ARTICLES

In the wake of *Pupino*: *Advocaten voor der Wereld* and *Dell'Orto*

By Ester Herlin-Karnell[*]

Abstract
This paper argues that the third pillar, despite the ECJ's landmark ruling of *Pupino* (which extended communautaire reasoning to the third pillar terrain) is and remains different from the supranational sphere. In so doing, the paper asks whether a consistent approach to EU law can be derived from the orthodoxy of EC law by focussing on the recent judgments of *Advocaten voor der Wereld* and *Dell'Orto*.

A. Introduction

Ever since the ratification crisis in 2005, the EU has been totally absorbed by the question consisting of what can be done in the Union with- or without a Constitution (CT). This debate, more than two years after the Dutch and French referenda has partially been rather stagnated, in both political and legal terms.[1] Yet, recently the German presidency attempted to put an end to 'the uncertainties' in Europe by agreeing on a 'New' Reform Treaty.[2] This Treaty was subsequently adopted during the informal European Council of Lisbon on 19 October 2007 and will be signed – as the Treaty of Lisbon – on 13 December 2007.[3] But a successful entry into force of this Treaty is of course yet another story. Nonetheless, if one looks closer at the previous alleged frozen situation in Europe, a different picture

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[1] See however the Action committee for European democracy, available via http://www.eui.eu/RSCAS/e-texts/ACED2007_NewTreatyMemorandum-04_06.pdf, Proposal for a new Treaty and supplementary protocols. See also the Berlin declaration available via http://www.eu2007.de/de/News/download_docs/Maerz/0324-RAA/English.pdf

[2] See German presidency conclusions agreed on 22-23 June 2007, Brussels, available via http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94932.pdf

[3] See the presidency agenda available via http://www.eu2007.pt/UE/vEN/Reunioes_Eventos/ChefesEstado/20071023Tratado.htm

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emerges. In fact, the lawyer looking for new 'integrationist' visions should turn to the area of the third pillar and European criminal law more generally. In this EU corner, the constitutional contours are far from settled. It is certainly true that the abolition of the pillar system as such is commonly viewed as having constituted the zenith of the CT – by finally dissolving the obscure EU Treaty structure and thus bringing together an even tighter judicial space. It is also true that the above mentioned Reform Treaty will reintroduce such abolition. Nevertheless, it is equally often acknowledged that the range of cases, such as most importantly the judgments of *Pupino*[4] and *C-176/03 Commission v. Council*[5] which were delivered in the aftermath of the failure of the CT, highlighted the still considerable tension between the Union's pillars – tensions which were more visible than probably expected. And indeed, the Commission's aspiration to, in the absence of/in the wait for a CT, transfer the third pillar to the Community stage via use of Art 42 EU (the bridging clause) did not succeed.[6] More concretely, this dream of a mini supranational adaptation turned out to be, surprisingly, short lived.[7] As stated though, the recent EU Council rewind the constitutional story back to the early days of the discussion on the CT – it is still too early to predict the exact impact of the 'New' Treaty.[8] This contribution intends to offer some reflections on current trends in the sphere of European criminal law with the focus on the judgments of *Advocaten voor der Wereld*[9] and *Dell'Orto*[10] by assessing them in the light of the, by now legendary, *Pupino*[11] ruling.

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[4] Case 105/03, *Criminal proceedings against Maria Pupino* [2005] ECR I-5285, discussed below.

[5] C-176/03, *Commission v. Council,* [2005] ECR I-7879 and the first follow-up to this case C-440/05 Ship-source pollution, delivered on 23 October 2007 nyr. See also Case T-306/01, *Yusuf and Al Barakaat International Foundation* v. *Council and Commission*, Case T-315/01, *Kadi* v. *Council and Commission*, T-306/01, [2005] ECR II-3533. Now pending before the European Court of Justice, Case C--415/05.

[6] COM(2006) 331 final. *Implementing the Hague Programme: the way forward'*

[7] Outvoted during informal discussions in the European Council Tampere, 27 September 2006 see http:// www.eu2006/fi/news. Discussed further in Ester Herlin-Karnell, *Recent Developments in the Area of European Criminal Law*, 14 MAASTRICHT J. EUR. & COMP. L. 15 (2007)

[8] See comments provided by Steve Peers, *Statewatch, the German presidency conclusions*, available at: http://www.statewatch.org/news/2007/jul/eu-reform-treaty-teu-annotated.pdf. And for an analysis of the informal European Council Lisbon, see comments by Steve Peers available at http://www.statewatch.org/news/2007/oct/eu-reform-treaty-revised-teu-2-1-3.pdf. See also SEBASTIAN KURPAS ET AL, THE TREATY OF LISBON: IMPLEMENTING THE INSTITUTIONAL INNOVATIONS (15 November 2007), available at http://shop.ceps.eu/BookDetail.php?item_id=1554; SERGIO CARRERO & FLORIAN GEYER THE REFORM TREATY AND JUSTICE AND HOME AFFAIRS (17 AUGUST 2007), available at http://www.libertysecurity.org/IMG/pdf_The_Reform_Treaty_Justice_and_Home_Affairs.pdf).

