Interpreting Member States' Legislation consistently with Community Law: Requirements and limitations of a new interpretative criterion

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The title of my speech may cause some surprise: "Interpreting Member States' legislation consistently with Community Law: Requirements and limitations of a new interpretative criterion"[1].

Indeed, already in 1984, in the Von Colson v Kamann case [2] [3], the CJEC (Court of Justice of the European Communities) declared the obligation of the national judge

> *"to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of community law , in so far as it is given discretion to do so under national law"*.

As it is widely known in the Marleasing (1990) case[4] the CJEC extended the obligation of interpretation in conformity to pre-existing national law:

> "in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by it and thereby comply with the third paragraph of Article 189 [currently, Article 249] of the Treaty".

Therefore, what is new in the principle of "interpretation in conformity" [5] that leads me to consider it as "a new interpretative criterion"?

Firstly, subsequent developments related thereto in the doctrine of the CJEC which have made it necessary to reconsider positions maintained in the Member States by the doctrine and the case law.

For the moment it is enough to say that in the Pfeiffer case (2004)[6], the CJEC extended the obligation of interpretation in conformity to "the whole body of rules of national law", beyond, therefore, "in particular legislative provisions specifically adopted for the purpose of implementing the requirements of a directive [in question]"; later on, the CJEC extended the obligation of interpretation in conformity, built within the context of the Community pillar, to the scope of the third pillar (in other words, police and judicial cooperation in criminal matters: Pupino case, 2005)[7].

And, secondly, it must be noted that despite it being familiar, a preliminary approach, to other traditional principles of the legal systems of the Member States, such as interpretation in conformity with the Constitution, or with International Law, this interpretation in conformity with Community Law, nevertheless, presents important variants, which single it out, within a context of continuous debate around its exact

[1] EN: Interpreting Member States' legislation consistently with Community law: requirements and limitations of a new interpretative criterion; FR: L'interprétation conforme du droit des Etats membres au regard du droit communautaire: exigences et limites d'un nouveau critère herméneutique.
[2] EN: Case; FR: Arrêt.
[3] Judgment of 10 April 1984 (14/83).
[4] Judgment of 13 November 1990 (C-106/89).
[5] EN: consistent interpretation or interpretation in conformity ; FR: interprétation conforme.
[6] Judgment of 5 October 2004 (C-397/01 to C-403/01).
[7] Judgment of 16 June 2005 (C-105/03).

scope in theoretical as well as practical terms, in relation to the aforesaid national interpretative principles.

Obvious proof of both statements may be found in the colloquia that have regularly been held for many years by the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union [8], which role, apart from its important cooperation in holding this seminar, must be highlighted, taking into account that without the "complicity" of national jurisdictions, the discourse of the CJEC may "fall on deaf ears"[9]. Therefore, the colloquia and seminars organised by the Association, as well as the publication on their Web page of the reports submitted for this purpose, are useful in the sense that we learn, through the highest national jurisdictions, of specific problems caused by Community Law upon application thereof by national public authorities to their citizens.

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Without any intention of presenting it in depth, let me remind you that in 1996 the Association held in Brussels a colloquium devoted to "The transposition of directives of the European Union into national legislation"[10], in which special attention was given to the subject under analysis now about "interpretation in conformity".

Again in 2004 the subject of "interpretation in conformity" was part of the colloquium of the Association held in The Hague [11], devoted then to "The quality of European legislation and its implementation and application in the national legal order" [12].

And, the same happened at the colloquium recently held in Warsaw [13] in June 2008, devoted to "Consequences of incompatibility with EC law for final administrative decisions and final judgments of administrative courts in the Member States" [14]. It is enough to reproduce in this respect an extract of the General Report in which it is highlighted that the authors of the questionnaire sent to the national speakers [15]

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[8] EN: Association of the Councils of State and the Supreme Administrative Jurisdictions of the European Union; FR: Association des Conseils d'État et des juridictions administratives suprêmes de l'Union européenne.

[9] EN: fall on deaf ears.

[10] EN: "The transposition of directives of the European Union into national legislation"; FR: "La transposition en droit interne de directives de l'Union européenne".

[11] EN: The Hague, FR: La Haye.

[12] EN: "The quality of European legislation and its implementation and application in the national legal order"; FR: "La qualité de la législation communautaire, sa mise en oeuvre et son application dans l'ordre juridique national".

[13] EN: Warsaw; FR: Varsovie.

[14] EN: "Consequences of incompatibility with EC law for final administrative decisions and final judgments of administrative courts in the Member States"; FR: "Conséquences de l'incompatibilité de décisions administratives définitives et de jugements définitifs des juridictions administratives des États membres avec la législation européenne".

[15] QUESTIONNAIRE: EN: When the case under consideration concerns the revocation of a final administrative decision, is it necessary to interpret your national law in compliance with Community law? Moreover: a) does such an interpretation have any influence on the scope of discretion of administrative bodies?; b) are there any examples of the interpretation of national law in compliance with EC law to be found in the practice of national courts?; FR: Lorsque l'affaire jugée concerne le retrait d'une décision administrative définitive, est il nécessaire d'interpréter votre législation nationale en conformité avec le droit communautaire? En outre: a) une telle interprétation a-t-elle une influence sur la portée du pouvoir

intended to establish "whether the obligation to interpret national law in conformity with EC law has an effect on the scope of discretion given to an administrative body". This could, for example, operate when the authority, acting under national *law* may revoke a decision, whereas in the event of incompatibility with EC law, it *would be obliged* to revoke the decision [16]. What was very clear, in any case, was that there was no uniform reply on this subject from national speakers.

Without abandoning for the time being the work done by the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, I pointed out before that interpretation in conformity is a subject that is constantly evolving, which makes us reconsider positions adopted in relation thereto in the Member States by the doctrine and case law. Thus, for instance, the German speech in the aforesaid colloquium organised by the Association in 2004 could not be sustained today without making some changes to it, what was then so firmly declared that the obligation of interpretation in conformity had to be ruled out before the expiration of the deadline for implementation of directives "even if it is obvious that the legislator shall not implement the directive on time".

As opposed to this statement, the doctrine of the CJEC in the Adeneler (2006) case must be invoked[17], in which, after reminding that "directives are either (i) published in the *Official Journal of the European Communities* in accordance with Article 254(1) EC and, in that case, enter into force on the date specified in them or, in the absence thereof, on the 20th day following that of their publication", it declared that "the national courts are bound to interpret domestic law so far as possible, once the period for transposition has expired, in the light of the wording and the purpose of the directive concerned with a view to achieving the results sought by the directive".

He also pointed out that the exact scope of the principle of interpretation in conformity is far from clear and it is subject of continuous debate. Another example is the Austrian report given at the same colloquium in 2004, in which upon saying that although the Austrian Administrative Court has frequently recourse to the method of consistent interpretation, it is also pointed to the problems that persist in its relation to the doctrine of direct effect; among other things, "can the result of consistent interpretation really be that in fact the effect of direct application is achieved?" [18].

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discrétionnaire des organes administratifs; b) Y a-t-il, dans la pratique des juridictions nationales, des exemples d'interprétation de la législation nationale en conformité avec la législation européenne?

