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## C-80/86 – *Kolpinghuis Nijmegen* *The General Principles of European (Criminal) Law as Limitation to the Enforcement of EU Law: The Kolpinghuis Nijmegen Rule\**

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DR LUISA MARIN

### I. Introduction: *Kolpinghuis Nijmegen* as a First Encounter between EU Law and National Criminal Law(s) Principles

In the same year in which Michael Jackson released his famous ‘Bad’ album (1987), the Court of Justice of the EU (CJEU or CJ) delivered, on the 8th of October 1987, the judgment in the case *Criminal Proceedings against Kolpinghuis Nijmegen BV* (hereinafter: *Kolpinghuis Nijmegen*), in which it gave its contribution to the edification of European criminal law, by deciding that the principles of legal certainty and non-retroactivity limited the enforcement of EU law into the legal orders of the Member States (MSs).<sup>1</sup> This chapter focuses on this ruling.

The judgment can be considered one of the cornerstones of EU criminal law for several reasons: from one perspective, it indicates how EU law can and cannot influence national law enforcement systems, with specific reference to

\* This chapter was written during my stay as Visiting Scholar at the Department of Legal Studies ‘A Saffa’ of Bocconi University, Milan, Italy, which I wish to thank.

<sup>1</sup> Case C-80/86 *Criminal Proceedings against Kolpinghuis Nijmegen BV* (hereinafter: *Kolpinghuis Nijmegen*) [1987] ECR 3982.

the interaction between EU law and national criminal law. Two years before the leading ‘Greek Maize’ case,<sup>2</sup> the CJ was building the edifice of EU law, unravelling the implications of its famous doctrines of direct effect and indirect effect, in particular for directives.<sup>3</sup>

From another perspective, the *Kolpinghuis Nijmegen* case represents a contribution to the edification of the principles of EU law, namely of legal certainty and non-retroactivity. These principles have a special significance for European criminal law, a field of law which has developed, first, thanks to the adjudication of the CJ and, later on, with the treaties and with the legislation.

The common element within both perspectives is the strong protective dimension developed for individuals by the CJ, with a judgment where EU law is deployed to protect citizens against the state, but also where the CJ resorts to general principles of national criminal justice systems in order to forge this protective dimension. EU law functions like a ‘shield’ against criminal law.<sup>4</sup>

*Kolpinghuis Nijmegen* is therefore, and for different reasons, a judgment of crucial importance in both EU law and EU criminal law, with a deep constitutional significance. It contributes to shape EU law as the house built upon the foundational *Van Gend en Loos* case, where the CJ stated that the EU legal order was ‘more than an agreement which merely creates mutual obligations between the contracting parties.’<sup>5</sup> As ‘a new legal order of international law for the benefit of which the states have limited their sovereign rights (...) and the subjects of which comprise not only Member States but also their nationals,’<sup>6</sup> *Kolpinghuis Nijmegen* develops a new declination of this core feature of EU law on the precise juncture of the relations between states and individuals. It is one of those judgments in which EU law emerges not simply as a law to be enforced, but also as a shield for individuals, and as such it shapes the EU as a system based on the ‘rule of law’. In a nutshell, it is one of the first encounters between European law and national criminal law principles, which then became European criminal law principles.

The chapter is organised as follows: after this short introduction (I), the judgment will be presented and discussed in relation to the case law of that time (II). In a following section (III), the legal issues at the core of the case will be analysed, and the chapter will move forward on the legacy (IV) of *Kolpinghuis Nijmegen* in the subsequent case law of the Court of Justice, showing how the knots of the direct effect(s) of EU law provisions continue to animate the debate on

<sup>2</sup> Case C-68/88 *Commission v Greece* (hereinafter: *Greek Maize* case) [1989] ECR 2695.

<sup>3</sup> B de Witte, ‘Direct Effect, Primacy and the Nature of the Legal Order’ in P Craig and G De Burca (eds), *The Evolution of EU Law* (Oxford University Press, 2011) 335.

<sup>4</sup> Y Cartuyvels et al (eds), ‘Les droits de l’homme, bouclier ou épée du droit pénal?’ (Brussels, 2007).

<sup>5</sup> Case 26/62 *Van Gend en Loos* [1963] ECR 1.

<sup>6</sup> *Ibid.*

European, criminal law and constitutional law scholarship, as the recent *Taricco* saga<sup>7</sup> demonstrates, before concluding (V).

