

THE FUTURE OF CRIMINAL LAW WITHIN THE EUROPEAN UNION – UNION LAW OR COMMUNITY LAW COMPETENCE?

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Recent developments regarding criminal matters within the European Union (EU) show a trend towards a supranational criminal competence, which could be realised before the entry into force of the European Constitution whose future is uncertain. The strongest indicators in this development are two judgments of the European Court of Justice (ECJ), one that extends the powers of the European Community (EC) over the protection of the environment through criminal sanctions¹ and the other applying the principle of conforming interpretation to framework decisions². This trend is questionable though, as the Treaty of the European Union (TEU) does not confer a criminal competence upon the EC. The third pillar containing criminal matters is intergovernmental in nature. This article critically discusses the recent trend and presents arguments against an implied supranational criminal law within the EU.

Les derniers développements concernant le droit pénal dans l'union européenne font ressortir une nette tendance tendant à instaurer des règles de compétence pénale supranationale qui peuvent être mises en oeuvre avant l'entrée en vigueur de la constitution européenne dont l'avenir demeure incertain.

Les signes révélateurs de cette tendance apparaissent clairement dans deux décisions rendues par la Cour de Justice Européenne, la première qui étend les pouvoirs de la communauté européenne en matière de protection de l'environnement par l'instauration de sanctions pénales et la seconde qui se fonde sur le principe de l'interprétation conforme pour imposer un cadre commun aux des décisions rendues en matière pénale en Europe.

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1 Case C-176/03 *Commission v Council* (13 September 2005).

2 Case C-105/03 *Pupino* (16 June 2005).

Une pareille évolution n'est cependant pas à l'abri de la critique dans la mesure où le Traité sur l'Union Européenne ne confère pas en matière pénale, de compétences particulières à la Commission Européenne.

En effet, le troisième pilier de la constitution, relatif aux matières criminelles et pénales, précise que ce domaine relève par nature de décisions intergouvernementales. Cet article analyse cette tendance récente et fait valoir les raisons pour lesquelles des règles supranationales en matière pénale, à l'intérieur de l'Union Européenne n'a pas véritablement de raison d'être.

I INTRODUCTION

The Treaty on the European Union signed in 1992 in Maastricht (Maastricht Treaty), which entered into force in 1993, for the first time established the political entity of the "European Union". Since the Maastricht Treaty the EU has been described as a "pillar model", containing three pillars, with the EU depicted as a roof connecting these three pillars.³ The first pillar is the Community pillar (EC), today consisting of the European Community and the Euratom. The first pillar is considered supranational, as the Member States have waived their sovereignty and Community law enjoys primacy over national law and has a direct binding effect. Regulations, the most extensive legislative measures available in the first pillar, are binding in their entirety and are directly applicable in all Member States by express wording of article 249 TEU. Directives, as the second most important legislative tool within the first pillar, entail direct (vertical) effect through European Court of Justice (ECJ) case law.⁴

The second pillar covers Common Foreign and Security Policy (CFSP). The Maastricht Treaty, introducing the pillar model, first established a close cooperation in the field of Justice and Home Affairs (JHA), which was incorporated into the third pillar. With the Treaty of Amsterdam, which came into effect in 1999, a large part of the third pillar concerning Home Affairs such as visa, asylum and immigration laws as well as judicial cooperation in civil matters was incorporated into the first pillar – the supranational EC – to speed up the process of establishing free movement of persons by subjecting these matters to community legislation.⁵ These changes involved an amendment of the third pillar, which now covers Police and Judicial Cooperation in Criminal Matters (PJCC).

3 Nigel Foster *Foster on EU Law* (Oxford University Press, Oxford, 2006) 37 ff; George A Bermann, Roger J Goebel, William J Davey, Eleanor M Fox *European Union Law* (West Publishing, St Paul, MN, 2002) 14 ss; Paul Craig, Grainne De Burca *EU Law* (3 ed, Oxford University Press, Oxford, 2003) 22 and following.

4 Paul Craig, Grainne De Burca *EU Law* (3 ed, Oxford University Press, Oxford, 2003) 202 and following.

5 George A Bermann, Roger J Goebel, William J Davey, Eleanor M Fox *European Union Law* (West Publishing, St Paul (MN) 2002) 23 and following; Paul Craig, Grainne De Burca *EU Law* (3 ed, Oxford University Press, Oxford, 2003) 29-39 and following.

