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The European Community and Harmonization of the Criminal Law Enforcement of Community Policy?¹

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1. Introduction

When I first travelled to Freiburg in 1987 for a study visit at the Institut für Kriminologie und Wirtschaftsstrafrecht der Universität Freiburg in the Erbprinzenstrasse I knew I was heading for the Mecca. My expectations were more than fulfilled. The Institute had the best library in the world in this area of research. It was moreover remarkable that the collection was not only excellent where German sources were concerned, but was also good for comparative law and European law. The library reflected its spiritual father. *Tiedemann's* mark was present everywhere. In his library, he brought his vision of legal scholarship to life. Soon, his library became the place to be for researchers from all over the world. And, not unimportantly, *Klaus Tiedemann*, the assistants and the secretariat were extremely accessible. I had stumbled on a Mecca of academic culture. No wonder then that since 1987 I have paid numerous brief working visits to the Erbprinzenstrasse.

I became personally and better acquainted with *Klaus Tiedemann* through our shared passion for the Ibero-American world and its legal culture. Our paths crossed at numerous conferences where we could exchange views. It was always a wonderfully rich experience to engage in discussions with him. Not only is *Klaus Tiedemann* a specialist in Wirtschaftsstrafrecht, but he also has a great general knowledge in the field of criminal law. He furthermore always manages to combine this with a wealth of humanist expertise.

Klaus Tiedemann is also passionate about Europe and a pioneer in the field of European Criminal Law. Through his publication on subsidy fraud (Subventionsbetrug) he, as one of the first in Europe, laid the foundations for research into the European dimension of domestic criminal justice. I have had the pleasure of fully enjoying his enthusiasm and expertise in this field during the Corpus Juris implementation study.³ Together with colleague *Mireille Delmas-Marty* he has given shape and content to a blueprint for a European model in the field of criminal law. At that time he clearly could not get enough of the subject as his pioneering

¹ This article is a rewritten and very substantial updated (until 15 July 2007) version of *J.A.E. Vervaele* The European Community and Harmonization of the Criminal Law Enforcement of Community Policy. A Cessio Bonorum from the Third to the First Pillar? in Kimmo Nuotio (Ed.), *Liber Amicorum Raimo Lahti*, 2007 (Forthcoming).

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³ *M. Delmas-Marty & J.A.E. Vervaele* The Implementation of the Corpus Juris in the Member States, vol. I-IV, Intersentia, Antwerp-Oxford, 2000-2001.

work in this area also resulted in a fabulous book on Europa-Delikte⁴ in which he in a masterly way combines his knowledge and expertise in the fields of Wirtschaftsstrafrecht and European criminal law.

Against this background, I had to make a choice concerning my contribution for *Klaus Tiedemann*. For a while, I hesitated between a contribution on Ibero-America and one on European criminal law, but finally opted for a European criminal law topic that is presently in the public eye and is and will continue to be of great consequence for the future shaping of European Criminal Law. *Klaus Tiedemann* himself furthermore already devoted a contribution to the legal basis of European criminal law in 1999.⁵ *Klaus Tiedemann* has always argued in favour of a functional competence of Europe in the field of criminal law, including in the framework of the EC Treaty. He was often alone in his views, especially in Germany, but it is evidence of great courage and vision that he has continued to defend this position. That he was not always understood is quite clear, as in the spring of 2006, an alarm went through several Member States concerning the (further) European erosion of national criminal law. The direct cause for this was the judgment of the Grand Chamber of the European Court of Justice in Case C-176/03⁶ concerning the harmonization of criminal penalties in environmental cases, in which the European Community (EC) was for the first time considered to be competent to harmonize the criminal law enforcement of Community policy.⁷ This topic is therefore the ideal contribution to a Festschrift for *Klaus Tiedemann*, as it is partly the fruit of his enlightened thinking. This thinking is also reflected in the Reform Treaty,⁸ which is the result of the European Council of 21/22 June 2007 under the German Presidency. The draft Constitutional Treaty has been reshaped into a Reform Treaty, by which criminal law harmonization and international cooperation in criminal matters fully become part of the Community integration process.

The Europeanization of criminal law has developed steadily since the entry into force of the Maastricht Treaty. Where does the fear of harmonization of criminal law through the first pillar spring from? Does it matter that greatly whether national criminal law is harmonized through Directives or through Framework Decisions? Is that no more than just a Brussels institutional issue? The central question in this contribution is what legal and political consequences may be expected from the Court's judgment.⁹ Answers to this question may

⁴ *K. Tiedemann* (ed.) *Wirtschaftsstrafrecht in der Europäischen Union, Rechtsdogmatik-Rechtsvergleich-Rechtspolitik*, Carl Heymanns Verlag, Köln, 2002.

⁵ *K. Tiedemann* *Reflexions sur la base juridique du Corpus Juris*, *AGON* Nr. 23 (1999), 7.

⁶ Case C-176/03, *Commission v. Council*, judgment of 13 September 2005.

⁷ Paragraph 48 of the judgment reads as follows: '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'.

⁸ http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94932.pdf

⁹ For a thorough analysis of the judgment itself see *S. White*, 'Harmonisation of criminal law under the First Pillar', *European Law Review*, 2006, in print and *P.-Y. Monjal* 'Reconnaissance d'une compétence pénale communautaire pour la CJCE', *Recueil Dalloz* 2005, no. 44, 3064-3067.

only be found by first looking back to the historical context of the uneasy relationship between European integration and national criminal law (section 2); and, second, analyzing the deepening political stalemate on this issue that occurred after the entry into force of the Treaty on European Union (section 3). The implications of the judgment will be analyzed by examining the positioning of the Commission (section 4), the Justice and Home Affairs Council and certain Member States (section 5) in relation to the judgement. In section 6 we will further explore recent developments with an analysis of the Commission's proposals and the case-law of the Court of Justice, subsequently to conclude in section 7 with some final remarks.

2. European Integration and Criminal Law, History of Development¹⁰

It is no secret that the EC's founding fathers overlooked the importance of the enforcement of Community law to a certain extent. Apart from a few exceptions in primary Treaty law, such as the obligation for Member States to criminalize violations of Euratom confidentiality or perjury in front of the European Court of Justice,¹¹ they maintained a resolved silence concerning Community law enforcement. The EC Treaty does not provide for clear legal bases or assign powers for either direct enforcement by the EC (with the exception of the enforcement of European competition rules), or for indirect enforcement of Community law by the Member States. This means that the enforcement of the common agricultural and fisheries policy, the Community Customs Code, the European stock market regulations, EU subsidy fraud rules, European environmental policy, etc. was completely left to the autonomy of the Member States. It is mainly thanks to the Court that this autonomy has been somewhat limited. The Member States are bound by the Court's interpretation of Article 10 EC (the duty of co-operation, the so-called Member State loyalty principle). The Court has established that the Member States have a duty to enforce Community law, whereby they have to provide for procedures and penalties that are effective, proportionate and dissuasive and that offer a degree of protection that is analogous to that offered in the enforcement of provisions of national law of a similar nature and importance (the assimilation principle). It does not only fall for the national legislation to fulfil these requirements; they must also be put into practice in the course of enforcement.¹²

The EC quickly recognized the gap in the EC Treaty where legislation was concerned. Already in 1976 an attempt was made to supplement the EC Treaty with two protocols concerning EC fraud and corruption by EC officials. Neither protocol gained the political approval of the Council of Ministers (Council), however.¹³ In the period between 1975 and 1990 the Commission was therefore forced to explore instead the political and legal boundaries of the EC Treaty. The Commission, supported by the European Parliament, was

¹⁰ For a more detailed analysis see *J.A.E. Vervaele* The Europeanisation of Criminal Law and the Criminal Law Dimension of European Integration, in *P. Demaret, I. Govaere & D. Hanf* (eds.) 30 Years of European Legal Studies at the College of Europe, Liber Professorum, *P.I.E.-Peter Lang*, Brussels, 2005, p. 277-298 and *N. Haekkerup* Controls & Sanctions in the EU Law, Djoef Publishing, Copenhagen, 2001.

¹¹ Art. 194(1) Euratom Treaty; Art. 30 of the Statute of the European Court of Justice.

¹² See Case 66/88, *Commission v. Greece*, [1989] ECR 2965 and the Communication from the Commission as a result of this case, OJ C 147/3, 1990.

¹³ *J.A.E. Vervaele* Fraud against the Community. The need for European fraud legislation, Kluwer, Deventer 1992, 85-96.

already then of the opinion that there was a considerable enforcement deficit on the part of the Member States. The Commission therefore submitted various concrete legislative proposals to the Council, with the aim of obliging the Member States to use both (punitive) administrative law and criminal law in the enforcement of Community law.