[9] C-303/05, *Advocaten voor de Wereld*. Judgment of 3 May 2007 not yet reported (available via http://eur-lex.europa.eu/JURISIndex.do?ihmlang=en)

B. Why insist on a debate?

The message of this paper is not revolutionary. In fact it is rather simple. The point is that in the current and in many ways highly adequate desire for changes, some well known concepts which are considered and debated within the traditional EC effective enforcement doctrine seem largely neglected when applied in the context of the third pillar. What is at hand here are the constitutional vibrations set by the landmark case of *Pupino*[12] – a judgment which, as is well known, extended reasoning based on Art 10 EC[13] and effectiveness (and thereby indirect effect) to the third pillar arena by emphasizing the importance of loyalty within the Union as a whole. The ambition of this paper is however to insist on a more sophisticated approach, than a loyalty mantra, towards the development of European criminal in general. More concretely, the crux is that by prompting national action based on a very broad, or even illegitimate, reading of the Treaty another issue arises which is – and it is here the EU seems largely paralysed – to cure the acute need for sufficient safeguards of the individual. [14] As to the latter, and more provocatively still: the current lack of safeguard rules in this area seems to constitute a catch twenty-two situation due to the very limited competence within the third pillar (Art 29-34 EU) to adopt such legislation and, furthermore, because of the political unwillingness to transfer further competence.[15] And yet this has not halted the EU's institutions from stumbling into criminal law in a rather unsophisticated manner, the result of which is an imbalance where many of the current third pillar measures seem doubtful from the perspective of legitimacy as well as legal certainty.[16]

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[10] C-467/05 *Giovanni Dell'Orto,* Judgment of 28 June 2007 not yet reported (available via http://eur-lex.europa.eu/JURISIndex.do?ihmlang=en)

[11] C-105/03, *Criminal proceedings against Maria Pupino* [2005] ECR I-5285

[12] C-105/03, *Criminal proceedings against Maria Pupino* [2005] ECR I-5285

[13] Art 10 EC states that the Member States shall take all appropriate measures to ensure the fulfilment of the obligation arising out of the Treaty and facilitate the achievement of the Community's tasks. They shall also abstain from any measure which could jeopardise the attainment of the objectives of the Treaty.

[14] See however the proposed framework decision on procedural rights, yet this proposal might not live up to ECHR standards. http://www.statewatch.org/news/2007/jun/eu-suspects-rights-draft-directive-jun-07.pdf

[15] See STEVE PEERS, EU JUSTICE AND HOME AFFAIRS Ch 9 (2006).

[16]Compare the discussions in id. See also Valsamis Mitsilegas, *The Constitutional Implications of Mutual Recognition*, COMMON MARKET LAW REVIEW 43 (2006), 1277, and) SECURITY V FREEDOM – A CHALLENGE TO EUROPE'S FUTURE (Therry Balzacq & Sergio Carrera eds., 2006).

This short paper starts by briefly outlining the characteristics of the third pillar and looks thereafter closer at the current depillarization trend. It should however be noted that due to the highly dynamic nature of European criminal law as an increasingly far reaching phenomenon, this paper has confined itself significantly to the *Pupino* case and its relationship the above mentioned recent rulings of *Advocaten voor der wereld* and *Dell'Orto* as anything else would be far beyond the scope of it.[17]

C. The jurisdictional complexity of the third pillar – in a (very selective) nutshell

It is well known that the third pillar entered the European limelight in the terms of EU criminal law co-operation in connection with the Maastricht Treaty and was taken a step further on the intergovernmental ladder as a result of the Amsterdam Treaty.[18] Thus, the problem with the third pillar is, notoriously, that it is vulnerable to the accusation that it is the site of a democratic deficit with minimum involvement of the European Parliament in the legislative process and lack of transparency in general. Furthermore, the Court has a very limited jurisdiction in this area (Art 35 EU).[19] It is however often stressed that the building blocks which were present in the EC Treaty, with the aim of achieving a common market, on which the Court founded the European mandate (i.e. Art 249 EC, but also Art 10 EC) can only with great difficulty be found in third pillar law.[20] Still it is frequently argued that the legitimacy of the European project would immediately increase if the Court's jurisdiction was expanded.[21] It is submitted though that the issue is much more complicated, i.e. a reformation of the Court's jurisdiction is not a step far enough for the legitimacy of the notion of European criminal law. And yet this

