

CASE-LAW OF THE EUROPEAN COURT OF JUSTICE IN CRIMINAL MATTERS

MICHAEL ŠVARC

Právnická fakulta, Masarykova univerzita, Brno

Abstract in original language

Práce se zaměří na judikaturu ESD v trestních věcech. Bude pracovat s hypotézou, že ESD podporuje při řešení sporů institucí v oblasti trestního práva spíše nadnárodní instituce na úkor mezivládní Rady EU. Na úvod práce stručně vymezí pojem institucionálních sporů v EU ve sféře trestního práva. Poté přistoupí k zevrubnějšímu rozboru vybraných klíčových rozsudků ESD v této oblasti. Nakonec dospěje k závěru, zda skutečně platí, že ESD podporuje v předmětných sporech institucí spíše nadnárodní instituce, respektive poukáže na limity takové „podpory“.

Key words in original language

Evropský soudní dvůr; spory institucí; řízení o neplatnost; řízení o předběžné otázce.

Abstract

This paper will focus on the case-law of the ECJ in criminal matters. It will elaborate on the hypothesis that the ECJ, while resolving disputes among Union institutions, supports supranational institutions to the expense of the intergovernmental EU Council. Firstly, the term of institutional disputes within the sphere of criminal law will be briefly introduced. Thereafter, more in-depth analysis of the crucial judgments of the ECJ in this area will follow. Finally, the conclusions will be drawn as to whether the ECJ supports the supranational institutions, respectively the limits of such a support will be stressed.

Key words

European Court of Justice; institutional disputes; the annulment procedure; the preliminary ruling procedure.

1. INTRODUCTION

In this paper I will focus on the case-law of the European Court of Justice (ECJ) in criminal matters. However, I will not elaborate on the whole and broad area of the case-law, which relates to the criminal law and goes back to the 1980s or even 1970s, but I will rather limit this paper to the more recent case-law, respectively four "leading" cases, involving institutional disputes among Union institutions, both the clear and disguised ones. These disputes will be demonstrated on two cases within the annulment procedure (of the Union acts) in the case of clear institutional disputes and on other

two cases within the preliminary ruling procedure in the case of disguised institutional disputes.

The aim of this paper, will be to prove the hypothesis, asserting that the ECJ, while resolving such disputes, is ready to support rather supranational institutions like the European Commission (Commission) and European Parliament (EP) to the expense of the intergovernmental Council of the European Union (Council), representing the will and interests of the Member States. In this respect, on the one hand the legal techniques used (i.e. the prevailing methods of interpretation such as teleological and effet utile line of reasoning) by the ECJ, resulting from its position and role within the EU legal framework, justifying such a "support" will be emphasized, on the other hand the limits of such a "support" will be stressed as well. Finally, also perspectives of the ECJ jurisprudence within the criminal area in the "lisabonised" world will be sketched briefly at the very end of this paper.

2. THE ROLE OF THE ECJ IN INSTITUTIONAL DISPUTES WITHIN THE ARE OF CRIMINAL LAW

Since its establishment in 1951, resp. 1957 the ECJ has been playing a huge role in the process of the European integration. In spite of the fact that its role traditionally focused on the case-law pursuing the establishment, resp. maintaining the functioning of the internal market, inter alia by assuring the removal of any forbidden obstacles thereof, its jurisprudence gradually stretched to other areas as well, including the area of the criminal law. Firstly, even at the times, where there was no european criminal law competence of whatsoever, it became apparent through the case-law of the ECJ that the criminal law of the Member States is not entirely immune from the influence of the european law and operation of its leading principles, such as the prohibition of discrimination and forbidden restrictions on the exercise of the rights to free movement (which might result in duty not to criminalize) or the requirement for effective and equivalent protection (which might result on the other hand in de facto duty to criminalize).¹

Later on with the entry into of force of the Maastricht Treaty, respectively the Amsterdam Treaty, which brought a kind of genuine EU criminal law competence (at least as regards certain aspects of substantive criminal law but also as regards the field of judicial cooperation in criminal matters as such) the role of the ECJ in the field of criminal law was furthermore substantially enhanced. The ECJ acquired inter alia the competence to rule on the legality of the acts (among which the harmonising framework decisions were deemed to be probably the most important ones) adopted in

¹ See, Kmec, J.: *Evropské trestní právo. Mechanismy europeizace trestního práva a vytváření skutečného evropského trestního práva*, Praha: C.H.Beck, 2006, s. 110-117, 102 - 109.

