ARTICLES

Sliding Towards Supranationalism? The Constitutional Status of EU Framework Decisions after *Pupino*

By Carl Lebeck[*]

A. Introduction

The constitutional structure of the EU comprises two different components, one supranational (the European Community - EC) and one intergovernmental (the European Union).[1] The EC is referred to as the first pillar, while the European Union in turn consists of two parts referred to as the second and third pillars respectively: the Common Foreign and Security Policy is the second, and the Police & Judicial Cooperation in Criminal Matters (the so called "area of Freedom, Security and Justice" - PJCC). The role of the common European institutions was from the outset more limited not just when it – which is logical – comes to legislation, but also when it comes to consultation and preparation of legislation. However, the ECJ retained jurisdiction to interpret the meaning of so called framework decisions in order to create a basis for uniform implementation in national law of such decisions. This was particularly true in relation to the Police and Judicial Cooperation in Criminal Matters. Whereas the European Court of Justice (ECJ) was granted jurisdiction in PJCC, the other community institutions, notably the European Commission, were given roles to supervise the implementation of framework decisions - but their role in enforcing uniformity was limited compared to the role of the community institutions in EC-law.

However, both the EU and EC are unified by the fact that the ECJ has a considerable role as the final arbiter of legal disputes in both systems, and both systems can be seen as mechanisms to approximate legislation and coordinate policies in a way that spans the competencies of both orders. Both systems have a large degree of institutional cohesion and the roles of all the actors involved overlap in the EU and the EC. In recent years, there has been a tendency to "supranationalize" certain

[*] Jur.kand. (Stockholm), M.Sc., M.Jur. (Oxon), LL.M. candidate Harvard Law School 2006/07. Email: clebeck@law.harvard.edu; c_lebeck@hotmail.com. I am grateful for the linguistic suggestions of the editors, the remaining mistakes are all mine.

[1] Ulrich Everling, *The Structure of the European Union,* 29 COMMON MARKET LAW REVIEW 1074 (1992)

aspects of intergovernmental cooperation, something which also shows some of the instabilities of the split constitutional order of EC/EU. Here I will use the case *Maria Pupino*[2] which concerned the effect of framework decisions that have not been implemented in national law, as an example to analyse the process of supranationalization and some of its effects.

The ECJ decided in *Pupino* on the principles of legal interpretation that from the perspective of EU-law ought to be applied when framework decisions in the field of police and justice cooperation are applied in domestic courts. The judgment is of considerable legal interest since the ECJ has not before laid down any clear principles for the domestic interpretation of framework legislation (as opposed to the interpretation of EC-law where there is ample case law on issues of interpretation in domestic courts). In the present case the ECJ was asked to interpret a framework decision (Council Framework Decision 2001/220/JHA of 15 March 2001) adopted on the basis of Articles 31 and 34(2)(b) of the Treaty on European Union (TEU), the framework decision concerning the standing of victims in criminal proceedings. The *Tribunale di Firenze* (Florence Court of Justice) asked whether, under that framework decision, in criminal proceedings concerning physical injury caused to vulnerable victims (in this case five-year-old children), if the victims were to be examined as witnesses outside of the courtroom by recording their evidence beforehand despite the fact that the Italian code of criminal procedure does not provide for such a procedure in relation to the offence concerned.

The constitutional issue thus concerned the jurisdiction of the ECJ as well as the creation of an indirect form of direct applicability, although not direct effect since the framework decision did not create rights and duties for individuals on framework decision was introduced. I seek to use the case as a focal point to illustrate and analyse some problematic aspects of the legal structure of the EU, and argue that the attempts of ECJ to "supranationalize" the third pillar is successful partly since there are few effective countervailing institutional interests to restrain that tendency. First, I will discuss some of the institutional implications of the pillar structure; secondly I will discuss in greater detail the place of framework decisions within that constitutional structure. Finally I will conclude with what the decision says about the character of the EU constitutional structure.

[2] C-105/03 Pupino

B. The Pillar Structure and the Third Pillar in the EU Constitutional Structure

I. The pillar structure

The tripartite structure of the EU-law was partly created as a way to delimit the supranational influences, as well as to make way for national parliamentary control and European cooperation on a number of issues where it otherwise would have been politically unfeasible and in several member states constitutionally unacceptable.[3] The TEU was created as a supplementary system of integration in fields where the member states did not want to apply the supranational method of integration that had been applied in the fields of the common market and in the integration of coal, steel and nuclear industries.[4] The creation of the third pillar was based on the premise that the system should be "intergovernmental," which for practical purposes meant that the TEU would rely on the same general principles of international law that govern the other treaties.[5] The reason for distinguishing between these forms of governance in European cooperation is related to national concerns for the creation of a European constitutional order that would largely resemble a state. However, the institutional structure, sometimes characterised as "executive federalism," was to a great extent retained.[6]

The strength of supranational governance is that it creates a legal basis for uniformity and efficiency, whereas the dilemma is that supranational decision-making must presuppose that the forms that the supranational government takes

[3] Deirdre Curtin, *A Europe of Bits and Pieces*, 30 COMMON MARKET LAW REVIEW 17-63 (1993) Deirdre Curtin & Ige F Dekker, *EU – a Layered International Organisation*, *in* THE EVOLUTION OF EU LAW, 112-126 (Paul Craig & Gráinne de Búrca eds., 1999). Armin von Bogdandy, GUBERNATIVES RECHTSSETZUNG, (2000) 39-42, 488-496, Armin von Bogdandy, SUPRANATIONALER FÖDERALISMUS - EINE NEUE HERRSCHAFTSFORM (1999) 17-21, 44-50. Trevor C Hartley, *International Law and the Law of the European Union*, 72 BRITISH YEARBOOK OF INTERNATIONAL LAW 1, 3-10 (2001), Stefan Griller, *EU – Ein staatsrechtliches Monstrum? in* EUROPAWISSENSCHAFTEN 201, 203-209 (Gunnar Folke Schuppert, Ingolf Pernice & Ulrich R Haltern eds. 2006)

[4] Bruno de Witte, *The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral*, *in* THE EUROPEAN UNION AFTER AMSTERDAM – A LEGAL ANALYSIS 51, 54 (Tom Heuekels et al eds., 1998)

[5] Steve Peers, *Who's Judging the Watchmen? The Judicial System of the "Area of Freedom Security and Justice* 18 YEARBOOK OF EUROPEAN LAW 337, 343-348, 376-380 (1998). Eileen Denze, INTERGOVERNMENTAL PILLARS OF THE EUROPEAN UNION 265-267 (2001). Peter-Christian Müller-Graf, *Die Europäische Zusammenarbeit in den Bereichen Justiz und Inneres (JIZ)*, *in* FESTSCHRIFT FÜR ULRICH EVERLING, vol. II 925, 932-934 (Gil Carlos Rodriguez Iglesias et al. eds., 2000). Pieter Jan Kuijper, *The Evolution of the Third Pillar from Maastricht to the European Constitution: Institutional Aspects.* 41 COMMON MARKET LAW REVIEW 609, 611-613 (2004).

[6] Philipp Dann, PARLAMENTE IM EXEKUTIVFÖDERALISMUS (2004)

can be legitimate for such decision-making, or that political decision-making can be limited to a minimum number of representatives, or can be replaced by non-discretionary legal and administrative decision-making (which may expand as well as limit effectiveness). The other forms of governance integrated in the second and third pillars concern either issues of foreign and security policy, which have traditionally been regarded as "political questions" (second pillar) beyond the purview of judicial control and issues of criminal law (third pillar) which, because of their relevance to the core fundamental rights and traditionally high degree of judicial control, have not been formally transformed into a community competency.[7] In relation to the second pillar, the legal instruments have mainly been characterised as "soft law" (joint opinions and recommendations of the council) that have not been possible to review, and which although binding at least to some extent on the member states, are impossible to implement for the governments of the member states outside normal legislative and budgetary procedures. It is also clear that the centre of European integration remains the European Community in most issues, and that its binding and directly effective powers provide the most stable part of the constitutional order.

Where the European Community relies on the fact that the member states recognize that it shares their sovereign powers on certain areas in order to allow for more effective policy-making, the second and third pillars are different. The third pillar can be described as instituting a kind of network of legislative deliberations that, although seen as binding on the member states parliaments,' offer supposedly only limited remedies if the member states choose not to adopt them. The pillar structure, however, means that legislative deliberation and thus also legislative control and debates over the proposals in national public spheres become all but foreclosed since the essential debates over an issue are already settled on the European level. In a similar way the national executives control important executive powers over EU-law, whereas national parliaments, for practical purposes are reduced to veto-players - although their formal status has been that of joint decision-makers when it comes to framework decisions. However, national parliaments formally retained considerable powers in relation to the adoption of framework decisions, since legislation implementing framework decisions would not be constitutionally different from any other form of legislation. The same role applies more generally for national courts reviewing constitutionality of legislation implementing framework decisions. Among the judicial institutions, the ECJ has a more dynamic role in the sense that it has an institutional position that, although

[7] de Witte, *supra* note 4, 52-53

dependent on cooperation with various national courts, also allows for greater internal cohesion than most national courts.[8]
The pillar model can be said as a way to allocate competencies on a functional basis while retaining a high degree of institutional overlap. This means that the functional divisions of powers can rather be seen as a matter of procedures and to some extent of national and European parliamentary and judicial control, but it is not a wholesale separation of powers by allocating certain powers to particular institutions. In that sense, it is clear that the creation of the pillar structure assumes that competencies can be clearly delineated not just by the kind of function that the different institutions exercise, but also in the fields they take place. However, the institutional overlap also leads to the conclusion that a very high degree of policy-coordination is still possible without supranational competencies in the given field.

