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THE PRINCIPLE OF CONFORMING INTERPRETATION OF NATIONAL LAW IN THE AREA OF CRIMINAL LAW. GENERAL REMARKS

1. Poland's access to the European Union not only affected the political, economic, and social life, but also constituted a breakthrough in the legal system, in particular in its axiological foundations, and in the application of law.Certain changes took place in the interpretation of law: terms such as 'consistent interpretation', 'interpretative obligation', 'principle of purposive interpretation', 'loyal interpretation', 'harmonious interpretation', 'benevolent interpretation', 'conciliatory interpretation', and 'concurring (concurrent) interpretation'.[1] It is no surprise that such changes have taken place since one of the fundamental methods of ensuring the effectiveness of European law is the principle of interpretation of national law in conformance to European law. This principle is an element of the system of rules used in order to achieve a correct and uniform application of *acquiscommunautaire* in all the member states of the European Union.

2. In the beginning of this discussion it should be emphasized that the legal ground for the requirement to interpret domestic law in conformance to European law is art. 10 of the Treaty Establishing the European Community (hereinafter referred to as the TEEC). This was confirmed by the European Court of Justice (CJ) in the case *von Colson and Kamann vs. North Rhein-Westphalia* (C-14/83) where it stated that the duty imposed on member states in art. 10 of the TEEC (i.e. the duty to undertake

[1] See: S. Prechal, Directives in EC Law, Oxford 2005, p. 181; G. Betlem, The Doctrine of Consistent Interpretation – Managing Legal Uncertainty, Oxford Journal of Legal Studies 2002, vol. 22, no. 3, pp. 397–418; S. Lefevre: "Interpretative communications and the implementation of Community law at national level", ELR, 2004, vol. 29, no. 6, pp. 808–822; A. Wentkowska, A 'Secret Garden' of Conforming Interpretation – European Union Law in Polish Courts Five Years after Accession, Yearbook of Polish European Studies 2009, Vol. 12, pp. 127–148.

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all appropriate efforts of a general or specific nature in order to ensure performance of the duties under the Treaty and resulting from the activities of the Community's institutions) applies also to national courts which, when applying domestic laws, in particular regulations implementing a directive, must interpret them in the light of the wording and the purpose of the directive. In its judgment, the CJ introduced the term 'indirect effect' which refers to application of domestic laws issued for the purpose of implementation of a directive. According to this principle, courts should perform interpretation of regulations "in the light of the wording and the purposes" of a directive which, by itself, does not have direct effect. This conclusion was inferred from the duty of member states of the European Union to ensure achievement of the purpose of directives. It was assumed that since a directive has no direct effect, its purposes related to application of domestic law can be achieved only in this way. The CJ went even further and stated that national courts should assume the intent of full performance of the duties defined in the directive and avoid applying domestic laws only after they find that they cannot be reconciled in any way with the directive.[2]

Currently, the duty to interpret domestic law in conformance to European law is based on the principle of loyalty (art. 4 (3) of the TEEC) and the need to ensure the effectiveness of the norms of European law in accordance with their purposes. The aforementioned principle translates into the duty to ensure the effectiveness of community law (*effet utile*), which covers both the duty to issue acts of domestic law implementing European directives (which is unequivocally provided for in art. 249) and, possibly, to issue appropriate acts of law that implement community regulations, if this turns out to be necessary to ensure proper application of regulations. Moreover, the principle of loyalty indicates that the duty to interpret

[2] See, The judgment of 16 December 1993 in case no. C-334/92, Wagner Miret v. Fondo de garantiasalarial, ECR, 1993, p. I-6912, paragraph 20–22: (...) "it should be borne in mind that when it interprets and applies national law, every national court must presume that the State had the intention of fulfilling entirely the obligations arising from the directive concerned. As the Court held in its judgment in case 106/89 Marleasing v La ComercialInternacional de Alimentación [1990] ECR I-4135, paragraph 8, 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, 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 189 of the Treaty. 21. The principle of interpretation in conformity with directives must be followed in particular where a national court considers, as in the present case, that the pre-existing provisions of its national law satisfy the requirements of the directive concerned."

