OPINION OF ADVOCATE GENERAL CRUZ VILLALÓN delivered on 20 October 2011 [1]

1. Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings [2] ('the Framework Decision') continues to give rise to uncertainties of interpretation where its provisions are applied to victims who are particularly vulnerable, specifically minors. After the judgment in *Pupino*, [3] the same court which sought a preliminary ruling in that case once again asks the Court of Justice about the scope of Articles 2, 3 and 8 of the Framework Decision and their relationship with the *incidente probatorio* ('special measures procedure') provided for in Italian criminal procedure, in accordance with which, where the victim is a minor, evidence may be taken early during the investigation stage.

2. More specifically, the Giudice per le indagini preliminari, Florence (the judge in charge of preliminary investigations, 'the G.I.P.') has referred to the Court two questions concerning the compatibility with the Framework Decision of the legislation governing the *incidente probatorio*. By the first question, the G.I.P. asks whether, by granting solely to the Public Prosecutor and the accused the right to initiate the holding of an *incidente probatorio*, the Italian provisions are compatible with the Framework Decision, since the Public Prosecutor has no obligation to seek an *incidente probatorio* where it is requested by a victim who is a minor. By the second question, the referring court asks whether the Framework Decision guarantees for victims who are minors a right of appeal against a reasoned decision of the Public Prosecutor in which the latter opposes the holding of an *incidente probatorio* after that procedure has been requested by a victim who is a minor.

I — Legal framework

A — *European Union law*

3. The Framework Decision on the standing of victims in criminal proceedings lays down a system of protection aimed at harmonising

1 — Original language: Spanish.

2 — Council Framework Decision of 15 March 2001 (OJ 2001 L 82, p. 1).

3 — Case C-105/03 *Pupino* [2005] ECR I-5285.

the national provisions governing such proceedings. To that end, the concept of 'victim' is defined as follows in Article 1(a):

'(a) "victim" shall mean a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State.'

4. Article 2, entitled 'Respect and recognition', refers to the need to afford specific treatment to victims who are particularly vulnerable, and reads as follows:

'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.

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

5. The victim's right to be heard is one of the main features of the standing provided for in the Framework Decision, and it also guarantees proportional treatment that is consistent with the objectives of proceedings and avoids burdensome procedures. For those purposes, Article 3 provides as follows:

'*Article 3*

Hearings, and provision of evidence

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

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

6. Finally, Article 8 lays down a number of rights for the protection of victims, including the right of vulnerable victims to testify in a manner appropriate to their dignity and particular situation:

'Right to protection

1. Each Member State shall ensure a suitable level of protection for victims and, where appropriate, their families or persons in a similar position, particularly as regards their safety and protection of their privacy, where

the competent authorities consider that there is a serious risk of reprisals or firm evidence of serious intent to intrude upon their privacy.

2. To that end, and without prejudice to paragraph 4, each Member State shall guarantee that it is possible to adopt, if necessary, as part of the court proceedings, appropriate measures to protect the privacy and photographic image of victims and their families or persons in a similar position.

3. Each Member State shall further ensure that contact between victims and offenders within court premises may be avoided, unless criminal proceedings require such contact. Where appropriate for that purpose, each Member State shall progressively provide that court premises have special waiting areas for victims.

4. 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 — *National law*

7. Article 111 of the Italian Constitution concerns the safeguards applicable to criminal proceedings and refers, among other matters, to the importance of the adversarial principle and to the derogations from that principle in procedures for obtaining evidence:

'*Article 111*

Jurisdiction must be exercised in the context of a fair trial governed by law.

All proceedings must observe the rule that both parties should be heard in conditions of equality, and all proceedings must take place before an impartial judge. The reasonable duration of proceedings shall be ensured by law.

…

Criminal proceedings shall be governed by the adversarial principle for the purposes of obtaining evidence. The guilt of the accused may not be proven on the basis of statements made by someone who has voluntarily avoided submission to examination by the accused or his defence counsel.

The law shall govern cases where evidence is not obtained in adversarial proceedings at the wish of the accused, or because there is proof that it is objectively impossible, or as a result of proven unlawful conduct.

…'

8. Article 112 of the Italian Constitution concerns the role of the Public Prosecutor in criminal proceedings and states that the Public Prosecutor 'has an obligation to bring'criminal proceedings'.

9. Article 392(1a) of the Codice di procedura penale italiana (Italian Code of Criminal Procedure; 'CPP') [4] provides for an *incidente probatorio*, aimed at the early gathering of evidence during the investigation stage:

'In proceedings for offences under Articles 572, 609a, 609b, 609c, 609d, 609g, 612a, 600, 600a, 600b, and offences concerning pornographic material provided for in Articles 600c.1, 600d, 601 and 602 of the Criminal Code, the Public Prosecutor, [on his own initiative] or at the request of the victim or the accused, may request that evidence be taken, by means of an *incidente probatorio*, from a person who is a minor or from a victim who is of age, even outside the cases provided for in paragraph 1.'

10. The right of victims to request an *incidente probatorio* is set out in Article 394, in the following terms:

'1. A victim may ask the Public Prosecutor to request an *incidente probatorio.*

2. If the Public Prosecutor refuses the request, he must issue a statement of reasons for his decision which he must notify to the victim.'

11. The conduct of the *incidente probatorio* is set out in Article 398(5a) CPP, which provides as follows:

'In preliminary investigations concerning offences under Articles 600, 600a, 600b, and offences concerning pornographic material provided for in Articles 600c.1, 600d, 601, 602, 609a, 609b, 609c, 609g and 612a of the Criminal Code, where the persons from whom evidence is to be obtained include minors, the judge shall determine by order... the place, time and particular circumstances for hearing evidence by means of the *incidente probatorio*, where a minor's situation makes it appropriate and necessary. In such cases, the hearing can be held in a place other than the court, in special support facilities or, failing that, at the minor's home. The witness statements must be fully documented by the use of sound and audiovisual recording equipment. Where recording equipment or technical personnel are not available, the judge shall have recourse to experts or technical advice. The

4 — The wording reflects the amendments introduced by the Law of 6 February 2006 (GURI. No 38 of 15 February 2006) adopting provisions for combating the sexual abuse of minors and child pornography on the Internet, and by Decree-Law No 11 of 23 February 2009.

interview shall also be minuted. The recordings shall be transcribed only at the request of the parties.'