## II. The Facts of the Case and the Judgment of 8 October 1987

### A. The Café Run by *Kolpinghuis Nijmegen*

The case dealt with a preliminary reference from the district court (*arrondissement bank*) of Arnhem, in the Netherlands, in which the referring court asked questions on a directive that, at the time, had not yet been implemented in national legislation.

Council Directive 80/777/EEC<sup>8</sup> on the approximation of the laws of the MSs relating to the exploitation and marketing of natural mineral waters (hereinafter: the Directive) required MSs to take measures necessary to ensure that only waters extracted from the ground and recognised by the national responsible authority as ‘mineral waters’ could be marketed as such.

The deadline for the implementation of the Directive expired on the 17 July 1984, but the Dutch state amended its legislation with effect from 8 August 1984, whereas the facts of the case took place precisely on 7 August 1984, one day before the entry into force of the legislation implementing the Directive. The facts therefore took place before the state had implemented the Directive, which was already due for transposition.

The facts of the case concerned a prosecution against a company running a café which used to sell a mixture of tap water and carbon dioxide under the label

<sup>7</sup>The ‘*Taricco* saga’ refers to a case of ‘dialogue among courts’, the Court of Justice (CJ) and the Italian Constitutional Court (ICC), on the compatibility with EU law of Italian provisions on time limitations for criminal proceedings. In ‘*Taricco I*’, the CJ answered a request for a preliminary ruling where the referring judge framed the Italian legislation on time limitations as creating a ‘de facto impunity’ for VAT ‘carousel frauds’. The CJ answered that effectiveness of EU law required the disapplication of national provisions, drawing direct effect from treaty provisions (Art 325 (1) and (2) of the TFEU). This ‘*Taricco I*’ judgment has triggered the reaction of the ICC, which, in a request for a preliminary reference (Order 24 of 2017), threatened the use of its ‘counter-limits’ doctrine, which would have created a systemic clash between EU law and Italian law. The CJEU moderated its ‘*Taricco I*’ position in the so-called ‘*Taricco II*’ judgment (*MAS and MB*), where it left discretion for the national court not to disapply national law in case this would have entailed a breach of the legality principle, as interpreted by the ICC. The ICC terminated this ‘saga’ with its judgment of 2018, no 115. The references are as follows: CJEU, Case C-105/14 *Criminal Proceedings against Ivo Taricco and others* [2015] ECLI:EU:C:2015:555; ICC, Order of 26 January 2017, no 24, at [www.cortecostituzionale.it](http://www.cortecostituzionale.it); CJEU, Case C-42/17 *Criminal Proceedings against MAS and MB* [2017] ECLI:EU:C:2017:936; ICC, judgment of 31 May 2018, no 115, at [www.cortecostituzionale.it](http://www.cortecostituzionale.it).

<sup>8</sup>Council Directive 80/777/EEC of 15 July 1980 on the approximation of the laws of the Member States relating to the exploitation and marketing of natural mineral waters [1980] OJ L229/1–10.

of ‘mineral water’. Tap water mixed with carbon dioxide, as one can easily agree, could not be considered as mineral water for the purpose of the Directive, and therefore could not be marketed with that indication. At a domestic level, the undertaking was charged with the infringement of the Inspection Regulation of the Municipality of Nijmegen, prohibiting the stocking and delivery of goods of unsound composition intended for trade and human consumption.

The public prosecutor also relied on the Directive on natural mineral waters in his request for conviction.

In this situation, the judge referring the case questioned the applicability of the Directive for the solution of the case at stake. Therefore, the core of the referral boiled down to the issue of whether an authority of the MS, such as a prosecuting entity, could invoke against a national a provision of a directive in a case which is not covered by the MS’s own legislation or implementing provision. It covered, in a nutshell, the question of whether a directive could bring about detrimental direct effects for individuals and how they could do so; second, it covered the issue of whether the Court can be bound to directives via the instrument of consistent interpretation.<sup>9</sup>

## B. The Judgment of the Court

This referral gave the Court the chance to dig into the issue of direct effects of directives not yet implemented and their relationship with criminal liability, a subject which was highly dynamic at that time.

After the seminal *Van Gend en Loos* of 1963, EU law history was made in the 1970s with the ramification of the doctrine of the direct effect of treaty provisions into the direct effect of directives following *Van Duyn*<sup>10</sup> and its progenies. In the 1980s, the CJ continued to further develop this complex doctrine.

In this judgment, confronted with the direct effect of directives and an individual’s criminal liability, the CJ had examined the first two questions together, since they both referred to the issue of ‘detrimental direct effects’, ie, direct effects which are detrimental for the individual concerned and do not confer on her/him any right, as was the situation in the classical *Van Gend en Loos* case.