[16] GENERAL REPORT/ RAPPORT GÉNÉRAL: EN: The authors of the questionnaire have intended to establish whether the obligation to interpret national law in conformity with EC law has an effect on the scope of discretion given to an administrative body. This could, for example, operate when the authority, acting under national law *may* revoke a decision, whereas in the event of incompatibility with EC law, it *would be obliged* to revoke the decision; FR: Les auteurs du questionnaire entendaient vérifier si l'obligation d'interpréter la législation nationale en conformité avec le droit européen avait l'influence sur le pouvoir discrétionnaire des organes qui édictaient les décisions. Il s'agit, par exemple, de l'hypothèse où l'organe statuant en application du droit interne *peut* revenir sur sa décision et en cas d'incompatibilité avec le droit communautaire il *est tenu* de la retirer.

[17] Judgment of 4 July 2006 (C-212/04).

[18] According to the GENERAL REPORT/RAPPORT GÉNÉRAL:
EN: Although the Austrian Administrative Court has frequently recourse to the method of consistent interpretation, it is also pointed to the problems that persist in its relation to the doctrine of direct effect; among other things, can the result of consistent interpretation really be that in fact the effect of direct application is achieved?; FR: Bien que le Tribunal administratif autrichien ait fréquemment recours à la méthode de l'interprétation conforme, le rapporteur fait également ressortir les problèmes qui persistent

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I will now give a final clarification before analysing the subject of my speech.

The technique or principle of "interpretation in conformity" referred to the Community legal system, is applied to three different levels, namely:

1) "interpretation in conformity" of *secondary* Community Law with *primary* original Community Law;
2) "interpretation in conformity" of Community Law *in totum* with International Law;
3) "interpretation in conformity" of national laws with Community Law.

It is at this last level, therefore, where I will focus my speech. However, the clarification that I have just made is also necessary to place appropriately the comparisons with familiar techniques or interpretative principles in the law of the Member States which I have already mentioned, concerning the "interpretation in conformity" of internal laws and regulations with the national Constitution or with International Law.

What happens is that such comparisons may be ambiguous, as: 1) when the national law is interpreted in conformity with Community Law, the person interpreting it is handling two "mutually autonomous" systems, although at the same time "coordinated and communicating"[19]; this, then, as opposed to what happens when the person interpreting handles the internal principle of interpretation in conformity of national law with the Constitution, in which case the said principle is applied within the context of a single system (despite the many federal features that it may present…); 2) when the national law is interpreted in conformity with international law and the intention is to extrapolate this internal experience to the scope of interpretation in conformity with Community law, the basic premise given by the CJEC in its leading cases Van Gend and Loos (1963)[20] and Flaminio Costa (1964)[21], is often forgotten, in which it specifies that the Community Law is a "new" "autonomous" legal system compared with the international legal system and the legal system of the Member States.

That is why comparisons, from an appropriate methodological approximation, must be done between similar interpretative levels, in other words, comparing the internal principle of interpretation in conformity with the Constitution with the Community principle of interpretation in conformity of secondary Law with primary Law; and comparing also the internal principle of interpretation in conformity with International Law with the Community principle of interpretation also in conformity with International Law.

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dans sa relation à la doctrine de l'application directe. Entre autres, une interprétation conforme peut-elle vraiment avoir pour effet une application directe?

[19] Decision of the Italian Constitutional Court of 4 July 1989, No. 389. I will mention more than once throughout my speech the Italian Constitutional Jurisdiction to pay homage to its decision of February 2008 for making reference for the first time for a preliminary ruling to Luxembourg (case recorded as C-169/08, Regione della Sardegna).

[20] Judgment of 5 February 1963 (26/62).

[21] Judgment of 15th July 1964 (6/64).

As an example I can mention the principle of "preservation of the legal system". This principle may also inspire the application of the internal principle of interpretation in conformity with the Constitution or the Community principle of interpretation in conformity of secondary Law with primary Law. However, as we will later see, it is a principle outside the application of the principle of interpretation of national laws in conformity with Community Law and, more specifically, in conformity with Community directives, which sometimes impose express modifications in the national regulations despite the existence of judgments announced by national courts which interpreted the regulations in conformity with Community directives. In other words: According to the consolidated doctrine of the Italian Constitutional Court, for instance, laws are not declared to be unconstitutional if it is possible to interpret them as unconstitutional but because it is impossible to interpret them in conformity (to the Constitution)[22]; within the European framework, however, national rules may be considered as "anti-Community" if they allow an interpretation that is contrary to directives so that, despite the fact that nationally the "State-Judge" may choose for interpretation in conformity in the specific case, the "State-Legislator" may incur in infringement that could be declared and punished under the former articles 226-228 TEC (this doctrine, indeed, contrasts with the doctrine of the CJEC of "interpretation in conformity" of *secondary* law with *primary* law, which is similar to the recent doctrine of the Italian Constitutional Court: cfr. case **Ordre des barreaux francophones et germanophone e.a., 2007[23],** in which the CJEC repeats that "the Court has consistently held that, if the wording of secondary Community law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the EC Treaty rather than to the interpretation which leads to its being incompatible with the Treaty").

As for the rest, even if we maintain the comparisons at the appropriate level, we must not forget that national systems have important variants among them. Thus, for instance, the principle of interpretation in conformity with the Constitution is not usually exercised in the same manner in the context of *ex ante* controls than of *ex post* controls; and also its intensity may vary according to the greater or lesser capacity recognised by whoever does the supreme interpretation of the Constitution to deliver interpretative judgments or even "manipulative" judgments, according to the expressive term related to the Italian constitutional jurisdiction. And the same happens with national interpretation principles in conformity with International Law. What's more, there may still be differences in the same national legal context, according to the nature of International Law used as parameter of interpretation of national law. We can give as an example a Spanish case in which article 10.2 of the Constitution confers reinforced status in interpretative terms to international treaties on human rights compared with the other Treaties [24].

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[22] Cfr. La giustizia costituzionale nel 2003. Conferenza stampa del 2 aprile 2004. President G. Zagrebelsky.
[23] Judgment of 26 June 2007 (C-305/05).
[24] According to the aforesaid rule "Provisions relating to the fundamental rights and liberties recognised by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain"

Let us now focus on the characteristics of the principle of interpretation in conformity of the national laws with the Community law, which is not a national principle, but a Community principle coined by the supreme interpreter of the Community legal system (the CJEC), with a tendency of being handled in an analogous manner by all national legal operators and in particular by national judges and courts:

1) This is a Community principle, as I have just mentioned. Despite the fact that in some Member States, as it happens with primary Community principles with direct efficiency, the intention is to find a national, constitutional or legal clause that protects the principle of interpretation in conformity, the truth is that it is an autonomous principle that derives from the Community legal system itself. Or using words of the CJEC, it is a principle that "is inherent in the system of the Treaty" [25][26].

2) It is a principle which, in a strict sense, can only be announced in relation to Community instruments that are legally binding (of all of them: in relation to the Treaty, see the Murphy case 1988[27], or more recently the ITC case 2007[28]; in relation to regulations that in certain cases require national implementation and complementary measures, see the Rolex case 2004 [29]). Therefore, despite the similarity of the language used by the CJEC, the interpretative power of binding Community rules is not the same as the interpretative power of non-binding Community rules. While binding rules force the national judge "to try as much as possible" to find a reading of the national rules in conformity with them, non-binding rules (soft law) only impose on the national judge "to taken them into account" when he/she interprets domestic law. Indeed, having denied the obligation to directly apply a recommendation as a consequence of its non-binding nature, the Court held in the Grimaldi case (1989)[30] that this, however, could not lead to considering recommendations "as not having legal effect", afterwards stating that "the national courts are bound to take them into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions".