The second and the third pillar can be described as intergovernmental, as EU law does not enjoy primacy over national law and does not have a binding direct effect. The Member States have not ceded sovereignty, therefore the drafted laws can be categorised as measures of public international law.⁶ The ECJ seems to disregard these differences between the third and the first pillar by granting the EC an implied power over criminal matters, as long as they cover community matters, as well as by applying a similar interpretation standard to third pillar framework decisions and to first pillar directives.⁷

II MUTUAL RECOGNITION

The Amsterdam Treaty shifted Home Affairs from the third to the first pillar and involved a restructuring of the third pillar. Frustrated by the slow and often ineffective decision making process within the third pillar, the Amsterdam Treaty paved the way to a deeper integration through new measures. Whereas prior to Amsterdam a convention entered into force if ratified by all signatories, treaties now come into effect if more than half of the signatories have ratified. The new tool introduced by the Treaty of Amsterdam is the framework decision, an instrument shaped after the first pillar's directive, but according to the different status of the third pillar with an important expressly stated difference. Similar to the directive it is binding upon the Member States as to the result to be achieved, but leaves the choice of form and method to the national authorities. But other than directives, framework decisions are expressly stipulated to not entail direct effect.⁸

Along with the formal changes concerning the tools within the third pillar, the strategy was changed as well to speed up the integration process. Although the beginning focused on the harmonisation and then approximation of criminal laws within the Union (which turned out to be a slow and complicated process) the focus was now on the principle of mutual recognition. Mutual recognition requires one Member State to recognise and enforce judicial decisions by another Member State on the understanding that, while legal systems may differ, the results reached by all EU judicial authorities should be accepted as equivalent. The principle of mutual recognition was asserted to be the "cornerstone" of judicial cooperation between Member States.⁹ The Framework

6 The most important legislative measures within the third pillar, which is of interest here, are on the one hand framework decisions, which are expressly stipulated to not entail direct effect by art 34 (2) b TEU and on the other hand conventions, which have to be ratified by the Member States to enter into force.

7 See below Part III.

8 Treaty on the European Union, art 34(2)b [TEU].

9 Tampere European Council Presidency Conclusions, 15 and 16 October 1999, para 33.

Decision on the European Arrest Warrant was the first and most striking example of the principle of mutual recognition put into practice.¹⁰

The principle of mutual recognition is not a new concept but was taken from the first pillar, where it had been developed to enhance fundamental freedoms and facilitate the single market. The idea behind it seems to be that the underlying systems do not need to be comparable and harmonisation therefore is not necessary. Whereas it may be a valid principle within the first pillar, its application in the third pillar is questionable due to the different nature of the civil and criminal judicial process. While the individual in the first pillar is mostly the subject of free movement rights claimed in national courts and (as regards internal market law) against State authority, the individual in the third pillar is the mere object of free movement arranged between the states.¹¹ Also the principle of mutual recognition in the first pillar is connected to and restricted by rules on jurisdiction, whereas there are no jurisdictional rules in criminal matters. The Member States are free to criminally prosecute based on their jurisdictional principles such as territoriality, nationality, passive personality, the protective principle as well as the universality principle.¹² The only restriction is a non-intervention-clause.¹³

Another important factor is the broad public policy exception applicable to mutual recognition of civil judgments within the first pillar,¹⁴ which is lacking in the third pillar.¹⁵ Whereas for example the Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters¹⁶ provides for a mandatory refusal of recognition on public policy grounds

10 OJ 2002 L 190, 1; concerning its implementation in Austrian Law see Murschetz "Die Übergabe eigener Staatsbürger nach dem Rahmenbeschluss über den Europäischen Haftbefehl und dem EU-JZG" (2006) 3 Newsletter Menschenrechte 163.

11 Steve Peers "Mutual Recognition and Criminal Law in the European Union: Has the Council got it wrong?" (2004) 41 Common Market Law Review 5, 24.

12 For an overview of the principles of jurisdiction see Christopher L Blakesley, Otto Lagodny "Competing National Laws: Network or Jungle?" in Albin Eser and Otto Lagodny (eds) *Principles and Procedures for a New Transnational Criminal Law*; Albin Eser and Otto Lagodny (Beiträge und Materialien aus dem Max-Planck-Institut für ausländische und internationales Strafrecht, Feiburg im Breisgau, 1992) 47 and following.