[17] The third pillar and the concept of European criminal law is currently a highly dynamic domain. One such development is the Prüm Treaty and the question of 'two speed Europe'. This treaty will be incorporated into the New Treaty. For an overview in general, PEERS (note 15)

[18] On The history of the third pillar see e.g. Sandra Lavenex and William Wallace, *Justice and Home Affairs,* POLICY-MAKING IN THE EUROPEAN UNION (Helen Wallace et al, eds, 2005) 457 and Dora Kostakopuolou *The Area of Freedom, Security and Justice and the European Union's Constitutional Dialogue* in THE FUNDAMENTALS OF EU LAW REVISED 153 (Catherine Barnard, ed 2007)

[19]And when the Court has such jurisdiction, it is only the highest national Court who can ask for a preliminary ruling (at the present time) which in practice means that very few cases are referred. See current developments in this area editorial comments CML Rev 44 (2007) 1 and 2006 COM(2006) 346 final, Art 68 EC.

[20] Monica Claes, *European Constitution and the Role of National Constitutional Courts*, in THE EUROPEAN CONSTITUTION AND NATIONAL CONSTITUTIONS: RATIFICATION AND BEYOND 235 **(** Anneli Albi & Jacques Ziller, eds, 2007), at 240

[21] E.g. JEAN CLAUDE PIRIS, THE CONSTITUTION FOR EUROPE (2006)

does not seem to concern the Court to any great extent; it is the emerging depillarization fashion to which we will now turn.

As is very well known, the famous *Pupino* decision set the constitutional ball rolling again (delivered soon after the failure of the CT in June 2005) by controversially extending supranational principles such as the concepts of effectiveness and loyalty based on Art 10 EC into the third pillar domain. The thesis here is however the importance of not placing too much reliance on the magical powers of these axioms. More concretely, it appears doubtful whether they should be automatically extended in the name of *Pupino* in order to solve current problems in third pillar matters in general. Although this ruling is well observed by now, the rather specific circumstances of it deserves a short reiteration. Briefly, the Court ruled that it would be very difficult for the Union to carry out its task effectively if the principle of loyal cooperation enshrined for EC law purposes in Art 10 EC, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under EU law, was not also binding in the third pillar. Regardless of the attractiveness (from the EU law perspective) of any such reasoning, one should nonetheless not forget what was at issue in *Pupino:* the matter at focus concerned methods for the taking up of testimony with minors in criminal law proceedings and the question asked by the national court was whether the prosecutor could rely on a framework decision that was not yet implemented in Italian law in order to allow minors to testify by alternative means (i.e. outside the court room during the pre-trial period).[22] As stated, the Court concluded that it could; and the framework decision was boosted with indirect effect, semi-conversely to the message of Art 34 EU which expressly excludes direct effect. Yet *Pupino* is not (explicitly) about Italian authorities being very slow when implementing new EU legislation. Neither is it only about the treasured value of Art 10 EC, loyalty, the question of indirect effect as such. This ruling concern, most fundamentally, the issue of what is to be counted as a 'fair trial' including the rather delicate matter of how little children are treated in the criminal law process. It appears, therefore, risky/too early to rely too heavily and too eagerly on this case in the ambitious aspiration to speed up the evolution of the third pillar.

[22] **For comments on this case see, e.g. Maria. Fletcher,** ***Extending "indirect effect" to the third pillar: the significance of Pupino*****, 30 EUROPEAN LAW REVIEW (2005) 862, PEERS (note 15) , John Spencer,** ***Child witnesses in the European Union*** **CAMBRIDGE LAW JOURNAL 64 (2005) 569, Valsamis Mitselegas** ***Constitutional principles of the European Community and European Criminal Law*****,** EUROPEAN JOURNAL OF LAW REFORM **(EJLR) 303 (2007) and my own contribution Ester Herlin-Karnell,** ***Recent Developments in the Area of European Criminal Law*** **14 MAASTRICHT J. EUR. & COMP. L. 15 (2007) and also Carl Lebeck,** ***Sliding Towards Supranationalism? The Constitutional Status of EU Framework Decisions after Pupino*****, 8** GERMAN LAW JOURNAL **501 (2007)**

And yet, legislative aspirations within the third pillar might sound paradoxical. Surely, the point with mutual recognition, which is the key theme in this area initiated by the Tampere conclusions[23], is to refrain, as far as possible, from further (legislative) harmonization.[24] Indeed, it is sometimes suggested that the very existence of 'European constitutionalism' could in itself legitimize further European action in criminal law matters. Others (including this author), on the contrary, argue that an increased EU involvement in this field would fundamentally require clearer delimitation of competences, increased legitimacy and at the very least a more coherent underlying system of the Member States criminal laws not only due to procedural protection but also due to the fact that the citizens of Europe need to know what is criminalized.[25]