The Council approved many of the Commission's proposals compelling the Member States to impose punitive administrative sanctions, especially in the field of the common agricultural policy. The Regulations in question provide for fines, forfeiture of financial guarantees, exclusion from subsidy schemes, professional disqualification, etc. This harmonization was not in the least limited to reparatory sanctions, but also expressly concerned punitive sanctions. The Member States were obliged to provide rules for these sanctions and to apply them. Of course the Member States were also free to impose these sanctions entirely or partly by criminal law enforcement means instead of using solely or partly administrative regulation, if this was in conformity with the requirements for enforcement as established by the Court. The growing influence of EU law on the law of punitive sanctions was not received well by all the Member States. Some Member States considered that the EC was applying the EC Treaty quite extensively or, further, that it had imposed obligations lacking a proper legal basis. In 1990 Germany considered that the limit had been reached. Two Regulations on agriculture¹⁴ formed the perfect excuse to bring an action for annulment before the Court. The Regulations not only prescribed restitution with a surcharge of unjustifiably obtained subsidies, but also punitive exclusion from subsidy schemes. Germany was of the opinion that the EC was not competent to prescribe punitive sanctions. What was remarkable in this case was that none of the other Member States intervened to support Germany in its contentions. Germany received an abrupt awakening when in 1992 the Court in its judgment in Case C-240/90¹⁵ recognized that the EC was competent to adopt the measures including the punitive sanctions which without a doubt fall within the scope of application of the criminal law guarantees of Article 6 ECHR. This landmark judgment finally cleared up the controversy surrounding the EC's competence to harmonize administrative (punitive) sanctions. Some 14 years later it cannot be said that the EC has made explosive use of this power. Quite the contrary, in fact: it is remarkable that in many areas of Community law no initiatives whatsoever have been taken in that direction. One might think of, for example, environmental law, securities law, tax law, etc. It is my opinion that the Commission has demonstrated insufficient initiative to give any systematic or consistent shape to the harmonization of administrative enforcement. By consistent I mean that a considered and horizontal policy should be in place. On the one hand, the Commission has failed to make use of its power to outline an EC enforcement policy from which it can be clearly concluded in which area of policy the harmonization of administrative enforcement by the Member States would be needed. Often, an ad hoc approach is applied by the directorates general (DGs) of the Commission. On the other hand, the Commission cannot justifiably be blamed for all evils. It is also its task is not to overwhelm the Council with legislative

¹⁴ Regulation 1260/90, OJ L 124, 1990, p. 715 and Regulation 1279/90, OJ L 126, 1990, p. 20.

¹⁵ Case C-240/90, *Germany v. Council and Commission*, [1992] ECR I-5383. For a detailed analysis of the EC harmonization of administrative enforcement, see *J.A.E. Vervaele Administrative Sanctioning Powers of and in the Community. Towards a System of European Administrative Sanctions?*, in: *J.A.E. Vervaele* (ed.) *Administrative Law Application and Enforcement of Community Law in the Netherlands*, Kluwer, 1994, Deventer-Boston, 161-202., <http://igitur-archive.library.uu.nl/law/2005-0622-155517/4371.pdf>; *J. Schwarze* 'Rechtsstaatliche Grenzen der gesetzlichen und richterlichen Qualifikation von Verwaltungssanktionen im europäischen Gemeinschaftsrecht', *EuZW* 2003, Heft 09, 261-269 and *M. Poemans* *La sanction dans l'ordre juridique communautaire*, Bruylant, 2004.

initiatives that are doomed to fail or will only lead to mounting political tension between the EC and the Member States. It has to be admitted that in some areas, such as financial services, and definitely in taxation, it is still impossible to gain support in the Council for prescribing punitive administrative enforcement.

The EC's competence to harmonize national criminal law is clearly a complex and sensitive issue. To explain this using the terminology of criminal penalties: it is like running the gauntlet. Due to the legislative gap within the EC Treaty, the most widely diverging positions could be adopted. Until recently, many have argued in no uncertain terms that criminal law belonged to the exclusive territory of national sovereignty. Criminal lawyers often do not seem to realize that sovereignty does not prevent international and supranational law from influencing national criminal law. UN law (criminal law treaties and Security Council resolutions), the law of the Council of Europe (the ECHR and criminal law treaties) all exert their influence on national criminal law. Is this interference from the UN and the Council of Europe? Of course it is not, as states have agreed to those treaties and to the political and legal objectives of the organizations in question. The same may be said of the process of European integration. Member States have given this shape and substance by means of the constitutive treaties. Of course, the process of European integration with its divided legal order has its own dynamics. However, here, too, the Member States are constantly involved in these processes. It only takes one glance at the agendas the lawyers are working with in order to draft legislation at the Dutch Ministry of Justice, including those dealing with criminal law, to realize how deeply involved the nation state is in the further definition of policy and legislation from Brussels.

From the case law of the ECJ it is abundantly clear that criminal (procedural) law belongs in the sphere of competence of the Member States,¹⁶ but that Community law may impose requirements as to the fulfilment and interpretation of this competence in the framework of the enforcement of Community law. Criminal law must not only be left aside when the rules to be enforced turn out to be contrary to Community law (negative interpretation). Community law also unmistakably establishes requirements which national criminal law enforcement has to fulfil if it is applied with the aim of compliance with Community law (positive integration). This duty to enforce in accordance with certain requirements also applies to criminal law if the Member States decide that this is the tool which they will use to enforce Community law.¹⁷ The Netherlands has had past experience with ineffective enforcement of European fisheries policy rules. Furthermore, the Netherlands is very aware of the fact that failing enforcement in the field of the fight against swine fever or of subsidies granted by the European Social Fund,¹⁸ cannot be excused by citing national sovereignty or national criminal law insights. The requirements which the EC has established for national criminal law enforcement also extend to criminal law policy and practice. This means, for example, shaping policy as to when to dismiss a case or indictment; and the exercise of prosecutorial discretion in cases that are relevant from a Community law perspective where the interests of the EC must also be weighed.¹⁹

¹⁶ Case 203/80, *Casati*, [1981] ECR 2595.

¹⁷ Case 68/88, *Commission v. Greece*, [1989] ECR 2965 and Case C-226/97, *Lemmens*, [1999] ECR 195.

¹⁸ *J.A.E. Vervaele* 'Fraude met Europese sociale subsidies in Nederland', *NJB* 2001, 2167-2175.

¹⁹ Case C-265/95, *Commission v. France*, [1997] ECR I-6959.

An air-tight separation between the criminal law policy of the Member States and that of the EC has never existed. Both de iure and de facto, the process of indirect EC harmonization of national criminal law, mainly of special criminal law, has been ongoing for decades. The Community legal order and integration also include the criminal (procedural) law of the Member States as a result of which the Member State autonomy is restricted. The European integration model is not compatible with restricting criminal law to national confines where it would remain out of reach of any Community law influence whatsoever. The key question is, however, whether the EC's competence to harmonize stretches so far as to enable the EC directly to oblige the Member States to criminalize violations of Community rules. Is the EC competent to impose requirements as to the nature and severity of the penalty? Does this possible competence also extend to the scope of application *rationae materiae*, *rationae personae* and *rationi loci*, to procedural aspects, to the modalities of application (statute of limitation, dismissal or dismissing charges, etc.)? Concerning these questions there is and has been plenty of debate in the literature. The majority of criminal law authors²⁰ in Europe deny that the EC has any power, however minor, to harmonize directly criminal law.

The Commission and the European Parliament have for decades been attempting to convince the Council to impose a Community obligation on the Member States to criminally enforce EC policy. The legislative proposals to this end, for example in the field of money-laundering and insider dealing,²¹ were functional in their approach and only provided for limited harmonization. By and large these proposals obliged the Member States to criminalize certain intentional acts and thus to provide for a penalty and, in the case of serious offences, for a prison sentence. The proposals did not contain any concrete provisions as to the substance of these penalties and prison sentences. However, even the limited harmonization approach has never been able to win the Council over. The Council, as usual, approved the proposals, but only after amending them in such a way that the obligations were stripped of their criminal law packaging. Any and all references to the criminal law nature of the obligations were systematically deleted. Criminal law prohibitory or mandatory provisions were changed into prohibitory or mandatory provisions of an administrative nature. Obligations to impose criminal sanctions were replaced by simple sanctions.

The systematic political neutralization of the criminal law harmonization proposals of the Commission could be indicative of a staunch unity on the part of the Member States in the Council. Nevertheless the Member States were internally divided on this question to such an extent that in 1990 the Ministers of Justice assigned a Council working group consisting of public servants with the task of subjecting the relationship between Community law and criminal law into fundamental discussion.²² The government experts agreed that Community

²⁰ The minority position among criminal lawyers was argued by inter alia *Grasso, Tiedemann, Delmas-Marty, Vogel and Vervaele* who all defended a limited functional competence. For an interesting recent discussion between proponents and opponents see *Zeitschrift für die Gesamte Strafrechtswissenschaft, Europäisches Strafprozessrecht*, 2004, Heft 2, 332-474 and *B. Schünemann (Hrsg) Alternativentwurf Europäische Strafverfolgung*, Köln 2004.

²¹ See COM(90) 106 final, OJ C 106, 1990 for the proposal for a directive, which is the previous history of Directive 91/308 on prevention of the use of the financial system for the purpose of money laundering. See COM(87) 111 final, OJ C 153, 1987 and COM(88) 549 final, OJ C 277, 1988, which is the previous history of Directive 89/592 coordinating regulations on insider dealing.