Starting from its case *Becker*,<sup>11</sup> on tax collection and VAT, the Court stated that provisions of directives, sufficiently precise and unconditional, may be relied upon by an individual against the MS where the MS fails to implement the directive by the end of the implementation period or if it has been implemented incorrectly.

This means that a MS which has not adopted the implementing measures required by the directive may not plead, as against individuals, its own failure to perform the obligation the directive entails. This results from the nature of the

<sup>9</sup>In this chapter, the terms consistent interpretation and indirect effect will be used interchangeably.

<sup>10</sup>Case 41/74 *Van Duyn* [1974] ECR 1337.

<sup>11</sup>Case 8/81 *U Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53.

obligation of the then Article 189 of the Treaty (now Article 288 of the Treaty on the Functioning of the European Union (TFEU)), which is of a binding nature toward states, and therefore entails that the individuals concerned should be able to rely on that binding nature.

The Court then moves on to analyse whether a directive can impose obligations on individuals, an issue that was tackled in *Marshall*,<sup>12</sup> which concerned the case of a dietician dismissed from the national health authority on the ground that she had reached retirement age. In *Marshall*, the Court held that the direct effect of directives can be invoked against the state irrespective of whether it acts as an employer or as *autorite' publique*. However, direct effect cannot operate against other individuals, thus denying that directives can have a so-called 'horizontal direct effect'. The logic of the CJ is 'to prevent the State from taking advantage of its own failures to comply with Community Law'.<sup>13</sup>

Developing its *Marshall* doctrine in *Kolpinghuis Nijmegen*, the Court held that 'a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person before a national court'.<sup>14</sup> Thus, as long as direct effect is concerned, a directive cannot display horizontal direct effect.

The second question tackled in *Kolpinghuis Nijmegen* concerned whether the Directive could bear indirect effect, in the sense that the national court 'may or must take into account of a directive as an aid to the interpretation of a rule of national law'.<sup>15</sup> In other words, if EU law could not work as a foundation of a duty of incrimination, can the national law, interpreted in harmony with or in light of the Directive, be used to establish such criminal liability? Must it be interpreted in such a way?

The CJ first recalled the *Von Colson* case,<sup>16</sup> where the doctrine of indirect effect or consistent interpretation was first posited, exactly 10 years after *Van Duyn*.

With the doctrine of consistent interpretation, the CJ further expanded the enforcement of EU law via the first European judges, ie, national courts. Consistent interpretation entails that, when a national court cannot derive direct effect from

<sup>12</sup> Case 152/84 *MH Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR723.

<sup>13</sup> *Cf ibid*, para 48: 'In either case it is necessary to prevent the State from taking advantage of its own failure to comply with Community law'. This clearly recalls the 'estoppel' argument; put forward in Case 148/78 *Criminal proceedings against Tullio Ratti* [1979] ECR 1629 as a rationale for direct effect. The lack of horizontal direct effect was also recently confirmed in the cases *Carp* and *Pfeiffer* quoted in *de Witte* (n 3) 335.

<sup>14</sup> *Kolpinghuis Nijmegen* (n 1) para 9.

<sup>15</sup> *Kolpinghuis Nijmegen* (n 1) para 11.

<sup>16</sup> Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891. This case added another room in the house of EU law enforcement. When direct effect is not an option, the judge should explore consistent interpretation. This means that in applying the national law and in particular the provisions of a national law specifically introduced to implement a directive, the court is required to interpret its national laws in light of the wording and purpose of the directive, on the basis of the principle of loyal cooperation.

a directive, because it is not precise, clear and unconditional enough, then the court can interpret its national law in conformity with EU law. Consistent interpretation is a category of interpretation which is also used by many other courts in Europe, and which echoes the *verfassungskonforme Auslegung* of the German Constitutional Court, for example.

However, in *Kolpinghuis Nijmegen* the CJ confronts the duty of consistent interpretation with the general principles of EU law, in particular the principles of legal certainty and non-retroactivity. In other words, the CJ states that in interpreting national law, the national court is limited by the general principles of EU law, namely the principle of legal certainty and non-retroactivity.

As stated a few months earlier in *Pretore di Salò*:<sup>17</sup>

a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive.<sup>18</sup>

That is also why in the referring case, the CJ answered that, notwithstanding the duty of consistent interpretation which generally speaking applies (the *Von Colson* rule), ‘the directive cannot of itself and independently of a law adopted for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive.’<sup>19</sup>

Therefore, the *Von Colson* rule is interpreted together with the rule that a directive cannot display ‘detrimental’ and ‘descendant’ direct effect, in order to set the same limitation of direct effect also to consistent interpretation. In so doing, the Court reinforces the protective dimension of EU law toward the individuals.

