OPINION OF ADVOCATE GENERAL MAZÁK
delivered on 28 June 2007 [1]

I — Introduction

1. By its application under Article 35(6) EU, the Commission is seeking annulment of Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution ('the framework decision') [2] on the grounds that, in infringement of Article 47 EU, the measures contained therein providing for an approximation of Member States' legislation in criminal matters should have been adopted on the basis of the EC Treaty rather than on the basis of Title VI of the Treaty on European Union.

2. Thus the present case concerns the distribution of competences between the first and the third pillars of the European Union as well as between the Community and the Member States in the area of criminal law — an area widely perceived as the preserve of State authority and sovereignty — and is therefore of truly constitutional significance.

3. It constitutes a follow-up to the judgment of 13 September 2005 in *Commission* v *Council* [3] by which the Court annulled Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law [4] on the ground that the measures at issue in that case, requiring the Member States to prescribe criminal penalties for a number of environmental offences, fell properly to be adopted by the Community on the basis of Article 175 EC.

4. However, that ruling leaves delicate questions to be considered as to the circumstances in which the Community has competence to oblige the Member States to provide for criminal penalties, and the precise extent to which that competence may be exercised.

1 — Original language: English.
2 — OJ 2005 L 255, p. 164.
3 — Case C-176/03 [2005] ECR I-7879.
4 — OJ 2003 L 29, p. 55.

5. On those points, the Commission and the European Parliament, on the one hand, and the Council and the 20 intervening Member States, on the other, have formed completely opposing views as to the implications of Case C-176/03.

6. The Commission and the European Parliament, which have also set out their views on the inferences to be drawn from that judgment in a communication [5] and a resolution, [6] respectively, interpret it broadly to mean that the Court's reasoning applies beyond the area of environmental protection and confirms that the Community legislature is in principle competent to adopt, under the first pillar, any provisions relating to the criminal law of the Member States that are necessary to ensure that rules of Community law are fully effective. It should be added that, in accordance with that interpretation, the Commission has already submitted proposals for the adoption of a number of Community directives obliging Member States to provide for criminal penalties in their national laws. [7]

5 — Communication of 23 November 2005 from the Commission to the European Parliament and the Council on the implications of the Court's judgment of 13 September 2005 (Case C-176/03 Commission v Council) (COM(2005) 583).

6 — European Parliament resolution on the consequences of the judgment of the Court of 13 September 2005 (C-176/03 Commission v Council) (2006/2007(INI)).

7 — See Amended Proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights (COM(2006) 168 final) and Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law (COM(2007) 51 final).

7. By contrast, all the Member States which have submitted observations in the present proceedings take the view that the findings of the Court in Case C-176/03 are to be construed restrictively as relating exclusively to environmental policy and that it is in any event outside the competence of the Community to define the type and level of criminal penalties to be provided for by the Member States.

8. Thus it is against the background of that controversy that the Court is called upon in the present case to shed light on the meaning of its judgment in Case C-176/03 with regard to the correct delimitation of the competence of the Community in the area of criminal law.

II — Legal framework and background

9. The framework decision was adopted on 12 July 2005 on the basis of Title VI of the Treaty on European Union, and in particular Articles 31(1)(e) EU and 34(2)(b) EU.

10. With a reference to the shipwreck of the tanker Prestige, it is stated in the preamble to

the framework decision that the fight against intentional or seriously negligent ship-source pollution constitutes one of the Union's priorities and that the legislation of the Member States should be approximated to that end (second and third recitals).

11. As appears from the fourth recital, that approximation is to be carried out by means of a 'double-text' mechanism comprising, on the one hand, the framework decision and, on the other, 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 ('the directive'), [8] whereby the framework decision is designed to supplement the directive with detailed rules on criminal matters.

12. Accordingly, the framework decision requires the Member States to prescribe criminal penalties in respect of ship-source discharges of polluting substances into the sea, which are to be regarded — pursuant to the framework decision, read in conjunction with the directive — as criminal offences.

13. Article 1 of the framework decision refers, as regards the applicable definitions, to Article 2 of the directive.

14. Article 2 of the framework decision requires each Member State to take the measures necessary to ensure that an infringement within the meaning of Articles 4 and 5 of the directive [9] is regarded as a criminal offence.

15. Article 3 ensures that the aiding, abetting or inciting of such a criminal offence is itself punishable.

16. Article 4 of the framework decision requires each Member State to ensure that the conduct referred to in Articles 2 and 3 is punishable by effective, proportionate and dissuasive criminal penalties and prescribes, moreover, in some detail the type and level of penalties to be imposed. In that regard, it determines in respect of various offences appropriate maximum penalty bands applicable in the case of custodial sentences.

17. Article 5 obliges Member States to take measures to ensure that legal persons can be held liable for offences under the framework decision in the circumstances specified.

8 — OJ 2005 L 255, p. 11.

9 — Article 4 of the directive, entitled 'Infringements', states: 'Member States shall ensure that ship-source discharges of polluting substances into any of the areas referred to in Article 3(1) are regarded as infringements if committed with intent, recklessly or by serious negligence. These infringements are regarded as criminal offences by, and in the circumstances provided for in, Framework Decision 2005/667/JHA supplementing this Directive.' Article 5 of the directive provides for certain exceptions to Article 4.

18. Article 6 provides for penalties against legal persons and contains specifications as to the nature and maximum level of those penalties.

19. Article 7 of the framework decision concerns jurisdiction.

20. Articles 8 and 9 deal, respectively, with the notification to the Commission and other Member States of information relating to an offence, and with the designation of contact points.

21. Finally, Articles 10 to 12 govern the territorial scope, the implementation and the entry into force of the framework decision.

22. The directive, for its part, which invokes in its preamble the Community's maritime safety policy and the protection of environment, was adopted on the basis of Article 80(2) EC, under Title V relating to transport. Article 80(2) EC reads as follows:

'The Council may, acting by a qualified majority, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport.'

23. The Commission objected, on the occasion both of the adoption of the directive and adoption of the framework decision, to the legal basis relied on by the Council to require the Member States to penalise the discharge of polluting substances from ships, and submitted that also in that respect Article 80(2) EC was the correct legal basis.

24. Contrary to that position, it is stated in the fifth recital to the framework decision that the correct instrument for imposing an obligation to provide for criminal penalties is the framework decision, based on Article 34 EU.