²² For the report of the ad hoc working group see *J.A.E. Vervaele Fraud against the European Community*, Deventer: Kluwer 1992, 313.

law can set requirements for national criminal law, but could not unite in an unequivocal position concerning the direct criminal law harmonization competence of the EC. Those Member States that were in favour of such a competence – a small majority, among which the Netherlands – nevertheless wished for certain conditions to apply. Such harmonization could only be the criminal law tailpiece of a Community law policy area, i.e. not being criminal law harmonization as such. This harmonization should, furthermore, leave intact a number of starting points or guarantees that were considered by (some of) the Member States to be essential for their own criminal (procedural) law. With regard to this, references were made for the rejection of the criminal liability of legal persons, the rejection of the introduction of minimum penalties, principles that play a role in sentencing (e.g. the ability-to-pay principle) and principles that play a role in the prosecution of offences (e.g. dismissal or dismissing charges and settlement).

The report of the divided working group therefore did not result in a political breakthrough. Within the framework of the EC Treaty in force it was politically impossible to arrive at a workable solution. A fundamental political difference of opinion started to develop.²³ Dutch attempts during the intergovernmental conference for the preparation of the Maastricht Treaty to integrate aspects of criminal justice, including the power of direct harmonization, into EC law were doomed to failure. The Luxemburg compromise, now known as the three pillar structure, organized criminal law co-operation and harmonization into a separate semi-intergovernmental pillar which entered into force as part of the Maastricht Treaty in 1993. With the entry into force of the Treaty of Amsterdam in 1999, the third pillar shed its semi-intergovernmental character and thereby became a fully fledged EU policy area

3. Criminal Law Co-operation and Criminal Law Harmonization in the EU, a Political Stalemate

Structuring the third pillar to include the direct legislative competence of the EU in the field of co-operation in criminal matters and criminal law harmonization²⁴ has not caused the battle to subside, quite the contrary in fact. After all, the third pillar is a supplementary power that cannot undermine or interfere with the array of EC powers. Both Article 2 EC and Article 47 EC in conjunction with Article 29 EU are clear on this. Whether or not this power exists does not depend on whether prior to the EU Treaty's entry into force any regulation or directive was ever created which imposes a duty to harmonize criminal law. Disuse of power does not lead to its demise, nor does the entry into force of the EU Treaty. It is not the political will that determines the legal competence, at least not without amendment of the Treaty. Nevertheless the third criminal law pillar has been defined by many as exclusive, i.e. excluding any criminal law competence within the first pillar.

It is my belief that it was clear from the outset that the political division of the legal estate between the first and the third pillar would culminate in an institutional battle of competence

²³ Where for example the Member States were prepared to criminalize money laundering based on obligations deriving from the international law made by the UN and Council of Europe, but not by the EC. See intergovernmental declaration to Directive 91/308, OJ L 66/77, 1991.

²⁴ See Special Issue of *Delikt en Delinkwent*, 2002, September, Special Issue *Panopticon*, 2004, no. 1; G. *Corstens and J. Pradel* *European Criminal Law*, Dalloz, 2002 and B. *Hecker* *Europäisches Strafrecht*, Berlin 2005; *Groenhuijsen, M.S.* (2004) 'Criminal Law in the European Union: a Giant Leap or a Small Step?' in A. *Moore* (ed.) *Police and Judicial Co-operation in the European Union*, Cambridge, 2004, 221-243.

concerning the position of criminal law within the EU. Furthermore, this division also drove apart administrative law enforcement and criminal law enforcement. My predictions from 1995²⁵ have come true. More and more often the EC and the EU table competing legislative proposals where the main concern is the fundamental question of the power to harmonize criminal law. In the case of many of the legislative initiatives from the period from 1993 to 2005, the Commission came to diametrically oppose the Council. There is no point in repeating every single initiative and counter-initiative here where the EC and the Member States have flagged the issue up in the Council. Two angles are however relevant for the present analysis. First of all, neither the Commission nor the Member States have submitted legislative proposals based on a well-thought enforcement and criminal law policy. In that sense, the Tampere programme²⁶ has provided insufficient direction. Even in policy areas of far-reaching integration, such as the internal market, the customs union or the monetary union there is no final enforcement element. In none of the institutions a policy plan has been formed to present an integrated vision on the need for harmonization accommodating prevention and punishment, and as part of the latter issue, on the relationship between administrative and criminal law enforcement. Both in the Council and in the Commission the approach has been predominantly ad hoc and eclectic. Striking in this context is that the Commission has not submitted any EC proposal for the criminal protection of the euro,²⁷ which is after all 'hardcore' EC monetary policy, and has gone along completely with the Council in the elaboration of a framework decision.²⁸ It is also striking that in some policy areas the Commission has failed to develop any initiative for the harmonization of punitive administrative law or criminal law or has only done so sparingly. In this context one might think of financial services and securities regulations. It is true that the recent Market Abuse Directive²⁹ obliges the Member States to enforce the provisions administratively, but no mandatory sanctions have been prescribed. Article 14(2) authorizes the Commission to draw a list of administrative measures and penalties, but this list is merely informative. The lack of any well-contemplated criminal law policy is also reflected in the initiatives for criminal law harmonization. Why, for instance, does the Commission press for the criminal law harmonization of environmental law and criminal law protection of the financial interests of the EC,³⁰ but fails to do the same in the field of competition or fisheries or the financing of terrorism? Why do the Member States urge for the criminal law harmonization of terrorism, xenophobia, the protection of victims of crime, but not for the criminal law harmonization of serious violations of food safety rules, intellectual property infringements or the financial management of businesses?

²⁵ *J.A.E. Vervaele* Law Enforcement in Community Law within the first and third pillar: do they stand alone?, *The Finnish Yearbook of International Law*, Vol. VII, 1996, 353-369.

²⁶ Most recently updated by COM(2004) 0401.

²⁷ Art. 12 of Regulation 974/98 limits itself to setting out a duty to enforce in wording that does not even reach the level of the minimum formulation as set out by the ECJ. The proposal for a regulation, COM(2000) 492 final, on the protection of the euro against counterfeiting did not contain any criminal law obligations.

²⁸ Framework Decision 2000/383, on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, OJ L 140/1, 2000.

²⁹ Directive 2003/6, OJ L 96/16, 2003.

³⁰ COM(2001)272 final, OJ C 240 E, 2001.

In addition, it is important to form a clearer picture of the institutional legislative skirmishes between the EC and the EU concerning criminal law harmonization. In sum, three types of legislative conflicts can be distinguished over the period between 1993 and 2005. The first type may be described as ‘warding off’. The Commission submits proposals for criminal law harmonization of Community law which the Council subsequently rejects. At best the proposal is neutralized and stripped of its criminal law packaging. The Council here applies an old legislative tactic that was used in the period before the entry into force of the Treaty on European Union. The Commission proposal for a regulation on official feed and food controls³¹ (2003) is an excellent example. The Commission emphasizes the need to provide for a functional harmonization of criminal law enforcement supplementing the existing harmonization of administrative law enforcement. The Commission claims that a basic list of offences committed intentionally or through serious negligence should be drawn up which could threaten feed and food safety and therefore public health, and for which the Member States must provide for criminal sanctions. The list should not be limited to offences related to actual placing on the market, but include all offences which may eventually lead to the placing on the market of unsafe feed or food. For this list of serious offences the Member States according to Article 55 should provide for minimum criminal standards:

- ‘1. Member States shall lay down the rules on penalties applicable to infringements of feed and food law and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. The Member States shall notify those provisions and any subsequent amendment to the Commission without delay.
2. For the purpose of paragraph 1, the activities referred to in Annex VI shall be criminal offences when committed intentionally or through serious negligence, insofar as they breach rules of Community feed and food law or rules adopted by the Member States in order to comply with such Community law.
3. The offences referred to in paragraph 2 and the instigation to or participation in such offences shall, as for natural persons, be punishable by sanctions of criminal nature, including as appropriate deprivation of liberty, and, as for legal persons, by penalties which shall include criminal or non-criminal fines and may include other penalties such as exclusion from entitlement to public benefits or aid, temporary or permanent disqualification from engaging in business activities, placing under judicial supervision or a judicial winding-up order.’

The fact that serious infringements of food safety might threaten public health has been conclusively proven by the various food scandals in numerous European countries which in some cases, for example the rapeseed oil poisoning case in Spain, have resulted in the death of many. Nevertheless, the Member States did not submit a proposal for a Framework Decision, but rather stripped the Commission proposal of its criminal law wrapping in the Council. In the adopted regulation, Article 55 now reads as follows:

- ‘1. Member States shall lay down the rules on sanctions applicable to infringements of feed and food law and other Community provisions relating to the protection of animal health and welfare and shall take all measures necessary to ensure that they are implemented. The sanctions provided for must be effective, proportionate and dissuasive.
2. Member States shall notify the provisions applicable to infringements of feed and

³¹ COM(2003)52 final, text available in electronic form only through Eur-Lex.

food law and any subsequent amendment to the Commission without delay.’³²

The second type may be described as ‘hijacking’, whereby the content of a proposal for a regulation or directive is copied into a proposal for a framework decision or vice versa. The Commission and the Member States take turns to hijack the content of each other’s proposals and subsequently package it in a different legal instrument. The clash concerning the harmonization of environmental criminal law is a point in case (framework decision versus directive).³³ In a number of cases this has led to a stalemate, whereas in others it has led to the adoption of framework decisions contrary to the opinion of the Commission and the European Parliament.