What is clear, though, is that *Pupino* highlights the need for a bigger discussion concerning legitimacy and safeguard issues within the EU and this is so irrespective of how one chooses to interpret supremacy and indirect effect within the framework of the third pillar. Moreover, even if we agree on the inadequate nature of the third pillar the matter does, arguably, not come to rest, i.e. to simply applaud the Court for its ambition of bringing the third pillar 'closer to Europe'. Because if taking the matter a step further, should it not be the opposite? That in an area, as 'unsophisticated' as the third pillar, associated with prosecutions and crime prevention; the Union is, conversely, not ready for supranational 'obedience'. It is submitted that the short term solution of automatically extending *Pupino* to third pillar issues, in general, does not only seem to harm the legitimacy of the Union as there is no Treaty support for it, but also and perhaps more importantly visualizes the awkward truth that without a more wider ranging discussion, this area will remain contestable. At stake here is the fact that, as explained, the question is more crucial than simply examining the possibility of using *Pupino* as a means to an end. Expressed differently, the traditional setting of EC law – developed in the context of civil law – cannot be automatically transferred to the third pillar since we are dealing with a different game. This comes of course sharply into focus in connection with the European Arrest Warrant (EAW)[26] and the abolition of dual criminality.

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[23] European Council, Tampere 1999

[24] Except for the competences set out in Art 29-31 EU, in the area of, especially, crime prevention, terrorism, organised crime and illicit drug trafficking.

[25]Compare the discussions in Elspeth Guild, *Crime and the EU's Constitutional Future in an Area of Freedom, Security and Justice*, EUROPEAN LAW JOURNAL 10 (2004) 218 and the special issue on EU criminal law in 12 MAASTRICHT J. EUR. & COMP. L. 115 (2005)

[26] 2002/584/JHA; OJ 2002 L190

D. The dynamics of European criminal law: *Advocaten voor der Wereld*

So, as stated, the recent judgment of *Advocaten voor de Wereld* constitutes the first test case of the validity of the EAW framework decision at the EU level.[27] Before looking closer at this ruling it should, however, be recalled that several Constitutional courts in Europe have, in short, either declared the national law implementing the EAW unconstitutional (for example Germany and Cyprus[28]) or on the contrary upheld it as part of the speedy process of criminal law co-operation in Europe (for example the Czech republic).[29] In other words, the challenges to the constitutionality of the EAW could concern the EU measure itself or the national measure implementing it or its application to a particular case. And as noted, in the present judgment, the Court had to deal with the (probably) most difficult issue of them all; the constitutionality of the EU instrument itself.

Accordingly, *Advocaten voor de Wereld* was a non profit making association that brought an action in Belgium for annulment of the EAW framework decision. One of the questions asked by the national court[30] - and arguably the far most interesting one – was whether the EAW breaches the principle of legality in criminal law. Interestingly, it has been suggested that the Court by establishing its jurisdiction in the present case implicitly extended the *Foto-Frost* principle (the possibility for the national courts to refer questions concerning the validity of community acts) to third pillar matters (compare though Art 35 (1) EU).[31]

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[27] Case 303/05, *Advocaten voor de Wereld*. Judgment of 3 May 2007. Opinion of AG Colomer delivered on 12 September 2006. For a comment see e.g. Steve Peers, *Salvation outside the Church: Judicial Protection in the Third Pillar after the Pupino and Segi Judgments*, 44 CML REV 883 (2007)

[28] For case comments see e.g. Valsamis Mitsilegas, *The Constitutional Implications of Mutual Recognition*, CML REV 43 1277 (2006), Jan Komárek, *European constitutionalism and the European arrest warrant: In search of the limits of 'contrapunctual principles*, 44 CML REV 9 (2007). On the Polish ruling, e.g. Dorota Leczykiewicz in 43 CML REV. 1181 (2006), , Krystyna Kowalik- Bąpczyk, *Should we polish it up? The Polish Constitutional Tribunal and the idea of supremacy of EU law*, 6 *GLJ 1355* (2005), and the German Constitutional Court, e.g. Alicia Hinarejos Parga in 43 CML REV. 583 (2006), Simone Mölders, *European arrest warrant act is void – the decision of the German Federal Constitutional Court of 18 July 2005*, *GLJ* (2006), 45. and on the Cyprus ruling, Alexandros Tsadiras, in 44 CML REV 1515 (2007)

[29] See CONSTITUTIONAL CHALLENGES TO THE EAW (Elspeth Guild ed., 2006)

[30] The other questions asked was whether the EAW should have been adopted as a convention rather than a framework decision and whether the EWA breached the principle of equality and non-discrimination.

