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Constitutional Principles of the European Community and European Criminal Law

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A. Introduction

Criminal law has been the field where perhaps the most dramatic developments in European Union law have occurred over the past few years. Developments have taken the shape of substantial policy declarations (with the Hague Programme, following from its Tampere predecessor, emphasising yet again the centrality of criminal law in the construction of the EU as an 'area of freedom, security and justice'), as well as significant legislative intervention, with the adoption of the Framework Decision on the European Arrest Warrant constituting the most far-reaching – and most extensively debated – example. Moreover, recent years have witnessed increasing judicial intervention in the field of EU criminal law. The Court of Justice has produced its first major judgments in the field, having been called to interpret third pillar law. National courts, especially supreme/constitutional courts, also had to inevitably intervene, called to assess the implications of measures such as the European Arrest Warrant and its implementing measures for domestic criminal justice and constitutional systems. These judgments, both by the ECJ and national courts, are of considerable significance for the development of European criminal law per se, but have also important constitutional implications for the development of Community/Union law and the relationship between the Union and Member States. In all cases, judges touched explicitly and implicitly upon constitutional principles of Community law to address the issue of the interaction between Community and Union law in the context of crime, and between Community/Union law and national constitutional law.[1] It is the application by courts of constitutional principles of the Community – in this case the attribution of competences, the duty of loyal co-operation and (in)direct effect, and primacy of Community law – to criminal law that this article will examine.

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1 The term 'constitutional principles of EC law' is understood to include 'systemic principles which underlie the constitutional structure of the Community and define the Community legal edifice' – T. Tridimas, The General Principles of EU Law 4 (2006). Tridimas includes these principles as a sub-category of the general principles of Community law.

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B. The Attribution of Competences – The Community and Criminal Law

The debate on the existence and extent of the competence of the Community in the field of criminal law has been long-standing.[2] A key factor leading to ambiguity and conflicting views on the existence of competence of the European Community in criminal matters has been the silence of the EC Treaty – from 1957 to today – on the matter. The debate has been fuelled by the development of Luxembourg case-law focusing on traditional Community policies such as free movement, the internal market or competition, but also touching upon criminal matters - most notably case-law relating to mechanisms to ensure the enforcement and effectiveness of Community law by imposing effective, proportionate and dissuasive sanctions for its breach.[3] However, at least until recently, the Court has not conferred to the Community explicitly the competence to define *criminal* offences and impose *criminal* sanctions.

This silence could lead to two diametrically opposed views regarding the existence of Community competence to define criminal offences and impose criminal sanctions, coloured by the attitude that one has towards criminal law, in particular whether one considers that criminal law is a special case and should be treated differently from economic law. Many of those in favour of greater EC involvement in the field have been arguing that criminal law should not be distinguished from other fields of law and that the Community should have powers to interfere in one way or another in Member States' decisions in criminal matters in order to safeguard the integrity of the EC legal order. Those more sceptical could argue that the criminal law is a special case. It is inextricably linked with state sovereignty and deals with sensitive areas such as the relationship between the individual and the State. They argue that any conferral of competence in criminal matters by Member States to the Community must be express in the Treaties and that intervention in criminal matters does not bode well with the character of the Community as a primarily economic space.[4]

These arguments were common before the Maastricht Treaty, which introduced the three-pillar structured European Union and granted the Union (but not the Community) a degree of competence in criminal matters in the third

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2 From the plethora of academic writing in the field, see in particular M. Delmas-Marty, *The European Union and Penal Law*, 4 European Law Journal 87 (1998); U. Sieber, *Union Européenne et Droit Pénal Européen*, 1993 Rev. Sc. Crim 249; H. G. Sevenster, *Criminal Law and EC Law*, 29 Common Market Law Review 29 (1992); M. Wasmeier & N. Thwaites, *The 'battle of the pillars': does the European Community have the power to approximate national criminal laws?*, 29 European Law Review 613 (2004); A. Klip, *European Integration and Harmonisation and Criminal Law*, *in* D. Curtin *et al.* (Eds.), European Integration and Law 109 (2006); and G. Giudicelli-Delage & S. Manacorda (Eds), L'Intégration Pénale Indirecte (2005).

3 *See in particular* Delmas-Marty, *supra* note 2; and Wasmeier & Thwaites, s*upra* note 2.

4 On this debate, *see in particular* Wasmeier & Thwaites, *supra* note 2. The authors argue in this context that criminal law should not be viewed as a separate Community policy (like the internal market, the environment etc.), but as a field of law which can horizontally advance the Community objectives.

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pillar. Even before Maastricht, Member States were faced with the dilemma of adopting criminal law in the context of Community initiatives linked with the internal market. The 1991 Directive on money laundering is a prime example.[5] The Community institutions, bound by commitments undertaken under the 1988 UN Convention on drug trafficking and the 1990 Financial Action Task Force (FATF) Recommendations, initiated a process of negotiation of a Community instrument aimed at fighting money laundering. But any such instrument would be meaningless (and arguably contrary to international commitments) if it did not involve some degree of criminalization of money laundering. However, such move was controversial in the light of the debate on whether the Community had competence to define criminal offences and impose criminal sanctions. The Commission, in its original proposal, suggested the criminalization of money laundering. The Council however was not ready for the conferral of such competence to the Community and the compromise reached in the final text was that money laundering would be 'prohibited' in Member States. This wording – which was repeated in the second and third money laundering Directives adopted in 2001 and 2005 respectively, long after the pillars were introduced – has however led to a de facto criminalization of money laundering in all EU Member States.[6]

The introduction of a Union competence in criminal matters in Maastricht in the third pillar did not change the situation regarding Community law, with the EC Treaty remaining silent regarding action in criminal matters. If anything, the introduction of the third pillar could strengthen the argument that the Community has no competence to define criminal offences and impose criminal sanctions, as such competence is expressly attributed (and thus limited to) the Union in the third pillar. Post-Amsterdam, (with asylum and immigration matters being 'communitarized') the issue of the correct legal basis and the existence of competence in criminal matters has arisen in the context of negotiations of measures in the field of irregular migration. A legal basis for the adoption of such measures could be found in the first pillar (in Title IV), but it was unclear whether such first pillar law could include criminal offences and sanctions. The compromise reached in this instance (concerning legislative action on human smuggling), in the light of Member States' reluctance to confer to the Community competence in criminal matters, was to adopt two parallel and interlinked measures: a first pillar Directive describing the regulated conduct, and a third pillar Framework Decision stipulating that the conduct described in the first pillar will be treated as a criminal offence and determining criminal sanctions.[7] Criminal law would thus remain in the third pillar.[8] Notwithstanding the Commission's initial proposals (which

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5 Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, OJ 1991, L 166/77.

6 For a detailed analysis of the background and negotiations to the Directive and the legal basis debate, *see* chapter 3 of V. Mitsilegas, Money Laundering Counter-measures in the European Union (2003).

7 Council Directive 2002/90/EC of 8 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L328/4, and corresponding Framework Decision, same OJ, at 1.

8 For an analysis, *see* chapter 4 of V. Mitsilegas, J. Monar & W. Rees, The European Union and Internal Security (2003).

