

Pollution law kicked out

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Oct 07

A controversial pollution law which sought to criminalize shipowners for acts of pollution has been kicked out by the European Court of Justice.

The EU ruling, which was strongly opposed by a host of shipping lobbyists, was overturned in Luxembourg on a technicality.

Rushed into being on the back of two high-profile oil spills, the law was rejected as it was not properly drafted by EU governments, press reports said.



Introduced in 2005, the law allowed owners, captains and companies to be charged for causing pollution.

If the rules had remained in place, individual penalties for accidental pollution could have topped \$1.8m.

The EU government must now head back to the drawing board with the law, which was drafted in response to the Prestige and Erika disasters.

A large shipping coalition, led by Intertanko, Intercargo and the International Salvage Union, slammed the directive as a unilateral measure which went against the carefully designed body of international law.

By [Andy Pierce](#) in London

published: 15:07 GMT, 23 October 2007 | last updated: 20:47 GMT, 23 October 2007

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JUDGMENT OF THE COURT (Grand Chamber)

23 October 2007(*)

(Action for annulment – Articles 31(1)(e) EU, 34 EU and 47 EU – Framework Decision 2005/667/JHA – Enforcement of the law against **ship-source** pollution – Criminal penalties – Community competence – Legal basis – Article 80(2) EC)

In Case C-440/05,

APPLICATION for annulment under Article 35(6) EU, brought on 8 December 2005,

Commission of the European Communities, represented by W. Bogensberger and R. Troosters, acting as Agents, with an address for service in Luxembourg,

applicant,

supported by:

European Parliament, represented by M. Gómez-Leal, J. Rodrigues and A. Auersperger Matic, acting as Agents, with an address for service in Luxembourg,

intervener,

v

Council of the European Union, represented by J.-C. Piris and J. Schutte, and by K. Michoel, acting as Agents,

defendant,

supported by:

Kingdom of Belgium, represented by M. Wimmer, acting as Agent,

Czech Republic, represented by T. Boček, acting as Agent,

Kingdom of Denmark, represented by J. Molde, acting as Agent,

Republic of Estonia, represented by L. Uibo, acting as Agent,

Hellenic Republic, represented by S. Chala and A. Samoni-Rantou, acting as Agents, with an address for service in Luxembourg,

French Republic, represented by E. Belliard, G. de Bergues and S. Gasri, acting as Agents,

Ireland, represented by D. O'Hagan and E. Fitzsimons, and also by N. Hyland, acting as Agents, with an address for service in Luxembourg,

Republic of Latvia, represented by E. Balode-Buraka, and E. Broks, acting as Agents,

Republic of Lithuania, represented by D. Kriauciūnas, acting as Agent,

Republic of Hungary, represented by P. Gottfried, acting as Agent,

Republic of Malta, represented by S. Camilleri, acting as Agent, assisted by P. Grech, Deputy Attorney General,

Kingdom of the Netherlands, represented by H.G. Sevenster and M. de Grave, acting as Agents,

Republic of Austria, represented by C. Pesendorfer, acting as Agent, with an address for service in Luxembourg,

Republic of Poland, represented by E. Ośniecka-Tamecka, acting as Agent,

Portuguese Republic, represented by L. Fernandes and M.L. Duarte, acting as Agents,

Slovak Republic, represented by R. Procházka, acting as Agent,

Republic of Finland, represented by E. Bygglin, acting as Agent, with an address for service in Luxembourg,

Kingdom of Sweden, represented by K. Wistrand, acting as Agent, with an address for service in Luxembourg,

United Kingdom of Great Britain and Northern Ireland, represented by E. O'Neill and D.J. Rhee, and also by D. Anderson, acting as Agents, with an address for service in Luxembourg,

interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts and A. Tizzano, Presidents of Chambers, R. Schintgen (Rapporteur), J.N. Cunha Rodrigues, M. Ilešič, J. Malenovský, T. von Danwitz, A. Arabadjiev and C. Toader, Judges,

Advocate General: J. Mazák,

Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 28 June 2007,

gives the following

Judgment

1 By its application the Commission of the European Communities 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 (OJ 2005 L 255, p. 164) ('the Framework Decision' or 'Framework Decision 2005/667').

Legal context and background to the dispute

2 On 12 July 2005, acting on the initiative of the Commission, the Council of the European Union adopted Framework Decision 2005/667.

