Impact of the Pupino decision on EU Law

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Introduction

Well over a decade on from the decision, this chapter considers the significance of the *Pupino*[1] judgment of the Court of Justice of the European Union ('CJEU or 'the Court') today from an EU perspective. *Pupino* is famous for having extended the so-called principle of "indirect effect" to the then third pillar, which dealt with Police and Judicial Cooperation in Criminal matters (PJCC). More precisely, it held that 'the principle of conforming legislation' was 'binding in relation to framework decisions adopted in the context of Title VI of the Treaty on European Union.'[2] The duty, as the Court has made clear, remains a valid constitutional tool for achieving an understanding and application of EU that coheres with domestic law. It is by its very nature, a flexible and limited tool which allows for inconsistencies between two connected legal orders to be ironed out gently and quietly at the behest of national authorities 'as far as possible'. This chapter will recall the key features of the principle as outlined by *Pupino*; identify how that principle has evolved in later case-law; and evaluate its place in the considerably different post-Lisbon context of EU PJCC and in light of the peculiar qualities of the field of criminal law. It is well known that the changes effected by the Treaty of Lisbon were transformative in the field of EU crime and policing, particularly in the sense of absorbing the agenda into a largely Communitarian constitutional framework and it is equally well recognised that *national* criminal justice systems represent and actively reinforce the sovereign authority of the state.

A review of cases in which the Court considers the indirect legal effects of PJCC instruments post *Pupino* and post Lisbon essentially reveals both a continued commitment to this principle, and a full alignment of its fleshed out terms – scope and limits – with the principle as developed more generally in EU law. From one perspective, this is arguably less controversial and in principle simpler in the post Lisbon era of enhanced constitutional legitimacy and rights protection[3], especially when compared to the *Pupino* era when it appeared that the Court had effectively ignored the added sensitivity of criminal law matters as reflected in third pillar constitutional and institutional framework. Nevertheless, another perspective is that national criminal law remains a highly sensitive field imbued with uniquely protected principles and safeguards for individuals. Any constitutional principle which compels national judges to adopt an interpretation of national criminal law that it would otherwise not have to, but for EU law – the primary rationale of which is to

[1] C-105/03 *Maria Pupino* ECR [2005] I-5285

[2] ibid [43]

[3] The Treaty of Lisbon confirmed the legal status, equivalent to the EU treaties, of the EU Charter of Fundamental Rights OJ 2010 C83/2, which includes the right to liberty and security (Article 6), the right to an effective remedy and to a fair trial (Article 47), the presumption of innocence and right of defence (Article 48), principles of legality and proportionality of criminal offences and penalties (Article 49) and the right not to be tried or punished twice in criminal proceedings for the same criminal offence (Article 50).

make EU law more effective in national legal orders – is likely to be met with some resistance. This tension is bound to be further exaggerated where criminal law itself is being 'Europeanised' because not only is there more scope for EU law to impinge on domestic criminal law, but there is more scope for substantial clashes, where for instance cornerstone principles, such as legality, diverge or emerge at the EU level only incrementally.

As predicted by many commentators, serious disruption to the balance of rights in national criminal justice systems as a direct consequence of EU level intervention would almost certainly provoke direct challenges from national courts to the authority of EU instruments adopted in this field and to the scope and exercise of EU competences.[4] To some extent this has played out,[5] but through this direct dialogue there are some tentative but important signs that the Court is mindful of the national sensitivities and peculiarities of criminal law and further, that it is recognising its own enhanced responsibility in this field. These tentative conclusions emerge from a reading of two cases in particular - the *Caronna*[6] case and the *Taricco '*saga'[7] – where we see first, the CJEU attributing particular importance to the position and scope of fundamental rights and safeguards in EU law and between EU law and national law and second, an acknowledgement of the pressures on national judges and the limits of what can be achieved through national judiciaries when the legal worlds of EU (criminal) and national criminal law collide.

These developments indicate an evolving relationship between the EU and domestic legal orders in the field of criminal law as well as articulating a fuller understanding of EU criminal law and crucially, the place of rights within it. Through direct, constructive and co-operative dialogue – possible thanks to the now full jurisdiction of the CJEU over PJCC and heeding the new and extended duties and principles articulated in Article 4(2) and 4(3) TEU[8] respectively - one might hope to see more mutual understanding and accommodation as between EU

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[4] See for instance Jo Shaw, 'One or Many Constitutions?: The Constitutional Future of the European Union in the 2000s from a Legal Perspective', (2007), Vol 52, Scandinavian Studies in Law, 393

[5] For instance the various constitutional challenges to the European Arrest Warrant at both the national and EU level; See eg E. Guild (ed) *Constitutional Challenges to the EAW* (TMC Asser, 2006) and C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633. More recently see C-105/14 *Ivo Taricco and Others* Grand Chamber, Judgment of 8 September 2015 (*Taricco I*) and C-42/17 *M.A.S & M.B* Grand Chamber, Judgment of 7 December 2017 (*Taricco II*)

