

OPINION OF ADVOCATE GENERAL  
KOKOTT  
delivered on 11 November 2004<sup>1</sup>

**I — Introduction**

1. In these proceedings the Court is called upon for the first time to interpret a framework decision adopted on the basis of Articles 31 and 34(2)(b) EU, namely, Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings (hereinafter 'the Framework Decision').<sup>2</sup> The Tribunale di Firenze wishes to know whether, under that framework decision, in criminal proceedings concerning physical injury caused to five-year-old children, those children must be examined as witnesses outside the trial by recording their evidence beforehand, even though the Italian law of criminal procedure does not provide for such a procedure in relation to the offences in question.

**II — Legal framework**

*A — Union law*

2. For the purpose of interpreting the Framework Decision, the Treaty on European Union, in the version resulting from the Treaty of Amsterdam, is authoritative, since the Framework Decision was adopted before the Treaty of Nice came into force. The legislative effect of framework decisions results from Article 34(2)(b) EU:

'... Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect.'

3. The application of the preliminary ruling procedure to acts referred to in Title VI of the Treaty on European Union results from Article 35 EU. On that basis, Italy has made a

<sup>1</sup> — Original language: German

<sup>2</sup> — OJ 2001 L 82, p 1

declaration which entitles all Italian courts to request preliminary rulings.

6. Article 3 deals with victims as witnesses:

4. The framework decision contains various provisions which may be relevant with regard to the standing of children as victims and witnesses in criminal proceedings.

'Each Member State shall safeguard the possibility for victims to be heard during proceedings and to supply evidence.

5. Article 2 relates to respect for and recognition of victims in general:

Each Member State shall take appropriate measures to ensure that its authorities question victims only insofar as necessary for the purpose of criminal proceedings.'

'(1) Each Member State shall ensure that victims have a real and appropriate role in its criminal legal system. It shall continue to make every effort to ensure that victims are treated with due respect for the dignity of the individual during proceedings and shall recognise the rights and legitimate interests of victims with particular reference to criminal proceedings.

7. Member States are to develop special procedures for giving evidence in accordance with Article 8(4):

(2) Each Member State shall ensure that victims who are particularly vulnerable can benefit from specific treatment best suited to their circumstances.'

'Each Member State shall ensure that, where there is a need to protect victims — particularly those most vulnerable — from the effects of giving evidence in open court, victims may, by decision taken by the court, be entitled to testify in a manner which will enable this objective to be achieved, by any appropriate means compatible with its basic legal principles.'

B — *Italian law*

8. According to the referring court, in the Italian law of criminal procedure the trial is intended to be the cornerstone of the procedure. In principle, therefore, evidence must be taken at the initiative of the parties in an adversarial procedure conducted between them at the trial under the direct supervision of the judge. However, a special inquiry procedure for recording evidence beforehand has also been introduced, enabling evidence to be taken at an early stage where, by its nature, it cannot be deferred until the trial. Use of that special inquiry procedure may be requested by either the prosecution or the defence. The decision on the request is taken by the investigating judge who, if he grants the request, then immediately orders the evidence to be taken in an adversarial procedure involving the parties. Evidence taken beforehand by that special procedure has the same full evidential value as that taken at the trial.

9. The legislature has listed specifically and exhaustively the situations in which use of that procedural instrument is admissible, either by indicating the types of evidence which may be recorded beforehand or by indicating the specific features of factual situations which justify recourse to the early taking of evidence.

10. Article 392(1) of the Codice di procedura penale (Code of Criminal Procedure; hereinafter 'the CPP') provides *inter alia* that a witness statement may be recorded beforehand where there is good reason to believe that it will not be possible to examine the witness at the trial because of illness or some other serious impediment or where, on the basis of clear and specific indications, there is good reason to believe that the witness is vulnerable to violence, threats, offers or promises of money or other benefits, intended to induce him not to testify or to give false testimony. Under subsequent amendments of the law, even if none of the aforementioned reasons applies, a court may order the special procedure of recording evidence beforehand in relation to the examination of a witness who is under 16 years of age where the case involves sexual offences or offences with a sexual background.

11. Under Article 398(5a) of the CPP, the court may opt for special forms of procedure for taking and recording evidence where the case involves sexual offences or offences with a sexual background and the witness statement of a person under 16 has to be given using the special procedure of recording it beforehand, if the minor's situation makes that necessary or shows it to be advisable. Those special forms of procedure consist of the possibility of holding the hearing in a place other than the court, in particular in special facilities or even at the minor's place of residence. The witness statements must

also be fully documented by the use of sound or audiovisual reproduction equipment.

mind, if necessary bringing in an expert in child psychology because of the sensitivity called for by the events in question and their significance and because of the difficulty of relating to the persons to be questioned because of their tender age.

### III — Facts and reference for a preliminary ruling

12. The referring court has pending before it criminal proceedings against a nursery school teacher, Ms Pupino, who is charged with having, in January and February 2001, misused disciplinary measures against and injured children entrusted into her care.