domestic law in conformance to European law exists in the light of the wording and the purposes of directives in order to achieve the results defined in the directives. Such propositions were expressed in the judgment of the CJ of the EU of 5 October 2004 in joined cases C-397/01 to C-403/01, where the Court stated that:

> 113. Thus, when it applies domestic law, and in particular legislative provisions specifically adopted for the purpose of implementing the requirements of a directive, the national court is bound to interpret national law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 249 EC.[3]
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> 114. The requirement for national law to be interpreted in conformity with Community law is inherent in the system of the Treaty, 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.[4]
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> 115. Although the principle that national law must be interpreted in conformity with Community law concerns chiefly domestic provisions enacted 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 as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive.[5]

The CJ drew the same conclusions in another judgment (C-334/92, *Wagner-Miret*) where it also stated that "national law must be interpreted so far as possible in conformity with directives. It is for the national court, within the limits of its discretion under national law, when interpreting and applying domestic law, to give to it, where possible, an interpretation which accords with the requirements of applicable Community law and, to the extent that this is not possible, to hold such domestic law inapplicable. It must be stressed that the interpretation of national law – in conformity with Community law – is reserved to the national courts." It should be added that the principle of interpretation of domestic law in accordance

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[3] See to that effect, inter alia: the judgments in Von Colson and Kamann, paragraph 26; Marleasing, paragraph 8, and FacciniDori, paragraph 26; see also: case C-63/97 BMW [1999] ECR I-905, paragraph 22; Joined Cases C-240/98 to C-244/98 OcéanoGrupo Editorial and SalvatEditores [2000] ECR I-4941, paragraph 30; and Case C-408/01 Adidas-Salomon and Adidas Benelux [2003] ECR I-0000, paragraph 21.

[4] See, to that effect: Case C-160/01 Mau [2003] ECR I-4791, paragraph 34.

[5] See, to that effect: Carbonari, paragraphs 49 and 50, and Case C-408/01 Adidas-Salomon and Adidas Benelux [2003] ECR I-0000, paragraph 21.

with European law should be observed by the legislator, whose duty is to implement the obligations that are binding on the state in the domestic law.

The aforementioned judgment also indicated that the principle of interpretation of domestic law in accordance with European law should apply in the case of assumed conformance of domestic law adopted earlier with a directive.

When discussing the interpretation of domestic law in the context of European law, one must keep in mind that national courts have the duty to interpret domestic law, adopted both before and after European laws, in a way that is to the maximum extent conforming to the wording and purpose of the directive, so as to ensure achievement of the purpose of the directive. As the Court of Justice held in its judgment in Case 106/89 Marleasing v La ComercialInternacional de Alimentación [1990], ECR I-4135, paragraph 8, "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, 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 189 of the Treaty."

National courts are required to apply interpretations of all national laws that conform to both primary and secondary Community law. The requirement applies to all national laws, adopted both before and after the adoption of a given European act of law, and includes the duty to interpret national law in ways that ensure, to the maximum possible extent, achievement of the provisions and purposes of the acts of Community law determined in the light of the entire Community law and the judgments of European courts. Thus, it can be assumed that the principle of interpretation conforming to European law applies mostly to national laws that are adopted in order to implement a given directive. Nevertheless, it is not limited to interpretation of European laws, as the national courts are required to take into account all the national laws when evaluating how they can be applied, so as to avoid results that are in contradiction with the purpose of the directive.[6]

It must also be emphasized that each interpretation involves application of national law, in particular that adopted in order to implement a directive. The CJ also indicated that it is possible to define the limits of conforming interpretation. The limits depend on the general principles of law, in partic-

