Court of Justice of the European Communities

Judgment of 13 September 2005 (Case C-176/03, *Commission* v. *Council*) annulling the Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law

Dionysios Spinellis*

The judgment of the European Court of Justice of 13 September 2005 decided an important institutional conflict in the Union. At the request of the Commission, the Court annulled the Council's Framework Decision 2003/80/JHA on the protection of the environment through criminal law.[1] In so doing, the Court acknowledged that the member states can be obliged under *Community* law and its system of conditions to impose criminal sanctions if this is necessary to protect Community law. It is beyond doubt that they thus can be obliged under *Union* law and its conditions. The underlying questions are about the relationship between the first and third pillars and the logic of each.

The controversy

The competence of the European Community in the area of criminal law in general has been a very controversial subject for some time. Neither the Treaty establishing the European Community nor the Treaty on European Union provides in clear or general terms for such a competence.[2]

Generally, the criminalization of conduct includes four phases. The first concerns the enactment of certain orders and prohibitions, the second phase provides for criminal sanctions, the third consists of the imposition of such sanctions by

* Emeritus professor of criminal law and criminal procedure, Law School, University of Athens.

[1] *OJ* [2003] L 29/55.

[2] H. Labayle, 'Μύθοι και πραγματικότητα: ποια η οδός προς μια ποινική καταστολή των παραβάσεων του κοινοτικού δικαίου', [Myths and realities: which is the way to a penal repression of offences of the Community law?], 24 *Revue Hellénique de droit Européen* (2004), p. 91et seq. at p. 97.

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criminal courts and the fourth in their execution. The European Community is undoubtedly competent for the first phase, while the third and the fourth phases undoubtedly belong to the competence of the national (judicial and administrative) authorities. Therefore, the problem is focused on the second phase, which is the question of whether the Community has the power to provide for penal sanctions itself or at least by obliging the member states to impose them.

When it comes to upholding Community law by the threat of (criminal) sanctions, three methods are possible: the purely national method, the Community method and the mixed one.[3]

According to the *purely national method*, the member states are free to provide for penal sanctions or not, as long as they fulfill certain conditions set by the case law of the Court of Justice (see *infra* paras. 47-49 of the noted judgment). It has however become questionable whether and to what extent this method can ensure that all member states provide equally efficient protection for certain Community legal interests, considering that some states even resort to administrative sanctions only.[4] Hence the disputed measure, which refers serious violations to a criminal procedure.

The *purely Community method* is the most sensitive one. In certain circumstances, the Treaty expressly provides for the right of the European Community to enact sanctions in secondary legislation (Articles 83(2)a and 110(3) EC). However, these sanctions are considered to be administrative sanctions.[5]

The *mixed method* obliges the member states to provide for criminal sanctions in certain areas. This was applied by recent Commission draft proposals for directives of the European Parliament and of the Council on penal protection of the environment and the Community's financial interests.[6] Certainly, member states can be obliged to enact criminal sanctions via third pillar measures. Article 31(1)(e) EU allows, *inter alia*, for the establishment of minimum rules relating to the constituent elements of criminal acts and to penalties, though only in certain specific areas (organized crime, terrorism and illicit drug trafficking). Article 29 EU envisages the imposition of criminal law measures also in other areas. All of

[3] J. Pradel, 'Γνωμοδότηση σχετικά με την επιβολή κυρώσεων ποινικού χαρακτήρα για παράβαση διατάξεων κοινοτικού δικάιου.' [Opinion on imposing sanctions of penal character for violation of Community law provisions], 24 *Revue Hellénique de droit Européen* (2004), p. 85 et seq., especially, p. 86-87.

[4] Cf. Vienna Action Plan (*OJ* [1999] C19/4, Point 18), 'criminal behaviour should be approached in an equally efficient way throughout the Union' and 'this goes in particular for policy areas where the Union has already developed common policies, and for policy areas with strong cross-border implications such as environmental crime'.