The understanding of democratic legitimacy contained in the pillar-model of European integration thus relies, to a very great extent, on a formalist understanding of constitutionalism, which also puts limited emphasis on the protection of structures of democratic deliberation. It also presupposes that legitimacy is mainly dependent on the *origins* of public power, rather than on the possibility of the citizens to exercise any kind of continuous and unified *control* of public power. That does of course not mean that it assumes unlimited public powers to be justified, but it assumes that purely legal constraints will be sufficient to control the exercise of public powers. The reason for that seems to be that whereas the pillar structure provides for the delimitation of public powers, it only provides quite limited control of the procedures for how these powers are exercised as long as they are within the competencies granted. There is thus no constitutional idea of separation of powers that underlie the tripartite division of EU, rather the idea which has developed is the view of "institutional balance"[9] where institutions have overlapping tasks and powers but they are supposed to – at least to some extent – constrain each other. Institutional balance in that context is regarded as a conservative principle aimed at promoting stability in the relations between EC/EU-institutions as well as between the member states and the common institutions. Institutional balance as a principle assumes that such institutions can balance themselves and maintain a balance of power without any external accountability. That kind of institutional balance may to a certain extent, work in maintaining an equilibrium of the allocation of decision-making powers among the EC/EU-institutions, but it is far more problematic to maintain such a relation between national and EC/EU-institutions.

[8] Mitchell Lasser, JUDICIAL DELIBERATIONS 347-360 (2004)

[9] Alan Dashwood, *States in the European Union*, 23 EUROPEAN LAW REVIEW 201, 206-209 (1998)

This can also be seen in the overlapping roles that characterize decision-making, such as when national governments decide both as a legislators under EC-law, with shared as well as exclusive legislative powers, and when they act also as legislators under EU-law by adopting framework decisions.[10] The latter case is of course one where the national governments are competent to act both as EU-legislators and as national governments, i.e. it is by definition an area of shared competencies. In a similar way, the European Commission both works as the executive power of certain aspects of EC-law, a supervisory institution in relation to the national authorities, as well as the institution with exclusive control over the legislative agenda of the European Community.[11]

II. Legislative instruments and accountability in the third pillar

The instruments for approximation of legislation under the third pillar include framework decisions, recommendations and joint opinions of the council. While they have a number of differences, they have in common that they lack direct effect.[12] However, recommendations[13] and joint opinions[14] have to a greater extent been used in relation to the second pillar, where legislative provisions are usually of limited importance and in most cases would not be politically feasible given the interests of the member states in retaining legislative control over foreign and security policy. Recommendations and joint opinions are not regarded as binding at all on the member states, directly or indirectly.[15] It is worth noticing that the only

[10] de Witte, *supra note* 4, 62-63.

[11] In the context of European integration this has been described as "functionalism," which is a technically correct description of that European integration is based on delegation of national powers concerning particular governmental functions. However, the normative idea that underlies functionalism is the liberal view of public power, where law is thought of as separate from political will, both by its forms of institutionalisation and by its decision-making method. In that sense however, functionalism and more traditional understandings of separation of powers share basic pre-suppositions concerning the relation between political decision-making and corresponding political control of public powers on one hand, and legal control of public powers on the other. The difference between functionalist approaches and approaches based on separation of powers lies in the understanding of which kinds of institutions are necessary to accomplish such controls.

[12] Armin von Bogdandy, Jürgen Bast & Felix Arndt, *Legal Instruments in European Union Law and their Reform: A Systematic Approach on an Empirical Basis* 24 YEARBOOK OF EUROPEAN LAW 91, 108-111 (2005)

[13] *Id.*, 112-114

[14] *Id.*, 114-115

[15] Elspeth Guild, *The Constitutional Consequences of Lawmaking in the Third Pillar of the European Union*, *in* LAWMAKING IN THE EUROPEAN UNION 65, 74-75 (Paul Craig & Carol Harlow eds., 1999)

instrument that is supposed to be binding within the third pillar is the framework decisions.

Framework decisions are, as the ECJ has pointed out, similar to directives in how they are drafted, and they generally pursue similar objectives of approximating legislation in different areas, but they do so without creating common national rules. Framework decisions in the third pillar and directives in the first pillar are similar and since both require incorporation into national law by national legislatures in order to have effect; they also make it possible for governments to comply in full with requirements of parliamentary oversight, as well as extend European integration without having to amend national constitutions. This is particularly important in fields of law where many countries have explicit constitutional requirements of parliamentary legislation in order for measures to be acceptable. The other instruments contained in the third pillar include joint opinions and recommendations, both adopted by the council. They have the same requirements of unanimity to be adopted, but they do not include any obligation under international law to adopt into national law their content, nor do they fall under the jurisdiction of the ECJ. This also means if that there is no possibility to ensure common interpretations, there is far less of the same kind of institutionalization of the application of such decisions, and that they presumably are harder to enforce. Even if framework decisions originally were not aimed at being implemented through national courts, but only by legislatures, it seems clear that the purpose of such a provision is to create uniformity without limiting the formal role of national parliaments.

However, it is important to notice that following a literal interpretation of art. 34 TEU, which sets out the conditions for validity and incorporation of framework decisions into national law, presupposes a distinction between the obligations of the member states under public international law to incorporate the framework decisions in national law. The TEU presupposes that national parliaments will retain a veto-power by incorporating framework decisions into law, rather than giving such decisions direct effect. This also means that the decisions of ECJ on the meaning of framework decisions can only bind individuals if the national legislatures have incorporated them into law. The structure of the framework decisions can thus be said to have created a structural "firewall" between the decisions at the European level and the legal effects on the individuals, and the firewall could only be opened by the national parliaments. The original design of framework decisions thus included a mix of unanimity requirements for adoption and amendment of framework decisions at the European level, but simple majorities (or the majorities required by national constitutional law) at the national level.

III. The EU-institutions and the third pillar

The division of different kinds of legislative instruments in EC-law and EU-law was supposedly guided by the principle that the EC has only attributed powers and these powers can be regarded as implicit in the powers that the member states have conferred upon it. In relation to the use of legislative instruments under EC-law, they were regarded as subsidiary to EU-decisions where the national governments were to retain more extensive competencies in intergovernmental cooperation, whereas other issues were to be dealt with at a national level. The basis for the structure of pillars can be found in a division of different competencies within them and different roles of the involved legal and political institutions. Notwithstanding that, there was also a crucial similarity, namely that most of the substantive legislative deliberation in EC-law as well as EU-law by necessity take place within the Council of Ministers, whether it would constitute itself as a conference of sovereign states drawing up international treaties or as a community legislature. In addition, several of the legislative instruments would work in similar ways, albeit with the crucial differences when it came to the role of national parliaments in implementing them. In relation to the third pillar, the balance of powers between institutions is different from what is the case in the EC, with the council have a far greater role. However, by giving the ECJ jurisdiction over the final interpretation of the legislation adopted under the third pillar, the most important aspect of EC-law is retained also in the context of the third pillar.

1. The European Commission and the third pillar

The role of the European Commission within the EU is most often equated with the role of the executive in member states; however it is also clear that the executive powers given to the Commission are different from stereotypical understandings of such powers. There are, for instance, hardly any of the traditional executive powers of national governments that the commission controls directly through any kind of administrative hierarchy (a large exception being issues of competition policy). The Commission is, for the most part, dependent on national authorities to have its decisions enforced, and thereby it is also to a great extent dependent on cooperation of domestic courts, executives and legislatures. In addition, the powers of defence and foreign policy are exercised at the European level, mainly through the Council having direct executive powers compared to the Commission's more limited ability to direct particular actions.