If we assume that the *Grimaldi* doctrine in principle is applicable to other variants of soft law, let us note the difference in shade of meaning between the interpretative scope of this and that of hard law, which is translated as an imposition on national judges and courts to pursue an interpretation of national rules in conformity with Community rules, so that, if this interpretation is possible, it cannot be ruled out by the national judge when he/she applies domestic law; *Grimaldi*, however, only imposes on the national judge the obligation of not leaving aside the existence of the recommendation, which places us not in the field of the obliged interpretation in conformity (both of the search thereof as well as, if found, of the full effectiveness thereof), but all the more in that of justification of potentially ruling it out when they apply domestic law.

Having said this, the door remains open to other possibilities, as we must not forget that admittedly the Court in the *Grimaldi* case also stressed the fact that recommendation

[25] EN: inherent in the system of the treaty; FR: inhérente au système du traité.
[26] Pfeiffer Case, quoted.
[27] Judgment of 4th February 1988 (157/86).
[28] Judgment of 11 January 2007 (C-208/05).
[29] Judgment of 7 January 2004 (C-60/02).
[30] Judgment of 13th December 1989 (322/88).

may "cast light on the interpretation of national measures adopted in order to implement them" (which seems to emphasise its interpretative power in relation to national law adopted in voluntary implementation of the recommendation, in comparison with the interpretative power in relation to national law *previous* thereto) or where they are designed "to supplement binding Community provisions" (which also seems to emphasise its interpretative power the more it is related to hard law). On the other hand, it seems to be clear that the publicity or not of the soft law may also lead to a greater or lesser intensity of its interpretative power and the same could be said about the presence or lack of doctrine of the Court of Justice supporting it, or about the context of its suitability (thus, the Court usually gives little value, or none at all, to the *declarations* that on many occasions accompany regulations or directives when they are not reflected somehow in the adopted rule because of normal discrepancies in the negotiation).

3) In the field of binding Community rules, the principle of interpretation in conformity varies in intensity according to the nature of the rule in question. Thus, although it has already been said, it is a principle "inherent to the system of the Treaty"[31], linked to the "principle of loyal cooperation" enshrined in article 10 TEC[32] and the "useful effect" of the reference for a preliminary ruling[33], the CJEC intensifies its grounds and consequences in the specific field of directives [34], specifically being based on the "useful effect" of the third paragraph of article 249 TEC[35]. Such reinforcement of the interpretation in conformity in the field of directives probably is based on the possibility for these rules not to be directly applicable to the dispute if there is incompatibility either because of the "precision and non-conditionality" of its content or owing to the refusal by the CJEC of its horizontal direct efficiency (in *inter privatos* disputes) and reverse vertical (in disputes between the public authority and private individuals, in which the former intends direct application of the directive vis-à-vis the latter): Cfr. Adeneler case, in which the CJEC declared that "it should be noted that that obligation [of interpretation in conformity], arising from the second paragraph of Article 10 EC, the third paragraph of Article 249 EC and the directive in question itself, *has been imposed in particular where a provision of a directive lacks direct effect*, be it that the relevant provision is not sufficiently clear, precise and unconditional to produce direct effect or that the dispute is exclusively between individuals". And we must not forget that ruling out in these cases the direct application of the directive (having assumed the shades of meaning that the CJEC has been introducing in its doctrine of direct efficiency when this one is purely "reactionary", that is to say, a purely "excluding" effect from the incompatible national legislation, without reaching the extreme of "replacement" by the directive), it is precisely the interpretation in conformity the only

[31] "Since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law when it determines the dispute before it": Cfr. Pfeiffer.

[32] Which imposes "on all the authorities of member states including, for matters within their jurisdiction, the courts", the obligation to take all appropriate measures, whether general or particular, to ensure the fulfilment of the obligations derived from Community Law*:* Cfr. Von Colson v Kamann.

[33] As "that jurisdiction would be deprived of most of its useful effect if individuals were not entitled to invoke [Community legal instruments] in order to obtain a conforming interpretation of national law before the courts of the Member States": cfr. *mutas mutandis* Pupino.

[34] That it is exactly the field where the doctrine of the CJEC on "interpretation in conformity" started: Cfr. Conclusions of the Advocate General in ITC.

[35] As the "binding nature" attributed therein to directives "in the sense that they 'bind' the Member States "as to the result to be achieved but shall leave to the national authorities the choice of form and methods", would be weakened if one did not recognise that this binding nature "entails for national authorities, and particularly national courts, an obligation to interpret national law in conformity", reaching therefore the result pursued by the directive and in fulfilment of article 249 TEC: cfr. *mutas mutandis* Pupino.

way that would allow European "harmonisation" of national legislation (as the liability of the State vis-à-vis individuals for the damage caused by incorrect implementation of Community Law would be apart from this "harmonisation"). This approximation would, on the other hand, be similar to that of British courts in relation to the *Human Rights Act* (*HRA 1998*), in which context, the impossibility of an interpretation in conformity with the European Convention on Human Rights does not lead to the direct application thereof to the detriment of opposing national legislation, but only to a "declaration of incompatibility"[36] of said legislation (which has led British courts, as we will later analyse, to intensify as much as possible the possibilities offered by this interpretation in conformity).

4) "Interpretation in conformity" has a clear intention of homogeneity in the sense of a principle handled in an analogous manner by the legal operators of all the Member States, beyond the margin for diversity, as we will later see, more apparent than real, allowed by the CJEC (let us remember that in Von Colson v Kamann, the CJEC held the obligation of the national court "*to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of community law, in so far as it is given discretion to do so under national law").* On the other hand, there is a tendency to overcome the shades of meaning that some top national jurisdictions introduced at some point, *motu propio*, as regards the intensity of the interpretation in conformity according to the nature of the domestic legal rule to be interpreted, specifically in relation to constitutional texts or at least of part thereof considered as the "hard core" of the national sovereignty.

This is the case of the Spanish CC which seems to have assumed that the obligation of interpretation in conformity would even reach essential values and principles of our constitutional text, gradually covered, following the evolution of the European Union, by the obligation of a *pro communitate* reading. Thus, in its Declaration 1/2004, of 13 December, after verifying the increasing explicit assumption, as a fundamental of the Union, of the same values and principles that prevail in national constitutional laws, especially from the Treaty establishing a Constitution for Europe, the Constitutional Court considered that this would "have the effect of enshrining the guarantee of the existence of the States and their basic structures, as well as their values, principles, and fundamental rights, which in no case *may become unrecognizable* following the phenomenon of the transfer of the exercise of powers to the supranational organisation" (therefore establishing the limit of the interpretative effort *pro communitate* in the readings *contra constitutionem*, which would make the said areas of constitution which are especially sovereign "irreconcilable").