13 Article 2(1) UN-Charter; Kai Ambos "Anmerkung" (1999) *Neue Zeitschrift für Strafrecht*, 404, 405; Irene Pappas *Stellvertretende Strafrechtspflege* (Beiträge und Materialien aus dem Max-Planck-Institut für ausländische und internationales Strafrecht, Feiburg im Breisgau, 1996) 77.

14 See Case C-7/98 *Krombach* [2000] ECR I-1935 where the ECJ stated, that a court is entitled to refuse recognition on the grounds that the legislation in the state of origin and in the Convention itself have been insufficient to protect the defendant from a manifest breach of his right to defend himself ... as recognized by the ECHR.

15 Peers, above n 11, 23.

16 OJ 2000 L 12, 1.

in article 34, the European Arrest Warrant as the most striking example for mutual recognition in criminal matters does not include such a clear-cut restriction, but only contains a very vague clause in article 1 (3), stating that it shall not have the effect of modifying the obligation to respect fundamental legal principles as enshrined in article 6 of the Maastricht Treaty.

Mutual recognition in criminal matters is supposed to enhance the free movement of criminal investigations, prosecutions and sentences across the EU. It is therefore a tool of repressive character, facilitating enforcement mechanisms within the EU. Accordingly most initiatives based on that principle are repressive measures such as the Framework Decision on the European Arrest Warrant¹⁷, the Framework Decision on the Application of the Principle of Mutual Recognition to Financial Penalties¹⁸ the Framework Decision on the European Evidence Warrant¹⁹ and many more²⁰. To counterbalance these intrusive measures not many activities have been undertaken. There are only three initiatives, all of which have not entered into force yet. One is the proposal for a Framework Decision on Certain Procedural Rights in Criminal Proceedings Throughout the European Union²¹ and the other two are a 2005 Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union,²² as well as a 2006 Green Paper on the Presumption of Innocence²³.

These numerous activities concerning intrusive measures should imply the development of equivalent standards for procedural rights in criminal proceedings. The approximation of laws, in particular by the establishment of minimum rules, should be a priority. Otherwise there is an imbalance between enforcement mechanisms on the one side and legal protection on the other

17 OJ 2002 L 190, 1.

18 OJ 2005 L 76, 16.

19 The final text is not yet available, see proposal for the framework decision COM (2003) 688 final 2003/0270 (CNS), the history is available at <<http://ec.europa.eu/>> (last accessed 5 February 2007).

20 Framework decision on the execution in the European Union of orders freezing property or evidence OJ L 196, 2.8.2003, 45; Proposal for a council framework decision on the organisation and content of the exchange of information extracted from criminal records between Member States COM (2005) 690 <<http://ec.europa.eu/prelex/>> (last accessed 5 February 2007); Proposal for a council framework decision on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings COM (2005) 91 <<http://ec.europa.eu/prelex/>> (last accessed 5 February 2007).

21 Framework Decision on Certain Procedural Rights in Criminal Proceedings Throughout the European Union <<http://ec.europa.eu/prelex/>> (last accessed 5 February 2007); critically Robin Lööf "Shooting from the Hip: Proposed Minimum Rights in Criminal Proceedings throughout the EU" (2006) 12 *European Law Journal*, 421.

22 Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union <<http://ec.europa.eu/prelex/>> (last accessed 5 February 2007).

23 Green Paper on the Presumption of Innocence <<http://ec.europa.eu/prelex/>> (last accessed 5 February 2007).

side.²⁴ While this balance is usually given in the national context, a system of checks and balances is missing within the EU due to different procedural rights granted to defendants. There are states that afford the prosecution with extensive rights, such as wiretapping and electronic surveillance, but attribute just as broad safeguards to the defendant, such as exclusionary rules. On the other hand there are states which grant fewer intrusive measures but also fewer safeguards to the defendant. Mutual recognition requires the applicant to consider these systems as equal. This may lead to an incident where a judicial decision of a state granting broad executive rights has to be enforced in a state that does not grant such intrusive measures but does not grant extensive rights to the defendant either. Therefore the development of equivalent standards for procedural rights is a necessity. But the activities in that field show that, while repressive, cross-border efficiency based on mutual recognition is increased steadily, procedural safeguards are left on the backburner.²⁵

It could be argued that action in the field of procedural rights is not necessary, because each member state is a signatory to the European Convention on Human Rights. This argument is flawed. On the one hand the Convention does not provide for a self-contained system of procedural law and the granted rights constitute only an absolute minimum standard. On the other hand the notion of an equivalent standard of procedural rights is still not a reality. This is apparent from the different ratification statuses of the different additional protocols as well as from the numerous judgments against Member States in the ECHR.²⁶ Good examples are Austria, which has been found on numerous occasions to have violated the non bis in idem principle, and Italy in respect of trials in absentia.²⁷