II — The facts

12. Mr X and Ms. Y, parents of the child Z, lived together in a stable relationship until June 2007. From that date the two parties came into conflict and each made various complaints against the other. In one of those complaints, Ms. Y informed the authorities of her suspicion that Mr X had committed sexual acts on their daughter who at that time was a minor; those acts allegedly took place during June 2007. The serious nature of the charges justified the opening of the preliminary investigation stage of criminal proceedings before the Giudice per le indagini preliminari.

13. According to the order for reference and the national case-file forwarded to the Court, on 8 May 2008 the Public Prosecutor made a request to the G.I.P. for discontinuance of the proceedings, arguing that the complaint lacked consistency. [5]

5 — In the opinion of the Public Prosecutor, in addition to the lack of evidence there is also the extremely contentious relationship of the child's parents since their separation, in particular since Ms. Y became aware that Mr X is in a stable relationship with another woman.

14. On 27 May 2008 the victim's representative formally opposed the Public Prosecutor's request for discontinuance. The G.I.P. heard the parties and the victim, the latter requesting that an *incidente probatorio* be held. Despite a fresh request for discontinuance from the Public Prosecutor, the G.I.P. dismissed that request and ordered an *incidente probatorio*, which was held on 9 November 2009.

15. Mr X's defence counsel lodged an appeal against the decision of the G.I.P. to order an *incidente probatorio* with the Corte di cassazione, which gave judgment upholding the appeal on 27 May 2010. The contested decision was annulled, as were all the acts related to the holding of the *incidente probatorio*.

16. On 14 July 2010 the Public Prosecutor again requested that the proceedings be discontinued, referring to the arguments set out in the first request and to information provided subsequently which, in the Public Prosecutor's opinion, did not alter the initial assessment of the facts. The victim's representative stated her opposition to the Public Prosecutor's request and a further hearing was held, after which the G.I.P. decided to seek a preliminary ruling.

III — The reference for a preliminary ruling and the procedure before the Court of Justice

17. The reference for a preliminary ruling was received at the Registry of the Court on 25 October 2010. In the course of a detailed explanation, the referring court refrains from formulating the questions individually, although it is sufficiently clear that two questions are referred which may be worded as follows:

'1. Must Articles 2, 3 and 8 of Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings be interpreted as precluding national provisions such as Article 392(1a) of the Italian Code of Criminal Procedure, in so far as the latter does not impose an obligation on the Public Prosecutor to request an early hearing and examination of a victim who is a minor by means of the *incidente probatorio* prior to the main proceedings, even though the victim has made a specific request to that effect?

2. Must Articles 2, 3 and 8 of Framework Decision 2001/220/JHA be interpreted as precluding national provisions such as Article 394 of the Code of Civil Procedure, which does not make it possible for that minor victim himself or herself to appeal to the courts against a refusal by the Public Prosecutor of his or her request to be heard by means of the *incidente probatorio*?'

18. Written observations were lodged by the lawyer for Mr X, the representative of the victim in the main proceedings, the German, Italian, Irish and Netherlands governments, and the European Commission. None of the parties requested a hearing.

IV — Preliminary remarks

19. The questions submitted by the referring court call for a prior explanation of Italian criminal procedure. The questions referred concern what is called the '*incidente probatorio*', a procedure which may take place during the investigation stage. As is well known, this is not the first time that the Court has been faced with the difficulties presented by the *incidente probatorio* in relation to European Union law; however, the context in which the issue is now raised is new, since it concerns the role of the Public Prosecutor and the fact that the Public Prosecutor is bound by the principle of legality and is therefore subject to review by the courts.

20. Despite the changes which the Italian Constitution introduced into criminal procedural law, the Italian legislature did not undertake a comprehensive reform in that field until the entry into force in 1988 of the CPP, a text the main contribution of which was the establishment of adversarial criminal proceedings. Until that time, Italian criminal procedure was based on an inquisitorial model, the prime example of which was the 'Rocco Code' of 1930. [6]

21. The CPP of 1988 instituted a criminal procedural model based on a strict separation between the investigation stage and the oral stage, in which the investigatory measures taken during the investigation stage are the responsibility of the police and the Public Prosecutor's Office. [7] During the investigation stage, the evidence necessary to support the prosecution and the defence is collected and included in the case-file. When the trial opens, the parties present the facts to the court in a way which supports their respective positions, provided that the facts concerned are found in the measures taken during the investigation. [8] In principle, the court which tries the case does not have access to the investigation file and instead has access only to the matters selected by the parties and admitted as evidence at the trial.

22. The main reason for the rigidity of that system lies in the adversarial model on which Italian criminal procedure is based, a model aimed at ensuring that the prosecution and the defence are both heard and that there is equality of arms between them. From those competing interests will emerge a substantive truth which will enable the court to categorise a particular type of conduct and decide the case. In short, the aim is to secure an outcome which strictly accords with the facts, while at the same time safeguarding the rights of the accused. [9]

23. However, Italian criminal procedure does not satisfy the characteristics of a pure adversarial model. Shortly after the entry into force of the CPP, the Corte costituzionale imposed and the ordinary courts applied, respectively, practices more akin to the earlier inquisitorial model. The divergence of positions between the legislature and the courts resulted in the amendment of Article 111 of the Italian Constitution, the text of which, inter alia, enshrines the basic principles of adversarial proceedings while at the same time allowing the legislature a certain margin of

6 — On the historical evolution of criminal procedural law in Italy, see Cordero, F., *Procedura Penale,* 8th ed., Giuffrè, Milan, 2006, pp. XX.

7 — Article 326 CPP.

8 — Article 493 CPP.