The third issue of the judgment dealt with the question of whether one can rely upon a directive via consistent interpretation before the expiry of the period prescribed for implementation.

Here the Court states that ‘it makes no difference to those answers if on the material date the period which the Member State had in which (sic!) to adapt national law had not yet expired.’<sup>20</sup>

This part of the judgment is not well explained or reasoned, which is why it has been criticised by scholarship, and later on, also clarified.<sup>21</sup>

The next section is devoted to understanding the judgment, by putting it into perspective with the case law of that time and unravelling its meaning for EU law and EU criminal law.

<sup>17</sup> Case 14/86 *Pretore di Salò v Persons unknown* [1987] ECR 2545.

<sup>18</sup> *Kolpinghuis Nijmegen* (n 1) para 13.

<sup>19</sup> *Kolpinghuis Nijmegen* (n 1) para 14.

<sup>20</sup> *Kolpinghuis Nijmegen* (n 1) para 15.

<sup>21</sup> cf Case C-212/04 *Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos (ELOG)* [2006] ECR I-06057.

### III. Revisiting *Kolpinghuis Nijmegen*. Direct Effect and Consistent Interpretation of Directives as a One-Way Road: The Limitation of ‘Descendant’ and ‘Detrimental’ Vertical Direct and Indirect Effects

Together with primacy, direct effect is one of the main pillars of EU law. Since *Van Gend en Loos* in 1963, it has contributed in carving out European and MSs’ legal systems in a way that nobody could have imagined.<sup>22</sup> Later on, other doctrines were added to this system of enforcement of EU law into the legal orders of the MSs, namely consistent interpretation and the residual state liability doctrine.

In 1987, the Court was building the doctrine of direct effect of directives, and also the doctrine of consistent interpretation. Among the recently posited bricks, we have recalled *Becker*, *Marshall*, *Von Colson* and *Pretore di Salò*, which are the four judgments referred to by the CJ in *Kolpinghuis Nijmegen*. Earlier, the CJ had tackled the issue of direct effect of directives with milestone cases such as *Van Duyn* and *Ratti*,<sup>23</sup> next to *Becker* and *Marshall*.

The direct effect of directives has triggered fierce criticism in many corners: in academic circles;<sup>24</sup> from other courts;<sup>25</sup> and also within the same CJ.<sup>26</sup> What appeared particularly problematic was the case law on the rationale and the scope of direct effect. Interestingly, it is one of the most vivid areas EU law, which is also highly debated these days.<sup>27</sup>

Five years after *Van Duyn*, the CJ in *Ratti* took the opportunity to express a new rationale to justify the direct effect of directives, in the so-called estoppel argument.<sup>28</sup> The estoppel argument entails that a state is precluded, estopped, by its failure to properly implement a directive from refusing to recognise its

<sup>22</sup> de Witte (n 3) and M Dougan, ‘When Worlds Collide! Competing Vision of the Relationship between Direct Effect and Supremacy’ (2007) 44 *Common Market Law Review*, Issue 4, 931–63.

<sup>23</sup> *Ratti* (n 10).

<sup>24</sup> T Tridimas, ‘Black, White and Shades of Grey: Horizontality Revisited’ (2002) 21 *Yearbook of European Law* 237; A Albors-Llorens, ‘The Direct Effect of EU Directives: Fresh Controversy or a Storm in a Teacup?’ (2014) 39 *European Law Review* 850–62, at 3–4, fn 15, and the literature there referred to.

<sup>25</sup> French *Conseil d’Etat*, judgment 20 octobre 1989 – Nicolo – Rec. Lebon p 190, at [www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Les-decisions-les-plus-importantes-du-Conseil-d-Etat/20-octobre-1989-Nicolo](http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Les-decisions-les-plus-importantes-du-Conseil-d-Etat/20-octobre-1989-Nicolo) (last accessed 11 February 2019).

<sup>26</sup> F Mancini wrote that this judgment goes beyond the letter of Article 189 of the EC Treaty. GF Mancini and D Keeling, ‘Language, Culture, and Politics in the Life of the Court of Justice’ (1995) *Columbia Journal of European Law* 397, 401.

