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Framework Decisions under the Lisbon Treaty: Current Status and Open Issues

It has almost been eight years since the Lisbon Treaty entered into force on 1 December 2009, reshaping the EU's competence in the field of criminal law and, among other aspects, abolishing the legal instrument of framework decisions. This contribution follows the course of framework decisions up to date and reviews significant questions that remain open regarding their current effect and their future status.

I. Preface

Framework decisions were introduced into European Union (EU) primary law, along with the area of freedom, security and justice, and for approximately a decade they were used to promote judicial cooperation in criminal matters. On 1 December 2009, when the Lisbon Treaty entered into force, the third pillar of the EU and framework decisions as its basic legal instrument were abolished; simultaneously, Protocol 36 of the Lisbon Treaty set rules regarding the future of those framework decisions that were in force at the time. Today, the status and the effect of framework decisions are still topics to discuss.

II. EU primary law on framework decisions

Framework decisions under Article 34(2)(b) of the Treaty on the European Union (TEU), prior to its 2009 amendment, had quite similar functions to directives: they were binding upon the Member States as to the result to be achieved, and they left to the national authorities the choice of form and methods.¹ However, as they were tools of *intergovernmental* cooperation, they had certain fundamental differences from directives. Most notably, they were coming into existence with a unanimous decision of the Council after consulting with the European Parliament,² the Court of Justice of the

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1 Article 249(3) of the Treaty establishing the European Community (TEC): "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods".

2 Former Article 39(1) TEU.

EU (CJEU) had limited and conditional jurisdiction over them,³ and the Commission had no power to start the infringement procedure against Member States not implementing them. In addition, due to an explicit reference of Article 34(2)(b), they could not entail direct effect; conversely, the CJEU had recognised the direct effect of directives decades ago, by stating that individuals can directly invoke before courts rights provided for in a directive, when its provisions are unconditional, sufficiently clear and precise, and when the Member State has not transposed it on time.⁴

Over the years, more norms were established with regard to adopting framework decisions for the needs of the third pillar. On the one hand, the Commission monitored the implementation of framework decisions by drafting reports and, in this way, exerted a certain amount of pressure on national legislators to comply.⁵ On the other hand, the CJEU recognised that, just as in the case of directives, national courts must make every effort to interpret national law consistently with EU law introduced with framework decisions;⁶ in this context, the CJEU also ruled that the restrictions to the duty of consistent interpretation (which apply when the duty would lead to an interpretation that is *contra legem* or to violating fundamental principles of law or to worsening the position of an individual in criminal proceedings) extend to framework decisions as well.⁷

III. Articles 9 and 10(1)-(3) of Protocol no 36 and their practical effect so far

Article 288 of the Treaty on the Functioning of the European Union (TFEU), listing the legal instruments of the current institutional regime, does not include framework decisions; thus, it is impossible for the EU legislator to issue such acts any more.⁸ In connection to this, Protocol no 36 to the Lisbon Treaty contains two provisions which

3 Former Article 35 TEU.

4 Judgment of 5.2.1963, case 26-62 (van Gend & Loos), ECLI:EU:C:1963:1; judgment of 4.12.1974, case 41-74 (Yvonne van Duyn), ECLI:EU:C:1974:133; judgment of 5.4.1979, case 148/78 (Criminal proceedings against Tullio Ratti), ECLI:EU:C:1979:110. See *H. Satzger*, International and European Criminal Law, 2012, pp. 93 *et seq.*

5 See on this *A. Weyembergh/ S. de Biolley (eds.)*, Comment évaluer le droit pénal européen?, 2006.

6 Judgment of 16.6.2005, C-105/03 (Criminal proceedings against Maria Pupino), ECLI:EU:C:2005:386.

7 Regarding framework decisions and their effect, *J. Pradel/ G. Corstens/ G. Vermuelen*, Droit pénal européen, 2009, pp. 511-515, *A. Hinarejos*, On the Legal Effects of Framework Decisions and Decisions, *European Law Journal* 2008, pp. 620 *et seq.*, *M. Ventrella*, Making the Fight against Criminal Organisations in the EU More Effective by Setting Aside National Constitutions, *European Journal of Crime, Criminal Law and Criminal Justice* 2008, pp. 225 *et seq.*

8 On the significance of moving from framework decisions to directives, *P. Asp*, The substantive Criminal Law Competence of the EU, 2012, pp. 104-110; *A. Klip*, *European Criminal Law*, 2016, p. 60, notes that the Lisbon Treaty has made the choice of the acts much clearer.

are important as regards the legal effects of the framework decisions that were in force at the time that the respective legal instrument was abolished from primary law.⁹

1. The content of the provisions and relevant institutional deliberations

Under Article 9 of the Protocol:

“The legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of the Treaty on European Union prior to the entry into force of the Treaty of Lisbon shall be preserved until those acts are repealed, annulled or amended in implementation of the Treaties. The same shall apply to agreements concluded between Member States on the basis of the Treaty on European Union.”

