DRAFT ONLY

Paper prepared by Mr Justice Fulford

Proposal

1. Having now looked that this area with some care, I am unpersuaded that it would be useful to send out a questionnaire on this subject. The effect of the recently signed Lisbon Treaty is that the role of the Court of Justice is going to change radically. Therefore, although it is of use to have an understanding for historical reasons of what the Court of Justice has done, given the changes now implemented by the treaty, it would be an arid exercise to ask member states to comment on what is now a subject of background interest only. If it is considered appropriate, this paper (in its present or amended form) can circulated within the ENCJ, and our group can monitor the activities of the Court of Justice under new legislative provisions, as well as the fate of the current and proposed Framework Decisions.

Introduction and the Past

2. Prior to the Lisbon Treaty changes were afoot which, I believe, should be of concern to all criminal judges and prosecutors across the EU. As part of a process of harmonisation, integration and standardisation of significant aspects of the administration of criminal law across the EU, two particular important shifts had been occurring. The first was the growth in the number of **Framework Decisions** emanating from the EU that tended to have a profound impact on the criminal law as administered in member states (most usually via national legislation but also – it seems likely – through the jurisprudence of the Court of Justice and the individual decisions of the domestic courts). Second, the **Court of Justice** appeared to be testing the limits of its authority in the sphere of criminal law, and it appeared that it was not going to be restrictive or minimalist in its approach.

Framework Decisions

3. First, **Framework Decisions**. These, in outline, were a law-making device created in the Amsterdam Treaty of 1999 on the European Union (Article 34 (2)) which addressed the ways in which the European Union (through the Council) can legislate in the area of criminal law. Framework Decisions, some argue, have equal force (though not the same effect) as EC Directives: unlike Directives, they *do not have direct effect* nationally, although *they have to be implemented* and, as such, they are instruments that are binding on the member states. They are, therefore, the product of EU rather than EC law, and their aim is harmonisation.

4. Because Framework Decisions cannot have direct effect nationally, they are not in themselves binding on a national judge and they do not supplant domestic legislation. However, they are, according to the Court of Justice,

necessary tools of interpretation (see ***Pupino*****: Case C – 105/03,** analysed between [14] – [22] below). The court explained it thus:

> 43. *"In the light of all the above considerations, the Court concludes that the principle of conforming interpretation is binding in relation to framework decisions adopted in the context of Title VI of the Treaty on European Union. 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 and thus comply with Article 34 (2) (b) EU."*

5. This was affirmed in ***Dell'Orto: Case C-467/05***:

> 28. "*In accordance with the case-law of the Court (*Pupino), *the national judge is obliged, insofar as possible, to interpret the provisions of the CPP concerning the extent of the decision-making powers of the judge responsible for enforcement, with regard to the return of property seized in the course of criminal proceedings, in conformity with Article 9(3) of the Framework Decision…".*

6. Framework Decisions (extant or proposed) cover issues as diverse as the standing of victims; freezing orders; confiscation orders; arrest warrants; evidence warrants; certain procedural rights in criminal proceedings; non-custodial pre-trial supervision measures; the use of previous convictions; the mutual recognition of financial penalties; ne bis in idem (double jeopardy); the transfer of prisoners; and the mutual recognition of sanctions that are alternatives to prison.

7. Given the wide-ranging subject matter of the existing and proposed Framework Decisions and the effect of the decision of the Court of Justice in ***Pupino***, prior to the Lisbon Treaty it was becoming apparent that there may be a need for greater awareness and training in this area.

The Court of Justice

8. Second, the expanding influence of the **Court of Justice**. With criminal law increasingly and firmly on the European agenda, the Court of Justice has been establishing and defining its own role. In ***Pupino***, the Court of Justice seemingly "trumped" the Italian Constitutional Court by reaching a decision on certain minimum protections for victims that the Italian Constitutional Court had decided should be left to legislation. In so doing, the Court of Justice arguably set itself above domestic courts at all levels. The Court stated that the relevant Framework Decision "must be interpreted as meaning that the national court must be able to authorize young children, who, as in this case, claim to have been victims of maltreatment, to give their testimony in accordance with arrangements allowing these children to be guaranteed an appropriate level of protection, for example outside the trial and before it takes place."