<sup>27</sup> For the most recent case law, see Case C-385/17 *Hein* [2018] ECLI:EU:C:2018:1018 and a comment from L S Rossi, ‘The Küçükdeveci Ambiguity: “Derivative” Horizontal Direct Effects for Directives?’, available at <http://eulawanalysis.blogspot.com> (last accessed 5 March 2019).

<sup>28</sup> This argument articulates that since MSs are bound to transpose directives, they are prevented, or estopped, from exploiting the effects of their failure to implement a directive, once the time limit for the implementation has expired. Cf *Ratti* (n 10).



direct effect. Had the state in question implemented the directive properly, then the individual would have been capable to invoke it before a national court. Had it not been the case, then the state cannot rely on the individual's wrongdoing, with the consequence that the national law in conflict with it should have been disapplied, because of the force of direct effect. In *Ratti*, the CJ recognised the 'ascendant' vertical direct effect, ie, from the individual towards the state, and not vice versa. The direct effect of EU law is therefore an enrichment of the legal sphere of the individual, and not a detriment to it.

*Kolpinghuis Nijmegen* is a landmark case in EU law for several reasons: it stated the lack of direct effect *in malam partem*, or detrimental and descendant direct effects, consistently with the *Pretore di Salò* case, but in addition to that, it also stated that indirect effect or consistent interpretation undergoes the same limitations. It therefore strengthens the protective dimension of EU law enforcement and consolidates it into limitations for direct and indirect effects.

Compared to *Pretore di Salò*, where the conclusion was reached on the basis of the nature of directives, in *Kolpinghuis Nijmegen* the CJ motivates its position on the general principles of EU law, in particular legal certainty or legality and non-retroactivity.<sup>29</sup> And this is precisely what makes *Kolpinghuis Nijmegen* a foundational case for European criminal law. This is indeed what turns it into a constitutional milestone, because it integrates national constitutional traditions into the European composite constitution.

The Court configured direct effect and consistent interpretation, in this case, as a one-way road: from the individual towards the state. The other direction, ie, from the state against individuals (so-called 'reverse direct effect'), has not proved to be acceptable by the CJ. The logic behind it is that the CJEU has never established that a state could use EU law it did not implement to invoke it against its citizens. This situation is in conflict with the idea of the social pact between the (then, European Economic Community, and now) EU and individuals established in *Van Gend en Loos*. This relationship, though mediated by the state, would never accept that a state could invoke against its own citizens a breach of EU law to its own benefit. This explains also part of the criticism raised against the '*Taricco I* rule'.<sup>30</sup>

One of the criticisms of the case is that the time factor of the expiry of the transposition period for directives appears to be irrelevant for the Court. In this way the Court first of all does not seem to pay attention to the powers and constitutional prerogatives of the national legislatures; second, by differentiating the temporal regime of the direct effect from consistent interpretation, the CJ does create an 'unnecessary complexity', which makes it more difficult for practitioners to enforce EU law.<sup>31</sup>

<sup>29</sup> S Coutts, 'Supranational Public Wrongs: The Possibilities and Limitations of European Union Criminal Law (2017) *Common Market Law Review* 771–804, at 781.

<sup>30</sup> The '*Taricco I* rule' seems to accept reverse direct effect, but in that case the provisions at stake were Art 325 (1) and (2) TFEU. See section IV below and the commentaries given in Chapter 15.

<sup>31</sup> G Betlem, 'The Doctrine of Consistent Interpretation – Managing Legal Uncertainty' (2002) *Oxford Journal of Legal Studies* 397–418, at 403.

Betlem, for example, observed that there is no justified difference between direct effect and indirect effect: recalling Van Gerven, who argued that if the rationale for consistent interpretation is the same as for direct effect, ie, a punishment against incorrect, delayed or non-implementation, Betlem concluded that the functioning should be the same, ie, to operate only after the expiry of the period of implementation.<sup>32</sup>

The solution to this dilemma arrived many years later, with *Adeneler*,<sup>33</sup> where the Court deployed the principle of loyal cooperation in order to create a duty to refrain from interpreting national law in a way that could jeopardise the attainment of the goals of the directive, also before the expiry of the transposition period.

