NJECL

www.njecl.eu

New Journal of European Criminal Law
Quarterly Journal / Volume 6 / 2015 / 04
ISSN 2032-2844

Subscriptions
Intersentia Publishers
Groenstraat 31
2640 Mortsel
Belgium
tel. +32 3 680 15 50
fax +32 3 658 71 21
mail@intersentia.be
www.intersentia.com

The subscription price for 2015 (Volume 6, 4 issues) is
- Individual subscriptions
  - print: 165 euros | 198 US dollars | 157 GB pounds
  - online: 175 euros | 210 US dollars | 166 GB pounds
  - print + online: 185 euros | 222 US dollars | 176 GB pounds
- IP access: 475 euros | 570 US dollars | 451 GB pounds
- Print + IP access: 495 euros | 594 US dollars | 470 GB pounds
- Separate issues (can be ordered via email to mail@intersentia.be): 75 euros | 90 US dollars | 71 GB pounds

Postage fees: Europe: free; Rest of the world: 25 euro. All prices are VAT excluded.
ECLAN and ECBA members receive a 15% discount on the subscription price.

NJECL is a double-blind peer reviewed journal. For the acceptance and review procedure, please visit www.njecl.eu.

ECBA
EUROPEAN CRIMINAL BAR ASSOCIATION

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SPECIAL ISSUE: THE COMPETENCE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN THE AREA OF FREEDOM, SECURITY AND JUSTICE

Edited by Paola Severino, Francesco Viganò and Antonio Gullo

CONCLUSIONS

FRANCESCO VIGANÒ*

It is not an easy task for me to draw conclusions from our stimulating debate, which has raised a number of different questions, impossible to properly address in my brief intervention. I will confine myself, instead, to some general remarks about the main challenges the EU, the Member States and the European Court of Justice are going to face after the key date of 1 December [t], 2014, incorporating some suggestions coming from our distinguished speakers' interventions on this floor.

1. THE LEGAL SITUATION

First of all, as far the *legal situation* is concerned, things seem to be quite clear. According to Article 10 of Protocol 36, as Prof. Blanchet, Mr. Zeder, Prof. Grasso and Prof. Bachmaier have explained in detail, after 1 December the Commission will be allowed to launch infringement procedures against Member States which have not transposed, or have not correctly transposed, former Third Pillar instruments – among which the *framework decisions* adopted under the Amsterdam Treaty.

Furthermore, any limitations on preliminary rulings under Article 267 TFEU will be eliminated. The ECJ will have full jurisdiction on the interpretation and validity of these instruments, even in respect of States which had not originally accepted its jurisdiction in this regard, or have accepted it only with limitations.

All this means, as Vice President Timmermans has pointed out, that police and criminal justice have ultimately become an *ordinary part of the EU law*, and have thereby almost completely lost any special status (apart from the peculiar mechanism of the "emergency brake" provided for by §3 of both Articles 82 and 83).

Of course, not every legal problem has been solved, as Prof. Satzger has demonstrated in his intervention. Framework decisions will be subject to full scrutiny by the Court, but will retain their legal status in other respects – in particular, as to their inability to produce direct effect within Member States. This still marks an important difference from directives, and could give rise to the complex questions discussed by Prof. Satzger whenever a framework decision has been only *partially* amended by a directive in the post Lisbon era. And still more difficult questions *in iure* will arise, of course, in respect of opting-out States, as Advocate General Mengozzi has explained.

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2. WHAT WILL THE COMMISSION DO?

In general terms, however, the *legal* situation concerning the bulk of the Amsterdam *acquis* for the vast majority of Member States is quite clear. Far less certain, from a *political* point of view, is how the European Commission will react to the new possibility to launch infringement procedures after 1 December.

As Prof. Bachmaier has underlined, a significant number of framework decisions have not been transposed, or not correctly transposed, by Member States.

On the other hand, and probably contrary to the expectations of the framers of Article 9, Protocol 36, the "Lisbonisation" process has been very slow so far, comprising a comparatively small number of framework decisions which have actually since been transformed into directives (such as the directives on trafficking of persons, or on the protection of the victims in criminal proceedings).

This is, by the way, hardly surprising. The adoption of directives is a far more complex procedure than that which led to the adoption of a framework directive under the Amsterdam Treaty. The Commission, in many cases, is likely to have considered that it was not worth initiating such procedure, given that after December 2014, it would have been possible in any case to enforce the old instruments against reluctant member States through the threat of infringement proceedings.

But what is going to happen now? Is the Commission really ready to launch infringement proceedings to enforce *all* these old instruments?