9 — See, in general, Giostra, G., 'Contraddittorio', *Enciclopedia Giuridica Treccani*, 2001, vol II, p. 1 et seq.; Ubertis, G., 'La ricerca della verità giudiziale', Ubertis, G. (ed.), *La conoscenza del fatto nel processo penale*, Giuffrè, Milan, 1992, p. 2 et seq.; Ferrua, P. 'La regola d'oro del processo accusatorio', Kostoris, R (ed.), *Il giusto processo tra contraddittorio e diritto al silenzio*, Ed. Giappichelli, Turin, 2002, p. 11 et seq; and Illuminati, G., 'Giudizio', Conso, G. and Grevi, V. (eds.), *Compendio di procedura penale*, Cedam, Padua, 2003, p. 644 et seq.

discretion. [10] That discretion has led to a procedural model which makes Italian criminal procedure an intermediate model, marked by its adversarial nature while also displaying a number of features peculiar to the inquisitorial model. [11]

24. Two features which constitute exceptions from the adversarial model are of particular importance to the disposal of the present reference for a preliminary ruling, since they concern the role of the Public Prosecutor and the adducing of evidence prior to the commencement of the trial.

25. During the investigation stage the role of the investigating judge (the G.I.P.) is more reactive than active, since his remit is limited to ensuring the proper conduct of the proceedings and safeguarding the rights of the accused and the victim. [12] The G.I.P. does not direct or intervene in the various investigatory measures, since the evidence is only formally adduced at the trial. That passive role of the G.I.P. makes the Public Prosecutor the main driving force of the proceedings during the preliminary investigation stage, with exclusive responsibility for directing the investigation [13] and bringing the prosecution. [14] By way of derogation from the pure adversarial model, Article 409(5) of the CPP provides that the G.I.P. may require the Public Prosecutor to 'draw up the'charges', thereby departing from his passive role in the interests of the principle of legality. [15]

26. In addition, during the investigation the facts which will subsequently constitute the evidence are investigated, but their being adduced as evidence before the court is a responsibility which falls exclusively to the police, the Public Prosecutor and the accused. There is an exception to that rule when the conditions set out in Article 392 CPP, which provides that the G.I.P. may use the *incidente probatorio*, are satisfied. The use of that procedure permits the early taking of evidence during the investigation stage, so that the evidence concerned may subsequently be assessed at the trial. The basis for that provision is clear: where there is a definite risk that it will not be possible to take evidence at the trial, or where it is necessary to reconcile the search for the substantive truth with other values of special importance, it is appropriate

10 — On the amendment and its background, see Pizzi, W.T and Montagna, M., 'The Battle to Establish an Adversarial Trial System in Italy', *Michigan Journal of International Law,* 2004, and Panzavolta, M., 'Reforms and Counter-Reforms in the Italian Struggle for an Accusatorial Criminal Law System', *North Carolina Journal of International and Commercial Regulation,* 2005.

11 — In that connection, see Busetto, L., *Il contraddittorio inquinato,* Cedam, Padua, 2009, p. 8 et seq.

12 — Article 328 CPP.

13 — Article 327 CPP.

14 — Article 50 CPP.

15 — '…il giudice, quando non accoglie la richiesta di archiviazione, *dispone con ordinanza che, entro dieci giorni, il pubblico ministero formuli l'imputazione*. Entro due giorni dalla formulazione dell'imputazione, il giudice fissa con decreto l'udienza preliminare' (emphasis added). Italian academic opinion is divided on the assessment of that power of the investigating judge: for some it flows logically from the requirement that the Public Prosecutor must abide by the law, which is explicitly enshrined in Article 112 of the Constitution, while for others it constitutes a dubious imbalance which is detrimental to the adversarial principle. See the contrasting views in the works of Zagrebelsky, V., 'Le soluzioni peggiori del male (a proposito del pubblico ministerio)', *Cassazione Penale*, 1991, p. 313, and Ferraioli, L., *Il ruolo di garante del giudice per le indagini preliminari,* Cedam, Padua, 2006, pp. 105 to 106.

to derogate from the adversarial principle and to bring forward to the investigation stage a procedure which, in principle, belongs to the trial. [16]

27. Under Article 392(1a) evidence may be taken early where the victim of one of the offences referred to therein is a minor. That measure is intended, first, to prevent the period elapsed between the facts and the trial from diminishing the value of the victim's testimony and, second, to ensure that the arrangements for giving evidence are appropriate to the particularly vulnerable position of minors.

28. Only the G.I.P. may order an *incidente probatorio*, exclusively at the request of the Public Prosecutor or the accused. [17] Where the victim is a minor, the CPP grants the victim the right to ask the Public Prosecutor to request the G.I.P. to hold the procedure. The Public Prosecutor's decision on the request for an *incidente probatorio*, which is discretionary, must, however, always be supported by a statement of reasons, [18] although, if the decision is negative, the victim has no right to appeal against it.

29. That is precisely the point on which the two questions referred by the G.I.P. in the present proceedings turn, and I shall proceed to analyse those questions below.

V — The first question

30. By its first question, the G.I.P. asks the Court whether a provision such as Article 392(1a) CPP is compatible with Articles 2, 3 and 8 of the Framework Decision. Specifically, in the opinion of the referring court, a system which does not impose an obligation on the Public Prosecutor to formally request an *incidente probatorio*, after a request to that effect has been made by a victim who is a minor, gives rise to uncertainties in the light of the aforementioned provisions of European Union law.

31. Mr X and the Member States which have lodged observations in these proceedings all submit that there is no inconsistency between

16 — On the rules governing, the basis for and the purpose of the Italian *incidente probatorio*, see, in general, Esposito, G., *Contributo allo studio dell'incidente probatorio,* Novene, Naples, 1989; Di Geronimo, P., *L'incidente probatorio,* Cedam, 2000; Morselli, *L'incidente probatorio,* Utet, Turin, 2000; Renon, P., *L'incidente probatorio nel processo penale, tra riforme ordinarie e riforme costituzionali,* Cedam, Padua, 2000; and Di Martino, C. and Procaccianti, T., *La prova testimoniale nel processo penale,* 2nd ed., Cedam, 2010, pp. 163 to 174.

17 — Article 394 CPP.

18 — Ibid.

Italian law and the Framework Decision. Those parties all point out that Articles 2, 3 and 8 of the Framework Decision certainly call on the Member States to adopt measures for the protection of vulnerable victims when such victims are called to give evidence in criminal proceedings, but those articles do not set out specific arrangements which must be used.

32. The Commission adopts an intermediate position, agreeing in principle with the foregoing view except where the G.I.P. is certain that there will be a trial, in which case the Commission argues that the *incidente probatorio* should be compulsory, one way or another, as a result of the Framework Decision. Only the representative of the victim in the main proceedings maintains that the Italian rules are unlawful.