9. Maria Pupino had been charged in an Italian court with various offences releting to the abuse of pre-school children. The prosecutor requested the court to use special procedures when taking testimony from the children. The defence objected on the grounds that Italian law did not explicitly permit special procedures to be used with victims of crime for which Pupino was charged. The Italian courts dismissed the prosecution's application but referred the matter to the Court of Justice. When ***Pupino*** when went back to the local Florentine court following the decision of the Court of Justice, the local judge (controversially) decided he was able, in the exercise of his discretion, to follow the Court of Justice, viz. to provide the victims with various special arrangements for giving evidence as indicated by the Court of Justice (whereas, as set out above, the domestic Constitutional Court had indicated that the protections sought for the victims were a matter for the legislature).

10. Furthermore, in ***Case C-176/03***, the Court of Justice seemingly carved out for itself the first stage of a general role of deciding which areas of the criminal law are so serious, within a European context, that they are more suitable for EC-wide directives for the purposes of harmonisation and integration. This heralded directly enforceable EC Directives in the sphere of the criminal law that were the product, in the first instance, of a Court of Justice decision on the importance of the area. The result in this case was met with some consternation by many governments, and the court has been accused of demonstrating a certain *federalisme judiciare.* Indeed, some elements within the Commission have indicated that it is high time to end this *gouvernement des juges.*

11. Historically, common standards attracting punitive administrative sanctions have been limited to such areas as farming, fishing and transport. Enforcement generally of regulations has always been something of a blank sheet (save for competition) and the Court of Justice has filled the gap and has established the clear obligation to "enforce", when there were irregularities, by mandatory sanctions. Therefore, the Community achieved the ability to impose certain punitive sanctions (essentially) via the Court. Some countries challenged the competence of the EC to set these punitive enforcement obligations but they lost a vital challenge on this issue before the court (see ***Case C-240/90*** when the Court of Justice recognised that the EC is functionally competent to harmonize measures, including in the field of punitive sanctions).

12. What was unknown was whether criminal procedure and criminal sanctions **generally** could be the subject of the "same treatment", leading to greater harmonisation Europe-wide. At the time of Maastricht in the early 1990s this was unclear and the approach then taken was to leave harmonisation of the criminal law to the Third Pillar (which is additional and complementary to the First Pillar). Between the Maastricht and Amsterdam Treaties there was a great deal of activity aimed at specific areas of harmonisation between criminal systems in areas such as fraud; this was the work principally of the individual member states rather than the Commission. In the Treaty of Amsterdam in 1999 one finds the real basis, relevant to the criminal law, for mutual recognition and harmonisation, and including the approximation of

minimum standards. The trend was being developed of building common standards and avoiding conflicts of jurisdiction.

13. Against that background, ***Case C-176/03*** was heard before the Grand Chamber of the Court of Justice. In this case the Commission of the European Community sought an annulment of a Council Framework Decision on the protection of the environment. The Framework Decision required member states to criminalize and impose penalties on certain conduct that harmed the environment and it dealt with serious environmental violations which the Commission decided was an area which required harmonisation between the member states. The Council did not accept a proposed Directive under EC law; however, the Commission (supported by the Parliament) argued the alternative instrument – a Framework Decision – was wrong in principle, and submitted before the Court of Justice that this should have been legislated in EC as opposed to EU law, and that as a result a Directive and not a Framework Decision should have been promulgated. The Court decided that in serious areas such as this there could be harmonisation of criminal law via Directives, together with the imposition of sanctions, and struck down the Framework Decision. The core part of the decision of the Court is as follows:

> *" 46 As regards the aim of the framework decision, it is clear both from its title and from its first three recitals that its objective is the protection of the environment. The Council was concerned 'at the rise in environmental offences and their effects which are increasingly extending beyond the borders of the States in which the offences are committed', and, having found that those offences constitute 'a threat to the environment' and 'a problem jointly faced by the Member States', concluded that 'a tough response' and 'concerted action to protect the environment under criminal law' were called for.*
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> *47 As to the content of the framework decision, Article 2 establishes a list of particularly serious environmental offences, in respect of which the Member States must impose criminal penalties. Articles 2 to 7 of the decision do indeed entail partial harmonisation of the criminal laws of the Member States, in particular as regards the constituent elements of various criminal offences committed to the detriment of the environment. 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, and Case C-226/97 Lemmens [1998] ECR I-3711, paragraph 19).*
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> *48 However, the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for*

combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.