III — The proceedings before the Court

25. By order of the President of the Court of 25 April 2006, the Portuguese Republic, the Kingdom of Belgium, the Republic of Finland, the French Republic, the Slovak Republic, the Republic of Malta, the Republic of Hungary, the Kingdom of Denmark, the Kingdom of Sweden, Ireland, the Czech Republic, the Hellenic Republic, the Republic of Estonia, the United Kingdom of Great Britain and Northern Ireland, the Republic of Latvia, the Republic of Lithuania, the King-

dom of the Netherlands, the Republic of Austria, and the Republic of Poland, on the one hand, and the Parliament, on the other, were granted leave to intervene in support of the forms of order sought by the Council and the Commission, respectively. In addition, by order of the President of the Court of 28 September 2006, the Republic of Slovenia was granted leave to intervene in support of the Council.

26. In contrast with several of the intervening Member States, neither the Commission nor the Council — the sole parties to the present proceedings — submitted an application for an oral hearing. Accordingly, the Court, considering itself sufficiently informed by the numerous written observations submitted, decided pursuant to Article 44a of its Rules of Procedure to proceed to judgment without an oral procedure.

IV — Main arguments of the parties

27. The Commission challenges the validity of the framework decision on the grounds that the criminal law measures provided for in Articles 1 to 10 could have been adopted on the basis of Article 80(2) EC relating to the common transport policy of the Community and that, consequently, the entire framework decision — being indivisible — infringes Article 47 EU.

28. According to the Commission, this follows from the principles laid down by the Court in Case C-176/03 which go beyond the area of environmental protection at issue in that case and apply in their entirety to other Community policies such as the common transport policy at issue in the present case. The importance of environmental protection in the Community and its particular characteristics, such as its 'transversal' nature, had in fact no decisive bearing on the decision of principle in Case C-176/03. Such criteria would in fact lead to a paradoxical situation, in that other important areas of Community law would be excluded a priori from the possibility of being enforced effectively by means of criminal penalties on the basis of the EC Treaty.

29. The Commission maintains that — although criminal law does not as such and in general fall within the Community's competence and action in that regard may be based only on implied powers associated with a specific legal basis — the Community legislature may provide for criminal measures in so far as is necessary to ensure the full effectiveness of Community rules and regulations. Those implied powers on the part of the Community are thus determined by the need to guarantee compliance with a Community rule or policy, but are not confined to criminal law measures in a

certain area of law or of a certain nature. The Community is therefore also competent to define the type and level of penalties if and in so far as it is established that this is necessary to ensure the full effectiveness of a Community policy. The framework decision does not in any event harmonise the type and level of the applicable criminal penalties but leaves a certain margin of discretion in that regard to the Member States.

30. The Commission considers all the measures provided for in Articles 1 to 10 of the framework decision as necessary to ensure the effectiveness of the common transport policy. The necessity test formulated by the Court in Case C-176/03 is therefore satisfied.

31. Finally, the Commission specifies that it is not relevant for the purposes of Article 47 EU if or how the Community has already exercised its competence under Article 80(2) EC, but only whether competence to adopt measures such as those provided for in the framework decision actually exists.

32. The European Parliament aligns itself essentially with the arguments of the Commission. In its view, Articles 1 to 6 of the framework decision fall entirely under the competence of the Community. The decision is therefore, on account of its indivisibility, unlawful as a whole.

33. The European Parliament argues that the framework decision contested in the present case is comparable in all respects with the framework decision at issue in Case C-176/03 in terms both of its objective and its content. The reasoning of the Court in that case thus applies *mutatis mutandis* in the present case. The Parliament observes in particular that it is clear from the preamble to the framework decision that, like the annulled framework decision, it is concerned with the protection of the environment and that in both cases the criminal offences envisaged relate in comparable fashion to discharges of polluting substances.

34. Although the European Parliament recognises that there is a difference between the two framework decisions as regards the precise definition of the level and type of the applicable penalties, it sees no reason why the outcome in the present case should be any different from that in Case C-176/03. In the view of the Parliament, when considering Article 5(1) of Framework Decision 2003/80, the Court already confirmed in that judgment that the competence of the Community in criminal matters extends to provisions concerning the type and level of penal sanctions.

35. Finally, the European Parliament submits that, regard being had to the preamble to the framework decision and the circumstances surrounding its adoption, the necessity of the criminal measures is established in the present case.

36. The Council, on the other hand, supported without exception by the Member States which have intervened in these proceedings, denies that the criminal measures provided for in the framework decision should have been adopted on the basis of Article 80(2) EC. It emphasises, first of all, that it is undisputed that that Article constituted the correct legal basis for the adoption of the directive, which comes chiefly under the common transport policy even if it also pursues objectives relating to environmental protection.

37. The Council contends that the present case must be distinguished in several respects from the situation covered by the ruling of the Court in Case C-176/03, which cannot necessarily be applied to other areas of Community action. In that regard, the Council points out that the Court framed its ruling in terms of the environmental objectives of the Community and emphasised the special importance of environmental protection. In particular, environmental protection is distinguished by 'the fundamental nature of that objective and its extension across the range of [the] policies and activities [of the Community]'. [10]

38. In contrast, not only does the common transport policy lack those characteristics, the scope of Community competence in that field depends also on a decision by the Community legislature. As the Court stated in Case C-476/98, Article 80(2) EC merely provides for a power for the Community to take action, a power which, however, it makes dependent on there being a prior decision of the Council. [11] It is thus up to the Council to decide *whether* and *to what extent* provisions may be laid down for sea and air transport. By adopting the directive, the Community legislature defined the extent to which it wished to take action in the field concerned. The Council admits that the Community legislature could in part have adopted more far-reaching measures on the basis of Article 80 EC, but emphasises that it clearly decided not to do so. The Council thus contests the premise of the Commission that the provisions contained in the framework decision should have been adopted by the Community legislature.

39. In the alternative, the Council contends that the provisions of the framework decision at issue differ from those of the framework decision annulled in Case C-176/03 in that they are more detailed, in particular with regard to the level and type of the penalties to be provided for by the Member States. It can clearly be inferred from Case C-176/03 that the Court attached importance to the fact that the provisions under scrutiny left to the Member States the choice as to which

10 — Cited in footnote 3, paragraph 42.