3 Based on Title VI of the Treaty on European Union, in particular on Articles 31(e) EU and 34(2)(b) EU, the Framework Decision constitutes, as is clear from the first five recitals in its preamble, the instrument by which the European Union intends to approximate criminal-law legislation of the Member States by requiring them to provide for criminal penalties in order to combat **ship-source** pollution caused with intent or by serious negligence.

4 The Framework Decision supplements Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on **ship-source** pollution and on the introduction of penalties for infringements (OJ 2005 L 255, p. 11), with a view to strengthening maritime safety by approximating the legislation of the Member States.

5 Framework Decision 2005/667 provides that the Member States are to adopt a certain number of criminal law-related measures with a view to attaining the objective pursued by Directive 2005/35, namely to ensure a high level of safety and environmental protection in relation to maritime transport.

6 Article 1 of the Framework Decision states:

'For the purposes of this framework decision, the definitions provided for in Article 2 of Directive 2005/35/EC shall apply'.

7 Article 2 of the Framework Decision provides:

'1. Subject to Article 4(2) of this framework decision, each Member State shall take the measures necessary to ensure that an infringement within the meaning of Articles 4 and 5 of Directive 2005/35/EC shall be regarded as a criminal offence.

2. Paragraph 1 shall not apply to crew members in respect of infringements that occur in straits used for international navigation, exclusive economic zones and on the high seas where the conditions set out in Annex I, Regulation 11(b) or in Annex II, Regulation 6(b), of the Marpol 73/78 Convention are satisfied.'

8 Article 3 of the Framework Decision provides:

'Each Member State shall, in accordance with national law, take the measures necessary to ensure that aiding, abetting or inciting an offence referred to in Article 2 is punishable.'

9 Article 4 of the Framework Decision is worded as follows:

'1. Each Member State shall take the measures necessary to ensure that the offences referred to in Articles 2 and 3 are punishable by effective, proportionate and dissuasive criminal penalties which shall include, at least for serious cases, criminal penalties of a maximum of at least between one and three years of imprisonment.

2. In minor cases, where the act committed does not cause a deterioration of the quality of the water, a Member State may provide for penalties of a different type from those laid down in paragraph 1.

3. The criminal penalties provided for in paragraph 1 may be accompanied by other penalties or measures, in particular fines, or the disqualification for a natural person from engaging in an activity requiring official authorisation or approval, or founding, managing or directing a company or a foundation, where the facts having led to his/her conviction show an obvious risk that the same kind of criminal activity may be pursued again.

4. Each Member State shall take the measures necessary to ensure that the intentionally committed offence referred to in Article 2 is punishable by a maximum of at least between five and ten years of imprisonment where the offence caused significant and widespread damage to water quality, to animal or vegetable species or to parts of them and the death or serious injury of persons.

5. Each Member State shall take the measures necessary to ensure that the intentionally committed offence referred to in Article 2 is punishable by a maximum of at least between two and five years of imprisonment where:

(a) the offence caused significant and widespread damage to water quality, to animal or vegetable species or to parts of them; or

(b) the offence was committed within the framework of a criminal organisation within the meaning of Council Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union [OJ 1998 L 351, p. 1], irrespective of the level of the penalty referred to in that Joint Action.

6. Each Member State shall take the measures necessary to ensure that the offence referred to in Article 2, when committed with serious negligence, is punishable by a maximum of at least between two and five years of imprisonment where the offence caused significant and widespread damage to water quality, to animal or vegetable species or to parts of them and the death or serious injury of persons.

7. Each Member State shall take the measures necessary to ensure that the offence referred to in Article 2, when committed with serious negligence, is punishable by a maximum of at least between one and three years of imprisonment where the offence caused significant and widespread damage to water quality, to animal or vegetable species or to parts of them.

8. Regarding custodial penalties, this Article shall apply without prejudice to international law and in particular Article 230 of the 1982 United Nations Convention on the Law of the Sea.'

10 According to Article 5 of the Framework Decision:

'1. Each Member State shall take the measures necessary to ensure that legal persons can be held liable for the offences referred to in Articles 2 and 3, committed for their benefit by any persons acting either individually or as part of an organ of the legal person, who have a leading position within the legal person,

based on:

- (a) a power of representation of the legal person, or
- (b) an authority to take decisions on behalf of the legal person, or
- (c) an authority to exercise control within the legal person.

2. Apart from the cases provided for in paragraph 1, Member States shall take the measures necessary to ensure that a legal person can be held liable where lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of the offence referred to in Article 2 for the benefit of the legal person by a person under its authority.

3. The liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are involved as perpetrators, instigators or accessories in the offences referred to in Articles 2 and 3.'