On the other hand, the Commission has powers that are on certain points more far-reaching than those of national executives, particularly in its exclusive powers to put forward legislative proposals under EC-law, (the Commission retains shared

powers of proposal in the second and third pillars with the European Council). That makes the Commission's agenda-setting power greater than those of national governments in any federal system, since the exclusivity of agenda-setting powers is one of the distinctive aspects of the split constitutional framework of the EC/EU. The role of the Commission also means that it can almost monopolize the agenda setting powers in the EC - something which is very uncommon in national constitutional orders where the power of agenda-setting, although often skewed in favour of the executive, usually also assumes input from the parliament (and in some countries includes the possibility of popular initiatives on either all, or at least some issues). One could thus say that whereas the Commission has limited powers when it comes to providing rules itself, it has been granted very wide powers in relation to agenda-setting. That role also means that the possibility for national governments to act effectively within the EC/EU system is to a great extent related to their respective capacity to influence the European Commission, a capacity which can be expected to be diminished in the larger EU as compared to the original European Economic Community (EEC) created by the original six member countries. One could thus say that whereas the decision-making capacity of the Council - at least in principle - can be expected to be diminished in a larger EU, the agenda-setting powers of the European Commission may not be diminished but rather to the contrary, be expanded. The role of the European Commission, however, has remained limited in relation to the third pillar, although there has been a continuing tension between the Council and the Commission on whether legislation should be adopted under the TEU or under EC-treaty.[16]

2. The European Council and the third pillar

The role of the Council is varying in different pillars of EC/EU-law. Whereas the Council, in the configuration of the Council of Ministers has shared legislative powers under art. 249 and 251 EC-treaty and exclusive legal powers under art. 308 EC-treaty[17] (and capacity to delegate legislative powers in cases when legislation would concern national security back to the member states through art. 297 of the EC-treaty[18]), the decision-making powers of the Council in relation to the third pillar are exclusive in relation to other EU-institutions, but obviously not in relation

[16] However, that tension is far from always present; there are moments when it is in the institutional interest of the Council to adopt legislation that is directly effective rather than to adopt indirectly effective framework legislation since that can make the implementation of the legislation more expedient.

[17] Marc Bungenberg, ART. 235 EGV NACH MAASTRICHT (1999).

[18] Panos Koutrakos, *Is Article 297 EC a 'reserve of sovereignty'?*, 37 COMMON MARKET LAW REVIEW 1339-1362 (2000)

to the member states. Measures under the second pillar concerning the common security and defence policy are of a character which is based more on piecemeal political decisions and international agreements, thus making them reliant on intergovernmental structures beyond the purview of other EU-institutions. The Council has exclusive powers in relation to other EU-institutions of issuing framework decisions, joint opinions and recommendations under the TEU.[19] (This refers strictly to the allocation of powers between different European institutions, not to the allocation of powers between member states and European institutions.)

The role of the Council in this respect is also of particular importance since it enables the executives of the EU to take action with only national, and thus only asymmetrical, oversight of parliamentary institutions. At the same time, the Council, being based on outcomes of elections in the member states, neither represents any common European people, nor can be held commonly accountable. What unifies the Council can thus be said to be the national interests of the respective member states (including the national interest to maintain a working European cooperation) and the common interest in strengthening powers of national executives.[20] The Council is also the presumably a more effective actor since it has greater formal competency to make binding decisions than the other political EU-institutions. The fact that the Council has at least to assent to all decisions under all pillars means that it can both block policies originating in other institutions and that it can coordinate decision-making in all three pillars. In relation to the Council, it is obvious that while the national executives have different agendas, they have all a common interest to maintain powers against their national parliaments. However, within the Council, there are also tensions between, on the one hand, the interests of national executives to maintain control at the national level and, on the other hand, the interest in the possibility of effective decision-making through the Council at the European level. From the perspective of national parliaments, it makes sense to compare framework decisions with executive agreements, where although acting as legislators of the EU, the Council are still acting in a way that is akin to the executive within a domestic political order. Of course, framework decisions mean that such powers are limited in the sense that they require agreement among the representatives of national

[19] Koen Lenaerts & Piet van Nuffel, CONSTITUTIONAL LAW OF THE EUROPEAN UNION 53-54, 428-430 (2nd ed. 2005).

[20] While that might be theoretically contestable in the sense that it is hard to point to any clear explanatory factor for a particular common "institutional interest" of the various national executives, it nevertheless is the assumption that such a common institutional interest of the national executives still make a lot of sense to the adopted policies, e.g. the tendency to use art. 308 of the EC-treaty and (to a lesser extent) framework decisions in an expansive way in order to avoid parliamentary oversight at both the national and the European level.

governments, but they are unconstrained by the kind of domestic controls a national executive would experience in relation to executive regulations in domestic law.

3. The ECJ and the third pillar

The role of ECJ under EC-law in general is to ensure that law is observed in the interpretation of the treaties, a very broad mandate that the ECJ has also utilised in its decision-making process.[21] The role of ECJ is based on the fact that it is a court established under a treaty of international law, and that in addition to the remedies that it has developed or conformed to the principles of public international law,[22] it has also played a considerable role in the "constitutionalization" of EC-law.

The ECJ has historically tended to increase the effectiveness of EC-law, mainly by expanding remedies for individuals concerning alleged breaches of EC-law on the part of the member states.[23] The ECJ can be said to have contributed with a high

[21] Miguel Poiares Maudro, WE THE COURT (1997). Hjalte Rasmussen, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE (1986). Id., THE EUROPEAN COURT OF JUSTICE (1999)

[22] The most obvious case of this is when the ECJ has applied principles of state-liability for non-implementation of directives and regulations of states. Although the ECJ has enabled citizens of the member states of the EU to vindicate their rights against the states, it has not created legal protection in the form of injunctions, but has instead chosen to develop principles of compensation for damages. However, since EC-law has mainly concerned economic damages, it is also clear that the difference between allocating costs in that way and by way of more general injunctions is relatively limited. However, the ECJ does, in cases where it finds a member state to be in violation of its obligations under the treaties, apply a mix between enforcement through principles of damages and injunctions applied to states, which seems to parallel state-liability in public international law. C-26/62 van Gend en Loos E.C.R. [1963] 3, C-6/90 Francovich and Bonifaci E.C.R. [1992] I-5357, C-224/01 Köbler E.C.R. [2003] I-10239 and C-173/03 Traghetti del Mediterraneo (not yet reported) are all examples of how the ECJ has applied the principle of state-responsibility in relation to state action within the framework of EC-law in a way which treats judicial powers as a part of a dependent part, analogous to the treatment of domestic judicial power on state-liability under public international law. C-105/03 *Maria Pupino* can be seen as an example how the ECJ has used the same principle in the context of EU-law.

[23] Acceto & Zleptnig argue that the principle of effectiveness is a central structural principle of EC-law, which has been illustrated in some recent cases where the court has extended the effects of legislation under the third pillars in the national legal orders. The normative reasons are based on a combination of that citizens are to be treated equally regardless of their nationality in relation to EC-law, and that the benefits from cooperation that arise from coordination will not come about if effectiveness is an overarching legal principle in deciding which forms implementation of the community decisions should take. The problem, from a normative perspective however, is that this presupposes that all forms of cooperation within the framework of the EU should be given equal effectiveness. The problem that Accetto & Zleptnig point to is that this presupposes that effectiveness is to be an overarching concern for some kind of normative reason, while disregarding reasons against regarding effectiveness as an overarching value. In relation to national law, that seems to be related to protection of fundamental rights and legal certainty and to some extent to the protection of political accountability within the

degree of institutional cohesiveness in relation to EC/EU-law, and since the ECJ has a default position as final arbiter, this also allows it to interpret the meaning and content of the supposedly intergovernmental forms of decision-making on framework decisions in a federalising direction.[24] In this respect, it is also clear that the historical price of cohesiveness and constitutionalization of EC-law has been a constraint on the member states by way of a *de facto* (in practice) limitation on the forms of cooperation acceptable within the framework of EC/EU institutions. This was most obviously the case with the initial decision that conferred direct effect upon the EC-treaty, as well as the decision of the ECJ to make directives "indirectly directly effective."[25]

However, whereas the definition of the task of the ECJ probably should be seen as identical in EC-law and EU-law, it is also clear that under the TEU, specific jurisdictions are set out. It is clear that the ECJ may review the legality of a framework decision under EU-law, and in that sense, the ECJ maintains a role as the constitutional court of the EU as it is the constitutional court of the EC.[26] However, their ability to review is more limited than what is the case under the EC-treaty, since the grounds for reviewing a framework decision concerns formal grounds; whether it is incompatible with the TEU or whether it requires legislation that is in some way inappropriate. Concerning the interpretation of framework decisions art. 35(1) of the TEU states in no uncertain terms that the ECJ is to have final jurisdiction over the interpretations of such decisions to ensure that they are applied uniformly in the EU. The article further qualifies the jurisdiction of the ECJ by making it possible for member states to postpone jurisdiction and to declare unilaterally that the ECJ will not have jurisdiction over a particular case.[27]