49 *It should also be added that in this instance, although Articles 1 to 7 of the framework decision determine that certain conduct which is particularly detrimental to the environment is to be criminal, they leave to the Member States the choice of the criminal penalties to apply, although, in accordance with Article 5(1) of the decision, the penalties must be effective, proportionate and dissuasive.*

50 *The Council does not dispute that the acts listed in Article 2 of the framework decision include infringements of a considerable number of Community measures, which were listed in the annex to the proposed directive. Moreover, it is apparent from the first three recitals to the framework decision that the Council took the view that criminal penalties were essential for combating serious offences against the environment.*

51 *It follows from the foregoing that, on account of both their aim and their content, Articles 1 to 7 of the framework decision have as their main purpose the protection of the environment and they could have been properly adopted on the basis of Article 175 EC.*

52 *That finding is not called into question by the fact that Articles 135 EC and 280(4) EC reserve to the Member States, in the spheres of customs cooperation and the protection of the Community's financial interests respectively, the application of national criminal law and the administration of justice. It is not possible to infer from those provisions that, for the purposes of the implementation of environmental policy, any harmonisation of criminal law, even as limited as that resulting from the framework decision, must be ruled out even where it is necessary in order to ensure the effectiveness of Community law.*

53 *In those circumstances, the entire framework decision, being indivisible, infringes Article 47 EU as it encroaches on the powers which Article 175 EC confers on the Community.*

54 *There is therefore no need to examine the Commission's argument that the framework decision should in any event*

> *be annulled in part in so far as Articles 5(2), 6 and 7 leave the Member States free also to provide for penalties other than criminal penalties, even to choose between criminal penalties and other penalties, matters allegedly falling undeniably within the Community's competence.*
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> *55 In the light of all the foregoing, the framework decision must be annulled."*

14. Elements from within the Commission have indicated that the rationale underpinning this decision could apply to many important areas of the criminal law, thereby suggesting that directly enforceable Directives can and should be issued in a range of areas. As a result, there has been an urgent debate going on as to which areas should be the subject of harmonisation in this (direct) sense (i.e. which areas should become the subject of EC law and directly enforceable Directives).

15. These issues have been ongoing before the Court of Justice, and case ***C-176/03*** was affirmed in ***Case C – 440/05***, a case in which the Commission sought to annul a Framework Decision that was intended to strengthen enforcements of laws against ship-source pollution. The Court of Justice applied the analysis used in C – 176/03 and struck down the Framework Decision.

The Lisbon Treaty

16. Under this recent Treaty, the current three pillar structure with its different decision making procedures is abolished, to be replaced by a single legal personality (after a 5 year transition). Common policies in the area of freedom, security and justice are brought inside the Community method. The hierarchy of norms will distinguish between legislative acts, delegated acts and implementing acts, although the terms "law" and "framework law" have been abandoned in favour of keeping the terminology of directives, regulations and decisions.

17. A new "ordinary legislative procedure" will now apply to all areas of European Union law and policy. This means that the European Commission will propose legislation with the European Parliament and the Council having equal power to enact legislation – so called co-decision system. Member states in Council will reach agreement by a qualified majority.

18. In the area of criminal law the Court of Justice will have full jurisdiction rather than just the power to hear preliminary references – indeed the jurisdiction of the Court is expanded to cover all the activities of the Union except for the Common Foreign and Security Policy. However, the Court has oversight in the case of a breach of procedure or a conflict over competence (in effect, patrolling the frontier between the first and second pillar). It can hear appeals against restrictive measures and give an opinion about an international treaty.

Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

19. By Article 69 B (2) "if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question."

20. The effect of this is that we are, in my view, now entering a wholly new phase, and we need to allow for the evolution of framework decisions and the role of the Court of Justice to unfold before sending round questionnaires.

21. However, it is important to alert members of the ENCJ to the past and to the potential for a new expanded role for the Court of Justice, and I propose that a paper along these lines is distributed as a first stage in monitoring the way that these important matters evolve under the Lisbon Treaty.

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