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extended criminal law competence in the first pillar), this strategy was followed by the Council subsequently in legislation relating to other first pillar policies: a Directive and accompanying Framework Decision were adopted regarding the criminalization of ship-source pollution.[9] In the field of environmental protection by criminal law, the Commission tabled a proposal for a first pillar Directive in 2001,[10] but Member States opted for a third pillar approach and agreed two years later a Framework Decision on environmental crime.[11]

It is the application of the above strategy to environmental crime which gave rise to intervention by the Court of Justice and a judgment with major implications for EU criminal and constitutional law.[12] The Commission, supported by the European Parliament, instituted an action for annulment of the Framework Decision on environmental crime at the ECJ, arguing that the third pillar measure was adopted under the wrong legal basis. It should have been adopted according to the Commission under the first pillar, as the protection of the environment is a first pillar objective. The Commission argued that while the Community does not have a general competence in criminal matters, it has competence to prescribe criminal penalties for infringements of Community environmental protection legislation if it takes the view that that is a *necessary means* of ensuring that the *legislation is effective* – adding that the harmonisation of national criminal law is *designed to be an aid* to the Community policy in question.[13] Along with this argument – based on the view that criminal law is merely an auxiliary, 'horizontal' means of achieving Community objectives – the Commission evoked Member States' duty of loyal co-operation and the general principles of effectiveness and equivalence, constantly present in the Court's case-law.[14]

The Council, supported by no less than 11 Member States,[15] opposed this view. The Council and the vast majority of the Member States[16] argued that as the law currently stands, the Community does not have power to require Member States to impose criminal penalties in respect of the conduct covered by the Framework

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9 OJ L 255/11 and 164.

10 COM (2001) 139 final, Brussels 13 November 2001.

11 OJ 2003 L29/55.

12 Case C-176/03, *Commission v Council*, 13 September 2005. For case commentaries, *see* Ch. Tobler, *Case-note*, 43 Common Market Law Review 835 (2006); and S. White, *Harmonisation of criminal law under the first pillar*, 31 European Law Review 81 (2006).

13 Para. 19 of the judgment, emphasis added.

14 Para. 20. A similar argument was advanced in 2003 by the European Parliament Legal Affairs Committee in its Report on legal bases and compliance with Community law (A5-0180/2003, 22 May 2003, rapporteur: I. Koukiadis). The Committee used Article 10 EC on loyal co-operation to argue in favour of the existence of EC competence in criminal matters in certain circumstances. However, the Committee took a seemingly more limited view to that of the Commission, arguing that EC competence to require the Member States to make provision for criminal penalties must be limited to cases in which the Community legislator considers that compliance with Community law can *only* be safeguarded by such means (point 5, emphasis added).

15 Denmark, Germany, Greece, Spain, France, Ireland, the Netherlands, Portugal, Finland, Sweden and the United Kingdom. This demonstrates the sensitivity that Member States (and indeed 'old' Member States in this case) have towards extending Community competence to criminal law.

16 With the exception of the Netherlands who supported the Council but via a different reasoning.

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Decision.[17] Not only is there *no express conferral of power in that regard*, but, given the considerable *significance of criminal law for the sovereignty of Member States*, there are no grounds for accepting that this power can have been implicitly transferred to the Community at the time where substantive competences, such as those exercised under Article 175 EC, were conferred on it.[18] Moreover, Articles 135 EC and 280 EC, (on customs co-operation and fraud against the Community budget respectively) which expressly reserve to the Member States the application of national criminal law and the administration of justice, confirm that interpretation, which is also borne out by the fact that the Treaty on the European Union devotes a specific title to judicial co-operation in criminal matters, which *expressly confers on the European Union competence in criminal matters.*[19] Finally, the Council argued, the Court has never obliged Member States to adopt criminal penalties and legislative practice is in keeping with that interpretation.[20]

In a landmark ruling, the Court found for the Commission and annulled the Framework Decision. The Court used Articles 47 and 29 TEU, according to which nothing in the TEU is to affect the EC Treaty.[21] The Court then focused on the environment as a Community objective. It confirmed that the environment constitutes one of the *essential objectives* of the Community, reminded that, according to settled case-law, the choice of legal basis must rest on objective factors which are amenable to judicial review, including in particular the aim and the content of the measure and stated that the aim is the protection of the environment and the content particularly serious environmental offences.[22] The essential character of environmental protection as a Community objective is crucial for determining whether criminal law can be used to achieve this objective in the Community pillar. According to the Court, while *as a general rule, neither criminal law nor the rules of criminal procedure fall within EC competence*, this does not prevent the EC 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*.[23] The Court found that Articles 1 to 7 of the Framework Decision (which relate to the environmental crime offences) have as their main purpose the protection of the environment and they could have been properly adopted on the basis of Article 175 EC.[24] That finding is not called into question by the existence of Articles 135 EC and 280

17 Para. 26.
18 Para. 27, emphasis added.
19 Paras. 28 & 29, emphasis added.
20 Paras. 31 & 32.
21 Para. 38.
22 Paras. 41 & 45-47.
23 Paras. 47-48. Emphasis added.
24 Para. 51.

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(4) EC.[25] However, the Court added that although Articles 1-7 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 these must be effective, proportionate and dissuasive).[26]

This is a seminal ruling, reminiscent of the Court's landmark judgments in the 1960s on primacy and direct effect. Facing the objections of a significant number of Member States, and the wording of the Treaties which confer express powers to the Union to act on criminal matters, while being silent on the role of the Community, the Court decided to interpret the Treaties creatively in order to expressly establish a Community competence to act in criminal matters. The timing of the judgment is noteworthy, as it came at a time when the Constitutional Treaty – which would put an end to the pillar structure and in effect would (with some exceptions) fully 'communitarize' the third pillar – was 'frozen', having been rejected in France and the Netherlands. This would effectively mean that criminal law harmonisation – if confined to the third pillar only – would necessitate unanimity of 25 (and, from 1 January 2007, 27), and require mere consultation of the European Parliament – thus potentially leading to legislative paralysis and the exacerbation of the democratic deficit in criminal matters. In the light of this timing, a further parallel could be drawn here with the 1960s, where the Court pushed European integration in the face of legislative stagnation.

It is interesting to look closely at the reasoning of the Court when reaching the conclusion of conferring criminal law competence to the Community. The starting point is the combination of Articles 29 and 47 TEU, which state respectively that third pillar action must be 'without prejudice to the powers of the European Community and that nothing in the EU Treaty will affect the Treaties establishing the European Communities. The Court used these provisions to strengthen the Community pillar and to address its centrality and primacy over the intergovernmental pillars. It sent thus a strong signal that third pillar action must not jeopardise Community action.[27] Having asserted the primacy and the need to ensure the integrity of the Community pillar, the Court did not take up the Commission's reference to the principle of loyal co-operation, and did not take up the Advocate General's extensive analysis of the specific need for a high

[25] Para. 52. The Court added that 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.

[26] Para. 49. In this context the Court seems to follow the distinction made between criminalisation and the choice of the appropriate penalty in the Opinion of AG Ruiz-Jarabo Colomer, who stated that 'it seems clear that the response to conduct which seriously harms the environment must be a criminal one but, in terms of punishment, the choice of the penalty to admonish that conduct and to ensure the effectiveness of Community law is the province of the Member States' (Para. 84). ECR 2005, I-7879.

[27] Manacorda has called this a censure by the Court of 'prohibited intergovernmentalization' (*intergouverementalisation prohibée*). S. Manacorda, *Judicial Activism dans le cadre de l'Espace de liberté, de justice et de sécurité de l'Union européenne*, 2005 Rev. Sc. Crim. 956.

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level protection of the environment. [28] It rather chose to focus specifically and extensively to an analysis justifying the conferral to the Community of a criminal law competence on the basis of the need to ensure the effective achievement of Community objectives. In this respect, the fact that the case involved the protection of the environment – an 'essential' Community objective according to the Court – may have been of particular relevance, notwithstanding the fact that the Court did not focus on environmental protection to such a great length as the Advocate General.[29] What is significant in this context is that the Court did not hesitate to apply its reasoning on the effective achievement of Community objectives in the field of criminal law, viewing criminal law as a means to an end, rather as a special field of law where special rules must apply. Criminal law will fall within Community competence, like any other field of law, if Community objectives are at stake. This conclusion may appear striking bearing in mind the express exclusion of the application of national criminal law in matters relating to customs co-operation and fraud by the EC Treaty (Articles 135 and 280(4)) and the express conferral of competence in criminal matters to the Union (and not the Community).[30]

However, it is not clear whether the judgment has established in principle that the Community may, under certain circumstances, have competence in the field of criminal law, or that it is limited to environmental crime only.[31] While the second case is highly unlikely, questions regarding the extent and scope of Community competence in criminal matters still remain.[32] In particular, it is not clear whether Community competence in criminal law is limited to the definition of criminal offences or extends also to the imposition of criminal sanctions.[33] The Court mentions that, while the annulled Framework Decision criminalizes

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[28] On this point, *see* H. Labayle, *Architecte ou spectatrice? La Cour de justice de l'Union dans l'Espace de liberté, sécurité et justice*, 42 R TD Eur. 10 (2006).

