

# The Legal Effect of Framework Decisions – A Case-Note on the Pupino Decision<sup>1</sup> of the European Court of Justice

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## I. Introduction

The enactment of legal rules under the third pillar of the Treaty on European Union (EUT), entitled “Provisions on Police and Judicial Cooperation in Criminal Matters” (PJC), is a rather new phenomenon in the European Union. Only after the entry into force of the Amsterdam Treaty in 1999,<sup>2</sup> which radically reformed the third pillar, the PJC reached its actual legal force.<sup>3</sup> Especially, the rather pure intergovernmental form of co-operation, as established by the Maastricht Treaty, had been replaced.<sup>4</sup>

Framework decisions are the main legal means in the third pillar.<sup>5</sup> According to Art. 34 (2) (b) EUT, framework decisions serve the purpose of approximating of the laws and regulations of the Member States. They shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. In no case shall they entail any direct effect. Thus, framework decisions are a tool for the harmonisation of national laws<sup>6</sup> and largely structured in an analogous way to EC directives, see Art. 249 (3) ECT. The only difference explicitly mentioned is the exclusion of direct effect, which is a common feature of EC directives. Yet, the wording of Art. 34 (2) (b) EUT is silent with regard to the precise legal status of non- or ill-transformed framework decisions. This issue was at the heart of the *Pupino* decision of the Grand Chamber of the European Court of Justice (ECJ).

## II. The Facts of the Pupino-Case<sup>7</sup>

In a reference for a preliminary ruling<sup>8</sup> of the Tribunale di Firenze (Italy) the judge in charge asked the ECJ a question concerning the interpretation of Articles 2<sup>9</sup>, 3<sup>10</sup> and 8<sup>11</sup> of Council Framework Decision 2001/220/JHA<sup>12</sup>.

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<sup>1</sup> C-105/03, 16 June 2005.

<sup>2</sup> *Lenaerts/Van Nuffel*, Constitutional Law of the European Union, 2nd ed. 2005, mn. 3-019.

<sup>3</sup> *Chalmers et al*, European Union Law, 2006, p. 33.

<sup>4</sup> *Lenaerts/Van Nuffel* (fn. 2), mn. 3-015.

<sup>5</sup> Other means are common positions (lit. (a), decisions within the meaning of lit. (c) and (international) conventions (lit. (d)).

<sup>6</sup> *Chalmers et al* (Fn. 3), p. 134.

<sup>7</sup> *Pupino*, para 12 et seq.

<sup>8</sup> On preliminary rulings see the „Information Note on references from national courts for a preliminary ruling“ of the ECJ, OJ 2005 C 143/1.

<sup>9</sup> Article 2:

1. Each Member State shall ensure that victims have a real and appropriate role in its criminal legal system. It shall continue to make every effort to ensure that victims are treated with due respect for the dignity of the individual during pro-

The order for reference shows that in criminal proceedings against Mrs *Pupino*, a nursery school teacher, was alleged to have committed several offences of misuse of disciplinary measures, a crime according to several provisions of the Italian criminal code, against a number of pupils aged less than five years at the time. This would have constituted a crime according to the Italian criminal code. At the time of the order for reference the proceedings before the Italian court were at the preliminary enquiry stage.

Under Italian law the criminal procedure is divided into two distinct stages. During the first stage, the preliminary enquiry, the Public Prosecutor’s Office makes enquiries and gathers evidence for the decision to abandon or to proceed with the trial. The gathering is done under the supervision of the judge in charge of the preliminary enquiries, who also, at the conclusion of an informal hearing, takes the final decision on whether to allow the prosecution to proceed or to dismiss the matter.

The second, adversarial stage of the proceedings is opened by a decision to send the examined person to trial. Here, the judge in charge of preliminary enquiries does not take part and only at that stage evidence must be gathered at the initiative of the parties (the so-called “adversarial principle”). Generally speaking, for acquiring the value of evidence in the full sense, it is necessary that the evidence gathered by the Public Prosecutor’s Office during the first stage must be subject to cross-examination during the trial.

