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OIKEUSTURVA JA HALLINTO
LEGAL PROTECTION AND ADMINISTRATION

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ENVIRONMENT AND SOCIETY

Samuli Miettinen

European Criminal Law in National Courts: The Application of Limits to Direct and Indirect Effect

Introduction and general themes

In the discourse on 'European criminal law', it is tempting to overlook the foundational limits on the extent to which the Union's legal system has direct effects on individuals. The Court has historically been recluctant to extend horizontal direct effect to anything beyond the most fundamental EC Treaty principles. This core set of principles includes non-discrimination. However, even then the Court has absolutely refused to acknowledge the direct effect of directives in 'horisontal' situations.[3] Effectiveness clearly rarely, if ever, overrides requirements of legality. It is clear that what one might call EU criminal law remains an intergovernmental, rather than a supranational legal framework. This remains the case after the Lisbon Reform Treaty, since the principled limits on the legal effects of directives and framework decisions, discussed below, are currently similar. Whilst the subsequent Treaty amendments provide for the possibility of minimum rules on both definitions and on sanctions and thus overcome some present debates on the scope and precision of the Union's criminal compe-

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1 Article 34(2)(b) EU Treaty. *Jolande Prinssen*: Domestic Legal Effects of EU Criminal Law: A Transfer of EC Law Doctrines? in Obradovic, D. – Lavranos, N., Interface between EU Law and National Law (Europa Law Publishing, Groningen, 2007) pp. 313–331 at p. 324. Prinssen suggests national law could be used to overcome this limit; however, it is submitted that as such, it could fall foul of the general principles required in the application of EU law, in particular that of legal certainty.

2 Notably in Article 82(1)(a) TFEU, where the Treaty calls for 'rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions'. I am indebted to Professor Anne Weyembergh for this insight.

3 F.ex. *Anthony Arnull:* The European Union and Its Court of Justice 2nd ed. (OUP, Oxford, 2006) pp. 172–174 and 198–202.

tence,[4] they also clarify that directives, rather than regulations, are the instrument with which the Union is competent to harmonise criminal law.[5] It might be more appropriate to speak of the Union-derived obligations of states to enact criminal law, rather than a 'criminal law' which implies something much more by way of individual obligations. In the light of the Court's integrationist approach towards the pillar structure and its nominal disassembly by the Lisbon Treaty, the retained emphasis on intergovernmentalism is clearly not attributable to the distinct legal nature of third pillar acts. The rift is deeper than this, and touches at the current limits of first pillar – classic Community law – between the logic of the internal market effectiveness paradigm and the rule of law without which that internal market can not achieve its broader, if sometimes implicit, aims.

Review of some foundational rulings

The judicial invention of direct effect in the context of Community law has from the outset been difficult to reconcile with the Treaty dichotomy between directly applicable rules, namely Regulations, and those which are not directly applicable.[6] What, precisely, the concept of 'direct effect' means, has been subject to a sustained academic discussion.[7] It has been traditionally been understood as the capacity of a provision of Community law to create rights for individuals. Winter distinguished direct effect, the "problem as to when a Community provision is susceptible of receiving judicial enforcement", from direct applicability, as "the method of incorporation of (secondary) Community Law into the municipal legal order".[8] Prechal argues that the modern notion of direct effect accepted by the ECJ is broader than this, and relates to "an obligation to apply" a Community norm either

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[4] See Case C-440/05 *Commission v Council (Ship Source Pollution Framework Decision)*, where the ECJ considered that ancillary Community criminal competence related to criminalization and relevant minimum definitions, but not to the setting of penalties.

[5] F.ex. Article 83(1) and 83(2) of the consolidated Treaty on the Functioning of the European Union.

[6] Article 249 EC.

[7] *Bruno de Witte:* Direct Effect, Supremacy and the Nature of the Legal Order in Craig, P – De Burca, G (eds), The Evolution of EU Law (OUP, Oxford, 1999).