Another criticism towards the CJ concerns the overall coherence of its case law on ‘horizontal’ direct and indirect effects; indeed, in *Faccini Dori*,<sup>34</sup> the Court, whilst repeating the *Marshall* rule, accepted that consistent interpretation can create duties upon one individual in a procedure started by another individual.<sup>35</sup> In short, while direct effect of directives is still not admitted in so-called horizontal situations, with the caveat of a broad interpretation of state authorities,<sup>36</sup> it is established that in horizontal situations EU law can create duties towards individuals, since in that situation the legal basis is given by the domestic law interpreted consistently with a directive, and not the directive itself. Though it is not possible here to deepen this issue, it has to be noted that direct effect of EU law has been enriched with cases such as *Mangold* and followers,<sup>37</sup> and has been revitalised in the last few years as direct effect of provisions of the Charter of Fundamental Rights,<sup>38</sup> which now has the same status as Treaty provisions, ex Art 6(1) TEU.

In the next section, we turn our attention to the case law following *Kolpinghuis Nijmegen*.

#### IV. The Legacy of *Kolpinghuis Nijmegen* in the Case Law

*Kolpinghuis Nijmegen* has left an important legacy in EU law. In the 1996 *Luciano Arcaro* (hereinafter: *Arcaro*) ruling,<sup>39</sup> the CJ confirmed that consistent interpretation is a duty descending from the principle of loyal cooperation.

<sup>32</sup> G Betlem, ‘The Principle of Indirect Effect of Community Law’ (1995) *European Review of Private Law* 1–19, at 12.

<sup>33</sup> Case C-212/04 *Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos* (ELOG) [2006] ECR I-06057.

<sup>34</sup> Case C-91/92 *Paola Faccini Dori v Recreb Srl* [1994] ECR I-03325.

<sup>35</sup> L Squintani and H Vedder, ‘Toward Inverse Direct Effect? A Silent Development of a Core European Law Doctrine’ (2014) *RECIEL* 145.

<sup>36</sup> Case C-188/89 *A. Foster and others v British Gas Plc* [1990] ECR 1990 I-03313.

<sup>37</sup> Case C-144/04 *W Mangold v R Helm* [2005] ECLI:EU:C:2005:709.

<sup>38</sup> Case C-414/06 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* [2018] ECLI:EU:C:2018:257.

<sup>39</sup> Case C-168/95 *Criminal Proceedings against Luciano Arcaro* [1996] ECR 1996 I-04705.

In *Arcaro* the Court was confronted with a question that arose after *Marshall*, ie, the issue of the effects of directives, after that the Court denied horizontal direct effects. That position, motivated by the estoppel doctrine, proved to be a difficult one to hold on to. But the Court tried to smooth out the consequences of that doctrine, by finding other channels to enforce EU law, by-passing horizontal direct effects.

In *Marleasing* and *Dominquez*, the Court accepted that if national law and the national legal system allow room for interpretation, then directives can govern the dispute and also disputes between private parties. The legal sources are therefore a combination of European and national legal acts, where the European one ‘jumps in’ to integrate the national legal acts.<sup>40</sup>

However, the Court was once again faced with the problems seen in *Kolpinghuis Nijmegen* while deciding on a preliminary reference raised by a local court in Vicenza, Italy, where Mr Arcaro, a legal representative of an undertaking working precious materials, was being prosecuted for discharging cadmium into the river Bacchiglione, without having submitted an application for the relevant authorisation, as provided for in the Directive.

This was a typical *Kolpinghuis Nijmegen* situation, ie, a national law not being compliant with a European directive aiming at protecting the environment: could the State therefore rely on such a European provision against an individual, even though this would impair that individual’s position?

Here the Court did not even examine whether the provision was sufficiently clear, precise and unconditional, but stated that ‘a directive may not by itself create obligations for an individual and that a provision of a directive may not therefore be relied upon as such against such a person.’<sup>41</sup> Once excluding direct effect, the CJ confirmed that neither via consistent interpretation a directive ‘cannot (...) have the effect of determining or aggravating the criminal liability of an individual who acts in contravention of the provisions of that directive.’<sup>42</sup>

Another ruling that ran along the same lines as *Arcaro*, and which was decided shortly after in the same year, was *Criminal Proceedings against X (re: Display Workers)*,<sup>43</sup> in which the CJ applied the *Kolpinghuis Nijmegen* rule to a case where the issue at stake was about the analogical interpretation of pre-existing crimes.<sup>44</sup> The issue in *Criminal proceedings against X* was about the extent of liability in criminal law arising under legislation adopted for the purpose of implementing a directive; the principle that a provision of the criminal law may not be applied extensively to the detriment of the defendant, which is the corollary of the principle of legality in relation to crime and punishment and more generally of the

<sup>40</sup> Betlem (n 31).

<sup>41</sup> *Arcaro* (n 39), para 36.

<sup>42</sup> *Arcaro* (n 39), para 37.