The Italian Code of Criminal Procedure (CPP) contains exceptions to this rule that can be invoked at the discretion of the national judge. For the case at hand, the exceptions of Art. 392 and Art. 398 CPP are at stake. According to Art. 392 (1a) CPP it is possible to use evidence gathered at the first

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ceedings and shall recognise the rights and legitimate interests of victims with particular reference to criminal proceedings.

2. Each Member State shall ensure that victims who are particularly vulnerable can benefit from specific treatment best suited to their circumstances.

<sup>10</sup> Article 3:

Each Member State shall safeguard the possibility for victims to be heard during proceedings and to supply evidence. Each Member State shall take appropriate measures to ensure that its authorities question victims only insofar as necessary for the purpose of criminal proceedings.

<sup>11</sup> Article 8:

Each Member State shall ensure that, where there is a need to protect victims – particularly those most vulnerable – from the effects of giving evidence in open court, victims may, by decision taken by the court, be entitled to testify in a manner which will enable this objective to be achieved, by any appropriate means compatible with its basic legal principles.

<sup>12</sup> OJ 2001 L 82, p. 1 et seq.

stage for the protection of certain victims (aged less than 16 years) in cases of strictly enumerated (sexual related) offences. Art. 398 permits the judge in charge to order evidence for the offences listed in Art. 392 CPP to be taken under special arrangements, thereby allowing the protection of minors concerned. The additional derogations are designed to protect on the one hand the dignity, modesty and character of minor witness and on the other hand the authenticity of the evidence.

In *Pupino*, the Public Prosecutor's Office asked the judge in charge of preliminary enquiries to take the testimony of eight children, witnesses and victims of the alleged offences, by the special procedure for taking evidence early, pursuant to Art. 392 (1a) CPP. The argument was that such evidence could not be deferred until trial due to the witnesses' extreme youth and other reasons. The Office also requested that evidence should be gathered under the special arrangements referred to in Art. 398 (5a) CPP. Hence, the hearing should take place in specially designed facilities with arrangements for protecting the children. Yet, Mrs. *Pupino* opposed that application, arguing that it did not fall within any of the categories enshrined in Art. 392 CPP.

The referring court states that under the national provisions in question the application of the Public Prosecutor's Office would have to be dismissed. Yet, the national judge was concerned that a number of offences excluded from the scope of Art. 392 CPP might well prove more serious for the victim than those referred to in that provision, e. g. the maltreatment of several children aged less than five years causing them psychological trauma.

### III. The Reasoning of the ECJ

In addressing the question for a preliminary ruling, the answer of the ECJ can be divided mainly into three subdivisions.

#### 1. Framework Decisions as Binding Law

Firstly the Court of Justice had to establish its jurisdiction over the matter at hand. In order to accomplish this, the Framework Decision 2001/220/JHA (FD) has to be considered as binding law for the Member States of the Union. During the oral hearing this had been disputed by several EU Member States.<sup>13</sup> Namely the Italian, Swedish and UK Governments raised the issue of legal distinction between framework decisions adopted under the third pillar and the first pillar Community directives.<sup>14</sup> Hence, due to the inter-governmental nature of cooperation between Member States in the PJC, a national judge cannot be obligated to interpret national law in conformity with EU law, as it is the well-established case-law under the ECT.<sup>15</sup>

The ECJ begins its analysis with the wording of Art. 34 (2) (b) EUT, which is very closely inspired by that of Art.

249 (3) ECT<sup>16</sup>, the provision stating the legal effect of Community directives. According to the Grand Chamber Art. 34 (2) (b) EUT confers a binding character on framework decisions, because they are "binding" the Member States "as to the result to be achieved, but shall leave to the national authorities the choice of form and methods". In the following paragraph the Court states expressly the binding character of framework decisions by referring to the identical wording of Art. 34 (2) (b) EUT and Art. 249 (3) ECT in the quoted passage.