As a result of Article 9, those framework decisions that were in force on 1 December 2009 survived the abolition of their legal basis.¹⁰ This provision was first introduced in the Treaty establishing a Constitution for Europe, where its importance for the legal continuity of EU law was even greater, given that the Treaty was to establish *entirely new* legal instruments.¹¹

Under Article 10(1)-(3)¹² of the Protocol:

“1. As a transitional measure, and with respect to acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon, the powers of the institutions shall be the following at the date of entry into force of that Treaty: the powers of the Commission under Article 258 of the Treaty on the Functioning of the European Union shall not be applicable and the powers of the Court of Justice of the European Union under Title VI of the Treaty on European Union, in the version in force before the entry into force of the Treaty of Lisbon, shall remain the same, including where they have been accepted under Article 35(2) of the said Treaty on European Union.

2. The amendment of an act referred to in paragraph 1 shall entail the applicability of the powers of the institutions referred to in that paragraph as set out in the Treaties with respect to the amended act for those Member States to which that amended act shall apply.

3. In any case, the transitional measure mentioned in paragraph 1 shall cease to have effect five years after the date of entry into force of the Treaty of Lisbon”.

9 See information on the origin and the formulation of the provisions in *T. Blanchet*, The genesis of protocol 36, *New Journal of European Criminal Law (NJECL)* 2015, pp. 434-449.

10 *H. Satzger*, Legal effects of directives amending or repealing pre-Lisbon Framework Decisions, *NJECL* 2015, p. 1.

11 *Blanchet*, *NJECL* 2015, p. 435.

12 Paragraphs 4 and 5 of Article 10 concern the UK’s opt-in / opt-out rights, so they are not examined in the context of the present contribution.

Based on Article 10, and since the transitional period mentioned in paragraph (3) elapsed on 1 December 2014, when it comes to framework decisions the Commission is no longer restricted from exercising its powers under Article 258 TFEU and the CJEU is no longer obliged to act in accordance with the former Article 35 TEU.

Besides these obvious remarks, determining the exact implications of the provisions presented above has, however, not been an easy task. In this context, there was relevant activity within the EU institutions in view of the conclusion of the transitional stage. More specifically, on 25 April 2013, the Presidency of the Council expressed its conviction that it was necessary to put together a list of the legal acts that would be affected by the end of the five-year period.¹³ Almost ten months later, the Presidency of the Council asked Coreper to activate the “Friends of Presidency Group for the purpose of reflecting and providing guidance and input on the application of Article 10”.¹⁴ Subsequently, a detailed preliminary list of the former third pillar *acquis* was prepared by the Commission¹⁵ and reviewed by the Friends of Presidency Group.¹⁶ Most of this activity, however, focused on the said list of acts¹⁷ and on the problems concerning the UK’s participation in the *acquis*, while other important issues pertaining to the future legal status of framework decisions were not adequately discussed.

2. Critical observations and points of concern

In parallel with the procedures commented upon in the previous section, certain questions of a serious nature were raised by the legal theory on the subject of the significance of Articles 9 and 10 of the Protocol regarding the effect of framework decisions after 1 December 2014.

First of all, it was indicated that, based on the letter of Article 9, if a framework decision is not altered in any way under the Lisbon Treaty, it maintains the legal effect that it had when it was adopted; this is primarily interpreted to mean that *it will always be deprived of a direct effect* (i.e. regardless of the respective empowerment of the Com-

13 Council Document no 8878/13, “Preparation of the upcoming end of the five year transitional period provided for in Article 10(1) to (3) of Protocol 36 on transitional provisions”.

14 Council Document no 6527/14; for the Friends of Presidency Group see also *V. Mitsilegas/ S. Carrera/ K. Eisele*, *The End of the Transitional Period for Police and Criminal Justice Measures Adopted before the Lisbon Treaty: Who monitors trust in the European Criminal Justice area?*, CEPS Paper No. 74 / December 2014, pp. 9-11.