11 — *Commission* v *Germany* [2002] ECR I-9855, paragraph 80.

criminal penalties to apply, so long as they were effective, proportionate and dissuasive. [12] The Community legislature has thus no competence to define the level and type of criminal penalties to be applied. The Council concludes therefore that the majority of the disputed provisions in the framework decision could not have been adopted by the Community and accordingly do not infringe Article 47 EU. If Case C-176/03 were to be interpreted along the lines advocated by the Commission, Title VI EU would largely be deprived of practical effect: thus such an interpretation manifestly goes beyond what the Court intended in its judgment, which must be construed restrictively and in the light of the particular circumstances underlying it.

40. Finally, the Council argues that it cannot be concluded from the adoption of the framework decision that the criminal measures provided for must be regarded as 'necessary' within the meaning of Case C-176/03.

41. The Member States which have intervened in these proceedings essentially follow the same line of reasoning as the Council. They maintain that the Community's implied competence to provide for criminal measures — as formulated by the Court in Case C-176/03 — is exceptional and falls to be narrowly construed. The implied competence to legislate on criminal law matters is confined to measures which are 'necessary' or (absolutely) 'essential' for combating serious environmental offences. It does not extend beyond the field of environmental protection to another common policy such as the transport policy at issue and in any event excludes, according to the Member States, harmonisation of the type and level of penalties as laid down in the framework decision.

42. The numerous, slightly varying arguments put forward by the Member States in support of their view turn in particular on the principles of subsidiarity, attributed powers and proportionality; the particular nature and necessary coherence of criminal law; the margin of appreciation to be left for the Member States; and the system set up by the Treaty on European Union which would be undermined if the arguments of the Commission were upheld.

43. It is also argued that Article 47 EU is intended to lay down a clear delimitation of competences between the first and the third pillars but not to establish that the former has primacy over the latter. A number of Member States challenge the view of the Commission that although the Member States remain free, on the one hand, to act individually so long as the Community has not decided to use its powers under Article 80(2) EC, they are precluded, on the other hand, from acting collectively on the basis of

12 — Cited in footnote 3, paragraph 49.

the third pillar. Also, as the Community had not yet legislated on ship-source pollution when the framework decision was adopted, it cannot be argued that that decision encroached on an existing Community competence.

44. The Member States conclude therefore that the framework decision was the correct legal instrument for the adoption of the criminal law measures contained therein.

V — Analysis

A — *The broader framework of the delimitation of competences: Article 47 EU*

45. A proper adjudication of the present case hinges, first of all, on Article 47 EU, which marks a watershed between the first, or Community, pillar on the one hand and the second and third pillars, covering foreign and security policy (Title V EU) and police and judicial cooperation in criminal matters (Title VI EU), on the other.

46. That distinction is important, since it demarcates the line between what is essentially the Community method, characterising the 'hard core' of European integration under the European Communities, and the more 'intergovernmental' policies and forms of cooperation established by the EU Treaty. [13]

47. In the light of the submissions of the parties, it appears appropriate to clarify the meaning of Article 47 EU and its impact on the issues of competence which are raised in the present case.

48. Article 47 EU provides that nothing in the Treaty on European Union is to affect the EC Treaty.

49. The Court has already held in that regard that it is the task of the Court to ensure that acts which, according to the Council, fall within the scope of Title VI of the Treaty on European Union 'do not encroach upon the powers conferred by the EC Treaty on the Community'. [14]

13 — The latter are quite distinct from the former, in particular, in terms of the nature and effect of the measures adopted to promote them and the legal instruments used (which are more of an international law nature, and lack direct effect); in terms of the decision-making procedure and the role played by the various institutions (there being no exclusive power of initiative on the part of the Commission, and the tendency as a rule for legislation to be adopted by unanimity vote of the Council, with only limited involvement on the part of the European Parliament); and, not least, in terms of judicial control (there being no action for infringement as provided for in Article 226 EC in the case of failure to transpose framework decisions into national law, and restrictions with regard to the Court's jurisdiction to give preliminary rulings). However, some principles elaborated in the context of Community law may also extend to the second and third pillars: see in particular, as to the duty of consistent interpretation, Case C-105/03 *Maria Pupino* [2005] ECR I-5285.

14 — See Case C-170/96 *Commission* v *Council* [1998] ECR I-2763, paragraph 16, and Case C-176/03, cited in footnote 3, paragraph 39.

50. As is already clear from that finding, Article 47 EU is not designed merely to ensure that nothing under the EU Treaty affects or runs counter to existing substantive provisions of Community law. Rather, it is intended, in a more comprehensive sense, to preserve also *the powers* conferred on the Community as such.

51. That is confirmed by the first paragraph of Article 29 EU, which expressly provides that Union provisions on police and judicial cooperation in criminal matters are 'without prejudice to the powers of the European Community'.

52. In order to determine whether Article 47 EU has been infringed, the question to be asked is therefore whether the provisions in question could have been adopted — potentially — on the basis of the EC Treaty. [15]

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

54. In that way, Article 47 EU reflects the architecture of the Union which, according to Article 1 EU, is 'founded on the European Communities, *supplemented* by the policies and forms of cooperation established by [the] Treaty [on European Union]' (emphasis added). As is also stated in that Article, the Treaty on European Union marks 'a new stage in the process of creating an ever closer union among the peoples of Europe'.

55. It is quite clear from that wording that, in providing for certain new forms of cooperation, the Treaty on European Union meant only to add to the fields of activities of the Communities, it did not mean to detract from them by providing for 'alternative' competences to be exercised by the institutions of the Union in cases where Community and Union policies may overlap, that is to say, by empowering the institutions to avail themselves in such situations of less integrated forms of cooperation under Titles V or VI EU.

56. It follows from the foregoing, first, that although, as a rule, the Council is not obliged to legislate at all, should it decide to do so in the context of the Union, it is obliged, in so

15 — See, to that effect, Case C-176/03, cited in footnote 3, paragraph 40.

far as the EC Treaty confers the necessary powers on the Community, to act exclusively on the basis of that Treaty.

57. Secondly, contrary to what some Governments are suggesting, no sound inferences can be drawn for present purposes from the fact that, at the time of the adoption of the framework decision, the Community had not yet adopted legislation with regard to the matters covered (since the directive was adopted subsequently).