the framework of the so-called annulment procedure within the sphere of judicial cooperation in criminal matters according to article 35(6)TEU, largely inspired by art. 230 TEC (whereby, however, naturally the acts at stake differed as well as those entitled to instigate such a procedure). The ECJ was granted also power to rule within the preliminary ruling procedure on the validity and interpretation of the enumerated acts, including the framework decisions, as provide for in art. 35 (1) TEU. This competence was inspired by art. 234 TEC. However, it was limited in comparison to the "Community preliminary ruling procedure". Within the context of the "Union third pillar", the preliminary rulings competence of the ECJ and its scope was made conditional upon the declaration of the respective Member States according to art. 35(2,3) TEU.

Both of the above mentioned procedures might serve as a basis for further analysis of institutional disputes which occurred within the EU criminal law sphere. These disputes might be divided into two categories. The first might be represented by so-called clear institutional disputes. The second by the so-called disguised institutional disputes. While the former can be identified from the cases within the annulment procedure, where the Union institutions stand and "fight" directly against each other, the latter - so-called disguised institutional disputes - might be revealed from the cases within the preliminary ruling procedures, whereby Union institutions - typically the Commission - and Member States, which might be regarded as representing the will of the Council, only intervene, respectively submit their observations.

2.1 THE ROLE OF THE ECJ IN CLEAR INSTITUTIONAL DISPUTES

2.1.1 ENVIRONMENTAL CRIMES CASE

On 27 January 2003 the Council adopted the framework decision on the protection of the environment through criminal law. On 15 April 2003 the Commission, supported by the EP, brought an application for annulment of this framework decision against the Council, which was supported by 11 Member States. On 13 September the ECJ delivered its judgment in this case.² The ECJ annulled the challenged framework decision. The supranational institutions represented by the Commission and the EP could celebrate a victory. The Council on the other hand was a loser in this "battle." Which arguments were brought in front of the ECJ by both sides and what was the reasoning of the ECJ, while resolving this dispute?

The Commission challenged the Council's choice of art. 34 TEU, in conj. with art. 29 and 31(e) TEU, as the legal basis for the framework decision at

² See, Judgment of the Court (Grand Chamber), Case C-176/03, Commission v. Council, „Environmental crimes,“ 13.9.2005.

stake, respectively its articles 1 - 7 (the Commission admitted, however, that such a challenge should not be applicable to jurisdictional or extradition issues as such).³ The Commission argued that there was a Community competence under art. 175 TEC (representing EC environmental competence) to require Member States to prescribe criminal penalties for infringements of Community environmental-protection legislation, if this were to be recognised as necessary for ensuring effectiveness of that legislation.⁴ And because this was the case according to the Commission and bearing in mind the aim and content of the challenged legislation, which was in the view of the Commission the protection of the environment, the instrument should have been adopted under art 175 TEC. The EP fully supported the stance of the Commission.⁵ In this respect, one must be fully aware of the motivation of the former, which has no co-legislative competence under the "third pillar" of the EU by contrast to its fully fledged legislative prerogatives within the Community competences (at least as a rule in most of the areas, including the environmental competence according to art. 175(1) TEC).

On the other side of the barricade there were completely opposite arguments of the Council. The Council asserted that there was no explicit Community competence in criminal matters at all and similarly no such competence could be implied in any case either, given the considerable significance of criminal law for the sovereignty of the Member States.⁶ More importantly, the Council also pointed to the fact, that any criminal law regulation, including the harmonisation of substantive criminal law, was meant to be restricted to the EU third pillar.⁷ The Council finally stressed that the aim and content primarily focused on a kind of criminal law harmonisation. At any rate, the Council was of the view that the sole fact that the environmental protection might be well regarded as an objective of the challenged instrument cannot serve as a basis for the Community implied criminal law competence.⁸

³ See, Judgment of the Court (Grand Chamber), Case C-176/03, Commission v. Council, „Environmental crimes,“ 13.9.2005, point 18.

⁴ See, Judgment of the Court (Grand Chamber), Case C-176/03, Commission v. Council, „Environmental crimes,“ 13.9.2005, point 19.

⁵ See, Judgment of the Court (Grand Chamber), Case C-176/03, Commission v. Council, „Environmental crimes,“ 13.9.2005, point 25.

⁶ See, Judgment of the Court (Grand Chamber), Case C-176/03, Commission v. Council, „Environmental crimes,“ 13.9.2005, points 26, 27.