15 SWD(2014) 166, also in Council Document no 9883/14.

16 See Council Document no 10114/14, also for an overview of the activity of the Friends of Presidency Group.

17 A significant task in this context was for the Commission “to assess and identify the legal acts related to the area of freedom, security and justice that had exhausted all their effects and/or were no longer relevant in order to repeal them”. Indeed, in November 2014, the Commission proposed to repeal 24 acts in the area of police cooperation and judicial cooperation in criminal matters (see COM(1024) 713, COM(1024) 714, COM(1024) 715); however, no framework decisions were included.

mission and the CJEU).¹⁸ The same estimation was apparently implied by the Council,¹⁹ which pointed out that the application of the pre-Lisbon effect of the third pillar instruments must take into account the CJEU case-law on the duty of consistent interpretation.²⁰

Another interesting aspect of the provisions is the reference to the *amendment* of an act adopted in the field of police and judicial cooperation in criminal matters within the third pillar. Normally, a framework decision would be modified by means of a new framework decision; nevertheless, this is no longer possible. Therefore, the amendment would have to be materialised with one of the legal instruments currently cited in Article 288 TFEU; in most cases, this would be a directive, due to its similarities with framework decisions.²¹ So, a question arises concerning *the extent to which the amendment would affect the modified framework decision*.²² Up until 1 December 2014, this was important in view of the rule of Article 10(2) that an amendment would entail the “early” applicability of the Commission’s and the CJEU’s powers “with respect to the amended act” (: not just to the new provisions of the modified framework decision).²³ Although this was critical only during the transitional period, a similar question could be asked today regarding the *direct effect* of a modified framework decision: is it possible for all its provisions to entail direct effect or just for the new ones inserted with or altered by means of a Directive?²⁴ According to Article 10, it is the second option which applies, because both the first and the second paragraph of the article refer exclusively to the infringement procedure and to the CJEU’s jurisdiction; hence, these are the only aspects of the legal effect regulated by the provision.²⁵

Furthermore, the discussion on the legal effect of framework decisions cannot be limited to the interpretation of articles 9 and 10 of Protocol no 36. It is imperative to also assess whether these legal instruments can actually be considered *legislative acts* in the sense of the term under the Lisbon Treaty. When the third pillar was still active, it was widely argued²⁶ that framework decisions were problematic in terms of democratic legitimacy, due to the limited and non-binding participation of the European Parlia-

18 S. Peers, The “Third Pillar *acquis*” after the Treaty of Lisbon enters into force, Statewatch Analysis, 3 November 2009, p. 2 [https://www.google.gr/url?sa=t&rc=t=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjE4sT37c_WAhXDZp0KHRB0CP0QFggmMAA&url=http%3A%2F%2Fwww.statewatch.org%2Fanalyses%2Fno-86-third-pillar-acquis-post-lisbon.pdf&usq=A0vVaw0lNB3w3NH3iUSBGAKTbK74].

19 Council Document no 8878/13, p. 3.

20 This is of practical importance for acts granting rights to individuals, mostly in the fields of judicial cooperation and criminal procedure; regarding granting rights with directives in the respective fields see Satzger, NJECL 2015, pp. 5-6.

21 Satzger, NJECL 2015, p. 2.

22 Satzger, NJECL 2015, p. 8; Mitsilegas/ Carrera/ Eisele, CEPS 2014, pp. 8-9.

23 See Blanchet, NJECL 2015, p. 439.

24 Mitsilegas/ Carrera/ Eisele, CEPS 2014, p. 10.

25 See Satzger, NJECL 2015, pp. 5-10, also for further references.

26 See indicatively COM(2011) 573, p. 4, and E. Baker/ C. Harding, From past imperfect to future perfect? A longitudinal study of the Third Pillar, European Law Review (E.L. Rev.) 2009, pp. 40-43, S. Douglas-Scott, The rule of law in the European Union – putting the secu-

ment in the respective legislative procedure.²⁷ Moreover, the legal instrument of framework decisions was abolished from primary law at the same time that the Charter of Fundamental Rights of the EU was introduced (i.e. with the Lisbon Treaty); so, when framework decisions were being adopted, there was no binding mechanism for the protection of fundamental rights in the EU. Therefore, attributing (fully or even partially) the legal effect of a legislative act to a framework decision appears to be essentially problematic and this should be taken into account when interpreting and applying articles 9 and 10 of the Protocol.²⁸

3. The progression of the Commission's stance

The prospect of the application of the Protocol's provisions was mentioned by the Commission in its 2011 report on the implementation of Framework Decision 2002/584/JHA on the European arrest warrant.²⁹ In 2014, its report³⁰ on the implementation of Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA was more explicit: it set the objective to assess conformity “against the background of the powers of the Commission to start infringement procedures as of 1 December 2014”. In this context, besides connecting the *effectiveness* of these acts to the level of their implementation in all the national legal orders, the Commission invoked the fact that the Framework Decisions had been agreed upon *unanimously* by the Member States, who later, when adopting the Lisbon Treaty, chose to create a new legal environment to ensure their application. Subsequently, in view of its upcoming (at that point) power to start the infringement procedure, the Commission urged the Member States to provide the necessary information to it and to enact any relevant legislation they might have been preparing, or amend any problematic legislation they might have enacted in the past.