[5] These sanctions, not expressly described as criminal, are critically referred to by some as 'quasi-criminal sanctions', *Report of the European Parliament on Legal Bases and compliance with Community law* (2001/2151 (INI), Committee on Legal Affairs and the Internal Market, A5-0180/2003 (Final), 22 May 2003, Rapporteur: Ioannis Koukiadis, p. 10.

[6] COM (2001) 139; COM (2001) 272.

these measures could be aimed at the protection of Community interests and legislation. These third pillar 'criminal' powers could be transferred to the Community on account of the simplified revision procedure in Article 42 EU (the so-called '*passerelle*').[7] The fundamental question now is whether the Community, apart from this possibility, at this moment already has the competence to oblige the member states to provide for criminal sanctions in certain cases.

The issue has been highly debated. Generally, two views can be opposed. The first holds that the power to provide rules entails the power to provide sanctions. Hence, since the European Community has the former power, by necessity it also has the latter. In this respect Article 10 EC, which contains the loyalty principle, can be invoked. Also Article 229 EC seems to point in this direction, for it states that 'Regulations adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the provisions of this Treaty, may give the Court of Justice unlimited jurisdiction with regard to the penalties provided for in such regulations.'

According to the second view, criminal justice forms part of the national culture and non-conceded sovereignty, and the power to provide criminal sanctions is not within the competence of the Community.[8] This view is also based on the notion that since the criminal sanctions pose restrictions on certain individual rights, the establishment of such sanctions should be effected only by bodies having a democratic legitimacy, i.e., being directly elected by the people. In this view, at least, secondary legislation enacted by the Council and the Commission without the co-decision of the European Parliament does not have such legitimacy. Therefore, the preferable methods for criminalizing certain forms of conduct for the protection of Community interests are international conventions or the use of the intergovernmental third pillar procedures.[9] These at least presuppose the intervention at some stage by the national parliaments and, even more important perhaps, require unanimity in the Council; in contrast to the first pillar, member states cannot be outvoted here. However, even under this view, the freedom of the member states is not considered as absolute. The European Court of Justice has held that a member state which does not penalize certain violations of the Community law under conditions analogous to those applicable to infringements of national law is in breach of its obligations under the EC Treaty.[10]

[7] See on this also Geert Corstens & Jean Pradel, *European Criminal Law* (The Hague, Kluwer Law International 2002), p. 467-468, 515-516.

[8] Pradel, *supra* n. 3, at p. 88; cf. also submissions of the Council and the Member States before the ECJ, mentioned by the Judgment, paras. 31-33.

[9] Report of the European Parliament on Legal Bases and compliance with Community law (2001/2151 (INI), Committee on Legal Affairs and the Internal Market, A5-0180/2003 (Final), 22 May.2003, Rapporteur: Ioannis Koukiadis, p. 10.

[10] C-68/88, *Commission* v. *Greece* (1989) ECR 2965, para. 23; C-186/98, *Nunes and de Mates* (1999) ECR-I-4883, paras. 12, 14. These cases refer to conduct harmful to the financial interests of

The legal services of the (political) Union institutions all adhered to the former view. They were all more or less of the opinion that the Community legislature can oblige member states to provide for criminal sanctions in support of Community obligations. The legal service of the Commission held that this is the case when it concerns conduct breaching Community law in cases of fraud and serious negligence. Concerning especially grave violations, the Community can even prescribe custodial sentences.[11] It based this position, *inter alia*, on two judgments of the Court of Justice,[12] which held that under Article 10 EC the member states are obliged to take all necessary measures in order to secure the effectiveness of the Community law, including penal measures, even when the Community provisions do provide but civil law sanctions.[13] Furthermore, the legal service of the Commission, invoking the supremacy of the first pillar with respect to the third pillar based on Articles 29 and 47 EU, held that the mechanisms of the third pillar should not be used if under the first pillar sufficient possibilities exist for the attainment of a certain purpose. If and to the extent that the Community legislature considers that only criminal sanctions can safeguard the compliance with Community law, then only the Community legislature – and not the third pillar legislature – has the legal capability to oblige the member states to provide for such sanctions.[14]