[8] *J. A. Winter:* Direct Applicability and direct effect-two distinct and different concepts in Community law (1972) 9 Common Market Law Review 425. *Arnull* 2006, p. 186.

directly or as the standard for judicial review.[9] Whichever of the definitions is adopted, the underlying rationale is that the useful effect of Community provisions, the effectiveness of a Community norm, requires that individuals are able to rely upon it even where a Member State has not fulfilled its Treaty obligations. Conversely, a Member State cannot rely on its own failure to implement those obligations.[10]

The duty of consistent interpretation has a similar pedigree, rooted in notions of effectiveness. In *von Colson,* the Court fashioned an obligation for national courts to interpret domestic law in the light of Community law from the Article 10 duty of loyal cooperation. Following *von Colson*, 'national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the [binding] result referred to in [Article 249]'.[11] In *Pupino*, that requirement was transposed to Framework Decisions. This was despite the lack of an express duty of loyal cooperation in the EU Treaty and the express denial of direct effect in Article 34(2)(b) of that Treaty. The duty of consistent interpretation required neither direct effect nor an express duty of loyal cooperation. Rather, since 'it would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation' did not exist,[12] it was implied by the broader objectives of the Union, namely the 'process of creating an ever closer union among the peoples of Europe'.[13] This duty applies to the entirety of domestic law, rather than rules enacted in order to implement a particular Union legal rule.[14]

Community norms can also be used as an avenue for the judicial review of national provisions. The seminal case in this respect is *CIA Security v Signalson and Securitel,* where the Court observed that a directive could in practice invalidate national rules that were contrary to its provisions.[15] Fail-

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[9] *Sacha Prechal:* Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union in Barnard, C., The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate (OUP, Oxford, 2007) pp. 35–69 at p. 38.

[10] Case 148/78 *Ratti* [1979] ECR 1629.

[11] Case 14/83 *von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891 paragraph 26.

[12] *Pupino* paragraph 42.

[13] *Pupino* paragraph 41.

[14] Joined Cases C-397/01 and C-403/01 *Pfeiffer* [2004] ECR I-8835 paragraph 115.

[15] Case C-194/94 *CIA Security* [1996] ECR I-2201.

ure of the Member State to abide by the directive's obligation to notify national standards endangered the effectiveness of Community law, and such 'constitute[d] a substantial procedural defect such as to render the technical regulations in question inapplicable to individuals'.[16] In *Unilever*, the Court noted that this type of review did not constitute horizontal direct effect, because the directive 'does not in any way define the substantive scope of the legal rule… [and therefore] creates neither rights nor obligations for individuals'.[17]

Limiting the Doctrines

The doctrines which seek to emphasise the effect of Community, and now with respect to sympathetic interpretation, Union law are tempered by rationales derived from both that paradigm of effectiveness as well as the more general fundamental rights jurisprudence of the Court. The consequence is that in the application of the doctrines of direct effect, sympathetic interpretation and judicial review based on Community norms, a balancing exercise must be carried out between the interests of effectiveness and uniformity, on the one hand, and of fundamental rights and similar limits, on the other. What follows is a brief overview of some of these, and a critique of the substantial discretion that appears to be granted to national courts when carrying out this balancing exercise.

Some basic limits to direct and indirect effect could be said to derive from the reasoning based on the 'effectiveness' of Community law. In *Ratti*, the Court observed that a Member State which had committed a breach of the Treaty must not be permitted to rely on its breach.[18] The horizontality rules that have evolved since can in many cases be attributed to an application of this estoppel-like rule. In *Marshall*, the Court noted that a directive could not of itself impose obligations on individuals.[19] The practical effect is that there must be something more, even if some horizontal effects were

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[16] *CIA Security* paragraph 48.

[17] Case C-443/98 *Unilever* [2000] ECR I-7535 paragraph 51.

[18] Case 148/78 *Ratti* [1979] ECR 1629. *Deirdre Curtin:* The province of government: delimiting the direct effect of directives in the common law context (1990) 15 European Law Review 195.