[29] On the significance of environmental protection in the development of the Court's case-law, *see* F. Jacobs, *The Role of the European Court of Justice in the Protection of the Environment*, 18 Journal of Environmental Law 185 (2006).

[30] For a critical view, *see* the evidence of Richard Plender to the House of Lords European Union Committee. Plender, who was counsel for the United Kingdom in the case, wonders whether the conferral of an implied Community power in criminal law was legitimate in the face of the absence of a subjective intention by Member States to confer such power and the existence of an express EU power in the third pillar. *See* House of Lords European Union Committee, *The Criminal Law Competence of the European Community*, 42nd Report, session 2005-06, HL Paper 227, Q1. For the opposite view, *see* Tobler, *supra* note 12, who argues that the Council seems to forget that the EC Treaty does not confer a catalogue of negative competences (851). For a view advocating Community action in criminal matters – very much along the lines put forward by the Court – *see also* Wasmeier & Thwaites, *supra* note 2.

[31] A very narrow view in this context has been put forward by ECJ Judge Puissochet, who stated before the French Senate that the Court has only said in this case that the Community has competence to oblige Member States to impose criminal sanctions *to protect the environment*. It has not recognised a Community competence to harmonise criminal law. Sénat, Réunion de la delegation pour l'Union européenne du Mercredi 22.2.2006.

[32] *See also* Labayle, *supra* note 28, at 14 and evidence by Steve Peers to the House of Lords European Union Committee, *supra* note 30*,* Q52.

[33] Some authors seem to suggest that Community competence is limited to criminalization only.

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conduct which is particularly detrimental to the environment, it leaves to the Member States the choice of the criminal penalties to apply.[34] It is not clear however if this means that the Community is granted powers to criminalize only or also to impose criminal sanctions, at least in the environmental crime field.[35] It seems paradoxical however – and potentially incoherent – to confer competence to define criminal offences and impose the criminalization of certain types of conduct but leave the choice of the sanctions to Member States, as sanctions would inevitably be criminal. Moreover, the imposition of a criminalization requirement to Member States in the first place (which, under the qualified majority voting arrangements of the first pillar may be outvoted in such a measure) arguably constitutes a greater challenge to State sovereignty and the exercise of power in the criminal law sphere than the dictation of the imposition of specific criminal sanctions.

A related issue involves the objectives for the achievement of which the Community has a criminal law competence.[36] The case involved environmental crime, which, according to the Court, is one of the 'essential' objectives of the Community.[37] It is not clear however whether Community competence in criminal matters will be limited to the achievement of 'essential' Community objectives or of any Community objective and, in the former case, what constitutes an 'essential' Community objective.[38] It is also not clear whether the severity of sanctions necessary to protect the environment or the transnational character of environmental protection played a part in the Court's ruling and therefore the delimitation of EC competence in criminal matters in the future. Is the environment a special case? Or, to the other extreme, does EC competence in criminal matters extend to the achievement of any Community objective? Shortly after the environmental crime judgment, the Commission published a Communication arguing for a recasting of a number of existing laws which have been adopted in a similar fashion to the environmental crime cases under a dual legal basis.[39] It subsequently tabled a proposal for a first pillar Directive

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See C. Haguenau-Moizard, *Vers une harmonisation communautaire du droit pénal?*, 42 RTD Eur 384 (2006).

[34] Para. 49.

[35] Wasmeier & Thwaites, *supra* note 2, argue that if a measure specifically aims at a concrete Community objective, particularly at the enforcement of related Community provisions through dissuasive (criminal) sanctions, it may fall into Community competence – however, detailed rules on the type and scale of sanctions would go beyond such an 'implied power'. In case of such a situation one could still have a cross-pillar split (634).

[36] And of course whether EC competence in criminal matters could be viewed outside the framework of the achievement of Community objectives.

[37] Para. 41.

[38] The latter question has been posed by Plender, *supra* note 30*,* Q10, and Labayle, *supra* note 28, at 14. In its Report on the judgment, the French Assembly seems to understand the judgment as limited to the achievement of 'essential' objectives. In their view, it is not enough that an objective is listed as such in the EC Treaty, but it must be essential and transversal. Assemblée Nationale, *Rapport d'information sur les consequences de l'arret de la Cour de Justice du 13 Septembre 2005*, 25.1.2006, Rapport No 2829, p.10.

[39] *Communication on the implications of the Court's judgment of 13 September 2005*, COM (2005) 583 final/2, Brussels, 24.11.2005.

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on criminal measures aimed at the enforcement of intellectual property rights,[40] and has advocated the use of the 'passerelle' provision in Article 42 of the TEU and 67(2) TEC to transfer criminal matters from the third to the first pillar.[41] However, Member States' reaction has been lukewarm. The Justice and Home Affairs Council merely took note of the Commission Communication and seems to advocate an examination of the legal basis on a case-by-case basis, while at the recent Tampere Council no less than 14 Member States rejected the proposals to use the 'passerelle' provision.[42] It seems that Member States do not share the Commission's enthusiasm and are cautious of the Court's judgment. The Court may have the opportunity to consolidate its position in the forthcoming case on the Framework Decision on ship-source pollution, challenged in a similar fashion by the Commission.[43]

C. Loyal Co-operation and (In)direct Effect

One of the fundamental differences between first and third pillar law is that, as is stated explicitly in the Treaty, Framework Decisions – the main legislative instrument in the third pillar and equivalent as to the form to Directives – do not have direct effect.[44] This limitation reflects Member States' sensitivity with regard to the potential effects of third pillar law. The limitation is significant as it restricts considerably the potential for enforcement of third pillar law by blocking avenues for individuals to challenge their legal position as resulting from EU criminal law before domestic courts. With the Treaty referring only to direct effect and excluding it in the context of Framework Decisions, the question arises however of whether other principles of Community law ensuring the enforcement of EC law in national courts – such as indirect effect – apply to the third pillar.

The Luxembourg Court dealt with this issue in the *Pupino* judgment.[45] The case arose after a reference by an Italian court asking to what extent the Italian Code of Criminal Procedure could be interpreted, in the light of a Framework Decision on the standing of victims in criminal proceedings,[46] as allowing

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40 COM (2006) 168 final, Brussels, 26.4.2006.

41 *Communication from the Commission to the European Council. A Citizens' Agenda: Delivering Results for Europe*, COM (2006) 211 final, Brussels, 10.5.2006.

42 Financial Times, *EU plan to fight terror in tatters*, 23-24.9.2006.

43 Case C-440/05, OJ 2006, C22/10.

44 Article 34(2)(b) TEU. It is interesting that, while the judge-made principle of direct effect makes its appearance in the EU Treaty in this 'negative' manner.

45 Case C-105/03, Maria Pupino, 16 June 2005. For commentaries on the case, *see inter alia*: J. R. Spencer, *Child Witnesses in the European Union*, 64 Cambridge Law Journal 569 (2005); M. Fletcher, *Extending 'indirect effect' to the third pillar: the significance of Pupino?*, 30 European Law Review 862 (2005); Editorial, *The Court of Justice and the third pillar*, 30 European Law Review 773 (2005); Ch. Hillgruber, *Anmerkung,* 17 Juristenzeitung 841 (2005); D. Sarmiento, *Un paso más en la constitucionalización del tercer pilar de la Union europea. La sentencia* Maria Pupino *y el efecto directo de las decisiones marco*, 10 Revista Electronica de Estudios Internacionales (2005), available at www.reei.org.