13. In August 2001, the Public Prosecutor's Office applied to examine, by the special procedure of recording their evidence beforehand, eight children born in 1996 who are witnesses to and victims of the offences at issue in the criminal proceedings. It argued that, because of the tender age of the witnesses and the resulting inevitable alteration of their psychological state and because of a possible 'process of psychological repression', that evidence could not be repeated at the trial. It also requested that the evidence be taken under protected conditions, that is, in a special facility under conditions which would safeguard the children's dignity, need for privacy and peace of

14. The defence opposed that application since there was no provision for taking evidence in that way in the case of the offences in question.

15. The referring court takes the view that the application by the Public Prosecutor's Office should be rejected, pursuant to the abovementioned provisions of Italian law of criminal procedure, since the recording of evidence beforehand, as an instrument for taking evidence at an earlier stage than the trial, is a procedural mechanism which is absolutely exceptional in character and cannot be used in situations other than those specified by law.

16. The court is nevertheless of the opinion that the restriction by Italian law of the use of the special procedure for recording evidence beforehand infringes Articles 2, 3 and 8 of the Framework Decision. Minors are always 'victims who are particularly vulnerable' within the meaning of Article 2 (2) of the Framework Decision. Special arrangements for the examination of witnesses should therefore always apply, regard-

less of the offence in question, in order to protect them. The referring court infers from Article 3 of the Framework Decision that repetitions of examinations of victims are, as a general rule, to be avoided because of the psychological stress involved. In view of the particular vulnerability of juvenile victims, it is therefore necessary to derogate from the basic rule that only statements made at the trial have evidential value. The referring court infers from Article 8(4) of the Framework Decision the principle that a court must always have the power to dispense with the hearing in open court if it may have adverse effects on victims as witnesses.

17. Since the referring court wishes to ascertain whether it is possible to interpret Italian law in the light of the Framework Decision, it asks the Court of Justice to rule on whether its proposed interpretation of Article 2(3) and Article 8(4) of the Framework Decision is correct.

#### IV — Legal assessment

##### *A — The right to make references for a preliminary ruling*

18. As all the parties acknowledge, the referring court is in principle entitled to

submit questions concerning framework decisions to the Court of Justice since Italy has exercised the option provided for in Article 35(3)(b) EU of conferring such jurisdiction on all its national courts and tribunals.

##### *B — Admissibility of the request for a preliminary ruling*

19. The French and Italian Governments and probably also, by implication, the Swedish Government challenge the admissibility of the request for a preliminary ruling on the ground that an answer given by the Court can have no bearing on the main proceedings. In the Commission's view, the Framework Decision does however require national law to be interpreted in conformity with it, so that an interpretation of the Framework Decision by the Court would have to be taken into account in the main proceedings.

##### 1. Conditions for admissibility

20. It is settled case-law that it is solely for the national court before which the case has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to

enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling.<sup>3</sup> Nevertheless, the Court has also stated that, in exceptional circumstances, it should examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction. According to that case-law, references for a preliminary ruling which are inadmissible include those which manifestly bear no relation to the actual facts of the main action or its purpose.<sup>4</sup> Although that case-law was developed in connection with Article 234 EC, there is no apparent reason why it should not be applied to references for a preliminary ruling under Article 35 EU.

ruling is therefore admissible if national law must be interpreted in conformity with the Framework Decision or even may be so interpreted (in that regard, see section 2 below) and an interpretation of the relevant provisions of Italian law of criminal procedure in conformity with the Framework Decision is not precluded from the outset (in that regard, see section 3 below).

## 2. Interpretation in conformity with framework decisions

21. The objections to the admissibility of the request for a preliminary ruling are based in essence on the view that the Court's reply can have no bearing on the main proceedings. In the present case, however, the request for a preliminary ruling may in any event have a bearing on the main proceedings if Articles 2, 3 and 8 of the Framework Decision are in principle relevant to the interpretation of the Italian provisions in question.<sup>5</sup> The request for a preliminary

22. In the view of the Greek and Portuguese Governments and the Commission, framework decisions likewise require national law to be interpreted in conformity with them. The Swedish Government, on the other hand, objects that Title VI of the Treaty on European Union establishes only intergovernmental cooperation. Acts adopted under Article 34 EU are therefore purely international law and cannot create an obligation under Union law for national courts to interpret their laws in conformity with framework decisions. The Italian and United Kingdom Governments expressed similar misgivings at the hearing.

3 — Case 13/68 *Salgoil* [1968] ECR 679, 690; Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59; Case C-36/99 *Idéal Tourisme* [2000] ECR I-6049, paragraph 20; Case C-322/98 *Kachelmann* [2000] ECR I-7505, paragraph 17; Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38; and Joined Cases C-480/00, C-481/00, C-482/00, C-484/00, C-489/00, C-490/00, C-491/00, C-497/00, C-498/00 and C-499/00 *Ribaldi* [2004] ECR I-2943, paragraph 72.

4 — Case 126/80 *Salonia* [1981] ECR 1563, paragraph 6, *Bosman*, paragraph 61, *Idéal Tourisme*, paragraph 20, *Kachelmann*, paragraph 17, *PreussenElektra*, paragraph 39, and *Ribaldi*, paragraph 72, cited in footnote 3.

5 — See, to that effect, Joined Cases C-87/90 to C-89/90 *Verholen and Others* [1991] ECR I-3757, paragraph 13.