33. I shall approach the reply to this question in three successive stages, dealing first of all with the particular standing which the Framework Decision affords to a victim who is a minor, in so far as he or she is a victim who is particularly vulnerable, and the effects which that entails. Having confirmed that that criterion is satisfied in the instant case, I shall discuss the possible implications of the Framework Decision for an *incidente probatorio* held during the preliminary stage of criminal proceedings involving a victim who is a minor. Lastly, I shall examine the specific rules governing the Italian *incidente probatorio*, in particular the powers granted to the Public Prosecutor during that procedure, in the light of the legal framework referred to above.

34. It is important to note at this juncture that the uncertainties raised by the referring court relate exclusively to the investigation stage of criminal proceedings. Accordingly, any considerations concerning the treatment given to victims, particularly minors, at any other stage of criminal proceedings is outside the scope of the questions referred to the Court.

A — *Framework Decision 2001/220 and victims who are particularly vulnerable*

35. Although the Framework Decision lays down a general body of rules applicable to all victims in criminal proceedings, Article 2(1) refers specifically to 'victims who are particularly vulnerable', for whom Member States are required to provide 'specific treatment best suited to their circumstances'. That provision, which in terms of the structure of the Framework Decision comes at the beginning, represents an essential concept which permeates all of its enacting terms. Therefore, the Member States have an obligation to establish differences in treatment for the benefit of victims who are particularly vulnerable, by avoiding any measures which provide arbitrarily for such victims to be treated in the same way as other victims and disregard the particular situation to which they are exposed. With regard to the effects of that concept, it should

be observed that the Framework Decision lays down a higher standard of protection where a national act affects a victim who is particularly vulnerable. [19]

36. As is well known, European Union law is silent with regard to defining the concept of a 'victim who is particularly vulnerable'. That is a conscious decision by the European Union legislature which is aimed at ensuring flexibility in the application of the Framework Decision. [20] However, there is no doubt that victims who are minors should be classified as 'victims who are particularly vulnerable' and the Court confirmed as much in *Pupino*, [21] referring to the detailed arguments set out by Advocate General Kokott in her Opinion in that case. [22] As the Court stated in the judgment in *Pupino*, 'a victim's minority is as a general rule sufficient to classify such a victim as particularly vulnerable within the meaning of the Framework Decision.' [23]

37. Accordingly, in the instant case, the provisions of the Framework Decision must be interpreted taking into account the high level of protection to be afforded to victims who are particularly vulnerable, which is the position of the victim in the main proceedings, who, it is alleged, was sexually assaulted by her father when she was five years old. That specific factor must be borne in mind throughout the reasoning in this Opinion, since it is one of the criteria which must be taken into consideration for the purposes of providing a conclusive reply.

B — *Articles 2, 3 and 8 of Framework Decision 2001/220 and measures for the early taking of evidence in the investigation stage of criminal proceedings*

38. At this juncture, before dealing with the specific features of the Italian *incidente probatorio*, it is appropriate to clarify the context in which the Framework Decision applies to national measures for the early taking of evidence during the investigation stage of criminal proceedings. As will be seen, the Framework Decision lays down a general obligation pursuant to which the Member States must take account of the particular circumstances of vulnerable victims where it is necessary to call those victims to give evidence in open court. The European Union legal framework,

19 — See the detailed analysis of Fayolle, L., *Naissance et influence de la notion d'exploitation sexuelle enfantine. Étude des incriminations et sanctions pertinentes et de la participation de l'enfant victime au cours de la phase préparatoire en droit comparé, en droit international, en droit du Conseil de l'Europe et en droit de l'Union Européenne,* doctoral thesis, IUE, Florence, 2008, p. 347 et seq.

20 — That is evidenced by the fact that the initiative for the Framework Decision presented by the Portuguese Republic, the text of which forms the basis for the legislation itself, specified in Article 2(2) a number of criteria for the identification of vulnerable victims, including their age (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)).

21 — Cited above in footnote 3.

22 — Opinion in *Pupino* delivered on 11 November 2004, points 53 to 58.

23 — *Pupino*, footnote 3, paragraph 53.

including primary law and the case-law of the Court, confirms that there is a duty to ensure the adoption of such measures, while granting the Member States a wide legislative discretion.

39. Under the second paragraph of Article 3 of the Framework Decision, Member States are required to take 'appropriate measures' to ensure that the authorities question victims 'only insofar as necessary for the purpose of criminal proceedings'. It is clear from the use of the words 'appropriate' and 'necessary' that Article 3 lays down a requirement of proportionality addressed to the Member States, which are responsible for taking the appropriate and necessary measures after weighing up all the interests involved. In addition, the article makes no reference to the different stages of criminal proceedings and merely formulates a general requirement which is applicable to the proceedings as a whole.

40. Article 8 of the Framework Decision operates as a *lex specialis* of Article 3. When laying down a standard of protection for victims as regards their safety and their privacy, Article 8(4) sets out in detail the obligation of the Member States to guarantee for the most vulnerable victims protection 'from the effects of giving evidence in open court'. For the purposes of ensuring such protection, the provision grants a right 'to testify in a manner which will enable [that protection] to be achieved, by any appropriate means compatible with its basic legal principles.' Therefore, where a victim is to appear as a witness in open court, the Framework Decision uses much stronger language and speaks more in terms of *a right of the victim*. However, it should be noted that the Framework Decision does so by once again granting considerable freedom of action to each Member State (it refers to 'any appropriate means') and by inserting a safeguard: 'its basic legal principles'.

41. The Court has had a single, albeit important, opportunity to interpret the scope of Articles 3 and 8 of the Framework Decision in the case of victims who are minors, and that occasion led to the well-known judgment in *Pupino*. [24] In paragraph 56 of that judgment, the Court ruled on the obligation incumbent on the Member States as a result of those provisions, holding that 'achievement of the aims pursued by the abovementioned provisions of the framework decision *require* that a national court should be *able*, in respect of particularly vulnerable victims, to use a special procedure, such as the Special inquiry procedure [*incidente probatorio*] for

24 — In Joined Cases C-483/09 and C-1/10 *Gueye and Salmerón Sánchez* [2011] ECR I-8263, the Court also dealt with the application of the two provisions to vulnerable victims, albeit in the context of domestic violence against women rather than minors as in the instant case and *Pupino*.

early gathering of evidence'.[25] The judgment goes on to state that that is the appropriate procedure if it 'best corresponds to the situation of those victims and is necessary in order to prevent the loss of evidence, to reduce the repetition of questioning to a minimum, and to prevent the damaging consequences, for those victims, of their giving testimony at the trial.'