The third type may be termed ‘cohabitation forcée’, whereby two proposals are elaborated alongside each other and in harmony with each other. The substantive provisions and, as the case may be, provisions concerning administrative harmonization are included in a proposal for a directive or a regulation, while the criminal law harmonization aspects are incorporated in a framework decision. A good example of what is known as a double text approach is Directive 2002/90 coupled with Framework Decision 2002/946 concerning illegal immigration.³⁴ The package as finally approved is an excellent example of ‘cohabitation forcée’. The Directive limits itself to defining the prohibited acts and participation and to imposing the obligation to provide for effective, proportionate and dissuasive sanctions. The Framework Decision further substantiates the criminal law repertoire by means of a direct reference to the prohibitory provisions in the Directive. It is made compulsory to provide for criminal sanctions. For some infringements committed for financial gain custodial sentences of a maximum duration of at least a certain period are made mandatory. The Framework Decision further regulates the liability of and penalties for legal persons,³⁵ jurisdiction, extradition, stepped up judicial assistance, etc. The provisions of the Directive thus function as the substantive and moral substrate for the criminal law obligations laid down in the Framework Decision. Another good example concerns environmental pollution from ships where both proposals³⁶ were drafted by the Commission.³⁷ Article 6 of the proposal for a

³² Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules, OJ L 165/97, 2004.

³³ Framework Decision 2003/80 of 27 January 2003 on the protection of the environment through criminal law (OJ L 29, 2003) which was annulled by the Court of Justice and the Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law, COM(2001), 139 of 13 March 2001, OJ C 180, 2001, as amended by COM(2002) 544, OJ C 020 E, 2003.

³⁴ Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorized entry, transit and residence, OJ L 328/17, 2002, and Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence, OJ L 328, 2002.

³⁵ Not, however, the *criminal* liability of legal persons.

³⁶ Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements, OJ L 255/11, 2005 and Council Framework Decision 2005/667 of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution, OJ L 255/164, 2005.

³⁷ Often this involves interinstitutional cooperation between a directorate-general responsible for the specific subject and the directorate-general for the third pillar.

directive includes the obligation to provide for criminal penalties for the illegal discharge of polluting substance as defined in the Marpol International Convention for the prevention of pollution from ships, including in case of serious infringements, custodial sentences, also for natural persons. The proposal for a framework decision directly refers to Article 6 of the Directive and further defines the forms of criminal sanctions. The proposal for a framework decision further includes provisions concerning joint investigation teams, judicial assistance, etc. Here too the criminal law provisions in the proposal for a directive proved ultimately unpalatable to the Council. In the approved Directive all references to criminal law obligations have been eliminated. It is moreover common knowledge that the negotiations on this package progressed with great difficulty. Certain Member States with major interests at stake in this sector were extremely wary of criminal law obligations which could be assessed and enforced by the Commission.

In the proposals concerning migration and pollution at sea the Commission has had to accept its loss, but it has not yet given up. A recent example of 12 July 2005 is the combined Commission proposal for a directive *and* a framework decision concerning criminal measures to combat intellectual property infringements.³⁸ This proposal is the further development from Directive 2004/48 concerning enforcement of intellectual property rights,³⁹ which imposes the obligation on the Member States to provide for private law and administrative law measures and to implement the obligations following from the international TRIPs agreement which makes criminal enforcement mandatory. In the proposal for a directive the Commission clearly claims a direct power to impose criminal law harmonization, but in doing so restricts itself to the obligation for the Member States to criminalize intentional offences, to provide for certain methods of criminal participation and to impose criminal penalties, including custodial sentences. The further determination of the sanctions (level, etc.), the question of jurisdiction and some aspects of criminal procedure, such as the initiation of criminal proceedings independently of a complaint, are all regulated under the Framework Decision.

This further analysis brings to light several issues. There is no coherent European criminal law policy present where all or any actors are involved. The Commission, as the keeper of the Community's interests, considers it its duty to compel the Member States to provide for criminal sanctions for serious infringements of common interests in European integration, and it finds its efforts completely blocked by the Council or it finds that the Council is only prepared to impose such an obligation through an EU framework decision. The Member States are not concerned in the first place about the enforcement of Community policy, but about the fight against terrorism, organized crime, etc. It has already been evident to the Commission for some time that the Council would continue to claim the exclusive rights to criminal law harmonization for the third pillar, even contrary to the opinion of its own Legal Service.⁴⁰ The 'cohabitation' did not lead to the desired result either. The Commission has

³⁸ Proposal for a directive on criminal measures aimed at ensuring the enforcement of intellectual property rights and the proposal for a framework decision to strengthen the criminal law framework to combat intellectual property offences, COM(2005) 276 final, only available in electronic form through EUR-Lex.

³⁹ OJ L 157/45, 2004.

⁴⁰ In a number of opinions, amongst other things concerning the criminal enforcement of environmental law, the Council's Legal Service has made clear that EC law provides a legal basis for a limited harmonization of criminal law, restricted to the obligation to criminalize infringements of mandatory and prohibitory provisions and to provide for criminal sanctions. The modalities of the criminal sanctions and other aspects should, according to the Legal Service, be regulated in third-pillar framework decisions. With respect to the proposal for

had to let go of its ambitions in the field of criminal law and acknowledge the exclusivity of the third pillar in these matters, even in clear EC law policy areas. The fact that the obligation for the Member State to achieve criminal law harmonization is not imposed through a directive or a regulation is not a neutral conclusion. Framework decisions require unanimity. Directives and regulations are usually adopted by means of co-decision and qualified majority. This means that the European Parliament is competent to co-decide which results in greater democratic legitimacy. It is therefore far more difficult to reach a decision in the JHA Council than using the first pillar procedure. Furthermore, as opposed to framework decisions, regulations and unconditional and clear provisions of directives have direct effects. In the first pillar the Commission also has many more trumps up its sleeve to oblige the Member States to comply with criminal law harmonization. The Commission may start infringement proceedings against a Member State. The Member States may be held financially responsible for non-compliance with enforcement duties and the Member States can even be fined for failing to comply with Court rulings. The Community way therefore has many advantages, both in terms of legitimacy and in terms of efficiency.

The political stalemate could only be broken by a ruling on the principle from the Court. The Commission has therefore succeeded well to provoke such a ruling by raising objections under Article 35(6) EU against the legality of the Framework Decision approved by the Council on 27 January on the criminal enforcement of environmental law.⁴¹ With this Decision, the Council set aside a proposal submitted by the Commission for a directive on the criminal enforcement of environmental law.⁴² On 13 September 2005 the Court delivered its long-awaited judgment in Case C-176/03. This judgment is a second landmark ruling concerning the enforcement of Community law as in it the Court recognized the competence of the EC to harmonize the enforcement by criminal law of Community law. No less than eleven Member States intervened in the proceedings. Ten Member States⁴³ supported the position of the Council. The Netherlands was the only Member State to argue in favour of a combined criminal harmonization competence under EC law;

‘provided that the penalty is inseparably linked to the relevant substantive Community

a framework decision on the retention of the traffic data of service providers the Legal Service of the Council was of the opinion that these matters could only be regulated under an EC instrument. The opinions are confidential.

⁴¹ That the Commission did not start proceedings before the Court in the matter of EC fraud may be explained by legal reasons. At the time of the approval of the 1995 PIF Convention under the Maastricht third pillar, approval of a criminal law harmonization directive would only have been possible on the basis of Article 209A. This provision however did not constitute a legal basis for harmonization. This was only introduced by Article 280 of the Amsterdam Treaty on European Union. On that basis the Commission in 2001 submitted a proposal for a directive for criminal law harmonization, but without questioning the legal validity of the Conventions. The proposal for a directive was however provoked by the slow ratification procedures and the incomplete ratifications of the PIF protocols.

⁴² See *F. Comte* ‘Criminal environmental law and Community Competence’, *European Environmental Law Review* 2003, 147-156 in defence of the Community approach. Argued from the contrary: *Y. Buruma and J. Somsen* ‘Een Strafwetgever te Brussel inzake milieubescherming’, *NJB* 2001, 795-797 and *I.M. Koopmans* ‘Europa en de handhaving van het milieurecht: een pijler te ver?’, *NTER*, 2004, 127-132. For a balanced position, see *R. Ortlep, R. Widdershoven and C. Backes*, et al., *Lex Dura, Sed Lex. Opstellen over de handhaving van omgevingsrecht* 2005, Kluwer, Deventer, 159-176.

⁴³ Denmark, Germany, Greece, Spain, France, Ireland, Portugal, Finland, Sweden and the United Kingdom.

provisions and that it can actually be shown that imposing penalties under criminal law in that way is necessary for the achievement of the objectives of the Treaty in the area concerned (see Case C-240/90 Germany v Commission [1992] ECR I-5383). That could be the case if the enforcement of a harmonizing rule based, for example, on Article 175 EC gave rise to a need for criminal penalties'.⁴⁴

4. The Commission's View on the Harmonization of Criminal Enforcement after Case C-176/03

Commissioner *Frattini*, responsible for the European Area of Freedom, Security and Justice, is aware that the judgment places the Commission as the driving force behind legislative policy in the EC to present a systematic or consistent, horizontal vision for all policy areas. After consultations between the various Directorate-Generals the Commission in November 2005 submitted a specific communication⁴⁵ to the European Parliament and the Council concerning the implications of the Court's judgment in case C-176/03.