[19] Case 152/84 *Marshall v Southampton Area Health Authority* [1986] ECR 723.

not precluded. Prechal distils the limits to the effects of directives on individuals as threefold: firstly, a textual argument, that the EC Treaty itself states that directives are binding upon Member States; secondly, a constitutional argument that acceptance of horizontal direct effect would amount to "a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations"; and one of legal certainty, that the principle of legal certainty precludes directives from creating obligations for individuals.[20]

The third category can be located within the Court's broader fundamental rights jurisprudence. This collection of diverse norms tempers the application of the Union's rules even though they do not in themselves generally create enforceable rights as such.[21] Whist the Court generally takes the uniformity and effectiveness of Community law seriously, in outlining these principles, the Court has consistently led national courts to believe that measuring the legal effects of its decisions against these Union principles is a matter for the national court in applying the legal principles to the case under consideration. This leads to a number of open questions as to where the limits to the effectiveness-inspired doctrines are reached, and when, if ever, the Court is prepared to state that, on the facts, fundamental rights preclude the imputation of legal effects such as direct or indirect effect. Where the Court does actively police the boundaries between effectiveness and fundamental rights, and particularly where it can be argued that the Court would implicitly permit a contrary judgment by a national court, it undermines two presumptions upon which mutual trust is founded: the rather charitable presumption that fundamental rights are not only respected in the Member States and the assumption that there is indeed a minimum level of protection that entitles one to believe that fundamental rights are uniformly respected throughout the Union. Mutual trust is a cornerstone of the Union's Area of Freedom, Security, and Justice. Without such trust it is difficult to operate a policy based on mutual recognition. Endangering that trust will therefore also endanger the effective administration of the AFSJ, since Member States that do not trust in a satisfactorily universal respect for those

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[20] *Prechal* 2007, at p. 47, quoting in (b) *Faccini Dori* paragraph 24 and in (c) referring to *Wells* para 56.

[21] See generally *Andrew Williams*: Respecting Fundamental Rights in the New Union: A Review in Barnard, C., The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate (OUP, Oxford, 2007) pp. 71–107.

rights are unlikely to respect requests for co-operation emanating from other Member States.[22]

In some early examples of the general principles of Community law, the Court observed that these included both the principle of legality and the principle of non-retroactivity of criminal penalties. In *Kolpinghuis Nijmegen,* the question arose whether a state could rely on the provisions of an unimplemented directive against an individual. Although described by the Commission as "inverse vertical effect" rather than horizontal effect,[23] the Court observed that 'a directive cannot, of itself and independently of a law adopted for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive'.[24] In relation to the obligations of consistent interpretation, it noted that those duties were 'limited by the general principles of law which form part of Community law and in particular the principles of legal certainty and [non-]retroactivity'.[25] As a consequence, it implicitly recognised that those general principles were a more significant consideration than the effectiveness of directives. As the Court unequivocally observed in *Wells*, 'the principle of legal certainty prevents directives from creating obligations for individuals. For them, the provisions of a directive can only create rights'.[26]

The principle whereby sympathetic interpretation could not amount to deriving an unimplemented obligation by interpretation, can be illustrated by the *Arcaro* judgment. In *Arcaro*, the Court observed that the 'obligation of the national court to refer to the content of the directive when interpreting the relevant rules of its own national law' is precluded 'where such an interpretation leads to the imposition of an individual of an obligation laid down by a directive which has not been transposed'[27]. Thus, one could argue that where the directive lays down a detailed obligation, perhaps even one otherwise capable of direct effect, that obligation can not itself be derived through the method of sympathetic interpretation. Direct effect and

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[22] For one prominent example, see the literature on the implementation of Recital 12 of the European Arrest Warrant Framework Decision.

[23] Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969 at 3974. *Arnull* 2006, p. 218.

[24] *Kolpinghuis Nijmegen* paragraph 14.

[25] *Kolpinghuis Nijmegen* paragraph 13.

[26] Case C-201/02, *Wells* [2004] ECR I-723 paragraph 56. *Arnull* 2006, p. 248.