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national political system. The alternative approach that some authors argue is that the ECJ has embraced an element of proportionality review as opposed to an across the board principle of supremacy. However, in relation to recent case-law, it seems as if the ECJ has instead chosen to adopt a far more extensive understanding of effectiveness as an overarching constitutional principle. *See* Matej Accetto & Stefan Zleptnig, *The Principle of Effectiveness: Rethinking Its Role in Community Law*, 11 EUROPEAN PUBLIC LAW 375, 379-383 (2005). Malcolm Ross, *Effectiveness in the European legal order(s): beyond supremacy to constitutional proportionality*, 31 EUROPEAN LAW REVIEW 476, 483-488 (2006)

[24] Lukas Wasielewski, *Differentiation in the System of Judicial Review in EU Law – the ECJ in a Differentiated Legal Order*, *in* THE EMERGING CONSTITUTIONAL LAW OF THE EUROPEAN UNION 158 ff, 164-169 (Adam Bodnar et al. eds., 2003)

[25] Christian Tomuschat, *Das Francovich-Urteil des EuGH – Ein Lehrstück zum Europarecht*, in FESTSCHRIFT FÜR ULRICH EVERLING, vol. II 1585 (Gil Carlos Rodriguez Iglesias et al. eds., 2000)

[26] Piet Eeckhout, *The European Court of Justice and the "Area of Freedom, Security and Justice": Challenges and Problems*, *in* JUDICIAL REVIEW IN EU – LIBER AMICORUM LORD SLYNN OF HADLEY vol. I 153-166, 159-161 (David O'Keeffe et al. eds. 2000). TEU Art. 35(6)

[27] TEU Art. 35(2), 35(3)a-b, 35(4)

A literal reading of art. 35(1) of the TEU seems to provide clearly that domestic courts are obliged to apply national legislation when implementing framework decisions in a way loyal to the content of framework decisions, as far as such an interpretation would not be *contra legem* (against the law). The reason for this is in the very fields of law that framework decisions concerning police and judicial cooperation in criminal matters concern. The requirement for statutory implementation at the national level means that it can be questioned as to whether the prejudicial reference was at all under the jurisdiction of the ECJ. The ECJ's acceptance of a request for a pre-judicial decision of a lower court in a Member State to make a disingenuous interpretation of the treaty outside the jurisdiction of the ECJ is questionable.

4. The European institutions – some common traits

The European institutions are sometimes seen to form what is at least an embryonic form of federal government. However, the EU is hard to compare with the other systems of federalism in national systems where there is considerable coordination of state and federal level policies through a national party-system.[28] The existence of a party-system works to temper the role of institutional interests in a federal system, thus the lack of a consistently developed party-system in the EU makes institutional interests of the common institutions much more important.

In relation to the role of the Commission, the European Court of Justice and the Council, there is a strong tendency for these bodies to act in relatively cohesive ways - which includes maintaining initiative - whereas national parliaments by definition are split along party lines. Given their fractured nature, national parliaments are usually unable to work as an effective constraint on the role of the

[28] The argument of Levinson & Pildes is essentially that why political safeguards work rather through political parties than through institutions is that political parties represent people with different and sometimes changing preferences for how power is to be allocated among institutions. Levinson & Pildes assume that institutional choices are ultimately dependent on political preferences on substantive issues. That seems to be true when such preferences are channelled through a long-lasting organisational system such as parties that represent certain interests. In the context of legislative institutions without parties, it is clear that the argument depends on whether and to what extent such contingent preferences will influence the process of political decision-making. In certain contexts, such as the EU, it is obvious that the kind of influence based on representation of popular political opinion is mediated through a number of political institutions, nationally and internationally, with limited direct control of parties. On the other hand, the powers of the member states are still regarded as the source and as the final constraint on EU-law in the sense that the member states are the ultimate sources of authority of EC-law, and it is the states that ultimately decide on whether to retain EC-law as a part of their legal system. See Daryl Levinson & Richard H Pildes, *Separation of parties, not of powers*, 119 HARVARD LAW REVIEW 2311 (2006). Larry Kramer, *Putting Politics Back in the Political Safeguards of Federalism,* 100 COLUMBIA LAW REVIEW 215-293 (2000)

legislative powers accorded to the Council, as well as to the judicial power accorded to the ECJ. In the legislative deliberations of the Council, the role of political conflicts along lines of ideology are limited and the issue is rather whether the Council is to further its own institutional interests. The parliamentary systems of most member states tend to work as a delimitation on the possibilities for parliaments to guard their own institutional interests. This means that unlike what is the case in other forms of decision-making in EC-law, the decision-making in the Council would not be directly applicable in the legal orders of the member states, nor would it - as in the case of directives - be effectively implemented through the courts in cases when a national legislature had failed to implement the directive.

5. National institutions and the pillar system; institutionalising asymmetry

Politically, the creation of the three-pillar model was a way to maintain at least nominal legal and political control at the national level by requiring parliamentary approval and unanimity. Theoretically, the requirement for unanimity and national parliamentary control might seem superfluous in the sense that all member states of the EU incorporate some kind of parliamentarianism; the governments representing the countries must have parliamentary support in order to survive. If the council approved sufficiently outrageous legislation, governments that did support it against popular or at least parliamentary opinion would not survive. The reason for the requirement of national legislation, beside the protection of the principle of legal certainty, seems to be an awareness that the kind of all-or-nothing control that is built in to parliamentary votes of no-confidence, is often not sufficient to maintain control of national executives, particularly not in systems where political parties are predominant, as they invariable are in legislative politics in the member states of the EU.

The dilemma of the construction of a pillar system wherein it is possible to retain diverse constitutional arrangements, is that there is a high degree of asymmetry in the relations between national parliaments and national executives, which also makes it practically harder for parliaments to change any such decisions. For example, the protection of intergovernmental decision-making has also made it practically far harder to revise decisions, since they have to be amended or abolished by the same means through which they have been adopted. There is thus a structural weakness of national parliaments in the context of EC/EU.

Another general problem of legislation adopted under EC/EU-law is that, since the deliberations of the council are not public (unlike the deliberations of parliament), there is much less basis for public criticisms and thus for accountability relating not only to the exact wording of the particular provisions debated, but also when it comes to more general accounts of the processes of decision-making. Therefore, the

standard of publicity that is regarded as important in most constitutional democracies with respect to legislative deliberation is protected to a far lesser extent in the context of the EC/EU. In relation to directives, this has been at least tacitly accepted by national courts, but it has also more or less rendered legislative deliberations in national parliaments on such law less relevant. The lack of effective division of powers creates an imbalance between the EC/EU and the member states, as well as between the national executives and the national parliaments, since the national executives *qua* legislators in the Council can act with collectively furthering their institutional interests, whereas the opportunity for such collective actions among parliaments is much more limited. Whereas party-interests and political differences reduce the powers of institutional interests at the national level, there is not much that creates similar constraints or willingness to concede powers to EU-institutions. Even if there are obviously differing political agendas at the EU-level, as well as on national levels, these political agendas are not divided along party-lines. There is no connection between groups having such agendas and powers of decision-making and appointment of political offices, as is found at the national level. Consequently, there are few incentives or even opportunities for interest-driven groups of national governments to act as cohesive units over time. By contrast, there are plenty of incentives at the institutional level to maintain as much power for as long as possible, since that is the only way to maximize political compromise over time. That means that in decisions of the Council, the default most likely position will be the institutional interests of the national executives.

The maintenance of the role of the national parliament can be seen both as a way to limit the democratic deficit, as well as to comply with a common aspect of domestic constitutionalism, that in a number of areas, legal rule-making must be made by the legislature.[29] In that sense, the creation of framework decisions characterized by including a requirement of unanimity in the Council of Ministers, as well as parliamentary ratification in the Member states, creates a basis for national political control and common interpretations of rules. Furthermore, under TEU, the national parliaments have a crucial role in deciding to implement framework decisions that have been agreed to by the executives through national statutory legislation. However, the approval and confirmative roles of national parliaments serve another purpose: in criminal law, parliamentary assent of legislation is an important safeguard of political accountability, publicity as well as making it possible for the citizens to keep themselves informed of criminal laws to which they are bound.

[29] Guild, *supra note* 15, 83-84

C. The Arguments of Pupino – Non-Implementation, Loyalty and Fundamental Rights

In *Pupino*, the ECJ attempts firstly to found its conclusions on the requirement of loyal cooperation of all EU member states, and secondly on the common commitment of all member states to protect fundamental rights. In this section, I will summarize the arguments that the ECJ used to analogize framework decisions with directives.

I. The requirement of loyal cooperation

The ECJ, in *Pupino*, attempted to rely on the idea of loyal cooperation as a founding principle of European integration. However, the TEU, unlike the EC-treaty does not include any article of loyal cooperation. Thus the ECJ appeared to transpose a legal concept from one legal order to another. Some critics have argued that the idea of loyal cooperation in good faith is a principle which, despite the claim of the ECJ, is not unique to the TEU, but a part of all international agreements under the Vienna Convention on the Law of Treaties.[30] That is certainly true, but what seems to distinguish the European Community from other treaties of international law is that the principle of loyal cooperation is interpreted considerably wider than in "ordinary" international regimes.[31] The principle of loyalty in the context of European Community law has included requirements not only of good faith interpretation of treaties that are implemented in domestic law, but also a far wider requirement of national courts to interpret legislative acts from the European Communities, as to further the objectives of integration, even in cases where under "ordinary" rules of international law, courts would neither actually have acted on such norms, nor have been expected to do so.[32] Therefore, it seems as if loyalty in the context of EC-law and loyalty in the context of international law in general mean slightly different things, with the requirements for loyalty set at a higher level in relation to EC-law.