⁷ See, Judgment of the Court (Grand Chamber), Case C-176/03, Commission v. Council, „Environmental crimes,“ 13.9.2005, point 29.

⁸ See, Judgment of the Court (Grand Chamber), Case C-176/03, Commission v. Council, „Environmental crimes,“ 13.9.2005, point 34.

The ECJ followed the below sketched line of reasoning, when resolving the dispute put in front of it. At the very beginning, the ECJ emphasized that according to art. 47 TEU nothing in the TEU is to affect the TEC.⁹ As a result, the ECJ assumed the task to check, whether art. 175 TEC could have been a proper legal basis in this case, as the Commission and the EP argued. In this respect the ECJ firstly scrutinized, whether the content and aim of the challenged instrument was the protection of the environment. And it held in affirmative.¹⁰ Secondly, the ECJ ruled on the implied competence to criminal regulation within the field at stake. In this regard, the ECJ stated that as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence.¹¹ However, the ECJ did not stop here, but went further on to hold that the Community legislature is not prevented to adopt measures which relate to the criminal law of the member states 1) which it considers necessary in order to ensure that the rules which it lays down (on environmental protection) are fully effective and 2) where the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure (for combating serious offences).¹² Also in this respect the ECJ held that the requirement for the criminal-law measure to be necessary and essential was fulfilled in this case and therefore the challenged instrument should have been adopted under art. 175 TEC and not under art. 34 TEU (in conj. with art. 29 a 31(e) TEU). Consequently, the ECJ annulled the framework decision, basically on the ground of forbidden interference with art. 47 TEU, respectively art. 175 TEC.¹³

In my view, the ECJ in this case clearly "backed" the supranational perspective, which was suggested by the Commission, to the expense of the intergovernmental perspective, represented by the Council. In fact, the ECJ followed and confirmed the main arguments of the Commission, especially those relating to the need for ensurance of the effectiveness of adopted "first pillar" rules through criminal law. The ECJ also clearly stressed the importance of art. 47 TEU, whereby in my view a kind of "in dubio pro communautaire" doctrine was established, resting on the idea, that wherever within the Community pillar the competence, even the implied one, might

⁹ See, Judgment of the Court (Grand Chamber), Case C-176/03, Commission v. Council, „Environmental crimes,“ 13.9.2005, point 38.

¹⁰ See, Judgment of the Court (Grand Chamber), Case C-176/03, Commission v. Council, „Environmental crimes,“ 13.9.2005, points 46, 47, 51.

¹¹ See, Judgment of the Court (Grand Chamber), Case C-176/03, Commission v. Council, „Environmental crimes,“ 13.9.2005, point 47.

¹² See, Judgment of the Court (Grand Chamber), Case C-176/03, Commission v. Council, „Environmental crimes,“ 13.9.2005, point 48.

¹³ See, Judgment of the Court (Grand Chamber), Case C-176/03, Commission v. Council, „Environmental crimes,“ 13.9.2005, point 53.

be inferred, there is no place for any competence within the EU third pillar. This pronounced supremacy among pillars seems to me somehow problematic and not entirely persuasive, especially in connection with a very broad and extensive ECJ approach towards the Community implied competences, as introduced in the analysed case. Furthermore, in my opinion, the arguments raised by the Council were not also properly settled, especially as regards the Council's assertion, that the exercise of the (substantive) criminal law competence should be possible only within the "Union third pillar" (following this logic: where the explicit powers were granted in the third pillar, there should be no place for implied powers on the same subject to be inferred elsewhere within the first pillar).¹⁴ Finally, as regards the requirement of necessity of the criminal law regulation, the ECJ seems to grant a great leeway for legislator in this respect, without resorting to any objective and genuine test of such a necessity.¹⁵ In principle the political appraisal of such a necessity by the legislator seems to be sufficient. To sum up the ECJ in my view showed in this case a great tendency to support the supranational institutions, represented by the Commission and the EP, to the expense of the intergovernmental Council. More specifically, the ECJ showed, while interpreting, that the explicit rules adopted as well as the historic or even actual intentions of the drafters of the challenged instrument might not be decisive at all, but rather teleological interpretation focused on the ensurance of the effectivity of the rules adopted might prevail. However, the ECJ did not specifically elaborated more deeply on the nature, extent, scope and intensity of the criminal law regulation in the first pillar. In this respect, three main questions remained unresolved. Which criminal measures might be adopted? Do these relate only to the definition of the criminal offenses, setting of the framework criminal penalties and liability of both natural and legal persons, even within the phase of instigation, aiding, abetting of the particular offence or are there also other measures, which might be validly adopted in the first pillar either (investigation, prosecution, jurisdictional, extradition questions)? Which areas of Community law might form the basis for the implied criminal competence? Should the implied criminal competence in this respect restrict only to the competence in environmental protection, because of its cross-cutting nature and because such protection constitutes