[6] Case C-7/11 *Caronna* [2012] OJ 2011/C 80 /26

[7] C-105/14 *Ivo Taricco and Others* Grand Chamber, Judgment of 8 September 2015 (*Taricco I*) and C-42/17 *M.A.S & M.B* Grand Chamber, Judgment of 7 December 2017 (*Taricco II*)

[8] Article 4(2) TEU reads: 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.' Article 4(3) TEU reads: 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.'

and national law and constitutional and criminal law. This, would certainly helpfully inform our understanding of the limits of the scope of the consistent interpretation duty upon national judges and probably also encourage a more active use of it. Today then, the *Pupino* principle remains valid in theory but poses significant challenges to national judges in practice. We need to look beyond it to better understand its scope and contribution.

Pupino: the judgment, the critique, the context

The *Pupino* judgment of June 2005 addressed for the first time the question of the effects within national legal orders of measures adopted under the powers of Title VI of the Treaty on European Union dealing with police and judicial cooperation in criminal matters (also known as the 'third pillar'). In holding that national judges have a duty to interpret national law insofar as possible in conformity with third pillar instruments, known as framework decisions - and specifically in that case a Framework Decision on the Standing of Victims in Criminal Proceedings[9] – the Court transposed a relatively mature constitutional doctrine developed within the framework of the first 'Community' pillar to the 'third pillar'. This doctrine of conforming interpretation is often referred to as the principle 'indirect effect'. It was first espoused by the Court in the case of *Von Colson*[10] in 1984 and fleshed out in a number of ways by later cases.

A brief reminder of facts and query in this case might be useful at this point. Ms Pupino, a children's nursery teacher in Italy, was prosecuted for having allegedly used physical violence against children in her care. At the initial stage of the criminal proceedings the public prosecutor asked for the children to be heard out of court considering their age and vulnerability. Such special arrangement for taking evidence were permitted pursuant to the Framework Decision on the standing of victims in criminal proceedings (2001/220/JHA) but not permitted according to the relevant provisions of the Italian code of criminal procedure. Unhappy with the limited scope of national law, the Italian court sought to question its compatibility with the EU Framework Decision bearing in mind its duty to "interpret its national law in the light of the letter and spirit of Community provisions." It consequently stayed national proceedings and requested a preliminary ruling from the CJEU, in the course of which the CJEU confirmed the duty of conforming interpretation applies in respect of framework decisions.

The Court based its finding on two familiar foundations plus two more. The "binding character" of framework decisions together with the duty of loyal or sincere cooperation provided the familiar Community law justificatory bases of the principle of conforming interpretation. These were supplemented by an *effet utile* argument linked to the limited jurisdiction of the Court to give preliminary rulings under the third pillar, namely that that jurisdiction would "be deprived of most of its useful effect if the duty of conforming

[9] Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings OJ [2001] L 82/1 (no longer in force.)
[10] Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* ECR [1984] 1891

interpretation did not exist." And finally, it held that is "perfectly comprehensible" that the authors of the EU Treaty designed third pillar instruments to have similar legal effects to first pillar instruments in order to contribute effectively to the pursuit of the Union's objectives.

This was remarkable indeed at the time. Prior to the *Pupino* judgment it had been assumed that third pillar instruments were not capable of giving rise to any legal effects in domestic regimes, in part because of the distinctive institutional features of the third pillar and in part because the Treaty expressly declared that Framework Decisions 'shall not entail direct effect.'[11] So although framework decisions were similar in character to the Community legislative instrument – directives – in that they were binding on Member States and the manner in which they were to be implemented in domestic law was left to the Member States, they differed fundamentally from directives in that they did not give rise to rights or obligations which individuals could enforce before their national courts. Nonetheless, the *Pupino* judgment made clear that national courts *were* required to 'take consideration of all the rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the Framework Decision.'[12]

In terms of scope of the principle, the Court provided a relatively comprehensive and familiar outline. The national courts were 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 framework decision[13]thereby reflecting the *Pfeiffer*[14] case, which itself absorbed the *Marleasing*[15] extension to interpretative duty to national provisions whether adopted before or after the relevant EU law. The "so far as possible" construction also reflects the *Marleasing* reformulation of the *von Colson* principle, and reminds us that national courts are ultimately its gatekeepers. But the limits of what is possible are then articulated by the Court in what were by then familiar terms.[16] First that the obligation is limited by the general principles of law, particularly those of legal certainty and non-retroactivity. And more specifically still, "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 a decision alone, independently of an implementing law."[17] Later in the judgment the Court confirmed that the Framework Decision must be interpreted in such a way that fundamental rights, including in particular the right to a fair trial as set out in Article 6 of the Convention and interpreted by the European Court of Human Rights, are respected.[18]