The Commission starts off by analyzing the content and scope of the Court's decision. Article 47 EU provides that EC law has priority over Title VI EU, i.e. the first pillar prevails over the third. The Court further held that Article 175 EC constitutes a proper legal basis for the matters regulated in Articles 1-7 of the Framework Decision. The Commission subtly points out that Articles 1-7 are criminal law provisions dealing with the definition of offences, the principle of the obligation to impose criminal penalties, the level of penalties, accompanying penalties and the rules on participation and instigation. The Court went further than the Advocate General in his Opinion by not only accepting that the EC may oblige the Member States to enforce by means of criminal law, but may also lay down in detail what the arrangements should be. The Commission then turns to the scope of the Court's judgment. The Commission highlights the fact that the judgment does not mean that the Court has hereby recognized criminal enforcement as an area of Community policy. Criminal enforcement is merely a tailpiece of a substantive policy area. However, the Commission does find that the Court's judgment may potentially impact all policy areas of negative integration (the four freedoms) and positive integration, for which criminal law methods may be necessary to ensure effective enforcement. This test of necessity must be defined functionally, on an area-by-area basis. For some policy areas no criminal enforcement is required, but for others it is. The necessity test also determines the nature of the criminal measures to be taken. The Court did not impose any restrictions there. Here too the approach is functional. The Commission does not elaborate further, but we may conclude from this that the Commission obviously wishes to leave the door open where necessary to harmonization of aspects of the general part of criminal law or of criminal procedural law. The Commission further indicates its preference for horizontal measures where possible, i.e. transcending specific policy areas. Here we might think of horizontal criminal measures for the agricultural sector and the structural funds in connection with fighting EC fraud or terrorism or organized crime. The Commission also believes that the judgment puts an end to the double-text approach, i.e. adopting directives and regulations for substantive policy and its administrative enforcement; and framework decisions for the criminal enforcement of that same policy. From now on, all this can be laid down in one single directive or regulation.

⁴⁴ From ground 36 in the Court's judgment in case C-176/03.

⁴⁵ COM(2005) 583 final.

In the second part of the communication the Commission discusses the consequences of the judgment more specifically. The Commission first of all indicates that criminal law provisions concerning police and judicial co-operation, including measures on the mutual recognition of judicial decisions and measures based on the principle of availability, fall within the area of competence of the third pillar. This is also true for the harmonization *per se* of the general part of criminal law or criminal procedural law in the framework of co-operation and mutual recognition. The criminal harmonization of policy areas that are not part of the EC Treaty, but that are nevertheless necessary for the objectives of the Area for Freedom, Security and Justice are placed within the third pillar. An interesting point is that in this second part the Commission further defines the conditions for criminal harmonization using the Community competence under the heading ‘*Consistency of the Union’s criminal law policy*’. The Commission clearly indicates that criminal harmonization under the EC competence is only possible if there is a clear need to make the policy in question effective. Furthermore, the requirements of the principles of subsidiarity and proportionality have to be met. This means that there is a strict obligation to provide grounds and reasons. The harmonization may concern the definition of offences, the criminal penalties, but also what are called ‘other criminal-law measures appropriate to the area concerned’. It is clear that the Commission does not from the start wish to pin itself down to merely the harmonization of the offence definitions and the criminal penalties. The Commission continues by stating that: ‘The criminal-law measures adopted at sectoral level on a Community basis must respect the overall consistency of the Union’s system of criminal law, whether adopted on the basis of the first or the third pillar, to ensure that criminal provisions do not become fragmented and ill-matched’. Both the Commission on the one hand and the Council and the European Parliament on the other must take care to ensure this consistency, and also prevent that Member States or the persons concerned are required to comply with conflicting obligations. This is an interesting requirement, but it also presupposes that the EU has a consistent criminal law policy in place. However, this is clearly not yet the case. Much is still to be done and gained here.

In the third part of the communication the Commission discusses the consequences of the Court’s judgment for actual legislative practice. In this, the Commission distinguishes between secondary legislation that has already been approved in the Council and pending proposals. The Commission considers it necessary to correct legislation of which it has become apparent after this judgment that it was adopted or proposed on the wrong legal basis. The EU institutions have a duty to restore their legality, and to provide legal certainty with respect to implementation in the Member States. In this context, the Commission also refers to its recent appeal to the Court for the annulment of Framework Decision 2005/667 of 12 July 2005 to strengthen the criminal-law enforcement of ship-source pollution.⁴⁶ The Commission envisages two strategies to perform the corrections in accordance with the Court’s judgment. Strategy number one is to identify specific criminal law measures from a list of adopted framework decisions and to transfer them into Community legislation, without any discussion as to content or scope. This is a formal and technical operation which requires a prior agreement between the European Parliament and the Council. The Commission also clearly indicates its own strategy, in case such an agreement would fail. In that case, the Commission will make use of its legislative initiative, not only to restore the legal basis, but also to at the same time prioritize substantive solutions in line with Community interests and needs. For the pending proposals it is clear that the ordinary legislative procedure applies allowing the Commission to amend its proposals where necessary. Finally, the Commission

⁴⁶ Case C-440/05, pending.

annexes a list of adopted secondary legislation and pending proposals which it considers need to be amended. The adopted secondary legislation concerns the criminal enforcement of the environmental protection;⁴⁷ the Euro⁴⁸ and non-cash means of payment;⁴⁹ money laundering, freezing, seizing and confiscation;⁵⁰ unauthorized entry, transit and residence;⁵¹ corruption in the private sector;⁵² attacks against information systems⁵³ and serious ship-source pollution.⁵⁴ Every time the Commission indicates the legal basis in the EC Treaty which should be used. At times the legal basis is specific, such as Article 123(4) EC for the criminal enforcement of the Euro or Article 80(2) EC for the criminal enforcement of ship-source pollution rules. Other times, the legal basis is based on the general power laid down in Article 95 EC, such as in the case of corruption in the private sector. In a number of cases, for example money laundering, a specific legal basis (*in casu quo* Article 47(2) EC) is combined with the general legal basis of Article 95 EC. Remarkably, however; the Commission omits to indicate which specific provisions or topics should be transferred to Community law. I believe that the Commission clearly wished to leave this point open for possible negotiations between the Council and the European Parliament.

As to the pending proposals, the Commission limits itself to two issues, namely the criminal-law protection of the Community's financial interests⁵⁵ and the criminal-law enforcement of intellectual property rights.⁵⁶ However, in a footnote the Commission also refers to a number

⁴⁷ Framework Decision 2003/80 of 27 January 2003 on the protection of the environment through criminal law (OJ L 29, 2003) which was annulled by the Court of Justice and the Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law, COM(2001), 139 of 13 March 2001, OJ C 180, 2001, as amended by COM(2002) 544, OJ C 020 E, 2003.

⁴⁸ Framework Decision on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the Euro, OJ L 140/1, 2000 as amended by Framework Decision OJ L 329/3, 2001.

⁴⁹ Framework Decision combating fraud and counterfeiting of non-cash means of payment, OJ L 149/1, 2001.

⁵⁰ Directive 91/308 on prevention of the use of the financial system for the purpose of money laundering, OJ L 166, 1991 meanwhile replaced by Regulation 2005/60 and the Framework Decision on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, OJ L 182/1, 2001.

⁵¹ Directive 2002/90 defining the facilitation of unauthorized entry, transit and residence, OJ L 328, 2002 and Framework Decision 2002/946 on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence, OJ L 328/17, 2002.

⁵² Framework Decision 2003/568 on combating corruption in the private sector, OJ L 192/54, 2003.

⁵³ Framework Decision 2005/222 on attacks against information systems, OJ L 69/67, 2005.

⁵⁴ Directive 2005/35 on ship-source pollution and on the introduction of penalties for infringements, OJ L 255, 2005 and Framework Decision 2005/667 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution, OJ L 255/11.

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Proposal for a Directive of the European Parliament and of the Council on the criminal-law protection of the Community's financial interests, OJ C 240E/125, 2001.

⁵⁶ Proposal for a directive on criminal measures aimed at ensuring the enforcement of intellectual property rights and the proposal for a framework decision to strengthen the criminal law framework to combat

of specific additional areas. It qualifies the proposal for a framework decision on combating racism and xenophobia as being in conformity with the Treaty, but adds that any future legislative initiative for the purpose of criminal-law enforcement should occur through a directive based on Article 13 EU. The Commission also points out two proposals whose preparation is currently stalled, namely the Greek proposal concerning the fight against trafficking in human organs and tissues⁵⁷ and the German proposal concerning criminal-law protection against fraudulent or other unfair anti-competitive conduct in relation to the award of public contracts in the common market.⁵⁸ For this analysis the Commission has not yet put all its cards on the table. Notably, no insight is provided in potential proposals for harmonization of policy based on which the Commission has not yet undertaken any action. One could think of for example the common agricultural or fisheries policy or financial services. Moreover, a number of failed proposals, such as that on feed and food controls, are not mentioned.