ity into the “area of freedom, security and justice”, E.L. Rev. 2004, pp. 220-223, A. Nieto Martín, An approach to current problems in European criminal law, in L. Arroyo Zapatero/ A. Nieto Martín (eds.), *European Criminal Law: An Overview*, 2010, pp. 49-56, B. Schünemann, Alternative Project for a European Criminal Law and Procedure, in M. Cherif Bassiouni/ V. Militello/ H. Satzger (eds.), *European cooperation in penal matters: issues and perspectives*, 2008, p. 123, J. Vogel, The European Integrated Criminal Justice System and its Constitutional Framework, *Maastricht Journal of European and Comparative Law* 2005, pp. 139-147.

27 The Commission stressed this difference in the legislative procedure in COM(2011) 175, p. 3: “any amendment of the Council Framework Decision means that the new rules introduced by the Lisbon Treaty for the adoption of legislative measures in this area will apply. These rules include co-decision between the European Parliament and Council [...]”.

28 For these thoughts see *Mitsilegas/ Carrera/ Eisele*, CEPS 2014, pp. 8-9, 16, 26; *Satzger*, NJE-CL 2015, pp. 8-9; *E. De Capitani*, Metamorphosis of the third pillar: The end of the transition period for EU criminal and policing law, EU Law Analysis blog, 10 July 2014 [<http://eu.lawanalysis.blogspot.gr/search?q=protocol+36>].

29 COM(2011) 175, p. 3.

30 COM(2014) 57 (see pp. 5, 11-12).

In 2015, the Commission’s Annual Report “Monitoring the application of Union law” for 2014³¹ linked the expiry of the transitional period to the *efficient functioning* of instruments for freedom, security and justice, and to the *full integration* of police and judicial cooperation in criminal matters “into the mainstream of EU law”. The respective report of the following year³² referred to the *correct* transposition of former third pillar instruments as an essential condition “for the good functioning of EU policies on freedom, security and justice”; it further announced that the Commission had already contacted those Member States that had not notified complete measures for transposing *seven specific framework decisions*.³³ In more recent documents,³⁴ the Commission stated that it has launched *the first infringement procedures* “over instruments belonging to the former third pillar”; this concerns Framework Decision 2006/960/JHA on the exchange of information and intelligence between EU law enforcement authorities (the procedure is noted to have been commenced for non-communication of national measures to implement the act).³⁵

Therefore, the Commission has started applying its post-transitional powers over framework decisions that are still in force. The outcome of this activity remains to be revealed. In this context, it will be particularly interesting to see whether the distinct nature and history of framework decisions will affect the criteria used to evaluate their implementation and their binding effect.

4. The CJEU’s relevant case-law

The CJEU has dealt with Articles 9 and 10 of Protocol no 36 in a number of occasions. In certain cases, reference to the provisions is made just with regard to the CJEU’s *jurisdiction to give preliminary rulings*.³⁶

31 COM(2015) 329, pp. 23-24.

32 COM(2016) 463, p. 11.

33 These are Framework Decisions 2006/960/JHA (the ‘Swedish initiative’), 2003/568/JHA on combating corruption in the private sector, 2008/841/JHA on the fight against organised crime, 2009/315/JHA on exchange of information extracted from criminal records between Member States (ECRIS), 2009/829/JHA on the European supervision order, 2008/947/JHA on probation and alternative sanctions, and 2008/909/JHA on transfer of prisoners.

34 See the following documents of July 2017: COM(2017) 370 (Monitoring the application of European Union law – 2016 Annual Report), p. 12, SWD(2017) 278 (Comprehensive Assessment of EU Security Policy) part 1/2, p. 12, and part 2/2, p. 123.

35 It is further stated that the infringement proceedings also cover national legislations which have failed to comply with *the Prüm Decisions* on information-sharing to combat terrorism and serious crime.

