

Legal effects of directives amending or repealing pre-Lisbon Framework Decisions

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A. Introduction

Framework decisions were defined as legal acts which were binding upon the Member States as to the result to be achieved but which should leave to the national authorities the choice of form and methods. In any case, they – unlike directives – should not entail direct effect.

The framework decision was quite frequently used in the area of judicial cooperation, based on Art. 34 of the old Treaty on the European Union. This legal basis was abolished by the Treaty of Lisbon. The forms of legal acts are now exhaustively enumerated in Art. 288 TFEU, the framework decision not being mentioned any more.

Nevertheless – as we have seen before – the framework decisions, despite the abolition of their legal basis, survived. This is due to Art. 9 para. 1 of Protocol No. 36¹ attached to the Treaty of Lisbon, which says:

“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Treaty on European Union prior to the entry into force of the Treaty of Lisbon shall be preserved until those acts are repealed, annulled or amended in implementation of the Treaties. ...”

For a period of five years, which ends on 30th November 2014, Art. 10 of the Protocol provided for provisional measures which excluded an infringement procedure by the Commission (Art. 258 TFEU) in relation to framework decisions. Moreover, the jurisdiction of the CJEU has been restricted to the *status quo* before the entry into force of the Lisbon Treaty. The Court’s jurisdiction thus depended on declarations by the respective Member

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¹ OJ C 115 of 09.05.2008, pp.322 – 326.

States accepting the jurisdiction of the Court of Justice for preliminary rulings. Actions for annulment, however, have always been possible.

As a consequence of the impressive number of framework decisions which formed the basis of the judicial cooperation in criminal matters at the end of 2009, the new strategy of the EU institutions was to “Lisbonise” framework decisions, which means – as was also expressed in Art. 10 of Declaration 50 to the Lisbon Treaty – that the European Parliament, the Council and the Commission should review former legislation and adopt legal acts amending or replacing pre-Lisbon legislation where appropriate.²

I will deal with those “Lisbonising” acts and their effects – also for the CJEU.

B. Amending or repealing Framework Decisions

I. Directives as the adequate instrument for “Lisbonising” Framework Decisions

First of all, the question arises what legal instrument can be used for amending or repealing a Framework Decision. A Framework Decision would – normally – be modified by another Framework Decision. But this form of legislation is not at the disposition of the legislator any more. Nonetheless, Art. 9 para. 1 of the Protocol No. 36 presupposes that it must be possible to “repeal, amend or annul” a Framework Decision under the Treaty of Lisbon. Such effects shall be brought about “in implementation of the Treaties”, a formulation which obviously refers to the new treaties and especially to Art. 288 TFEU, where all forms of legal instruments at the disposition of the European legislator are listed. Although an amendment of a Framework Decision is not only conceivable by a directive – a regulation, for instance, could also have such an effect – the far-reaching parallels between Framework Decision and directive suggest that the latter is the legal instrument of choice in this context.³ Of course, it must not be overlooked that – although the similarities between Framework Decision and directive are obvious – there are important differences: The Framework Decision required unanimity in the Council, the EP only had to be consulted, and the national Parliaments had less power, especially in relation to questions of subsidiarity. As to the effects, the main difference was that Art. 34 TFEU explicitly excluded any direct effect of framework decisions,

² In practice, this is happening only on an *ad hoc* basis: *Peers*, CMLR 2011, pp. 686 *et seq.*

³ *Fletcher* in *Eckes/Konstadinides*, *Crime within the Area of Freedom, Security and Justice*, p. 19.

whereas such an effect has long been recognised – at least under certain conditions – in relation to directives by the European Court of Justice⁴.

If the legislator chooses a directive in order to amend or repeal a Framework Decision this is – and this must be the starting point – an “ordinary” directive in the sense of Art. 288 TFEU. Thus, in general, the Community decision-making rules apply, which means majority voting in the Council and the joint adoption of European legislation by Council and Parliament according to the ordinary legislative procedure.⁵ In relation to the creation of an area of freedom, security and justice, nevertheless, some special rules apply, e.g. the “emergency brake” in Art. 82 para. 3 and Art. 83 para. 3 TFEU in relation to harmonising measures in case a Member State “considers that a draft directive ... would affect fundamental aspects of its criminal justice system.” Moreover, three Member States, UK, IE and DK, are in principle not bound by any legal act in this area. Nevertheless, they can choose to take part in an individual measure.