The mutual recognition of arrest warrants, evidence warrants and judgments can only be advocated if the underlying principles are equal. But this is not the case yet, neither concerning substantive law nor concerning procedural law. The slow pace of harmonisation can be attributed to the fact that criminal proceedings are the most intrusive measures available to the states. Criminal law is used as an ultima ratio, only if other measures such as civil and administrative regulations cannot achieve the goal. What states consider as a criminal act differs greatly and depends to a large extent on ethnic and moral values, which have developed historically.²⁸ Good examples are the so

24 Schünemann "Bürgerrechte ernst nehmen bei der Europäisierung des Strafverfahrens" (2003) *Strafverteidiger* 116, 119; Schünemann "Europäischer Haftbefehl und EU-Verfassungsentwurf auf schiefer Ebene" (2003) *Zeitschrift für Rechtspolitik*, 185, 187 and following.

25 Löff, above n 21, 423.

26 Susie Alegre, Marisa Leaf "Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – the European Arrest Warrant" (2004) 10 *European Law Journal* 200, 201.

27 *Gradinger v Austria*, no 15963/90 (23 October 1995); *Marte and Achberger v Austria*, Judgment (struck out of the list) no 22541/93 (5 March 1998); *Franz Fischer v Austria*, no 37950/97 (29 May 2001), *WF v Austria*, no 38275/97 (30 May 2002), *Sailer v Austria*, no 38237/97 (6 June 2002), *Sejdovic v Italy*, no 56581/00 (1 March 2006).

28 Peers, above n 11, 24.

called "Anti-Nazi laws" implemented in Germany and Austria prohibiting neo-Nazi activities, or abortion, which is a crime in Ireland and Portugal and in the rest of the EU legal under specific circumstances. Procedural law differs on such aspects as access to counsel at all stages of the proceedings; different exclusionary rules are attached to different intrusive measures and so on. Mutual recognition can neither equal out these differences nor should it ignore them. Accordingly the better way to proceed within the third pillar is by harmonisation, even though it is a slower and more difficult process, due to the intergovernmental nature of the third pillar. The principle of mutual recognition of judicial decisions in criminal matters should not be advanced without the establishment of equivalent standards of procedural rights for the defendant within the Union.

III CASE C-176/03 AND INCREASED HARMONISATION THROUGH AN "ANNEX COMMUNITY COMPETENCE"

The ECJ is now trying to increase the level of harmonisation in criminal matters by partly shifting it into the Community pillar. In its far-reaching ruling on the environmental law framework decision the Court decided that criminal law does not exclusively fall under the third pillar.²⁹ Where criminal law is used to ensure the effective implementation of a given sector of Community policy, the Community legislation is empowered to lay down criminal law provisions. The Court basically awarded the Community an implied powers competence. If the subject-matter falls within Community law, the power to draft criminal provisions falls within Community law as well, given that they are in fact necessary to ensure effective implementation of the subject-matter. By this ruling the ECJ gives the Community the power to introduce harmonised criminal law across the EU, creating for the first time a body of European criminal law that all Member States must adopt.

Unfortunately this far-reaching and unprecedented decision was not supported by well-founded and convincing reasoning; it is as ominous as it is deluded. The only apparent justification for its finding lies within the principle of effectiveness regarding the subject-matter of the act concerned: If the subject-matter, the aim of the measure, covers a community competence, the power to regulate it, even through criminal penalties, falls to the community as well, if it is necessary to ensure effectiveness of Community law. The Court failed to clarify how broad these new competences are, especially if the Community legislator is also allowed to regulate the choice of penalty.

The Commission welcomed this ruling and immediately incorporated it in the follow-up Directive on Criminal Measures Aimed at Ensuring the Enforcement of Intellectual Property Rights.³⁰ Furthermore the Commission is now trying to apply this ruling not only to future activities but also to prior legal instruments. The areas covered according to Community officials are internal market measures, environmental protection, data protection, defence of intellectual property and

29 Case C-176/03, above n 1.

30 Directive on Criminal Measures Aimed at Ensuring the Enforcement of Intellectual Property Rights COM(2006) 168 final.

monetary matters. Also it has been indicated that the Commission will apply a broad understanding of the judgment, allowing it not only to push Member States to apply criminal sanctions, but also to set the scale of sanctions.³¹

With this judgment the ECJ overruled the governments of EU Member States, taking away from them the exclusive right to draft criminal laws and to impose their own penalties on people breaking the law. The Court granted the unelected Commission an unprecedented role in the administration of criminal justice.