The Polish CC seems to adopt a similar position in its decision of 11th May 2005 (on the Accession Treaty of Poland to the European Union), in which, after proclaiming that "The norms of the Constitution, being the supreme act which is an expression of the Nation's will, would not lose their binding force or change their content by the mere fact of an *irreconcilable inconsistency* between these norms and any Community provision", it later said: "The principle of interpreting domestic law in a manner "sympathetic to European law", as formulated within the Constitutional Tribunal's jurisprudence, has its limits. In no event may it lead to results contradicting *the explicit*

[36] EN: declaration of incompatibility

wording of constitutional norms or being irreconcilable with the minimum guarantee functions realised by the Constitution"[37].

The Czech Constitutional Court, on the other hand, declared in its decision on the European Arrest Warrant of 3rd May 2006: "Article 1 Paragraph 2 of the Constitution of the Czech Republic, in conjunction with the principle of cooperation set out in Article 10 of the EC Treaty, forms the basis for a constitutional principle according to which domestic law, including the Constitution, should be interpreted in conformity with the principles of European integration and of cooperation between Community authorities and Member State authorities." "Where there are several possible interpretations of the Constitution, which includes the Charter of Fundamental Rights and Freedoms, if only some of the interpretations lead to fulfilment of the obligations assumed by the Czech Republic in connection with its membership of the EU, we must opt for an interpretation that supports fulfilment, and not one that would exclude"[38].

5) In short, it is a principle with expansive intention, as it has proven its extension to the scope of the third pillar (Pupino case). I will analyse this further later on.

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In the field of directives, which is where the principle has been more dealt with by the CJEC, there are still questions to be answered at the theoretical level as well as in the practical application to specific cases.

The starting point must be the presence of a directive and of national rules to be interpreted in conformity with the former; as, if there is no national rule, there is nothing to be interpreted in conformity with the directive, and the discourse must, as appropriate, focus on direct efficiency. The statement is obvious, but the truth is that there are some judgments delivered by the CJEC which have caused some confusion in this sense. As an example of this we can mention its references to the fact that, taking into consideration the special legal nature of directives and the limits derived from the general principles of law, "the requirement of a directive-compliant interpretation cannot reach the point where a directive, by itself and without national implementing legislation, may create obligations for individuals or determine or aggravate the liability in criminal law of persons who act in contravention of its provisions" (recently, Kofoed Case, 2007[39]). It is obvious that if there is no internal rule to be interpreted this absence

[37] EN: The norms of the Constitution, being the supreme act which is an expression of the Nation's will, would not lose their binding force or change their content by the mere fact of an irreconcilable inconsistency between these norms and any Community provision; The principle of interpreting domestic law in a manner "sympathetic to European law", as formulated within the Constitutional Tribunal's jurisprudence, has its limits. In no event may it lead to results contradicting the explicit wording of constitutional norms or being irreconcilable with the minimum guarantee functions realised by the Constitution.

[38] EN: Article 1 Paragraph 2 of the Constitution of the Czech Republic, in conjunction with the principle of cooperation set out in Article 10 of the EC Treaty, forms the basis for a constitutional principle according to which domestic law, including the Constitution, should be interpreted in conformity with the principles of European integration and of cooperation between Community authorities and Member State authorities. Where there are several possible interpretations of the Constitution, which includes the Charter of Fundamental Rights and Freedoms, if only some of the interpretations lead to fulfilment of the obligations assumed by the Czech Republic in connection with its membership of the EU, we must opt for an interpretation that supports fulfilment, and not one that would exclude.

[39] Judgment of 5 July 2007 (C-321/05).

conceptually determines the impossibility of resorting to the principle of interpretation in conformity and not the limits derived from the nature of directives (within the context of their non-interpretative efficiency, but direct) or of the general principles of law… This as rightly understood that the national judge, as we have already analysed, must take into consideration "the whole body of rules of national law" (Pfeiffer case), even pre-existing (Marleasing case) and not only the legislation adopted to implement the directive in question, for which reason the principle of interpretation in conformity could, within this context, be useful to cover cases of legal vacuum in an integration manner.

Having said this, the presence of a directive requires it to be taken into consideration before interpreting the national Law. Although I also consider this second statement to be obvious, it does not seem to be so obvious in view of some speeches given at the Colloquia of the Association, as in the Colloquium of 2004, in which we find statements such as "the national text is obviously the starting point of any national interpretation".

If done in this manner, one may be conditioning the efficiency of the principle of interpretation in conformity.

The idea is not to interpret the national text in isolation and, in case of doubt, to resort to the European text. The idea is to interpret the national text, from the beginning, in conformity with the directive (and not only in conformity with the latter, as it has recently been reminded by the CJEC in the Promusicae case in 2008[40], "when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality"). It is thus clearly explained in the speech given by England and Wales at the aforesaid Colloquium held in 2004: "the courts will frequently take as their starting-point the terms of the directive rather than (to the extent that it may be different) the terms of the national implementing legislation".

Analysing now the starting point, the "CILFIT spirit" may play a role (stated again in the Intermodal Transports case in 2005[41]) as well as the Community methods of interpretation. And, in this context, it must be highlighted that the interpretation of the Community legal system presents special characteristics, such as the variety of official linguistic versions to be taken into consideration or the intensification of resorting to Comparative Law.

In any case, it can happen and indeed it does happen that doubts on the scope of the directive arise when it is compared with the national legislation. It will be then, and not before, when the reference for preliminary ruling will play a role.

It must be remembered in relation to this that, according to the *Information note on references from national courts for a preliminary ruling* (2005)[42],

[40] Judgment of 29 January 2008 (C-275/06).
[41] Judgment of 15 September 2005 (C-495/03).
[42] EN: Information Note on references from national courts for a preliminary ruling; FR: **Note informative sur l'introduction des procédures préjudicielles par les juridictions nationales**.

> "A national court or tribunal may refer a question to the Court of Justice for a preliminary ruling as soon as it finds that a ruling on the point or points of interpretation or validity is necessary to enable it to give judgment. It is the national court which is in the best position to decide at what stage of the proceedings such a question should be referred (point 18);
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> It is, however, desirable that a decision to seek a preliminary ruling should be taken when the proceedings have reached a stage at which the national court is able to define the factual and legal context of the question, so that the Court has available to it all the information necessary to check, where appropriate, that Community law applies to the main proceedings. It may also be in the interests of justice to refer a question for a preliminary ruling only after both sides have been heard (point 19)"[43].

However, it must be insistently clarified that the reading of the internal legislation must be determined from the beginning by the principle of interpretation in conformity from an a priori perspective (in the sense that it pre-determines the handling of national principles of interpretation) and, also, it must be transversal (in the sense that it imposes a handling of the national principles of interpretation that are most appropriate, in the specific case, to the Community principle of interpretation in conformity).