However what traditionally has been said to distinguish obligations of the states under EC-law as opposed to public international law in general is that loyal action is expected by all branches of the government, unlike international obligations

[30] Göran Lysén, EU FRAMEWORK DECISIONS (2005) 13-15

[31] Armin Hatje, LOYALITÄT ALS RECHTSPRINZIP (2001) 36-38, 38-41

[32] Lysén *supra note* 30, 38-49

where the legislature and the executive but generally not the courts have been compelled to make law conform to those international requirements. This has, of course, not changed the fact that courts have a duty to implement legislation aimed at implementing international obligations, but courts have generally been assumed to implement only domestic legislation, even if that might lead to states finding themselves in breach of their international duties. The principle was rejected by the ECJ in relation to directives on the basis that states cannot be allowed to use their own failure to implement their obligation as a defence.[33] However, Art. 35 of the TEU explicitly states that framework decisions do not have direct effect, and the argument raised by the French government intervening in the case was that since the Italian court had effectively substituted the framework decision for Italian law, the ECJ would not have any jurisdiction. The problem emerged in the pre-judicial question of the Italian court, namely that despite the absence of any such regulations in the criminal procedure, the court still asked the ECJ for a prejudicial decision. The argument against it was that since Italy did not implement the framework decision accordingly, and that since direct effect is expressly excluded, the question from the national court was manifestly unfounded.

Whereas the states have in practice all accepted the indirect direct effect of directives, this has not been the case with framework decisions, where the limits of jurisdictions have been stated. The presumption has been that the interpretation of framework decision will only be relevant when they have been transposed to domestic law. In that sense, the interpretation of the present framework decision was similar to the ECJ's earlier interpretation of directives. The arguments on loyalty were spelled out in greater detail by Advocate General Kokott in her opinion.[34] Her argument relies on the general principle of loyalty that underlies all international treaties have to be given a particular legal form, which binds all national institutions, including courts, despite the rejection of direct effect by the member states. However, when it comes to the style of interpretation, it is also clear that Kokott's approach is quite specific relying on the general structure of the EU-treaty as well as the structure of framework decisions. The dilemma with the approach is that in using a very general description of purposes of the treaty to decide a question where the structural approach cannot yield any clear answers, Kokott, as well as the ECJ, applies a method where they are expanding not only the purposes of the EU, but also the discretionary powers of the ECJ, where high-level structural arguments expand the breadth of the ECJ's judgment.

[33] C-8/81 *Becker v Finanzamt Muenster-Innenstadt*, E.C.R. [1982] 53

[34] C-105/03 *Maria Pupino*, para. 22-26, 38-41, 45-46 (opinion of AG Kokott)

However, the ECJ applies an understanding of loyal cooperation distinctive to the EC/EU, claiming that it creates a reason for *all* domestic institutions to act on the basis of decisions from the EC/EU.[35] The underlying assumption seems to be that the same more expansive understanding of loyal cooperation that underlies EC-law[36] also lies behind the interpretation of EU-law in the second and third pillars.

II. Fundamental rights

The issue of fundamental rights arose because the implementation of framework decisions, despite the rules of the Italian Code of Criminal Procedure, would lead to retroactivity in the field of criminal procedure.[37] Special protection for victimized minors testifying before courts has been required by the European Court of Human Rights (EctHR) as an effect of article 6 European Convention on Human Rights (ECHR). Moreover, such a minor form of retroactivity that did not concern the criminalization of the *act* prosecuted but only one aspect of the trial can hardly be said to violate the principle of non-retroactivity in any more important respect. Furthermore, the ECJ explicitly stated that there is a duty of the ECJ in applying rules under TEU to interpret them in accordance with the requirements of the ECHR, given the generally stated objective of protection of fundamental rights under article 6 TEU. The ECJ has repeatedly affirmed the status of fundamental rights in EC-law, but in relation to the TEU the ECJ explicitly stated that the interpretation has to conform to the ECHR. The statement that the EU has to conform to the ECHR seems also to imply that the EU has to respect as binding interpretations of ECHR by the European Court of Human Rights, something which is assumed in the ECHR and set out explicitly in the ECHR and its additional protocols. It should be noticed that the ECtHR has previously accepted changed in retroactive criminal procedure, even if such changes might substantially change the outcome of a criminal case. In that sense there was hardly a problem of conflicts of fundamental rights since the ECJ seems to have adopted a form of reasoning where the central issue of was whether the underlying actions were unlawful, whether prosecution and punishment of them were foreseeable, and finally whether the procedural change was grossly disproportionate.

It is interesting that neither the ECJ nor the Advocate General discussed the protection against retroactivity in criminal procedure in the law of the member states, and whether that would be a problem. Instead, the ECJ focused only on the

[35] C-105/03 *Maria Pupino*, para. 37-48

[36] Per Hallström, *European Union Law – From reciprocity to loyalty*, 39 SCANDINAVIAN STUDIES IN LAW 79 (1999)

[37] C-105/03, *Maria Pupino,* para. 58-61

case-law of the EctHR, which obviously was seen as a lowest common denominator of protection of fundamental rights in European law.[38] In relation to fundamental rights, however, the present case included a balance between the rights of victims in criminal procedure on the one hand and the rights of the accused on the other. Balancing those rights becomes even more problematic in the sense that it dealt with the part of the criminal process concerned with establishing the guilt of the accused, rather than sentencing someone whose guilt is already established beyond a reasonable doubt. The underlying principle applied by the ECJ as well as by the EctHR is that a defendant will not be protected against changes in criminal procedure that may worsen her position when the act itself was not made criminal retroactively. The judgment thus signals that the ECJ has accepted that the interpretation of fundamental rights protected in the EU should largely be determined by the EctHR. One can therefore say that *Pupino* to a certain extent has solved a problem of fundamental rights protection in the EU: by asserting that the Council of Ministers acting under the TEU should act in a way not superseding protection of fundamental rights. However the problem seems to be that whereas parliamentary control and ultimately national judicial control was supposed to ensure that framework decisions would have an equivalent degree of protection of rights as in each national constitution, the ECJ has practically used a standard for protection which is to be regarded as a minimum-standard rather than average standard or standard for human rights protection in the member states with highest degree of constitutional protection of civil rights. Thus the ECJ can still not be said to provide any complete avoidance of constitutional conflicts at the national level.

D. The Constitutional Effects of Pupino - Framework Decisions as Directives?

EC-law includes two kinds of general legislative instruments, namely regulations and directives that are aimed at the public and at member states respectively under the first pillar. In EC-law, a distinction is made between regulations that are directly effective and directly applicable in the legal orders of the member states, creating rights and duties for individuals, and directives, which are created to create common policies to be implemented by legislation, but not a matter of direct effect in the national legal orders.[39] Neither of that is the case in relation to the intergovernmental pillars where the main forms of legislative action are recommendations, joint opinions and framework decisions. Recommendations and joint opinions mainly play a part in relation to coordination of foreign and security policy and the parts of economic policy-coordination that falls outside the purview of the first pillar, whereas framework decisions is the main form of decision-

[38] C-105/03 *Maria Pupino*, paras. 45-48

[39] Tomuschat, *supra note* 25, 1608-1609

making in relation to the PJCC. The purpose of framework decisions is to create instruments that are to work as legislation and which is binding on each member state under public international law, but which is not directly or indirectly, directly effective on rights and duties of individuals in the national legal orders, and which is not to be applied without normal forms of incorporation into national law. In relation to framework decisions and the *Pupino* decision it seems important to point out the following: the radical effect consists in that national courts set aside national law in favour of decisions not implemented in national law, and that the ECJ states that the national courts ought to set aside national law, or interpret national law, if necessary *contra legem,* in order to give effect to the framework decision, regardless of whether it is implemented in national law or not, and regardless of whether it leads to a retroactive application of the framework decision against an individual. It does however not create individual rights, or remedies for individuals to use in cases of non-implementation of framework decisions.