[6] See: the judgment of the CJ of 25 February 1999 in case Carbonari et al (C-131/97), Court Reports 1999 r., p. I-1103, 50.

ular the principle of security of legal transactions and the *lex retro non agit* principle. Moreover, a limit on the application of conforming interpretation is established by the letter of the law of each member state. This is because interpretations *contra legem*, which ignore the letter of the national law, are not permitted.[7]

3. The European Union was established by the Treaty of Maastricht. This treaty had a 'pillar' structure, by which each pillar was distinguished by a different manner in which the law was derived, its binding effect, and compliance monitoring.[8] The first pillar was based on the EC Treaty. The second pillar was where a common defense and foreign policy takes shape. The third pillar concerned cooperation in the areas of justice and home affairs. Until the Treaty became effective, the issue of application of interpretations conforming to Community law in the criminal law did not exist. When the European Union was created and the third pillar (police and judicial cooperation in criminal cases) was established, the problem appeared of application of such interpretations in the case of national criminal laws implementing framework decisions.[9] However, this has been the source of many problems, especially that the unique nature of cooperation in criminal cases has been the source of many concerns. What was emphasized in particular was the intergovernmental nature of cooperation in this area. The role of the individual member states was preponderant in the third pillar, in contrast to the first pillar, in which the organs of the Community had more influence. What was also indicated was the absence in the third pillar of the principle of loyalty. The literature was not unanimous on this matter.[10] Only the judgment of the CJ of 16 June 2005 in case C-105/03 (the case of Maria Pupino) brought an unequivocal solution. In the aforementioned judgment, the CJ stated that:

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[7] Case 80/86 Kolpinghuis Nijmegen [1987] ECR 3969.

[8] E. Denza, The intergovernmental pillars of the European Union, Oxford 2002, pp. 311–322.

[9] See G. Conway, Juridical interpretation and the third pillar. Ireland's acceptance of the European arrest warrant and the Gözütok and Brügge case, European Journal of Crime, Criminal Law and Criminal Justice 2005, Vol. 2, pp. 255–283.

[10] Cf.: C. Mik, Wykładnia zgodna prawa krajowego z prawem Unii Europejskiej [Conforming interpretation of national law with European Union law], in: S. Wronkowska, ed., Polska kultura prawna a proces integracji europejskiej [Polish legal culture and the process of European Integration], Kraków 2005, pp. 148–149.

> 41. The second and third paragraphs of Article 1 of the Treaty on European Union provide that that treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe and that 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 people.
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> 42. It would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfillment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions, as the Advocate General has rightly pointed out in paragraph 26 of her Opinion.

In its judgment in Pupino, the CJ held that "the principle of conforming interpretation is binding in relation to framework decisions adopted in the context of Title VI of the Treaty on European Union. When applying national law, the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with Article 34(2)(b) EU."[11] The final part of the latter sentence indicates that when interpreting national law, the national court must refer not only to the act of secondary law (the framework decision) but also to the provisions of primary law, in this case the Treaty on European Union. After all, it is easy to notice that the basic purpose of acts of secondary law is to implement the provisions of the treaty that are the legal basis for their adoption. This requirement has been clearly emphasized in the judgments of the CJ pertaining to Community law.

In the Pupino case, the CJ added that the duty of the national court to refer to the framework decision in its interpretation of national criminal law is subject to limitations arising from general principles of law, to include in particular the principle of legal certainty and the principle that law does not apply retroactively. Both these principles, according to the CJ, prevent, among other things, situations where, based on the framework decision and

[11] Case C-105/03 Pupino [2005] ECR I-5285, paragraph 43. See also Opinion of Mr Advocate General Mengozzi delivered on 20 March 2012. Proceedings concerning the execution of a European arrest warrant issued against João Pedro Lopes Da Silva Jorge, Case C-42/11, ECR 2012; M. Fletcher, R. Lööf, W. C. Gilmore, EU Criminal Law and Justice, Cheltenham 2008, pp. 36–38.

irrespective of the statute implementing it, the duty in question would lead to determination or aggravation of penal responsibility of persons violating provisions of criminal law.[12] The latter limitation clearly pertains to situations where a conforming interpretation leads to determination or aggravation of responsibility under substantive criminal law, in particular by creation, one could say *per analogiam*, of a new type of crime.