¹⁴ See in this respect, Bříza, P., Švarc, M. Komunitarizace trestního práva v Lisabonské smlouvě a její (případná) reflexe v právním řádu ČR. *Trestněprávní revue*, Nakladatelství C.H.Beck, Praha, 2009, č. 6, s. 162, whereby the view is defended that the list in art. 31(e) is not an exclusive but rather demonstrative one. However, see also: Tobler, Ch. Case C-176/03, *Commission v. Council*, judgment of the Grand Chamber of 13 September 2005, *Common Market Law Review*, 2006, No. 43, p. 844, footnote 23, referring to: Weyembergh, A.: *Approximation of criminal laws, the constitutional treaty and the Hague programme*. *Common Market Law Review*, 2005, No. 24, p. 1569.

¹⁵ See, critically in this respect, Tobler, Ch. Case C-176/03, *Commission v. Council*, judgment of the Grand Chamber of 13 September 2005, *Common Market Law Review*, 2006, No. 43, p. 850.

and essential objective of the Community as such. Or should such competence stretch further to (at least) all other harmonised Community areas (such as intellectual property policy area or transport policy area etc.)? And finally - should the criminal law regulation within the first pillar be very limited or is there a room for a more intensive and deeper regulation, involving e.g. the type and level of the criminal penalties prescribed? Another case of the ECJ on Ship-source pollution shed some light on these issues.

2.1.2 SHIP-SOURCE POLLUTION CASE

On 12 July 2005 - at the time before the delivery of the above referred judgement - the Council adopted framework decision to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution. On 8 December 2005 the Commission, obviously encouraged by the ECJ ruling on Environmental Crimes Case, raised application for annulment of that framework decision according to art. 35(6) TEU against the Council. While the Commission was supported in this action - not surprisingly - again by the EP (however there was a slight difference among these two supranational institutions as regards the breath of measures allowed to be adopted under the first pillar, where the EP seemingly employed a more cautious stance¹⁶), the Council was backed by 19 Member States, the vast majority of 25 EU Member States at that time. The judgment in this case was delivered by the ECJ on 23 September 2007.¹⁷ The challenged framework decision was again annulled. However, the ECJ was also ready to set some clear limits to the Community criminal competence. Specifically, the ECJ explicitly ruled that there is no Community criminal competence as regards the determination of the type and level of criminal penalties to be imposed, which sharply contrasted to the submissions of the Commission in this respect.¹⁸ Such stance of the ECJ - which I highly appreciate - seemingly reflected underlying reasons, such as inter alia the full respect for the coherence of national systems of criminal sanctioning, which were well elaborated within the Opinion to this case by the advocate general (AG) Mazák (as well as AG Colomer in the Environmental Crimes Case).¹⁹

¹⁶ See, Judgment of the Court (Grand Chamber), Case C-440/05, Commission v. Council, „Ship-source pollution,“ 23.10.2007, point 41 compared to point 31.

¹⁷ See, Judgment of the Court (Grand Chamber), Case C-440/05, Commission v. Council, „Ship-source pollution,“ 23.10.2007.

¹⁸ See, Judgment of the Court (Grand Chamber), Case C-440/05, Commission v. Council, „Ship-source pollution,“ 23.10.2007, points 70, 71.

¹⁹ See, Opinion of the Advocate General Mazák to the Judgment of the Court (Grand Chamber), Case C-440/05, Commission v. Council, „Ship-source pollution,“ 23.10.2007, especially points 106, 107, 108.