[27] Case C-168/95 *Arcaro* [1996] ECR I-4705.

sympathetic interpretation would thus appear mutually exclusive, since if an obligation might be capable of direct effect, an application of *Arcaro* dictates that it may not be capable of an equivalent interpretative effect.

Also in *Arcaro*, the Court noted that the principle of consistent interpretation could not arise where 'it has the effect of determining or aggravating, on the basis of the directive and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that directive's provisions'.[28] Arnull attributes this effect to the estoppel principle, and argues that in horizontal proceedings between individuals, 'the duty of construction continues to apply in its full vigour'.[29] This would certainly seem possible in respect of satisfying the estoppel principle, but it seems likely that deriving criminal law obligations on the basis of unimplemented directives could still be challengable as violating the general principles, in particular legal certainty and non-retroactivity. The principle of *nullum crimen, nulla poena sine lege* is, however qualified by some subsequent case law where so long as a pre-existing offence could be found, the alteration of procedural rules through a requirement of consistent interpretation does not infringe that rule.[30]

The question then arises whether an individual should be entitled to rely on unimplemented rules of Community law against other individuals. The Court has consistently denied that 'horisontal direct effect' is possible in the case of directives. In *Marshall*, it observed that 'a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person.'[31] It revisited, and confirmed this in *Faccini Dori*, as a consequence of which the preclusion of horizontal direct effect seems settled for the time being.[32] In relation to Treaty provisions, the Court has been slightly more permissive. If a Treaty provision were to develop a foundational character that was clearly intended to be invoked against individuals[33] or which was similar to the provisions on discrimination that have achieved horizontal application despite

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[28] *Arcaro* paragraph 42.

[29] *Arnull* 2006 at p. 219, citing *Webb v EMO Air Cargo (UK) Ltd* [1995] IRLR 645.

[30] See f.ex. Case C-105/03 *Pupino* [2005] ECR I-5285.

[31] Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority*

[32] Case C-91/92 *Faccini Dori v Recreb* ECR I-3325.

[33] Case 127/73 *BRT v SABAM* [1974] ECR 51, on the direct effect of competition law provisions.

being formally addressed to Member States,[34] this question may require further examination.

Some of the Court's recent case law on the legality principle is problematic. In *Niselli* the Court examined how a directive might, not of itself but as a result of its effects on the validity of domestic provisions, alter the criminal liability of a defendant. In essence, domestic law made failure to obtain authorisation a criminal offence, but subsequently decriminalised the defendant's behaviour. This decriminalisation was incompatible with Community law, and the question arose whether Community law could invalidate the decriminalisation, therefore retaining the prior rules by which the defendant's conduct would have been criminal. Whilst Advocate General Kokott advocated a distinction between exclusionary and substituting legal effects, therefore taking the view that the application of the prior domestic law which was conformant to the Community requirement was possible. The Court was careful to note that the exclusion of the later norm in *Niselli* did not of itself impose the criminal law obligation, but rather that it simply precluded the later decriminalisation.[35]

This could now be interpreted as a limit to the principle of retroactive application of the more lenient penalty in *Berlusconi*; namely that where the more lenient penalty was contrary to EC law, the prior law in force at the time of the commission of the offence could be relied upon.[36] In the *Berlusconi* case, the Court in an analogous later situation observed that where setting aside more lenient domestic law, even where that more lenient rule was contrary to Community law, resulted in a more onerous burden on a defendant, this would be contrary to the principle of non-retroactivity, thus arguably overruling *Niselli*.[37]

Article 6 of the European Convention requires fairness in criminal proceedings. In *Pupino,* the Court of Justice noted that this required an assessment of the proceedings as a whole, rather than the application or preclusion of a particular rule.[38] Ensuring that the proceedings were fair was a

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[34] Case 43/75 *Defrenne v SABENA* [1976] ECR 455.

[35] Case C-457/02 *Niselli* [2004] ECR I-10853 paragraphs 29 and 30.