Further in its judgment in the Pupino case, similar to the aforementioned Community case law, the CJ defines the limits of conforming interpretation by stating that:

> 47. The obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law ceases when the latter cannot receive an application which would lead to a result compatible with that envisaged by that framework decision. In other words, the principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem*. That principle does, however, require that, where necessary, the national court consider the whole of national law in order to assess how far it can be applied in such a way as not to produce a result contrary to that envisaged by the framework decision.

The above text indicates that the Court confirmed the need to consider fundamental rights when interpreting the framework decision concerning the position of victims in criminal proceedings. This idea was further developed in the judgment of the CJ of 9 October 2008, in case C-404/07 *György Katz v. István Roland Sós*, where the Court found it to be necessary to observe the rights under art. 6 of the European Convention on Human Rights. The Court stated that:

> 48. (...) theFramework Decision must be interpreted in such a way that fundamental rights, including in particular the right to a fair trial as set out in Article 6 of the ECHR, are respected.
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> 49. It is therefore for the referring court to ensure in particular that the way in which the evidence is taken in the criminal proceedings, viewed as whole, does not prejudice the fairness of the proceedings for the purposes of Article 6 of the ECHR, as interpreted by the European Court of Human Rights.

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[12] See for example, in relation to Community directives: Joined Cases C-74/95 and C-129/95 X [1996] ECR I-6609, paragraph 24, and Joined Cases C-387/02, C-391/02 and C-403/02 Berlusconi and Others [2005] ECR I-0000, paragraph 74. The Court has ruled that 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 (see: Case 80/86 Kolpinghuis Nijmegen [1987] ECR 3969, paragraph 13, and Case C-60/02 X [2004] ECR I-0000, paragraph 61).

4. The CJ's judgment in the Pupino case became a milestone in the evolution of interpretation of criminal law in conformance to European law. It shows that application of European criminal law in criminal cases may not automatically and in a binding manner constitute grounds for modification of the constitutional norms that are higher in the hierarchy of the legal system. Adoption of an opinion to the contrary would mean that inclusion of the above duty in the process of interpretation of national criminal law may cause deterioration of the legal situations of individuals and lead to doubts from the point of view of constitutional provisions.[13] Consequently, it will not always be possible to interpret national law in conformance to the 'European' interpretation model and the postulate of interpretation that is conforming "to the highest degree possible."

The unique nature of criminal law, in particular the large number of guarantees intended to protect rights and freedoms connected with liability in criminal law and the conduct of the process leading to realization of such responsibility, is the source of problems with application of interpretation of national law conforming to European law. This was clearly demonstrated in the implementation of the framework decision concerning the European arrest warrant and the interpretation of the part of the code of criminal procedure that became the target location for the implementation of this cooperation tool. The experiences related to the European arrest warrant have demonstrated the fact that a number of problems, to include coincidence between conforming interpretation and the supreme nature of constitutional norms eventually led to amendment of the constitution by the parliament. To set aside the problems related to the European arrest warrant, it needs to be stated that European law constitutes an independent source of law that may not be abrogated by provisions of national law, irrespective of their importance. Thus, it is not appropriate to make