On the other hand, it must be stressed that in all other aspects the ECJ upheld or even expanded, rather than limited, its former "Environmental crimes Case precedent". The ECJ mainly confirmed again the predominant role of art. 47 TEU, respectively implied community criminal competence (although limited, as shown above), when necessary and essential for ensuring the effectiveness of the community rules adopted.²⁰ In this specific case, the ECJ furthermore accepted that such a criminal law regulation could had been adopted also within the area of transport policy, respectively maritime safety policy, although the link to the protection of environment in this context was also emphasized.²¹ As a result, one could probably believe that such a regulation was allowed in other harmonised areas of community law as well, such as areas like intellectual property law, competition law or illegal immigration.²²

2.1.3 INTERIM CONCLUSIONS

Both of the above analysed cases in my view prove a great tendency of the ECJ to support the supranational institutions, represented by the Commission and the EP, to the expense of the intergovernmental Council. The ECJ showed readiness to annul the Union acts, if these were to encroach upon the Community competences, which might be even extensively inferred as implied criminal competences, if necessary and essential for the effectiveness of the Community rules adopted. However, the ECJ also limited the Community implied criminal law competence by specifically stating that the determination of the type and level of criminal penalties imposed falls outside of such a competence. In this respect, the ECJ demonstrated that its supportive stance towards the supranational institutions might be limited and that it also takes into account the interests and arguments of the intergovernmental Council, representing the Member States. At any rate its teleological and "effet utile" focused interpretation seems to prevail.

²⁰ See, Judgment of the Court (Grand Chamber), Case C-440/05, Commission v. Council, „Ship-source pollution,“ 23.10.2007, points 52, 53, 62, 64, 66, 68, 69.

²¹ See, Judgment of the Court (Grand Chamber), Case C-440/05, Commission v. Council, „Ship-source pollution,“ 23.10.2007, point 69.

²² See, critical reflection on the expansion of the Community criminal competence to these fields In: Dawes, A., Lynskey, O.: The ever-longer arm of EC law: The extension of Community competence into the field of criminal law. *Common Market Law Review*, 2008, No. 45, p. 131 – 158

2.2 THE ROLE OF THE ECJ IN DISGUISED INSTITUTIONAL DISPUTES

2.2.1 PUPINO CASE

In my view Pupino Case²³ represents a leading case in the area of criminal law. In this case the ECJ was asked by the Italian court within the preliminary ruling procedure under art. 35 TEU to give an interpretative ruling on specific provisions of the framework decision on the standing of victims in criminal proceedings, which related to the special criminal procedure to be employed in respect of vulnerable victims, respectively application of the procedural benefits, such as testifying outside the trial and before it takes place, towards maltreated children. In fact the Italian court probably wanted the ECJ to rule on its duty to the so-called euroconform interpretation, which could seemingly allow for higher protection of maltreated children in comparison with the valid Italian legislation, if strictly interpreted without taking into account the aims of the invoked provisions of the framework decision at stake.

In this case the Commission, in the position of intervening party, respectively the party submitting its observations, supported the view that the framework decisions should operate like directives within the first pillar.²⁴ Specifically the Commission argued that indirect effect, while being aware that the direct effect is explicitly excluded by art. 34(2)(b,c)TEU, should be confirmed also in relation to framework decisions. By contrast, the majority (although slight) of the Member States (represented by the Italian, British, Swedish and in principle Dutch government), which submitted their observations, and which (for academic purpose of this paper) might be regarded as spelling out the view of the intergovernmental Council, opposed the above mentioned view. Their arguments emphasized inter alia that framework decisions and Community directives shall be deemed as completely different and separate sources of law, and that a framework decision cannot therefore place a national court under an obligation to interpret national law in conformity - an obligation, which was derived by the ECJ case-law concerning Community directives.²⁵ The ECJ, however, rejected this argument and held quite the opposite, supporting thus the view of the Commission. The ECJ firstly stressed the binding nature of framework decisions, inspired largely by the directives as defined in art. 249

²³ See, Judgment of the Court (Grand Chamber), Case C-105/03, „Pupino,“ 16.6.2005.

²⁴ See, Judgment of the Court (Grand Chamber), Case C-105/03, „Pupino,“ 16.6.2005, point 31.

²⁵ See, Judgment of the Court (Grand Chamber), Case C-105/03, „Pupino,“ 16.6.2005, point 25.

TEC. As a result the ECJ stated that the binding character of the framework decision places on national authorities, and particularly national courts, an obligation to interpret national law in conformity.²⁶ Moreover, the ECJ added, that while having jurisdiction in preliminary ruling procedure, this would be deprived of most of its useful effect, if individuals were not entitled to invoke framework decisions in order to obtain a confirming interpretation of national law before the courts of the Member States.²⁷ Furthermore, the ECJ, without any clear reference in the text of the TEU (unlike Article 10 TEC), went further to pronounce the applicability of the principle of loyal cooperation in this field as well, pointing to both the aim of the Union to create an ever closer Union among the peoples of Europe, where the solidarity shall reign, and the necessity to ensure that the Union may effectively fulfil its tasks.²⁸ Till this point the ECJ seemed to be supportive - without any reservation - to supranational perspective, introduced by the Commission. However, again here its support was not "blind" and unlimited. The ECJ emphasized the limits to the application of the so-called indirect effect. The ECJ held that such interpretation cannot be *contra legem* and conflict the principles of legal certainty and non-retroactivity or establish and aggravate criminal liability.²⁹