23. The basis of the principle that national law must be interpreted in conformity with

Community law derives from settled case-law and may be summarised as follows: the third paragraph of Article 249 and Article 10 EC and each individual directive oblige the Member States, that is, all their authorities, including the courts and tribunals, to achieve the result envisaged in that directive by taking all appropriate measures, whether general or particular, to fulfil that obligation. It follows that, when applying national law, whether adopted before or after the directive, the national court which has to interpret that law must do so, as far as possible, in the light of the wording and purpose of the directive so as to achieve the result it has in view and thereby comply with it.<sup>6</sup>

24. All those requirements are also amply fulfilled with respect to the Framework Decision. Although there is no identically-worded equivalent to Article 10 EC in Union law, the Member States nevertheless have a duty of loyalty to the Union. Article 34(2)(b) EU is equivalent — so far as is relevant here — to the third paragraph of Article 249 EC and therefore obligations for the Member States also arise from the Framework Decision itself, including the duty to interpret their national laws in conformity with it.

(a) Loyalty to the Union

25. The Italian and United Kingdom Governments point out that there is no provision equivalent to Article 10 EC in Union law. As in Community law, however, Member States and institutions are also bound by a duty of mutual loyalty in Union law.

26. That is apparent from an overview of the provisions of the Treaty on European Union. Article 1 EU lays down the objective of creating a new stage in the process of achieving an ever closer union among the peoples of Europe, on the basis of which relations between the Member States and between their peoples can be organised in a manner demonstrating consistency and solidarity. That objective will not be achieved unless the Member States and institutions of the Union cooperate sincerely and in compliance with the law. Loyal cooperation between the Member States and the institutions is also the central purpose of Title VI of the Treaty on European Union, appearing both in the title — Provisions on Police and Judicial Cooperation in Criminal Matters — and again in almost all the articles.

I shall now examine those aspects in detail.

27. Against that background, Article 10 EC lays down some axiomatic principles, namely, that obligations must be fulfilled and damaging measures refrained from. The

6 — Case C-106/89 *Marleasing* [1990] ECR I-3135, paragraph 8; Case C-334/92 *Wagner Muet* [1993] ECR I-6911, paragraph 20; Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 26; and Case C-162/99 *Comect Austria* [2003] ECR I-5197, paragraph 38.

same applies in Union law, without needing to be expressly mentioned.

cally worded does not mean that they must necessarily be interpreted identically. An international treaty is to be interpreted — and this also in the light of the Vienna Convention on the Law of Treaties of 23 May 1969 — not only on the basis of its wording, but also in the light of its objectives.<sup>7</sup>

(b) Article 34(2)(b) EU

28. Framework decisions in Union law are also largely identical in their structure to directives in Community law. Under Article 34(2)(b) EU, they are binding upon the Member States as to the result to be achieved but leave the choice of form and methods to the national authorities. Although direct effect is expressly excluded, at least the wording concerning their binding character as to the result to be achieved corresponds to that of the third paragraph of Article 249 EC, on the basis of which — together with other reasons — the Court has developed the doctrine of the application of national law in conformity with Community directives.

29. However, the Swedish Government's objection is effectively that, despite that similar wording, Article 34(2)(b) EU does not have legal effects comparable to those of the third paragraph of Article 249 EC. In that respect it is true that the Court has held, in connection with the European Economic Area in particular, that the fact that the provisions of an agreement and the corresponding Community provisions are identi-

30. In the same way as the EC Treaty<sup>8</sup> or the Agreement on the European Economic Area, the Treaty on European Union is a treaty with its origin in international law. It is distinguished from the EC Treaty by its lesser degree of integration and from the EEA Agreement primarily by its objectives.

31. The lesser degree of integration under the Treaty on European Union is apparent in the definition of a framework decision, which excludes direct effect. The powers of the Court of Justice under Article 35 EU are reduced in comparison with Community law. Its substantive power of review is expressly excluded in paragraph 5, so far as concerns the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State

7 — Opinion 1/91 *Opinion on the draft EEA Agreement* [1991] ECR I-6079, paragraph 14; see also Case C-312/91 *Metalsa* [1993] ECR I-3751, paragraph 12; Case C-416/96 *Eddline El-Yassini* [1999] ECR I-1209, paragraph 47; and Case C-268/99 *Jany and Others* [2001] ECR I-8615, paragraph 35.

8 — Case 26/62 *Van Gend & Loos* [1963] ECR I, 11, and Case 6/64 *Costa v Enel* [1964] ECR 585, 593.

or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security. The preliminary ruling procedure is available only if the Member State concerned has expressly 'opted in' and the Commission cannot bring Treaty infringement proceedings. In addition, Council decisions do not necessarily require a proposal from the Commission, but may also be taken on the initiative of any Member State. Under Article 34(2) EU, the Council does not decide by a majority, but in principle unanimously. Finally, under Article 39 EU, the Parliament's involvement takes the form only of consultation.

joint exercise of sovereignty by the Union. Moreover, the first paragraph of Article 3 EU obliges the Union to respect and build upon the *acquis communautaire*.<sup>11</sup>

33. The increasing degree of integration expressed in the phrase 'ever closer cooperation' is also shown by the development of the Treaty on European Union which, after its creation by the Treaty of Maastricht, was brought ever more closely into line with the structures of Community law by the Treaties of Amsterdam and Nice and is to be merged fully with Community law by the Constitutional Treaty.