Yesterday Vice President Timmermans voiced some reassurances for Member States, which should not expect "an avalanche of infringement proceedings" starting from December 2014. The Commission's best option is instead, according to the Vice President, that of *dialogue* with Member States. *Cooperation* will be the key word in our context; and, according to Mr Timmermans, the Commission will be ready to give assistance to Member States in their task of transposing the former instruments into their legal systems, within a context of what appears a smooth process.

It is clear, however, that the mere possibility of an infringement proceeding will dramatically improve the effectiveness of the enforcement process led by the Commission, in comparison to the prior situation where Member States did not face any real prospect of sanctions in the case of non-compliance with framework decisions.

This leads us to the problem of *assessing priorities*: for the Commission, and consequently for Member States.

Since the framework decisions which have not been transposed by many Member States are quite numerous, a crucial question – which was not mentioned by Vice President Timmermans – will be indeed that of setting priorities in enforcing the

transposition of the obligations arising from so many instruments, in the realistic awareness that the transposition process is very complex for every Member State (particularly where sensitive parts of the internal legal system are at stake, such as in the case of criminal law and criminal process). Member States do need some guidance in this respect, as it would be unrealistic to think that they should transpose the whole bulk of framework decisions at the same time.

Even from the Commission's point of view, it is clear that not all the framework decisions are still worth transposing. As Vice President Timmermans repeated yesterday, some of them are likely to be considered *obsolete*, and should therefore be replaced by new directives.

In particular, it has now become clear – or clearer than it was at the time of their adoption – that some of the old framework decisions raise serious questions about their *compatibility with fundamental rights*, or *basic principles of law*. After all, third pillar instruments were adopted only by the Council, i.e. by representatives of the EU *governments*, whose main concerns were *citizens' security* and *mutual recognition* of judicial decisions, whilst the *fundamental rights* of the addressees of the criminal norms, or of the individuals involved in a judicial decision, were certainly not crucial for those decision makers, at a time when the Charter had not yet been given the status of primary EU legislation.

Apart from the question of their compatibility with fundamental rights, the *quality* of many framework decisions is being cast into doubt by many scholars. May I recall the criticism expressed in the *Manifesto*, signed by a distinguished international group of scholars led by Prof. Satzger himself, directed against some obligations of criminalisation arising from framework decisions, which apparently run counter to basic, and commonly shared, principles of criminal policy and legislation.

Unless such flaws are amended in the context of new "Lisbonised" directives, it would be probably unwise for the Commission to insist on the immediate transposition of these instruments. Not only could national Parliaments prove reluctant to fulfil their obligations, but the national constitutional courts might also later annul the transposition laws due to their incompatibility with the constitutional guarantees granted at a domestic level – the latter perspective being even worse from the point of view of EU institutions.

Let us take the example, already mentioned by Prof. Grasso, of the *framework decision 2008/913/JHA on racism and xenophobia*. There have been serious concerns in several Member States about the compatibility of some specific offences set forth in this instrument with the fundamental right to freedom of expression; and indeed, the Spanish Constitutional Court in 2007 declared void the offence of *denial* or trivialisation of genocides – which the Member States are now bound to criminalise under the framework decision – precisely because of its incompatibility with freedom of expression. Such national judgments could easily lead to harsh confrontations between constitutional courts and EU institutions (including the ECJ). A still more troubling perspective would be the possibility of a last resort intervention of the

ECtHR in the case of an actual conviction of an individual for this offence, resulting perhaps in the finding of an Article 10 ECHR violation by a respondent State which has done nothing other than to correctly transpose the EU framework decision, and apply the new offence to the particular case at issue. Obviously, EU institutions have a strong interest in avoiding such distressful scenarios, particularly when the issue at stake is not really crucial to EU interests.

All these considerations would suggest that the negotiations which will take place between the Commission and Member States should take into account the crucial question of the quality of the instruments to be transposed, with an open door to the solution of "Lisbonising" (and thereby amending) at least the more flawed among the old instruments. A solution, by the way, which would provide them – as Prof. Grasso has rightly pointed out – with a much higher degree of *democratic legitimation*, which is particularly necessary in a context where the very principle of legality – a cornerstone of our common understanding of criminal law – is far from being shared to the same extent in all European legal system, as Prof. Flick's intervention has vividly illustrated.

For all these reasons, it would be advisable, in my opinion, that the Commission and Member States adopt a truly *dialogic* approach in the enforcement of the transposition of the existing framework decisions – an approach that was so nicely described by Dr Melillo, as he stressed in his intervention that "it is absolutely necessary that all the parties involved should get together in such a spirit of exchange of views and dialogue, so as to ensure that the assessment of the compliance be always constructive and not aimed simply at sanctioning: the Member States need the expertise of the European institutions as much as those need their feedback on how the measures taken at European level actually operate within the institutional, legal and social reality of the Member States to which they are addressed".