In my view the ECJ in this case again showed a kind of tendency to support rather the supranational perspective to the expense of the intergovernmental one. However, again the application of newly introduced principle of loyal cooperation, respectively indirect effect or euroconform interpretation within the third pillar was subject to a set of clear limits, as enumerated above. Therefore, in my opinion, it might be concluded that the ECJ in this case in principle did not misuse its interpretative power, but applied it in rather quite well balanced than excessive manner. However, I am also well aware of the possible burdensome requirements upon Member States or any other problematic implications, which might be generated by this judgement.³⁰ Therefore my conclusions hold only in so far as the established

²⁶ See, Judgment of the Court (Grand Chamber), Case C-105/03, „Pupino,“ 16.6.2005, point 34.

²⁷ See, Judgment of the Court (Grand Chamber), Case C-105/03, „Pupino,“ 16.6.2005, point 38.

²⁸ See, Judgment of the Court (Grand Chamber), Case C-105/03, „Pupino,“ 16.6.2005, points 41, 42.

²⁹ See, Judgment of the Court (Grand Chamber), Case C-105/03, „Pupino,“ 16.6.2005, points 44, 45, 47.

³⁰ See, for instance Spaventa, E.: Opening Pandora's Box: Some reflections on the Constitutional Effects of the Decision in Pupino. *European Constitutional Law Review*, 2007, No. 3, p. 18 – 22 or Peers, S.: Salvation outside the church: Judicial protection in the third pillar after the Pupino and Segi judgments. *Common Market Law Review*, 2007, No. 44, p. 921 – 924, where the author comes up with practical examples, for instance that the wrongful detention, prosecution and conviction connected to the double jeopardy rules

above mentioned limits are to be fully observed and cautiously applied both by the Member States and the ECJ itself (for instance, the ECJ should be especially restraint, when holding on the conform interpretation and should in no way specifically instruct national courts in a way, which could be objectively perceived as *contra legem* interpretation).

2.2.2 GÖZUTOK AND BRÜGGE CASE

The last case, which will be dealt with briefly in this paper, concerns the ruling of the ECJ on the *ne bis in idem* principle, enshrined in art. 54 of the so-called Convention implementing Schengen agreement (CISA), which was integrated into the Union framework with the entry into force of Amsterdam Treaty (1999). This principle reads as follows: "A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party." In the Gözutok and Brügge Case³¹ the question emerged within the preliminary ruling procedures instigated by the Belgian and German courts, whether also settlement of the respective criminal cases by the public prosecutors, whereby the criminal proceedings were discontinued, while the imposed obligations were fulfilled, respectively the prescribed sum of money was paid, even without the court being involved, amount to such a final disposal, or not.³² The supranational Commission submitted observations, calling the ECJ to hold in affirmative and to give an autonomous meaning to the term "final disposal", which would cover also the decisions terminating criminal proceedings by the public prosecutors, even without any involvement of the courts.³³ On the other hand, governments of Germany, Belgium and France (which represented a slight majority of those Member States, which submitted their observations), defended quite the opposite view and pleaded for a restrictive interpretation of the principle or rule at stake, wishing to keep their power to criminalize.³⁴ Belgium even pointed to the Council Programme of measures to implement the principle of mutual recognition of decisions in criminal

should be compensated in accordance with the principles established as regards liability for damages of Member States for infringement of the European law.

³¹ See, Judgment of the Court (Grand Chamber), Joint Cases C-187/01, C-385/01, „Gözütok and Brügge,“ 11.2.2003.

³² See, Judgment of the Court (Grand Chamber), Joint Cases C-187/01, C-385/01, „Gözütok and Brügge,“ 11.2.2003, points 2, 8, 23.

³³ See, Judgment of the Court (Grand Chamber), Joint Cases C-187/01, C-385/01, „Gözütok and Brügge,“ 11.2.2003, point 41.