58. The vertical distribution of powers between the Community and the Member States must in that regard be distinguished from the horizontal, inter-pillar distribution of powers governed by Article 47 EU. In the former relationship, Member States remain — except in the case of an exclusive competence of the Community — in principle free to act unless the Community has actually exercised its own competences in such a way as to 'pre-empt' the Member States within the meaning of the *AETR* case-law. [16]

59. In the latter relationship, by contrast, action under Titles V or VI EU is precluded from the outset by the existence of appropriate powers under the EC Treaty, regardless of whether and to what extent they may actually already have been exercised by the Community.

60. Accordingly, it is not contradictory to maintain that, in so far as the Community has not yet adopted legislation in the field of criminal law, the Member States remain in principle free to act in that area at national level whilst at the same time maintaining that, by virtue of Article 47 EU, the Council is precluded from acting under Title VI EU.

61. As regards, more particularly, the arguments put forward by several Governments to the effect that if the Member States are free to act 'individually' they should *a fortiori* be free to act 'collectively', that is to say, by means of a framework decision under Title VI, [17] it must be noted that, although each Member State is represented in the Council, the legal nature of Council action cannot be assimilated to mere 'collective' action on the part of the Member States. As an institution of the Union, the Council exercises, pursuant to Article 5 EU, its powers under the conditions and for the purposes provided for by the Treaties establishing the Communities and the Treaty on European Union.

16 — See as to that, inter alia, Case 22/70 *Commission* v *Council* '*AETR*' [1971] ECR 263, paragraph 31, and Case C-476/98, cited in footnote 11, in particular paragraphs 108 to 110.

17 — In that regard, reference was also made to the maxim 'he who can do more can do less'.

62. Thirdly, it is in my view not decisive with regard to Article 47 EU — as the Commission has rightly observed — that pursuant to Article 80(2) EC the Council may decide whether or to what extent provisions may be laid down for sea and air transport. Even if it is true that the EC Treaty makes that power dependent on there being a prior decision of the Council, [18] the fact remains that the Council has a power under the EC Treaty to take action in relation to sea transport.

63. Accordingly, the question that now falls to be examined is whether the disputed criminal law provisions of the framework decision could, in the light of the findings of the Court in Case C-176/03, have been adopted on the basis of Article 80(2) EC.

64. It should not be overlooked, however, that even if the Court were to find that, for one reason or another, there is no such competence under the policy on transport that would not, strictly speaking, be the end of the story.

65. Article 80(2) EC was chosen as the legal basis for the directive in the case before us, but that does not necessarily mean that no other provision of the EC Treaty — the most likely alternative being Article 175 EC on the environment — could have served as the legal basis for the adoption of the disputed measures contained in the framework decision. In principle, if it were to be found that the provisions of the framework decision could have been adopted using a legal basis provided for elsewhere in the EC Treaty that would mean that the framework decision infringes Article 47 EU.

66. However, the parties to the present proceedings have either avoided that issue or agreed that only one of the provisions in the EC Treaty — if any — could constitute a correct legal basis for the adoption of measures such as those at issue, namely, Article 80(2) EC. Accordingly, I shall base my assessment on that view.

B — *The implications of Case C-176/03: scope of the competence of the Community to provide for criminal measures*

67. In many respects, criminal law stands out from other areas of law. Availing itself of the most severe and most dissuasive tool of social control — punishments — it delineates the outer limits of acceptable behaviour and

18 — See Case C-476/98, cited in footnote 11, paragraph 80.

in that way protects the values held dearest by the community at large. [19] As an expression essentially of the common will, criminal penalties reflect particular social disapproval and are in that respect of a qualitatively different nature as compared with other punishments such as administrative sanctions.

68. Thus, more so than other fields of law, criminal law largely mirrors the particular cultural, moral, financial and other attitudes of a community and is especially sensitive to societal developments.

69. There is, however, no uniform concept of the notion of criminal law and the Member States may have very different ideas when it comes to identifying in closer detail the purposes which it should serve and the effects it may have. It is thus difficult to talk about criminal law in general terms and without specific national connotations.

70. Nevertheless, if we take the European Convention on Human Rights as a common point of departure, we can in any event note that it takes account of the particular nature of criminal law charges and penalties by providing, under Article 6(2) and (3) and Article 7, for additional and more extensive procedural and substantive guarantees with regard to criminal cases as compared with civil cases. The European Court of Human Rights has given the notion of 'criminal offence' as used in those Articles an autonomous meaning and seeks to relate that notion not primarily to the classification in domestic law, but rather to the nature of the offence itself and the nature and severity of the sentence which can be imposed. [20] The Court has held, as regards more particularly the purpose of criminal sanctions that 'the aims of prevention and reparation are consistent with a punitive purpose and may be seen as constituent elements of the very notion of punishment'. [21]

71. In my view, it can quite safely be said that criminal law is characterised by its dissuasive or deterrent nature. [22] It should be borne in mind, however, that deterrence is not the only identifiable purpose of criminal law and that the way in which this *ultimum remedium* of the law is used — some of the parties have also emphasised this point — indicates the social standards underpinning the community concerned and is therefore, in the last analysis, inherently related to the identity of that community.

19 — See in a similar sense already Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-176/03, judgment cited in footnote 3, point 72.

20 — The so-called 'Engel criteria': Eur. Court H. R., *Engel and others v. the Netherlands*, judgment of 8 June 1976, Series A No 22.

21 — Eur. Court H. R., *Welch v. the United Kingdom*, judgment of 9 February 1993, Series A No 307.

22 — See in that regard also Opinion of Advocate General Jacobs in Case C-240/90 *Germany* v *Commission* [1992] ECR I-5383, point 11, and Opinion of Advocate General Saggio in Case C-356/97 *Molkereigenossenschaft Wiedergeltingen* [2000] ECR I-5461, point 50.

72. The power to impose criminal sanctions has certainly traditionally been seen as intimately linked to sovereignty and properly to be entrusted to the individual States and intergovernmental forms of cooperation rather than to the Community. However, even though, as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence, [23] it must be emphasised that the criminal law is by no means a *domaine reservé* for the Member States under the EC Treaty.