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[11] Art 34 (2)(b) EU Treaty
[12] *Pupino* [62]
[13] *Pupino* [47]
[14] Joined Cases C-397/01 to C-403/01 *Bernhard Pfeiffer and Others* ECR [2004] I-8835
[15] Case 106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* ECR [2004] I-8835
[16] Case 80/86, *Kolpinghuis Nijmegen BV* ECR [1987] 3969 and C-212/04 *Adeneler and others* ECR [2006] I-6057
[17] *Pupino* [44] and [45]
[18] *Pupino* [59]

A second, familiar limit identified was that the obligation cannot serve as the basis for an interpretation of national law *contra legem*.[19] In other words, the obligation on the national court ceases when the contents of the provision of national law are not open to interpretation in conformity with the norm of EU law. The national judges need only apply interpretative methods recognised by it and national law should not be improperly distorted; ultimately it is for the national judges to decide on what is possible.[20]

Applying these limits to the query at issue in the case, the Court held that "the provisions which form the subject-matter of this reference for a preliminary ruling do not concern the extent of the criminal liability of the person concerned but the conduct of the proceedings and the means of taking evidence."[21] And in relation to the *contra legem* limitation the Court noted that it was "not obvious" that an interpretation of national law in conformity with the framework decision is impossible, before finally conceding that it is for the national court to determine whether such a conforming interpretation is indeed possible.[22] The upshot of all this was that EU law should be interpreted to enable special evidence gathering procedures to be used for children in Italian criminal trials, something that was not previously possible as a matter of national law.

This case, reviewed extensively at the time, was a remarkable assertion of the constitutional quality and legal effects of a field of EU law that had retained significant features of inter-governmentalism precisely because States wished to reflect the centrality of criminal justice issues to their own sovereign power. The explicit bar to framework decisions creating direct effect; the limited jurisdiction of the CJEU; the limited role of the European Parliament and the unanimity requirement to pass legislation were all distinctive features of the third pillar. Should EU level action in this field be capable of producing independent legal effects in the national context – all be they indirect - that would be a game changer in terms of the vertical power balance between the EU and states in relation to criminal law matters. *Pupino* was that game-changer.

From an EU constitutional law perspective, this was another notable act of judicial constitutional activism on the part of the CJEU. Certainly, dubiety surrounded the legitimacy of the ruling given the pillar distinctions, the Court's reasoning was subject to critique and interesting constitutional questions were pondered, such as whether the Community principles of supremacy and state liability might also apply to the third pillar.[23] Cautious optimism was expressed to the extent that the principle of conforming interpretation might

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[19] *Pupino* [47]. By analogy with Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 13, and Adeneler and Others, paragraph 110

[20] For an interesting exposition on the *contra legem* limit see M. Brenncke 'Hybrid Methodology for the EU Principle of Consistent Interpretation' (2017) *Statute Law Review*

[21] *Pupino* [46]

[22] *Pupino* [48]

[23] See for instance E. Spaventa, ibid; M. Fletcher, 'Extending 'indirect effect' to the third pillar: the significance of Pupino?' (2005) 30(6) European Law Review 862; Spencer, J. 2005. Child witnesses and the EU. Cambridge Law Journal 64(3): 569;

be a route to securing the protection of individual rights in the PJCC field and to the extent that the ruling enhanced judicial scrutiny over an EU field of co-operation with relatively impoverished democratic credentials.[24] And we were reminded of the wider political context of the day, namely that the EU's political actors and the Member States had already laid out a 'Communitarised' constitutional vision for the field of EU criminal in the then Draft Constitutional Treaty – the features of which would ultimately come to fruition in the Lisbon Treaty. It had been suggested that the Court was boldly flexing its transformative constitutional muscles[25] at a time of gathering political storm clouds *vis a vis* the draft Constitutional Treaty, but it might equally have been the case that the Court in *Pupino* simply anticipated what it had reason to believe was going to happen in any case.[26]

From another perspective, this ruling was seen as an entirely inappropriate incursion into sovereign territory, requiring well-established national criminal procedures to be revised at the behest of EU law. National constitutional courts among those enjoining the EU to tread carefully in this field. For instance in its judgment reaffirming the constitutionality of the act adopting the Lisbon Treaty 2007, the Bundesverfassungsgericht (BVerfG) observed that the European Union should proceed with caution given the potential encroachment on competences primarily reserved to the Member States on the basis of special constitutional sensitivity, [including] "decisions on substantive and formal criminal law [and] on the disposition of the police monopoly on the use of force towards the interior…".[27]

The principle after *Pupino*, after Lisbon.