31 NIAL FENELLY, THE EUROPEAN ARREST WARRANT: RECENT DEVELOPMENTS, paper presented at the ERA conference EU Court in the Area of Freedom, Security and Justice: Recent Developments, Trier on 14 June 2007

In short, the Court concluded that the EAW does not breach the principle of legality. In reaching such a conclusion[32], the Court did as AG Colomer had suggested in his opinion – it broke its silence on the Charter.[33] Moreover like in the judgments of *Gestoras Pro Amnistía, and Segi*[34], concerning sanctions in the fight against terrorism, it emphasized, in particular, the virtue of Art 6 EU and the protection of fundamental rights. The Court stated:

§ 45 It must be noted at the outset that, by virtue of Article 6 EU, the Union is founded on the principle of the rule of law and it respects fundamental rights… It follows that the institutions are subject to review of the conformity of their acts with the Treaties and the general principles of law, just like the Member States when they implement the law of the Union ...'
§ 46 It is common ground that those principles include the principle of the legality of criminal offences and penalties and the principle of equality and non-discrimination, which are also reaffirmed respectively in Articles 49, 20 and 21 of the Charter of Fundamental Rights of the European Union..'.

Moreover, the Court stipulated that even if the Member States were to reproduce word-for-word the list of the categories of offences set out in the Framework Decision for the purposes of its implementation, the actual definition of those offences and the penalties applicable are those which follow from the law of 'the issuing Member State'. Of course, such reasoning could be said to be in line with the traditional definition of 'mutual recognition' once developed in the context of internal market law. Still the problem is that this does not in anyway remedy the lack of maximum certainty in criminal law. It is true that the Court did not express any explicit view as regards whether the above noted list of crimes (with no dual criminality) lives up to the requirement of legality in criminal law in general. The only thing that matters is, according to the Court, the law of the issuing state which, to repeat, is safeguarded or supervised by the general notion of human rights in the EU and, more specifically, by the Charter.

Yet one could legitimately ask how much the Charter really adds to the discussion on procedural legality in European criminal law. After all, after having stressed the

[32] Or more adequately to firstly establish its jurisdiction.

[33] As it had previously done, and thereby started this novel trend, in C-540/03, *Family Reunification* judgment of 27 June 2006, not yet reported (available via http://eur-lex.europa.eu/JURISIndex.do?ihmlang=en)

[34] Case C-354/04 and C-355/04, *Gestoras Pro Amnistía, and others v. Council*, *et al* delivered on 27 February 2007 Not yet reported (available via http://eur-lex.europa.eu/JURISIndex.do?ihmlang=en)

virtue of legality the Court went on to – in line with the *ne bis in idem* cases[35] - state that there is currently a high level of mutual trust between the Member States. But such trust is surely a question of degree and raises the question of how to measure the notion of 'trust'. One would have thought that some kind of empirical evidence would be necessary, but no such data seems to form part of the Court's judgment. It could perhaps be interesting to pause here. It is important to stress, although perhaps somewhat superfluously, that the national objections to the EAW are far from as simple as 'European integration' verses 'national protectionism'. In other words, simplifications are not sophisticated enough for a successful European criminal law based on cooperation. Whether or not the abolition of dual criminality could be considered as intruding on the crucial dual notion of legality – as both a substantive and procedural requirement[36] (and from the perspective of fair trial, it is easy to think that the EAW, as it stands today, clearly intrude on these safeguards[37]), it is nonetheless very interesting that the current working group on 'European criminal law' set up by a number of criminal law experts within the EU[38] have argued that it is not acceptable to abandon dual criminality, at the present stage, as it can compel a Member State to surrender a defendant to another state to face charges which would be fundamentally unacceptable under its own constitutional legal order. [39] An alternative to further approximation at the EU level, in the context of the EAW, seems however in their view be to provide policymakers with workable minimum norms concerning the limits of mutual recognition.[40] And yet, is this not exactly the problem in connection with the notion of loyalty as developed in the above mentioned *Pupino* case? More especially, what is at stake here is the risk that by focussing so much on enforcement it could easily create an

[35] See e.g. the classical joined cases C-187/01 and C-385/01 *Gözütok and Brugge* ECR [2003] I-1354 and the more recent Gaspardini C-467/04 judgment of 28 September 2006 not yet reported (available via http://eur-lex.europa.eu/JURISIndex.do?ihmlang=en)

[36] Compare Art 6 and Art 7 ECHR.

[37] An often stated argument against this is that ECHR provides a sufficient standard. But as is so well known all the Member States have – and will probably continue to have – cases pending before the ECtHR.