3. WHAT ROLE FOR THE ECJ?

That said, everyone is aware that dialogue does not always work; and that, in spite of the assurances given by Vice President Timmermans, a certain number of infringement proceedings are likely to be launched in the years to come against Member States which will not have transposed framework decisions.

The ECJ will then experience not only a possible increase in its caseload concerning former third pillar instruments – as pointed out in his greeting address by its President Skouri and, albeit in cautious terms, in Prof. Bachmaier's paper –; but will also face another, and more crucial, question, which leads us again to the issue of *fundamental rights* – a keyword, which has been continuously repeated during this conference.

It is arguable that fundamental rights will operate, in the context of infringement proceedings, as a kind of *defence* raised by the respondent States, which could well claim that their lack of transposition of a framework decision was due to its incompatibility with the fundamental rights recognised within their national legal

system. Let us go back to the example of *denial crimes*: a State which has not implemented the framework decision could argue before the ECJ in the context of an infringement proceeding that it has not criminalised denial or trivialisation of genocides, precisely because such offence would have run counter to the fundamental right to freedom of expression.

A similar problem could arise also in a reverse situation, in the context of Article 267 proceedings. Let us assume that the Member State *has* transposed the framework decision on racism and xenophobia by criminalising denial and trivialisation of genocides. A national court could in this case raise concerns about the compatibility of such an offence with the freedom of expression, and therefore could ask the ECJ for a preliminary ruling on the *validity* of such provision from the perspective of respect of fundamental rights – a question, by the way, which the national court would have a duty to pose to the ECJ *before* raising a similar question before its own constitutional court, according to the well-known *Melki* ECJ ruling.

In both cases, the key issue for the ECJ will be that of *defining the standard* of protection of fundamental rights, which shall be deemed relevant at an EU level (as a "defence" for the respondent State in the former case, and as a ground for invalidation of the EU provision in the latter). Will the ECJ then have due regard to fundamental rights *as they are understood* at a national level, or will it rather impose *its own concept* of them, into account at most their interpretation by the ECtHR?

This highly sensitive question was answered in *Melloni* (and later reiterated in Opinion 2/13 on the accession of the EU to the ECHR) in a very straightforward – and probably simplistic – way, in terms which sound at least unpleasant to the ears of Member States as well as to academics'. The answer – roughly formulated – is the following: *within the scope of application of the EU law* (or of national legislation implementing EU law), the level of protection of fundamental rights is that established *by the Charter*, not by national constitutions; and the ultimate judge about the extent and application of fundamental rights at EU level is the ECJ itself, not the national constitutional courts – otherwise, as stated by the Court in *Melloni*, mutual cooperation instruments would be deprived of their *effet utile*.

Perhaps this was the only viable solution from the ECJ's point of view – and the Spanish Constitutional Court eventually accepted it, in a particular case where it would have been rather odd to refuse cooperation with the requesting State. However, it is far from certain that all Member States will be prepared to accept this principle in the future, which implies – in essence – an *obligation to set aside the constitutional protection offered to an individual right at a national level*, for the sake of cooperation among Member States in the field of criminal law and process. In my opinion, national constitutional courts will instead be likely to fiercely resist this principle, thereby declaring *void* the transposition provisions which run counter to fundamental rights *as they are understood* at a *national* level, according to the relevant constitutional case-law.

In order to avoid such a scenario, a great amount of caution will be required by the ECJ when dealing with fundamental rights. If the ECJ is not willing to overrule *Melloni*, it should at least be prepared to set very *high standards* of protection of fundamental rights, in such a way as to make it unnecessary for national constitutional courts to reaffirm *their own* concept of fundamental rights as against the ECJ – even by assuming, where necessary, the risk of some loss in terms of *effet utile* of some normative instrument in the field of police and judicial cooperation.

As has been often repeated in academic discussion, and as Vice President Albrecht has also reiterated in his message, the ECJ is called upon to become in the near future *a true constitutional court* for the EU legal space in the coming years. The Court must take this task seriously. After all, a couple of recent judgments by the ECJ, among which the well-known 2014 ruling on the annulment of the data retention directive, show how intense and effective this scrutiny by the Court can be, when it is really willing to play the role of a true guardian of fundamental rights within the EU legal space.