<sup>43</sup> Joined cases C-74/95 and C-129/95 *Criminal Proceedings against X* [1996] ECR I-06609.

<sup>44</sup> R Sicurella, ‘Art. 49. Principi della legalità e della proporzionalità dei reati e delle pene’ in R Mastroianni et al (a cura di), *Carta dei diritti fondamentali dell’Unione Europea* (Giuffrè, 2017) 976.

principle of legal certainty, precludes bringing criminal proceedings in respect of conduct not clearly defined as culpable law.

This position of the CJ has been criticised by Betlem since in both cases the Court acknowledged that the duty of consistent interpretation is limited in criminal law situations, but the CJ did not reach the same conclusion in civil and administrative cases.<sup>45</sup> This constitutes a disparity of treatment which is not well justified.

Another application of the case in question was represented by another ruling called *Criminal Proceedings against X (re: Counterfeited Goods)*,<sup>46</sup> which should be interpreted as an extension of the *Kolpinghuis Nijmegen* rule to regulations. Of course, it does apply to those specific regulations that empower the MSs to adopt penalties to punish the infringements established in those same regulations.<sup>47</sup>

Perhaps the most famous progenies of *Kolpinghuis Nijmegen* are two more recent cases, *Berlusconi* and *Pupino*.<sup>48</sup>

Without going into these cases in depth,<sup>49</sup> it is worth mentioning that *Berlusconi* was a case where the State created a manifest breach of EU law, by passing new legislation, allegedly more favourable for the suspect, Mr Berlusconi, who was the Prime Minister of Italy at the time.

The *Berlusconi* case represents the link between the legality principle and the principle of the *favor rei*. Before the entry into force of the Charter of Fundamental Rights, the CJ ascribed the principle to the common constitutional traditions, and used it to rule the case.<sup>50</sup>

With the judgment in *Pupino*, the Court transferred the logic of the *Kolpinghuis Nijmegen* rule to framework decisions, which were the ‘counterparts’ of the directives for the Third Pillar.

In the *Pupino* case the issue at stake concerned the interpretation of a framework decision which did not have an impact on the criminal liability of the individual, but on the rules of procedure to be followed for the acquisition of testimony of minor victims of crimes. In this case, we also see the influence of the principle of legality interpreted as procedural legality, in contrast to substantive legality.

Interestingly, in *Pupino* the CJ does not mention the classical limitations of the *Kolpinghuis Nijmegen* rule, but it states that consistent interpretation cannot entail an interpretation *contra legem*. The Court acknowledges that the substantive dimension of criminal law is not significant in this case, but rather the procedural dimension. In *Pupino* we are therefore confronted with the procedural dimension of the legality principle. That is why the domestic court has to assess, in light of

<sup>45</sup> Betlem (n 31) 406.

<sup>46</sup> Case C-60/02 *Criminal Proceedings against X* [2004] ECR I-00651.

<sup>47</sup> *Ibid*, para 62.

<sup>48</sup> Joined cases C-387/02, C-391/02 and C-403/02 *Criminal Proceedings against Silvio Berlusconi, Sergio Adelchi and Marcello Dell’Utri and Others* [2005] ECR I-03565.

Case C-105/03 *Criminal Proceedings against Maria Pupino* [2005] ECR I-05285.

<sup>49</sup> See, chapters 4 and 5 of this book.

<sup>50</sup> Sicurella (n 44) 989.

the principle of fair trial of the European Convention on Human Rights, whether the results of the interpretation process still respect the fundamental rights of the accused person, in particular the principle of fair trial. The CJ leaves this assessment to the national court.

In this case law, the Court therefore also used direct effect and consistent interpretation to forge a protective dimension in the context of EU law enforcement, and this is to be read in the several declinations of the *Kolpinghuis Nijmegen* rule discussed above.

The *Taricco* case, however, finds the *Kolpinghuis Nijmegen* rule put ‘under stress’.

If the *Kolpinghuis Nijmegen* rule entails that a directive or a regulation, cannot, of itself and independently of a national law adopted by a MS for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of the directive, one logically could think that the same should apply to a treaty provision.

However, for the Court in *Taricco*, the disapplication of the national rule of time limitation would in no way lead to a conviction of the accused for an act or omission which did not constitute a criminal offence under national law at the time when it was committed ... nor to the application of a penalty which, at that time was not laid down by national law.<sup>51</sup>

The CJ apparently saves the *Kolpinghuis Nijmegen* rule, because it does not frame the time limitation as having a substantive nature, but it interprets it as a merely procedural institute. In practice, it does not pay attention either to the fact that this would represent a factual denial of the *Kolpinghuis Nijmegen* rule.