I. Towards "indirect direct applicability" of framework decisions?

In the *Pupino* case, the ECJ as well as the Advocate General argue that the structure of framework decisions is similar to that of directives in the sense that both aim at harmonizing certain policies in the member states by referring not the particular method for by which a goal is to be attained but to the goal itself.[40] Directives is a form of legislation aimed at giving greater flexibility with regard to the means of implementation in the member states, without prejudicing the need for legal unity in relation to the policy-goals to be attained.[41] In that respect, it has been compared to the *Colson* case[42] that established the principle of "indirect effect" for directives; although, it did not, establish individual remedies for such lack of implementation. Some have argued that the decision in *Pupino* is a way to incorporate the *effet utile* of EC-law into the third pillar.[43] That might be true, but it seems troubling that *effet utile* is also applied in relation to the content of adopted legislative policies and not the effectiveness of the chosen model of decision-making. Fletcher argues that the *effet utile* is an established principle of EC-law, but concedes that the *effet utile* in EU-law does not have any clear textual support. It is true that the TEU is not entirely clear on these points, but there is, as discussed here, a very strong structural argument against accepting *effet utile* in the third pillar.

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[40] C-105/03 *Maria Pupino*, para. 41-43 and paras. 68-69 (opinion of AG Kokott)

[41] Maria Fletcher, *Extending "indirect effect" to the third pillar: the significance of* Pupino*?* 30 EUROPEAN LAW REVIEW 862 (2005)

[42] Case C-14/83 *von Colson and Kamann*, E.C.R. [1984] 26

[43] Fletcher *supra note* 41, 871-872

The difference between directives and frame-work decisions cannot only be ascertained by an analysis of their wording, but also a reference to the presumed legislative intention of the member states. It is notable (and problematic) that the ECJ refers to structural and linguistic similarities between directives and framework decisions based on the similarities in their wording as well as on the similarities in wording between Art. 249 EC-treaty and Art. 34(2)b TEU, but fails to mention that they are to be decided within different pillars. The view that the domestic courts, as a result of that structural similarity, ought to take into account a particular conception of their interpretative role, for which there is no textual support, seems awkward. The ECJ argues that when it makes an analogy to the indirect direct effect of directives that the choice of words in one treaty should be interpreted in an expansive way since the choice of the same words in another treaty with a very different constitutional context had been expansively interpreted by the court at an earlier occasion. The ECJ assumes that the fact that the ECJ's interpretation of the "indirect direct effect" of directives has not been openly challenged by the member states indicates that any statement using a similar expression also includes acceptance of the principle of interpretation claimed by the ECJ.[44] It is logical in the sense that since an interpretation of a certain construction has gone unchallenged, similar interpretations of similar wordings seem justified. The problem is that the ECJ in the reasoning in its decision entirely disregards constitutional arguments and analogizes as if there is no distinction between the first (supranational) and the second and third (intergovernmental) pillars. It is a view which makes it almost impossible for the member states to foresee the effects of choices with regard to the constitutional structure of the EU and it also means that it becomes close to impossible to give the ECJ any jurisdiction over a field of law and retain its intergovernmental character.

The ECJ argues that since there is an undisputed obligation for national courts to interpret "as far as possible" domestic law in conformity with framework decisions, the fact that the procedures for ensuring that the member states comply are less extensive when it comes to framework decisions than for directives does not change that. Whereas it seems obvious that the content of an obligation is not changed by the procedural safeguards in place for it, the existence of an obligation does not create procedural safeguards to ensure compliance. The ECJ does not take into account the fact that the distinction between contents of obligations and procedures to protect them cuts both ways in the sense that an obligation cannot create a procedural safeguard if it is explicitly ruled out in the treaty on which the legislative act is founded.

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[44] Vassilios Skouris, "*Rechtswirkungen von nicht umgesetzten EG-Richtlinien und EU-Rahmenbeschlüssen gegenüber Privaten – neuere Entwicklungen in der Rechtsprechung des EuGH*", ZEITSCHRITFT FÜR EUROPARECHTLICHE STUDIEN 4-2005, 474-476

The most troubling aspect of the ECJ's argument can be grasped only by looking at a development of the analogy it makes. By analogizing the treatment of directives and framework decisions, the court points to a radical interpretation of the remedies provided to ensure national implementation of directives in the past to justify a radical interpretation of the effectiveness of framework-decisions. In adopting the view espoused by the ECJ, precedents, instead of constraining judicial decisions, justify evermore extensive powers of the court.[45]

The ECJ rejected the structural arguments advanced by a number of national governments that sought to distinguish between principles of interpretation (including loyalty) of EC-law as opposed to the more limited character of the TEU. Their rejection was based on Art. 1 TEU, where the member states expressed that the conclusion of the TEU signified the advent of a new stage in integration between the European peoples. Although the aim of the TEU is clearly a more extensive form of political integration than what was envisaged in the EC-treaty, it seems also clear that the rejection of the principle of direct effect as well as the more limited jurisdiction of the ECJ points to an inter-national rather than supranational constitutional structure. The very reason for creating a particular legal order with respect to issues falling under the second and third pillars was that conferring such competencies to the European Community was unacceptable to the member states for constitutional and political reasons. It seems reasonable that the very impetus for the creation of the EU as distinct from the EC should influence the interpretation of otherwise similarly structured legal acts. Despite the fact that the general purpose of framework decisions is similar to that of directives, namely the harmonisation of the legislation of the member states, it seems also certain that the reason for creating another institutional structure to make such decisions was that, unlike directives, they were not supposed to have "indirect direct effect." The problem seems thus to be that if the approach of the ECJ is followed to its logical conclusion, it will become impossible for the member states to agree to anything else than supranational instruments of law.

The "indirect direct effect" of directives and its subsequent horizontal application concerns issues where legality although being important is not necessarily the ultimate value. In the case of framework decisions concerning judicial cooperation in the field of criminal law, "indirect direct effect" risks violating basic principles of

[45] For a more traditional understanding of the role of precedents, *see* Fredrick Schauer, *Precedent*, 39 STANFORD LAW REVIEW, 571 (1986-1987), In the context of EC/EU-law, *see* Albertina Albors-Llorens, *Changes in the Jurisdiction of the European Court of Justice under the Treaty of Amsterdam*, 35 COMMON MARKET LAW REVIEW, 1273 (1998), Anthony Arnull, *Owning up to Fallibility: Precedent and the Court of Justice*, 30 COMMON MARKET LAW REVIEW, 247 (1993)

legality in criminal law.[46] Since the principle of legality is a central (and in most cases, entirely accepted) part of the constitutional principles common to all member states, it seems to be an even more questionable aspect of the decision. In that respect, the ECJ's unwillingness to accept a clear distinction between framework decisions and directives is problematic.

II. Framework decisions, supermajority-requirements and accountability

The closest constitutional analogy to framework decisions within national law is the executive ordinance, statutory instruments and similar kinds of executive rule-making that are either based on legislative delegation of powers, or as in the present case, constitutionalized delegation of powers through the treaties. However, the institutional design of such decisions pre-*Pupino* was quite different in the sense that it in order to be effective within the legal order of a member state, it had to be incorporated by the parliament, which of course also meant that a parliament, as a matter of EU-law (if not as a matter of good faith interpretation of the TEU under public international law) also could abolish it and so avoid implementation. The analogy with executive regulations was consequently limited in the sense that the procedure for framework decisions narrowed parliamentary deliberation, and also added a strong argument in favour of every framework decision, namely the benefits of coordination in Europe regarding the policy-area in question.

It has been argued that such forms of rule-making can be seen as a way to preserve accountability and transparency in an ever more complex world.[47] Therefore, it can be seen as one of the ways to institutionalise accountability in a system where parliamentary accountability, due to developments such as political parties and interest-groups, has been become less transparent. On the other hand, the executive has become more identifiable and more clearly held to account in elections. The role of accountability also appears to be connected to the idea that national governments are able to change such rules with quite limited parliamentary control.[48] In the

[46] The ECJ notes in its decision that there is a duty to interpret national law to be in harmony with framework decisions. It is not obvious how far such an obligation goes and the ECJ does not define any general principle on that matter. However, it is notable that the ECJ did not reject the view that their interpretation would be *contra legem* in relation to Italian domestic law.

Vlad Constantinesco, *The ECJ as a Law-Maker:* Praeter Aut Contra Legem*, in* JUDICIAL REVIEW IN EU – LIBER AMICORUM LORD SLYNN OF HADLEY, vol. I, 73 (David O'Keeffe ed., 2000)

[47] von Bogdandy *supra note* 3, 39-55

[48] One aspect that seems to be important in relation to unanimity requirements is that it provides for a certain minimal transparency to the decision-making process, namely that an unanimity requirement makes it clear that all changes were supported by all governments, unlike various forms of QMV-

context of framework decisions, transparency seems to be quite clear in the sense that it is the executive branch that is accountable for the positions taken by the national government. The effect of the *Pupino* decision could be said to pierce the "wall" between EU-law and national law, and thus also limit national legislative accountability and strengthen the dominance of the joint decision-making of the executives of the member states. From the outset, framework decisions, by requiring parliamentary approval and in principle at least could be made ineffective under national law through parliamentary decisions, limited the practical role of national parliaments, while preserving ultimate control. In that respect, the *Pupino* decision shifts important controls over the effectiveness in national law of such decisions from national parliaments to the court.