[38] Petter Asp et al, *Double Criminality and Transnational Measures in EU Criminal Proceedings*, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTDOGMATIK (ZIS) 512 (2006) .

[39] In the present context see Carl Lebeck, National constitutional control and the limits of European integration, PUBLIC LAW 23 (2007) who in contrast to most comments on the German Constitutional Court's approach to the EAW, recently argued that the German Constitutional Court added an additional legitimacy aspect to European law by insisting on scrutinizing EU law standards.

[40] One could read between the lines here that it is a fear that further approximation will result in an increased repression within the Union, which is especially problematic for, e.g., the Nordic countries. P Asp et al, *Double Criminality and Transnational Measures in EU Criminal Proceedings*, ZIS 512 (2006)

imbalance, where some Member States in less clear cases (concerning the somewhat adjustable notion of fair trial) choose to comply with fidelity at the possible expense of the individual (and. procedural legality).[41] This is probably the reason why it was recently emphasized that it is not enough that mutual trust is gained between judicial authorities and their officials within the EU, as in order to realise a common area of freedom, security and justice – trust into each others legal systems that guarantee civil liberties, fundamental freedoms and the rule of law must exist between the citizens of Europe.[42] But the Court in *Advocaten voor der Wereld* did not touch upon *Pupino*. One could of course accept this and argue that the reason why the Court did not elaborate on it was that there was simply no need in the present context. Or conversely, it is tempting to think that this really is one of the most difficult matters that confront the EU and that the Court therefore avoided diving into it, also as it was not explicitly on the agenda. Nonetheless, it is arguably disappointing that the Court did not provide a more enlightening legal reasoning as to why the EAW – as it currently stands – is reconcilable with legality and fundamental rights more broadly. In this way, the Court adopts a very narrow definition of what legality really is.[43]

E. Dell'Orto and the wider constitutional debate

The recent case of *Dell'Orto*[44] is perhaps more instructive when trying to grasp what is constitutionally afoot. Curiously, this case concerns once again the framework decision on the protection of victims (as in *Pupino*) and the setting is once again Italy. But *Dell'Orto,* has a further component, namely the framework decision is supplemented by a directive on state compensation for victims.[45] This directive requires the Member States to establish a compensations scheme but leaves the methods for doing so to the national systems. Although there already is a degree of approximation in this field due to a Council of Europe Convention – the EU measures at stake have been accused of being too vague which leaves room for

[41] Compare Valsamis Mitselegas, *Constitutional principles of the European Community and European Criminal Law*, EUROPEAN JOURNAL OF LAW REFORM 303 (2007)

[42] ELSPETH GUILD & FLORIAN GEYER, JUSTICE AND HOME AFFAIRS ISSUES AT THE EUROPEAN UNION LEVEL written evidence to Select Committee on Home Affairs, (November 2006)available at Centre for European Policy Studies, http://www.ceps.eu/index3.php

[43] See in the context of *Pupino*, Valsamis Mitselegas 'Constitutional principles of the European Community and European Criminal Law', ELJR (2007) 303 and also my own attempt, *Recent Developments in the Area of European Criminal Law*, 14 MAASTRICHT J. EUR. & COMP. L. 15 (2007)

[44] C-467/05 *Giovanni Dell'Orto*, opinion of AG Julianne Kokott delivered on 8 March 2007 and judgment of 28 June 2007.

[45] Directive 2004/80 OJ 2004 L 261/15

interpretation questions. [46] This was also the issue that arose in *Dell' Orto*. More specifically, the question asked by the national court was whether the right to compensation from the offender applies to any party affected by the crime in question, and whether the Italian court could interpret 'victim of crime' in line with a framework decision in the light of the directive at hand even though these measures were adopted after the crime in issue had been committed.

Although the case is interesting also from the perspective of whether the Court has jurisdiction to answer the case (the AG and subsequently the Court concluded, following *Pupino,* that such jurisdiction was not manifestly impossible) and whether procedural rules applies to the matter at hand although the crime was committed before the time in issue, these questions will, however, not be analyzed here. What will be looked at instead are the thinning lines between the pillars. Accordingly, AG Kokott in her opinion stated that to the extent that Union law is influenced by Community law, it shall in principle have the same meaning as supranational law. On the other hand, she stressed the fact that in accordance with the message of Art 47 EU, which makes clear that the Community should be safeguarded, that must also mean the opposite, i.e. that EC principles should not undermine the special character of the EU Treaty which rests on intergovernmental co-operation. However, she immediately concluded that it is the very special nature of the third pillar that could justify the need for greater consistency so that third pillar measures legitimately could be interpreted in the light of the first pillar. In fact, her approach appears (naturally) ambivalent, in the sense that she underlines the need of creating a more conform approach to the Union as a whole, but at the same time she emphasizes that there are still significant differences between the pillars which should not be underestimated.