11 Article 6 of the Framework Decision provides:

'1. Each Member State shall take the measures necessary to ensure that a legal person held liable pursuant to Article 5(1) is punishable by effective, proportionate and dissuasive penalties. The penalties:

- (a) shall include criminal or non-criminal fines, which, at least for cases where the legal person is held liable for offences referred to in Article 2, are:
 - (i) of a maximum of at least between EUR 150 000 and EUR 300 000;
 - (ii) of a maximum of at least between EUR 750 000 and EUR 1 500 000 in the most serious cases, including at least the intentionally committed offences covered by Article 4(4) and (5);
- (b) may, for all cases, include penalties other than fines, such as:
 - (i) exclusion from entitlement to public benefits or aid;
 - (ii) temporary or permanent disqualification from engaging in commercial activities;
 - (iii) placing under judicial supervision;
 - (iv) a judicial winding-up order;
 - (v) the obligation to adopt specific measures in order to eliminate the consequences of the offence which led to the liability of the legal person.

2. For the purpose of the implementation of paragraph 1(a), and without prejudice to the first sentence of paragraph 1, Member States in which the euro has not been adopted shall apply the exchange rate between the euro and their currency as published in the *Official Journal of the European Union* on 12 July 2005.

3. A Member State may implement paragraph 1(a) by applying a system, whereby the fine is proportionate to the turnover of the legal person, to the financial advantage achieved or envisaged by the commission of the offence, or to any other value indicating the financial situation of the legal person, provided that such system allows for maximum fines, which are at least equivalent to the minimum for the maximum fines established in paragraph 1(a).

4. A Member State that implements the framework decision in accordance with paragraph 3 shall notify the General Secretariat of the Council and the Commission that it intends to do so.

5. Each Member State shall take the measures necessary to ensure that a legal person held liable pursuant to Article 5(2) is punishable by effective, proportionate and dissuasive penalties or measures.'

12 Article 7(1) of the Framework Decision specifies the factual characteristics of the offences in respect of which the Member States are to take the measures necessary to establish their jurisdiction, so far as is permitted by international law.

13 Under Article 7(4) of the Framework Decision, when an offence is subject to the jurisdiction of more than one Member State, the relevant Member States are to strive to coordinate their actions appropriately, in particular as regards the conditions for prosecution and the detailed arrangements for mutual assistance. Article 7(5) of the Framework Decision specifies the connecting factors to be taken into account in that

context.

14 Article 8 of the Framework Decision provides:

'1. Where a Member State is informed of the commission of an offence to which Article 2 applies or of the risk of the commission of such an offence which causes or is likely to cause imminent pollution, it shall immediately inform such other Member States as are likely to be exposed to this damage, and the Commission.

2. Where a Member State is informed of the commission of an offence to which Article 2 applies or of the risk of the commission of such an offence which is likely to fall within the jurisdiction of a Member State, it shall immediately inform that other Member State.

3. Member States shall without delay notify the flag State or any other State concerned of measures taken pursuant to this framework decision, and in particular Article 7.'

15 According to Article 9 of the Framework Decision:

'1. Each Member State shall designate existing contact points, or, if necessary, create new contact points, in particular for the exchange of information as referred to in Article 8.

2. Each Member State shall inform the Commission which of its departments acts or act as contact points in accordance with paragraph 1. The Commission shall notify the other Member States of these contact points.'

16 Under Article 10 thereof, the Framework Decision is to have the same territorial scope as Directive 2005/35.

17 Article 11 of the Framework Decision provides:

'1. Member States shall adopt the measures necessary to comply with the provisions of this framework decision by 12 January 2007.

2. By 12 January 2007, Member States shall transmit to the General Secretariat of the Council and to the Commission the texts of the provisions transposing into their national law the obligations imposed on them by this framework decision. On the basis of that information and a written report by the Commission, the Council shall, by 12 January 2009 at the latest, assess the extent to which Member States have complied with this framework decision.

3. By 12 January 2012, the Commission shall, on the basis of information supplied by the Member States on the practical application of the provisions implementing this framework decision, submit a report to the Council and make any proposals it deems appropriate which may include proposals to the effect that Member States shall, concerning offences committed in their territorial sea or in their exclusive economic zone or equivalent zone, consider a ship flying the flag of another Member State not to be a foreign ship within the meaning of Article 230 of the 1982 United Nations Convention on the Law of the Sea.'

18 In accordance with Article 12 thereof, the Framework Decision entered into force on the day following that of its publication in the *Official Journal of the European Union*.