As things transpired, the 'pillarised' critiques of- and queries arising from- *Pupino* lost their salience with the entry into force of the Treaty of Lisbon, as of 1 May 2009. But what did this mean for the application of the conforming interpretation principle to the PJCC sphere in practical terms? It will be recalled that the Lisbon Treaty changes which were particularly transformative to the field of EU crime and policing both in terms of its substance and its constitutional framing. Most prominently, the pillar structure of the EU was ended and PJCC was incorporated into the TFEU complete with the application of many 'Community law features' to the field, including democratic and (full)[28] judicial oversight by the European Parliament and the Court of Justice, respectively. Of particular note, another *Communitarising* feature introduced was that henceforth, the only legislative instruments to be adopted in the field of police and criminal law matters were to be the traditional Community 'directives', replete with direct and indirect legal effect potential.[29] What then of the already adopted third pillar framework decisions? They survived the entry into force

[24] Fletcher and Spaventa, ibid.
[25] Fletcher
[26] E. Spaventa at 24
[27] BVerfG, 2 BvE 2/08, para 252–253. See B. Davies, 'EU Criminal Law in National Courts: Breaking the Monopoly?' (2013) Vol 34(3) Liverpool Law Review 241
[28] Protocol 36 Transitional arrangements
[29] Article 83 EU Treaty.

of the Lisbon Treaty due to the Transitional Provisions in Protocol 36, according to which the legal effect of acts adopted pursuant to the third pillar before 1 May 2009 were 'preserved until those acts are repealed, annulled or amended in implementation of the treaties.'[30] So, framework decisions until such time as they are *Lisbonised*, would continue to lack direct effect, but be able to have indirect legal effects in a given national legal system *a la Pupino*. This has been confirmed by the Court in relation to enduring post Lisbon framework decisions as we will see in more detail below.[31] The principle would almost certainly apply also following their amendment to, presumably, a directive.[32] The extent to which such amending (or repealing) directives acquire direct effect is more contested.[33] However the principles of supremacy, direct effect and indirect effect would apply to any new post-Lisbon legislative measures adopted in the field of police and judicial cooperation in criminal matters.[34]

The CJEU has, on a number of occasions since the entry into force of the Treaty of Lisbon, considered the legal effects of enduring Framework Decisions, including for the first time, mutual recognition instruments that are assumed to be underpinned by mutual trust between Member States. Compliance with the duty of conforming interpretation in this context might be more challenging for national judges as the limits of that mutual trust are exposed. Nonetheless, as we shall now see, in these cases, it has taken the opportunity to reiterate the principle of conforming interpretation in identical terms to cases previously handed down in different fields, so that it is fully absorbed into a single EU articulation of the principle.

In ruling on the scope of a Member State to implement a ground for non-execution of the European arrest warrant,[35] the Grand Chamber in *Lopes Da Silva Jorge,*[36] reiterated the interpretative duty on national judges in these more expansive terms: the principle "requires national courts to do whatever lies within their jurisdiction, taking the whole body

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[30] Article 9 of Protocol (No 36) on transitional provisions, annexed to the EU treaties [2012] OJ C 326/322

[31] C-42/11 *Lopes Da Silva Jorge* [2011] ECR C103/16; C-554/14 *Ognyanov* [2015] ECR C73/17; the fullest summary of the principle in a case concerning EU criminal justice matters can be found in Case C-579/15 *Daniel Adam Popławski* Judgment of the Court (Fifth Chamber) of 29 June 2017 at paragraphs 26 – 36. All cases concerned mutual recognition instruments.

[32] The victims' rights framework decision at issue in *Pupino* has now been replaced by Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, [2012] OJ L 315/57

Note also that although the duty of consistent interpretation is most commonly applied in the context of directives, the duty also applies in relation to the EU Treaties, general principles of EU law, regulations, recommendations and potentially even to the Charter of Fundamental Rights of the EU. See Sim Haket, 'Coherence in the Application of the Duty of Consistent Interpretation in EU Law' (2015) 8(2) Review of European Administrative Law 215 at fn 11

[33] H. Satzger, 'Legal Effects of Directives Amending or Repealing Pre-Lisbon Framework Decisions' (2015) 6(4) New Journal of European Criminal Law 528

[34] Steve Peers, *EU Justice and Home Affairs* (3rd edn, OUP, 2011) 42

[35] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1

[36] C-42/11 *Lopes Da Silva Jorge* [2011] ECR C103/16

of domestic law into consideration and applying the interpretative methods recognised by it, with a view to ensuring that the framework decision in question is fully effective and to achieving an outcome consistent with the objective pursued by it."