73. In fact, it is clear already from case-law prior to Case C-176/03 that Community law intersects in several respects with criminal law. However, rather than discussing in detail that case-law — which, together with the relevant secondary Community law, has already been analysed *in extenso* by Advocate General Ruiz-Jarabo Colomer [24] — I shall briefly recall the most important types of intersection between Community law and national criminal law.

74. First of all, and on a more general level, Community law can indirectly influence national criminal law in that it requires, as regards matters within its scope, the relevant national criminal legislation to be in conformity with Community law. This perspective of compatibility is illustrated by the *Amsterdam Bulb* case, in which the Court held that in the absence of any provision in the Community rules laying down specific penalties, the Member States *are free* to adopt such penalties as appear to them to be appropriate, including criminal penalties. [25] On the other side of the coin, criminal penalties for infringement of national laws implementing Community law *may be precluded* by Community law on the grounds, for example, that they are excessive and thereby become an obstacle to the free movement of persons. [26]

75. In such cases, Community law thus delimits — by requiring 'negative integration' — the scope of action of the Member States with respect to criminal law. [27]

76. In what can be seen as a move towards 'positive integration' and the acknowledgement of positive obligations in the field of criminal law, the Court held in the '*Greek Maize*' line of cases that where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Member States

23 — Case C-176/03, cited in footnote 3, paragraph 47, with reference to Case 203/80 *Casati* [1981] ECR 2595, paragraph 27; and Case C-226/97 *Lemmens* [1998] ECR I-3711, paragraph 19.

24 — See his Opinion in Case C-176/03, judgment cited in footnote 3, point 30 et seq.

25 — Case 50/76 [1977] ECR 137, paragraphs 32 and 33 (emphasis added).

26 — See, as to that, Case C-193/94 *Skanavi* [1996] ECR I-929, paragraph 36 (emphasis added).

27 — Case C-457/02 *Niselli* [2004] ECR I-10853 should also be mentioned as an example of the indirect impact of Community law — in that case the Community rules on waste — on national criminal law. See, as to the limits in that context, Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565.

can be required, by virtue of the general duty of the Member States as laid down in Article 10 EC, to take all measures necessary to guarantee the full effectiveness and application of Community law, to 'ensure in particular that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive'. [28] The Court specified in *Nunes and de Matos* that the same reasoning applies where a Community regulation lays down particular penalties for infringement, but does not exhaustively list the penalties that the Member States may impose, as in the case of the regulation on the European Social Fund at issue in that case. [29]

77. Viewed against that background, the Court took in Case C-176/03 a step that was certainly qualitatively significant but not, after all, incomprehensible by accepting that the Community legislature may have the power to adopt measures which expressly require Member States to provide for criminal penalties with regard to certain conduct and which do therefore indeed, as the Court acknowledged, entail partial harmonisation of the criminal laws of the Member States. [30]

78. How big that step really was — that is to say, how far the Community competence thus established to provide for criminal penalties extends both in 'breadth' and in 'depth' — is of course the question central to the present dispute.

79. The reasoning which led the Court to recognise that power in Case C-176/03 can be summarised briefly as follows.

80. The question which the Court had to ascertain — and which it answered in the affirmative — was whether the criminal measures provided for in the framework decision at issue in that case could be adopted on the basis of Article 175 EC on the environment. [31]

81. In that regard, the Court first recalled that according to Article 2 EC and its case-law, the protection of the environment constitutes one of the essential objectives of the Community. It further made reference to Article 6 EC, which states that environmental protection requirements must be inte-

28 — Case 68/88 *Commission* v *Greece* [1989] ECR 2965, paragraphs 23 and 24.

29 — Case C-186/98 [1999] ECR I-4883, paragraph 12.

30 — See Case C-176/03, cited in footnote 3, paragraph 47.

31 — Paragraph 40.

grated into the definition and implementation of Community policies and activities, and to Articles 174 EC to 176 EC which lay down the framework within which Community environmental policy must be carried out. [32]

82. The Court went on to state that the measures referred to in the three indents of the first subparagraph of Article 175(2) EC all imply the involvement of Community institutions in matters for which, apart from Community policy on the environment, either the Community has no legislative powers or unanimity within the Council is required.

83. The Court then recalled settled case-law according to which the choice of legal basis for a Community measure must rest on objective factors which are amenable to judicial review, including in particular the aim and the content of the measure. [33]

84. Accordingly, as regards the aim of the framework decision, the Court inferred both from its title and from its first three recitals that its objective was the protection of the environment. [34]

85. As to the content of the framework decision under scrutiny, the Court then recognised that Articles 2 to 7 thereof entailed partial harmonisation of the criminal law of the Member States, 'in particular as regards the constituent elements of various criminal offences committed to the detriment of the environment' and reaffirmed that, as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence. [35]

86. In the following key passage of the judgment, however, the Court held, quite succinctly, that that 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'. [36]

32 — Paragraphs 41 to 43.

33 — Paragraph 45, with reference to Case C-300/89 *Commission* v *Council 'Titanium dioxide'* [1991] ECR I-2867, paragraph 10, and Case C-336/00 *Huber* [2002] ECR I-7699, paragraph 30.

34 — Paragraph 46.

35 — Paragraph 47.

36 — Paragraph 48.

87. It is thus clear that the Court recognised a power on the part of the Community to require Member States to adopt criminal measures as envisaged by the framework decision, and held that power to be an implied facet of the powers conferred on the Community under Article 175 EC.

88. However, the Court described that power very closely, in direct relation to the particular facts of the case, rather than in the form of a principle, which accounts for the difficulty of distinguishing the underlying rationale from its concrete application.

89. It should be noted, first of all, that the ruling in Case C-176/03 is — and in that regard it resembles the earlier *Greek Maize* case-law [37] — fundamentally motivated by and born out of the concern to ensure the full effectiveness of Community law. That is not only clear from the key passage cited above, but — besides the Opinion of Advocate General Ruiz-Jarabo Colomer [38] — also from paragraph 52 of the judgment in which the Court states that it is not possible to infer from Articles 135 EC and 280(4) EC that any harmonisation of criminal law must be ruled out 'even where it is necessary to ensure the effectiveness of Community law'. [39]

90. Furthermore, seen from another angle, in finding that Article 175 EC confers on the Community competence to require Member States to criminalise certain conduct which is particularly detrimental to the environment, the Court employed essentially a line of reasoning predicated on *implied powers*, according to which the Community enjoys the powers or means necessary to achieve a given objective or task attributed to it. [40] Put simply, the Community objective of environmental protection and its *effet utile* would, according to the *ratio* of the judgment, be compromised if the Community legislature did not have the power to adopt the criminal law measures necessary to ensure that the rules which it lays down on environmental protection are fully effective.