32. Unlike the EEA Agreement, which is concerned only with the application of rules on free trade and competition in economic and commercial relations between the Contracting Parties,<sup>9</sup> but provides for no transfer of sovereign rights to the inter-governmental institutions which it sets up,<sup>10</sup> the Treaty on European Union, as stated in the second paragraph of Article 1, marks a new stage in the process of creating an ever closer union among the peoples of Europe. To that end it supplements the activities of the Community with new policies and forms of cooperation. The term *policies* indicates that, contrary to the view of the Swedish Government, the Treaty on European Union includes not only inter-governmental cooperation, but also

34. Consequently, according to its definition, a framework decision has been approximated closely to a directive and Article 34(2) (b) EU must be interpreted in the same way as the third paragraph of Article 249 EC since those provisions are identical in substance.

35. At the hearing, the United Kingdom objected, with regard to acts adopted under

9 – Opinion 1/91, cited in footnote 7, paragraph 15.

10 – Opinion 1/91, cited in footnote 7, paragraph 20.

11 – The transfer of the *acquis communautaire* to Union law is illustrated by the judgment in Joined Cases C-187/01 and C-385/01 *Gözütok and Brugge* [2003] ECR I-1345, paragraph 45, in which the principle of interpretation of effectiveness is applied in the context of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19).

Article 34 EU, that, in contrast to Community law,<sup>12</sup> there is no complete system of legal remedies and procedures designed to ensure that the legality of acts of the institutions is subject to judicial review. Such acts can only be reviewed by way of a request for a preliminary ruling if the Member State concerned has accepted the jurisdiction of the Court of Justice to give preliminary rulings, as specified in Article 35 EU. Nor is it possible for individuals to bring direct actions. The Italian Government held a similar view. In rebuttal of that view, it must be said that interpretation in conformity does not lead to the introduction of new rules, but presupposes that rules already exist which — within the limits of what is permissible under national law — are amenable to an interpretation in accordance with the framework decision. Thus it would be in relation to the provisions of national law amenable to a conforming interpretation that legal remedies would have to be sought.

(c) Intermediate conclusion

36. In summary, it follows from Article 34(2) (b) EU and from the principle of loyalty to the Union that every framework decision obliges national courts to bring their interpretation of national laws as far as possible into conformity with the wording and purpose of the framework decision, regardless of whether those laws were adopted

before or after the framework decision, so as to achieve the result envisaged by the framework decision.

37. Even if it were necessary to concur with the Swedish Government in its view concerning the classification of the Framework Decision as international law, interpreting national law in conformity with the Framework Decision would still seem at least to be the natural solution. Even as an act of international law, the Framework Decision would be binding on the Member States. Consequently — as the United Kingdom argued at the hearing — even if the Framework Decision were deemed to be purely international law, it would have to be assumed that all the authorities of the Member States, including the courts and tribunals, would bring their conduct into compliance, as far as possible, with that obligation. At the same time, however, the United Kingdom Government pointed out that that form of interpretation in conformity cannot lay claim to the same primacy as Community law and may therefore — pursuant to national law — have to give way to other forms of interpretation. However, that would not preclude an answer given by the Court from being of help in the interpretation of national implementing legislation.

3. Possibility of an interpretation in conformity with the Framework Decision in the main proceedings

38. Even if there is a duty to interpret national law in conformity with the Framework Decision, the admissibility of the

<sup>12</sup> — See Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, paragraph 40.

request for a preliminary ruling nevertheless presupposes that that duty is not manifestly irrelevant in the main proceedings in this case because such an interpretation would be impossible.

39. In that respect, the Italian and French Governments object that in the present case the result sought by the referring court is unachievable because of contrary provisions of Italian law. With regard to that objection, it must be conceded that interpretation in conformity with the Framework Directive is possible only in so far as national law provides for the possibility of such an interpretation. That is expressed in the qualification 'as far as possible' used by the Court.<sup>13</sup> Although the objectives pursued by provisions of Union law demand precedence over all other methods of interpretation, they cannot lead to a result which could not be achieved under national law by way of interpretation.<sup>14</sup> Only national courts can determine the extent to which, in the final analysis, their national law allows scope for that.<sup>15</sup>

40. In this case, however, it is not evident that an interpretation in conformity with the

framework decision would be impossible and therefore that a reply from the Court would be of no value to the national court. 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.<sup>16</sup> Nor does it appear inconceivable, with regard to the recording of evidence beforehand, that the concept of 'other serious impediment' in Article 392(1) of the CPP could be construed as including the deterioration in the power of recollection and the psychological stress experienced by children as a consequence of examination at the time of the trial, and thus as providing the procedure of recording evidence beforehand with a legal basis other than Article 392 (1a) of the CPP. Moreover, despite its presumption of an infringement of the Framework Decision, the referring court itself assumes that an interpretation in conformity with it is possible. Although the request for a preliminary ruling contains contradictions in that respect, it is not the task of the Court of Justice to call that assessment into question.

41. Contrary to the view of the French, Greek and Netherlands Governments, the obligation to interpret national laws in conformity is also not subject, in the context of the law of criminal procedure, to any special restrictions under Union law which would preclude the relevance of the request

13 — See the references in footnote 6.