46 OJ 2001 L82/1.

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children allegedly having suffered a number of forms of abuse by their teacher (such as striking them and not allowing them to use the bathroom) to testify under a special procedure, and not in normal court proceedings, against the teacher. The Italian Code of Criminal Procedure allowed for this possibility for children (under 16) only in cases of sexual offences or offences with a sexual background. The Luxembourg Court was thus asked to decide whether, and in which terms, Framework Decisions entail indirect effect.

After asserting jurisdiction,[47] the Court accepted that the 'interpretative obligation' of national courts under Community law also extends to third pillar Framework Decision. The Court based its approach to a great extent on the binding character of Framework Decisions. It stressed that the wording of Article 34(2)(b) EU on Framework Decisions is very closely inspired by that of the third paragraph of Article 249 EC on Directives with Article 34(2)(b) EU conferring a binding character on Framework Decisions in the sense that they 'bind' the Member States 'as to the result to be achieved but shall leave to the national authorities the choice of form and methods'.[48] The Court then asserted that "*the binding character of framework decisions, formulated in terms identical to those of the third paragraph of Article 249 EC, places on national authorities, and particularly national courts, an obligation to interpret national law in conformity*."[49] The limits placed on the jurisdiction of the Court do nothing to invalidate that conclusion.[50]

The Court backed up its conclusion with a further line of argumentation focusing on the need to achieve the objectives of the Union effectively which is linked to the principle of loyal co-operation. According to the Court, *irrespective of the degree of integration envisaged by the Treaty of Amsterdam,* it is perfectly comprehensible that the authors of TEU should have considered it useful to make provision, in the context of Title VI of that Treaty, for recourse to legal instruments with effects *similar to those provided for by the EC Treaty, in order to contribute effectively to the Union's objectives.*[51] In this context, the Court stated that it would be difficult for the Union to carry out the task of creating an ever closer Union (enshrined in Article 1TEU) effectively if the principle of loyal co-operation – which is enshrined in Article 10 of the EC Treaty – were not also binding in the area of police and judicial cooperation in criminal matters.[52] On the basis of these arguments, the Court asserted that the principle of conforming interpretation is binding in relation to framework decisions.[53]

Having applied the Community law principle of interpretative obligation to the third pillar, the Court referred to first pillar case-law to set out, in a manner similar

47 Paras. 19-30 of the judgment.
48 Para. 33.
49 Para. 34. Emphasis added.
50 Para. 35.
51 Para. 36. Emphasis added.
52 Paras. 41 & 42.
53 Para. 43.

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to the first pillar, the limits and contours of indirect effect.[54] The Court reiterated that the interpretative obligation of national courts is limited by general principles of law, such as legal certainty and non-retroactivity, adding that in particular, those principles prevent that obligation from leading to the criminal liability of persons who contravene the provisions of a Framework Decision from being determined or aggravated on the basis of such decision alone, independently of an implementing law.[55] However, the Court, following the Opinion of AG Kokott,[56] noted that in the context of the present case *do not concern the extent of criminal liability of the person concerned but the conduct of the proceedings and the means of taking evidence*.[57] Further in the judgment, the Court stated that the principle of conforming interpretation *cannot serve as the basis for an interpretation of national law contra legem*. Following its recent judgment in *Pfeiffer*,[58] the Court qualified this limitation however by adding that indirect effect does require that, where necessary, *the national court consider the whole of national law* in order to assess how far it can be applied in such a way as not to produce a result contrary to that envisaged by the framework decision.[59]

Having established the principle and its limits, the Court went on to examine the specific case.[60] It confirmed that the achievement of the aims of the Framework Decision on the rights of victims in criminal proceedings require that a national court should be able, in respect of particularly vulnerable victims, to use a special procedure, such as the one provided for already in Italian law.[61] However, in the light of the concerns raised regarding the potential impact of such interpretation on the rights of the defendant, the Court added two caveats: that, in the light of the Framework Decision, the adopted conditions for giving evidence must be compatible with the basic legal principles of the Member State;[62] and that the national court must ensure that the application of those measures is not likely to "make the criminal proceedings against Mrs Pupino, considered as a whole, unfair within the meaning of Article 6 of the [ECHR], as interpreted by the European Court of Human Rights."[63]

This is another landmark ruling from Luxembourg. The Court did not hesitate to transplant Community law to the third pillar, by stating that Framework Decisions entail indirect effect. This is notwithstanding the fact that the third pillar

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54 For an analysis *see inter alia* G. Betlem, *The Doctrine of Consistent Interpretation – Managing Legal Uncertainty*, 22 Oxford Journal of Legal Studies 397 (2002).

55 Paras. 44 & 45, including references to the Court's case-law.

56 Opinion delivered on 11 November 2005, Para. 42.

57 Para. 46. Emphasis added.

58 Cases C-397/01 to C-403/01, Pfeiffer et al. *v.* Deutsches Rotes Kreuz, 5 October 2004, in particular Para. 115. For a commentary *see* S. Prechal, *Case-Note*, 42 Common Market Law Review 1445 (2005).

59 Para. 47. Emphasis added. *See also* Fletcher, *supra* note 45, at 873.

60 Paras. 50-61.

61 Para. 56.

62 Para. 57. The Court referred to Article 8(4) of the Framework Decision.

63 Para. 60. In the preceding Paras. the Court stressed the fact that according to Article 6(2) TEU the Union respects fundamental rights and that the Framework Decision must be interpreted in a way that fundamental rights are respected (Paras. 58 and 59).

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itself excludes the application of direct effect- the basic Community law principle whose limits are inextricably linked with the development of the indirect effect concept by the ECJ. It is also irrespective of the degree of integration the States signatory to the Amsterdam Treaty wished to achieve in criminal matters – the Court disassociates the envisaged degree of integration from the need of ensuring the effective achievement of Union objectives.[64] The reasoning of the Court is noteworthy, especially the emphasis on the principle of loyal co-operation. The principle is enshrined in Article 10 of the EC Treaty, but not in the third pillar – the Court seems to apply loyal co-operation by analogy to the third pillar, based on the very general provision of Article 1 TEU calling for the establishment of an 'ever closer Union'.[65] By focusing on the principle of loyal co-operation, the Court not only emphasises (in a manner similar to the environmental crime case) the importance of the effective achievement of Treaty objectives (only this time these involve the Union and not the Community); similarly to the *Pfeiffer* ruling,[66] the Court also avoids linking indirect effect with the primacy of Union law over national law[67] – the Court is silent in this regard and the issue remains open.[68]

The impact of the application of the interpretative obligation of the national judge in this case is striking. The Luxembourg Court has in reality re-written the Italian Code of Criminal Procedure. Following the Court's guidance the domestic judge has little choice but allow minors in this case to take advantage of the Code's protective provisions, although they were not covered by the legislation. This has led to the criticism that in fact the Court confers not indirect, but direct effect to the Framework Decision – in stark breach of the wording of Article 34

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[64] A similarly 'ahistorical' interpretation can be found in the *ne bis in idem* cases, with the Court stating there that the intentions of the signatories of the Schengen Convention were not relevant after the incorporation of the Schengen *acquis* in the EC/EU legal order post-Amsterdam. *See* Cases C-187/01 and C-385/01, 11 February 2003, *Gözütok and Brügge* Para. 46.

[65] *See* K. Lenaerts & T. Corthaut, *Of birds and hedges: the role of primacy in invoking norms of EU law*, 31 European Law Review 287 (2006). This reasoning has been heavily criticised by the European Law Review editorial, *supra* note 45*,* where it is stated that Article 1 TEU is not subject to the Court's jurisdiction (Article 46 TEU). Fletcher, *supra* note 45, at 71, also criticises the emphasis on loyal co-operation, by arguing that the third pillar covers co-operation *between* Member States. However, this seems to be an extremely 'intergovernmental' view of the third pillar, whose system indeed shares a number of common features with the first pillar and laws stemming from it represent a further degree of integration to international law instruments.