In relation to the *justificatory* foundations of the principle we also see alignment with more recent cases on the principle of conforming interpretation. The Court in *Lopes Da Silva Jorge* justified the duty on national judges with reference first, to the "binding character" of framework decisions and second, by claiming that the duty "is inherent in the system of the TFEU, since it permits national courts, for matters within their jurisdiction, to ensure the full effectiveness of EU law when they determine the disputes before them."[37]

The first of these justifications – the binding nature of framework decisions - can be found in *Pupino*. Missing now, of course, is the justificatory argument in *Pupino* connected to ensuring the *effet utile* of the limited third pillar preliminary reference jurisdiction; that being unnecessary given the extended judicial oversight introduced by the Treaty of Lisbon. Missing too, also logically, is the argument drawn from the implied intention on the part of the authors of the EU Treaty concerning the legal effect of framework decisions. More conspicuous however, is the absence of any explicit reference to the principle of loyal cooperation as the foundation for the effectiveness argument, and hence the principle of conforming interpretation. It will be recalled that the pre-Lisbon principle of loyal or sincere cooperation has been a clear basis for the duty of consistent interpretation from its original development in *Von Colson.* Found only in Article 10 EC and therefore presumed by some to extend only to the Community pillar, the Court in *Pupino*, somewhat controversially, ruled that it also applied in respect of the third pillar, thus providing a by then well-established foundation for the extension of the principle of indirect effect. In its post Lisbon iteration[38], the principle of loyalty now appears as a strengthened, reciprocal and general principle of 'sincere cooperation'[39] between the Union and the Member States in Article 4 (3) Treaty on European Union, clearly applicable to all policy fields.[40] Reference to it would have been easy and perhaps expected and yet it is not there.[41] Instead the Court, as noted above,

[37] *Lopes Da Silva Jorge* [53] and [54]

[38] Article 4(3) TEU reads 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

[39] Contrast with the more limited and one-way duty of Article 10 EC: 'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.'

[40] Although note that a separate duty of cooperation is maintained in Article 24(3) TEU in specific relation to Common Foreign and Security Policy.

[41] Herlin-Karnell, reminds us that in the terrorist sanctions judgments of *OMPI, Gestoras Pro Amenstia* and *Segio* the notion of loyalty was recognised as being 'especially binding' in the third pillar. See Ester Herlin-

refers to the principle of conforming interpretation as being "inherent in the system of the TFEU…" which first emerged in the *Pfeiffer* judgment (para 114) in relation to ensuring the full effectiveness of *Community* Law and was extended to cover *European Union* law in the post-Lisbon case of *Dominguez*,[42] concerning the working time directive. In *Pfeiffer* the duty of sincere cooperation was also explicitly recalled as a foundation for the duty of consistent interpretation whereas it did not appear in *Dominguez*. Are we to take it that sincere cooperation principle is still a central foundation for the duty but that it is now simply part of the 'inherent in the system of the Treaty' argument? It is not clear. On the one hand, its absence might be welcomed given the argued overreliance and ambiguous impact of the *effet utile/effectiveness* argument used by the Court as both an enforcement mechanism and a competence parameter.[43] On the other hand, emphasising the importance of sincere cooperation in its fleshed out and *reciprocal* Lisbon version, might be of rejuvenated and richer value today, particularly in relation to EU criminal law, where there is a greater likelihood of, and potentially more at stake in terms of individual rights in, clashes between the EU and Member States. It is suggested that Article 4(3) TEU, especially when read with Article 4(2) TEU – the respect for national identities provision[44] - provides a constitutional framework that allows for a more sophisticated development and understanding of criminal law *at* and *by* EU and national levels; it should be capable of embracing more than a narrow *effet utile* route to achieving – indeed, insisting on - the coherence of EU law above all else. As promising as this might sound, it is also ambiguous, at least in the current stage of development of EU criminal law. Perhaps, the Court is sensitive to this; nevertheless it still feels odd to eschew direct reference to the sincere cooperation duty as a primary rationale for the principle of conforming interpretation.

In *Ognyanov*[45]concerning another instrument of mutual recognition, this time Framework Decision 2008/909[46], the Grand Chamber pursued a similar alignment of the principle. Here,

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Karnell, 'In the wake of *Pupino*: *Advocaten voor der Wereld* and *Dell'Orto*' (2007) 8(12) German Law Review 1147

[42] C-282/10 *Dominguez* Judgment of the Court (Grand Chamber), 24 January 2012 at [24]. For a critical commentary of this case, see M.De Mol, 'Dominguez: a deafening silence' (2012) 8(2) ECLRev 2012 280

[43] For a full exposition of this thesis in the context of EU criminal law, see E. Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (Hart 2012)

[44] Introduce for the first time by the Treaty of Lisbon, Article 4(2) TEU reads: 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.'

[45] C-554/14 *Ognyanov* [2015] ECR C73/17

[46] Framework Decision 2009/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the EU. [2009] OJ L327/27. In this case Bulgarian law governing the enforcement of criminal sentences, and its settled interpretation by the Bulgarian supreme court, allowed for a reduction in custodial sentence on account of work carried out by the sentenced person while detained in the issuing Member State. The relevant EU Framework Decision made no such provision for reduction of sentence.

it confirmed that the duty on the national court arises from the date of expiry of implementation deadline identified in the Framework Decision by analogy with *Adeneler*.[47] It further confirmed that the requirement to interpret national law in conformity with EU law includes the expansive obligation, on all national courts, to alter, where necessary, settled case-law if that case-law is based on an interpretation of national law that is incompatible with the objectives of a framework decision.[48] As such, the principle of consistent interpretation also requires that a lower national court disapplies, on its own authority, settled domestic case law achieved by the national court of last resort, if that case-law is not compatible with the objective of EU law. The Court further clarified that a contrary interpretative judgment cannot be the *sole* reason for claiming that an EU-compatible interpretation is impossible.[49]

An evaluation of the principle in the field of criminal law

Having identified that the principle first established in *Pupino* has been absorbed into the mainstream understanding of the principle in EU law (as formerly developed in the Community context), this section briefly reflects on its peculiar challenges in the context of PJCC today and suggests that two recent cases offer some welcome developments and guidance to national judges on the limits of their interpretative duty to give effect to EU law.