42. It is important to note that the 'requirement' referred to by the Court means only that national courts should be 'able' to use a special procedure for the early taking of evidence. At no point is an obligation to provide for an *incidente probatorio* procedure of the kind laid down in Italian law imposed on Member States. In using that terminology, the judgment in *Pupino* draws attention to the fact that, for the purposes of the Framework Decision, it is important that Member States provide for specific treatment for victims who are particularly vulnerable, either by means of written provisions or, in a general way, by means of judicial practice. At no point does the Court state that the *incidente probatorio* should be the sole method of achieving that objective.

43. That conclusion is not invalidated by the outcome at which the Court arrived in *Pupino*. It is well known that the Court held in the operative part of the judgment that by restricting the *incidente probatorio* procedure exclusively to a limited number of offences, the Italian rules were not compatible with the Framework Decision.

44. In declaring the Italian rules unlawful, the Court was not giving a broad interpretation of the Framework Decision which would lead to the expansion of the *incidente probatorio* procedure to the whole of the European Union. I believe that the underlying and decisive reason for the judgment in *Pupino* lies in the fact that it is virtually impossible to identify a rationale behind the decision of the Italian legislature to restrict the *incidente probatorio* only to cases of sexual offences where the victim is a minor. Italian law was not called into question because of the existence or absence of a particular procedure but rather because that procedure was provided for in proceedings relating to certain offences, such as sexual assault, but not in others, such as injury. The Court found that that definition deprived without any justification a significant number of particularly vulnerable victims of a procedure suited to their particular circumstances.[26]

25 — Emphasis added.

26 — See in that connection Case C-404/07 *Katz* [2008] ECR I-7607, in which the Court held that the Framework Decision does not oblige a national court to permit the victim to be heard as a witness in criminal proceedings instituted by a substitute private prosecution such as that in issue in the main proceedings. 'However, *in the absence of such a possibility*, it must be possible for the victim to be permitted to give testimony which can be taken into account as evidence' (paragraph 50). Therefore, the Framework Decision does not determine the specific arrangements but rather the existence of the right itself.

45. The Member States have an even wider discretion when furthering interests which also warrant protection, as applies to policies aimed at protecting the rights of persons other than the victim. The Court acknowledged as much in *Gueye* when it recognised the possibility of restricting the right of a vulnerable victim to be heard where that is justified on public interest grounds, such as combating domestic violence. [27]

46. Finally, it is necessary to refer to Article 24 of the Charter of Fundamental Rights, the first paragraph of which provides that children's views 'shall be taken into consideration on matters which concern them in accordance with their age and maturity.' According to the explanations on the provisions of the Charter, Article 24 is based on Article 12 of the New York Convention on the Rights of the Child, [28] ratified by all the Member States, the wording of which is virtually identical to the wording of the rights laid down in the European Union provision. [29] The main difference between the two provisions (which in no way amounts to a contradiction) is found in Article 12(2) of the Convention which, after recognising the right of a child to express his or her views and to be heard, states that a child 'shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.'

47. Accordingly, as regards a child's right to have his or her views taken into consideration in accordance with his or her particular circumstances, Article 24(1) of the Charter includes a judicial dimension. It follows from an interpretation of that provision in the light of the New York Convention that Member States have an obligation to take into account the needs of victims who are minors where they are called to appear before a court. Neither the Charter nor the Convention lay down specific rules on the action which Member States must take. Article 24 merely requires that protection measures must *exist* while allowing the Member States a wide discretion in that regard.

48. That approach was confirmed by the Court in the, to date, limited case-law on Article 24 of the Charter. One such case was *Aguirre Zarraga*, [30] which concerned the right of a child to be heard in civil proceedings relating

27 — *Gueye and Salmerón Sánchez*, paragraph 62. See also the Opinion of Advocate General Kokott in that case, in particular point 63 which refers to the '*auxiliary function*' of Article 8 of the Framework Decision, the subject-matter of which 'is not concerned with covering all conceivable interests of the victim'.

28 — Convention adopted and opened for signature and ratification on 20 November 1989 (UN Treaty Series, Vol. 1577, p. 43).

29 — The explanation on Article 24 is worded as follows: 'This Article is based on the New York Convention on the Rights of the Child signed on 20 November 1989 and ratified by all the Member States, particularly Articles 3, 9, 12 and 13 thereof.'

30 — Case C-491/10 PPU *Aguirre Zarraga* [2010] ECR I-14247.

to the custody of that child. As in *Pupino*, the Court pointed out that European Union law requires the existence of procedures – but not of one specific procedure – for protecting the rights of children in court proceedings. In that way, the judgment establishes that the Member States have a wide discretion for the purposes of assessing what the appropriate measures are in a particular case. [31] In line with that assertion, the Court concludes by stating that, notwithstanding the wording of Article 24 of the Charter, 'hearing the child cannot constitute an absolute obligation, but must be assessed having regard to what is required in the best interests of the child in each individual case'. [32]

49. Although the Framework Decision was adopted before the entry into force of the Charter, it must be interpreted in accordance with the fundamental rights laid down therein. [33] Further, as I have just stated, when the provisions cited are interpreted in harmony, they always point to the same premiss: the Member States have an obligation to adopt specific measures which meet the particular needs of victims who are minors in court proceedings. However, none of the provisions analysed impose a specific, single procedure and instead they allow the Member States a wide discretion which must guide not only the legislature but also the courts.

50. Against the background of that legislative framework, I am now in a position to address the specific issue in this case. The question referred by the G.I.P. does not concern the *existence* of the *incidente probatorio*, because it is provided for in a case such as the instant one, but rather the procedural rules which govern it, in particular the degree of influence which either the victim or the investigating judge has when it comes to instigating an *incidente probatorio*. To put it another way, it is necessary to assess whether the measures concerned make it excessively *difficult* for victims to access the *incidente probatorio* procedure. Clearly, there is likely to be an infringement of the Framework Decision where a Member State imposes conditions which are so onerous that they are tantamount to the elimination of all special procedures by which vulnerable victims may give evidence. It is now necessary to determine whether the Italian legislation at issue gives rise to such an outcome.