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Let us go back to the doctrine of the CJEC. The national court is bound to interpret national law, "so far as possible", in pursuit of an interpretation in conformity with Community law, handling its methods of interpretation ("in so far as it is given discretion to do so under national law": Von Colson v Kamann; cfr. also Pfeiffer). In principle, then, there is margin for handling ("discretion"[44] given by its national law, the expression used by the CJEC in Frigerio Luigi & C, 2007[45]), taking into consideration the reference of the CJEC to the national methods of interpretation. This discretion, however, is less than what it seems, given that the handling of national methods of interpretation depends on the achievement of interpretation in conformity. Probably the

[43] EN: 18. A national court or tribunal may refer a question to the Court of Justice for a preliminary ruling as soon as it finds that a ruling on the point or points of interpretation or validity is necessary to enable it to give judgment; it is the national court which is in the best position to decide at what stage of the proceedings such a question should be referred. 19. It is, however, desirable that a decision to seek a preliminary ruling should be taken when the proceedings have reached a stage at which the national court is able to define the factual and legal context of the question, so that the Court has available to it all the information necessary to check, where appropriate, that Community law applies to the main proceedings. It may also be in the interests of justice to refer a question for a preliminary ruling only after both sides have been heard; FR: 18. La juridiction nationale peut renvoyer à la Cour une question préjudicielle dès qu'elle constate qu'une décision sur le ou les points d'interprétation ou de validité est nécessaire pour rendre son jugement; c'est elle qui est la mieux placée pour apprécier à quel stade de la procédure il convient de déférer une telle question. 19. Il est toutefois souhaitable que la décision de renvoyer une question préjudicielle soit prise à un stade de la procédure où le juge de renvoi est en mesure de définir le cadre factuel et juridique du problème, afin que la Cour dispose de tous les éléments nécessaires pour vérifier, le cas échéant, que le droit communautaire est applicable au litige au principal. Il peut également s'avérer de l'intérêt d'une bonne justice que la question préjudicielle soit posée à la suite d'un débat contradictoire.-

[44] EN: discretion; FR: marge d'appréciation.

[45] Judgment of 18 December 2007 (C-357/06).

CJEC assumed beforehand when it refers to the national methods of interpretation that national judges and courts are flexible in their handling of these methods (as also the CJEC handles its own Community methods of interpretation with flexibility…[46]), which facilitates its subordination to the pursuit of an interpretation in conformity with the directive. With this and no other objective one has to handle the national methods of interpretation, which from the beginning may be influenced by the scope of the Community principle of interpretation in conformity.

As an example one could mention the value of the preparatory work in the interpretation of the internal rules. They may be very important in the interpretative methodology of a national legal system. But this importance has already made relative in Marleasing as it extends the principle of interpretation in conformity, as we have already mentioned, to the pre-existing national Law. Even more so in Pfeiffer, as it extends it, as I mentioned at the beginning of my speech, to all the national Law, and not only to rules adopted for the implementation of directives:

> "Although the principle that national law must be interpreted in conformity with Community law chiefly concerns provisions of national law adopted in order to implement the directive in question, it does not entail an interpretation merely of those provisions but requires the national court to consider national law [that is to say, "the whole body of rules of the national Law"] as a whole in order to assess to what extent it may be applied in such a way that it does not produce a result contrary to that sought by the directive".

But, also, even a little earlier than delivering the Pfeiffer judgment, the CJEC expressly stated in the Björnekulla case (2004)[47], that

> "Where a national court is called upon to interpret national law, whether the provisions in question were adopted before or after the directive concerned, it is required to do so, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 249 EC (…). That applies notwithstanding any contrary interpretation which may arise from the *travaux préparatoires* for the national rule".

Therefore, this subordination of the national methods of interpretation in pursuit of interpretation in conformity with directives which also reaches, as it is logical, the grammatical or textual method, which may be not only modulated but also replaced by another national method of interpretation within the framework of the aforesaid search for a reading in conformity with the Community rule.

Thus, as opposed to frequent statements which say that the internal norm can only be interpreted if there was some sort of ambiguity in it (identifying interpretation contrary to the spirit of the law the limit of *contra legem* that the CJEC recognises to interpretation in conformity), the truth is that what in principle seems not to present

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[46] Cfr. H. Kutscher, *Méthodes d´interprétation vues par un juge à la Cour*, Cour de Justice des Communautés Européennes – Reencontré judiciaire et universitaire, 27 et 28 septembre 1976; recently, A. Rosas, *Methods of Interpretation – Judicial Dialogue*, en *The Role of Internacional Courts*, **C. Baudenbacher** & **E. Buses (eds.), German Law Publishers, 2008.**

[47] Judgment of 29 April 2004 (C-371/02).

double readings in the light of the pure spirit of the text of the rule to be interpreted, it could, however, admit different readings if this text is interpreted within its context, or in the light of the preparatory works of the national rule or the spirit of the latter, always prevailing in this interpretative effort, as we have already mentioned before, the pursuit of interpretation in conformity.

* * *

We could mention here the decision delivered by the *House of Lords* on 21st June 2004, in the Ghaidan case, clarifying before in this respect that, although it is a decision delivered within the framework of the aforementioned HRA 1998, this rule and specifically article 3 (1) thereof (according to which "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights"[48]), was based on the doctrine of the CJEC on interpretation in conformity with directives (as Lord Rodger of Earlsferry stated in his opinion: "When Parliament provided that, "so far as it is possible to do so", legislation must be read and given effect compatibly with Convention rights, it was referring, at the least, to the broadest powers of interpreting legislation that the courts had exercised before 1998. In particular, Parliament will have been aware of what the courts had done in order to meet their obligation to interpret domestic legislation "*so far as possible*, in the light of the wording and the purpose of the [Community] directive in order to achieve the result pursued by the latter"[49]; indeed, the formula "so far as it is possible to do so" is interpreted much more intensely by British courts than by New Zealand and Australian courts which have a similar formula in the *New Zeland Bill of Rights Act 1990* y en la *Human Rights Act 2004*[50]) respectively.

The opinion of Lord Nichols of Birkenhead given before the opinions of his colleagues clarifies a great deal:

> "One tenable interpretation of the word 'possible' would be that section 3 is confined to requiring courts to resolve ambiguities. Where the words under consideration fairly admit of more than one meaning the Convention-compliant meaning is to prevail. Words should be given the meaning which best accords with the Convention rights.
>
> This interpretation of section 3 would give the section a comparatively narrow scope. This is not the view which has prevailed. It is now generally accepted that the application of section 3 does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, section 3 may nonetheless require the legislation to be given a different meaning.

[48] EN: So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

[49] EN: When Parliament provided that, "so far as it is possible to do so", legislation must be read and given effect compatibly with Convention rights, it was referring, at the least, to the broadest powers of interpreting legislation that the courts had exercised before 1998. In particular, Parliament will have been aware of what the courts had done in order to meet their obligation to interpret domestic legislation "*so far as possible*, in the light of the wording and the purpose of the [Community] directive in order to achieve the result pursued by the latter…".

[50] Cfr. A.S. Butler, *The Act Human Rights Act: A New Zealander´s View* (an edited and shortened copy of remarks made at a seminar to the ACT Law Society on 8 July 2004).

> From this it follows that the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear"[51].

Lord Steyn reaches a similar conclusion:

> "It is necessary to state what section 3(1), and in particular the word "possible", does not mean. First, section 3(1) applies even if there is no ambiguity in the language in the sense of it being capable of bearing two *possible* meanings. The word "possible" in section 3(1) is used in a different and much stronger sense. Secondly, section 3(1) imposes a stronger and more radical obligation than to adopt a purposive interpretation in the light of the ECHR. Thirdly, the draftsman of the Act had before him the model of the New Zealand Bill of Rights Act which imposes a requirement that the interpretation to be adopted must be reasonable. Parliament specifically rejected the legislative model of requiring a reasonable interpretation". "Instead the draftsman had resort to the analogy of the obligation under the EEC Treaty on national courts, as far as possible, to interpret .national legislation in the light of the wording and purpose of directives"[52].