14 — Case 14/83 *Von Colson and Kamann* [1984] ECR 1891, paragraph 25, and *Wagner Miret*, cited in footnote 6, paragraph 22. A different view is taken by Advocate General Ruiz-Jarabo Colomer in his Opinion in Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, I-8839 and I-8859, point 24 et seq. However, see also the judgment in those joined cases, paragraph 116.

15 — Judgment in Case C-60/02 *X* [2004] ECR I-651, paragraph 58 et seq.

16 — See p. 5 et seq. of the Italian Government's observations.

for a preliminary ruling. It is true that the rule that offences and punishments are to be strictly defined by statute (*nullum crimen, nulla poena sine lege [scripta]*)<sup>17</sup> must be taken into account.<sup>18</sup> That rule is one of the general legal principles underlying the constitutional 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 Rights<sup>19</sup> and 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.

42. However, this case does not concern substantive criminal law, but the law of criminal procedure. It is therefore not a question here of establishing or aggravating criminal responsibility, but of assessing the

court procedure leading to judgment. It is not, therefore, the *nulla poena sine lege* rule which applies, but the principle of a fair trial, which must be further elaborated below.

43. An interpretation in conformity is also not precluded by the fact that the incidents to be investigated took place at a time before the adoption of the Framework Decision. According to settled case-law, procedural rules are generally held to apply to all proceedings pending at the time when they enter into force.<sup>20</sup>

44. Consequently, in the present case, an interpretation of Italian law in conformity with the Framework Decision is not manifestly precluded. The request for a preliminary ruling is therefore admissible.

### C — Interpretation of the Framework Decision

45. The referring court essentially asks whether Articles 2, 3 and 8 of the framework decision establish an obligation to examine eight five-year-old children as witnesses to

17 — Opinion of Advocate General Ruiz-Jarabo Colomer in Joined Cases C-74/95 and C-129/95 X [1996] ECR I-6609, I-6612, point 43. Opinion of Advocate General Jacobs in Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95 *Tombesi and Others* [1997] ECR I-3564, point 37.

18 — See in that regard the judgment of the Court of Justice in Joined Cases C-74/95 and C-129/95 X [1996] ECR I-6609, paragraph 24 et seq., with reference to the Eur. Court H. R., *Kokkinakis v. Greece* judgment of 25 May 1993, Series A no. 260-A, § 52, and the Eur. Court H. R., *S.W. v. United Kingdom* and *C.R. v. United Kingdom* judgments of 22 November 1995, Series A no. 335-B, § 35, and no. 335-C, § 33. See also the judgments of the Court of Justice in Case 63/83 *Kirk* [1984] ECR 2689, paragraph 22, Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 13, Case C-168/95 *Arcaro* [1996] ECR I-4705, paragraph 42, and X, cited in footnote 15, paragraph 61 et seq.. See also in detail in that regard my Opinions in Case C-457/02 *Niselli* [2004] ECR I-10853, I-10855, point 53 et seq., and in Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi* [2005] ECR I-3565, I-3568, point 140 et seq..

19 — Opened for signature on 19 December 1966 (*LIN Treaty Series*, vol. 999, p. 171).

20 — Joined Cases 212/80 to 217/80 *Salumi and Others* [1981] ECR 2735, paragraph 9; Joined Cases C-121/91 and C-122/91 *CT Control Rotterdam and JCT Benelux v Commission* [1993] ECR I-3873, paragraph 22; Case C-61/98 *De Haan* [1999] ECR I-5003, paragraphs 13 and 14, and Joined Cases C-361/02 and C-362/02 *Tsapalos* [2004] ECR I-6405, paragraph 19.

the alleged physical abuse of which they were victims by recording their evidence beforehand in a manner appropriate for children. In that court's view, it is to be feared that, on the one hand, by reason of the psychological development of the children, their power of recollection of the offence will deteriorate and that, on the other hand, giving evidence at a (subsequent) trial could have detrimental psychological consequences for the children.

47. Next, therefore, it must be considered whether the children concerned here are to be regarded as victims who are particularly vulnerable. If so, it must then be considered whether the recording of their evidence beforehand, which is requested, would constitute the treatment best suited to their circumstances, in particular safeguarding their effective participation in the proceedings as witnesses.

46. The basis of such an obligation could be Article 2(2), Article 3 and Article 8(4) of the Framework Decision. Under Article 2(2) of the Framework Decision, victims who are particularly vulnerable are to benefit from specific treatment best suited to their circumstances. Article 8(4) gives concrete expression to that obligation. It requires that, where there is a need to protect victims — particularly those most vulnerable — from the effects of giving evidence in open court, victims may, by decision taken by the court, be entitled to testify in a manner which will enable that objective to be achieved, by any appropriate means compatible with its basic legal principles. Under Article 3, each Member State must safeguard the possibility for victims to be heard during proceedings and to supply evidence. In particular, each Member State must, pursuant to that article, take appropriate measures to ensure that its authorities question victims only in so far as necessary for the purpose of criminal proceedings.