5. The Judgment in Case C-176/03: Reception in the Member States and in the JHA Council

Despite the unanimous opinions of the various legal services of the EU organs, including that of the Council itself, the Court judgment has been greeted with amazement and disbelief by many governments. That the Court decision would not be embraced by the Member States is hardly surprising given their numerous interventions in the proceedings in favour of the Council. However, the governments have mainly focused their criticism on the Communication of the Commission and introduced this in the JHA Council. In Denmark the Minister of Justice wasted no time informing Parliament of the judgment and submitting a reservation.⁵⁹ The Minister maintained the view that no legal basis could be found in the EC Treaty, even though expressed an awareness that the Court judgment is not limited to environmental law. In France, the initiative came from Parliament itself. On 25 January 2006 the European Affairs Commission of the French *Assemblée Nationale* informed the Speaker of the *Assemblée*.⁶⁰ The Commission is of the opinion that the Court has acted beyond its competence and has demonstrated a certain *fédéralisme judiciaire*. The Commission also states that it is high time to end the *gouvernement des juges* and restore the power to the entities for whom it belongs, namely the governments of the Member States. The Commission therefore proposes to apply the bridging provision of Article 42 EU and thereby build an emergency brake procedure in the European Council.⁶¹ The Commission is not terribly pleased with the EU Commission's communication in response to the judgment either. It rejects what it considers 'its excessive interpretation'. According to the Commission, it is impossible to conclude from this judgment that there is a Community competence for criminal harmonization in all common policy areas of the EC and the four

intellectual property offences, COM(2005) 276 final, only available in electronic form through EUR-Lex.

⁵⁷ Proposal for a framework decision of 26 April 2003, OJ C 100/27, 2003.

⁵⁸ Proposal for a framework decision of 4 September 2000, OJ C 253/3, 2000.

⁵⁹ Memorandum of 13 October 2005, http://www.euo.dk/upload/application/pdf/a16a3e79/2005_sv21.pdf

⁶⁰ <http://europapoort.eerstekamer.nl/9345000/1/j9vvgy6i0ydh7th/vgbwr4k8ocw2/f=/vh7rdrlf7yxv.pdf>

⁶¹ This is the emergency brake procedure provided for in the European Constitutional Treaty in case of criminal law harmonization which poses a threat to essential interests of a Member State.

freedoms of the internal market. Instead, the Court limited this power to essential, cross-sector and fundamental objectives.

In the Netherlands the Inter-Departemental Commission on European Law (ICER) argues in favour of care being taken to preserve the mix of instruments, i.e. the choice in practice between the application of administrative sanctions or criminal sanctions, and thus argues against making the competence of the EC in the field of the specific definition of criminal sanctions too exclusive. The ICER's opinion was taken over in its entirety in the Cabinet position of April 2006⁶² as presented to Parliament. The Senate of Parliament established a special commission for JHA matters, reporting on the criminal law-related proposals of the European Commission. This commission checks whether proposals comply with the principles of subsidiarity and necessity.

In January 2006 in Vienna the JHA Council during informal consultations examined the Commission's communication for the first time. The Council is of the opinion that there is no urgency to enact rectifying legislation. Many adopted framework decisions have by now been implemented in national law. It also emerged that the Council is not prepared to conclude a transfer agreement in favour of the first pillar. The Commission indicated on the spot that it was prepared to run through the legislative process on a case-by-case basis. The Ministers agreed on the following three principles as the basis for considering the impact of the Court's case law on other Community policies:

- “1. As a general rule, criminal law as well as the rules of criminal procedure fall outside the Community's competence (see paragraph 47 of the judgment) The Community must therefore interpret and apply any exception to this general rule in a narrow sense.
2. The Community legislator is entitled to take legislative 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 are fully effective (see paragraph 47 of the judgment). This implies that the Community legislator cannot oblige Member States to provide for criminal penalties for violations of rules which the Community has not or not yet, established or which have been established pursuant to national law only.
3. The Community legislator must leave to the Member States the choice of the criminal penalties to apply, as long as they are effective, proportionate and dissuasive (see paragraph 49). Consequently, Community acts cannot determine in detail and exclusively the level of penalties to be introduced, they should leave a discretion to the Member States”.

It remains, of course, to be seen if these common principles will be held up by the Court of Justice in its upcoming judgements. The Ministers elaborated moreover during the formal JHA Council of February 2006⁶³ a procedure to be followed with regard to legislative files containing proposals relevant to the development of criminal law policy. This procedure requires the Presidency to draw the attention of COREPER II to such proposals. After seeking COREPER II's guidance, the Presidency refers the proposal to an appropriate working party for consultation, taking into account all relevant factors, such as its content, its

⁶² DIE-402/06, <http://europapoort.eerstekamer.nl/9345000/1f/j9vvgv6i0ydh7th/vh61mh1tt9ua>.

⁶³ See document 7876/06 of the Presidency, Procedural consequences of the judgment of the Court of Justice in case C-176/03, 16 February 2006.

aim and the expertise required. The procedure furthermore requires the Article 36 Committee (CATS) to be kept informed, ensuring an opportunity for JHA experts to offer views on criminal law provisions from an early stage of the negotiations, which can then be conveyed to the relevant working party. The JHA experts consulted will in the rule be the national delegates of the Justice Department in the Article 36 Committee's Working Party on Substantive Criminal Law (DROIPEN). The Presidency can submit the proposal also to COREPER II with the aim to submit any relevant question to the JHA Council. The substantive EC Council of Ministers remains fully responsible for the entire content of the proposal. In this way, consultations could be held between the JHA Council and the other Community Councils in the areas concerned and the JHA Ministers could ensure the consistency of the Union's criminal law system.⁶⁴ The position of the JHA Council is clearly more moderate than the views of some of the national Ministers of Justice. The competence to harmonize, including the harmonization of criminal sanctions and possibly aspects of criminal procedural law, is recognized. In June 2007 the application of this procedure has been evaluated under the German Presidency. In practice proposals with a dominant criminal law content have been referred to a JHA working party. For proposals in which the criminal law content is only a small part of a larger content, only an opinion has been asked to a JHA working party. The German Presidency proposes to consolidate this procedure. .

6. The actors involved: the European Commission's and JHA Council's realism and the ECJ's case-law.

From the analysis of the positions of the Member States and of the position of the JHA Council of Ministers it is clear that the Commission overplayed its hand with its communication concerning the Court's judgment in case C-176/03. The Commission has acknowledged this and has clearly opted for a cautious strategy whereby a number of concrete harmonization proposals are submitted to the Council.

The Commission has meanwhile published a new proposal for a Directive of the environment through criminal law,⁶⁵ replacing the annulled framework decision⁶⁶ and the proposal for a directive of 2001.⁶⁷ In this area we can speak of a legal vacuum to be filled in. The new proposal is still based on the idea of minimum harmonization, but goes slightly beyond the offence included in the proposal directive of 2001, by imposing in Article 3(a) that discharge, emission or introduction of a quantity of materials or ionising radiation into air, soil or water, which causes death or serious injury to any person constitutes a criminal offence, independent of the unlawfulness of the action (keine Verwaltungsaksezorität). Secondly, the new proposal clearly goes much further where the harmonization of sanctions is concerned. Regarding imprisonment, the proposed approximation is based on a three-step scale, depending on the mens rea (serious negligence or intent) and the respective aggravating circumstances. The system of fines for legal persons, which can be administrative or criminal, also follows a three-step approach. The proposal also includes alternative sanctions (such as placing under judicial supervision, a ban on engaging in commercial activities or the publication of judicial

⁶⁴ Point 3.3.2 of the Hague Programme of 24 November 2005.

⁶⁵ COM(2007) 51 final.

⁶⁶ Council framework decision 2003/80/JHA, OJ L 29/55, 09.02.2003.

⁶⁷ Com(2001) 139 final.

decisions) for both natural and legal persons. Despite the cautious strategy mentioned above, the Commission has submitted a varied set of proposals with criminal law substance, most of which are related to the further implementation and execution of international law instruments, including criminal law enforcement obligations. The Commission further submitted an amended proposal for a directive on criminal measures aimed at ensuring the enforcement of intellectual property rights.⁶⁸ This proposal is related to the WTO Agreement on Trade-Related Aspects of Intellectual Property (the “Trips Agreement”) which was approved by means of Council Decision 94/800/EC.⁶⁹ The criminal law substance of the proposal to a high extent accords with that of the proposal for the environmental directive. The Commission also for the first time included criminal law-related provisions in a proposal for a regulation (proposal of 18 December 2006 for a new Council Regulation setting up a Community regime for the control of exports of dual-use items and technology).⁷⁰ Article 15(2) provides for the exchange of information between the competent authorities concerning convictions for criminal offences related to the export of dual-use items or technologies, as well as other intelligence. Under Article 21 Member States are to lay down criminal penalties for at least serious infringements of the provisions of the regulation, especially for the unauthorized export of items that are to, or can be, used in connection with the development or manufacture of chemical, biological or nuclear weapons or of missiles capable of their delivery, as well as for the falsification or omission of information with a view to obtaining an authorization that would otherwise have been denied. The obligation to lay down criminal penalties is based on the objective of strengthening the EU regime on the export of dual-use items, on a call made in UN Security Council Resolution 1540 for the imposition of civil or criminal penalties for infringements of provisions to control exports, as well as on the European Strategy against the proliferation of WMD. The Commission also submitted a proposal for a directive amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons.⁷¹ The Commission has, on behalf of the EC, signed the Protocol on the Illicit Manufacturing and Trafficking of Firearms, their Parts, Components and Ammunition as annexed to the UN Convention against Transnational Organized Crime.⁷² Article 16 of the Commission proposal imposes upon Member States the obligation to define as criminal offences a series of conduct linked to the manufacturing and trafficking of firearms. The proposal does not contain any references to the possible harmonization of the sanctions to be imposed. The Commission has very recently submitted a proposal for a directive providing for sanctions against employers of illegally residing third-country nationals.⁷³ The proposal contains a general prohibition on the employment of third-country nationals who reside illegally. Serious infringements must be sanctioned by criminal penalties. Article 10 defines which conduct must be defined at national level as a criminal offence. Factors are the significance of the numbers employed, the time-frame during which the offences occurred, repeat offending, etc. The proposal does not harmonize the sanctions

⁶⁸ COM (2006) 186 final.