The Court delivered its ruling after a disagreement between the Commission and the Council over the punishment of polluters. Although both sides agreed that polluters should face criminal penalties, they disagreed on the legal basis for such legislative action establishing criminal responsibilities. The Commission claimed the right to insert criminal penalties into laws to protect the environment through a directive. Unless it did so, its attempt to halt cross-border pollution would be ineffective. The Council on the other hand argued that under the "third pillar" of the Maastricht Treaty, the matter should be dealt with by a framework decisions adopted by the governments through the Council who would have the power of veto. Therefore the Council did not approve of the proposed directive but instead adopted a "Framework Decision on the Protection of the Environment through Criminal Law"³². The Commission then challenged the Council at the EJC and applied for annulment of the framework decision. The Court agreed with the Commission and annulled the framework decision as it "infringes Article 47 TEU as it encroaches on the powers which Article 175 TEC confers on the Community"³³.

The Council of Ministers asserted rightly that, as EU law currently stands, Member States cannot be forced to impose criminal penalties in respect of conduct covered by the Framework Decision.³⁴ Eleven of the then 15 Member States supported the Council's position and contended that "not only is there no express conferral of power" to the Community to impose criminal sanctions under the European treaties, "but, given the considerable significance of criminal law for the sovereignty of the Member States, there are no grounds for accepting that this power can have

31 Michel Petite, head of the European Commission's legal service stated: "I suppose that for a directive to be complied with, we might want to say it has to be a criminal penalty, we may want to say it has at least to be at this level. That could be viewed as a necessary condition for the directive to be complied with properly. But that was not contemplated in the ruling." Nicholas Watt "Brussels wins right to force EU countries to jail polluters" (14 September 2005) *The Guardian* London.

32 "Framework Decision on the Protection of the Environment through Criminal Law" OJ 2003 L 29, 55.

33 Case C-176/03, above n 1, para 53.

34 Case C-176/03, above n 1, para 26.

been implicitly transferred to the Community at the time when specific substantive competences, such as those exercised under Article 175 EC [regarding environment], were conferred on it."³⁵

The Court basically followed the Commission's contentions applying the principle of effectiveness. The ruling implies that the Commission can propose an EU crime that, if passed by the European Parliament and a qualified majority of Member States, must be adopted by all Member States even though a particular government and Parliament may be against it. Accordingly the particular EU Member can be forced to introduce a crime into its law if enough other EU States support it. It also gives the Commission the power to compel members to enforce EU criminal law if governments fail to introduce the relevant laws or if their courts refuse to apply these laws. The regrettable result is the prevalence of the strictest laws.

This is a dangerous step in the wrong direction, a step that the governments, if one looks at the current status of the European Constitution, apparently were not ready to take.³⁶ Aware of this failure regarding fast-track integration, the ECJ steps up, in coordination with the Commission, to achieve the favoured level of integration by its rulings instead of by a democratic decision making process. It acts as a motor of integration leaving out the Member States, which, as the drafters and therefore sovereigns of the treaties, should be the only authorities competent to make such a decision. The drafters and sovereigns of the treaties brought judicial cooperation in criminal matters under its own title in the Maastricht Treaty and expressly conferred criminal matters on the EU and not the Community. Accepting an implied conferral of powers cannot work in intergovernmental cooperation; it only fits within a supranational structure, which the third pillar certainly is not.

This newly-awarded Community competence faces another criticism. In general the meetings of the Council are arranged by subject-matter with different ministers attending from the Member States.³⁷ Therefore framework decisions establishing criminal conduct within the third pillar are drafted by the Council of Ministers of Justice, who are as such authorities competent in drafting criminal laws. When drafting a directive on the other hand, dealing with one of the Community subject matters such as environment, the Council is composed of the Ministers responsible for the specific subject-matters within the Member States. As a consequence a directive establishing criminal responsibilities for pollution will not be drafted by competent authorities in the field of justice, but by authorities competent in the field of environmental issues, the Secretaries of State for the Environment.