Interestingly, the legal service of the Council has also taken the view that the Community can oblige member states to enact criminal sanctions. This is only to the extent, however, that the Community legislature considers that respect of Community provisions can be safeguarded only through recourse to these sanctions.[15]

In the same vein, the legal service of the European Parliament considered that the Community is competent to oblige the member states to adopt criminal sanctions in concrete cases, but it doubted whether the Community also has the competence to unify the penal legislations of the member states. It thought that the Community can only demand that they punish criminally one or more forms of conduct.[16]

the Community, but could be invoked also in respect of other cases, where the member state is obliged to penalize certain forms of conduct. Cf. also Article 226 TEC.

[11] SEC(2001) 227 Working Document prepared by the Commission on the establishment of an *acquis* on criminal penalties for environmental offences, p. 3.

[12] C-9/89, *Kingdom of Spain* v. *Council*, (1990) ECR I-1383, para. 24; C-333/99, *Commission* v. *French Republic*, (2001) ECR I-1025, para. 55.

[13] Report of the European Parliament on Legal Bases and compliance with Community law (2001/2151 (INI), Committee on Legal Affairs and the Internal Market, A5-0180/2003 (Final), 22 May 2003, Rapporteur: Ioannis Koukiadis, p. 13.

[14] Ibid.

[15] Ibid.

[16] Ibid, p. 14.

Finally, the Committee on Legal Affairs of the European Parliament held that according to the case-law of the Court of Justice it is not outside the competence of the Community to require member states to impose penal sanctions in certain cases and even to determine the forms of conduct which must be criminalized. It doubted however whether the Community can prescribe the member states to enact custodial penalties in certain cases.[17]

In view of the above, it is generally accepted among the legal services of the Union institutions that the Community legislature is at least competent to require member states to provide for criminal sanctions, considering as a legal basis Article 10 EC or other, specific, provisions.[18] However, it is also accepted that the competence of the Community legislature in this respect is not limitless, but subject to certain strict criteria.

The Court essentially concurs with this, but draws the limits rather broadly.

The dispute before the Court

On the initiative of Denmark, the Council on 27 January 2003 adopted a third pillar Framework Decision concerning the protection of the environment, based on the Articles 29, 31(e) and 34(2)(B) EU, as worded prior to the entry into force of the Treaty of Nice. The text of it lays down a number of environmental offences – committed either intentionally (Article 2), or by negligence (Article 3) – in respect of which the member states are required to prescribe criminal penalties. It also provides: that even participating in or instigating the above offences should be made punishable by the member states (Article 4); that the penalties must be 'effective, proportionate and dissuasive', including 'at least in serious cases, penalties involving deprivation of liberty which can give rise to extradition' (Article 5(1)); that the criminal penalties may be accompanied by other penalties or measures (Article 5(2)); and that legal persons should be subject to sanctions, criminal or not criminal (Article 7). The view of the Council was that this competence derives from the provisions of Title VI of the EU Treaty concerning police and judicial co-operation in criminal matters (the 'third pillar' provisions).

The Commission objected to the legal basis of that Framework Decision. Indeed, on 15 March 2001, it had filed a proposal for a directive under the first pillar with a similar content, based on Article 175(1) EC.[19] It was worried that its central role in legislation concerning EC matters was affected in a general way and invoked Article 47 EU, which prohibits prejudice to EC law (and Commission competences) by way of EU decisions. The European Commission believed that

[17] Ibid.
[18] Labayle, *supra* n. 2, at p. 107.
[19] *OJ* [2001] C180E/238.

such a competence can be based only on the rules of the EC Treaty (the 'first pillar') and challenged before the European Court of Justice the Council's choice of Article 34 EU in conjunction with Articles 29 and 31(e) EU as the legal basis of that Framework Decision.