36 For example, judgment of 27.5.2014, case C-129/14 PPU (Zoran Spasic), ECLI:EU:C:2014:586, paragraphs 14-15, 42-46 (“42. It can be seen from the order for reference that the request for a preliminary ruling is based on Article 267 TFEU, whereas the questions referred concern the CISA, a convention adopted under Title VI of the EU treaty in the version applicable prior to the entry into force of the Treaty of Lisbon. 43. It is settled case-law, in that respect, that the system laid down in Article 267 TFEU applies to the Court’s jurisdiction to give preliminary rulings under Article 35 EU, itself applicable until 1 December 2014, subject to the conditions laid down by that provision (...). 44. The Federal Republic of

In other cases, the CJEU has held that, because of Article 9 citing that the legal effects of third pillar acts shall be preserved until the latter are repealed, annulled or amended, these acts, for as long as they remain in force, are also *valid secondary legal bases* of other instruments. For example, in relation to a 2013 Decision fixing the date of effect of a 2008 third pillar Decision, the CJEU held that “[...] a provision of an act duly adopted on the basis of the EU Treaty before the entry into force of the Treaty of Lisbon which lays down detailed rules for the adoption of other measures continues to produce its legal effects until it is repealed, annulled or amended, and permits the adoption of such measures in accordance with the procedure established by that provision”; what’s more, the CJEU argued that the 2008 Decision’s provision functioning as a secondary legal base should have been interpreted as permitting the Council to adopt the 2013 Decision *only after having consulted the Parliament according to [pre-Lisbon] Article 39(1) TEU*, since the repeal of the latter “cannot alter” such an “essential procedural requirement”.³⁷

The CJEU has also dealt with preliminary questions concerning specifically framework decisions. In case C-554/14³⁸ and regarding Framework Decision 2008/909/JHA, it reaffirmed the Member States’ *obligation to interpret national law in conformity with EU law*. Its conclusions were repeated in case C-579/10 (on the European arrest warrant), where it further *clarified that framework decisions do not entail direct effect*.³⁹

IV. The evolution of framework decisions in the post-Lisbon era

The EU legislator has made various choices with regard to the framework decisions that were in force on 1 December 2009; the following section presents a list of EU ac-

Germany made a declaration under Article 35(2) EU accepting the jurisdiction of the Court of Justice to give preliminary rulings in accordance with the arrangements laid down in Article 35(3)(b) EU [...]. 45. In those circumstances, the fact that the order for reference does not mention Article 35 EU but rather refers to Article 267 TFEU cannot of itself make the reference for a preliminary ruling inadmissible (...). 46. It follows from the foregoing that the Court has jurisdiction to answer the questions referred”).

37 Judgment of 16.4.2015, case C-540/13 (European Parliament v Council of the European Union), ECLI:EU:C:2015:224, paragraphs 47, 53-60. Similarly, judgment of 16.4.2015, joined cases C-317/13 and C-679/13 (European Parliament v Council of the European Union), ECLI:EU:C:2015:223; judgment of 23.12.2015, case C-595/14 (European Parliament v Council of the European Union), ECLI:EU:C:2015:847; judgment of 10.9.2015, case C-363/14 (European Parliament v Council of the European Union), ECLI:EU:C:2015:579; judgment of 22.9.2016, joined cases C-14/15 and C-116/15 (European Parliament v Council of the European Union), ECLI:EU:C:2016:715. Regarding the legal effect of common positions see judgment of 9.7.2012, case C-130/10 (European Parliament v Council of the European Union), ECLI:EU:C:2012:472, paragraphs 107-111.

38 Judgment of 8.11.2016 (Criminal proceedings against Ognyanov), ECLI:EU:C:2016:835, paragraphs 57-71.

39 Judgment of 29.6.2017 (Daniel Adam Poplawski), ECLI:EU:C:2017:503, paragraphs 25-39.

tions concerning these framework decisions and aims at highlighting the directions taken.⁴⁰

[1] First of all, several framework decisions have been *replaced*:

- Framework Decision 2000/383/JHA on counterfeiting has been replaced by Directive 2014/62/EU;
- Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings has been replaced by Directive 2012/29/EU;
- Framework Decision 2002/475/JHA on terrorism has been replaced by Directive (EU) 2017/541;
- Framework Decision 2002/629/JHA on trafficking in human beings has been replaced by Directive 2011/36/EU;
- Framework Decision 2004/68/JHA on the sexual exploitation of children and child pornography has been replaced by Directive 2011/93/EU;
- Framework Decision 2005/222/JHA on attacks against information systems has been replaced by Directive 2013/40/EU;
- Framework Decision 2008/977/JHA on the protection of personal data processed within police and judicial cooperation in criminal matters has been replaced by Directive (EU) 2016/680;
- Also, Framework Decision 2008/978/JHA on the European evidence warrant has been replaced by Directive 2014/41/EU, but, for reasons of legal certainty, it has additionally been repealed by Regulation (EU) 2016/95.⁴¹ The use of a regulation is commented in the preamble of the act, where it is stated that, although Article 83(1) TFEU provides for the adoption of directives, the choice of a regulation to repeal the Framework Decision is appropriate “because this Regulation does not establish minimum rules concerning the definition of criminal offences and sanctions, but only repeals obsolete acts without replacing them with new ones”.