C — *The obligation of the Public Prosecutor to request the G.I.P. to hold an incidente probatorio*

51. In summary, the referring court is uncertain whether the Italian procedural legislation is compatible with Articles 2, 3 and 8 of the

31 — Ibid., paragraph 67.
32 — Ibid., paragraph 66.
33 — *Pupino* paragraph 59; *Katz*, paragraph 48; and *Gueye*, paragraph 64.

Framework Decision since, even where there is an express wish for an *incidente probatorio* on the part of a victim who is a minor, that procedure may be held only if the Public Prosecutor provides the initial impetus. The G.I.P. does not have an *ex officio* power to order the procedure and nor may the victim request it directly from the G.I.P.; instead the victim is required to apply to the Public Prosecutor's Office for the latter to make the appropriate request to the G.I.P. In the opinion of the referring court, that situation constitutes the problem of 'the inherent unreasonableness of Article 392(1a) and Article 398 [CPP]', since although those provisions impose on the Public Prosecutor the obligation to draw up the indictment (and the judge may even compel the Public Prosecutor to do so), they do not impose on the Public Prosecutor the obligation to request an *incidente probatorio*.

52. The reply to this question calls for a detailed interpretation of Article 8(4) of the Framework Decision. As regards cases where a child must give evidence in open court, that provision provides that Member States 'shall ensure that, where there is a need to protect [vulnerable] victims', measures are taken so that victims may testify 'in a manner which will enable this objective to be achieved'. The article also includes two important clarifications. The first concerns the appropriate authority and the form which the relevant decision should take, since the article provides that the procedure is to be determined 'by decision taken by the court'.[34] The second operates as a limitation, since the procedure must be guaranteed in the Member State concerned provided that it is implemented 'by any appropriate means compatible with its basic legal principles', that is, with national law. Therefore, the Framework Decision requires Member States to grant to a public authority, which must be a court, competence for procedures for the early giving of evidence, but also calls for certain safeguards for the benefit of each legal system. The protection of vulnerable victims is paramount but considerable latitude is granted to the national authorities with regard to the appropriate means of ensuring that protection.

53. Further, Recital 9 in the preamble to the Framework Decision states that its provisions 'do not... impose an obligation on Member States to ensure that victims will be treated in a manner equivalent to that of a party to proceedings.' That statement is consistent with the wording of Article 8 since, for the purposes of interpretation, it makes clear that the standing of victims warrants special protection, but it does not require for that reason that their standing should be the same as that of the Public Prosecutor. In an adversarial system such as the Italian, the decision to grant exclusive responsibility for bringing prosecutions to an independent body which is subject to the principle of legality would be invalidated if, pursuant to a legislative instrument of European Union law, victims

34 — That nuance is not insignificant, as the initial Portuguese proposal referred in general to the 'Member States'. Therefore, the provision confers power exclusively on the courts in the broad sense.

were afforded standing equivalent to that of the Public Prosecutor. The Framework Decision does not lay down a retributive model of criminal justice and nor can the contrary be inferred from its preparatory documents: when the Portuguese Republic proposed the draft decision to the Council, at no point did it refer to the need to make victims a driving force in all types of criminal proceedings in the Member States. [35] Accordingly, in providing that the decision to use a particular procedure must be adopted 'by decision taken by the court', in accordance with the basic legal principles of the Member State concerned, Article 8 draws attention to the fact that a victim is the *subject* of protection but not *the holder of powers* designed to guarantee his or her protection. Those powers are vested in the judicial authorities, including, in the Italian legal system, the Public Prosecutor. [36]

54. In the light of the applicable legislative framework, I will now consider whether the provisions governing the *incidente probatorio* are compatible with the Framework Decision.

55. According to Article 394 CPP, victims have the right to contact the Public Prosecutor to request that he in turn ask the G.I.P. to order an *incidente probatorio*. The Public Prosecutor's decision must be accompanied by a statement of reasons in all cases, so that, where the victim's request is refused, the reasons for that decision are given. Further, the Public Prosecutor is bound exclusively by the principle of legality and also has a constitutional obligation to bring prosecutions. [37] The function of the Public Prosecutor is to uphold the principle of legality, a task which he carries out with complete independence and for which purpose he has constitutional status which is legally protected. [38] In the context of that function of upholding the law, the Public Prosecutor must logically take into consideration the individual position of the most vulnerable victims. In his capacity as an independent judicial authority bound by the principle of legality, the Public Prosecutor has an obligation to protect a child's best interests. From that perspective, the Public Prosecutor is an authority who, in his capacity as

35 — See recitals 8, 9 and 10 of the initial Portuguese proposal which clearly state that the objective of the initiative was to approximate laws concerning criminal procedure with a view to *addressing victims' needs in an integrated manner*. At no point does the initiative seek to subvert the role of the victim in criminal proceedings in each Member State. While it is true that there is intense debate concerning the proper place for victims in such proceedings (see, in that connection, Ashworth, A., 'Victims' rights, defendants' rights and criminal procedure', Crawford, A. and Goodey, J. (eds.), *Integrating a victim perspective within criminal justice: international debates,* Aldershot, Ashgate-Dartmouth, 2000), it is not clear that the Framework Decision seeks to adopt a particular view in that regard.

36 — See Articles 50 to 54c of the CPP.

37 — See Article 112 of the Italian Constitution.