91. To what extent can it now be taken out of the equation that Case C-176/03 was about environmental protection and about 'combating serious environmental offences'? Is the power to require criminal enforcement, as the Council and the intervening Member States contend, limited 'in breadth' to environmental law or, as the Commission and the Parliament claim, in principle applicable to other common policy areas such as the transport policy at issue?

37 — See point 76 above.

38 — See, in particular, points 84 to 87 of the Opinion, judgment cited in footnote 3.

39 — Case C-176/03, cited in footnote 3, paragraph 52.

40 — See as to that reasoning Joined Cases 281/85, 283/85 to 285/85 and 287/85 *Germany* v *Commission* [1987] ECR 3203, paragraph 28.

92. Although the numerous references in the judgment to protection of the environment and its place in the Treaty could be read as suggesting — as the Council and the Member States essentially argue — that the Court intended to restrict its reasoning to the specific field of the environment, I share the view of the Commission that there is indeed no sound basis for regarding the power to provide for criminal measures as being limited in that way.

93. It is true that protection of the environment is — as the Special Reports recently submitted by the Intergovernmental Panel on Climate Change made clearer than ever — of vital importance not only from a European policy perspective but also for the future of mankind as a whole [41] and that it constitutes, as the Court recalled in Case C-176/03, an essential objective of the Community. [42]

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

95. In keeping with what has been said above concerning the role or, rather, the effect of criminal law as a barometer of the importance attached by a community to a legal good or value, [43] to single out environmental protection in such a way would in my view not do justice at all to the nature — or, it might even be said, to the *identity* — of the Community.

96. What is more, the environment is not the only 'horizontal' matter (Article 6 EC) under the EC Treaty — we need think only of gender equality (Article 3(2) EC), non-discrimination (Article 12(1) EC) or public health (Article 152(1) EC) — and, in any event, I cannot see why that particular attribute should, as the Council and several Member States have argued, be regarded as decisive in relation to the power to require criminal enforcement.

41 — See also the emphasis put on environmental concerns by Advocate General Ruiz-Jarabo Colomer in his Opinion, judgment cited in footnote 3, points 52 to 70.

42 — Paragraph 41 of the judgment.

43 — See point 67 et seq. above.

97. Furthermore, it is not really feasible to argue that that power should be limited to the area of environment when we take into account that it is a corollary to the principle of effectiveness of Community law.

98. Viewed from that perspective, the presumption that the power to require criminal penalties is limited to the area of the environment carries with it the implication either that, because of its particular nature, environmental protection is the only area which needs criminal enforcement in order to be fully effective or, in the alternative — if we accept that other policies may also need such enforcement to be effective — that the Community legislature must regard a potential lack of effectiveness as acceptable in other areas because of, for instance, their 'minor importance' or the 'less essential' objectives that they pursue. In my view, both of those positions are unacceptable and neither can be upheld.

99. In the light of the foregoing I therefore believe that it is not reasonably possible — in any event, not without a dash of arbitrariness — to reserve exclusively for the specific area of the environment the power of the Community to require the Member States to use the tool of criminal enforcement. Since the raison d'être for that power lies with the general principle of effectiveness underlying Community law, it must in principle also exist in relation to any other Community policy area (such as transport), subject, of course, to the limits set by the Treaty provisions providing the substantive legal basis in question.

100. The concrete contours of the power to take measures relating to the criminal law of the Member States remain, however, still to be addressed. In that regard, too, the reasoning in Case C-176/03 is rather ambiguous. It makes reference both to 'essential measure[s] for combating serious ... offences' and to measures relating to criminal law which the Community legislature 'considers necessary in order to ensure that the rules which it lays down ... are fully effective'. [44]

101. Some light is shed on the meaning of those criteria later on in the judgment in so far as, in assessing whether in the case before it the conditions for adoption of the measures at issue on the basis of Article 175 EC were fulfilled, the Court considered it decisive that the framework decision referred to infringements of a considerable number of Community measures and that the Council took the view 'that criminal penalties were

44 — Paragraph 48.

essential for combating serious offences against the environment'.[45]

102. Accordingly, it appears from the judgment in Case C-176/03 that the Community legislature has the power to adopt measures providing for the imposition of criminal penalties where it considers such penalties necessary in order to ensure that the rules which it lays down are fully effective and on condition that criminal measures are essential for combating serious offences in the area concerned.

103. Turning to the question whether, within that framework, the Community can prescribe the type and level of the penalties to be applied ('depth' of the power), I agree with Advocate General Ruiz-Jarabo Colomer[46] that 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.

104. It must be borne in mind that the issue here is not a possible power on the part of the Community to impose criminal penalties itself, but rather the power to require the Member States to provide, *within their respective penal systems*, for certain forms of conduct to be classed as criminal offences as a means of upholding the Community legal order. Clearly, therefore, that raises not only concerns as to the internal consistency of the criminal law of the Union, which the Commission has rightly addressed in its Communication on Case C-176/03,[47] but also as to the coherence of each national penal system.

105. As is clear from the submissions of the intervening Governments in that regard, the Member States have already on a general level quite different ideas as to the role and purpose of criminal law as an instrument of enforcement. On a more concrete level, those diverging ideas are reflected by differences in the national penal systems as regards the overall level of penalties, the balance struck between the various forms of sentences and, obviously, the type and level of penalties provided for in respect of particular offences. Each criminal code reflects a particular ranking of the legal interests which it seeks to protect (property, the person, the environment, and so on) and varies the penalties accordingly.

106. Thus the determination by the Community legislature of the type and level of penalties to be imposed — on the basis of a power which is ancillary to the specific

45 — Paragraph 50.

46 — See points 83 to 87 of his Opinion, judgment cited in footnote 3.

47 — Cited in footnote 5, at point 13.

competences provided for by the Treaty and which allows, at sectoral level, for (only) partial harmonisation of national criminal laws — could lead to fragmentation and compromise the coherence of national penal systems.