The Commission has been strongly supported by the European Parliament. During the plenary of 9 April 2002, the Parliament gave (1) a positive opinion (Co-decision procedure - first pillar) about the proposal for a directive and (2) an opinion (consultation procedure - third pillar) about the draft framework decision. In its latter opinion, it called upon the Council to use the framework decision as a complementary instrument to the Directive, limited to third pillar aspects, such as judicial co-operation.[20] Following the European Parliament's opinion on the proposal for a directive, the Commission amended its proposal. For this reason, the European Parliament joined the Commission in the proceedings before the Court. On the other hand, the Council was supported by eleven of the EU Member States, which intervened in its favour in the proceedings.

The reasoning of the Court

The central issue on which the Court of Justice had to rule was whether the Council was right to choose as an instrument of the criminal policy on the protection of the environment a Framework Decision based on Articles 29, 31(e) and 34(2)(b) EU, or whether the correct legal basis in that respect should have been Article 175(1) EC, and the proper instrument, a directive of the European Parliament and of the Council.

First the Court ruled on the relations of the provisions invoked by the parties defending the two rivaling enactments. It acknowledged the relevance of Article 47 EU providing that the Union Treaty shall not affect the EC Treaty, and it also referred to Article 29 EU, the first provision of Title VI of the EU Treaty, that includes the caveat 'without prejudice to the powers of the European Community' (para. 38). Therefore, the acts taken under Title VI may not encroach upon the powers conferred on the Community by the EC Treaty. It is the task of the Court to ensure compliance with this principle (para. 39).

Subsequently, the Court of Justice defined the powers of the Community with respect to the environment under the EC Treaty. It referred first to the provisions according to which the protection of the environment constitutes one of the essential objectives of the Community and to its case-law referring to the provisions concerned.[21] It further mentioned Article 6 EC, which states that environmental

[20] Judgment, paras. 12-13.

[21] C-240/83 *ADBHU* (1985) ECR 531, para. 13; C-302/86, *Commission* v. *Denmark* (1988) ECR 4607, para. 8; C-213/96 *Outokumbu* (1998) ECR I-1777, para. 32.

protection requirements must be integrated into the definition and implementation of the Community policies and activities. Finally, it referred to Article 174(1) EC, where the objectives of the Community policy on the environment are listed, and to Article 175 EC that points out the procedure to be followed in order to achieve them. That procedure is the one laid down in Article 251 EC, by which the Council and European Parliament act in co-decision.

The Court recalled that, according to its case-law, the choice of the legal basis for a Community measure must rest on objective factors amenable to judicial review. These factors include in particular the aim and the content of the measure (para. 45). Now, with respect to the Framework Decision in question, it is clear both from its title and its first three recitals that its objective is the protection of the environment through criminal law. As to the contents of the Framework Decision, it is also clear that Article 2 establishes a list of offences in respect of which the member states must impose criminal penalties, and Articles 2-7 entail partial harmonization of the criminal laws of the member states.

The most important point of the judgment is the following:

> (…) As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence (…). However, the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective. (para. 47-48)

That part of the Court's ruling is characterized by the relatively weak support offered by the wording of the legal texts, and also by the strong teleology or expediency, dictating that in order to achieve the end of protecting the environment through criminal law, a common policy of the member states should be imposed by Community law.

In view of the above, the Court held that:

> It follows from the foregoing that, on account of both their aim and their content, Articles 1 to 7 of the framework decision have as their main purpose the protection of the environment and they could have been properly adopted on the basis of Article 175 EC (para. 51)

Consequently, the entire Framework Decision, being indivisible, encroached on the powers which Article 175 TEC confers on the Community, and therefore it infringed Article 47 EU. Therefore, the Court ruled that the Framework Decision was not in conformity with EC law.

Comments

The judgment can best be seen as the beginning of a new line of case-law. Firstly, it articulates the possibilities and conditions under which the EC may impose upon the member states, in principle, the obligation to provide for the criminal protection of the environment. It may do so when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is considered by the Community legislature to be a necessary measure for combating serious environmental offences. This finding is in conformity, for one thing, with the traditional character of penal law, which should be the last resort used to safeguard compliance with certain provisions of the law and to protect the legal interests of individuals and the society at large.