[2] Moreover, there are currently pending *proposals for the replacement* of framework decisions:

- Framework Decision 2001/413/JHA on fraud and counterfeiting of non-cash means of payment is to be replaced by a directive, according to COM(2017) 489;
- Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders is to be replaced by a regulation, according to COM(2016) 819.

⁴⁰ The list contains all the framework decisions that were in force on 1 December 2009; references to non-legislative acts affecting certain framework decisions are indicative.

⁴¹ See paragraphs 12-13 of the preamble of the Regulation.

[3] There are cases of *partial replacement* as well:

- Framework Decision's 2003/577/JHA provisions on the execution of orders freezing evidence have been replaced by Directive 2014/41/EU; the Framework Decision's provisions on the execution of orders freezing property are to be replaced by the regulation cited just above (COM(2016) 819);
- Framework Decision's 2001/500/JHA provisions on confiscation have been replaced by Directive 2014/42/EU; on the other hand, the Framework Decision's provisions on money laundering are still in force and planned to be replaced by a directive, according to COM(2016) 826;
- Framework Decision's 2005/212/JHA provisions on extended confiscation (and most of its definitions) have been replaced by directive 2014/42/EU; however, the general rule on confiscation is still in force.

[4] There are also cases of *amendments*:

- Framework Decision 2004/757/JHA on illicit drug trafficking has been recently amended by Directive (EU) 2017/2103;
- Framework Decision 2009/315/JHA on the exchange of information extracted from the criminal record is to be amended by a directive, according to COM(2016) 07.

[5] Most notably, the effect of the rest of the framework decisions in force is being *strengthened* irrespective of any (direct) legislative intervention:

- As mentioned before, it has been announced by the Commission that, on the one hand, *infringement proceedings* have been launched regarding Framework Decision 2006/960/JHA on the exchange of information and intelligence between law enforcement authorities, and on the other hand, Member States have been asked to *notify complete measures for transposing* Framework Decisions 2003/568/JHA on corruption in the private sector, 2008/841/JHA on organised crime, 2008/909/JHA on the application of the principle of mutual recognition to criminal judgments imposing custodial sentences or measures involving deprivation of liberty, 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions, and 2009/829/JHA on the application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.⁴²
- The scope of the Directive on the European Investigation Order is *restricted* in order not to affect the scope of Framework Decision 2002/465/JHA on joint investigation teams;⁴³ in parallel, Member States are addressing notifications to the Com-

42 COM(2016) 463, p. 11.

43 See Article 3 of Directive 2013/41/EU.

mission concerning the level of the latter's implementation in their national legislation.⁴⁴

- Notifications concerning the level of implementation are being addressed by the Member States regarding Framework Decision 2009/948/JHA on the prevention and settlement of conflicts of jurisdiction in criminal proceedings as well;⁴⁵ in addition, the act is invoked in recent legislative procedures.⁴⁶
- The Commission has evaluated the implementation of Framework Decision 2002/946/JHA (which along with Directive 2002/90/EC constitute the "Facilitators Package", i.e. the EU's legal framework against facilitation of unauthorised entry, transit and residence) and remarked that "there is no sufficient evidence to draw firm conclusions about the need for a revision of the Facilitators Package at this point in time. While an EU legal framework addressing migrant smuggling remains necessary in the current context, at present *its full and correct implementation should be prioritised*, in the context of the Action Plan. [...] In parallel, instances of non-conformity will continue to be pursued with Member States to ensure correct transposition and application of the current EU legal framework. *If necessary, the Commission will use its powers under Article 258 TFEU, including initiating infringement procedures.* [...] The need for possible legislative amendments to the Facilitators Package could be re-evaluated, once the implementation of the Action Plan has reached greater maturity".⁴⁷
- The functioning especially of the European Criminal Records Information System (ECRIS) is evaluated under the criterion of allowing the proper application of Framework Decision 2008/675/JHA on taking account of convictions in the Member States in the course of new criminal proceedings;⁴⁸ the *full implementation* of the latter is presented to be an important reason for amending the ECRIS Framework Decision.⁴⁹
- The Commission announced that "important implementation work for 2017 includes *ensuring the full and correct implementation*" of Framework Decision

44 See for example Council Document no 5913/17.

45 See for example Council Document no 6272/17.

46 See SWD(2017) 298 (Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and the Council on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA), p. 223 "Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings provides for procedures and remedies to solve such conflicts of jurisdiction".