[13] See: P. Kardas, Rola i znaczenie wykładni prowspólnotowej w procesie dekodowania norm prawa karnego. Uwagi na marginesie uchwały SN z dnia 3 marca 2009 r. (I KZP 30/08) [The role and importance of conforming interpretation in the process of decoding of criminal law norms. Comments on the margin of the resolution of the Supreme Court of 3 March 2009], CzPKiNP 2009, no. 2, pp. 23–27; M. Królikowski, Wokół problemów z zasadą nullum poena sine lege przy dostosowaniu kary orzeczonej w innym państwie członkowskim Unii Europejskiej [On the problems with the principle ofnullumpoena sine lege in adjustment of a penalty adjudicated in another member state of the European Union]; CzPKiNP, 2009, no. 2, pp. 33–54; P. Wiliński, Zasada nullum poena sine lege a wykonanie kary wobec osoby przekazanej w trybie ENA [The principle ofnullumpoena sine lege and the execution of a penalty agains a person transferred in accordance with the EAW procedure], CzPKiNP 2009, no. 2, pp. 55–70; A. Sakowicz, Zasada ne bis in idem w prawie karnym w ujęciu paneuropejskim [The principle of ne bis in idem in criminal law from pan-European perspectives], Białystok 2011, p. 20 ff.

references to the principles and concepts of national law when evaluating the validity of measures adopted by EU institutions, as this would negatively affect the uniformity and effectiveness of European law. Also, it is not reasonable to establish constitutional guarantees in order to protect its priority over the norms defined in European criminal law. This is because observance of fundamental rights is a part of EU law and a general principle of law (art. 6 (3) of the TEEC), and consequently the defense of fundamental rights must be guaranteed in the framework of the structure and the purposes of the EU. It appears that constitutional rules should be modified only when the process of decoding of a constitutional norm does not enable unequivocal compliance with a European norm. In order to determine if this is the case, it is necessary to perform interpretation so as to cover all the national acts of law, irrespective of their level.[14]

5. National courts must first reconstruct the interpretation model which constitutes a reference point in the process of decoding the norm included in a provision of the national law.[15] What this means is that a national body must analyze the provisions of the European law and interpret them taking into account not only their letter but also their context, system, function, and purpose.[16] Proper interpretation of the secondary law in the light of the primary law must also be ensured. In addition, it must be determined whether the directives define the minimum or the maximum standard. One must also not forget about the special importance in this process of reconstruction of the preamble of the act of law and the case law of the Court of Justice. Even the above general remarks lead to the conclusion that autonomous interpretation of European law must be based on systemic and functional priorities.[17]

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[14] See: P. Kardas, P. Kardas, Rola i znaczenie wykładni prowspólnotowej w procesie dekodowania norm prawa karnego. Uwagi na marginesie uchwały SN z dnia 3 marca 2009 r. (I KZP 30/08) [The role and importance of conforming interpretation in the process of decoding of criminal law norms..., pp. 24–25.

[15] K. Płeszka, "'Ius' i 'lex' w prowspólnotowej wykładni prawa krajowego ['Ius' and 'lex' in the conforming interpretation of national law], in: Prawo, władza, społeczeństwo, polityka. Księga jubileuszowa profesora Krzysztofa Pałeckiego [Law, power, society, politics. A jubileebook of Professor Krzysztof Pałecki], Kraków 2006, p. 102.

[16] C. Mik, Wykładnia zgodna... [Conforming interpretation...], op. cit., p. 130.

[17] Interpretation of the purpose must also be mentioned; more information can be found in: D. Fiedorow, Wykładnia celowościowa prawa wspólnotowego w orzecznictwie sądów Unii Europejskiej [Interpretation of the purpose of community law in the judgments of courts of the European Union], in: C. Mik, ed., Wykładania prawa Unii Europejskiej [Interpretation of European Union law], Toruń 2008, pp. 59–85.