19 Article 1 of Directive 2005/35 provides:

'1. The purpose of this Directive is to incorporate international standards for **ship-source** pollution into Community law and to ensure that persons responsible for discharges are subject to adequate penalties as referred to in Article 8, in order to improve maritime safety and to enhance protection of the marine environment from pollution by ships.

2. This Directive does not prevent Member States from taking more stringent measures against **ship-source** pollution in conformity with international law.'

20 Article 2 of Directive 2005/35 provides:

'For the purpose of this Directive:

1. "Marpol 73/78" shall mean the International Convention for the Prevention of Pollution from Ships, 1973 and its 1978 Protocol, in its up-to-date version;

2. "polluting substances" shall mean substances covered by Annexes I (oil) and II (noxious liquid substances in bulk) to Marpol 73/78;

3. "discharge" shall mean any release howsoever caused from a ship, as referred to in Article 2 of Marpol 73/78;
4. "ship" shall mean a seagoing vessel, irrespective of its flag, of any type whatsoever operating in the marine environment and shall include hydrofoil boats, air-cushion vehicles, submersibles and floating craft.'

21 According to Article 3 of that directive:

'1. This Directive shall apply, in accordance with international law, to discharges of polluting substances in:

- (a) the internal waters, including ports, of a Member State, in so far as the Marpol regime is applicable;
- (b) the territorial sea of a Member State;
- (c) straits used for international navigation subject to the regime of transit passage, as laid down in Part III, section 2, of the 1982 United Nations Convention on the Law of the Sea, to the extent that a Member State exercises jurisdiction over such straits;
- (d) the exclusive economic zone or equivalent zone of a Member State, established in accordance with international law; and
- (e) the high seas.

2. This Directive shall apply to discharges of polluting substances from any ship, irrespective of its flag, with the exception of any warship, naval auxiliary or other ship owned or operated by a State and used, for the time being, only on government non-commercial service.'

22 Article 4 of that directive provides:

'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 ... supplementing this Directive.'

23 According to Article 8 of Directive 2005/35:

'1. Member States shall take the necessary measures to ensure that infringements within the meaning of Article 4 are subject to effective, proportionate and dissuasive penalties, which may include criminal or administrative penalties.

2. Each Member State shall take the measures necessary to ensure that the penalties referred to in paragraph 1 apply to any person who is found responsible for an infringement within the meaning of Article 4.'

24 At the time of adoption both of Directive 2005/35 and the Framework Decision, the Commission made statements in order to dissociate itself from the 'double-text' approach taken by the Council. The statement relating to the Framework Decision reads as follows:

'Given the importance of combating **ship-source** pollution, the Commission is in favour of the discharge of polluting substances by ships being made a criminal offence and of penalties being adopted at national level in the event of the infringement of Community regulations concerning **ship-source** pollution.

The Commission is, however, of the opinion that the Framework Decision is not the appropriate legal instrument with which to impose on Member States an obligation to criminalise the illicit discharge of polluting substances at sea and to establish corresponding criminal penalties at national level.

The Commission – as it is arguing in the Court of Justice in its appeal C-176/03 [Case C-176/03 *Commission v Council* [2005] ECR I-7879] against the Framework Decision on the Protection of the Environment through Criminal Law – considers that, within the competences which it possesses for the purpose of achieving the objectives set out in Article 2 of the Treaty establishing the European Community, the Community is empowered to require Member States to provide for penalties – including, if appropriate, criminal penalties – at national level, where this proves necessary in order to achieve a Community objective.

This is the case with regard to questions of **ship-source** pollution, for which Article 80(2) of the Treaty establishing the European Community constitutes the legal basis.

Pending the ruling on C-176/03, if the Council adopts the Framework Decision in spite of this Community competence, the Commission reserves all the rights conferred upon it by the Treaty.'

25 Considering that the Framework Decision had not been adopted on the correct legal basis and that Article 47 EU had thereby been infringed, the Commission brought the present action.

The action

26 By Order of the President of the Court of 25 April 2006, leave to intervene in support of the forms of order sought by the Commission and the Council respectively was granted, on the one hand, to the European Parliament and, on the other, to the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, the Republic of Estonia, the Hellenic Republic, the French Republic, Ireland, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.

27 By Order of 28 September 2006, the President of the Court granted the Slovenian Republic leave to intervene in support of the forms of order sought by the Council.