47 See SWD(2017) 117, pp. 35-37.

48 See for example COM(2017) 341, pp. 5-6 ("criminal courts might pass judgements without knowledge of previous convictions in other Member States, contrary to the requirements set out in Framework Decision 2008/675/JHA").

49 See for example SWD(2016) 4, pp. 3-6, 19, and 8 of ANNEX 1 ("Courts are affected, as an improved ECRIS with regard to TCN will provide easy access to information on previous convictions of a TCN. Courts can fully implement Framework Decision 2008/675/JHA on taking account of previous convictions in new criminal proceedings concerning the same person").

2009/905/JHA on accreditation of forensic service providers carrying out laboratory activities.⁵⁰

- The Council is working on “establishing standardized *forms* concerning Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties. These forms, which will be translated in all languages, have the objective *to facilitate the procedure of enforcement of the (cross-border) decisions on financial penalties under the Framework Decision*”.⁵¹
- Framework Decision 2008/913/JHA on racism has been placed at the base of recent EU activity. On 31 May 2016, the Commission presented a “Code of conduct on countering illegal hate speech online”. The main commitments under the Code include that “Upon receipt of a valid removal notification, the IT Companies review such requests against their rules and community guidelines and, where necessary, national laws transposing the Framework Decision 2008/913/JHA”.⁵²
- Finally, Framework Decision 2002/584/JHA on the European arrest warrant has given rise to numerous preliminary questions in front of the CJEU, which has repeatedly applied the principle of *autonomous and uniform interpretation of EU law* with regard to concepts of the act, gradually unifying their meaning; besides, the CJEU has issued certain cornerstone rulings concerning the European arrest warrant,⁵³ which is also the most widely used instrument of mutual recognition in the field of judicial cooperation in criminal matters.

Consequently, one observes that, while several framework decisions have had the expected fate of replacement by directives, many others are still in force and, more importantly, they are all essentially active; furthermore, they follow a variety of paths, adding to the complexity of the issues that concern their effect.

V. Assessment and final thoughts

When the Lisbon Treaty entered into force, it changed drastically the institutional background against which the EU’s legislation evolves in the field of police and judicial cooperation in criminal matters. Even though there are provisions aiming to provide space for national arguments to be raised, the *effectiveness* of the legal acts adopted under the new regime is obviously enhanced. In this context, framework decisions, deriving from the former third pillar of the EU and, thus, bearing strong intergovernmental characteristics, were understandably considered inappropriate to keep func-

50 SWD(2017) 259, Part I: Policy areas, Accompanying the document Monitoring the application of European Union law 2016 Annual Report COM(2017) 370, p. 68.

51 See e.g. Council Documents no 14898/16, 11032/17, 11151/17.

52 See for example Council Documents no 15122/16 and SWD(2017) 155.

53 Most notably, judgment of 3.5.2007, case C-303/05 (Advocaten voor de Wereld VZW v Leden van de Ministerraad), ECLI:EU:C:2007:261; judgment of 26.2.2013, case C-399/11 (Stefano Melloni v Ministerio Fiscal), ECLI:EU:C:2013:107; judgment of 5.4.2016, joined cases C-404/15 and C-659/15 PPU (Pál Aranyosi, Robert Căldăraru), ECLI:EU:C:2016:198.

tioning unaffected within a supranational environment. At the same time, replacing all of them with directives could prove to be an extremely difficult task; despite the abolition of the unanimity rule, reaching an agreement -or a compromise- in certain topics could be very challenging, even for the standards of qualified majority. Therefore, it seems that disturbing balances already achieved should only be attempted when there is good reason. Besides, prioritising the full implementation of existing instruments before weighing the option of replacing them is in line with the EU principle of subsidiarity.⁵⁴ As a result, finding a way to render framework decisions more effective could not be regarded as an unacceptable or inconsistent objective.

On the other hand, however, the Lisbon Treaty also enhanced the *democratic features* of the EU legislative procedure. Today, the European Parliament co-decides with the Council in the field of police and judicial cooperation in criminal matters, while the Charter of Fundamental Rights of the EU has legally binding force. Conversely, as mentioned before, the decision-making in the third pillar was heavily criticised due to the European Parliament's weak participation in it; framework decisions were not even thought to be "legislative" acts.⁵⁵ Similarly, there was no binding instrument for the protection of fundamental rights in the EU at the time. These basic deficiencies cannot be retroactively cured by the Member States adopting a protocol strengthening the acts' effect. Likewise, the fact that framework decisions were enacted in unanimity does not solve the problem of democratic legitimacy, because unanimity in the Council only shows strong political will; it does not make up for the lack of a parliamentary body deciding.