In short, even if there is no ambiguity (we could also mention here that the White Paper Rights Brought Home: *The Human Rights Hill*, that was attached to the Law while it was being processed, describes the clause of Section 3 as a principle of interpretation that "goes far beyond the rule which enabled the courts to take the Convention into account in resolving any ambiguity in a legislative provision"), the obligation of interpretation in conformity may impose, as Lord Millett explains, "abnormal" readings (in other words, give it a meaning which, "however unnatural or unreasonable, is intellectually defensible"), which cannot be achieved by resort to standard principles and presumptions [53].

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[51] EN: One tenable interpretation of the word 'possible' would be that section 3 is confined to requiring courts to resolve ambiguities. Where the words under consideration fairly admit of more than one meaning the Convention-compliant meaning is to prevail. Words should be given the meaning which best accords with the Convention rights. This interpretation of section 3 would give the section a comparatively narrow scope. This is not the view which has prevailed. It is now generally accepted that the application of section 3 does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, section 3 may nonetheless require the legislation to be given a different meaning. From this it follows that the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear.

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[53] EN: It obliges the court to give an abnormal construction to the statutory language and one which cannot be achieved by resort to standard principles and presumptions.

In the opinion of Lord Steyn, “there is a Rubicon which courts may not cross”, which is none other than the transformation of the judicial role into a legislative role. And, in relation to this, Lord Rodger of Earlsferry very convincingly rules out provisions of the type mentioned in the Constitution of Belize which, upon referring to pre-existing laws it imposes the obligation of interpreting it “with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the constitution”[54]. According to Lord Rodger of Earlsferry, “The language of such provisions may be thought to go even further than the language of section 3(1) of the 1998 Act, especially in saying that existing laws are to be construed with such modifications etc "as may be *necessary*" to bring them into conformity with the constitution”[55].

* * *

Now, going back to the Community principle of interpretation in conformity (which connection with the HRA 1998 is, at the same time, highlighted in the context of the third pillar of the European Union by the House of Lords itself in its decision of 28th February 2008, in the Dabas case), it must be said that it *imposes* a review of the internal interpretative methodology in the pursuit of an interpretation in conformity. This methodology which, apart from the homogeneity that this imposition represents, shall be variable in the sense that the national judge will have to choose, depending on each specific case, the most appropriate internal principle of interpretation to achieve a reading of its Law in conformity with Community Law.

For this reason the *contra legem* limit expressly mentioned by the CJEC since the Pupino case, in my opinion, can be found in readings of national legislation not so much opposing those derived from the text, or from the context, or from the preparatory works… (because, as we have already analysed, the Community principle of interpretation in conformity, includes, if need be, changing from a national principle of interpretation into another one –the one that leads to an interpretation in "greater conformity” with the European rule-), but rather beyond the interpretative methodology itself, making the interpreter a legislator. This is exactly the sense that in my opinion it should be given to the statement of the CJEC that “the principle of interpretation in conformity with Community law thus requires *the referring court to do whatever lies within its jurisdiction*, having regard to the whole body of rules of national law, to ensure that the Directive is fully effective” (Pfeiffer case). This taking into consideration that the effort made by the national judge in pursuit of an interpretation in conformity must be translated into suitable justification in relation to this, with the risk, otherwise, not only to exceed the principle of separation of powers, but also to simply incur in arbitrariness.

The intensity in this interpretative effort, on the other hand, has its consequences not only on the intensity of the justification required from the national judge (that is to say, a greater interpretative effort, greater intensity in the justification), but in the connection

[54] EN: Existing laws are to be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the constitution.

[55] EN: The language of such provisions may be thought to go even further than the language of section 3(1) of the 1998 Act, especially in saying that existing laws are to be construed with such modifications etc "as may be *necessary*" to bring them into conformity with the constitution.

of the principle of interpretation in conformity with another main principle which prevails in the relations between the European legal system and internal legal systems, such as legal certainty.

Indeed, if the interpretative effort is greater for the achievement of an interpretation in conformity, the internal law will be further away if it is thus interpreted from the requirements that the CJEC derives from the principle of legal certainty, in the sense of imposing that individuals are, really and effectively, in a position to know all the rights recognised in the Community legal system, and to use these rights, if appropriate, before the national courts. Thus, for instance, the CJEC, in the Steenhorst-Neerings case (1993)[56], after declaring that if, however, despite that wording, the national courts consistently apply such a provision without distinction to women and men in the same situation, *as it seems to be clearly stated in a national law against the provisions in a Directive*, there is nothing to preclude the national courts from continuing to apply that provision [57], it sustained that this judicial task "ensures that the Directive [in question] is given full effect *for so long as the Member State has not yet adopted the legislation necessary to implement it in full*". Thus, and as I mentioned earlier, national rules could be considered to be "Anti-Community" if they can be interpreted in conformity after an intense interpretative effort of the national judge but if they can also be interpreted contrary to Community Law, despite this effort. In other words, despite the fact that the "State-Judge" may choose an interpretation in conformity in a specific case (even on the basis of "constant judicial application"), the "State-Legislator" may incur in infringement until there is formal modification of the legislation in question for the purpose of fully meeting the requirements of the principle of legal certainty; these requirements are also especially reinforced in the presence of directives which aim is "the attribution of rights to nationals from other Member States, because these nationals are not in general aware [of the provisions in the legal system of States other than their own]" (case Commission v. Germany, 1985[58]). The CJEC insisted on this in the case Commission v. The Netherlands (2001)[59], in which after reminding that the requirements of legal certainty were intensified "where the directive in question is intended to accord rights to nationals of other Member States", and even more so a type of nationals traditionally unprotected, as consumers are, it declared that "even where the settled case-law of a Member State interprets the provisions of national law in a manner deemed to satisfy the requirements of a directive, that cannot achieve the clarity and precision needed to meet the requirement of legal certainty".
Going back to the limits that the CJEC imposed on the interpretation in conformity, to the already rejected *contra legem* interpretation, the limits derived from other general principles of Community Law must be added as, for instance, the principle of legality in criminal matters (cfr. case Kolpinghuis Nijmegen, 1987[60]) or, in general, punishing, which prevents extensive or analogical interpretations which aim is to determine or aggravate the liability (instead, the aforementioned limits related to the direct efficiency of directives according to the parties involved in the dispute are prevented: cfr. the already mentioned Kofoed case). That is why in the case Commission v. Spain (2004)[61]

[56] Judgment of 27th October 1993 (C-338/91).
[57] According to the referring court, the provision in the Dutch Law had been applied "to widows and widowers alike where they suffer incapacity for work, although, according to its text, only women forfeit their benefits for incapacity for work on being awarded a widow's pension".
[58] Judgment of 23rd May 1985 (29/84).
[59] Judgment of 10th May 2001 (C-144/99).
[60] Judgment of 8th October 1987 (80/86).
[61] Judgment of 7th January 2004 (C-58/02).

the CJEC, after saying "the Spanish legislation does not prohibit all the types of acts set out in the Directive. None the less, in a number of cases, certain acts provided for in the Directive", it declared that "even interpreting the Criminal Code in accordance with the Directive, the gaps and inadequacies found by the Commission cannot be filled or made good without breaching the principles of legality and legal certainty, which prevent sanctioning conduct which has not been clearly designated and expressly treated as an infringement by the Criminal Code".