³⁴ See, Judgment of the Court (Grand Chamber), Joint Cases C-187/01, C-385/01, „Gözütok and Brügge,“ 11.2.2003, point 41.

matters, whereby for the future work it was proposed to recognise also other decisions than those of the courts. In this respect, however, the Belgium asserted, that due to the fact that such legislation was only planned for the future, it could not be inferred beforehand by the ECJ through its case-law.³⁵ The ECJ, however, rejected this kind of perspective. Again, the ECJ put rather "supranational" glasses on and confirmed that other criminal proceedings were to be barred, if beforehand the same criminal case had been settled by the public prosecutor even without any involvement of the judge and the obligation imposed had been fulfilled.³⁶ However, here, it would not be precisely fair to hold that the ECJ ruled against the Council as such because it is true, that should the Council be of another view (i.e. that the courts' decisions were to be meant solely), it was its job, to be more precise in wording. The wording of the relevant art. 54 CISA, as the ECJ noticed and stressed, left enough room to rule in the way promoted by the Commission and confirmed by the ECJ.³⁷ Besides the wording itself, the ECJ, also emphasized the purpose and objective of the relevant provision, which is designed to guarantee that the right to freedom of movement is not obstructed by the fear to be prosecuted once more in another Member State (after final disposal of the criminal case in one Member State).³⁸ Furthermore, the ECJ pointed out that in fact it would lead to absurd consequences, if the ECJ were to rule in line of the observations of the above mentioned governments. Such interpretation, excluding the application of ne bis in idem rule in cases where the courts are not involved, would only effectively harm the offenders of minor or medium offences, which might be regularly settled even without the court intervention. By contrast the serious offenders could enjoy this safeguard against repeated criminal proceedings.³⁹

The reasoning of the ECJ - although primarily teleological but not contrary to the wording at the same time - in this case seems to me quite convincing. The ECJ therefore in my view did not excessively transgress its interpretative "discretionary leeway" here. The ECJ rather proved only the readiness to fill the gaps, which the Council left to it. The further ECJ case-

³⁵ See, Opinion of the Advocate General Colomer to the Judgment of the Court (Grand Chamber), Joint Cases C-187/01, C-385/01, „Gozutok and Brügge,“ 11.2.2003, point 128, 129.

³⁶ See, Judgment of the Court (Grand Chamber), Joint Cases C-187/01, C-385/01, „Gozutok and Brügge,“ 11.2.2003, point 48.

³⁷ See, Judgment of the Court (Grand Chamber), Joint Cases C-187/01, C-385/01, „Gozutok and Brügge,“ 11.2.2003, point 42.

³⁸ See, Judgment of the Court (Grand Chamber), Joint Cases C-187/01, C-385/01, „Gozutok and Brügge,“ 11.2.2003, point 38.

³⁹ See, Judgment of the Court (Grand Chamber), Joint Cases C-187/01, C-385/01, „Gozutok and Brügge,“ 11.2.2003, point 40.

law on certain other aspects of this principle showed, however, that not all other judgements were so well balanced or enough sensitive for criminal law differences (Van Esbroeck,⁴⁰ Van Straaten, Gasparini, Bourquain), while others (Miraglia, Kretzinger, Kraajenbrink, Turanský) showed that the ECJ is ready to set limits to its expansive jurisprudence either. However, analysis of these cases goes beyond the aim of this paper, and will not be therefore further dealt with here.

2.2.3 INTERIM CONCLUSIONS

Also within the preliminary ruling procedures, respectively two analysed cases, which might be (with a great deal of simplification) regarded as the representants of the so-called disguised institutional disputes, the ECJ confirmed its preference for supranational perspectives, promoted by the Commission. However, the rulings of the ECJ, sketched above, seemed to me not to be excessive, because they followed quite persuasive teleological, systematical and logical line of reasoning and did not conflict directly the explicit wording. Moreover, as was demonstrated on Pupino case, a set of limits was established for the correct application of the confirmed principles such as that of indirect effect, which was "transported" to the so-called third pillar from the first pillar case-law on directives. In his respect, it might be admitted that also in these cases, especially the first one, the ECJ started gradually to rebuild the "Maastricht temple". However, quite sensitively, I would tell. The ECJ was not willing to destroy the third pillar but was rather ready to improve some of its functional features.