The unanimity requirement has two effects. The first is that it introduces a kind of safeguard to decision-making, although that should probably not be overestimated since legislative activity through framework decisions varies. That was not the case at the outset of framework decisions since there then was a built-in majoritarian element through national parliaments. Discarding the ordinary legislative process of the member states means that the majoritarian element is set aside and instead changed into a more limited legislative process characterised by the unanimity requirement. While this may provide stability, in effect it also functions as a means for national executives to bind their successors at the national level, whereas the council itself, although constrained by the supermajoritarian decision-rule still is able to amend its policies. Even if the arguments against supermajority rules for legislation seem limited in certain respects and in any other event hardly worse than many other procedural restrictions on legislative powers, the creation of an unanimity requirement leads to the result that all powers are concentrated to the Council of Ministers. The effect of the *Pupino* judgment is that legislative retrenchment will work as a way to constrain not only future decision-makers in that legislative body of the Council of Ministers, but also effects an entrenchment on national legislatures. This is a central difference since the original structure of framework decisions was that they require unanimity in the council and continuing support from national parliaments. As a result of *Pupino*, national courts are bound to a much greater extent to give effect to framework decisions that the national parliaments have chosen not to implement.

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procedures that make it impossible for the citizens to know which government that took which position. In that respect, unanimity requirements enhances transparency and accountability, on the other hand, it only works to provide information in cases where there actually was a decision to change law, i.e. there is no possibility to account for non-decisions through the unanimity requirement.

E. Conclusions – "Constitutional Deficit" the Democratic Deficit in a New Key?

I. From supremacy of EC-law to supremacy of EU-law?

The debate on the character of EC/EU-law in relation to the law of the member states has been a continuous subject for debate all since the decision in *Costa v. ENEL*, where the supremacy of EC-law over national law was declared by ECJ.[49] The historical debate over who is the ultimate source of authority, how one should define finality of EC/EU-law and who is to be regarded as the final arbiter[50] or the final decision-maker[51] have tended to concern ultimate sources of legitimacy of law. The debate on the nature of EC/EU constitutional law, whether there is a constitution, and who is the final arbiter on the meaning of that constitution has, to a great extent, turned on an idea of the final decision-maker. It is an analysis which focuses on the structural features of constitutional law and constitutionalism at the expense of the functions of law.[52] While that discussion focuses on one important aspect of how one should understand the relations between constitutional law in the member states and the constitutional legal structure of the EU, it seems quite clear that such an approach is far from exhaustive. The problem of the kind of functional supranationalization that the ECJ seems to engage in at the moment, is not necessarily that it claims to alter constitutional structure when it comes to the issue of who is being the final arbiter of constitutional issues, but that it continuously raises the political constraints on the legislative and judicial institutions of the member states, while at the same time decreases the practical effects of national parliamentary control.

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[49] C-6/64 Costa v. ENEL. E.C.R. [1964] 1251

[50] Mattias Kumm, *Who is the final arbiter of constitutionality in Europe?*, 36 COMMON MARKET LAW REVIEW 351 (1999)

[51] Franz C. Mayer, *Wer soll der Hüter der Europäische Verfassung Sein in* DIE ZUKUNFT DER EUROPÄISCHEN UNION: EINE KRITISCHE BILANZ DES KONVENTS, 429 (Olivier Beaud & Ingolf Pernice, eds., 2004)

[52] One should however be clear about that the constitutionalization of EC/EU-law has mainly concerned the constitutionalization of certain competencies of the institutions, the remedies under EC-law and the jurisdiction of the ECJ. As has often been pointed out, it has been a development focused on functions, rather than attempting to make a claim of the powers of EC/EU stemming from a particular European "demos" or in any other way making a claim to some kind of inherent political legitimacy. However, in a similar way, domestic courts have often avoided according any final authority to EC/EU-decisions. Therefore, what has often been described as a constitutionalization of the EU seems to be a matter of cooperation and routinization of decision-making through customary practices and not of the creation of institutional hierarchies associated with the more traditional approach of constitutionsalization at the level of the nation-state.

The case of *Pupino* has major constitutional relevance in the sense that it was a bold attempt by the ECJ to attempt to "constitutionalize" and thus also to "supranationalize" a form of cooperation that was intentionally designed to keep the intergovernmental character intact (and thus also retain the ultimate domestic law-making powers with domestic parliaments). The *Pupino* case also shows that there is a strong tendency of supranationalization, but also that it is a piecemeal process, where the developments towards direct effect of a type of legislative instruments, e.g. framework decisions is done in a step-by-step fashion. Despite that, it seems obvious that when a legislative instrument which is formally not binding is seen as giving rise to an obligation to interpret existing law in harmony with it, even when not implemented in national law and even when such an interpretation would be *contra legem*, the most important step towards supranationalization is taken. What is important in this decision is that the ECJ interprets, for the purpose of relations between the EU and the member states, the principle of loyal cooperation in a much wider fashion than what is common in public international law and uses that principle to assert jurisdiction. In *Pupino*, the ECJ rejects interpretation of treaties based on intentions spelled out in the institutional choices and the text of the treaty, preferring to assume a kind of constitutionalization based on linguistic analogies to cases where the ECJ previously interpreted provisions expansively, regardless of any considerations of constitutional structure. The effect is that the ECJ has chartered a course of "supranationalization" of the third pillar, which, given the constitutional and institutional choices of the member states is problematic, at least in the absence of a conception of political legitimacy of EU-law detached from the political choices of the member states.

Ultimately it leads to a point where, although the member states may still be masters of the treaties in the sense that they are those with the competency to make the treaties and also – ultimately – to dismantle them, the ECJ's approach implies that there are no substantive limits to its own jurisdiction, once any area of policy is described as a EU-competency under the treaties. As such, the possibilities for the member states to enumerate, within the processes of treaty-making, the powers to be given to the EC and EU will be limited, and thus also that the potential range of constitutional choices for the member states will be likewise limited. The ECJ establishes a principle of loyal and effective cooperation as a kind of "supra-constitutional" norm which, in certain circumstances, will supersede the constitutional choices consented to by the member states. (However it can do so, only because of the particular institutional features of the EU institutions.) This does not mean that the member states are not masters of the treaty in some ultimate sense, but their control of the treaties within the EC/EU structure is much more limited than the control accorded to parties of "ordinary" international treaties.

II. Who are the masters of the treaties post-Pupino?

Whereas the "supranationalization" on one hand limits the constitutional choices available to the member states in relation to European integration, it also enhances the powers of the council *qua* legislator of the EU.[53] While the legislative role of the Council and the relation between the Council and the national legislatures in the context of the first pillar was not originally clearly spelled out, it has been upheld over a long constitutional development. The problem is that the amplified role of the Council in terms of the increased effectiveness and reduced parliamentary control of legislation also upsets the separation of powers within the domestic constitutional orders.

The competencies of EU-law, as opposed to EC-law concerns competencies that have traditionally been reserved to national parliaments, and which have usually not been possible to delegate to subsidiary rule-making of national governments. In that respect, it is also obvious that the development of the EU represents a greater challenge to traditional central tenets of national parliamentary powers, such as in relation to criminal law and criminal procedure. The constitutional legitimacy of the framework decision in the field of criminal law and criminal procedure from the perspective of domestic constitutional law has thus relied on the notion that national parliaments have the ultimate say concerning such legislation. The reason for parliamentary control of such legislation has been both to ensure a high degree of publicity both in the process of legislating, and in relation to the legislation itself. The problem with the kind of institutional structures of the EU is not one of delegation *per se*, but of a tendency of sliding towards greater independence and less oversight from the member states. It should be noticed that it does not change the fact that the member states do retain the ultimate powers over the EU. However, the difficulty in relation to the principles of constitutional government is that the hurdles to exercise such control, as well as the role of legislative institutions that deliberate in public, become increasingly limited in relation to supranational institutions where direct control is very hard to exercise.

