paul Vandevenne, Marc Wilms, Jozef Mesotten and Wilms Transport NV* [1991] ECR I-4371.

Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* [1991] ECR I-4685.

Case C-199/90 *Italtrade SpA v. Azienda di Stato per gli interventi nel mercato agricolo (AIMA)* [1991] ECR I-5545.

Case C-240/90 *Federal Republic of Germany v. Commission of the European Communities* [1992] ECR I-5383.

Case C-116/91 *Licensing Authority South Eastern Traffic Area v. British Gas plc.* [1992] ECR I-4071.

Case C-168/91 *Christos Konstantinidis v. Stadt Altensteig* [1993] ECR I-1191.

Case C-210/91 *Commission of the European Communities v. Hellenic Republic* [1992] ECR I-6735.

Case C-226/91 *Criminal proceedings against Johannes Martinus Lemmens* [1998] ECR I-3711

Joined Cases C-267/91 and 268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097.

Case C-382/92 *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* [1994] ECR I-2435.

Case C-62/93 *BP Soupergaz Anonimos Etairia Geniki Emporiki-Viomichaniki kai Antiprossopeion v. Greek State* [1995] ECR I-1883.

Joined Cases C-358/93 and C-416/93 *Criminal proceedings against Aldo Bordessa, Vicente Marí Mellado and Concepción Barbero Maestre* [1995] ECR I-361.

Case C-384/93 *Alpine Investments v. Minister van Financien* [1995] ECR I-1141.

Case C-36/94 *Siesse - Soluções Integrais em Sistemas Software e Aplicações Ldª v. Director da Alfândega de Alcântara* [1995] ECR I-3573.

Case C-84/94 *United Kingdom of Great Britain and Northern Ireland v. Council of the European Union* [1996] ECR I-5755.

Case C-177/94 *Criminal proceedings against Gianfranco Perfili* [1996] ECR I-161.

Case C-193/94 *Criminal proceedings against Sofia Skanavi and Konstantin Chryssanthakopoulos* [1996] ECR I-929.

Case C-233/94 *Federal Republic of Germany v. European Parliament and Council of the European Union* [1997] ECR I-2405.

Joined Cases C-58/95, C-75/95, C-112/95, C-119/95, C-123/95, C-135/95, C-140/95, C-141/95, C-154/95 and C-157/95 *Criminal proceedings against Sandro Gallotti and others* [1996] ECR I-1435.

Joined Cases C-74/95 and C-129/95 *Criminal proceedings against X* [1996] ECR I-6609.

Case C-114/95 *Criminal proceedings against Jean-Louis Maurin* [1996] ECR I-2909.

Case C-168/95 *Criminal proceedings against Luciano Arcaro* [1996] ECR I-4705.

Case C-299/95 *Friedrich Kremzow v. Republik Österreich* [1997] ECR I-2629.

Case C-354/95 *The Queen v. Minister for Agriculture, Fisheries and Food, ex parte, National Farmers' Union and Others* [1997] ECR I-4559.

Case C-274/96 *Criminal proceedings against Horst Otto Bickel and Ulrich Franz* [1998] ECR I-7637.

Case C-291/96 *Criminal proceedings against Martino Grado and Shahid Bashir* [1997] ECR I-5531.

Case C-186/98 *Criminal proceedings against Maria Amélia Nunes and Evangelina de Matos* [1999] ECR I-4883.

Case C-377/98 *Kingdom of the Netherlands v. European Parliament and Council of the European Union* [2001] ECR I-7079.

Case C-213/99 *José Teodoro de Andrade v. Director da Alfândega de Leixões, intervener: Ministério Público* [2000] ECR I-11083.

Case C-290/99 *Council of the European Union v. MartinBangemann*, which was removed from the Court's register by Order of 3 February 2000 (Official Journal 2000 C 122, at p. 17).

Case C-210/00 *Käserei Champignon Hofmeister GmbH & Co. KG v. Hauptzollamt Hamburg-Jonas* [2002] ECR I-6453.

Case C-336/00 *Republik Österreich v. Martin Huber* [2002] ECR I-7699.

Case C-100/01 *Ministre de l'Intérieur v. Aitor Oteiza Olazabal* [2002] ECR I-10981.

Case C-230/01 *Intervention Board for Agricultural Produce v. Penycoed Farming Partnership* [2004] ECR I-937.

Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257.

Case C-304/02 *Commission of the European Communities v. French Republic* [2005] ECR I-6263.

Joined Cases C-387/02, C-391 and C-403/02 *Criminal proceedings against Silvio Berlusconi, Sergio Adelchi, Marcello Dell'Utri and others* [2005] ECR I-3565.

Case C-20/03 *Criminal proceedings against Marcel Burmanjer, René Alexander Van der Linden, Anthony De Jon* [2005] ECR I-4133.

Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285.

Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879.

Case C-371/03 *Siegfried Aulinger v. Bundesrepublik Deutschland*, Judgment (Official Journal C 289 of 29.11.2003), delivered on 9 March 2006.

Case C-373/03 *Ceyhun Aydinli v. Land Baden-Württemberg* [2005] ECR I-6181.

Case C-383/03 *Ergül Dogan v. Sicherheitsdirektion für das Bundesland Vorarlberg* [2005] ECR I-6237.

Case C-40/04 *Criminal proceedings against Syuichi Yonemoto* [2005] ECR I-7755.

Case C-328/04 *Attila Vajnai* [2005] ECR I-8577.

AG Capotorti in **Case C-50/76** *Amsterdam Bulb BV v. Produktschap voor Siergewassen* [1977] ECR 137.

AG Lenz in **Case C-64/88** *Commission of the European Communities v. French Republic* [1991] ECR I-2727.

AG Tesauro in **Case C-68/88** *Commission of the European Communities v. Hellenic Republic* [1989] ECR 2965.

AG Jacobs in **Case C-240/90** *Federal Republic of Germany v. Commission of the European Communities* [1992] ECR I-5383.

AG Jacobs in **Case C-168/91** *Christos Konstantinidis v. Stadt Altensteig* [1993] ECR I-1191.

AG Saggio in **Case C-356/97** *Molkereigenossenschaft Wiedergeltingen eG v. Hauptzollamt Lindau* [2000] ECR I-5461.

AG Fennelly in **Case C-376/98** *Federal Republic of Germany v. European Parliament and Council of the European Union* [2000] ECR I-8419.

AG Stix-Hackl in **Case C-210/00** *Käserei Champignon Hofmeister GmbH & Co. KG v. Hauptzollamt Hamburg-Jonas* [2002] ECR I-6453.

AG Stix-Hackl in **Joined Cases C-482/01 and C-493/01** *Orfanopoulos and Oliveri* [2004] ECR I-5257.

AG Kokott in **Joined Cases C-387/02, C-391 and C-403/02** *Criminal proceedings against Silvio Berlusconi, Sergio Adelchi, Marcello Dell'Utri and others* [2005] ECR I-3565.

AG Léger in Case C-20/03 *Criminal proceedings against Marcel Burmanjer, René Alexander Van der Linden, Anthony De Jong* [2005] ECR I-4133.

AG Ruiz-Jarabo Colomer in **Case C-176/03** *Commission of the European Communities v. Council of the European Union* [2005] ECR I-7879.

AG Jacobs in **Case C-371/03** *Siegfried Aulinger v. Bundesrepublik Deutschland*, delivered on 19 November 2005.

AG Stix-Hackl in **Case C-385/03** *Hauptzollamt Hamburg-Jonas v. Käserei Champignon Hofmeister GmbH & Co. KG* [2005] ECR I-2997.

AG Geelhoed in **Case C-432/04** *Commission of the European Communities v. Edith Cresson*, delivered on 23 February 2006.

The Court of First Instance

Judgments

Case T-83/91 *Tetra Pak International SA v. Commission of the European Communities* [1994] ECR II-755.

Case T-228/97 *Irish Sugar plc v. Commission of the European Communities* [1999] ECR II-2969.

Case T-306/01 *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [2005] ECR II-0000.

The Court of Human Rights

Judgments

ECHR judgment of 21 September 1993 in *Kremzow v. Austria*, Series A, No 268-B.

Other Materials

Rome Statute of the International Criminal Court (Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.

Books

Corstens, Geert/Pradel, Jean, *European Criminal Law,* The Hague/London/New York, 2002.

Craig, Paul/de Búrca, Grainne, *EU Law, Text, Cases and Materials*, Oxford/New York, 3rd edition, 2003.