107. Moreover, the seriousness of a criminal penalty, its effectiveness and dissuasiveness, cannot be viewed in isolation from the other criminal penalties provided for under national law and the way in which penalties are made use of in a given Member State as an instrument of enforcement. As the United Kingdom Government observed in that regard, a given level of fine can send out very different messages in different Member States regarding the seriousness of the offence in question.

108. In my view, therefore, and in accordance with the principle of subsidiarity, the 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.

109. Case C-176/03 does not contradict that view. Rather, the Court's observation that the provisions of the annulled framework decision 'leave to the Member States the choice of the criminal penalties to apply, although, in accordance with Article 5(1) of the decision, the penalties must be effective, proportionate and dissuasive' [48] mirrors the position of Advocate General Ruiz-Jarabo Colomer in so far as he maintains that the Community cannot go further than requiring the Member States to provide for certain offences and to make them punishable by 'effective, proportionate and dissuasive' criminal penalties. [49] Moreover, such a delimitation of the respective powers of the Community and the Member States is in line with the case-law prior to Case C-176/03. [50]

110. It is true that, unlike the Advocate General, [51] the Court did not specifically address the requirement laid down in Article 5(1) of the annulled framework decision that the most serious conduct should be punished by deprivation of liberty, entailing extradition, and did not expressly indicate that such a provision (relating to the type of penalty) could not be adopted under the first pillar. It would be erroneous to infer, however, that a provision relating to the type of penalty could indeed be adopted on that basis. The Court's finding that the framework decision, which it considered indivisible, fell properly to be adopted under Article 175 EC

48 — Cited in footnote 3, paragraph 49.

49 — See points 83 to 85 of his Opinion, judgment cited in footnote 3.

50 — See point 76 above.

51 — See point 94 of his Opinion, judgment cited in footnote 3.

— in that it provided that certain conduct which is particularly detrimental to the environment is to be criminal — already meant that the framework decision had to be annulled, and it was not examined in further detail because there was no need to do so. [52]

111. The delimitation of powers as outlined, according to which the Community can require the imposition of effective, proportionate and dissuasive criminal penalties but must leave the determination of their type and level to the Member States, has also the advantage of being clear-cut. I doubt that it would be at all practicable to differentiate further with regard to the degree of detail in which the Community may determine penalties. [53]

112. To sum up, it may be said that according to Case C-176/03, as I read it, the Community legislature can, whenever criminal measures are necessary to ensure the full effectiveness of Community law and essential to combat serious offences in a particular area, require Member States to penalise certain conduct and to adopt in that regard effective, proportionate and dissuasive criminal sanctions.

113. That competence enables the Community to avail itself, within the powers and policy areas conferred upon it, of the full range of legal enforcement measures in order to uphold its own legal order. It is thus a significant factor in the movement of Community law, so to speak, towards a *lex perfecta*. At the same time, the existence of such competence does not call into question the general rule that criminal law and the rules of criminal law fall within the purview of the Member States; nor — since it leaves the Member States the choice of the criminal penalties to apply — does it in my view interfere with national penal systems to such an extent that it could unacceptably affect their coherence. [54]

114. It ought not be concealed, however, that the competence of the Community in relation to criminal law as established by the Court in Case C-176/03 reveals on closer inspection certain conceptual flaws, which make it difficult, as the present case shows,

52 — Conversely, the Court held that there was no need to examine the Commission's argument that the framework decision should in any event be annulled in part on account of the choices it leaves to the Member States. See paragraph 54 of Case C-176/03, cited in footnote 3.

53 — By, for example, indicating the type of penalty, but not the level of the penalty or by defining the level of penalties in terms of a certain range.

54 — It may be noted, moreover, that, as the Austrian Government pointed out, a comparable ancillary competence is known to certain federal systems, by which the states are competent to adopt, inter alia, measures in the field of criminal law which are necessary for the regulation of matters within their purview despite the fact that, as a rule, criminal law falls under the competence of the national legislature.

to ascertain whether in a concrete case the conditions for the exercise of that competence are fulfilled.

115. In the first place, effectiveness is in several respects an imprecise criterion on the basis of which to establish competence for the adoption of measures relating to criminal law.

116. Firstly, and on a more general level, effectiveness is not an all or nothing issue but a question of degree. The difficulty lies in identifying the required standard: When are rules in a specific field not sufficiently effective or not 'fully effective', thus necessitating the instrument of criminal law?

117. Secondly, what is the contribution of criminal penalties to the effectiveness of a law? Criminological debate continues as to which way and in which matters criminal penalties represent the best means of ensuring the effective enforcement of the law. It may be too simple to assume that criminal law is always the appropriate remedy for a lack of effectiveness.

118. Thirdly, although its deterrent effect means that there is certainly a correlation between criminal law and effectiveness, effectiveness does not entirely encapsulate the essence of criminal law. As I have already suggested above, the policy considerations behind the use of criminal penalties in a given community go well beyond the mere question of effective enforcement.

119. It is thus clear that the questions whether criminal measures are in a particular case 'essential' for combating serious offences or 'necessary' in order to ensure that rules are 'fully effective' call, not only for 'objective' consideration of the substantive legal basis or policy area in question, but also for a degree of judgment. From that perspective, it was no accident that the Court referred to criminal law measures which the Community legislature '*considers* necessary' and established that 'the Council *took the view* that criminal penalties were essential'. [55]

120. In the second place, it is not ideal that the Community's criminal competence as outlined attaches by way of *accessorium sequitur principale* to the specific competences conferred on the Community — in such a way that it could virtually be regarded as merely a single aspect of the Community policy concerned — whilst at the same time

55 — See Case C-176/03, cited in footnote 3, paragraphs 48 and 50 (emphasis added).

its implications have to be accommodated by the criminal law of the Member States, which is normally perceived as forming a distinct body of law.

121. It appears to me problematic, in particular, that the conditions for the adoption of measures relating to criminal law under the Community pillar, notably the legislative procedure, depend on the area of Community action concerned, and vary accordingly.

122. For the same reason, it hardly constitutes a satisfactory basis for a broader move towards the criminal enforcement of Community law. If such a policy is to be pursued within the Community, a specific legal basis providing for a uniform legislative procedure would certainly be desirable.