Thus, the Court in *Dell'Orto* took a step back. But how far that step really was is arguably less clear. According to the Court the matter at stake was obvious: i.e. the directive and the framework decision in issue were so fundamentally different that '*not even supposing that the directive was capable of having any effect on the interpretation of the provision of a framework decision ….[they] are not on any analysis linked in a manner which could call for a uniform interpretation in question.*'[47] Surely, anything else would have been too '*contra legem*'. Nonetheless it once again demonstrates, not only the differences between the willingness of the national courts in the various Member States (where Italian courts appear very EU Court friendly) but also that this is an area signified by ad hoc approaches. It might therefore be too early to elaborate the exact impact of this ruling.

[46] See the discussion in Peers, (note 15) at 451

[47] C-467/05 *Giovanni Dell'Orto,* Judgment of 28 June 2007 not yet reported (available via http://eur-lex.europa.eu/JURISIndex.do?ihmlang=en)

In any case, what is especially interesting from the perspective of European criminal law powers is the fact that AG Kokott briefly discussed the possibility that the framework decision at stake, nevertheless, could be contrary to the competences of the Union, but she then reaches the opinion that this is not a question which the Court should rule on *ex officio* anyway. Yet this seems to be in slight contrast with her earlier expressed view in the *Pupino* case itself, where she stressed the fact that art 31 EU is not exhaustive.[48] Indeed it should be recalled that in the *Pupino* case the AG argued that the framework decision at stake was valid (although she admittedly also briefly stressed the fact that there were doubts concerning the competence) for several reasons, namely; firstly, that the protection of victims is important for the safety of citizens, secondly that such a competence could increase judicial cooperation since the evidence in question could be used in all Member States and thirdly that the third pillar's demand of unanimity prevents Member States from being bound without their consent.[49] The Court did however not engage in any such discussion – neither in *Pupino* nor in *Dell'Orto*. Certainly, this nonetheless illuminates the still blurred situation of the division of competences, not only between the EC and the EU, but also between the EU and the Member States.[50]

Finally, and as a further complexity, what could be noted in present context is perhaps that it is far from certain that the victim should be a party in the criminal law process at all.[51] In fact, in many legal EU systems this issue is a civil law dispute separate from the criminal law proceedings (which only involves the defendant and the prosecutor as the parties in the process). So the EU has made a clear theoretical choice here, although the issue is far from obvious. The reason for this is according to the framework decision, which at least addresses the matter, to speed up the judicial process that often includes a long waiting time for the victim. This is also one of the reasons why the Italian court asked if a legal person could be counted as

[48] Opinion of AG Kokott delivered on 11 November 2004, in Case 105/03, *Criminal proceedings against Maria* [2005] ECR I-5285. For a comment on §§ 48-52 of the AG's opinion in *Pupino,* see eg, Hiejke Hijmans, 'The third pillar in practice: coping with inadequacies Information sharing between Member States' paper distributed at the ERA conference EU COURT IN THE AREA OF FREEDOM, SECURITY AND JUSTICE: RECENT DEVELOPMENTS, Trier 14-15 June 2007.

[49] §§ 48-52 Opinion of AG Kokott delivered on 11 November 2004, in Case 105/03, *Criminal proceedings against Maria* [2005] ECR I-5285

[50] Another question is that it is far from crystal clear that the victim should be a legal actor in the criminal law process at all. In fact, in many EU legal systems this issue is a civil law dispute separate from the criminal law proceedings (which only involves the defendant and the prosecutor as the parties in the process). It appears the EU has made a clear theoretical choice here.

[51] See e.g. ANDREW ASHWORTH, GENERAL PRINCIPLES OF CRIMINAL LAW (2006)

a 'victim' although the framework decision did not include it explicitly. However, as indicated, neither the Court nor the AG agreed by stating that only physical persons are to be regarded as victims in line with the above stated framework decision and the directive as it otherwise would extend its wording beyond the scope of the measure. Yet it once again implicates that there are many questions in EU criminal law which are not sufficiently answered or analyzed during the legislative process, in order to establish why they are treated in a certain way at the European level.[52]

F. Brief concluding remarks

It can easily be concluded that things are happening very quickly in the area of European criminal law. The danger is when in the pursuit of substantial changes even basic concepts which are traditionally recognized in national criminal law (or at least should be!) seem to be forgotten when trying to solve the constitutional chaos which signifies the third pillar.