This then leads to minimising the consequences of the Pupino judgment (taking into consideration precisely the material scope of the third pillar, which specific characteristics as to the effects of its legal instruments, indeed, disappear in the Treaty of Lisbon), not to prevent them (as the principle of interpretation in conformity, for instance and as it is shown in the Pupino case itself, may use its powers when there are national provisions not referred to the scope of criminal liability of the party concerned, but to the development of the proceedings and the way the evidence is examined; and even within this context the interpretation in conformity must respect other fundamental rights that do extend their scope of action to cover procedural rules, such as the right to a fair trial…).

* * *

As for the second pillar (foreign policy and common security) it is sufficient to draw attention to the doubts that are raised by extending to it the principle of interpretation in conformity (not to mention the doubts still existent in the third pillar until there is "Communitarisation" with the Treaty of Lisbon as, for instance, the extension of the principle to the Member States that have not accepted the preliminary ruling jurisdiction of the CJEC, or to instruments, such as common positions, excluded from the preliminary ruling jurisdiction both in terms of interpretation and validity).

In favour of its extension (as regards the principle of the EU; irrespective, then, of the power that it may have to use as a principle that may have an effect on national legal systems), the principle of loyal cooperation specifically provided for in the second pillar plays a role [62], as well as the binding nature for the Member States of EU intervention instruments in this scope [63]. One should add the "bridges" with the other two pillars [64], in which context it would be difficult to reject the principle of interpretation in conformity in relation to EU Law, taken as a whole and, at the same time, interpret it suitably and systematically.

[62] According to article 11.2 TEU, "The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity" and "They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations".

[63] The obligatory nature of common actions and common positions is clearly derived from the text of the TEU: The former, according to article 14.3, "shall commit the Member States in the positions they adopt and in the conduct of their activity"; and as regards common positions, the Treaty adopts an imperative tone by saying that the Member States "shall ensure that their national policies conform to the Union positions" (article 15) and shall "uphold" them in international forums (article 19.1). Quite another thing is the manner in which these obligations must be fulfilled in case of infringement, taking into consideration the jurisdictional exclusion of the CJEC in this respect.

[64] Cfr. Articles 60 and 301 TEC in relation to the Community pillar and article 38 TEU in relation to the third pillar.

However, one should not underestimate arguments against it connected with the inter-governmental nature of the second pillar. Indeed, despite the fact that the three pillars globally considered represent a step forward in "an ever closer union among the peoples of Europe", and that, as the CJEC declared in the Pupino case "the task of the Union, which is founded on the European Communities, supplemented by the policies and forms of cooperation established by that treaty, shall be to organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples", the CJEC itself has just referred in another very important case (Kadi, 2008[65]) to "the coexistence of the Union and the Community as *integrated but separate legal orders*". Now, we must not forget that in the very same Pupino case the CJEC, apart from providing the basis for the interpretation in conformity through the principle of loyal cooperation, it supported its doctrine in the useful effect of framework decisions (when it mentioned, *mutas mutandis* and despite the express rejection of its direct efficiency, the doctrine related to Community directives) and of its own preliminary ruling jurisdiction. The backing for both is non-existent in the field of the second pillar, before and after Lisbon (which refuses to give to the EU the capacity to adopt "legislative acts" in this field, at the same time that it opens the same to the jurisdiction of the CJEC in very restrictive terms, among which the preliminary ruling jurisdiction is not included…).

I will now conclude my speech by giving a few brief considerations devoted to the divergence that one can observe sometimes between the theory of the CJEC and its practical application when it imposes the principle of interpretation in conformity on national judges and courts and the consequences derived from this for the European judicial structure itself and national judicial structures.

The basis from which one should start, according to the CJEC, for instance, appears in the aforesaid Promusicae case:

> "As regards the division of responsibilities under the cooperative arrangements established by Article 234 EC, the interpretation of provisions of national law is admittedly a matter for the national courts, not for the Court of Justice, and the Court has no jurisdiction, in proceedings brought on the basis of that article, to rule on the compatibility of national rules of law with Community law. On the other hand, the Court does have jurisdiction to provide the national court with all the guidance as to the interpretation of Community law necessary to enable that court to rule on the compatibility of national rules with Community law".

The problem lies in that, on more than one occasion, the CJEC seems to have crossed this jurisdictional border and it has done so also in a confusing manner *imposing* on the national judge a certain interpretation in conformity where there seemed not to be any margin therefor; in other words, there are plenty examples in which the CJEC has imposed on the national judge a sort of hidden direct application (apparently as interpretation in conformity) of the European law.

This is exactly what happened in the Marleasing case in which the matter raised by a Spanish first-instance court was if petitioned by a company (Marleasing) the declaration of nullity of the contract establishing another company (La Comercial) for lack of cause based on Articles

[65] Judgment of 3rd September 2008 (C-402/05 P and C-415/05 P).

1261 and 1275 of the Spanish Civil Code (in the absence of provisions then on a scheme of nullity in the Companies Act 1951), according to which contracts without cause or whose cause is unlawful have no legal effect, the latter could oppose at the same time to the petition the First Directive on Companies, which lists exhaustively the cases in which the nullity of a company may be ordered (beyond which "the companies will not be subject to any kind of inexistence, absolute nullity, relative nullity and voidability"), which does not include lack of cause amongst them.

Literally, the Court raised the question in the following terms: "Is Article 11 of Council Directive 68/151/EEC of 9 March 1968, which has not been implemented in national law, directly applicable so as to preclude a declaration of nullity of a public limited company on a ground other than those set out in the said article?".

After delivering the aforesaid doctrine on interpretation in conformity, the CJEC imperatively ruled: "A national court hearing a case which falls within the scope of Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, is required to interpret its national law in the light of the wording and the purpose of that directive in order to preclude a declaration of nullity of a public limited company on a ground other than those listed in Article 11 of the directive".

This announcement, with no further explanations, implied in practice the obligation of the Court to disapply, as it is contrary to the Community Directive, the lack of cause provided for in the Spanish Civil Code as grounds for nullity of the contract establishing La Comercial.

It must be noted that the Civil Code, with is ordinary Law rules, was applied by reference to the Code of Commerce, in the absence of commercial rules, which was the case as the Spanish Public Limited Companies 1951 did not have rules related to nullity; in other words, the intention was to compare the Directive not with legislation applicable specifically to companies that included grounds for nullity not mentioned in the former but with ordinary legislation (applicable to contracts) which was applied in the absence of special rules (as regards the incorporation of companies).

In fact, assuming that the majority doctrine had sustained in Spain the application "for analogy" of the provisions related to the nullity of contracts, the question raised, according to the Advocate General, is "to what extent the grounds of nullity under ordinary law can be applied by analogy to public limited companies", and the opinion given in this respect is that "the requirement that an interpretation must be consistent with a directive precludes the application to public limited companies of the provisions on nullity under ordinary law in such a way as to permit a declaration of nullity of such a company on grounds other than those exhaustively listed in Article 11 of the First Directive".

Without going into too much detail as to what is arguable in this approximation (as one thing is the application by analogy and another very different thing is the complementary application by express legal reference), it must highlighted that the Advocate General raised the question of contradiction between the Directive and Spanish law in terms, in his opinion, salvable in interpretation terms, consisting in the end in blocking out from, also in his opinion, the interpretative rule of the analogy.