Arguments of the parties

28 The Commission considers that, by virtue of the legal basis used for its adoption, the Framework Decision infringes Article 47 EU and must therefore be annulled.

29 According to the Commission, it is clear from the judgment in Case C-176/03 *Commission v Council*, the implications of which extend beyond Community policy on environmental protection, that regard must be had to the aim and content of a measure in order to determine the appropriate legal basis for its adoption. Although the Court noted in that judgment that criminal law does not, as a rule, fall within the Community's sphere of competence, it recognised that the Community does have an implied competence linked to a specific legal basis and may therefore adopt appropriate criminal-law measures, provided that there is a need to combat failure to implement Community objectives and that the aim of those measures is to ensure that the Community policy in question is fully effective. The Court did not define the scope of the Community legislature's competence in criminal-law matters, since it did not draw any distinctions based on the nature of the criminal-law measures in question.

30 In the present case, the preamble to the Framework Decision states that its purpose is to supplement and thereby ensure the effectiveness of the system established by Directive 2005/35, which was adopted on the basis of Article 80(2) EC.

31 As to the content of the Framework Decision, the Commission submits that the measures provided for in Articles 1 to 10 thereof all relate to criminal law and concern conduct which must be regarded as reprehensible under Community law.

32 According to the Commission, the criterion requiring that there be a need, laid down by the Court in Case C-176/03 *Commission v Council*, is also fulfilled in the present case. Firstly, the Council implicitly acknowledged as much in adopting the Framework Decision, since the third indent of the second paragraph of Article 29 EU provides that the Member States may approximate their legislation on criminal matters only 'where necessary'. Secondly, given the specific features of the conduct covered by Directive 2005/35, all the provisions of that framework decision are necessary in order to ensure that the system established by the directive is effective.

33 The Commission adds that, contrary to what the Council contends, the Court does not require an additional criterion, relating to the 'transversal' nature of the Community policy in question, to be satisfied in order for a degree of competence in criminal-law matters to be recognised as accruing to the Community. Moreover, such a criterion would, for most areas of Community law, preclude the possibility of any form of criminal-law protection under Community law, even where there was clearly a need for criminal-law measures to be taken.

34 As to the argument that the Council was free to act on the basis of Title VI of the EU Treaty to adopt measures relating to the criminal law of the Member States, since it had decided, as it was entitled to do under Article 80(2) EC, not to specify the penalties further in Directive 2005/35, the Commission states that Article 80(2) EC does not contain conditions for the existence of Community competence as such, but only for the exercise of that competence. The Council could, of course, have decided that the Member States remained competent. If it had, however, the Member States would have had to take action separately, since Article 47 EU precludes reliance on Title VI of the EU Treaty.

35 The Commission adds that the Framework Decision does not harmonise the type and level of applicable criminal penalty, as the Member States retain a certain latitude in that regard and the national courts have

discretion to adjust the penalties to suit the individual case. Thus, the provisions of Framework Decision 2005/667 do not differ fundamentally from those of Article 5(1) of Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law (OJ 2003 L 29, p. 55), which was annulled by the Court in Case C-176/03 *Commission v Council*.

36 Criminal law does not, of course, constitute an independent Community policy area. The fact remains, however, that the Community has an ancillary criminal-law competence, which it may exercise if necessary. The criterion of need, applied by the Court in Case C-176/03 *Commission v Council*, applies only in relation to the exercise of that competence, not to the question whether such a competence exists.

37 In the light of the functional approach taken by the Court in Case C-176/03 *Commission v Council*, and the fact that the measures provided for in Articles 1 to 10 of the Framework Decision are criminal-law rules which are necessary to ensure the effectiveness of the common transport policy, as elaborated upon in Directive 2005/35, the Commission considers that the Framework Decision as a whole infringes Article 47 EU and must accordingly be annulled.

38 The Commission also observes that the terms 'essential' and 'needed', on the one hand, and the notion of 'necessary' within the meaning of Article 29 EU, on the other, in fact reflect the same concept and that, at that level, there is no difference between the EC Treaty and the EU Treaty.

39 Lastly, the Commission submits that its interpretation of the judgment in Case C-176/03 *Commission v Council* does not deprive Title VI of the EU Treaty of any useful purpose, since a great many areas coming within the scope of that title are not affected by that interpretation.