As noted above, interestingly, AG Kokott in her opinion in *Dell'Orto* mentioned the importance of not undermining the disparities between the pillars. This was also the approach adopted by AG Mazak in his recent opinion in the so-called *Ship source pollution* case (the first follow up to the notorious C-176/03, *Commission v. Council*[53]), concerning the division of competences between the first and the third pillar in criminal law, who rather aggressively argued that the EC Treaty remains superior to the third pillar domain – Art 47 EU still bites.[54] The Court in this case essentially followed the outcome in the earlier C-176/03, *Commission v Council* and ruled (and thereby concluded that the criminal law was a first pillar issue policed by art 47 EU) that the EC legislator has the power to impose criminal penalties, in the pursuance of the protection of the environment, in order to ensure that the rules which it lay down are fully effective.[55]

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[52] Other EU criminal law examples, see e.g. Maria Kaiafa Gbandi, *The development towards Harmonization within Criminal Law in the European Union – A Citzen's Perspective,* EUROPEAN JOURNAL OF CRIMINAL LAW AND CRIMINAL JUSTICE,239 (2001)

[53] C-176/03, *Commission v. Council,* [2005] ECR I-7879

[54] C-440/05 *Commission v Council,* Opinion of AG Mazak on 28 June 2007. See also C-91/05, and the opinion of AG Mengozzi delivered on 19 September 2007. Thanks to Steve Weatherill for pointing it out.

[55] C-440/05 *Commission v Council* Judgment of 23 October 2007 not yet reported (available via http://eur-lex.europa.eu/JURISIndex.do?ihmlang=en)

, concerning Art 80 (2) EC. As is well known the earlier C-176/03 *Commission v Council* concerned Art 175 EC.

Returning to the core of this short paper: the implications of the *Pupino* ruling and the meaning of decisions delivered in the wake of it. To the extent that it is possible to compare the above discussed judgments of *Advocaten voor der Wereld* and *Dell'Orto* a few general observations are merited as arguably these cases are both similar and different. They are similar in the sense that they were both expected to shed a clarifying light on the scope of *Pupino* and – as hopefully has been shown – they did not really do that. But they are also different. Because, while the Court in *Advocaten voor der Wereled* appears to have been wearing 'blinkers' as regards the current problems with mutual recognition[56] in criminal law, the judgment in *Dell'Orto* is much more cautious although it is true that this does not rule out a more extensive application of an *Pupino* dogma should the setting be different. So the reader who wants to grasp the slippery impact of *Pupino* in the area of the third pillar more generally, is therefore advised to turn to the recent (so-called terrorist sanction cases) judgments of *OMPI*[57], *Gestoras Pro Amenstia* and *Segio*[58] where the notion of loyalty as developed in *Pupino* has been given surprisingly strong powers as being 'especially binding' in the third pillar. That is however the subject for another paper. The question here is instead whether the Reform Treaty will constitute a sufficient panacea of European criminal law. Needless to say, this remains to be seen. Notwithstanding this, it seems already now clear that a formal abolition of the pillar structure and an extension of the Court's jurisdiction, as previously stated, are not a good enough solution from the perspective of legitimacy and legality in the hunt for further Europeanization of criminal law. In any event, in the meantime a tentative approach is needed so that the third pillar does not get divorced from the mission – and promise – of creating an area of freedom, security and justice.[59]

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[56] For a recent special issue on the challenges of mutual recognition in general the recent special issue in JEPP, e.g. the summarizing paper by Miguel Maduro *So close and yet so far: the paradoxes of mutual recognition*, 14 JOURNAL OF EUROPEAN PUBLIC POLICY 814 (2007) and especially Sandra Lavenex, *Mutual recognition and the monopoly of force: limits of the single market analogy*, 14 JEEP 762 (2007)

[57] T 228/02, *Organisation des Modjahedines du peuple d'Iran v. Council,* delivered on 12 December 2006 nyr. § 123 of the judgment states: 'The Court notes that, under Article 10 EC, relations between the Member States and the Community institutions are governed by reciprocal duties to cooperate in good faith (see Case C-339/00 *Ireland* v *Commission* [2003] ECR I-11757, §§ 71 and 72, and case-law cited). That principle is of general application and is especially binding in the area of JHA governed by Title VI of the EU Treaty, which is moreover entirely based on cooperation between the Member States and the institutions (Case C-105/03 *Pupino* [2005] ECR I-5285, § 42).'

[58] Case C-354/04 and C-355/04, *Gestoras Pro Amnistía, and others v. Council*, *and Segi* delivered on 27 February 2007 not yet reported (available via http://eur-lex.europa.eu/JURISIndex.do?ihmlang=en

[59] See e.g. Terry Balzacq & Sergio Carrera, *The Hague Programme: The Long Road to Freedom, Security and Justice,* SECURITY V FREEDOM – A CHALLENGE TO EUROPE'S FUTURE, 1 (Therry Balzacq & Sergio Carrera, eds, 2006),