This opinion has been confirmed in the judgments of the CJ which indicated that, even though linguistic interpretation is regarded as the starting point for the interpretation of European law, it rarely constitutes the final stage of interpretation.[18] However, linguistic interpretation is more and more often losing its priority to systemic, functional, and teleological interpretation.[19] This is due not only to the number of official languages but also to the fact that the EU and its entire legal system are evolving and, consequently, many terms do not have a fixed definition. Also, rejection of the priority of linguistic interpretation is justified by the use of autonomous terms, which are the product of various interests of the member states and the work of numerous law-making bodies in the EU. As a result, the center of gravity of the *in dubio pro Communita* interpretation has shifted to systemic interpretation and the increasingly dominant functional interpretation. Certainly this is due to the need to achieve the maximum outcomes using the current laws given the presence of differences between the legal systems of the member states and to eliminate discrepancies and conflicts between national laws and EU laws.[20]

Going back to the discussion of the phases of interpretation conforming to European law, it must be stated that the next step is to decode the norm present in the national law based on the internal rules of interpretation, while applying a conforming interpretation. The outcome of this process should be confronted with the interpretation model, which does not always lead to a desirable outcome. If the linguistic interpretation leads to an unequivocal result which is in contradiction with the European norm, the conforming interpretation cannot become the binding interpretation *contra legem* as only the national legislator has the power to change the law. This applies to both constitutional norms and to norms expressed in regular statutes.

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[18] See C. Gulman, Methods of interpretation of the European Court of Justice, Scandinavian Studies in Law 1980, vol. 24, pp. 198–199.

[19] A. Kalisz, Wykładnia i stosowanie prawa wspólnotowego [Interpretation and application of community law], Warsaw 2007, p. 156; also the publications given there; M. Górka, Zasada stosowania języków państw członkowskich w systemie prawnym Unii Europejskiej [The principle of use of the languages of member states in the legal system of the European Union], RadcaPrawny, 2004, no. 3, p. 23 ff.

[20] Some authors present their critical opinions whereby departure from linguistic interpretation is a "compensation" of the shortage of democracy in the EU. For example, M. Klatt alleges that there are no grounds for different evaluations of the linguistic limits in relation to the community law and the national law, see M. Klatt, Theorie der Wortlautgrenze. Semantische Normativität in der juristischen Argumentation, Baden-Baden 2004, p. 26.

It must be added that in order to determine what is a *contra legem* interpretation in specific cases, it is necessary to analyze the national law and to apply interpretation methods adopted in the national law. This is not self-evident as there are judgments of the CJ where the Court suggested that "national courts are required to interpret their national law within the limits set by Community law, in order to achieve the result intended by the Community rule in question."[21] This opinion can be considered as justified only if norms of the European law can be applied directly. If, despite the application of a conforming interpretation, a norm of the national law remains in conflict with the European model norm, the national court has the duty to desist from applying the national norm and must use the European norm, if it is suitable for direct application. For this to happen, the European law must be clear, unconditional, and independent of its implementation by national or EU bodies. Only when the above criteria have been met, can the norm be referred to before national judicial and law enforcement bodies.

It should be added that in European law, it is the primary law that has direct effect. According to art. 288 indent two of the TEEC, regulations are fully binding and are applied directly in all member states and, consequently, all norms included in regulations have direct effect. The situation is different in the case of directives because, in principle, a directive normally constitutes an indirect mode of legislating or regulating, which is applied through national laws that implement them into the legal systems of member states. Directives have direct effect only in exceptional situations. An example is a situation where a directive has not been implemented on time or has been implemented incorrectly. As the CJ has emphasized in its judgments, even in such special situations provisions of directives cannot impose duties on