40 The European Parliament observes that the Framework Decision is a perfect match of the framework decision which was the subject-matter of the judgment in Case C-176/03 *Commission v Council*. Firstly, its aim and content are wholly analogous to that of Framework Decision 2003/80, which was annulled by the Court in that judgment. As is clear from the preamble thereto, the fight against pollution and protection of the environment are not ancillary or secondary objectives of Framework Decision 2005/667. Likewise, its content is similar to that of Framework Decision 2003/80, since in both cases the criminal offences envisaged relate to the discharge of polluting substances. Although the two framework decisions diverge as regards the specific definition of the type and level of criminal penalty to be applied, that divergence is not such as to justify, in the present case, an outcome which is any different from that in Case C-176/03 *Commission v Council*. In fact, in that judgment the Court has already held that the Community legislature's competence in criminal-law matters extends to provisions such as Article 5(1) of Framework Decision 2003/80 concerning the type and level of criminal penalties.

41 Next, the criterion requiring that there be a need is also fulfilled in the present case. Lastly, since Articles 1 to 6 of the Framework Decision come within Community competence, that decision, being indivisible, should be regarded in its entirety as infringing Article 47 EU.

42 The Council, by contrast, puts forward as its principal argument that, in adopting Directive 2005/35 together with the European Parliament under the co-decision procedure, it decided – in accordance with Article 80(2) EC – the question 'whether' and, if so, 'to what extent' the Community legislature must exercise its competence to adopt provisions on **ship-source** pollution, in particular provisions introducing penalties for infringement of the relevant rules. Through the adoption of that directive, the Community legislature wished to demarcate the limits of its own power to take action in matters involving maritime transport policy. This approach is entirely in keeping with Article 80(2) EC and the case-law of the Court.

43 The Community legislature could have decided to go further on the basis of Article 80(2) EC. However, in keeping with the powers conferred on it by the EC Treaty, it chose not to do so. It is also noteworthy that the European Parliament and the Council followed the Commission's proposal concerning the legal basis to be used for Directive 2005/35. Although that directive also pursues objectives relating to protection of the environment, the Community legislature took the view that it essentially falls under the common transport policy and that the addition of a legal basis concerning environmental protection, in particular Article 175(1) EC, was not necessary. As it is, the legal basis chosen was not questioned by either the Parliament or the Commission.

44 Given the conditional nature of the competence in matters of transport policy conferred by Article 80 EC on the Community and the fact that transport policy, unlike environmental policy which was the policy area at issue in Case C-176/03 *Commission v Council*, does not pursue an objective that is essential, transversal and fundamental, the Council considers that the inferences to be drawn from that judgment need not necessarily be the same in respect of both policies.

45 In those circumstances, it cannot validly be claimed that the provisions laid down in Framework Decision 2005/66 ought to have been adopted by the Community legislature.

46 In the alternative, the Council contends that the Community is not competent to lay down binding rules on the type and level of criminal penalty which the Member States must provide for in their national law and

that, accordingly, the Council did not infringe the EC and EU Treaties by adopting Articles 1, 4(1), (4), (5), (6) and (7) and 6(1)(a), (2) and (3), or Articles 7 to 12 of the Framework Decision.

47 The Council states that, in terms of its aim and content – the key elements for determining the appropriate legal basis for adopting a measure – the Framework Decision is designed to approximate the laws of the Member States relating to the fight against **ship-source** pollution by harmonising the type and level of the applicable criminal penalties. However, it is clear from Case C-176/03 *Commission v Council* that such harmonisation, which goes far beyond that provided for in Framework Decision 2003/80, does not currently fall within the Community's sphere of competence.

48 Since the approach adopted by the Court in that judgment must be regarded as marking an exception to the principle that criminal law falls outside the Community's sphere of competence – as do, by the same token, the rules of criminal procedure – the Council considers that the criteria applied by the Court in support of that approach must be interpreted narrowly. That approach should therefore apply only where there is a 'need', a concept which is not identical to that of 'necessary' as referred to in the second paragraph of Article 29 EU.

49 The Council adds, with regard to the interpretation of the judgment in Case C-176/03 *Commission v Council* advocated by the Commission, that not only would it deprive Title VI of the EU Treaty of much of its useful purpose, it also manifestly disregards the fact that the Court opted for that approach in that judgment because the Community objective of environmental protection is essential, transversal and fundamental.

50 Lastly, the Council observes that, in Case C-176/03 *Commission v Council*, the Court held that, in the light of their aim and content, the Community was competent to adopt Articles 1 to 7 of Framework Decision 2003/80 and that it would therefore have excluded Articles 8 on jurisdiction and Article 9 on extraditions and prosecutions from that sphere of competence. Likewise, in the present case, Articles 7, 8 and 9 of Framework Decision 2005/667 cover areas in respect of which the EC Treaty has not conferred any competence on the Community.