Curtin, Deirdre/Mortelmans, Kamiel, *Application and Enforcement of Community Law by the Member States: Actors in Search of a Third Generation Script,* in: Institutional Dynamics of European Integration – Essays in Honour of Henry G. Schermers – Volume II, edited by Deirdre Curtin/Ton Heukels – Dordrecht/Boston/London 1994, 423–466.
(Cited as Curtin/Mortelmans in: Institutional Dynamics of European Integration II).

Douglas-Scott, Sionaidh, *Constitutional Law of the European Union,* Harlow 2002.

Gutknecht, Brigitte, *Das Subsidiaritätsprinzip als Grundsatz des Europarechts,* in: Fuer Staat und Recht: FS fuer Herbert Schambeck, herausgegeben von Johannes Hengstschläger…- Berlin 1994, 921–946.
(cited as Gutknecht in: FS Schambeck)

Krämer, Ludwig, *Europäisches Umweltrecht in der Rechtsprechung des EuGH dargestellt anhand von 50 Urteilen,* Wien 2002.

Lewis, Clive, *Remedies and the Enforcement of European Community Law,* London 1996.

Oehler, Dietrich, *Fragen zum Strafrecht der Europäischen Gemeinschaft,* in: FS fuer Hans-Heinrich Jeschek zum 70. Geburtstag – Zweiter Halbband, herausgegeben von Theo Vogler in Verbindung mit Joachim Hermann…- Berlin 1985, 1399–1410.
(cited as Oeler in: FS Jeschek)

Tiedemann, Klaus, *Reform des Sanktionswesens auf dem gebiet des Agrarmarktes der Europäischen Wirtschaftsgemeinschaft,* in: Strafrecht, Unternehmensrecht, Anwaltsrecht: FS fuer Gerd Pfeiffer zum Abschied aus dem Amt als Präsident des Bundesgerichtshofes, herausgegeben von Otto Friedrich Freiherr von Gamm…- Köln/Berlin/Bonn/Muenchen 1988, 101–117.
(Cited as Tiedemann in: FS Pfeiffer)

Tridimas, Takis, *The General Principles of EC Law,* Oxford/New York 1999.

Verhoeven, Amaryllis, *The European Union in Search of a Democratic and Constitutional Theory,* The Hague/London/New York 2002.

De Witte, Bruno, *The Role of Institutional Principles in the Judicial Development of the European Union Legal order,* in: The Europeanisation of Law: The Legal Effects of European Integration, edited by Francis Snyder – Oxford/Portland 2000, 83-100.
(Cited as de Witte in: Snyder)

Articles

Albrecht, Peter-Alexis, *Europäischer Strafrechtsraum: Ein Albtraum?,* in: 37 ZRP 2004, 1–4.

Alegre, Susie/Leaf, Marisa, *Criminal Law and Fundamental Rights in the European Union: Moving towards Closer Cooperation,* in: E.H.R.L.R. 2003, 3, 326–335.

Barnard, Catherine, *Fitting the remaining pieces into the goods and persons jigsaw*, in: E.L.Rev, 2001, 26 (1), 35–59.

Biondi, Andrea, *Advertising alcohol and the free movement principle: The Gourmet Decision*, in: E.L.Rev. 2001, 26 (6), 616–622.

Calliess, Christian, *Europa als Wertegemeinschaft – Integration und Identität durch europäisches Verfassungsrecht?,* in: 59 JZ 2004, 1033–1045.

Chalmers, Damian, *The European Rule of Law and National Misgovernance*, in: E.L.Rev. 2005, 30 (2), 163–164.

Chalmers, Damian, *The Court of Justice and the Third Pillar*, in: E.L.Rev. 2005, 30 (6), 773–774.

Comte, Francoise, *Criminal Environmental Law and Community Competence,* in: European Environmental Law Review 2003, 147–156.

Dannecker, Gerhard, *Strafrecht in der Europäischen Gemeinschaft,* in: 51 JZ 1996, 869–880.

Douglas-Scott, Sionaidh, *The Rule of Law in the European Union – Putting the Security into the Area of Freedom, Security and Justice,* in: E.L.Rev. 2004, 29 (2), 219–242.

Drake, Sara, *"Twenty Years After Von Colson: The Impact of "Indirect Effect" on the Protection of the Individual's Community Rights"*, in: E.L.Rev. 2005, 30 (3), 329–348.