[66] *See* Prechal, *supra* note 58.

[67] *See* Labayle, *supra* note 28, at 31. *See also* Lenaerts & Corthaut, *supra* note 65. The authors argue that

> the Court could have avoided this frantic search for a ground for an equivalent provision, if it had recognised that the duty of consistent interpretation is inherent in any hierarchy of norms and thus a simple corollary of the principle of primacy in that it is the easiest way to ensure that no inconsistent national laws are applied over EU law

(293).

[68] A question which also remains open is the application of the State liability case-law to the third pillar. Could this be the next step the Court will take to ensure enforcement of Union law in the absence of direct effect?

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TEU.[69] The Court seems to overcome potential obstacles caused by the argument that adding a category of privileged witnesses to the Italian Code of Criminal Procedure in the face of the silence of the Code in this regard would in fact be *contra legem*, by using the *Pfeiffer* formula that the national judge must consider national law 'as a whole'. However, this raises important questions regarding the impact of such consideration on the internal coherence of national criminal justice systems, whose balance may be disturbed by piecemeal attempts of national judges to accommodate Union law demands in specific cases. Judges themselves may be faced with difficult balancing exercises, especially in cases where Union law itself – like in the case of the Framework Decision in question – is drafted in broad terms, having to take into account all complex parameters and interests involved in a criminal trial.

In this balancing of competing interests, *Pupino* raises a number of questions regarding safeguarding the rights of the defendant in the development of the European Union as an 'area of freedom, security and justice'. In *Pupino*, it appears that the interpretation would emphasise the rights of the alleged victims at the expense of the rights of the defendant. The position of the defendant may become even worse if the legislative output of the third pillar continues to focus predominantly on enforcement/security aspects, rather than instruments protective of rights.[70] Moreover, in the light of the current focus on security, indirect effect may serve to stress the emphasis on enforcement. For instance, national courts may be asked to use indirect effect to supersede national implementing legislation on the European Arrest Warrant which may contain further safeguards for the individual than the actual EU Framework Decision. The Commission has already criticised a number of Member States for adding further safeguards in implementing laws (such as human rights protection as a ground for refusal of the execution of a European Arrest Warrant) as incompatible with the principle of mutual recognition.[71]

These concerns are accentuated by the limits posed by the Court in existing case-law safeguards regarding indirect effect and criminal law. In *Pupino,* the Court seemed to transpose all the first pillar safeguards limiting indirect effect in criminal law cases, but then substantially qualified its position by stating that the present case *does not involve criminal law per se*, but the gathering of evidence, ie criminal procedure.[72] This narrow framing of protection in the criminal justice

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[69] Sarmiento, *supra* note 45.

[70] Indeed, the fact that negotiations on the Commission proposal on the rights of the defendant in criminal proceedings have stalled may be attributed partly (along with the weak legal basis) to Member States' reluctance to agree on an instrument that may have far-reaching consequences for their domestic legal system, especially post-Pupino. *See* V. Mitsilegas, *Trust-building Measures in the European Judicial Area in Criminal Matters: Issues of Competence, Legitimacy and Inter-institutional Balance*, *in* S. Carrera & T. Balzacq, Security versus Freedom? A Challenge for Europe's Future, at 287-288 (2006).

[71] *Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States,* COM (2005) 63 final, Brussels, 23 February 2005 and SEC (2005) 267; and COM (2006) 8 final, Brussels, 24 January 2006, and SEC (2006) 79.

[72] The question arises here of how the Court's approach in the first pillar cases setting limits to

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process raises particular concerns: not only is at times difficult to disassociate aspects of criminal law from criminal procedure, but, more importantly, it is questionable to exclude the application of principles such as legal certainty, non-retroactivity and aggravation of a person's criminal liability from the criminal process and limit them, as the Court does, to 'the extent of the criminal liability of the person concerned' in the light of the significant consequences that the criminal process may have for the individual.[73] This approach may be the source of serious clashes between national protective provisions – potentially constitutionally enshrined – and third pillar law, especially in the light of the increased focus on enforcement.

D. Primacy in the Context of Mutual Recognition

Mutual recognition of judicial decisions has been central in the development of EU criminal law post-Tampere and confirmed in the Hague Programme as the cornerstone of EU action in criminal matters. The emphasis on mutual recognition, instead of harmonisation of criminal law, has been a convenient choice for Member States concerned about ceding sovereignty in criminal matters. The political appeal of mutual recognition for such Member States lies in the fact that, instead of embarking in a very visible attempt to harmonise their criminal laws at EU level, they can be seen to promote judicial co-operation by not having to change in principle their domestic criminal laws. For EU institutions promoting the principle, on the other hand, mutual recognition would avoid stagnation in European integration in criminal matters (linked to Member States' reluctance to harmonise criminal law and the decision-making constraints of the third pillar) and would lead to a 'spill-over' harmonisation of minimum procedural standards justified as facilitating the practical operation of mutual recognition and leading to the establishment of a common level playing field across the EU.[74]

The central characteristic of the mutual recognition mechanism is that – instead of a common legislative standard negotiated and adopted at EU level – it is a *national* standard, judgment or order (for example, a European Arrest Warrant) that must be recognised and executed by the equivalent authorities of other Member States.[75] In recognising these standards in specific cases, national judicial authorities implicitly accept as legitimate the national legal, constitutional and judicial system which has produced them in the first place. In that sense, mutual recognition represents a '*journey into the unknown*', where national authorities

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indirect effect to protect the individual, in particular *Berlusconi* (Cases C-387/02, C-391/02 and C-403/02, 3 May 2005) will apply to first pillar criminal law after the environmental crime case. Lenaerts and Corthauld are of the view that the limits posed by the Court will be applicable in these cases (312), assuming that first pillar criminal law will be limited to the determination of criminal liability.

[73] The wording in itself is also not clear. The Court talks about 'the extent' of criminal liability. Would this cover for instance cases of the *determination* of criminal liability per se?

[74] For a more detailed analysis, *see* Mitsilegas, *supra* note 70.

[75] For further details, *see* V. Mitsilegas, *The Constitutional Implications of Mutual Recognition in Criminal Matters in the European Union*, 43 Common Market Law Review 1277 (2006).

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are in principle obliged to recognise – with a minimum of formality – decisions emanating from the legal system of any given EU Member State.[76] However, the issue of the extent to which one can successfully 'borrow' the mutual recognition principle from its internal market framework – where it initially appeared – and transplant it to the criminal law sphere is contested.[77] The main objection that could be voiced to such transplant is one of principle, namely that criminal law and justice is an area of law and regulation which is qualitatively different from the regulation of trade and markets. As I have noted elsewhere,

> Criminal law regulates the relationship between the individual and the State, and guarantees not only State interests but also individual freedoms and rights in limiting State intervention. Court orders and judgments in the criminal sphere may have a substantial impact on fundamental rights, and any inroads to such rights caused by criminal law must be extensively debated and justified. Using mutual recognition to achieve regulatory competition (as has been the case in the internal market) cannot be repeated in the criminal law sphere, as the logic of criminal law is different and market considerations cannot give a solution. While market efficiency requires a degree of flexibility and aims at profit maximisation, clear and predictable criminal law principles are essential to provide legal certainty in a society based on the rule of law. The existence of these – publicly negotiated – rules is a condition of public trust to the national legal order.[78]

In the light of the above, the application of the mutual recognition principle in the criminal law sphere in the European Union has posed a number of constitutional challenges to Member States.[79] These challenges were evident in particular in the process of negotiation, adoption and implementation of the flagship mutual recognition instrument, the European Arrest Warrant.[80] A major concern regarding the European Arrest Warrant involved the abolition of the dual criminality requirement for a list of 32 offences, which is seen to constitute a breach of the legality principle. While advocates of mutual recognition have argued that maintaining dual criminality is contrary to the very principle of mutual recognition,[81] those

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[76] Mitsilegas, *supra* note 75.