[21] See: Case C-106/89 Marleasing [1990] ECR I-4135, paragraph 8, and Case C-262/97 Engelbrecht [2000] ECR I-7321, paragraph 39; as for what is the reference point in the case of determination of a contrallegem interpretation, see: S. Biernat, "Wykładnia prawa krajowego zgodnie z prawem Wspólnot Europejskich" [Interpretation of national law conforming to the law of European communities], in: C. Mik, ed., Implementacja prawa integracji europejskiej... [Implementation of European integration law...], p. 134; C. Mik, "Wykładnia zgodna..." [Conforming interpretation...], pp. 132–133, 159–161; K. Kowalik-Bańczyk, "Prowspólnotowa wykładnia prawa polskiego" [Conforming interpretation of Polish law], EPS, 2005, no. 12, pp. 9–18; M. Szpunar, Odpowiedzialność podmiotu prywatnego z tytułu naruszenia prawa wspólnotowego [Liability of private entities for breaching Community law], Warsaw 2008, pp. 170–173, and the judgment of the CJ of 8 October 1987 in case Kolpinghuis Nijmegen (C-80/86), [1987] ECR I-3969, paragraph 13; judgment of the CJ of 4 July 2006 in case Adeneler et al. (C-212/04), [2006] ECR I-6057, paragraph 110; judgment of the CJ of 23 April 2009 in case Angelidaki et al. (C-378/07), [2009] ECR I-3071, paragraph 199; judgment of the CJ of 16 June 2005 in case Pupino (C-105/03), [2005] ECR I-5285, paragraph 44 and 47.

individuals. This is the result of the proposition that state bodies cannot benefit from their failure to implement or their incorrect implementation of a directive.[22]

The above leads to the conclusion that every European norm can be a model for conforming interpretation but, if norms cannot be applied effectively, only some of them will bring about the desired result in the form of direct effect. This feature of European law cannot constitute *per se* grounds for liability in criminal law or its aggravation. As the CJ was right in observing in its judgment in the Berlusconi case:

> 74. In the specific context of a situation in which a directive is relied on against an individual by the authorities of a Member State within the context of criminal proceedings, the Court has ruled that 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.[23]

The limits of the national court's departure from the literal wording of the law in favor of a conforming interpretation are derived from the contents of the national law and the interpretation methods adopted in the national law. If linguistic interpretation does not lead to identification of an unequivocal norm coded in the national law, then systemic and functional interpretation is required. At this stage, the national court is required to check whether the contents of the norm, given one of the possible meanings of the interpreted provision of national law, is not in conflict with the norms of EU law. In the event of such conflict, the court must reject this meaning of the phrase being interpreted that leads to this conflict. As the judgments of the CJ rightly indicate:

> 115. Although the principle that national law must be interpreted in conformity with Community law concerns chiefly domestic provisions enacted 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 as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive.

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[22] See: B. Kurcz, Wspólnoty Europejskiej i ich implementacja do prawa krajowego [European communities and their implementation into the national law], Kraków 2004, pp. 204–223.

[23] Judgment of the CJ of 3 May 2005 in the joined cases C-387/02, C-391/02, and C-403/02, Penal proceedings against Silvio Berlusconi, Sergio Adelchi, Marcello Dell'Utri and others, [2005] ECRI-3565, paragraph 74.

> 116. In that context, if the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the directive.[24]

In order to avoid breaching European law, the national court should "do everything within its capacities," taking into account all the norms of the national law, in order to guarantee the effectiveness (*effet utile*)[25] of the norms of EU law. Thus, the national court is required, pursuant to the principle of conforming interpretation, to take into account all the national norms and to interpret them to the widest possible extent (to include the norms of the constitution) in the light of the wording and the purpose of the respective EU law, so as to achieve the result anticipated in it. Nevertheless, such a process of decoding of the norm is subject to certain limitations.

As the judgments of the CJ indicate, the obligatory nature of such interpretation cannot "have the effect of determining or aggravating the liability in criminal law"[26] or violate the principle of legal certainty and the principle that law must not be applied retroactively. Thus, it appears that interpretation conforming to European laws cannot lead to an expansion of the scope of application of norms of national law pertaining to penal law or have other effects that are disadvantageous to the persons who face liability in criminal law.[27] This is prevented by the *nullumcrimen sine lege* principle. That rule is one of the general legal principles underlying the constitutional

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[24] See: the judgment of the CJ of 5 October 2004 in case Pfeiffer (C-397-403/01), [2004] ECR I-8835, paragraph 115–116; judgment of the CJ of 16 July 2009 in case Mono Car Styling SA, in liquidation v. DervisOdemis et al. (C-12/08), Court Reports, 2009, p. I-6653, paragraph 63.