3. CONCLUSION

In this paper the role of the ECJ in institutional disputes within the area of criminal law was dealt with. The aim of the paper was to verify the hypothesis that the ECJ supports the supranational institutions, represented by the Commission and the EP, to the expense of the Council. After examining the four leading cases, two of them falling within the category of the so-called clear institutional disputes and other two belonging to the disguised institutional disputes, it might be concluded, in my opinion, that indeed there is a great tendency to support supranational institutions and their views and perspectives by the ECJ. However, it has to be added as well, that such a "support" is not granted as unconditional or without any limits, as was shown, for instance by both the Ship-source pollution Case and Pupino Case. The ECJ usually also strives (but not always succeeds) to give persuasive reasons for its final conclusions, which rest mainly on teleological and systematical interpretation, whereby the principle of effectiveness plays the crucial role.

⁴⁰ For a brilliant critical reflection see, Komárek, J.: "Tentýž čin" v prostoru svobody, bezpečnosti a práva. *Jurisprudence*, 2006, č. 3, s. 51 - 57.

Finally, as regards the perspectives of the role of the ECJ in institutional disputes within the criminal law with the entry into force of the Lisbon Treaty, it must be stressed, that most of such institutional disputes in front of the ECJ, at least the clear ones, will probably disappear, due to the fact that the third pillar will also disappear, respectively will be integrated within the main Union policy areas, governed in principle by the same supranational rules, like co-decision with the EP or qualified majority voting within the Council. As a result, it is to be expected in my view that the disputes will be rather held in "political arenas" than in front of the ECJ. However, the ECJ, which jurisdiction was strengthened in the criminal law area substantially, will undoubtedly actively exercise its competences in certain other respects, aspects and fields, concerning e.g. larger powers as regards preliminary ruling procedures and completely newly introduced infringement procedures in this area. The "lisabonised world" will not thus see that much - if any - direct or clear institutional disputes within the criminal law area in front of the ECJ, generated mainly by the pillar struggles in the past. However, we might look forward to series of interpretative judgments or even the judgments on validity of the instruments adopted, where particularly those Member States, defeated within the Council, or individuals, by way of preliminary ruling procedures, will come up with their applications, interventions or observations and the ECJ will be called upon to rule on the issues of validity and interpretation. No doubt that the ECJ will even within this new setting prefer supranational perspective. After all it remains its task to ensure that in interpretation and application of the founding Treaty (newly - Lisbon Treaty) the law is observed. The law of supranational autonomous legal order (respecting both the international law and common constitutional traditions of the Member States).

Literature:

- Bříza, P., Švarc, M.: Komunitarizace trestního práva v Lisabonské smlouvě a její (případná) reflexe v právním řádu ČR. Trestněprávní revue, Nakladatelství C.H.Beck, Praha, 2009, č. 6, s. 161 - 170.
- Craig, P., de Búrca, G.: EU Law - Text, Cases and Materials. New York: Oxford University Press, 2003.
- Dawes, A., Lynskey, O.: The ever-longer arm of EC law: The extension of Community competence into the field of criminal law. Common Market Law Review, 2008, No. 45, p. 131 – 158.
- Kmec, J.: Evropské trestní právo. Mechanismy europeizace trestního práva a vytváření skutečného evropského trestního práva, Praha: C.H.Beck, 2006, s. 230.

- Komárek, J.: „Tentýž čin“ v prostoru svobody, bezpečnosti a práva. *Jurisprudence*, 2006, č. 3, s. 51 – 57.
- Peers, S.: Salvation outside the church: Judicial protection in the third pillar after the Pupino and Segi judgments. *Common Market Law Review*, 2007, No. 44, p. 883 – 929.
- Spaventa, E.: Opening Pandora's Box: Some reflections on the Constitutional Effects of the Decision in Pupino. *European Constitutional Law Review*, 2007, No. 3, p. 5 – 24.
- Tobler, Ch.: Case C-176/03, Commission v. Council, judgment of the Grand Chamber of 13 September 2005, *Common Market Law Review*, 2006, No. 43, p. 835 – 854.
- Weyembergh, A.: Approximation of criminal laws, the constitutional treaty and the Hague programme. *Common Market Law Review*, 2005, No. 24, p. 1567-1597.

Case-law of the Court of Justice:

- Judgment of the Court (Grand Chamber), Case C-105/03, „Pupino“, 16.6.2005.
- Judgment of the Court (Grand Chamber), Case C-176/03, Commission v. Council, „Environmental crimes“, 13.9.2005.
- Judgment of the Court (Grand Chamber), Case C-440/05, Commission v. Council, „Ship source pollution“, 23.10.2007.
- Judgment of the Court (Grand Chamber), Joint Cases C-187/01, C-385/01, „Goütok and Brügge“, 11.2.2003.

Contact – email

michael.svarc@volny.cz