#### 2. Interpretation in Conformity

Secondly, the Grand Chamber concludes from the binding character of framework decisions that national authorities, and particularly national courts, are under an obligation to interpret national law in conformity with framework decisions.<sup>17</sup>

In its reasoning the ECJ had recourse to the systematic and teleological interpretation of the EUT. In this respect the Grand Chamber notes that Art. 1 (2) EUT speaks of "creating an ever closer union among the peoples of Europe". The effect of this creation can be, in order to contribute effectively to the pursuit of the Union's objectives, that the drafters of the EUT provided legal instruments with effects similar to those provided for by the ECT.<sup>18</sup> Further, as the second and third paragraph of Art. 1 EUT show, the European Union's task is to organise the relations between the Member states and between their peoples in a manner demonstrating consistency and solidarity.<sup>19</sup>

Then the Court of Justice turns to its fundamental argument, the principle of loyal cooperation between the Union and its Member States. Due to the Court's reasoning, the principle of loyal cooperation requires that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European law. Consequently, the principle must also be binding in the area of police and judicial cooperation in criminal matters,<sup>20</sup> which is entirely based on cooperation between the Member States and the Union institutions.<sup>21</sup> As a conclusion, the Court states that the principle of conforming interpretation is binding in relation to framework decisions adopted in the context of Title VI EUT. When applying national law, a national court that is called upon to interpret it must do so as far as possible in the light of the wording and the purpose of the framework decision in order to attain the result which it pursues and thus comply with Art. 34 (2) (b) EUT.<sup>22</sup>

<sup>16</sup> *Pupino*, para. 33. The wording of Art. 249 (3) ECT is as follows: A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of forms and method.

<sup>17</sup> *Pupino*, para. 34.

<sup>18</sup> *Pupino*, para. 36.

<sup>19</sup> *Pupino*, para. 41.

<sup>20</sup> *Pupino*, para. 42.

<sup>21</sup> AG Kokott, para. 26.

<sup>22</sup> *Pupino*, para. 43.

<sup>13</sup> *Pupino*, para. 24 et seq.

<sup>14</sup> *Pupino*, para. 25 et seq.

<sup>15</sup> Case 14/83, *von Colson and Kamann*, [1984] ECR 1891, para. 26; Case 79/83, *Harz*, [1984] ECR 1921, para. 26.

The obligation of national courts to apply the interpretation in conformity is also not hampered by the limited jurisdiction of the ECJ in the third pillar. According to Art. 35 (2) EUT the Court can exercise its jurisdiction only to give preliminary rulings in case of member States' declarations to do so. This declaration shall further specify whether only the courts of last resort are permitted to give preliminary rulings or if all national courts which consider that a question is necessary to enable it to give judgments are entitled to do so.<sup>23</sup> Moreover, as the Grand Chamber correctly concludes, there is no complete system of actions and procedures designed to ensure the legality of the acts of the institutions in the context of Title VI of the EUT. This situation is irrelevant for the Grand Chamber, because the system of judicial protection has to be seen in a distinct manner from the purpose of the EUT, as enshrined in Art. 1 EUT. The Court reasons that, from the existence of a system of preliminary rulings similar but different to the one under Art. 234 ECT, the authors of the EUT envisaged an ever closer union among the Member States.<sup>24</sup> Further, according to Art. 35 (4) EUT, any Member State, irrespective of a given declaration, is entitled to submit statements of case or written observations to the ECJ in cases which arise under Art. 35 (1) EUT,<sup>25</sup> i. e. preliminary rulings. In using these arguments, the Court is of the opinion that its jurisdiction would be deprived of most of its useful effect if individuals were not entitled to invoke framework directions in order to obtain a conforming interpretation of national law before the courts of the Member States.<sup>26</sup>

### 3. Limitations

In its preliminary ruling, the Court of Justice stated two limitations on the principle of conforming interpretation, namely general principles of law and secondly the interpretation *contra legem*.<sup>27</sup>

#### a) General Principles of Law

The Court acknowledges that general principles of law limit the obligation of national courts to refer to the content of framework decisions when interpreting the relevant rules of its national law.<sup>28</sup> For the case at bar, the said principles were namely legal certainty and non-retroactivity, which prevent 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.<sup>29</sup> The ECJ is not assuming a breach of these principles because the Italian CPP does not regard the criminal liability of the person con-

cerned but the conduct of the criminal proceedings and the means of taking evidence<sup>30</sup> in Italy.