Furthermore, the judgment establishes that Community action with respect to criminal measures must be based on implicit powers connected with a specific legal basis and at a sectoral level only. The check of necessity in the concrete sector should be met in each case. This finding establishes the principles, which may apply also to other common policies and – as the Commission argues – even to the four freedoms, namely the freedom of movement of persons, goods, services and capital,[22] with respect to the protection of which criminal penalties may be necessary.

The judgment delineates the scope of the competences of the EC organs and procedures in the field of criminal law and procedure. The Community can oblige member states to take effective, proportionate and dissuasive criminal measures in order to ensure that the rules it lays down on environmental policy – and also with respect to other sectors covered by the Community policies – are fully effective. In that respect, it can, depending on the necessity and the expected effectiveness, include not only the principle of resorting to criminal measures, but also give details concerning them. Thus, it may include the definition of the offences, their constituent elements and even the nature or level of the penalties applicable,[23] which above a certain level may be custodial penalties. It should be noted that the Court went further than Advocate-General Ruiz-Jarabo Colomer, who, in his opinion, based the power to oblige the member states to enact penalties involving deprivation of liberty (Article 5(1)) on the third pillar, in contrast to the Court.[24]

By contrast, the judgment does not express any clear opinion about the competences on certain matters related to the criminal protection, e.g., the judi-

[22] Communication of the Commission to the European Parliament and the Council on the implications of the Court's judgment of 13 Sept. 2005, para. 10.

[23] Ibid.

[24] See opinion of AG Ruiz-Jarabo Colomer delivered on 26 May 2005, para. 97. See n. 22

cial cooperation in criminal matters, jurisdiction, extradition and prosecution (Articles 8-9 Framework Decision). Considering the Framework Decision indivisible, the Court annulled it entirely. It is probable that the latter aspects are seen to come under the third pillar, as the Commission admitted,[25] and could only be inserted in a Framework Decision as a complement to a Directive. However, in view of the silence of the Court in this respect it is not excluded that the said measures may be inserted in the Directive if the Community legislature finds that necessary to protect Community interests.

Main purpose test

Finally, the judgment is interesting because the Court of Justice applies its case-law on the choice of the correct legal basis in the first pillar to a cross pillar situation. With respect to the first pillar, the Court has reasoned that, 'If examination of a Community act shows that it has a twofold purpose or twofold component and if one of these is identifiable as main or predominant, whereas the other is merely incidental, the act must be founded on a sole legal basis, that is, the one required by the main or predominant purpose or component.'[26] The judgment seems to extend this test of the 'main purpose' of the measure to choices between a first pillar measure (Directive) and a third pillar measure (Framework Decision) (para. 51).

In view of the above judgment and of the relevant discussions, it can be considered that, for the future, the following disputed points have been clarified:

1. The European Community has the competence at sectoral level to oblige member states to criminalise and impose penal sanctions for forms of conduct damaging or affecting the environment and also in other cases affecting Community policies, if they are necessary and the objective cannot be obtained by less repressive measures.
2. These penal sanctions should be effective, dissuasive and proportionate and analogous to those applicable for infringements of national law. The duty to impose them may include sanctions involving deprivation of liberty in very serious cases.
3. The procedure to be followed by the European Community in order to oblige the member states to criminalise serious offences against the environment should be the adoption of directives under Articles 175 and 251 TEC.

[25] Judgment, para. 23.
[26] C-336/00 *Huber* [2002] ECR I-7699, para. 31.

Remaining questions have become more acute. Among these:

1. What are the consequences of the annulment of the Framework Decision for national laws implementing it? The implementing measures had to be taken before 27 January 2005.[27]
2. How far does Community competence go in relation to criminal matters such as extradition, jurisdiction and prosecution, should these be considered necessary for the effectiveness of Community policy?

[27] A solid discussion of these questions is given by the dissertation of Vandamme, Thomas A.J.A., *The Invalid Directive. The Legal Authority of a Union Act requiring Domestic Law Making* (Groningen, Europa Law Publishing 2005).

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