#### 1. Legal basis of the framework decision

48. Although the referring court has not raised any questions in this regard, an observation as to whether they were legitimately adopted on the chosen basis is called for before the provisions at issue are interpreted. Specifically in the case of acts adopted under Article 34 EU, particular attention is called for with regard to doubts concerning their lawfulness, especially since — as the United Kingdom Government has pointed out — the legal remedies available in relation to such acts are limited.<sup>21</sup> It is true that an act is presumed to be lawful and accordingly produces legal effects until such time as it is withdrawn, annulled in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality. However, that principle does not apply to acts tainted by an irregularity whose

<sup>21</sup> — See point 35 above

gravity is so obvious that it cannot be tolerated. Such acts must be regarded as *non-existent*.<sup>22</sup> If serious doubts arise, therefore, the Court is in any event obliged, in preliminary ruling proceedings, to examine of its own motion the lawfulness of the provisions to be interpreted. An interpretation is in fact meaningful only if the provisions to be interpreted are valid.

not absolutely necessary in order to improve cooperation.

49. At first sight, there could be doubt as to whether Article 3 EU and Article 34(2) EU constitute a sufficient legal basis for the provisions to be interpreted. Article 34(2)(b) merely defines framework decisions as a permissible form of action. The only possible basis with regard to the substance of the provisions to be interpreted here is therefore Article 31 EU. Under that article, common action on judicial cooperation in criminal matters includes various fields, listed under (a) to (e), which however can be applied to the protection of victims only with difficulty. Victim protection falls neither within the scope of facilitating and accelerating cooperation in relation to proceedings and the enforcement of decisions (a) nor within that of facilitating extradition (b), preventing conflicts of jurisdiction (d) or harmonising certain constituent elements of criminal acts (e). Only ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation (c), could include victim protection. However, common standards of victim protection are

50. The fields of common action expressly listed are not exhaustive, however, a fact which is most clearly apparent in the French version of the introductory sentence. Instead of 'shall include', the latter uses the phrase '*visé entre autres*'. The individual policy fields therefore describe only potential legislative spheres, without thereby strictly delimiting the competence of the Union. That competence is to be determined in the light of the general objectives of police and judicial cooperation in criminal matters, as they are laid down in Article 29 EU. The principal objective under that article is to provide citizens with a high level of safety within an area of freedom, security and justice through, in particular, improved judicial cooperation.

51. The protection of citizens who, despite the efforts to ensure their safety, have become victims of a crime certainly merits a prominent place within such an area. At the same time, common standards for the protection of victims when giving evidence in criminal proceedings may also encourage cooperation between judicial authorities, since they guarantee that that evidence is usable in all the Member States. Finally, the requirement of unanimity when the Council adopts framework decisions ensures that no Member State can become subject to a framework decision without its consent.

22 — Case C-475/01 *Commission v Greece (Ouzo)* [2004] ECR I-8923, paragraph 18 et seq.

52. Consequently, despite the uncertainties which appear at first sight to exist with regard to the legal basis of the provisions to be interpreted, it must not simply be assumed in this case that those provisions are no longer covered by the Union's legislative powers. When questioned at the hearing, the French Government, the Netherlands Government and the Commission also expressed that view. Answering the question submitted is therefore not pointless on the ground that the law to be interpreted is non-existent.

## 2. The particular vulnerability of children

53. The Commission, like the referring court, assumes that children are, in principle, particularly vulnerable victims. The Commission bases its view primarily on the fifth recital in the preamble to Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings,<sup>23</sup> according to which children are more vulnerable and are therefore at greater risk of falling victim to trafficking. In the French Government's view, on the other hand, vulnerability must be assessed in the light of all the circumstances of the individual case, taking into account not only the age of the victim and the nature of the offence, but also other circumstances.

54. The Framework Decision does not define which victims are particularly vulnerable. In particular, it contains no reference to the fact that children are particularly vulnerable. Such references were still contained in Portugal's proposal, which, in Articles 2(2) and 8(4), expressly referred to age as a ground of particular vulnerability.<sup>24</sup> The Parliament even called expressly for particular account to be taken of children in the context of Article 3.<sup>25</sup>

55. The explanation for the fact that no such specific examples of particularly vulnerable victims are given lies in the fact that particular vulnerability can be due to a multitude of reasons which would be difficult to formulate in a definition. That is underlined by the documents used as background to the efforts to establish a European system of victim protection. The Commission's Communication of 1999,<sup>26</sup> mentioned in the second recital in the preamble to the Framework Decision, dealt almost exclusively with the position of Union citizens who were victims of crime in other Member States. In that connection, the Commission also mentioned the possibility of making it easier for them to take part in criminal proceedings in other Member States by the

24 — Initiative of the Portuguese Republic with a view to adopting a Council Framework Decision on the standing of victims in criminal procedure (OJ 2000 C 243, p. 4 et seq.).

25 — Legislative resolution of 12 December 2000 (OJ 2001 C 232, p. 61 et seq.), proposed amendments Nos 13 and 25; see also Report No A5-0355/2000 of 24 November 2000 drawn up by Carmen Cerdeira Morterero MEP, p. 11 et seq. and p. 17.