In a second line of reasoning the Court of Justice, while interpreting the FD, states that, due to Art. 6 (2) EUT, the FD must be interpreted in a way that fundamental rights, and especially the rights enshrined in the ECHR<sup>31</sup>, are respected.<sup>32</sup> Concluding, the Grand Chamber sees an obligation vested in the national courts to interpret the national law in accordance with framework decisions, but the national court has also to ensure that this interpretation does not run afoul of fundamental rights.<sup>33</sup> In *Pupino*, the ECJ named expressly the right to a fair trial as it is laid down in Art. 6 ECHR.<sup>34</sup>

#### b) Interpretation *contra legem*

The French Government was of the opinion that an interpretation of the Italian CPP in conformity with the framework decision is impossible, as acknowledged by the Italian court, and additionally that an interpretation *contra legem* is not covered by the principle of conformity.<sup>35</sup> The Court follows that opinion as a matter of principle, yet it does not see an infringement of the principle under the given facts and refers insofar to the arguments given by AG *Kokott* in her opinion.<sup>36</sup> The ECJ stresses that a national court has to 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 relevant framework decision.<sup>37</sup> Further, the determination of an interpretation *contra legem* is the task of the national court<sup>38</sup> and not of the ECJ, because the latter is not in position to assess the whole of the national law at stake. Hence, and rightly so, the Court subjects its answer to that reservation.<sup>39</sup>

## IV. The Answer of the Court of Justice

After the general comments regarding the legal force of framework decisions, the Court answered the referred question referred for the preliminary ruling. The Court summarizes thereby the content of the Art. 2, 3 and 8 (4) FD<sup>40</sup> and held that Art. 3 FD requires each Member state to safeguard the possibility for victims to be heard during criminal proceed-

<sup>23</sup> See Art. 35 (3) EUT for further details.

<sup>24</sup> *Pupino*, para. 36.

<sup>25</sup> *Pupino*, para. 37.

<sup>26</sup> *Pupino*, para. 38.

<sup>27</sup> *Pupino*, para. 44 et seq.

<sup>28</sup> *Pupino*, para. 44.

<sup>29</sup> See e. g. Joined Cases C-387/02, 391/02 and 403/02, *Berlusconi*, para. 74.

<sup>30</sup> *Pupino*, para. 46.

<sup>31</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, ETS no. 45 and 155.

<sup>32</sup> The Court of Justice, interestingly, goes even further and binds itself to the jurisprudence of the European Court of Human Rights on Art. 6 ECHR, see *Pupino*, para. 59.

<sup>33</sup> *Pupino*, para. 60. An overview of the jurisprudence of the European Court of Human Rights can be found by *Ovey/White*, *The European Convention on Human Rights*, 3rd ed. 2002.

<sup>34</sup> *Pupino*, *ibid.*

<sup>35</sup> *Pupino*, para. 24.

<sup>36</sup> AG *Kokott*, para. 40.

<sup>37</sup> *Pupino*, para. 47.

<sup>38</sup> *Pupino*, para. 48.

<sup>39</sup> *Pupino*, para. 49.

<sup>40</sup> Framework Decision 2001/22/JHA (fn. 12).

ings.<sup>41</sup> Additionally, Art. 2 and 8 (4) FD require each Member State to make effort to ensure that victims are treated with due respect for their personal dignity during proceedings, to ensure that particularly vulnerable victims benefit from specific treatment best suited to their circumstances, and to ensure that where there is a need to protect victims from the effects of giving evidence in open court.<sup>42</sup> Moreover, victims may be entitled to testify in a manner enabling that objective to be achieved. This should be done by any appropriate means compatible with the said basic legal principles and by a decision of the national court. Summarily, the objectives of the FD are to ensure that particularly vulnerable victims receive “specific treatment best suited to their circumstances” as well as to guarantee to all victims a kind of treatment which pays due respect to their individual dignity and gives them the opportunity to be heard and to supply evidence.<sup>43</sup>