[77] *See* S. Peers, *Mutual Recognition and Criminal Law in the European Union: Has the Council Got it Wrong?*, 41 CML Rev 5 (2004).

[78] Mitsilegas, *supra* note 75.

[79] *See* V. Mitsilegas, *The Constitutional Implications of Mutual Recognition in Criminal Matters in the European Union*, 43 Common Market Law Review 1277 (2006), whereupon this Para. and a substantial part of the following Paras. on the national constitutional courts are based.

[80] Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, OJ 2002 L190/1. For an analysis of various aspects of the European Arrest Warrant *see inter alia*: S. Alegre & M. Leaf, *Mutual Recognition in European Judicial Co-operation: A Step Too Far Too Soon? Case Study – the European Arrest Warrant*, 10/2 European Law Journal 200 (2004); N. Venemann, *The European Arrest Warrant and its Human Rights Implications*, 63 ZaoRV 103 (2003); J. Wouters & F. Naert, *Of Arrest Warrants, Terrorist Offences and Extradition Deals: An Appraisal of the EU's Main Criminal Law Measures against Terrorism after '11 September'*, 41 CML Rev 911 (2004); B. Gilmore, *The Twin Towers and the Third Pillar: Some Security Agenda Developments,* EUI Working Paper LAW No 2003/7; J. R. Spencer, *The European Arrest Warrant*, 6 Cambridge Yearbook of European Legal Studies 201 (2003).

[81] H. Nilsson, *Mutual Trust or Mutual Mistrust?*, *in* G. de Kerchove & A. Weyembergh (Eds.), La

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expressing concerns note that the abolition of dual criminality is contrary to the – constitutionally enshrined in a number of Member States – *principle of legality* (or *nullum crimen sine lege*). It has been argued forcibly that constitutionally it is not acceptable to execute an enforcement decision related to an act that is not an offence under the law of the executing State and that the executing State should not be asked to employ its criminal enforcement mechanism to help prosecuting/punishing behaviour which is not a criminal offence in its national legal order.[82] A related concern involves the link *between legality and legitimacy of criminal law at the national – and EU – level*.[83] Mutual recognition challenges concepts of legality and legitimacy. Contrary to harmonisation, which would involve – even with the current prominent democratic deficit in the third pillar – a set of concrete EU-wide standards which would be negotiated and agreed by the EU institutions, mutual recognition does not involve a commonly negotiated standard.[84] On the contrary, EU Member States must recognise decisions stemming from the national law of other Member States. Agreeing on the *procedure* to recognise *national* decisions, rather than *substantive rules* in the field of criminal law reflects a legitimacy and democracy deficit. Indeed, it has been said that one is led towards a 'government-led' – as opposed to parliamentary, production of criminal law norms.[85] Last, but not least, the European Arrest Warrant was perceived to *challenge well established constitutional protections in the executing State (such as the bar to the extradition of own nationals) and thus challenge the relationship between the individual and the State created on the basis of citizenship and territoriality* leading to the over-extension of the punitive sphere in the 'area of freedom, security and justice'.[86] Related to this were fears that the application of the European Arrest Warrant in practice, will lead to *the breach of the suspect's rights*.[87] Concerns have been focusing in particular on whether the suspect will

Confiance Mutuelle dans l'Espace Pénal Européen/Mutual Trust in the European Criminal Area 29 (2005).

82 *See in particular* M. Kaiafa-Gbandi, To Poiniko Dikaio stin Europaiki Enossi (Criminal Law in the European Union) (2003), at 328 (in Greek, my translation).

83 On the link between legality and legitimacy in EU criminal law in general *see* Ch. Van den Wyngaert, *Eurojust and the European Public Prosecutor in the Corpus Juris Model: Water and Fire?*, *in* N. Walker (Ed.), Europe's Area of Freedom, Security and Justice 232 (2004). The article draws upon the analysis of legitimacy in K. Lenaerts & M. Desomer, *New Models of Constitution-Making in Europe: the Quest for Legitimacy*, 39 CML Rev. 1217 (2002), especially 1223-1228.

84 This has led to calls for a level of approximation/harmonisation to accompany mutual recognition in criminal matters. *See* Peers, *supra* note 77; A. Weyembergh, *Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme*, 42 CML Rev. 1574 (2005); A. Weyembergh, *The Functions of Approximation of Penal Legislation within the European Union*, 12 MJ 155 (2005).

85 *See* B. Schuenemann, *Fortschritte und Fehltritte in der Strafrechtspflege der EU*, 151 Goldtammer's Archiv für Strafrecht 203 (2004).

86 *See also* Schünemann, *supra* note 85, at 313.

87 *See in particular* Alegre & Leaf, *supra* note 80; Venemann, *supra* note 80; P. Garlick, *The European Arrest Warrant and the ECHR*, *in* R. Blekxtoon (Ed.), Handbook on the European Arrest Warrant 167 (2005).

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enjoy ECHR rights in the issuing State, in particular the right to a fair trial and the protection from torture.[88]

National courts would sooner or later have to deal with these concerns. Following the implementation of the European Arrest Warrant across the European Union, the first important decisions by national constitutional courts on the relationship between the Warrant and domestic constitutional and criminal law started appearing.[89] These cases were of fundamental importance, as they inevitably had to deal with broader issues of the relationship between Union law and national constitutional law, bringing into the fore again the debate over primacy of (this time Union and not Community) law over national constitutional law. At the same time, the cases touched upon the relationship between national courts and the Luxembourg court, as well as the issues of legality and legitimacy mentioned above.

A landmark case on the compatibility of legislation implementing the European Arrest Warrant with national constitutional law came from the German *Bundesverfassungsgericht*.[90] The case involved a European Arrest Warrant issued by Spain and requesting the surrender of Mamoun Darkazanli. The latter, who had both German and Syrian citizenship, was prosecuted in Spain for being actively involved in the activities of Al-Qaeda. His extradition to Spain was approved by lower German court. The defendant launched a constitutional complaint before the German constitutional court challenging these decisions on a wide range of constitutional grounds. These included claims inter alia that the European Arrest Warrant and the implementing legislation lacked democratic legitimacy, that the abolition of dual criminality would result in the application of foreign law within the domestic legal order, and that the defendant's right to judicial review was breached.[91] The Court accepted the complaint. However, rather than declaring

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[88] This issue was prominently debated in national parliaments in the negotiation of the Warrant and the process of its implementation. In the debate on the 2003 Extradition Act – which implemented the European Arrest Warrant in the UK – David Cameron, now leader of the Conservative party, said:

> To put the matter in tabloid form, the Minister is not telling us to trust the current Greek, Portuguese or Spanish criminal justice systems. Instead, he is saying that we must trust any criminal justice system of any present or future EU country not as it is today but as it may be decades in the future.

Hansard 25 March 2003, col.197.

[89] For a detailed overview, *see* E. Guild (Ed.), Constitutional Challenges to the European Arrest Warrant (2006) (containing chapters on all major national cases thus far); *see also* Z. Deen-Racsmány, *The European Arrest Warrant and the Surrender of Nationals Revisited: The Lessons of Constitutional Challenges*, 14 European Journal of Crime, Criminal Law and Criminal Justice 271 (2006).

[90] Judgment of 18 July 2005, 2 BvR 2236/04. The text of the judgment, (and a press release in English- press release no. 64/2005) can be found at www.bundesverfassungsgericht.de.

