The implications of the Court's judgment of 13 September 2005 (Case C-176/03 Commission v Council): the Commission's right of initiative, distribution of powers between the first and third pillars as regards provisions of criminal law

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PURPOSE: to outline and assess the Commission’s response the European Court of Justice’s judgement on Case C-176/03, the Commission v Council

CONTENT: this Communication is the Commission’s response to an ECJ judgement in which the Commission asked the Court to annul Council Framework Decision 2003/80/JHA *on the protection of the environment through criminal law*. The judgement, issued in September 2005, clarifies a long-standing dispute between the Commission and Council regarding the distribution of power in relation to the provision of criminal law and the distribution of power between the first and the third pillars. The aim of this Communication is three-fold. Firstly, to explain the conclusions drawn from the judgement. Secondly, to suggest a way forward with regard to those texts which, in light of the Court’s ruling, have not been adopted in accordance with the correct legal basis and thirdly, to set out a course for the future use of the Commission’s right of initiative.

As regards the first aim, namely an explanation of the judgement, the Court concludes that the Council Framework Decision infringes Article 47 of the TEU in that it encroaches on the powers which Article 175 confer on the Community. (Article 47 establishes the primacy of Community law over Title VI of the TEU). A further conclusion to be drawn from the judgement is that it lays down principles, which go beyond the case in question. In other words, the same reasoning can be applied, in its entirety, to the four other freedoms – the movement of persons, goods, services and capital. At the same time, however, the judgement is clear that criminal law does not constitute a Community policy *per se* and that Community action in criminal matters must be based only on implicit powers associated with a specific legal basis.

In other words appropriate measures of criminal law can be adopted on a Community basis only, on a sectoral level only and only in cases where criminal law measures can guarantee an effective policy relating to one of the four freedoms. From this, the Commission concludes that, depending on the subject matter, the Court’s reasoning can be applied to all Community policies and freedoms, which involve binding legislation. Whether or not to include criminal penalties on future proposals must be decided upon on a case by case basis. Crucially, the Commission does note that in presenting proposals containing criminal penalties, the dual principles of “necessity and consistency” must be applied.

As regards the general situation following-on from the distribution of powers between the first and the third pillar, the new legal landscape effectively brings to an end the double-text mechanism, which has been used on several occasions in the past. This implies that either a criminal law provision specific to the matter in hand is needed and subsequently adopted under the first pillar – or there is no need to resort to criminal law at an EU level. Current, horizontal law encouraging police and judicial co-operation, providing provisions on the principle of availability and providing provisions on the harmonisation of criminal law relating to creation of an area of freedom, security and justice, on the other hand, do all fall under the scope of Title VI of the TEU.

As a consequence of the judgement the Commission has prepared, in Annex, a list of all the Framework Decisions which it considers are entirely or partly incorrect. This list has been drawn up on the basis that they were adopted on an incorrect legal basis. The Framework Decisions listed include, *inter alia*, Decisions on the protection of the environment through criminal law; on combating fraud and counterfeiting of non-cash means of payment; and on the protection of the Community's financial interest. The Commission intends to regularise these texts as quickly as possible given that it has a duty to restore their legality. As an interim measure, the Commission has decided to appeal to the ECJ for an annulment of the Council Framework Decision to strengthen the criminal law framework for the enforcement of the law against ship source pollution. The appeal will be withdrawn once the proposal aiming to correct the legal basis of the framework Decision in question has been adopted.

In terms of how to rectify the present situation the Commission outlines several options. One approach proposed would be to review existing instruments with the sole purpose of bringing them into line with the distribution of powers between the first and the third pillar based on the Court judgement. Were this approach to be adopted the Commission would ensure that the proposal's do not contain any provisions differing in substance from those of the acts already adopted – even where the Commission felt these acts were not satisfactory. This approach offers a quick, easy solution. However, it can only work if both Parliament and the Council agree not to open discussion of substance during this special procedure and it requires the agreement of all three institutions.

Should the institutions decide not to adopt such a strategy the Commission would be forced into making use of its power of proposal in order to restore the correct legal basis. The Commission would take this opportunity to prioritise substantive solutions in line with what it judges to be in the best interests of the European Community. These proposals will then have to follow the full decision-making procedure process in accordance with their correct legal basis.