First, it is recalled that while the interpretative duty on national judges is broad, the precise scope of the stated limits to that duty are not foreseeable in every case, and ultimately the national judges themselves are the final arbiters as to whether an EU-friendly interpretation of national law is "possible".[50] As we have seen the CJEU has articulated two explicit limits to the principle of conforming interpretation and has apparently further directed national courts in more general terms as to the scope of what is possible; for instance that national legislation specifically implementing EU law should be capable of a conforming interpretation and a duty for lower courts to disapply rulings of higher courts. The Court in that sense reinforces the superiority of EU law within the confines of a plural system and encourages national courts to go to reach the outer limits of their scope in finding an interpretation that is compatible with EU law. Ultimately though, national judges sitting in courts across the length and breadth of the EU must determine whether an interpretation will be *contra legem* (further than possible) ostensibly based on a view as to the limits of

[47] C-212/04 *Adeneler and Others* [2006] ECR I-06057 [115] and [124]. One might also suggest that before the deadline for transposition that there is an obligation to refrain from interpreting national law in a way that would seriously compromise the attainment of the objective of Framework decision by analogy with C-129/96, *Inter-Environnement Wallonie ASBL v Région wallonne* ECR [1997] I-07411

[48] By analogy with inter alia C-441/44 *Dansk Industri (DI)* Judgment of the Court (Grand Chamber) of 19 April 2016 concerning the general framework directive relating to the principle of non-discrimination (also see Case C-456/98 *Centrosteel* [2000] ECR I-6007)

[49] *Ognyanov* [69] and [70]

[50] K.Sawyer, 'The Principle of '*interprétation conforme*': How Far Can or Should National Courts Go when Interpreting National Legislation Consistently with European Community Law?' (2007) vol 28(3) *Statute Law Review* 165; S.Haket, 'Coherence in the Application of the Duty of Consistent Interpretation in EU Law' (2015) Vol 8 (2) Review of European Administrative Law 215

canons of construction/interpretation (understood to be) available to it. The extent to which there are or even can be objective limits to meaning and interpretation is surely relevant here.[51] Certainly, wider pragmatic and socio-legal perspectives that emphasise other factors as determinative of the limits of the duty (or indeed of engaging it at all) –are certainly persuasive. These have been noted to include legal cultural perspectives, power dynamics within the judiciary and between the judiciary and legislature. All of these might predetermine what are acceptable interpretations.[52] And where significant constitutional norms are at put at risk by EU law, it is surely hardly surprising that national judges choose not to pursue the conforming interpretation duty.[53]

What about the specific criminal liability proviso as a limit to the application of the principle? The well-established position that EU law cannot in and of itself either determine or aggravate the criminal liability of the individual, was reiterated by the Court in *Pupino* as a specific expression of the general principles limitation, of which the principles of legal certainty and non-retroactivity were highlighted.[54] This extension to the field of PJCC puts the criminal liability proviso under the spotlight. As Spaventa pointed out in 2007, "in the Community law context, the application of the criminal liability exception has not proven to be particularly difficult nor particularly controversial. However, the transposition of the same doctrine in the field of co-operation in criminal matters might be more difficult, since the consistent interpretation in this field is more likely to centre on the interpretation of criminal law." And, the Court's particular finding on this proviso in *Pupino* arguably put it "under significant strain."[55] In essence the Court had indicated that where provisions of national law are procedural in nature, they could and should be interpreted so as to conform with framework decisions; in other words national rules on criminal procedure cannot 'determine or aggravate' criminal liability. This is contentious, as although such rules (for instance relating to evidence gathering or time limits for prosecution) are not constitutive of criminal liability, they might well determine the outcome of the case to the detriment of the defendant. Moreover, the particular constitutional value that is attributed by states to specific aspects of the criminal law can vary. The Court's ruling on the liability proviso can consequently be read as imposing a particular and narrow understanding of the

[51] See L.Rodak, 'Objective interpretation as conforming interpretation' (2011) Vol 1(9) *Oñati Socio-Legal Series* 11

[52] J. Bengoetxea and H.Jung, 'Autonomy and Heteronomy of the Judiciary in Europe' (2011) Vol 1(9) *Oñati Socio-Legal Series* 1