[91] For commentaries to the judgment *see inter alia* F. Geyer, *The European Arrest Warrant in Germany. Constitutional Mistrust towards the Concept of Mutual Trust*, *in* E. Guild (Ed.), Constitutional Challenges to the European Arrest Warrant 101 (2006); J. Vogel, *Europaischer Haftbefehl und deutsches Verfassungsrecht*, 60 Juristenzeitung 801 (2005); J. Komarek, *European Constitutionalism and the European Arrest Warrant: Contrapunctual Principles in Democracy*,

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that the Framework Decision itself was in breach of the German Constitution itself (which could take us back straight to the *Solange* debate and explicitly apply this to third pillar – EU-law), the Court took the view that it was the German implementing law that was at fault, as it did not transpose all the safeguards included in the European Arrest Warrant Framework Decision into national law. The implementing legislation was declared void and the complainant not surrendered.[92]

Central to the Court's approach has been the emphasis on concepts of legitimacy, territory and citizenship and the protection of fundamental rights. A central concept was the special bond between the citizen and the State, and the legitimate expectations of citizens to be protected within the framework of their State of belonging. Following a reasoning strongly reminiscent of the *Solange* jurisprudence, the Court examined in detail the issue of extradition of German citizens. Article 16(2) of the German Basic Law was amended in 2000 to provide with the possibility of an exception to the principle of non-extradition of German nationals 'to a Member State of the European Union or to an international court of justice as long as ('*soweit*') constitutional provisions are upheld'.[93] In examining this provision, the Court stressed the specific link between German citizens and the German legal order. Citizens must be protected, if they remain within the German territory, from uncertainty, and their trust to the German legal system has a high value. In implementing the European Arrest Warrant, the German Parliament did not take into account this special link between citizen and State, by not transposing in the national legislation the 'territoriality' grounds for refusal enshrined in Article 4(7) of the Framework Decision. The implementing law constituted thus a breach of Article 16(2) of the Basic Law.[94]

The Court thus placed emphasis on the importance of national constitutional provisions in the development of European criminal law. This view is linked with the Court's view that mutual recognition in criminal matters remains a limited form of integration which is not devoid of (domestic) constitutional checks and balances. The Court stressed that co-operation in the third pillar is based on limited mutual recognition, which does not presuppose harmonisation and can be seen as a means to preserve national identity and statehood, and added that Article 6(1) TEU, which emphasises the respect by all EU Member States of fundamental rights, provides the foundation for mutual trust in this context. However, the Court stressed, that the *national legislator continues to have a duty to react if the trust is breached.* The Basic Law requires that in every individual

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Jean Monnet Working Paper 10/05, www.jeanmonnetprogram.org; S. Moelders, *European Arrest Warrant is Void – The Decision of the Federal Constitutional Court of 18 July 2005*, 7 German Law Journal 45 (2005), www.germanlawjournal.com; S. Wolf, *Demokratische Legitimation in der EU aus Sicht des Bundesverfassungsgerichts nach dem Urteil zum Europaischen Haftbefehlsgesetz*, 38 Kritische Justiz 350 (2005); case note by A. Hinajeros Parga, 43 Common Market Law Review 583 (2006).

92 New legislation was recently passed to address the judgment: *Gesetz zur Umsetzung des Rahmenbeschlusses uber den Europaischen Haftbefehl und die bergabeverfahren zwischen den Mitgliedstaaten der Europaischen Union,* BGB1 2006, I, 1721.

93 My translation. *See also* Geyer, *supra* note 91; Komarek, *supra* note 91 at. 15-16.

94 *See* Mitsilegas, *supra* note 70.

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case a concrete review of whether the rights of the defendant are respected should be made. The Court concluded that Articles 6 and 7 TEU (which proclaim respect for human rights by all EU Member States) do not justify the assumption that State law structures in EU Member States are materially synchronised and that review of individual cases is nugatory, adding that the effect of the strict principle of mutual recognition and the wide mutual trust connected thereto cannot limit the constitutional guarantee of fundamental rights.[95]

The *Bundesverfassungsgericht* has stopped short of rekindling the primacy debate at the level of third pillar/Union law and avoided to rule on the compatibility of the German Constitution with secondary European Union legislation, i.e. the Framework Decision on the European Arrest Warrant. However, by annulling the German implementing law on the grounds of the protection of human rights and emphasising the, in the majority of the judges' view, limited nature of European integration under the third pillar, the Court sent a clear signal that the development of third pillar European criminal law would be closely scrutinised by it and that primacy of such law over fundamental domestic constitutional principles should by no means be assumed.

The insistence of the Court in upholding national constitutional guarantees even in fields where the country has undertaken obligations under EU law is in sharp contrast with the ECJ approach in *Pupino*, where the Luxembourg court stressed the binding character of third pillar law and the application of the principle of loyal co-operation in the third pillar. The *Bundesverfassungsgericht* seems to have deliberately chosen to ignore the message and spirit of the Luxembourg court *Pupino,* which was published weeks before the German ruling.

Issues related to the relationship between the European Arrest Warrant and national legislation implementing it on the one hand and national constitutional law on the other have also been examined – in the context of constitutional bars to the extradition of own nationals – by the Polish Constitutional Tribunal[96] and the Supreme Court of Cyprus.[97] Unlike the *Bundesverfassungsgericht*, which examined the European Arrest Warrant in the light of the general framework of respect of national constitutional guarantees, the Polish and Cypriot courts adopted a somewhat narrower approach, by focusing primarily on the compatibility of the obligations their Governments undertook under EU law with the specific constitutional provisions prohibiting the extradition of their nationals.[98] Both courts found that the surrender of citizens of their countries on the basis of

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[95] Mitsilegas, *supra* note 70. *See in particular* para. 118 of the judgment. *See also* Komarek, *supra* note 91, at 17-18; and Geyer *supra* note 91.

[96] Judgment of 27 April 2005, P 1/05. For commentaries, *see* Komarek, *supra* note 91; K. Kowalik-Banczyk, *Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law*, 6 German Law Journal 1355 (2005) www.germanlawjournal.com; and D. Leczykiewicz, *Case Note*, 43 Common Market Law Review 1181 (2006).

[97] Decision of 7 November 2005, Council document 14281/05, Brussels 11 November 2005. For commentary, *see* E. A. Stefanou & A. Kapardis, *The First Two Years of Fiddling around with the Implementation of the European Arrest Warrant in Cyprus*, *in* E. Guild (Ed.), Constitutional Challenges to the European Arrest Warrant 75 (2006).

[98] *See* M. Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, 11 European Law Journal 264 (2005).

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legislation implementing the European Arrest Warrant clashed with their national Constitution. However, their approach to European Union law and its relationship with national constitutions differed significantly from the approach of the *Bundesverfassungsgericht.* The Polish Court attempted to accommodate to a great extent the EU requirements. It placed great emphasis on the obligation of national courts to interpret domestic law in a manner compatible with EU law – thus following the ECJ's approach in *Pupino* and extending 'indirect effect' to third pillar measures.[99] It also stressed the imperative of complying with international obligations that Poland has undertaken. According to the Court, the Warrant should be given the highest priority by the Polish legislator: if action to remedy the clash between the Warrant and the national constitution is not taken, this will amount to an infringement of the constitutional obligations of Poland under international law but 'could also lead to serious consequences on the basis of European Union law'.[100] The Cypriot Supreme Court on the other hand based its reasoning to a great extent on the legal nature of the European Arrest Warrant, it being a third pillar Framework Decision. Although Framework Decisions are binding, they do not have direct effect and are transposed in Member States only with the proper legal procedure. According to the Court, this had not happened in Cyprus, as the implementing legislation is contrary to the Constitution. The Court appeared reluctant to explicitly state that the national Constitution has primacy over EU law, at least over Framework Decisions. Moreover, the Cypriot Court was at pains to stress its respect for the ECJ *Pupino* ruling[101] and referred in detail to judgments of other Supreme Courts, such as the Courts of Poland, Greece and Germany.[102]

National constitutional courts thus have demonstrated, to a varying degree, the tensions that exist between European Union criminal law and national constitutional law. Although national courts avoided to examine specifically the issue of primacy of Union law over their domestic constitutions, this has been an underlying issue in all three judgments analysed above. The timing of the judgments- all of which came after *Pupino* – is important, with the choice of the courts to refer (or not) to the Luxembourg Court signifying the beginning of a constitutional dialogue between the ECJ and national constitutional courts on EU criminal law. The need for such debate was emphasised by Advocate General

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[99] However, the Court noted that this interpretative obligation has its limits, and cannot worsen an individual's situation, especially in criminal matters – *Id.*, Para. 8.