In short, making choices corresponding to the current attributes of the EU's primary law cannot be limited to serving effectiveness; it must include respecting the modern democratic function of the EU as well.

Nowadays, the evolution of framework decisions, as presented above, must also be taken into account. *Replacing* framework decisions with directives has long been considered as *the optimal option* for the EU legislator, in view of all the concerns expressed;⁵⁶ still, so far, less than half of them have been replaced with directives.⁵⁷ Furthermore, the rest of the framework decisions are activated in various manners for the purposes of police and judicial cooperation in criminal matters. Making use of the progress that was accomplished within the third pillar is not problematic *per se*; on the contrary, it is imperative for the effectiveness and for the continuity of EU law. The

54 Currently, this is an important objective for the EU; the European Agenda on Security includes as a distinct key principle the "Better application and implementation of existing EU legal instruments" (see relatively A. Giannakoula, *The European Agenda on Security – A Comment*, *European Criminal Law Review* (EuCLR) 2016, pp. 99 *et seq.*)

55 *Mitsilegas/ Carrera/ Eisele*, CEPS 2014, p. 9.

56 See *Satzger*, *NJEC* 2015, p. 10, and *Mitsilegas/ Carrera/ Eisele*, CEPS 2014, pp. 30, 33-35, referring also to the role of the European Parliament.

57 See respective estimations which take into account also reasons related to the special regime regarding certain Member States (i.e. the UK, Ireland and Denmark) in *Blanchet*, *NJEC* 2015, pp. 447-449.

problem relates specifically to upgrading framework decisions to *legislative acts without them fulfilling the respective prerequisites*.

Apart from the institutional issues, it is important to note that certain provisions of framework decisions have been assessed to be problematic by the legal theory⁵⁸ and by the EU bodies. For example, it has been acknowledged that the Framework Decision on the European arrest warrant does not provide adequate protection against the *disproportionate* application of the instrument,⁵⁹ with the European Parliament reporting that “the weaknesses identified not only undermine mutual trust but are also costly in social and economic terms to the individuals concerned, their families and society in general”.⁶⁰ Initiating the legislative procedure for replacing the Framework Decision with a directive would be an opportunity for the EU legislator to revisit the provisions of the act and address the problems indicated. In fact, the European Parliament has proposed concrete amendments, which also cover issues that the CJEU is very often obliged to deal with;⁶¹ obviously, adopting *legislation* on the proportionality check, the concept “judicial authority”, the right to an effective legal remedy, or the better definition of the crimes where the European arrest warrant should apply, has an enormous added value.

Therefore, with regard to provisions of framework decisions that entail severe consequences for individuals or involve serious problems in their application, the incentive for replacing them with directives should be defined not only in terms of enhancing the effectiveness of the EU’s intervention, but also in terms of increasing its legitimacy and solving such problems. In these cases, the adoption of a post-Lisbon legislative act seems necessary. In the meantime, the Commission could contribute to the balancing between preserving the efficiency of EU law and respecting the fundamental significance of the amendments brought about with the Lisbon Treaty by adjusting its assessments to the fact that framework decisions were introduced within (and thus *influenced by*) a less advanced institutional environment, which in reality left a wide margin of discretion to the national legislators and called upon national parliaments to provide for the critical democratic legitimacy.

58 See indicatively Manifesto on European Criminal Policy, ZIS 2009, pp. 697-747 (updated in EuCLR 2011, pp. 86-103) and Manifesto on European Criminal Procedure Law, ZIS 2013, pp. 412-446, as well as *M. Kaiafa-Gbandi*, The Importance of Core Principles of Substantive Criminal Law for a European Criminal Policy Respecting Fundamental Rights and the Rule of Law, EuCLR 2011, pp. 7 *et seq.*, and *M. Kaiafa-Gbandi*, The EU and US criminal law as two-tier models, 2016, pp. 112-134.

59 See relevant arguments in Council Document no 17195/1/10 (“Revised version of the European handbook on how to issue a European Arrest Warrant”), pp. 14-15, COM(2011) 175 pp. 8-9, report of the European Parliament A7-0039/2014, p. 5; also, *Mitsilegas/ Carrera/ Eisele*, CEPS 2014, pp. 16-18, 26-30.

60 See report A7-0039/2014, p. 7.

61 See for example *A. Rosan*, If You Are a Judicial Authority and You Know It, Raise Your Hands – Case Note on C-452/16 PPU, Poltorak, C-453/16 PPU, Özçelik, C-477/16 PPU, Kovalkovas, EuCLR 2017, pp. 88 *et seq.*