38 — See footnote 36 of this Opinion. On the subject, see Zanon, N., *Pubblico Ministero e Costituzione,* Cedam, Padua, 1996.

guardian of the law, protects victims who are minors during criminal proceedings. [39]

56. The fact that a victim who is a minor must address a request to hold an *incidente probatorio* exclusively to the Public Prosecutor bolsters that assessment. Since Italian law entrusts the Public Prosecutor with the task of representing a child's best interests, the Public Prosecutor must decide whether, in the furtherance of those interests, it is appropriate formally to request an *incidente probatorio*. In that connection, the decision of the Public Prosecutor is the 'decision taken by the court' referred to in Article 8(4) of the Framework Decision, a concept which, as I observed above, must be interpreted broadly in the light of the principles underlying each national legal system. [40] Thus, Italian law has assigned to the Public Prosecutor, among other tasks, the role of protector of the victim where testimony must be given in open court. By entrusting that task to the Public Prosecutor, an independent body bound only by the law, by respecting the right of the victim to be heard on the subject of whether it is appropriate to hold an *incidente probatorio*, and by adopting a decision accompanied by a statement of reasons on that subject, the national legislation has taken a balanced approach which, in principle, safeguards the objectives and provisions enshrined in the Framework Decision.

57. The foregoing is further confirmed if we consider the specific features of the Italian model of criminal procedure, which must be taken into account in accordance with Article 8(4). The requirement that victims must be able to give evidence by means of specific procedures, provided that those procedures are compatible with a Member State's 'basic legal principles', emphasises the importance of those basic legal principles and also of each national procedural-law tradition, in particular the criminal procedural tradition. That limitation is now set out in general terms, in relation to the whole area of freedom, security and justice, in Article 67(1) TFEU, which provides that the European Union constitutes such an area 'with respect for fundamental rights and the different legal systems and traditions of the Member States.' The Framework Decision, which was adopted pursuant to the legal bases of that policy, complies with that requirement and accommodates the specific features of each legal system.

39 — See Spangher, G., *Trattato di procedura penale,* vol. 3, Indagini preliminari e udienza preliminare, Utet, Turin, 2009, pp. 608 and 609, and Bresciani, L., 'Persona offesa dal reato,' *Digesto penale*, IX, Utet, Turin, 1995, p. 527. There appears to be some dispute about this role in Italy and it is branded by some commentators as 'judicial paternalism,' but the charge refers to the general limitation which applies to *all* victims and not specifically to victims who are minors, as occurs in the present case. On that debate, see Errico, G., 'Rilettura dell'incidente probatorio per l'attuazione di un processo giusto,' Cerquetti, G. and Florio, F. *Dal principio dal giusto processo alla celebrazione di un processo giusto*, Padua, 2002.

40 — It should be noted that the constitutional status of the Public Prosecutor is provided for in Part II, Title IV of the Italian Constitution, which concerns 'the Judiciary.' See more specifically Articles 107 and 112, which clearly include the Public Prosecutor's Office as part of the judiciary, in the broad sense.

58. In the case of Italy, it should be recalled that the *incidente probatorio* is an exception to the adversarial principle and as such it is dealt with specifically in Article 111 of the Constitution.[41] The possibility of taking evidence early in criminal proceedings is a measure provided for in most national legal systems, but its practice is accompanied by numerous safeguards aimed at protecting the rights of the accused. That tension, underpinned by a criminal justice model which European Union law does not call into question, pursues a balance between the effective search for the substantive truth, the protection of the best interests of vulnerable victims and the fundamental rights of the accused. Italian law takes into consideration all those interests in the rules governing the *incidente probatorio* and, accordingly, I believe that the provisions concerned do not infringe either the wording or the objectives of Articles 2, 3 and 8 of the Framework Decision.

59. Before concluding, it is worth drawing attention to the argument put forward by the Commission, to the effect that there is an infringement of the Framework Decision in cases where the G.I.P. is certain that a trial will be held. The view put forward by the Commission involves two scenarios. The first arises after the trial has taken place when, the Commission submits, a victim who is a minor is exposed to detrimental effects which are incompatible with the Framework Decision. The second scenario arises before the commencement of the trial, if the G.I.P. is certain that the trial will take place.

60. In the first scenario, the Commission is incorrect merely to assert that the trial will have detrimental effects for a victim who is a minor, since, as the Italian Government points out in its written observations, Italian law provides for specific measures for the protection of vulnerable victims during that stage of the proceedings. It cannot be stated categorically that it is contrary to the Framework Decision for a victim who is a minor to give evidence at a trial. Furthermore, the instant case does not concern the position of the victim during the trial but rather during the stage preceding the commencement of the trial. Accordingly, that aspect of the argument put forward by the Commission must be rejected.

61. However, the second scenario described by the Commission warrants closer attention. In circumstances such as those in the main proceedings, and as regards the pre-trial stage of the proceedings, it could be the case that refusal by the Public Prosecutor to request an *incidente probatorio* is at odds with a decision to commence the adversarial stage or with a decision within the judge's sphere of competence as a result of which it is possible to foresee that the proceedings will continue. In that context, a refusal to hold an *incidente probatorio* might, as the case may be, lead to an infringement of the Framework Decision. Accordingly, it is necessary to analyse in detail whether, during the pre-trial stage of

41 — See the references cited in footnote 10 of this Opinion.

Italian criminal proceedings, circumstances of that nature arise.

62. In Italian law, the bringing of a prosecution does not automatically lead to the opening of a trial. That outcome happens only after the Giudice'dell'udienza preliminare (magistrate of first instance), a single judge who is a person other than the Giudice per le indagini preliminari, [42] has heard the parties in open court, classified the charges and opened the oral stage of the proceedings. [43] Therefore, between the bringing of a prosecution and the commencement of the oral stage of the proceedings there is a period of time during which it is still possible to request an *incidente probatorio*. [44] Where the G.I.P. requires the Public Prosecutor to draw up the charges, the procedure will commence in relation to the holding of a preliminary hearing which will result in a decision on the commencement of the oral stage of the proceedings. [45] During that period the likelihood of a trial taking place will have increased. Furthermore, if there are uncertainties regarding the consistency of the facts on which the prosecution is based, the trial is the appropriate forum for clarifying all those uncertainties. In that connection, attention should be drawn at this juncture to the case-law of the European Court of Human Rights on the positive obligations of the State, in particular the Public Prosecutor, where there are vulnerable victims and where uncertainties relating to the facts put an end to an investigation on which, strictly speaking, a decision should be made in court. [46] Accordingly, once the Public Prosecutor has been ordered to draw up the charges and in the event that the Giudice dell'udienza preliminare orders the opening of the oral stage of the proceedings, it is predictable, and also logical, that the Public Prosecutor will agree to a request of a victim who is a minor and seek an *incidente probatorio*.