35 Case C-176/03, above n 1, para 27.

36 Regarding the content and the future of the Constitution see Foster, above n 3, 47 and following.

37 Craig, De Burca, above n 5, 66.

IV PUPINO AND THE PRINCIPLE OF CONFORMING INTERPRETATION OF NATIONAL LAW APPLICABLE TO FRAMEWORK DECISIONS

In the *Pupino* judgment³⁸ the ECJ again ruled in favour of integration, by holding that Member States are required to interpret national law in conformity with community law in the area of police and judicial cooperation in criminal matters.

The *Pupino* judgment is based on a reference for a preliminary ruling by the Tribunale di Firenze concerning the framework decision on the standing of victims in criminal proceedings.³⁹ The Court held that the principle of conforming interpretation is binding in relation to framework decisions. "When applying national law, the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues".⁴⁰ According to the ECJ this obligation is only limited by such principles as legal certainty and non-retroactivity. What would apparently go too far is an interpretation of national law *contra legem* as well as the creation of criminal liability plainly through interpretation. The ECJ reasoned its judgments mainly by stressing the similarity between framework decisions and directives and by using the principle of effectiveness.⁴¹

The large dissimilarities between the two legislative measures and even more so between the two pillars have not been considered properly by the Court. On the contrary the Court considered the fact that it enjoys a much less extensive jurisdiction in the third pillar as compared to the first pillar does nothing to invalidate its findings.⁴² What has been left unresolved by the Court is whether Member States, which have not accepted the Court's jurisdiction, are also bound to the Court's ruling on conforming interpretation of national law.⁴³ As Member States have a choice on whether to put themselves under the auspices of the Court regarding third pillar issues, and those states deliberately did not opt in, an application of this ruling seems wrong. This limited jurisdiction of the ECJ, which depends on the Member States' own volition, exactly demonstrates one of the major differences between first pillar directives and third pillar framework decisions. Furthermore a framework decision is a measure of the third pillar and as such has to be accepted unanimously by the Member States through the Council⁴⁴, directives on the other hand are adopted by a qualified

38 Case C-105/03, above n 2.

39 OJ 2001 L 82, p. 1.

40 Case C-105/03, above n 2, para 43.

41 Case C-105/03, above n 2, paras 36, 38, 42.

42 Case C-105/03, above n 2, para 35.

43 Christoph Herrmann "Gemeinschaftsrechtskonforme Auslegung nationalen Rechts in Strafverfahren" (2005) 14 Europäische Zeitschrift für Wirtschaftsrecht 433, 438.

44 TEU, art 34(2).

majority in the Council⁴⁵. Also the democratic legislative process differs greatly regarding directives and framework decisions: While directives are enacted with considerable involvement of the elected European Parliament, the Parliament is granted only very limited consultation rights in the third pillar⁴⁶. For all those dissimilarities between framework decisions and directives, different interpretation methods have to apply, and an obligation to conforming interpretation of national law with regards to framework decision has to be rejected.⁴⁷ The ECJ on the other hand disregards these major differences as well as ignores the express exclusion of direct effect of framework decisions in article 34 (2) b TEU. It approximates the effect of framework decisions to the effect of directives and opts for integration instead of subsidiarity. The goal of the Court seems to be to achieve the level of integration envisaged by the failed Constitution.

V CONCLUSION

The recent rulings of the ECJ concerning criminal matters disclose the mindset of the Court, and support the suspicion that, when faced with a choice between subsidiarity and integration by strengthening the EU's federal powers, it will choose the latter. This is especially problematic as the European Constitution, which would have pushed integration by eliminating the pillar structure and giving the Court broader jurisdiction concerning criminal matters, was rejected by some of the Member States and therefore has not entered into force. The Court apparently is trying to achieve the favoured level of integration by its recent rulings, instead of by a democratic decision-making process.

What the EU is confronted with regarding criminal matters today is on the one hand mutual recognition facilitating close cooperation between prosecuting authorities without equivalent procedural safeguards and on the other hand harmonisation through the Community legislature through an implied powers competency established by the ECJ as well as through an obligation to conforming interpretation of third pillar measures.

45 See TEC, art 251.

46 TEU, art 39.

47 Michael Adam "Die Wirkung von EU-Rahmenbeschlüssen im innerstaatlichen Recht" (2005) 18 Europäische Zeitschrift für Wirtschaftsrecht 558 ss; Thomas Fetzer, Thomas Groß "Die Pupino-Entscheidung des EuGH – Abkehr vom intergouvernementalen Charakter der EU? – Erwiderung auf Herrmann, EuZW 2005, 436" (2005) 18 Europäische Zeitschrift für Wirtschaftsrecht 550 and following.