⁶⁹ OJ L 336, 23.12.1994, p. 1.

⁷⁰ COM (2006) 829 final.

⁷¹ COM (2006) 93 final.

⁷² OJ L 280, 24.10.2001, p 5.

⁷³ COM (2007) 249 final.

to be imposed under criminal law. Under Portuguese presidency there will be a joined session of the Council of Justice Ministers and the Council of Employment, Social Affairs, Public Health and Consumer protection on this proposal. It is interesting to note that in other proposals, like the one for a new regulation on the Community Customs Code⁷⁴ which is one of the most harmonized areas of EC law, the Commission did not include in Article 22 on penalties any criminal offences or criminal sanctions at all, even though recital 12 of the regulation underlines the need for dissuasive sanctioning: “It is necessary to ensure an appropriate level of effective, dissuasive and proportionate sanctions throughout the Internal Market in order to discourage any serious infringements of the customs rules and thus reduce risk of fraud, of threats to safety and security, and to protect the financial interests of the Community”. The same can be said of the draft regulation concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visa.⁷⁵ Article 29 of the Presidency proposal⁷⁶ seems to go beyond the Commission proposal.⁷⁷ However, both stop short of imposing criminal sanctions for the misuse of data. The least that can be said is that it is not very clear from the proposals when and by which criteria the Commission does in fact opt for criminal law obligations.

The proposals on environmental protection, protection of intellectual property rights and on weapons were sent by COREPER II to the Working Party on Substantive Criminal Law (DROIPEN) for further discussion. It is clear from the meetings of the Working Party that the Member States are calling for the clarification of some fundamental issues. Under debate, for instance, is whether the Community legislator should confine itself to ensuring, by criminal law means, the enforcement of Community law or of such national law that transposes Community law, or whether the directive should also apply to purely national environmental law. Quite a number of Member States are of the opinion that only violations of Community environmental legislation should be covered by the directive. The original proposal for a directive for the protection of the environment through criminal law⁷⁸ was indeed limited to the criminal law enforcement of Community environmental legislation as listed in the annex. The new 2007 proposal for a directive⁷⁹ does indeed in Article 2 define *unlawful* as “infringing Community legislation or a law, an administrative regulation or a decision taken by a competent authority in a Member State aiming at the protection of the environment”. As a consequence, the new proposal does not include an annex of Community legislation. This could be considered as a widening of the scope of application of Community harmonization in this field, but that is not in fact the case, bearing in mind that in the Council Framework

⁷⁴ COM (2005) 608.

⁷⁵ COM (2004) 835.

⁷⁶ Art. 29 of the Presidency Proposal : “Member States shall take the necessary measures to ensure that any misuse of data entered in the VIS is punishable by penalties, including administrative and /or criminal penalties in accordance with national law, that are effective, proportionate and dissuasive”.

⁷⁷ Art. 29 of the Commission Proposal : “The Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation relating to data protection and shall take all measures necessary to ensure that they are implemented (...)”.

⁷⁸ COM (2001) 139 final.

⁷⁹ COM (2007) 51 final.

Decision on the protection of the environment through criminal law⁸⁰ the Member States defined *unlawful* in Article 1 (a) in a similar way as in the proposed new directive, namely as: “infringing a law, an administrative regulation or a decision taken by a competent authority, including those giving effect to binding provisions of Community law aiming at the protection of the environment”. Thus, the Commission did nothing other than taking over the agreed upon need by 27 Member States for the criminal protection of the environment. Member States that are now watering down the scope of application of the proposed directive are evidently applying a double standard. Member States are further of the unanimous opinion that the discussion on the insertion of criminal sanctions in the directive should be postponed until the ECJ has ruled in case C-440/05 on the Commission’s action for annulment of the Framework Decision to strengthen the criminal law framework for the enforcement of the law against ship-source pollution, which ruling is expected to be handed down towards the end of 2007. This judgment should offer more insight into the scope of the harmonization competence in the EC for criminal law enforcement, providing answers to questions such as ‘Is such harmonization also possible in fields like transport?’ and ‘Does it also concern sanctions?’, etc.

Speculation about this is rife as the Court of Justice and the Court of First Instance have not yet handed down clearly crystallized case-law on the distribution of competence between the pillars, apart from the criminal law aspects. This is especially clear in matters which also have a primordial law enforcement aspect (without being of a purely criminal-law character), but also have links with the internal market. In joined cases C-317/04 and 318/04 the European Parliament and the European Data Protection Supervisor challenged the Agreement between the EC and the USA on the data processing of passenger name records (PNR) of air passengers by the air carriers to the USA Bureau of Customs and Border Protection⁸¹ because of lack of sufficient data protection. In its judgment the Court takes into account that the PNR data are initially collected by airlines in the course of an activity which falls within the scope of Community law, namely sale of an aeroplane ticket which provides entitlement to a supply of services. However, the Court underlines that the data processing is quite different in nature. The data processing is not necessary for a supply of services, but is regarded as necessary for safeguarding public security and for law-enforcement purposes. In other cases of double objectives the Court was willing to accept a Community legal basis, but not in this case. It annulled both Council Decisions, which means that this matter has to be regulated under the third pillar.⁸² Taking into account this judgment, Ireland challenged Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, as the main or predominant purpose of the Directive is to facilitate the investigation, detection and

⁸⁰ Framework Decision 2003/80/JHA, OJ 2003, L 29/55.

⁸¹ Joined cases C-317/04 and C-318/04, <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=nl&newform=newform&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&alldocrec=allldocrec&docj=docj&docor=docor&docop=docop&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=allldocnorec&docnoj=docnoj&docnoor=docnoor&typeord=ALLTYP&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=&domaine=&mots=PNR&resmax=100&Submit=Zoeken>

⁸² The absurd consequence is that less data protection will be provided, as there is no general regime for data protection in the third pillar and as the proposal for a data protection regime has meanwhile excluded application to data transfer to third countries.

prosecution of serious crime, including terrorism.⁸³

The Commission on the other hand challenged a Council Decision in the second pillar (title V of the EU Treaty), by which a European Union contribution was granted to ECOWAS in the framework of the Moratorium on Small Arms and Light Weapons Directive on the control of the acquisition and possession of weapons.⁸⁴ In the eyes of the Commission, the CFSP decision is an infringement of Article 47 TEU, since it affects Community powers in the field of development aid.

In Cases T-306/01, *Ahmed Ali Yusuf Al Bakaraat* and T-315/01, *Abdullah Kadi*, the Court of First Instance construed a legal basis in the EC Treaty for the lists of sanctions against organizations and persons who are suspected of being involved in the financing of terrorism, by combining provisions from the EC Treaty with Article 2 EU, the objective of realizing a common foreign and security policy.

This diverging case-law of the Court of First Instance and the Court of Justice does not immediately warrant the conclusion that the Court of Justice will decide differently in case C-440/05 than it did in case C-176/03. After all, this does not involve competences which have links with both Community policy and third pillar policy. Initially, this concerns the question of whether the approximation of criminal law is an essential measure to ensure the effectiveness of a Community policy. This will require a file-by-file review.

Just before the submission of this article Advocate *General Mazäk* did publish his opinion in case C-440/05. It is clear from the proceedings that the Council could count on the support of the 19 intervening Member States.⁸⁵ The AG underlines that, contrary to the view expressed by certain governments, article 47 EU establishes the primacy of community action and law under the EC Treaty over activities undertaken on the basis of Title V or Title VI of the EU Treaty⁸⁶ and that it does not make a difference if the Community, at the time of the adoption of the framework decision, had already or not yet adopted legislation with regard to the matters covered.⁸⁷ Second, he underlines that if the Court were to find that, for one reason or

⁸³ Case C-301/06, <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&alldocrec=alldocrec&docj=docj&docor=docor&docop=docop&docav=docav&docsom=docsom&docinf=docinf&alldocnrec=alldocnrec&docnoj=docnoj&docnoor=docnoor&typeord=ALLTYP&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=C%2F301%2F06&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=&domaine=&mots=&resmax=100&Submit=Submit>

⁸⁴ Case C-91/05, <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&Submit=Submit&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&alldocrec=alldocrec&docj=docj&docor=docor&docop=docop&docav=docav&docsom=docsom&docinf=docinf&alldocnrec=alldocnrec&docnoj=docnoj&docnoor=docnoor&typeord=ALLTYP&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=C%2F91%2F05&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=&domaine=&mots=&resmax=100>

⁸⁵ Were granted leave to intervene: Portugal, Belgium, Finland, France, Slovakia, Malta, Hungary, Denmark, Sweden, Ireland, Czechia, Greece, Estonia, United Kingdom, Latvia, Lithuania, Netherlands, Austria and Poland.