Eisele, Jörg, *Einflussnahme auf nationals Strafrecht durch Richtliniengebung der Europäischen Gemeinschaft,* in: 56 JZ 2001, 1157–1165.

Emiliou, Nicholas *Subsidiarity: An Effective Barrier against the Enterprises of Ambition?,* in: E.L.Rev. 1992, 17 (5), 383–407.

Faure, Michael, *European Environmental Criminal Law: Do we really need it?,* in: European Environmental Law Review 2004, 1829.

Fletcher, Maria, *Extending "Indirect Effect" to the Third Pillar: The Significance of Pupino*, in: E.L.Rev. 2005, 30 (6), 826877.

France, E. Roger, *The Influence of European Community Law on the Criminal Law of the Member States,* in: European Journal of Crime, Criminal Law and Criminal Justice 2 (1994) 324358.

Hirsch, Guenter, *Der EuGH im Spannungsverhältnis zwischen Gemeinschaftsrecht und nationalem Recht,* in: 53 NJW 2000, 18171822.

Hugger, H., *The European Community's Competence to Prescribe National Criminal Sanctions,* in: European Journal of Crime, Criminal Law and Criminal Justice 3 (1995), 241–271.

Jacobs, Francis G., *Human Rights in the European Union: The Role of the Court of Justice*, in: E.L.Rev. 2001, 26 (4), 331–341.

Jung, Heike, *"L'Etat et moi": Some Reflections on the Relationship between the Criminal Law and the State,* in: European Journal of Crime, Criminal Law and Criminal Justice 6 (1998) 208–215.

Harding, Christopher, *Exploring the Intersection of European Law and National Criminal Law,* in: E.L.Rev. 2000, 25 (4), 374–390.

Kaiafa-Gbandi, M., *The Development towards Harmonization within Criminal Law in the European Union – A Citizen's Perspective,* in: European Journal of Crime, Criminal Law and Criminal Justice 9 (2001) 239–263.

Lensing, H. *The Federalization of Europe: Towards a Federal System of Criminal Justice,* in: European Journal of Crime, Criminal Law and Criminal Justice 1 (1993) 212–229.

Pache, Eckhard, *Zur Sanktionskompetenz der Europäischen Wirtschaftsgemeinschaft,* in 28 EuR 1993, 173–182.

Schutze, Robert, Cooperative Federalism Constitutionalised: The Emergence of Complementary Competences in the EC Legal Order, in: E.L.Rev. 2006, 31 (2), 167–184.

Sevenster, Hanna G., *Criminal Law and EC Law,* in: 29 C.M.L.Rev. 1992, 29–70.

Sieber, Ulrich, *Europäische Einigung und Europäisches Strafrecht,* in: 103 ZStW (1991), 957–979.

Stella, Paola, *The Purpose and Effects of Punishment,* in: European Journal of Crime, Criminal Law and Criminal Justice 9 (2001) 56–68.

Stiebig, Volker, *Strafrechtsetzungskompetenz der Europäischen Gemeinschaft und Europäisches Strafrecht: Skylla und Charybdis einer europäischen Odyssee?,* in: 40 EuR 2005, 466–493.

Temple Lang, John, *The Duties of Cooperation of National Authorities and Courts under Article 10 EC: Two more Reflections*, in: E.L.Rev. 2001, 26 (1), 84–93.

Tiedemann, Klaus, *Europäisches Gemeinschaftsrecht und Strafrecht,* in: 46 NJW 1993, 23–31.

Toth, A. G., *The Principle of Subsidiarity in the Maastricht Treaty*, in: (1992) 29 C.M.L.Rev. 1079-1105.

Vogel, Joachim, *Wege zu europäisch-einheitlichen Regelungen im Allgemeinen Teil des Strafrechts,* in: 50 JZ 1995, 331-341.

Wasmeier, Martin/ Thwaites, Nadine, *The "Battle of the Pillars": Does the European Community have the Power to Approximate National Criminal Laws,* in: E.L.Rev.2004, 29 (5), 613-635.

Weatherill, Stephen, *Better Competence Monitoring,* in: E.L.Rev. 2005, 30 (1), 23-41.

White, Simon, *Harmonisation of Criminal Law under the First Pillar,* in: E.L.Rev. 2006, 31 (1), 81-91.

Zuleeg, Manfred, *Der Beitrag des Strafrechts zur europäischen Integration,* in: 47 JZ 1992, 761-769.

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