[36] For an alternative interpretation, see *Arnull* 2006 pp. 248–249, who argues that the judgment leaves "it to the national court to decide whether the defendant should be dealt with on the basis of the law in force at the time of the facts or the trial".

[37] Joined Cases C-387/01 et seq *Berlusconi* [2005] ECR I-3565 paragraphs 76 and 77.

[38] *Pupino* paragraph 60.

matter for the national court, and even though without reference to the Union norm, particular types of evidence could not be gathered, use of such evidence in the absence of a national provision was not in itself considered by the Court to breach Article 6. This means that in practice, under EU law the question of whether a Member State complies with Article 6 ECHR is for that Member State, rather than the European Court of Justice. This principle in turn makes one suspect that the *Bosphorus* test remains unsatisfied, and that the Member State's application of EU law would be considered on a challenge to the ECtHR.[39]

In *Pupino,* the Court observed that whilst there was an obligation to interpret domestic law in conformity with framework decisions, 'the principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem*.'[40] The appreciation of whether this was the case, however, can be a question for the domestic court which is therefore exclusively in the position of determining its own compliance with the principle of legality. In *Pupino*, the Court demonstrated a permissive view towards the discretion of the national court, observing that the facts of the case did not demonstrate that a *contra legem* interpretation was inevitable.[41]

Critique

In its case law outlining the limits of direct effect, sympathetic interpretation and judicial review based on Community law provisions, the Court has established a number of seemingly unequivocal rules that are either directly or indirectly based on the fundamental rights which it has recognised as a part of both Community and Union law. It has posed a number of counterfactuals which limit the application of the effectiveness-increasing doctrines, but has left the evaluation of compatibility between effectiveness doctrines and fundamental rights-principles to national courts. This raises concerns regarding the extent to which Union citizens can be deemed to enjoy an adequately equivalent level of protection before domestic courts, in partic-

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[39] *Bosphorus Hava Yollari Turizm ve Ticaret AS v Ireland* No. 45036/98, paragraphs 161–166.

[40] *Pupino* paragraph 47.

[41] *Pupino* paragraph 48.

ular whether the limits expressed by the ECJ are nominal or real, and whether there are appropriate safeguards to ensure that domestic courts do not misuse their considerable discretion. There are also concerns regarding the adequate uniformity of fundamental rights protections, since for example conform-interpretation can be tempered by *domestic*, rather than EU-derived or influenced, rules.[42]

In the field of criminal law, the ECJ has developed the limits to the doctrines in a way that potentially leaves the system open to abuse. If and when such abuse occurs, aggrieved individuals have few effective remedies. Member States' domestic courts are not well placed to make this judgment. The reasons for this concern vary from those domestic courts' possibly overenthusiastic acceptance of supremacy and seeking to impose sanctions on defendants in cases where domestic legislation is inadequate, to more traditional concerns over the uniform application of the *acquis communautaire*. It could be argued that domestic courts are in essence entrusted, in the criminal sphere, with a greater degree of autonomy than might be the case with similar issues in Community civil law and this degree of autonomy prejudices both the development of Community law and the fundamental rights of defendants. Domestic courts are not well placed to balance principles derived from Community law with each other, particularly when the balancing exercise is between effectiveness of the legal order and the Community-derived fundamental rights and other foundational doctrinal issues. Nor is it beyond doubt that they will give due consideration to the limits to the doctrines, given that the European Court of Justice sees its role as simply determining whether, on the facts, it can be determined that an effectiveness-inspired decision is absolutely precluded by some other norm.

In the context of conforming interpretation, the level of protection will in all likelihood substantially vary depending on the totality of domestic legal provisions. In *Adeneler*, the Grand Chamber of the Court of Justice reiterated its brief observations in *Pupino* on the limits of the requirement for sympathetic interpretation.[43] After noting the existence of that requirement to

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[42] See for example C-268/86 *Impact* judgment of the Grand Chamber of 15.4.2008, not yet reported, paragraph 102.