⁸⁶ Paragraph 53 of the opinion.

⁸⁷ Paragraph 57 of the opinion.

another, there is no such competence under the policy on transport that would not, strictly speaking, be the end of the story. There can be alternatives for the legal basis in the EC Treaty. The AG does reject the argument of the Member States that the EC criminal competence should be limited to the environment or to substantial matters with a horizontal approach in the EC Treaty. His approach is mainly that the criminal law competence should be a corollary to the general principle of effectiveness of Community law. For that reason he accepts that art. 80 (2) EC does provide the legal basis for the criminal law enforcement of ship-source pollution, instead of art. 31 (1) (e) and art. 34(2) (b) EU and proposes that the Court should annul framework decision 2005/667/ JHA. However, he does agree with the opinion of AG *Ruiz-Jarabo Colomer* in the C-176/03 case: “the Community legislature is entitled to constrain the Member States to impose criminal penalties and to prescribe that they be effective, proportionate and dissuasive, but beyond that, it is not empowered to specify the penalties to be imposed”.⁸⁸ He believes that otherwise it could lead to fragmentation and compromises the coherence of national penal systems and that member states are as a rule better placed than the Community to translate the concept of effective, proportionate and dissuasive criminal penalties into their respective legal systems and societal context. It remains to be seen if the Court will follow the AG’s opinion on the whole.

7. Conclusion

Although the Commission has tempered its ambitions after the judgment of the Court in Case C-176/03, there is no doubt as to the consequences of the Court’s judgment for the Europeanization of criminal law and therefore also for the criminal law dimension of European integration. Is the reproach that the Court has exceeded its competence justified? Is this really an example of a *gouvernement des juges*? Where have we heard this before? When in 1963 and 1964 the Court in *Van Gend en Loos* and *Costa v Enel* established the priority and direct effect of Community law as constitutional principles, the Member States were also united in their outrage. Since then, however, these principles have been considered as the basic pillars upon which European integration rests and furthermore it is generally accepted that European integration would have failed without the autonomy of the Court. Moreover, some Member States are hardly in a position to take the Court to task or to appeal for the autonomy of the Member States. France, for example, has built up an impressive list of cases of failed enforcement, and has induced the financial wrath of the Commission and the Court by ignoring the Court’s findings against it in the case concerning fisheries enforcement.⁸⁹ In this recent judgment the Court has also taken painstaking care: it has opted to sit in full chamber and it has taken its time with the case. In my view, the judgment is consistent with the Court’s approach in the past. The Court has never subscribed to the exclusive powers of the Member States or the third pillar in the field of criminal law. The Court does indeed apply an extensive interpretation of the EU Treaty, but has been doing so for dozens of years and by taking a functional approach, namely realizing the objectives of European integration.⁹⁰

⁸⁸ Paragraph 103 of the opinion.

⁸⁹ Case C-304/02, *Commission v. France*, judgment of 12 July 2005, not yet reported, text available through the European Court of Justice’s website.

⁹⁰ In Case T-306/01, *Ahmed Ali Yusuf Al Bakaraat – T-315/01, Abdullah Kadi*, the Court construes a legal basis in the EC Treaty for the lists of sanctions against organizations and persons who are suspected of being involved in the financing of terrorism, by combining provisions from the EC Treaty with Article 2 EU, the objective of realizing a common foreign and security policy.

However, I agree with those who are critical of the judgment that the Court would have done well to provide more extensive reasoning for its decision, which would have prevented a number of present doubts from arising. First of all, the Court does not expressly discuss the material scope of the judgment. In my view, the Commission of the French *Assemblée* has got hold of the wrong end of the stick. Of course the EU Commission will have to provide grounds to demonstrate that the objective in question is essential to European integration and that the harmonization of criminal law is effective and necessary. However, I find it impossible to conclude from ground 42 (cross-sector and fundamental nature of the objective) that that is the ultimately decisive criterion or that the harmonization of criminal law would be out of the question for, for example, guaranteeing food safety, tackling EC fraud or protecting the Euro. After all, would it not be odd if harmonization were possible for supporting policies, but not for areas of exclusive Community policies? A second problem in connection with the material scope concerns the way in which Articles 135 and 280 EC are worded where they exclude *the application of national criminal law* and *the national administration of justice* from the power to adopt measures. The Court limits itself to observing that these provisions do not stand in the way of criminal law harmonization in environmental matters. However, this has not clarified what the scope of these provisions actually is for possible criminal law harmonization. It is interesting that the Dutch Council of State in its opinion⁹¹ considers that criminal law harmonization is inherent in Article 280 and that the restrictions mentioned do not stand in the way of the Community obligations to criminalize and the harmonization of the definitions of the offence. The principles, on which the national criminal justice systems are based, such as the choice whether to prosecute, discretion in sentencing, etc., are excluded. It is also to be hoped that the judgment of the Court in Case C-440/05 will shed more light on the harmonization of criminal sanctions. In this case, the Commission after all expressly states that the provisions from the challenged framework decision on combating ship-source pollution that concern the type and level of criminal sanctions also fall within the Community competence.

The discussion concerning the legal interpretation of the judgment is one thing; converting this legal competence into political currency in the Council is another. It is true that the co-decision procedure offers more chance of success than the unanimity procedure and that the Council will have to guard against being reprimanded again by the Court. Despite the Council's and the Member States' sceptical attitude it would still be the logical thing for some policy areas, such as serious infringements of stock market rules (insider dealing, market abuse, etc.) to unite the substantive rules and administrative and criminal law enforcement into one Community instrument and in this way prescribe for an integrated enforcement model.

Criminal-law enforcement should furthermore remain the tailpiece, based on the idea of an *ultimum remedium*. Communitarization of criminal law does thus not mean the end of administrative enforcement law. The European Commission also attaches great value to administrative enforcement. Moreover, the duty of criminal-law enforcement based on a regulation or a directive does not automatically mean that all cases must also be criminally investigated and prosecuted. The Member States are and remain competent to determine after thorough consideration which enforcement system (private law, administrative law or criminal law) is best used in a given case. The national legislator can thus continue to use

⁹¹ Opinion of the Council of State, 31 August 2001, reference no. W03.01.0420/I/A, annex to TK II 2001-2002, 22 112, no. 207. The Cabinet rightly increasingly asks the Council of State for its opinion on European legislative proposals.

models whereby certain actions can be curtailed both administratively and under criminal law (mix of instruments). Even in the case of a duty to enforce through criminal law, the Member States still retain the power to decide whether to prosecute or not. However, this choice must be based on appropriate considerations, including the European interests at stake.

Does all this mean that we can now sit back and relax and go back to the business of the day? I should think not. More than ever the Member States are required to think about a European criminal policy, both as concerns the enforcement of Community policy and as concerns the further definition of the area of freedom, security and justice. Discussions will have to take place in the Member States concerning the common interest in effective enforcement of Community policy and the internal market, the realization of the common area and the connected common rule of law guarantees. Criminal law undeniably reflects a piece of the national legal culture and it is therefore a symbol of state sovereignty. In the development of a European integration model based on shared sovereignty it is only logical that the Member States co-operate in the creation of a common legal culture, also in the area of criminal law. The Member States and the European Union need a commonly supported criminal law policy. The Hague programme is too one-sidedly focused on the area of freedom, security and justice. This programme has to be recalibrated as a result of the Court's judgment by the insertion of the enforcement of Community law. The Court's judgment also offers a perfect opportunity to re-examine the part on criminal law harmonization in the Constitutional Treaty. Article III-272(2) for example offers the perfect basis for an integrated enforcement policy in the EU.⁹²

The Court's judgment transcends the institutional debate and forces us to take up the discussion of the position of criminal law in the European integration. The recent opinion of AG in case C-440/05 goes in the same direction. Instead of exclusively focusing on the *national* protection of criminal law values it is high time to focus on a *European* agenda of criminal law values. Only in this way we may give substance to mutual trust between the Member States and the enforcement bodies and instil faith in the citizen in criminal justice in Europe. The object of the debate is no longer whether we want European criminal law, but what we want it for and under what conditions. The work of Klaus Tiedemann, from his publications on subsidy fraud to his major project on Europa-Delikte, is a constant source of guidance. Hopefully, he will continue to guide us further in the years to come. We will need this guidance in order to fill in the criminal law agenda in the future Treaty of the EU (the Reform Treaty) and to strike the right balances in enforcing Union policies and also to realize the *ultima ratio* in EU criminal policies.

⁹² Vogel, J. 'The European integrated criminal justice system and its constitutional framework', *Maastricht Journal of European and Comparative Law*, 2005, 125-147.