63. That is the outcome which the Commission appears to have in mind when it asserts that the Italian legislation is incompatible with the Framework Decision in cases where the G.I.P. is certain that there will be a trial. However, neither the G.I.P. nor the Public Prosecutor can be absolutely certain in that regard, since the decision falls exclusively to the Giudice'dell'udienza preliminare. However, it is clear that the Public Prosecutor, as guarantor of legality and protector of a child's best interests, will in most cases be called on to request an *incidente probatorio* after he has been required to draw up the charges.

42 — See Article 34(2a) CPP.

43 — See Articles 418 to 426 CPP.

44 — In fact, the Corte costituzionale, by judgment No 77 of 10 March 1994, held that the rule prohibiting the holding of an *incidente probatorio* during the preliminary hearing stage was unconstitutional.

45 — Articles 415 and 416 CPP.

46 — In particular, with regard to victims who are minors and the obligation to continue the investigation with a view to a trial, see the judgment of the European Court of Human Rights of 4 March 2004 in the case of *M.C.* v *Bulgaria*, No 39272/98, paragraph 148 et seq. In that connection, for a detailed discussion, see Fayolle, L., op. cit., p. 315 et seq.

64. However, as I pointed out in paragraph 34 of this Opinion, it is not necessary in the circumstances of the present case to deal with the impact of the Framework Decision on the later stages of the proceedings in which the G.I.P. is not involved. Therefore, despite the fact that the situation to which the Commission refers could legitimately give rise to uncertainties concerning the compatibility of the legislation at issue with the Framework Decision, it is my view that the Court must reply to the question specifically raised in these proceedings, which concerns solely and exclusively the investigation stage.

65. Accordingly, as a result of the arguments set out above, I propose that the Court's answer to the first question should be that Articles 2, 3 and 8 of the Framework Decision must be interpreted as meaning that they do not preclude a national provision such as Article 394 CPP which does not impose on the Public Prosecutor an obligation to request the hearing and taking of evidence from a victim who is a minor by means of the *incidente probatorio* during the investigation stage, following a specific request to that effect by such a victim.

VI — The second question

66. Next, the referring court asks the Court whether Articles 2, 3 and 8 of the Framework Decision preclude a provision such as Article 394 CPP which does not make it possible for a victim who is a minor to appeal to the G.I.P. against a refusal by the Public Prosecutor of his or her request to be heard in accordance with an *incidente probatorio*. As I will explain below, the reply to that question follows indirectly from the answer I have proposed to the first question.

67. As I stated above, the Italian legislation grants an important role to the Public Prosecutor when it comes to requesting an *incidente probatorio*. Unlike the accused, who also has the right to request that procedure, a victim who is a minor may ask the Public Prosecutor's Office to make a request to the G.I.P. for the procedure to be held. As I have already observed, the Public Prosecutor becomes rather like a protector of the victim when deciding whether the request is appropriate. Those powers are necessarily discretionary because each case requires a detailed analysis, especially where particularly important interests and values are involved, as always occurs where the victim is a minor. In

such cases, the role of the Public Prosecutor may be even more important because a victim who is a minor will usually act through a representative, as in the instant case. In such circumstances, the Public Prosecutor safeguards and pursues the lawful requests of a victim who is a minor, while also monitoring each request in order to prevent the risk of exploitation of the proceedings for purposes which fall outside their scope. [47]

68. In those circumstances, it is reasonable for the Italian legislature to impose on the Public Prosecutor at least the obligation to state reasons, even though his decision on the request for an *incidente probatorio* is not subject to appeal. That requirement makes the procedure transparent, is compatible with the rights of the accused, and also guarantees the right of victims to be informed of all acts which concern them. In addition, the fact that the victim is entitled to be heard by the G.I.P. where a request is made for discontinuance of the case, ensures that the victim has the opportunity to respond to the Public Prosecutor's arguments. Therefore, as I stated above, there is a possibility that the G.I.P. will require the Public Prosecutor to draw up the charges and, at that point, the right to request an *incidente probatorio* arises again. Thus, the fact that there is no right of appeal against the decision of the Public Prosecutor does not mean that the victim is deprived of all possibility of his or her request succeeding.

69. Further, were the Framework Decision to call for a right of appeal against decisions of the Public Prosecutor, the model and the balance created by the Italian legislature would be seriously compromised. As I have already observed, the *incidente probatorio* system is principally the responsibility of the Public Prosecutor where the victim is a minor, and the decision on whether it is appropriate to make a request for that procedure to the G.I.P. is assigned to that 'judicial authority' for the purposes of Article 8(4) of the Framework Decision. Were the victim to have a right to appeal to the G.I.P. against that decision, the system would be undermined because the decision would not fall in the last instance to the Public Prosecutor but rather to the court.

70. Accordingly, in the light of the above arguments, I propose that the Court's answer to the second question should be that Articles 2, 3 and 8 of Framework Decision 2001/220 must be interpreted as not precluding a national provision such as Article 394(1) CPP which does not make it possible for a victim of the relevant offence who is a minor to appeal to the courts, during the investigation stage, against the decision of the Public Prosecutor not to grant his or her request to apply to the G.I.P. for an *incidente probatorio*.

47 — See Spencer, J., 'The victim and the prosecutor', Bottoms, A. and Roberts, J.V. (eds.), *Hearing the Victim. Adversarial justice, crime victims and the State,* Willan, Devon-Portland, 2010, pp. 141 to 144.

VII — Conclusion

71. In the light of the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Giudice per le indagini preliminari, Florence as follows:

(1) Articles 2, 3 and 8 of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings must be interpreted as not precluding a national provision such as Article 394 of the Italian Code of Criminal Procedure which does not impose on the Public Prosecutor an obligation to request the hearing and taking of evidence from a victim who is a minor by means of the *incidente probatorio* during the investigation stage, following a specific request to that effect by such a victim.

(2) Articles 2, 3 and 8 of Framework Decision 2001/220 must be interpreted as not precluding a national provision such as Article 394 of the Italian Code of Criminal Procedure which does not make it possible for a victim of the relevant offence who is a minor to appeal to the courts, during the investigation stage, against the decision of the Public Prosecutor not to grant his or her request to apply to the Giudice per le Indagini Preliminari for an *incidente probatorio*.