[53] See Albi's summary and critique of the commentary which accuses certain national constitutional courts of going against the spirit of *Pupino* and undermining loyal cooperation in their consideration of the European Arrest Warrant; A. Albi, 'The European Arrest Warrant, Constitutional Rights and the Changing Legal Thinking: Values Once Recognised Lost in Transition to the EU Level' in M.Fletcher, E.Herlin-Karnell and C.Matera (eds) *The European Union as an Area of Freedom, Security and Justice* (Routledge, 2017) 137, 139 ff

[54] Pupino [44] and [45]

[55] B. Davies, fn 24, 253. Davies usefully highlights that the underpinning rationale for the liability proviso has varied in EU law and outlined why a more coherent logic is needed, and made more necessary by the expansion of EU competences and activity in the criminal law domain.

principle of legality on national courts, that might well be at odds with the national conception of the same.

So, if the question of what amounts to the determination and aggravation of criminal liability goes to the heart of fundamental safeguards that are recognised for individuals uniquely in the field of criminal justice *and* the EU's conception of these safeguards (including within the specific scope of EU criminal justice) appears at odds with those of the States, is a national judge still required to interpret domestic law so as to achieve the objectives and obligations laid down in EU legislation? A formal application of the principle of conforming interpretation viewed through a narrow *effet utile*/loyalty lens might elicit a positive response to this question, but some recent CJEU cases might be signalling otherwise, perhaps reflecting a greater comprehension on the part of the Court of the constitutional *and* criminal law sensitivities at stake.

In *Caronna*, which concerned Directive 2001/83/EC on medicinal products for human use and the relevant national implementing law, the Court confirmed the interpretative limits of EU secondary law as lying in the determination or aggravation of criminal liability without a national legal basis. But in so doing, it also suggested that fundamental rights considerations trump the duty to interpret domestic law in conformity with secondary EU law obligations. It held that respect for the principle of legality as enshrined in Article 49 EU Charter of Fundamental Rights would prevail even where national law is contrary to EU law and in so doing permitted the non-compliance of national law with an EU directive on fundamental rights grounds.[56]

The *Taricco* saga[57] is also worth a brief mention. This litigation before the CJEU and the Italian Constitutional Court has generated a number of fundamental questions about the relationship between European criminal law and national constitutional law and about the impact of EU law on domestic criminal justice systems. It has been recognised that the ensuing dialogue between the two Courts has resulted in "a considerable of pragmatism and degree of mutual accommodation, while leaving a number of issues unresolved."[58]

In *Taricco I* the court, in ruling on compatibility of Italian law with the obligations of Member States pursuant to Article 325 (1) and (2) TFEU concerning the combatting of fraud affecting the financial interests of the EU, appeared to imply (as it had done in Pupino) that the principle of legality (Article 49 EUCFR) doesn't apply in the context of national procedural rules pertaining to time limits for criminal prosecution. According to its autonomously

[56] See on how this case-law can be used to enhance protection of individuals in other spheres of EU criminal law; L. Mancano, 'Another Brick in the Whole. The Case-Law of the Court of Justice on Free Movement and Its Possible Impact on European Criminal Law' (2016) Vol 8(1) Perspectives on Federalism 1
on European Criminal Law Vol 8 (1) 2016-

[57] C-105/14 *Ivo Taricco and Others* Grand Chamber, Judgment of 8 September 2015 (*Taricco I*) and C-42/17 *M.A.S & M.B* Grand Chamber, Judgment of 7 December 2017 (*Taricco II*)

[58] V. Mitsilegas, 'Judicial Dialogue in Three Silences: Unpacking *Taricco"* (2018) Vol 9(1) *New Journal of European Criminal Law* 38

defined conception of the principle of legality, it therefore held simply that the Italian provisions on statute of limitation should be disapplied by national courts if they impede the effectiveness of protection of the financial interests of the EU.[59] This was controversial, not least because a feature of the Italian legality principle was that it did also apply to limitation periods. In fact the disapplication of the provisions of national law by national judges would have breached the prohibition of retroactive effects (as for the crimes which had not been time-barred before the time the *Taricco I* judgment came out), the sufficient precision of criminal law, and the separation of powers. It is apparent that too much was left to national judges by this judgment, opening up the prospect of disparate application.[60] These too high expectations on national courts to 'cure' national legislation from any incompatibilities with EU Law were apparently later 'corrected'[61] by the Grand Chamber of the CJEU in *Taricco II* - this time a reference from Italy's Constitutional Court on the same matter - where the CJEU actually said "it is primarily for the national legislature to lay down rules on limitation that enable compliance with the obligations……[of EU law]."[62] If nothing else this is a welcome acknowledgement that national judges can be put in very difficult situations by EU law; Situations that strain and disturb well-established national constitutional practices and potentially undermine rules and central tenets of national criminal law. In such circumstances it is just too simple to suggest that national judges are being 'disobedient ' or 'unfriendly' towards the EU and the matter should not simply be viewed through a narrow EU loyalty and *effet utile* lens. In actual fact, the Italian constitutional court in *Taricco II* showed considerable respect to the EU by asking it for further guidance. It actively sought a more balanced and more directive judgment from the EU in light of domestic constitutional values and adopted language and style that was authoritative[63] but not threatening. And the judgement of the CJEU ultimately did show deference to the domestic understanding of the scope of the principle of legal certainty. In light of that principle, it allowed Italian judges *not to* disapply the time-bar norms set out in national law which had previously been declared

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[59] More precisely, national judges should disapply if they consider that the "national rule prevents the imposition of effective and dissuasive penalties in a *significant number of cases* of *serious* fraud affecting the financial interests of the European Union" [58]; emphasis added.