II. Effects of Directives amending or repealing Framework Decisions

1. The primary effect of a directive amounts to an obligation vis-à-vis the national legislators, who are the addressees of the legal instrument.⁶ In our case, when the directive is used to modify the pre-existing Framework Decision, the Member States have to adapt their internal legislation to the aim set out in the framework decision as modified by the directive (within the timetable for implementation provided by the directive). If the European legislator merely used a directive to repeal a Framework Decision without formulating new objectives, the effect would be a purely negative one: The legally binding obligations of the Member States under the Framework Decision would be eliminated; the Member States would regain their liberty to legislate as they wish – in the absence of other obligations under EU law.

2. A directive can, however, only create obligations for those Member States for which it is binding. Under the Treaty of Lisbon two main exceptions arise:

- First, if the modifying directive is based on Article 82 or 83 of the TFEU and a Member State maintains that the directives would affect fundamental aspects of its criminal justice system,

⁴ For a detailed account see *Schroeder* in *Streinz, EUV/AEUV*, 2nd. Ed., Art. 288 AEUV paras 101 *et seq.*

⁵ *Fletcher, ibid.*, p. 20.

⁶ *Schroeder* in *Streinz, EUV/AEUV*, 2nd. Ed., Art. 288 AEUV para 72.

the Member State is – as a result of the complex provision and procedure, laid down in para. 3 of the two provisions – in the end not bound by the directive.

However, it is not clear what the term “fundamental aspects of the criminal justice system” exactly refers to⁷ and whether the CJEU has the jurisdiction to rule on the admissibility of pulling the “emergency brake”. The answers to these questions depend entirely on whether the provision is interpreted from *the perspective of a Member State or of the European Union*. Since the provision is part of the European Treaties, one might be tempted to favour an exclusively European standard as its interpretation falls within the jurisdiction of the CJEU according to art. 267 (1) (a) TFEU.

However, the specific purpose of the provision is to safeguard the national identities of the Member States and to protect their criminal justice systems. Consequently, a certain margin of appreciation must be left to the Member States and be exempt from the jurisdiction of the CJEU. This margin of appreciation, however, is exceeded if a Member State pursues goals which evidently are not connected with the integrity of its domestic criminal law system. Otherwise, a Member State could paralyse European legislation by such a (mis-) use of the “emergency brake”, which would be inconsistent with the established principle of majority. Apart from truly fundamental aspects, a Member State’s domestic legal system is not accorded any special protection under art. 83 (3) TFEU.⁸ Although the Member States enjoy a margin of appreciation in their definition of “fundamental aspects”, the CJEU remains competent to rule on whether or not the “emergency brake” has been abused.⁹

- The second exception to the binding force of directives relates to Member States which opt out under the conditions set out in Protocols No. 21 and 22 to the Treaty of Lisbon. The UK, Ireland and Denmark are generally not bound by measures in relation to the creation of an area of freedom, security and justice. Nevertheless, they are entitled to an opt-in in any such measure.¹⁰

It is obvious that those exceptions – the opt-in and the “emergency brake” – contribute to the danger of a considerable diversity or – expressed more precisely – heterogenous

⁷ See *Satzger*, International and European Criminal Law, § 7 para 48.

⁸ *Heger*, ZIS 2009, p. 415; *F. Zimmermann*, Jura 2009, p. 848.

⁹ *Satzger*, International and European Criminal Law, § 7 para 47.

¹⁰ For details see *Peers*, CMLR 2011, pp. 690 *et seq.*

conditions within the European Union, which is the opposite of the “single judicial area” that the European Union aspires to be.