However, the FD does not define the concept of a victim’s vulnerability for the purpose of Art. 2 and 8 (4) FD and the Grand Chamber abstains from giving a proper definition. The Court of Justice opines that young, maltreated children do fall within the category. The factors to which attention should be paid are the age of the victims and the nature and consequences of the alleged offences.<sup>44</sup> Under Italian law testimony given during the preliminary enquiries must be repeated at the trial in order to acquire full evidential value, whereby in certain, limited cases it is possible to testify only during the preliminary enquiries.<sup>45</sup> In such constellations the mentioned provisions of the FD require, according to the ECJ, that a national court should be able to use the exception, i. e. to use a special procedure for the protection of particularly vulnerable victims.<sup>46</sup> Finally, the Grand Chamber concludes that Art. 2, 3, and 8 (4) FD must be interpreted as meaning that the national court must be able to authorise young children, who claim to have been victims of maltreatment, to give their testimony in accordance with arrangements allowing those children to be guaranteed an adequate level of protection.<sup>47</sup> Additionally, the national court is required to take into consideration all the rules of national law and to interpret them, as far as possible, in the light of the wording and the purpose of the FD.<sup>48</sup>

## V. Comments

The preliminary ruling of the Grand Chamber in *Pupino* is of utmost importance. It touches upon extremely sensitive legal principles, namely the sovereignty of states, judicial protection and the protection of fundamental rights. These will be addressed in turn.

### 1. Interpretation in Conformity with Framework Decisions

The Court of Justice draws a comparison of framework decisions adopted under Art. 34 (2) EUT with EC directives regulated in Art. 249 (3) ECT. Under the ECT the principle of interpretation of national law in conformity with EC directives is widely acknowledged. The systematic reason for this is laid down in Art. 249 (3) ECT in conjunction with Art. 10 ECT. Each Community directive obliges the Member States to achieve the result envisaged in the directive by taking all appropriate measures, whether general or particular, to fulfil that obligation. It follows that the national court has to interpret national law in the light of the wording and purpose of the directive.<sup>49</sup> In the EUT a provision equivalent to Art. 10 ECT is missing. Art. 10 ECT is considered being the basis for the supra-nationality of the Community legal order and its primacy over the legal orders of the Member States.<sup>50</sup> The Union, on the other hand, is structured in an inter-governmental way, which should secure the sovereignty of its Member States.<sup>51</sup> Hence, the Union has a far lesser degree of integration than the Community.

The Court, as well as AG *Kokott*, states in *Pupino*, that despite lacking provision similar to Art. 10 ECT, the Member States of the Union are also bound by a duty of mutual loyalty in Union law.<sup>52</sup> Interestingly, in her opinion, AG *Kokott* does not decide the question of the legal nature of Union law, but says only that even if Framework Decisions were deemed to be purely international law, the authorities of the Member States have to bring their conduct into compliance with the international obligation. Concerning the EU Treaty it has to be noted that according to Art. 1 (2) EUT, the EU Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe. On this basis the relations between the Member States and between their peoples can be organised in a manner demonstrating consistency and solidarity. Such an objective can only be fulfilled if the Member States and the institutions of the Union cooperate loyally. So, according to the view of AG *Kokott*, Art. 10 ECT does not have to be mentioned expressly in Union law.<sup>53</sup>

This conclusion is disputable, yet convincing. The absence of a provision comparable to Art. 10 ECT was a structural decision of the Member States of the Union, who did not want to insert the principle of supra-nationality in the EUT. The structure of the second and third pillar are still strictly inter-governmental. This cannot be regarded as an obstacle to the Member States to accept a similar, but not identical, obligation under Public International Law. In this respect the interpretation of Art. 1 (2) EUT by the Grand

<sup>41</sup> *Pupino*, para. 51.

<sup>42</sup> For the exact wording see fn. 9, 11.

<sup>43</sup> *Pupino*, para. 54.

<sup>44</sup> *Pupino*, para. 53.

<sup>45</sup> *Pupino*, para. 55.

<sup>46</sup> *Pupino*, para. 56.