51 The arguments put forward by the Member States which have intervened in the present proceedings are largely similar to those relied on by the Council.

Findings of the Court

52 Under Article 47 EU, none of the provisions of the EC Treaty is to be affected by a provision of the EU Treaty. The same rule is laid down in the first paragraph of Article 29 EU, which introduces Title VI of the EU Treaty, entitled 'Provisions on police and judicial cooperation in criminal matters'.

53 It is the task of the Court to ensure that acts which, according to the Council, fall within the scope of Title VI do not encroach upon the powers conferred by the EC Treaty on the Community (see Case C-170/96 *Commission v Council* [1998] ECR I-2763, paragraph 16, and Case C-176/03 *Commission v Council*, paragraph 39).

54 It is therefore necessary to determine whether or not the provisions of Framework Decision 2005/667 affect the Community's competence under Article 80(2) EC, in that they could have been adopted on the basis of that provision, as submitted by the Commission.

55 It should be borne in mind, firstly, that the common transport policy is one of the foundations of the Community, since Article 70 EC, read together with Article 80(1) EC, provides that the objectives of the Treaty are, in matters of transport by rail, road or inland waterway, to be pursued by the Member States within the framework of that policy (see Case 97/78 *Schumalla* [1998] ECR 2311, paragraph 4).

56 Next, it should be noted that, under Article 80(2) EC, the Council may decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea transport (see, inter alia, Case C-18/93 *Corsica Ferries* [1994] ECR I-1783, paragraph 25), and the procedural provisions of Article 71 EC are to apply.

57 As evidenced by the Court's case-law, far from excluding the application of the EC Treaty to sea transport, Article 80(2) EC merely provides that the specific rules of the Treaty relating to the common transport policy, which are set out in Title V thereof, will not automatically apply to that sphere of activity (see, inter alia, Case C-178/05 *Commission v Greece* [2007] ECR I-0000, paragraph 52).

58 Since Article 80(2) EC does not lay down any explicit limitations as to the nature of the specific common rules which the Council may adopt on that basis in accordance with the procedural provisions laid down in Article 71 EC, the Community legislature has broad legislative powers under Article 80(2) EC and is competent – by virtue of that provision and in keeping with the other provisions of the EC Treaty relating to the common transport policy, in particular Article 71(1) EC – to lay down, inter alia, 'measures to improve transport safety' and 'any other appropriate provisions' in the field of maritime transport (see, to that

effect, in respect of road transport, Joined Cases C-184/02 and C-223/02 *Spain and Finland v Parliament and Council* [2004] ECR I-7789, paragraph 28).