[100] *Id*., Para. 17. According to the Court,

> Poland and other Member States of the European Union are bound by the same structural principles attaining proper administration of justice and due process before an independent court, even in case if it is connected with Polish citizens' deprivation of guarantees … The care for fulfilment of a value, which is Poland's credibility in the international relations as a state which respects [the] fundamental rule pacta sunt servanda speaks furthermore for this.

Point 5.2, cited and translated in Komarek, *supra* note 91, at 14.

[101] Stressing that the Court's case-law could not have been different, since if EU Member States did not conform with their obligations stemming from the EU treaty, this would collapse.

[102] Mitsilegas, *supra* note 70.

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Ruiz-Jarabo Colomer in his recent Opinion on another landmark case, this time involving the European Arrest Warrant.[103] The Advocate General pointed out to a prominent role by the Luxembourg Court in this context, in situating 'the interpretation of the values and principles which form the foundation of the Community legal system within parameters comparable to the ones which prevail in national legal systems'.[104] It remains to be seen whether such a roile will be acceptable by national constitutional courts, and whether the ECJ will take the opportunity, when interpreting the European Arrest Warrant, to further its earlier case-law by transposing the primacy principle to the third pillar in order to overcome national constitutional obstacles to the Warrant.[105]

E. Conclusion: From a Constitutional Dialogue to an Open Debate on the Future of European Criminal Law

European integration in the field of criminal law in recent years has been substantially advanced by the Court of Justice in Luxembourg, in a series of striking judgments reminiscent of the Court's activism in the 1960s. Notwithstanding the resistance of Member States, the Court has explicitly conferred to the Community competence to act in criminal law (at least as regards environmental crime) and showed no hesitation in transplanting constitutional principles of the Community legal order into the third pillar. In this manner, it can be said that the Court – in the face of the 'freezing' of the Constitutional Treaty and the potential legislative stagnation that the current third pillar arrangements may bring – is attempting to bring the Constitutional Treaty provisions in criminal matters forward and introduce the 'Community method' in European criminal law.

The Court's approach raises a number of legitimate constitutional concerns. The conferral by the Court of competence to the Community in criminal matters seems at odds with with the wish of Member States to grant competence in criminal law expressly to the Union and not to the Community, with the EC Treaty remaining silent on the matter even after the 'communautarisation' of third pillar immigration and asylum policies post-Amsterdam (although admittedly Member States have accepted, with some safeguards, the 'Community method' in criminal law in the Constitutional Treaty). As evidenced also in *Pupino,* the Court readily subordinates any intention of the contracting parties to the perceived need

[103] Case C-303/05, Advocaten voor de Wereld VZW *v.* Leden van de Ministerraad, Opinion delivered on 12 September 2006.

[104] Para. 8.

[105] The Advocate General concluded that the abolition of dual criminality does not contravene the legality or the equality principle, and is compatible with Article 6(2) TEU. It is extremely noteworthy that the AG – in a logic similar to the one of the Court in *Pupino* – stated that the Framework Decision cannot be said to contravene the legality principle because the instrument does not provide for any punishments or harmonisation of criminal law and because arrest and surrender following a European Arrest Warrant are not punitive in nature (Paras. 103-105). This logic reduces the concept of criminal law or the criminal law sphere to a minimum and thus places considerable – if not insurmountable – limits to the protection of the defendant in criminal proceedings.

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to achieve Community/Union objectives. However, an issue like the conferral of competence must be handled with great care, especially in the sensitive field of criminal law. Conferral of competence by the Court certainly differs as regards the level and extent of dialogue and debate from conferral of competence in a revised EC Treaty, which has to be debated, and ratified, by all Union Member States in accordance with their constitutional requirements.

The Court's approach also raises concerns regarding the vision by the Union institutions of criminal law and the protection of fundamental rights including the rights of the defendant. The central question here being whether criminal law is viewed as a 'special case' and whether its particular characteristics, as regulator of the relationship between the individual and the State, are taken into account. In the environmental crime case in particular, the Court seems to subordinate criminal law considerations under traditional Community law principles and not to consider it as a separate area of law/policy, but rather as a horizontal field which can be used to advance Community objectives (notwithstanding the fact that in the third pillar, competence is allocated on the basis of action to combat specific offences). This approach may lead to the erosion of the 'protective' function of criminal law as understood in national legal systems, with the special characteristics of criminal law giving way to the need to achieve Community objectives. These concerns are exacerbated by the fact that, both the Court in *Pupino* and the Advocate General in the European Arrest Warrant case, have adopted an extremely narrow approach to what constitutes 'criminal law'. This appears to be limited to the definition of criminal offences and their punishment, and does not extend to criminal procedure. The consequences of such a vision of criminal law may be considerable, as the space triggering the safeguards (such as legal certainty and non-retroactivity) reserved for the individual in the criminal justice process is gradually shrinking.

It was a matter of time before national constitutional courts would react to developments in European criminal law. Early opportunities were provided by the need to examine the European Arrest Warrant in a domestic context. The judgments of courts in a number of Member States demonstrate a more cautious stance than the one from Luxembourg towards the development of European criminal law, with courts emphasising the need to uphold national constitutional safeguards. While national courts have adopted a wide range of approaches vis-à-vis the relationship between national constitutional law and European criminal law, the timing (post-*Pupino*) and content of the judgments reflect the beginning of a constitutional dialogue between national courts and Luxembourg. The forthcoming ECJ ruling on the European Arrest Warrant case may further this dialogue, with the Court's response to both the constitutional questions raised in the reference and the points made by national constitutional courts eagerly awaited.

Court judgments also caused a sensation with Member State governments. Three trends can be discerned after the *Pupino* and the environmental crime cases, and the scepticism of national courts and public opinion towards the European Arrest Warrant. The first is a reluctance of Member States to agree further third pillar legislation in the Council, especially if this involves the adoption of protective

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standards – with the proposal on procedural rights in criminal proceedings being a prime example. While unanimity in a Union of 25 might play a part, the implications of *Pupino* for the implementation of third pillar law may be a more decisive factor in Member States' reluctance to undertake further obligations under Union law. The second trend – clearly evident after the Tampere II summit in September 2006 – is Member States' resistance to using the 'passerelle' Treaty provisions and transfer competence in criminal law to the first pillar. The Luxembourg Court may have ruled in that direction, Member States may have agreed to make such move in the Constitutional Treaty, but currently there seems to be little political will to change the status quo. The third trend – linked with the other two – points towards a legislation fatigue, especially with regard to mutual recognition. National scepticism has led to the striking reservations by Germany to the dual criminality list of the European Evidence Warrant, and in spite of a constant flow of proposals by the Commission, not much has been agreed in the Council the past year.

These developments at national level underline the need for an extensive, open debate across the European Union on the future direction of European criminal law. The attempts by the Court of Justice to further European integration in the field by case-law may serve to further the debate, but remain piecemeal and sit uneasily with national scepticism regarding ceding sovereignty in this field and the challenges that integration in the terms proposed may pose for fundamental rights. The Court's attempts may backfire in the light of the special place of criminal law in national constitutional systems and in the eyes of European Union residents and citizens.

The latter have loudly demonstrated their disapproval of policies on which they feel they have not been consulted – and EU action without an express legal basis in the Treaties and without an extensive and open debate may serve to further alienate citizens from the European project.