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[53] In relation to the issue of the character of the EC/EU, it seems notable that there are two concurrent trends within the case law of the ECJ with regard to the relation between the member states and the EC/EU. One trend concern the increasing malleability of competencies of the EC, which is related to expansionist understandings of implied powers granted under art. 308 EC-treaty which concerns the extent of EC-powers, whereas in relation to the third pillar, it seems mainly to be a matter of effects of powers granted. However, these currents have in common that they both serve to amplify the institutional role of the Council at the expense of the national parliaments. In these both respects, it seems as if the effect has been enhancement of the role of national executives through the Council. In practice it seems to lead to that the role of the Council as legislator and the ECJ as arbiter of claims of constitutional validity are enhanced. For developments in EC-law, e.g. Carl Lebeck *Article 308 EC-treaty: From a Democratic Deficit to a Constitutional Deficit?* EUROPARÄTTSLIG TIDSKRIFT 231 (2007)

It therefore becomes apparent that there is a weakness in the constitutional structure of the EC/EU, rendering it very difficult to actually delimit the powers of the EU under the treaties. The EU, as a constitutional structure, is less stable than what is often envisaged. Why? Since the creation of the common institutions and the functional expansion of the role of legislation – under EC as well as under EU-law – European law in principle seems only possible to constrain through national courts. The paradox is that the instability of EC/EU-law seems more or less only possible to constrain through domestic courts based on national constitutional norms, whereas at the same time, such a constraint would also undermine the effectiveness of the EC/EU. The irony is as mentioned above that – despite the idea of the EC/EU as a constitutional order defined by attributed, limited and pre-determined powers- the constitutional structure, due to the tendency of judicial expansions of competencies and remedies seems to have a built-in instability that tends to expand the competencies of the EC/EU and the effects EC/EU-law. The relative constitutional instability and the political costs associated with enforcing the role of the member states as masters of the treaties seems also to point to a more extensive form of democratic deficit in European integration than what has been usually recognized.

However, the development that seems to lead to a less constitutionalized structure of EC/EU-law[54], but it is not self-evident what the effects of such developments will be. The case law seems to point in two directions, it means on one hand that the role of ECJ and the supranational character of the EC/EU is strengthened, and it means secondly that the freedom of the representatives of member states to decide becomes greater. The effect seems to be that the constitutional constraints of EC/EU law in terms of the adherence to the principle of attributed powers seems to have less of a practical effect, and it secondly seems to lead to that the binding effect on national law will be greater. One could say that it simultaneously leads to two developments that have often been seen as contradictory, on one hand it increases the role of the governments of the member states, and on the other hand, it means that supranational enforcement of supranational law becomes more assertive. It seems to lead a situation where the member states have considerable freedom to use the legislative powers of the community as they like, but limited options in constraining themselves. On the other hand, the development of the supranational side of community law increases the possibilities for national executives to constrain themselves and national legislatures as national political institutions through the EC/EU. The paradox seems to be that the member states become masters of the community, rather than masters of the treaties, but much more limited in their capacity to constrain the EC/EU as such. One may thus say that

[54] Joakim Nergelius, "*De-legalize it*" - *On Current Tendencies in EC Constitutional Law*, 21 Ybk Euro. L. 443 (2002)

there is an imbalance in the constitutional structure of the EC/EU where the constitutional framework enhances the power enhancing aspects of constitutionalism, but undermines the power constraining aspects of it.

III. Supranational constitutionalization as compensation of national deconstitutionalization?

To a certain extent, all forms of international integration can be described as a trade-off between effectiveness in fulfilling central tasks of governments and certain aspects of a liberal constitutional government, such as the protection of fundamental rights and political accountability.[55] It has thus been argued that the creation of constitutional structures of supra- and international governance is mirrored in deconstitutionalization of national legal and governmental structure.The legitimacy of such international forms of governance has been derived from their greater effectiveness in exercise of certain aspects of public authority, but their acceptability, as all institutions with delegated powers, rely on the idea that powers are limited and pre-determined in order to enable legitimate exercise of powers and simultaneously minimize risks of abuse.

There is thus a trade-off between publicity of deliberations, formal powers to make decisions and possibility of direct political control within domestic constitutional structure and the possibility for effective international cooperation, however, that trade-off has also led to the deformalisation the decision-making process in the domestic legal order. The "deformalisation" of law does either mean that formal criteria (e.g. adoption, promulgation, publication etc) for assessing whether a particular legal norm within a given legal system is valid are deformalized, or that procedural requirements of the decision-making processes are relaxed. In that sense, it is reasonable to speak of a kind of deconstitutionalization at the national level, since the procedural requirements of decision-making, while existing on the national level, function with more limited effectiveness. In that respect, one may say that the connection between constitutionalization of international institutions, and deconstitutionalization at the national level can only be partially connected (at least as long as international public powers do not have any institutional capacity of enforcement of their own). Thus deconstitutionalization and deformalization of political decision-making at the national level presupposes, as in the case of the EC/EU and the relation to the member states that certain constitutional rules, e.g. rules on treaty-powers are upheld. It thus seems as if changes of constitutional practices with regard to decision-rules can take place without formal constitutional

[55] Eric A Stein, *International Integration and Democracy – No Love at First Sight*, 95 Am. J. Int' L. 489, 515-520 (2001)

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changes, and that such changes instead are dependent on the relations between national institutions (e.g. courts) and EU-institutions (e.g. the ECJ).

By contrast, the creation of more formalized rules at the supranational level has been regarded as a way to preserve certain aspects of constitutionalism in supranational institutions.[56] Some authors have claimed that the relation of the EU to the member states has been characterized by a certain degree of "fluidity."[57] I think that is true to the extent that it refers to that the relation between them has been formalized only to a limited extent, but it is not true in the sense of the structural principles that the ECJ has developed in adjudicating disputes concerning the powers of the EU. However, in that respect, there is also a certain paradox in that the validity of decisions stemming from the EC/EU are dependent on treaties where member states have consented to be bound, and the legitimacy of such treaties ultimately rest on the legitimacy of constitutional orders that provide for treaty-powers.

In relation to other commonly developed legal norms, the constitutionalization thesis of law of international organisations seems more defensible. The fact that the ECJ did provide for substantive review of the compatibility with the measure to human rights might be seen as a way to recognise that there should be at least a consensus on human rights protection among the member states of the EC/EU on the system of protection of fundamental rights set up under the ECHR and EctHR. However, the substantive review of the issue was based entirely on what the EctHR had decided in a number of earlier cases where it had more or less stated that retroactive changes in the law of criminal *procedure* that would disadvantage the defendant were compatible with fundamental rights, at least to a certain extent. In that respect, the ECJ has continued a path taken early on where the EctHR has become the benchmark for protection of fundamental rights.[58]. However, these standards have never been set out in any constitutional document, nor defined as a principle of deference to EctHR, but it has been the outcome of minimalist

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[56] Anne Peters, *The Constitutionalist Reconstruction of International Law: Pros and Cons*, NCCR Trade Working Paper 11/2006, 10-11

[57] Graínne de Búrca & Bruno de Witte, *The Delimitation of Powers Between the EU and its Member States*, *in* ACCOUNTABILITY AND LEGITIMACY IN THE EUROPEAN UNION, 201, 205-209 (Anthony Arnull & Daniel Wincott eds., 2002)

[58] Jason Coppel & Aidan O'Neill, *The European Court of Justice: Taking Rights Seriously?*, 29 COMMON MARKET LAW REVIEW 669 (1992), and for a contrary opinion, *see* Joseph H.H. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights in the European Community*, 61 WASHINGTON LAW REVIEW 1103 (1986), Joseph H.H. Weiler & Nicolas Lockhart, '*Taking Rights Seriously*' *Seriously: The European Court of Justice and its Fundamental Rights Jurisprudence - Part I*, 32 COMMON MARKET LAW REVIEW 51 (1995)

interpretations of EC/EU-law over time. Supranational constitutionalization thus depends on a certain degree of pragmatism in the cooperation between different courts which paradoxically leads to a certain degree of deformalization rather than formalization of law.

IV. Conclusions

In this paper, I have sought to argue that the lack of institutionalized political divisions in the making of EC/EU-law in the Council leaves a greater role for institutional interests than what is common in federal systems, where the options for coordinated actions are greater in European institutions than at the national level. At the level of positive analysis, this leads to a strong tendency to "supranationalize" ever more important fields of law that have in some way come within the ambit of European law. In that sense, there seems to be a built-in limitation to the stability of the EC/EU constitutional structure, which makes it problematic to speak of constitutionalization in the traditional sense, since that also includes a stabilization of institutional roles within a legal and political order.

Supranationalization formalizes the effects of EU-law within the national legal orders, but it does so at the expense of political accountability and, to some extent, the formalization of law within national legal orders. The limitation on political accountability is dual: it both concerns the limitations with respect to decision-making at the level of public policies, as well as the barriers created to effective constitutional choice in the context of the treaty. The traditional critique of the "democratic deficit" within the EU has focused on lack of unified accountability for decision-makers within the EU. The *Pupino*-case points in that respect to a "constitutional deficit," where the institutional logic of the institutions undermines and restricts certain constitutional choices of the member states. The creation of a particular institutional logic that seems to set limits to the constitutional choices of the member states is problematic from the perspective of legitimacy, since the basis for the legitimacy of the EU in the constitutional orders of the member states remains that the EU has been given limited and delineated powers. The possibility of such constitutional choices is also central in relation to the legitimacy of EU as a legal order that enables cooperation and provide benefits from cooperation in ways that the member states see fit. The conclusion from *Pupino* can only be that the ECJ has undermined the possibilities for constitutional choices in both of these respects. There is thus a certain limit to constitutional choices that are shaped by the institutional structure of the EU, and the ECJ's decision in *Pupino* is an illustration of this quandary.