- 59 That finding, to the effect that within the scope of the competence conferred on it by Article 80(2) EC, the Community legislature may adopt measures aimed at improving maritime transport safety, is not called into question by the fact that, in the present case, the Council has not considered it appropriate to adopt the provisions of Framework Decision 2005/667 on the basis of Article 80(2) EC. In fact, the existence of the legislative competence conferred by Article 80(2) EC is not dependent on a decision by the legislature actually to exercise that competence.
- 60 Moreover, since requirements relating to environmental protection, which is one of the essential objectives of the Community (see, *inter alia*, Case C-176/03 *Commission v Council*, paragraph 41), must, according to Article 6 EC, 'be integrated into the definition and implementation of ... Community policies and activities', such protection must be regarded as an objective which also forms part of the common transport policy. The Community legislature may therefore, on the basis of Article 80(2) EC and in the exercise of the powers conferred on it by that provision, decide to promote environmental protection (see, by analogy, Case C-336/00 *Huber* [2002] ECR I-7699, paragraph 36).
- 61 Lastly, it must be borne in mind that, according to the Court's settled case-law, 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 (see Case C-300/89 *Commission v Council* [1991] ECR I-2867, '*Titanium dioxide*', paragraph 10; *Huber*, paragraph 30; and Case C-176/03 *Commission v Council*, paragraph 45).
- 62 More specifically, in respect of Framework Decision 2005/667, the preamble thereto states that its purpose is to enhance maritime safety and improve protection of the marine environment against **ship-source** pollution. As evidenced by the second and third recitals in the preamble, that decision is intended to approximate certain legislation of the Member States in order to avoid a recurrence of damage like that brought about by the sinking of the oil tanker, the *Prestige*.
- 63 As is clear from the fourth recital in the preamble to Framework Decision 2005/667 and the sixth recital in the preamble to Directive 2005/35, the Framework Decision is intended to supplement the directive with detailed rules on criminal matters. As evidenced by the first and 15th recitals in the preamble to Directive 2005/35 and also in Article 1 thereof, it also aims to ensure a high level of safety and environmental protection in maritime transport. Its purpose, according to the 15th recital in the preamble and Article 1, is to incorporate international **ship-source** pollution standards into Community law and to establish penalties – criminal and administrative – for infringement of those rules, in order to ensure that they are effective.
- 64 As to the content of Framework Decision 2005/667, by virtue of Articles 2, 3 and 5 thereof, it introduces the obligation for Member States to provide for criminal penalties for persons, natural or legal, who have committed, aided, abetted or incited one of the offences referred to in Articles 4 and 5 of Directive 2005/35.
- 65 Moreover, the Framework Decision, according to which the criminal penalties must be effective, dissuasive and proportionate, lays down, in Articles 4 and 6, the type and level of criminal penalty to be applied according to the damage caused by the offences to water quality, to animal or vegetable species or to persons.
- 66 Although it is true that, as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence (see, to that effect, Case 203/80 *Casati* [1981] ECR 2595, paragraph 27; Case C-226/97 *Lemmens* [1998] ECR I-3711, paragraph 19; and Case C-176/03 *Commission v Council*, paragraph 47), the fact remains that when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, the Community legislature may require the Member States to introduce such penalties in order to ensure that the rules which it lays down in that field are fully effective (see, to that effect, Case C-176/03 *Commission v Council*, paragraph 48).
- 67 In the present case, the Court finds, firstly, that the provisions laid down in Framework Decision 2005/667 – like those of Framework Decision 2003/80, at issue in the proceedings which gave rise to the judgment in Case C-176/03 *Commission v Council* – relate to conduct which is likely to cause particularly serious environmental damage as a result, in this case, of the infringement of the Community rules on maritime safety.
- 68 Secondly, it is clear from the third, fourth, fifth, seventh and eighth recitals in the preamble to Directive 2005/35, read in conjunction with the first five recitals in the preamble to Framework Decision 2005/667, that the Council took the view that criminal penalties were necessary to ensure compliance with the Community rules laid down in the field of maritime safety.
- 69 Accordingly, since Articles 2, 3 and 5 of Framework Decision 2005/667 are designed to ensure the efficacy of the rules adopted in the field of maritime safety, non-compliance with which may have serious

environmental consequences, by requiring Member States to apply criminal penalties to certain forms of conduct, those articles must be regarded as being essentially aimed at improving maritime safety, as well as environmental protection, and could have been validly adopted on the basis of Article 80(2) EC.

70 By contrast, and contrary to the submission of the Commission, the determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence.

71 It follows that the Community legislature may not adopt provisions such as Articles 4 and 6 of Framework Decision 2005/667, since those articles relate to the type and level of the applicable criminal penalties. Consequently, those provisions were not adopted in infringement of Article 47 EU.

72 It should also be pointed out that the references made in Articles 4 and 6 of the Framework Decision to Articles 2, 3 and 5 thereof highlight the fact that, in the present case, those provisions are inextricably linked to the provisions concerning the criminal offences to which they relate.

73 As regards Articles 7 to 12 of Framework Decision 2005/667 – which respectively concern jurisdiction, notification of information between Member States, designation of contact points, territorial scope of application of the Framework Decision, the implementation obligation on Member States and the date of entry into force of the Framework Decision – it is sufficient to note, in the present case, that those articles are also inextricably linked to the provisions of the Framework Decision that are referred to in paragraphs 69 and 71 of this judgment, which means that it is not necessary to rule on the question whether they fall within the sphere of competence of the Community legislature.

74 In the light of the foregoing, it must be concluded that Framework Decision 2005/667, in encroaching on the competence which Article 80(2) EC attributes to the Community, infringes Article 47 EU and, being indivisible, must be annulled in its entirety.

Costs

75 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Council has been unsuccessful, the Council must be ordered to pay the costs. Pursuant to the first subparagraph of Article 69(4), the interveners in these proceedings must bear their own costs.

On those grounds, the Court (Grand Chamber) hereby:

- 1. Annuls 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. Orders the Council of the European Union to bear its own costs;**
- 3. Orders the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, the Republic of Estonia, the Hellenic Republic, the French Republic, Ireland, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, and the United Kingdom of Great Britain and Northern Ireland and also the European Parliament to bear their own costs.**

[Signatures]