<sup>47</sup> *Pupino*, para. 61.

<sup>48</sup> *Pupino*, *ibid.*

<sup>49</sup> C-105/89, *Marleasing*, [1990] ECR I-4135, para. 8; C-462/99, *Connect Austria*, [2003], ECR I-5197, para. 38.

<sup>50</sup> ECJ, C 14768, *Wilhelm*, [1969] ECR 1, para. 6; C-249/85, *Albako*, [1987], ECR 2345, para. 14; *Craig/De Burca*, EU Law, 3rd ed. 2003, p. 275.

<sup>51</sup> One could assume that the Union is based upon the principle of *co-operation* of its Member states, while the Community is based upon (a deeper) *integration*.

<sup>52</sup> AG *Kokott*, para. 25 et seq.

<sup>53</sup> AG *Kokott*, para. 27.

Chamber and AG *Kokott* is conclusive. The object and purpose of the treaty, as it is laid down in Art. 1 (2) EUT clearly show that the Member States agreed upon the principle of loyalty.

Despite the convincing reasoning of the Court, the differences between the two legal orders should be stressed. First, framework decisions do not entail direct effect, Art. 34 (2) (b) EUT. Secondly, the lesser degree of integration can also be seen by the reduced powers of the Court of Justice in comparison with Community Law. These differences should not be blurred by the further case-law of the Court.

### 2. Jurisdiction of the ECJ, Art. 35 (2) EUT

As stated supra, the powers of the Court of Justice in the third pillar are limited. Art. 35 (5) EUT expressly excludes its competence in certain matters. The preliminary ruling procedure is available only if the respective Member State has opted in.<sup>54</sup> Thus, the differences between the system of preliminary rulings according to Art. 234 ECT and Art. 35 EUT are huge. Although the question had not been expressly addressed by the Court, the courts of Member States which not accepted the preliminary ruling procedure under the ECT are also bound by the Court's preliminary rulings under the third pillar. This is due to the Grand Chamber's reasoning that the binding character of framework decisions exists independently from the declaration under Art. 35 (2) EUT. Until now, only 12 Member States made a declaration under Art. 35 (2) EUT, meaning that only courts in these Member States can issue questions for preliminary rulings of the ECJ. For the courts in other Member States it is only possible to interpret the national law in conformity with their own, autonomous interpretation of framework decisions if there is no applicable case-law of the ECJ on the question at stake. This hampers the aim of the preliminary rulings-system, the uniform application of Union law.<sup>55</sup>

This unhappy situation is the logical result of the mixed application of legal principles in the EUT, the inter-governmental structure including the strong emphasis on the sovereignty of the Member States on the one hand and the creation of an "ever closer Union", as it is laid down in Art. 1 (2) EUT, on the other hand. These principles have to be weighed and a reasonable compromise has to be found.

### 3. Legal Certainty and Non-Retroactivity

The compliance with the principle of legal certainty and non-retroactivity, as stated by the Grand Chamber, is not fully convincing. The procedural rules implicitly influence the judgment and the sentence in the criminal proceedings against Mrs *Pupino*. In this regard they are as important as provisions of the Italian Criminal Code. Yet, this view is –

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<sup>54</sup> Under the preliminary ruling procedure, the ECJ gives an interpretation of Union law or rule on its validity, see the „Information Note“ (fn. 8), OJ 2005 C 143/1.

<sup>55</sup> For the ECT see C-16/65, *Schwarze*, [1965] ECR 877/886; *Lenarts/Arts*, Procedural Law of the European Union, 1999, mn. 2-003.

admittedly – not the most common one in academic writing. The pre-eminent view is a strict distinction between procedural and substantial criminal provisions, whereby only the latter enjoy the application of a strict *nulla poena (nullum crimen)* -principle in criminal law.<sup>56</sup>

### 4. Self-Binding to the Jurisprudence of the European Court of Human Rights

From a dogmatic point of view, the self-binding of the Court of Justice to the jurisprudence of the European Court of Human Rights is extremely interesting and important.<sup>57</sup> The European Union is not a member of the Council of Europe, but its Member States are. Moreover, the membership of the Council of Europe is also a pre-requisite for the membership in the Union. As a result, the relationship between the two courts, which sometimes protect overlapping fundamental rights in a different manner,<sup>58</sup> is of the utmost importance. In *Pupino*, the Grand Chamber expressly acknowledges that the fundamental rights of Art. 6 (2) EU, the rights of the Union, shall be interpreted in accordance with the case-law of the Strasbourg court, to which the Union is not a member.