[60] On this point and for a wider critique of *Taricco I* see for instance, Emmanouil Billis, ' The European Court of Justice: A "Quasi-Constitutional Court" in Criminal Matters? The *Taricco* Judgment and Its Shortcomings' (2016) Vol 7(1) *New Journal of European Criminal Law* 21-38

[61] See analysis by C.Peristeridou and J.Ouwerkerk, 'A Bridge over Troubled Water – a Criminal Lawyers Response to Taricco II.' Dec 2017 *Verfblog* https://verfassungsblog.de/a-bridge-over-troubled-water-a-criminal-lawyers-response-to-taricco-ii/ [accessed 11 April 2018]

[62] *Taricco II* [41]

[63] As it might be in the light of the 'controlimiti doctrine' which it could invoke to buttress supreme national constitutional principles. See more generally M. Dani, 'National Constitutional Courts in Supranational Litigation: A Contextual Analysis' (2017) 23 European Law Journal 189 who argues that constitutional courts can "still exert a strategic influence in supranational litigation and encourage considerate handling of national constitutional claims by the Court of Justice. National constitutional courts, however, cannot be expected to embark on rights-based constitutional resistance against supranational technocratic and intergovernmental encroachment. If faithful to their task, they can only correct Union policy measures in the light of national constitutional principles and proportionality. This approach may have the disturbing paradoxical effect of reinforcing a legal and political order corroding the idea of constitutional democracy."

incompatible with EU law by the CJEU in *Taricco I*. The Court here gave an indication of how to adapt the principle of legality to a multi-level governance system. The challenge is clear; in the absence of clarity and uniformity around policy and principles of the EU's PJCC agenda, it must do enough to avoid overt clashes of authority while preserving, or rather accommodating pluralism.

To summarise, the role of national judges to secure the indirect effect of EU criminal law must be understand within the wider setting of the as yet uncomfortable 'fit' between EU Law with the *effet utile* and internal coherence imperatives used to justify the extension of the principle and the national criminal law replete with its own internal coherence, peculiarities and sensitivities.[64] While the consistent interpretation duty should be valued for its potential to neutralize or soften constitutional conflicts, and its recognition of the role of national judges as guardians of EU law, the degree, extent and cost of the asymmetries here is such that national judges cannot and should not be expected to offer anything like a comprehensive solution. And yet the developments identified in these cases might perhaps serve to embolden national judges to engage more readily with the duty of conforming interpretation and enable them to do so more easily.

Conclusion

Leaving aside the concerns relating to judicial activism and law-making on the part of the CJEU in *Pupino*, the upshot of the ruling at the time was that it brought national judiciaries into the picture at a time when judicial and democratic oversight of this area of law was woefully lacking. This was remarkable at the time because of the distinctiveness of the third pillar, but it was also broadly accepted by EU law scholars, even welcomed, as a mechanism through which individual rights might be upheld. Today, within the confines of markedly different constitutional setting, the *Pupino* principle endures in the PJCC field and has been fully aligned with the by now expansive duty of conforming interpretation developed in other fields of law. Far from these factors providing for a more legitimate and rights-based 'Europeanisation' of criminal law which can be smoothly applied in domestic contexts with the minimum of interpretative gymnastics, in fact, a much more contentious picture prevails. The *Pupino* judgement gave us the first hint of the challenges that would lie ahead in term of the substantive clashes between EU law and national law (particularly around the crucial question of individual rights and safeguards). In such a context, the conforming interpretation principle saddles national judges with a considerable and uncomfortable burden. Meanwhile the EU, and in particular the Luxembourg Judges, have the unenviable but (within the confines of the multi-level, supranational EU legal order) ultimately inevitable task of articulating more thoroughly the contours of EU criminal law and the legal relationship between the EU and national law. There are some signs here that the CJEU recognises the uniqueness of domestic criminal law regimes and the fundamental principles and safeguards upon which they are built, and that the effective interpretation and

[64] On this see for instance Albi, *ibid* fn 47

application of EU law – including via conforming interpretation of national law - is bound up with that. The challenges that fall to judges, at all levels, (probably inappropriately so) have arguably never been greater in the history of the EU; certainly the stakes have never been higher.