C — Validity of the framework decision at issue

123. Although the principal issues raised in the present case have already been addressed in the preceding points, it remains to be assessed *in concreto* whether or to what extent the contested terms of the framework decision — regard being had, in particular, to its aim and content [56] — could properly have been adopted on the basis of the EC Treaty.

124. As regards the aim of the framework decision, it is clear from its title and recitals that it takes as its object the approximation of the legislation of Member States for the enforcement of the law against ship-source pollution and in that regard is designed to supplement the directive.

125. Thus, like the directive [57] — in furtherance, specifically, of the Community's maritime safety policy — the framework decision seeks to protect the environment and, in particular, to combat environmental crime (first recital of the framework decision).

126. As I have already stated above, [58] the Commission bases its application in the present case on the view that the provisions

56 — See Case C-176/03, cited in footnote 3, paragraph 45 and the case-law cited therein.

57 — See, in particular, the first and the fourth recitals.

58 — See points 65 and 66.

contained in the framework decision should have been adopted, like the directive, on the basis of Article 80(2) EC, since it concerns maritime transport. Save for the criminal law aspect, the other parties or interveners have in principle neither questioned that position nor maintained that Article 175 EC on the environment would be eligible as a legal basis for the directive or for the measures provided for in the framework decision, were they to be adopted under the Community pillar.

127. In my view, too, the Commission is not wrong to hold that, despite the environmental aspect, the aims of the framework decision can be pursued on the basis of Article 80(2) EC concerning maritime transport. While the pollution of the sea is certainly as such an environmental concern, its reduction or prevention is at the same time an important field of Community action in maritime transport. [59]

128. It should be noted in that regard that the fact that a Community measure pursues aims of environmental protection does not automatically mean that it has to be adopted on the basis of Article 175 EC. The Court has already held that although Articles 174 EC and 175 EC are intended to confer powers on the Community to undertake specific action on environmental matters, its powers under other provisions of the Treaty remain intact, even if measures adopted thereunder pursue at the same time one of the objectives of environmental protection; moreover, since environmental protection requirements are a necessary component of the Community's other policies, a Community measure is not to be classed as action on environmental matters merely because it takes account of those requirements. [60]

129. In my view, measures seeking environmental protection which, as in the present case, specifically concern ship-source pollution form part of the maritime transport policy for which Article 80(2) EC provides a particular legal basis. I agree therefore with the Commission that Article 80(2) EC enabling rules to be laid down for sea transport, not Article 175 EC on environ-

59 — See the second recital of Directive 2000/59/EC of the European Parliament and of the Council of 27 November 2000 on port reception facilities for ship-generated waste and cargo residues (OJ 2000 L 332, p. 81), which was also adopted on the basis of Article 80(2) EC.

60 — See, to that effect, Case C-336/00, cited in footnote 33, paragraph 33.

ment, would be the correct legal basis for the adoption of such measures.

130. Turning, however, to the content of the framework decision, the Commission, supported by the Parliament, claims, quite sweepingly, that the framework decision could have been adopted in its entirety on the basis of Article 80(2) EC.

131. As is evident from the foregoing considerations, that view is not correct as regards Articles 4 and 6 of the framework decision in so far as they prescribe in some detail — albeit partly in the form of penalty bands — the type and level of penalties to be applied. The adoption of such provisions falls, as I have indicated above, within the scope of Title VI of the Treaty on European Union. Furthermore, in so far as they concern the establishment and coordination of jurisdiction, a mechanism for the exchange of information on the commission of criminal offences and the establishment of contact points to that end, Articles 7, 8, and 9 of the framework decision reach to my mind beyond the competence of the Community as outlined above to require the Member States to criminalise certain conduct. Those provisions were therefore rightly adopted by means of a framework decision in the field of police and judicial cooperation in criminal matters. Finally, Articles 10 (Territorial scope), 11 (Implementation) and 12 (Entry into force) are of a merely technical nature.

132. However, the framework decision contains also a number of provisions concerning the constituent elements of the criminal offences to be provided for, as well as the requirement that they be punishable by effective, proportionate and dissuasive criminal penalties. I count amongst these provisions Article 2; Article 3; Article 4(1) on Penalties, in so far it obliges Member States to ensure that the offences referred to in the two previous Articles are punishable by effective, proportionate and dissuasive criminal penalties; Article 5, under which legal persons can be held liable for those offences; and Article 6(1), in so far as it provides that such legal persons may be punished by effective, proportionate and dissuasive penalties.

133. In that regard, it should be noted that — as is recalled in the first recital of the directive — the Community's maritime safety policy, which is an aspect of sea transport, is aimed at a high level of safety and environmental protection. As appears from the recitals to the framework decision, the Council considered it necessary, following the accident of the tanker Prestige, to impose

on the Member States an obligation to provide for criminal penalties to combat environmental crime in order to improve safety at sea. Given the impetus of the serious pollution caused by the shipwreck of the Prestige, the framework decision should, as its title says, strengthen the criminal law framework for the enforcement of the law against ship-source pollution.

134. Moreover, as the second recital of the directive relates, the rules in the Member States, which are based upon the Marpol 73/78 Convention, were being ignored on a daily basis by a considerable number of ships sailing in Community waters, without corrective action being taken.

135. Lastly, the Community legislature stated expressly in the directive (fourth and fifth recitals) that measures of a dissuasive nature form an integral part of the Community's maritime safety policy and that there is a need for effective, dissuasive and proportionate penalties in order to achieve effective protection of the environment in the field.

136. Against that background it can to my mind be assumed that the adoption of criminal measures is, in the view of the Community legislature, necessary for the effective protection of the environment as regards ship-source pollution and that such measures are essential to combat serious offences in the field.

137. It thus falls within the competence of the Community to oblige Member States to penalise such offences and to establish effective, proportionate and dissuasive penalties.

138. It follows that Articles 2, 3 and 5 of the framework decision, as well as parts of Articles 4(1) and 6(1) thereof, could properly have been adopted on the basis of Article 80(2) EC.

139. Consequently, since the framework decision is to be regarded as indivisible, the entire framework decision should, in my view, be regarded as adopted in infringement of Article 47 EU and, accordingly, should be annulled.

VI — Conclusion

140. In the light of the foregoing considerations, I propose that the Court should:

(1) annul Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution;

(2) order the Council of the European Union to pay the costs;

(3) order the interveners to bear their own costs.