[43] Case C-212/04 *Adeneler and others v ELOG,* Judgment of the Grand Chamber, 4. July, 2006. Whilst the case involved Directive 1999/70/EC, it is clear from cases cited above that the rules apply *mutatis mutandis* to framework decisions. Indeed, the Court made reference to this aspect of *Pupino* in paragraph 110.

'ensure the full effectiveness of Community law'[44] and the general requirements of legal certainty and non-retroactivity,[45] it stated that national courts must 'do whatever lies within their jurisdiction, taking the *whole body of domestic law* into consideration and applying the interpretative methods recognised by domestic law' when interpreting national law in conformity with Union instruments.[46] As a consequence, national systems may employ wildly variable standards of protection, and their choice to do so is not in itself contrary to ECJ jurisprudence. To the contrary, the assessment of whether fundamental rights or domestic law precludes a particular invocation of a Union rule is left to the appreciation of domestic courts.

The Court has already demonstrated a *laissez-faire* approach to national courts' assessments of fundamental rights, since the factual assessment of whether a given method of interpretation is contrary to the fundamental rights of defendants in criminal proceedings is essentially left to the Member States. In *Pupino*, the Court suggested that the relevant national procedural regulations could be extended to categories of victims recognised as vulnerable under its interpretation of the framework decision, but not under national law.[47] This seems to border on an interpretation *contra legem* and calls into question whether the Court of Justice can be trusted to interpret the compatibility of Union law with fundamental rights as the European Court of Human Rights has recently suggested,[48] but nevertheless signals the great degree of latitude available to national courts under the requirements of sympathetic interpretation. One wonders whether a similar margin of appreciation would be extended where the framework decision or, following the entry into force of the Lisbon Treaty, a directive seeks to provide positive rights.[49] It seems inadequate, in order to avoid the estoppel rule from applying, to simply state that in *Pupino,* the rights of victims, rather than the State's reliance on an unimplemented framework decision, were balanced against the protections afforded to defendants.

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[44] *Adeneler* paragraph 109.

[45] *Adeneler* paragraph 110.

[46] *Adeneler* paragraph 111.

[47] *Pupino* paragraph 48.

[48] *Bosphorus Hava Yollari Turizm ve Ticaret AS v Ireland* No. 45036/98, 30 June 2005.

[49] COM (2004) 328 2004/0113/CNS Proposal for Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, as of May 2008 last discussed by the JHA Council in session 2794 on April 19,2007.

Secondly, in *Pupino*, the Court also suggested that it was prepared to uphold a rather formalistic delimitation between criminal law and criminal procedure to the detriment of defendants. The rights of defendants were to be protected in so far as the principle of legality applied to the former, but according to the Court were not under assault where the rules applied merely to 'the conduct of proceedings and the means of taking evidence'.[50] Amending the rules of criminal procedure by way of a sympathetic interpretation in accordance with a framework decision was not deemed to affect the rights of the defendant. Furthermore, the assessment of whether the proceedings were, as a result, fair within the meaning of Article 6 ECHR, was delegated to the Member State's authorities in light the totality of the case rather than the fairness of that particular invocation of Union rules. Taking this analytical framework to one logical extreme, it could be argued on this basis that the amendment or repeal of a statute of limitations on the basis of a Union rule could also constitute a procedural, rather than a substantive change to the detriment of the defendant.[51] It is very difficult to accept that this does not materially affect defendants' rights, or pose the possibility of an infringement of the relevant ECHR rules on the fairness of the criminal process despite rulings of the European Court of Human Rights that draw analogous distinctions[52] particularly since the application of the Convention principles is dependent not on the criminal law designation of those rules but on their punitive nature. At the very least, this could invite litigation raising the spectre of primacy in the EU pillars where a framework decision requires a sympathetic interpretation that could be seen as contrary to domestic procedural rights but does not fall within the Court's demonstrably restrictive notion of what constitutes *contra legem*. The *Adeneler* and *Impact* judgments suggest that in the realm of civil obligations, the totality of domestic rules is instrumental in determining the extent to which a conform-interpretation is possible. This can do nothing but aggravate variable levels of fundamental rights protection within the Union as a whole, but also seems to signal that primacy of Union provisions is itself subject to the totality of domestic law.