It is true that the Advocate General addressed the question from the perspective of the analogical application supported by Professor Garrigues, specifically in his Course on Commercial Law handled by the Commission in its observations in which our illustrious jurist contradicts himself as he mixes analogy with reference. But not more than the Advocate General himself who should have noticed that he was in the presence of the latter and not of the former, as he supported his argument at the bottom of the page through the literal text of "Article 50 of the Spanish Commercial Code, which provides that commercial agreements - according to Article 116 of that code, a (trading) company constitutes a commercial agreement - are governed by the rules of ordinary law, except where otherwise provided by special rules" (which would place us within the framework not of analogy but of reference to ordinary Law and, once we are in this context, we could raise the possible presence, according to Larenz[66], of a subsequent hidden vacuum to be covered through teleological reduction –the rule contained in the law and formulated too broadly must be redirected to the scope of application appropriate for the aim or connection of meaning of the law in light of the technical or economic development).

Whatever the case may be, the thing is that the reasoning finally followed by the Advocate General is not present in the announcement of the CJEC which, restricting it –in a most transcendental case in terms of general doctrine involved in it- to making reference to the report for the hearing for a broader description of the facts in the main proceedings, of the development of the proceedings and of the written observations presented before it, and silencing the considerations given by the Advocate General, it first transformed, in its reasoning –without further explanations- in terms of interpretation the issue raised by the Court in application terms, subsequently announcing a judgment that not only the doctrine but also the members of the CJEC have understood –to a greater or lesser degree- as application efficiency, which would make the rejection thereof relative, there being directives involved, in the field of *inter privatos* relations.

This example shows us how the CJEC (including Advocates General) must act prudently when, repeating its words, "the Court does have jurisdiction to provide the national court with all the guidance as to the interpretation of Community law necessary to enable that court to rule on the compatibility of national rules with Community law". One must be very cautious, on the one hand, at analysing the interpretation possibilities offered by the national Law, as this task exceeds its competences (and it must be added, in purely practical terms, that it probably lacks all the national elements, de facto and in law, to go down to the field of the specific case). And, on the other hand, one must be extremely cautious also, at preparing the judgment, duly explaining to the national judge the border between the interpretation in conformity and direct application, as well as the possibilities of crossing the border which European Law would offer, or not offer.

Only in this way announcements that seem to impose interpretations in conformity could be avoided where they do not seem to be possible which, apart from being, as it has already been said, a jurisdictional excess of the CJEC upon interpretation of the national Law, it leads to confusion in its own doctrine, especially in relation to European legal rules, which direct effectiveness is limited (directives) or expressly denied by the Treaty (framework decisions). Also, from a judicial structure perspective, problems could be avoided strictly at the European level (with a CJEC increasingly loaded with matters after the accession of new Member States, and the proliferation of new European instruments within the framework of an area of freedom, security and justice, which total opening to the preliminary ruling possibility is provided for in the

[66] *Metodología de la Ciencia del Derecho* (trans. Gimbernat Ordeig), publishing house Ariel, Barcelona, 1966, p. 292 and following pages.

Treaty of Lisbon), and at the national level (with possible suspicion not only of jurisdictional excesses of the CJEC but of the attitude of judges and courts of the Member States that tend to feed such excesses, forcing the transfer to Luxembourg, through the preliminary ruling, of the prominence of the highest national courts as regards supreme interpreters of the national Law).

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An example that proves that we still have a long way to go we could mention the Pupino case, which is such an important case in terms of interpretation in conformity as the Marleasing case was, and in which one notices also that the intervention of the CJEC could cause some confusion upon the analysis done to determine whether the national law allows or not an interpretation in conformity with European Law; this determination, once again, is only for the referring court and that in Pupino it seemed to clearly lead to ruling out by the Examining Judge of the Court in Florence the possibility of carrying out this interpretation in conformity (as it was clearly understood by the French government: Cfr. FJ 24).

It is even more worth noting Whereas 40 in the Conclusions of the Advocate General, on which the CJEC is expressly based and in which he reminds us that "the Italian Government itself refers to possible legal bases – which did not occur to the referring court –for examining juvenile victims under specially protected conditions during the trial", which does not imply, as the Advocate General said, the possibility of holding the hearing in a place other than the court, in particular in special facilities, as it was reminded by the *Corte Costituzionale* in its judgment delivered on 6th December 2002, number 529. This judgment, indeed, which was delivered within the framework of a matter of unconstitutionality raised by the same referring Court of the preliminary ruling in Pupino, clearly stated the impossibility of applying the aforesaid evidence pre-trial hearing in relation to juvenile victims, *not of sexual crimes*; and this is what the referring judge assumed apparently, as it is read in the Conclusions of the case ("the court takes the view that, pursuant to the abovementioned provisions of Italian law of criminal procedure, […] is a procedural mechanism which is absolutely exceptional in character and cannot be used in situations other than those specified by law" and later on: "The [referring] court is nevertheless of the opinion that the restriction by Italian law of the use of the special procedure for recording evidence beforehand *infringes* the Framework Decision"), for which reason it is surprising that the Advocate General admitted in the aforesaid Whereas 40, without further explanations, that "request for a preliminary ruling contains contradictions in that respect".

In short, the way in which the judgment was drafted is also confusing ("Articles 2, 3 and 8(4) of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings must be interpreted as meaning that the national court must be able to authorise young children, who, as in this case, claim to have been victims of maltreatment, to give their testimony in accordance with arrangements allowing those children to be guaranteed an appropriate level of protection, for example outside the trial and before it takes place") as the conclusion of the Advocate General ("In summary, Article 2(2), Article 3 and Article 8 (4) of the Framework Decision 2001/220/JHA may, in the light of the circumstances of the particular case, create an obligation for the national courts to carry out a special procedure, appropriate for children, of recording evidence beforehand, provided that such a procedure is compatible with the Member State's basic legal principles – including the fundamental rights recognised by the Union").

In both announcements, despite the repetition of the classical formula of interpretation in conformity (where the Advocate General declares "each individual directive obliges the courts and tribunals to interpret national law, whether provisions before or after the framework decision, to achieve the result envisaged in that directive, so far as it possible, in the light of the wording and purpose of the framework decision"), seem to *impose* recourse to evidence pre-trial hearing (which consists of giving testimony outside the public trial and before it is held), thus exceeding the general doctrine expressly clarified in the same matter by the CJEC (in the sense that the "the principle that national law must be interpreted in conformity with Community law cannot lead to an interpretation *contra legem*"); as one thing is to emphasise the pursuit of procedural possibilities that allow special protection for the victim and quite another thing is to insist, even if it is just as an example, on a specific procedural channel, excluded by the national Law (in the opinion of the referring court itself [67]).

[67] The Examining Judge in Florence who referred the preliminary ruling finally decided, based on the framework decision, to give permission to proceed to the evidence pre-trial hearing (thus extending its application to juvenile victims *not of sexual crimes*). Subsequently, the same was decided in relation to a mentally ill person, who *was not a minor*, who was victim of a sexual crime. Cfr. Consiglio Superiore Della Magistratura. Incontro di studio sul tema "Il ruolo del GIP [giudice per le indagine preliminari] e l´udienza preliminare" (Roma 11 – 13 dicembre 2006). Relazione sul tema *La formazione anticipata della prova e le attività d´integrazione investigativa e probatoria del giudice*, a cura de N. Russo.