26 — Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee — Crime victims in the European Union — Reflections on standards and action (COM(1999) 349 final).

use, for example, of video conferencing or evidence given by telephone.<sup>27</sup> Similar measures are also called for in an earlier Council resolution which, however, concerns the protection of witnesses against all forms of direct or indirect threat, pressure or intimidation, in particular in connection with organised crime.<sup>28</sup> The conclusions of the European Council held at Tampere, referred to in the third recital in the preamble, mention the protection of witnesses only from the point of view of access to justice.<sup>29</sup> The Council of Europe Recommendation mentioned in the Portuguese Government's proposal for the Framework Decision refers in general terms to respect for victims and their dignity during the criminal procedure<sup>30</sup> and to the particular need for protection of victims of organised crime.<sup>31</sup> With regard to children, only the presence of their parents or guardians during questioning is mentioned.<sup>32</sup>

Political Rights proclaims the right of the child to such measures of protection as are required by his status as a minor, on the part of the State. The Convention on the Rights of the Child,<sup>33</sup> which has been ratified by all the Member States of the Union, puts that duty of protection into specific terms. In particular, under Article 3(1), the best interests of the child are to be a primary consideration. The first sentence of Article 39 requires States Parties to take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, or abuse, torture or any other form of cruel, inhuman or degrading treatment or punishment.

56. Nevertheless, at international level, all the Member States have already acknowledged a particular need for protection in the case of children. Under the first sentence of Article 25(2) of the Universal Declaration of Human Rights, children are entitled to special care and assistance. Article 24(1) of the International Covenant on Civil and

57. Accordingly, Article 24 of the Charter of Fundamental Rights of the European Union guarantees the right of children to such protection and care as is necessary for their well-being. In all actions relating to children taken by public authorities the child's best interests must be a primary consideration.

58. Since according to the foregoing, children are, in principle, particularly in need of protection, they must in general also be regarded as particularly vulnerable when they have been victims of crime. In this case there is nothing to indicate that the vulnerability of the children concerned should be assessed in any other way. Being five years

27 — COM(1999) 349 final, p. 7.

28 — Resolution of the Council of 23 November 1995 on the protection of witnesses in the fight against international organised crime (OJ 1995 C 327, p. 5).

29 — Presidency Conclusions — European Council (Tampere), 15 and 16 October 1999, No 32.

30 — Recommendation No R(85)11 of the Committee of Ministers to Member States on the position of the victim in the framework of criminal law and procedure, adopted on 28 June 1985, point 8.

31 — Recommendation No R(85)11, point 16.

32 — Recommendation No R(85)11, point 8.

33 — Opened for signature on 20 November 1989 (*LIN Treaty Series*, Vol. 1577, p. 43).

old at the time of the offence and on the date of the hearing sought, they were at an age when psychological damage as a consequence of what took place cannot be ruled out. Moreover, the offences charged in this case, involving maltreatment by a nursery school teacher — that is, a person in a position of trust — are particularly liable to harm the children's development.

59. In summary, it must be concluded that children who are victims of criminal offences are, in general, particularly vulnerable.

### 3. Need for a procedure of recording evidence beforehand

60. If the referring court shares the provisional assessment made above, the further question arises as to whether, under the Framework Decision, a hearing by the special procedure of recording evidence beforehand, as described above, is required. The referring court, but also the Portuguese Government seem to assume that, in the present case, pursuant to Article 2(2) and Article 3 of the Framework Decision, a procedure of recording evidence prior to the trial is necessary.

61. In that respect it must first be noted that neither of those two provisions contains specific requirements as to how its objectives are to be achieved. However, Article 2(2) of the Framework Decision requires treatment *best* suited to the circumstances of victims who are particularly vulnerable. The framework decision thus goes beyond the Portuguese proposal, which required only *appropriate* measures. A choice between two types of procedure is therefore permissible under Article 2(2) only where they are equally suited to the circumstances of the victim. Moreover, it follows from the first paragraph of Article 3 that victims must be given the opportunity to testify effectively. Here too, whichever procedure is conducive to effective participation merits priority. Finally, under the second paragraph of Article 3, victims are to be questioned only in so far as is necessary. Superfluous repetition of questioning must accordingly be avoided.

62. The referring court and probably also the Portuguese Government assume that in this case it would be less stressful for the victims to record their evidence beforehand than to testify subsequently at the trial. At the same time, the referring court is of the opinion that the victims would be better able in that way to contribute to establishing the facts, since they might no longer be able to recollect the sequence of events so well at the trial. If those assumptions are in fact justified, which only the trial court can assess after taking into account the child concerned in each case and consulting experts where

appropriate, application of the procedure of recording evidence beforehand would in fact be, in this case, the best treatment for the victims, enabling them to participate in the criminal proceedings as witnesses effectively while affording them protection.

63. However, the Italian and French Governments object that in the Italian law of criminal procedure, under Article 392(1a) of the CPP, the recording of evidence beforehand is admissible only in the case of sex offences for statements by children who are both victims and witnesses. That provision of Italian law is not, they claim, in breach of the discretion allowed by the Framework Decision, to which the Netherlands Government also drew attention at the hearing.