4. FUNDAMENTAL RIGHTS AND MUTUAL RECOGNITION INSTRUMENTS: AGAIN, A CRUCIAL ROLE TO BE PLAYED BY THE COURT

Some speakers in this conference have touched upon the very sensitive question whether respect for fundamental rights can also be invoked by national courts as a *ground for refusal*, in the case of the execution of measures adopted according to mutual recognition instruments, such as the EAW. In particular, the issue was directly addressed by Prof. Mitsilegas and by Prof. Bachmaier in their extensive interventions, whereas Dr. Bay Larsen has examined the case law of the ECJ – and that of the ECtHR – in the distinct field of child abduction cases, from which, however, some important lessons can possibly be learned when it comes to the different context of police and judicial cooperation.

It is almost trivial to underline that mutual recognition of judicial decisions is based on *mutual trust* among Member States, which is based in turn on the *presumption* that the requesting State will respect the fundamental rights of the individual concerned in the subsequent criminal proceeding which will be instituted against him or her – exactly as the Brussels II Bis regulation or the Dublin system on asylum law are based on the assumption that fundamental rights of asylum seekers will be respected by the State of their original entry into the EU. But these presumptions should be considered as *rebuttable* (as the ECJ recognized in the cases of *NS* and *Tarakhel*, in the context of asylum law), at least when there are *serious grounds* to believe that the fundamental rights of the individual concerned will *not* be respected by the Member State to which he or she will be transferred. As Dr Bay Larsen has pointed out, "the requested Member State cannot choose to 'turn a blind eye' to clear

indications of systemic deficiencies in the requesting Member State". Trust, as Prof. Mitsilegas put it, cannot be simply "presumed": it must be, in first instance, "earned" by every single Member State from its European fellows.

Hence it follows that a crucial problem which the ECJ will probably have to face in the future is *which standards* should be set in order to assess such a serious risk of disregard of fundamental rights by the requesting State.

In particular, will the standard – to which the ECJ case law usually refers in the field of asylum – of a *systemic failure* in the protection of fundamental rights within the requesting State prove to be a viable solution, given that this very standard has already shown so many flaws in that particular context? Or could the *assurances* usually given by *government* agencies of the requesting States possibly play a significant role as far as EU mutual recognition instruments are concerned, since these instruments structurally do *not* require any intervention by those agencies, and are based instead on a direct relationships between *judicial* authorities?

On the other hand, here again we meet the awkward question as to *what* fundamental rights we are talking about. Problems will probably arise not only as far as *systemic* and *blatant* violations of fundamental rights by a single Member State are at stake – such as in the case of gross and systemic overcrowding of prisons –, but also in relation to single pieces of national legislation of the requesting State on criminal procedure or of substantive criminal law, which might not be in line with some fundamental rights or principles recognised at a national level within the requested State. After all, every legal system has its *own* concept of 'fair trial', or of 'proportionality' between the penalty and the gravity of the offence; but it would be certainly odd for the ECJ to allow every Member State to refuse cooperation, whenever the requesting State does not *exactly* meet the national standards in every single detail, for example by not allowing a particular right to the defence, or by setting forth a penalty for a particular crime that is significantly harsher than that in force in the requested State for the same crime.

Once again, the (very challenging) task for the ECJ in the near future will be that of elaborating *common minimum standards* which should be met by every Member State in order to take part in the simplified procedures systems created by the EU instruments – if necessary, by supporting and further developing the efforts made by EU legislation, and analysed in his paper by Prof. Mitsilegas, in order to establish these standards through directives adopted on the basis of Article 82 TFEU.

This new challenge for the ECJ is, by the way, very fortuitous from the perspective of a criminal law scholar. As Prof. Mitsilegas has pointed out, the transposition of mutual recognition of framework decisions (which will probably be speeded up after December 1, 2014) and the adoption and subsequent transposition of new directives in this field will hopefully boost a process of *redefining fundamental rights* and *enforcing them effectively* throughout the European space, as a necessary pre-condition for mutual trust to be built and cooperation in criminal matters among Member States to be enhanced.

Ultimately the ECJ will have – even from this perspective – a tremendous opportunity to show itself equal to its role as an engine *for forging a new EU conscience*, by becoming more and more a crucial actor in the *protection and promotion of fundamental rights* (and basic EU values) even in the area of freedom, security and justice – at a different, but by no means less important, level as the *other* European Court, which has been already, and very effectively, playing this role for decades within the wider space of the Council of Europe.

This is, at the end the day, the ultimate message that was sent to the Luxembourg Court – like a kind of *fil rouge* linking all the interventions together – by our distinguished guests in this Rome conference: a commonly shared request that the Court *take fundamental rights seriously* (even more seriously than it has done so far), since *their* effective protection and enhancement is an essential condition – perhaps *the* essential condition – for the future smooth functioning of the whole system of the area of freedom, security and justice within the EU.