[25] Judgment of the CJ of 16 July 2009 in case Mono Car Styling SA, in liquidation, v. DervisOdemis et al. (C-12/08), Court Reports, 2009, p. I-6653, paragraph 64. See also: C. Mik, "Wykładnia zgodna..." [Conforming interpretation...], op. cit., p. 161; M. Szpunar, Odpowiedzialność podmiotu prywatnego z tytułu naruszenia prawa wspólnotowego [Liability of private entities for breaching Community law], pp. 172–174; S. Biernat, in: J. Barcz, ed., Prawo Unii Europejskiej [Law of the European Union], p. I-291.

[26] The Court has ruled that 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 (judgment in Case 14/86 Pretore di Salò [1987] ECR 2545; judgments in Case 152/84 Marshall [1986] ECR 723, paragraph 48, and in Case 80/86 Kolpinghuis Nijmegen [1987] ECR 3969, paragraph 9.

[27] P. Kardas, Rola i znaczenie wykładni prowspólnotowej w procesie dekodowania norm prawa karnego. Uwagi na marginesie uchwały SN z dnia 3 marca 2009 r. (I KZP 30/08) [The role and importance of conforming interpretation in the process of decoding of crim-

traditions common to the Member States. It is also enshrined in Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter 'the ECHR'), the first sentence of Article 15(1) of the International Covenant on Civil and Political Rightsand the first sentence of Article 49(1) of the Charter of Fundamental Rights of the European Union. It is a specific enunciation of the principle of legal certainty in substantive criminal law. Moreover, on the basis of that rule, which also prohibits the extensive interpretation of criminal provisions to the disadvantage of the person concerned, the interpretation of national law in accordance with directives in criminal proceedings is subject to strict limits.

This leads to the belief that the direct effect of the norms of European law and interpretation of criminal law in accordance with the principle of conforming interpretation is subject to limitation due to the *nullumcrimen-nullapoena sine lege* principle. This is also confirmed by the judgment of the CJ of 12 December 1996 in case *Criminal proceedings against X* (joined cases C-74/95 and C-129/95), where the court stated that:

> 24. (...). However, that obligation on the national court to refer to the content of the Directive when interpreting the relevant rules of its national law is not unlimited, particularly where such interpretation would have the effect, on the basis of the Directive and independently of legislation adopted for its implementation, of determining or aggravating the liability in criminal law of persons who act in contravention of its provisions.
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> 25. More specifically, in a case such as that in the main proceedings, which concerns the extent of liability in criminal law arising under legislation adopted for the specific 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 principle of legal certainty, precludes bringing criminal proceedings in respect of conduct not clearly defined as culpable by law. That principle, which is one of the general legal principles underlying the constitutional traditions common to the Member States, has also been enshrined in various international treaties, in particular in Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms (...).[28]

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inal law norms..., p. 21; M. Szpunar, Odpowiedzialność podmiotu prywatnego z tytułu naruszenia prawa wspólnotowego [Liability of private entities for breaching Community law], pp. 179–180.

[28] See: the judgment of the CJ of 12 December 1996 in case Criminal proceedings against X (joined cases C-74/95 and C-129/95), [1996] ECR I-6609, paragraph 25.

6. In the context of the above discussion, the opinion that, in the process of reconstruction of a normative model in criminal law, national courts conducting interpretation conforming to EU law are limited by general legal principles, to include the principle of legal certainty, the *nullumcrimen sine lege*, and the principle that law cannot be applied retroactively, is fully justified.[29] These principles reflect both the constitutional standards and the legal culture that determines the model of liability in criminal law and the system of rules that guarantee the rights and freedoms of individuals.

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[29] The judgment of the CJ of 3 May 2007 r. in case Advocatenvoor de Wereld (C-303/05), [2007] ECR I-3633, paragraph 49.