The rationale of this is that the Grand Chamber tries to avoid differences in the protection of individuals in criminal matters. Criminal matters are rather sensitive, because they concern the basic freedoms of individuals. Any individual is entitled, after the exhaustion of local remedies, to file an application at the European Court of Human Rights,<sup>59</sup> because the Member States of the ECHR remain responsible for guaranteeing the rights contained in the Convention even where they create an international organization.<sup>60</sup> A judgment of the ECtHR stating the infringement of the ECHR would severely hamper the application of Framework Directives in national laws. Due to these reasons, the self-binding of the Court of Justice seems to be very wise. It will be seen in the future whether it goes beyond the rather small subject-matter of criminal law.

The statement of the ECJ that it is the national court's task to ensure the conformity of the interpretation of the framework directive with the ECHR as interpreted by the ECtHR provides ample reason for discussion. As a result, the national court is not only obliged to apply the preliminary reference ruling of the Court of Justice, but also to check if this interpretation, in its application to a given case, would not lead to a breach of the Convention. This burden can hardly be carried by a national judge because he has to be familiar with the case-law of the ECtHR to a given provision. Moreover, the judgments of the Strasbourg court are only

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<sup>56</sup> AG *Kokott*, para. 41.

<sup>57</sup> See fn. 32.

<sup>58</sup> See e. g. the cases *Niemitz* of the ECtHR and *Limburgse Vinyl Maatschappij* of the ECJ ([1999] ECR II-931). Recently, The ECJ brought its jurisprudence in conformity with the case-law of the ECtHR, see *Roquette Freres*, [2002] ECR I-9011.

<sup>59</sup> ECtHR, *Bosphorus*, application no. 45036/98, judgment of 30 June 2005.

<sup>60</sup> *Ovey/White* (fn. 33), p. 18.

published in English and French, languages which not all judges in the Member States of the European Union are able to analyse. In addition, they would need independent opinions addressing the issue. This would lead to a prolongation of the national trial. Yet, the reasoning of the Grand Chamber has to be regarded as the only possible solution for the problem under the given law. In preliminary references the ECJ is barred to rule upon the national legal systems, this obligation rests on the national courts. They are in the position to apply the national law as a whole and are able to assess the conformity of the interpretation of this law with the ECHR.

#### VI. Concluding Remarks

The decision of the Grand Chamber in *Pupino* deserves approval. The weaknesses of the judgment stem from the intermediate structure of the third pillar, which is neither full supra-national, nor a loose federation of independent Member States. The EU Treaty conveys certain powers to enacted framework decisions. The systematic interpretation as applied by the Court of justice is very convincing and shows clearly the intention of the Member States towards a deeper integration for the Union. Hence, the conformity principle has to be applied either. Applause should also be granted for the non-blurring of the differences between the law of the Union and the law of the Community. Only in certain respects are the two distinct legal orders similar, in others, especially if it comes to the principle of supra-nationality, they are different.

Keeping this in mind, the reasoning of AG *Colomer* in his opinion in the *Advocaten voor de Wereld*-case<sup>61</sup>, is rather controversial. In paragraph 43 of his opinion he argues that the supranational, harmonised legal system, which falls within the scope of the first pillar of the Union, also operates in the third, intergovernmental, pillar – albeit with a clear Community objective by transferring to framework decisions certain aspects of the first pillar and a number of the parameters specific to directives. According to the view of the *author*, the *Pupino* decision of the ECJ cannot be used as a basis for this submission.

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<sup>61</sup> C-303/05, *Advocaten voor de Wereld*, Opinion delivered on 12 September 2006.

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