64. However, no such discretion is apparent in Article 2(2) of the Framework Decision. In particular, there is no restriction of its application to specific offences. Nor is it evident that only the offences expressly mentioned by the Italian legislature require a procedure of recording evidence beforehand to be used for the benefit of children. On the contrary, it is possible that such a procedure would also be the treatment best suited to the circumstances of a particularly vulnerable victim in the case of other

offences and therefore the treatment required under the Framework Decision.<sup>34</sup>

65. The only restriction is to be inferred from Article 8(4) of the Framework Decision. Under that provision, each Member State must ensure that, where there is a need to protect victims — particularly those most vulnerable — from the effects of giving evidence in open court, victims may, by decision taken by the court, be entitled to testify in a manner which will enable this objective to be achieved, by any appropriate means compatible with its basic legal principles. In relation to Article 2(2) of the Framework Decision, that provision is the *lex specialis* in so far as it makes the obligation to protect victims subject to special conditions where the normal practice of giving evidence in open court is to be dispensed with. Forms of oral evidence which are in breach of the requirement of a public hearing must only be allowed to the extent that they are compatible with the Member State's basic legal principles. In the present case, however, it cannot be argued that the procedure of recording evidence beforehand is fundamentally incompatible with Italy's basic legal principles, in so far as they stem from Italian

34 — Thus, for example, under Paragraph 255a of the German Code of Criminal Procedure, in proceedings for offences against sexual self-determination (Paragraphs 174 and 184 f of the German Criminal Code) or against life (Paragraphs 211 to 222 of the German Criminal Code) or for maltreatment of wards (Paragraph 225 of the German Criminal Code), the examination of a witness under 16 may be replaced by a showing of the audiovisual recording of his earlier judicial examination if the accused and his defence had the opportunity to take part in it.

law alone. Article 392(1a) of the CPP does in fact allow evidence to be recorded beforehand, at least in relation to the offences listed.

66. As the Commission and the French Government rightly argue, however, each Member State's basic legal principles must also take into account the right of the accused to a fair trial. Under Article 6(2) EU, the Union — that is to say, the Community and the Member States — must also respect that right, which is also enshrined in Article 47 of the Charter of Fundamental Rights.<sup>35</sup> In particular, Article 6 of the of the European Convention on Human Rights is applicable in this regard. Under that provision, the defendant in criminal proceedings is entitled *inter alia* to a public hearing and to have the main witnesses heard and questioned at that hearing, with a view to adversarial argument. At the same time, the defendant must have the opportunity to question and challenge witnesses.<sup>36</sup>

67. Those rights may have to be balanced against the interests of the witnesses, which are likewise protected as human rights, in particular where those witnesses are also victims.<sup>37</sup> In that connection, the European Court of Human Rights recognises that Article 6 of the ECHR allows the interests

of juvenile witnesses to be taken into account in criminal proceedings.<sup>38</sup> However, the defendant must at least be given the opportunity to question vital prosecution witnesses.<sup>39</sup> Accordingly, the European Court of Human Rights held that there was a violation of Article 6 of the ECHR when convictions were based on the examination of children using special procedures for children where the defendant or his lawyer were unable to observe the examination or to put questions.<sup>40</sup> On the other hand, it allowed examination under conditions appropriate for a child prior to the hearing in a case where, although the defendant's lawyer had the opportunity to observe the examination and to put questions, he did not avail himself of that opportunity.<sup>41</sup>

68. The extent to which, pursuant to those principles, a procedure of recording evidence beforehand is admissible can be established only by striking a balance in each individual case, taking into account the interests of the witnesses, the rights of the defence and also, where appropriate, the importance attached to the imposition of a punishment. In general, having regard to Article 6 of the ECHR, it must also be assumed in that context that, at least in the case of offences involving physical injury to children, special protective arrangements, such as those proposed in this case, should apply.

35 — Case C-276/01 *Steffensen* [2003] ECR I-3735, paragraph 69 et seq., with additional references.

36 — Eur. Court HR, *Van Mechelen and Others v. Netherlands*, judgment of 23 April 1997, *Reports of Judgments and Decisions* 1997-III, p. 711, § 51.

37 — Eur. Court HR, *Doorson v. Netherlands*, judgment of 26 March 1996, *Reports of Judgments and Decisions* 1996-II, p. 470, § 70.

38 — Eur. Court HR, *P.S. v. Germany*, judgment of 20 December 2001, § 28.

39 — Eur. Court HR, *Doorson*, cited in footnote 37, § 72 et seq.

40 — Eur. Court HR, *P.S.* judgment, cited in footnote 38, § 25 et seq., and *A.M. v. Italy*, judgment of 14 December 1999, *Reports of Judgments and Decisions* 1999-IX, § 25 et seq.

41 — Eur. Court HR, *S.N. v. Sweden*, judgment of 2 July 2002, *Reports of Judgments and Decisions* 2002-V, § 49 et seq.

69. In summary, Article 2(2), Article 3 and Article 8(4) of the Framework Decision 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.

## V — Conclusion

70. In the light of the foregoing observations, I propose that the Court reply to the request for a preliminary ruling as follows:

- (1) Under Article 34(2)(b) EU and in accordance with the principle of loyalty to the Union, any framework decision requires the national courts to adapt their interpretation of national law — regardless of whether the provisions in question were enacted before or after the framework decision — as far as possible to the wording and purpose of the framework decision, so as to attain the objective pursued by the framework decision.
- (2) Children who are victims of crime are, in general, particularly vulnerable within the meaning of Article 2(2) and Article 8(4) of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings.
- (3) Article 2(2), Article 3 und Article 8(4) of Framework Decision 2001/220 are to be interpreted as meaning that they may, in the light of the circumstances of the individual case, create an obligation for the national courts to carry out a procedure of recording evidence beforehand, appropriate for children, provided that such a procedure is compatible with the Member State's basic legal principles, including the fundamental rights recognised by the Union.