Years before *Taricco*, this problem of framing situations as procedural or substantive had already been discussed as a possible risk for the individual concerned: a change of laws considered as procedural could have had a ‘detrimental effect for the defendant, amounting in practice to determining or aggravating his/her criminal liabilities, in a manner which undermines the spirit if not even the letter of the safeguards developed in the *Kolpinghuis Nijmegen* case law’.<sup>52</sup>

The *Taricco* case has represented a sort of ‘denial’ of the *Kolpinghuis Nijmegen* rule, in the sense that it admitted in practice, based on direct effect of treaty provisions, a detrimental and descendent direct effect, based on the disapplication of the national law. So, in a sense, it is not such a surprise that, after solicitations of the Italian Constitutional Court, the CJ mitigated its *Taricco I* rule in its *MAS and MB* case, also known as *Taricco II*, by allowing the national court to assess whether the disapplication of national law would entail a breach of the legality principle, as claimed by the Italian Constitutional Court, but also calling upon the duties of the legislature to take the necessary measures.<sup>53</sup>

<sup>51</sup> *Taricco* (n 7), para 56.

<sup>52</sup> A Dashwood, M Dougan, E Spaventa and D Wyatt, ‘European Union Law’ (Hart Publishing, 2011) 244 ff.

<sup>53</sup> Case C-42/17 *Criminal Proceedings against MAS and MB* ECLI:EU:C:2017:936, paras 59–62.

## V. Conclusions: The Emergence of the General Principles of a Protective European Criminal Law

The *Kolpinghuis Nijmegen* judgment represents one of the milestone cases of the CJEU. It is a judgment in which the CJ started to build its catalogue of principles and fundamental rights that have contributed to shape EU law as the law of a unique polity, based on the rule of law, whose members are not simply the Member States but also their citizens, who are also EU citizens.

Two years before the ‘*Greek Maize*’ case, the Court stated that the enforcement of EU law, taking place thanks to European legal instruments, via direct effect, or via their interpretation by domestic courts, could not have detrimental effects from the states towards the individuals. As such, it descends directly from the *Van Gend en Loos* logic, but complements it with a new perspective.

By enshrining the principles of legality and non-retroactivity among the general principles of EU law, the CJ gave a crucial contribution in creating the protective dimension of European criminal law, which later on found expression in the Charter of Fundamental Rights of the EU, in particular in Article 49. The Court was already developing the so-called shield dimension of fundamental rights and principles of European criminal law, before the ‘*Greek Maize*’ case, which is to be understood as an expression of the sword dimension of EU enforcement apparatus, via the ‘*longa manus*’ of the Member States.

*Kolpinghuis Nijmegen*, its legacy and the subsequent evolution of European criminal law,<sup>54</sup> has developed in the sense that if the EU has a competence in criminal law, as the Lisbon Treaty eventually decided, it is not EU law as such to establish criminal liability. The legality principle in the EU is based on the legality of the MSs’ legal orders. In *Advocaten voor de Wereld*,<sup>55</sup> the CJ stated that the legality principle is to be assessed with reference to national law. In *Berlusconi*, the Court stated that the principle of *favor rei* was against the application of the more stringent regime, in compliance with EU law. The Union legislation was not deemed to be able to establish criminal liability. In Article 83(1) and (2) of the TFEU, the Union can adopt directives that the MSs have to transpose.

To conclude, the European integration process has given a criminal law competence to the EU, that dimension is still, to some extent, limited to a few supranational and core areas, and also functional to the fulfilment of other regulatory goals.<sup>56</sup> In spite of this, the CJ had started to define a protective dimension

<sup>54</sup>Case C-176/03 *Commission of the European Communities v Council of the European Union (re: Environmental Crimes)* [2005] ECR I-07879; Case C-440/05 *Commission of the European Communities v Council of the European Union (re: Ship Source Pollution)* [2007] ECR I-09097.

<sup>55</sup>Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-03633.

<sup>56</sup>Coutts (n 29) 801 ff.

of EU law from 1987, with the foundational case of *Kolpinghuis Nijmegen*, which enshrined the legality in criminal law as a limit to the enforcement of the same EU law into the legal orders of the MSs. It is therefore important to recall the constitutional nature of this case and of its legacy, because it contributed to the construction of the EU edifice, whose main component is the respect of the rule of law, and also helped shape the process of integration through fundamental rights and principles, and not only through law.