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[50] *Pupino* paragraph 46.

[51] For a contrary view, see Joined Cases C-387/02 *et seq.*, *Berlusconi.*

[52] See for example the opinion of AG Colomer in Case C-303/05 *Advocaten voor de Wereld VZW* at point 105, reiterating the ECtHR distinction between extradition as a process and substantive rights.

Conclusions

In conclusion, the broad, principled requirement that neither directives nor framework decisions may in themselves 'determine or aggravate' an individual's liability under criminal law[53] must be taken with the substantial caveat that the substantive scope of an individual's criminal law liability is interpreted rather strictly by the European Court of Justice, and that it leaves assessments on whether this occurs to the Member States without providing the detailed guidance which it on occasion engages with in relation to hard internal market cases. These difficulties in the application of the limits to the effectiveness-based doctrines are likely to persist, and possibly be aggravated, following the entry into force of the Lisbon Treaty since it provides for directives, rather than Regulations, as the principal means of regulating criminal matters at the Union level.[54] The outcome is a variable framework of domestic provisions, domestic application of very general norms, and a refusal of the Court consider their merits in circumstances where it seems to the uninitiated that national courts are prepared to give precedence to the effectiveness paradigm over fundamental rights. In this light it would seem inappropriate to justify mutual trust on the basis of an implicit acceptance that fundamental rights are, in any event, protected.

Some potential solutions to this dilemma are clearly unworkable. One of these unworkable proposals is that the ECJ should investigate in every case the precise extent to which fundamental rights and effectiveness-derived obligations of application or interpretation conflict, and that it should in every case make that determination on behalf of the national court. This is not unworkable only because of the hallowed delimitations of power between the Union and the domestic courts, but because the sheer volume of such claims could demote the ECJ's principle-enunciating role to one of a court of first instance. As is discussed above, the converse seems equally unworkable because although it pays some nominal consideration to fundamental rights, the level of discretion in their application is suspect not only from the point of view of those rights but from the effectiveness and uniformity of the Union rules which are sought to be enforced.

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[53] *Pupino* paragraph 45.

[54] See Articles 82–83 of the Consolidated Version of the Treaty on the Functioning of the European Union, OJ C115/47 9.5.2008.

More workable, perhaps, is that as Spaventa has suggested, the Court should 'clearly state that the principle of consistent interpretation can never be used to the detriment of the defendant, regardless of the nature of the rules in question'.[55] A simple test to this effect could be that consistent interpretation could only be used at the behest of a defendant. Taking this same principle and applying it throughout the corpus of criminal law obligations, it might be appropriate for the Court to simply consider that any invocation of Union rules in cases with criminal law implications must be at the request of the defence. If this were to include the rules on direct effect and on judicial review based on Community instruments, such a procedural principle would ensure that none of the fundamental rights guarantees for defendants were breached, and would do so without resorting to the cumbersome case-by-case review that would otherwise be required. Whilst it must be acknowledged that this could be at the expense of victims' rights in unimplemented Union instruments, in civil cases victims remain unable to rely on unimplemented directives to the detriment of other individuals and as such it seems difficult to accept that criminal law obligations could be relied upon where for reasons of principle no civil law obligations could. The result would be a Union legal system which, at the risk of unenforceability, encouraged Member States to clearly transpose criminal law obligations into their domestic law and which also legitimated those rules through the application of the domestic legislative process. Most foundationally, the ensuing system would be one which reflected the expressed, long-standing preference for the fundamental rights of the defense as a pre-requisite of the rule of law upon which all else, including the effectiveness of the Union's other principles, must be founded.

[55] *Eleanor Spaventa*: Opening Pandora's Box, Some Reflections on the Constitutional Effects of the Decision in *Pupino* (2007) 3 European Constitutional Law Review 5-24 p. 13.