3. As directives under the Treaty of Lisbon may have direct effect, this is also true for a directive amending or repealing a Framework Decision, which is – as I have pointed out before – an “ordinary” directive. According to the Court’s jurisprudence, a directive is directly effective to the extent that the following requirements are met: the directive must be phrased clearly and precisely and be free of all ambiguity. The time limit for implementation must have expired and the directive has to be beneficial for the individual concerned.¹¹ Given that directives concerning substantive criminal law typically exercise an incriminating effect on the individual, the direct effect of those directives can in principle be excluded.¹² Direct effect thus may be more important in relation to judicial cooperation and criminal procedure. There are several provisions in directives passed under the Treaty of Lisbon which meet this requirement, and also in directives replacing former Framework Decisions. An example could be Art. 6 of the “Directive 2012/29/EU of 25th October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA”:

Right to receive information about their case

1. Member States shall ensure that victims are notified without unnecessary delay of their right to receive the following information about the criminal proceedings instituted as a result of the complaint with regard to a criminal offence suffered by the victim and that, upon request, they receive such information:

(a) any decision not to proceed with or to end an investigation or not to prosecute the offender;

(b) the time and place of the trial, and the nature of the charges against the offender.

¹¹ For further information on these prerequisites see *Satzger*, International and European Criminal Law, § 7 para 75; *Ruffert* in *Calliess/Ruffert*, Art. 288 AEUV paras 77 *et seq.*

¹² On the so-called “reverse vertical direct effect”, see Case C-80/86 “*Kolpinghuis Nijmegen*” ECR 1987, 3969 (para 9); joined Cases C-387/02, C-391/02 and C-403/02 “*Berlusconi*” ECR 2005, I-3565 (paras 73 *et seq.*); see also *Streinz*, *Europarecht*, para 446; see further *Kapteyn* in *Kapteyn/VerLooren van Themaat*, EC Law, pp. 531 *et seq.*

The right to receive information about the decision not to proceed etc. and about the time and place of trial etc. are clearly and without ambiguity established, a right is bestowed upon the victim so that – upon the expiry of the time limit – this article is directly applicable. Of course, such a direct effect can only exist in those Member States for which the directive is legally binding (see above).

4. As far as amending Framework Decisions by directives is concerned, questions may arise which seem to be unsolved so far. Is it possible that by modifying a Framework Decision through a directive, individual provisions within the Framework Decision may become directly effective? What do I mean by this?

If a Framework Decision is amended by a directive, two different ways of interpreting the character of the amended Framework Decision are conceivable:

First it could be said that – in application of Art. 9 para. 1 of the Protocol No. 36 – the Framework Decision in so far as it is not “amended, repealed or annulled” retains the legal character of a Framework Decision after the amendment. Only the individual provision amended by the directive changes its legal character and is a directive provision from now on.¹³ The former Framework Decision is then a mixed legal instrument consisting of Framework Decision and directive elements. Thus, direct effect is only possible if the directive element fulfils the Court’s conditions set out above.

Second, a different view could be taken: As soon as the EU legislator amends a former Framework Decision, the whole act acquires the legal character of a directive.¹⁴ In reference to the myth of King Midas, I call this the „golden touch theory”, as any act “touched” by an amending directive is itself transmuted into a directive. The consequence would be that all elements within the former Framework Decision which meet the requirements for direct effect can be invoked by an individual before court.

An example may demonstrate the difference: Article 3 of the Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings¹⁵ deals with the “Right to information about rights”. It says:

¹³ *Herrnfeld* in Schwarze, EU-Kommentar, Art. 67 AEUV, para 37 *et seq.*

¹⁴ *Röben* in Grabitz/Hilf/Nettesheim, Das Recht der EU, Art. 67 AEUV para 157.

¹⁵ OJ 2012 L 142 of 01.06.2012, pp. 1-10.

“1. Member States shall ensure that suspects or accused persons are provided promptly with information concerning at least the following procedural rights, as they apply under national law, in order to allow for those rights to be exercised effectively:

- (a) the right of access to a lawyer;*
- (b) any entitlement to free legal advice and the conditions for obtaining such advice;*
- (c) the right to be informed of the accusation, in accordance with Article 6;*
- (d) the right to interpretation and translation;*
- (e) the right to remain silent.”*

Although there is a national law proviso (“as they apply under national law”), the result that there must be e.g. access to a lawyer or the right to remain silent is clearly stated. Only the details in relation to how these rights are applied are left to national law. *Whether* such a guarantee is established is not left to the discretion of the national legislator – and to this extent the provision could be considered sufficiently clear and could thus be regarded as capable of producing direct effect.

If we then have a look at Article 11 para 2 of the Framework Decision on the European Arrest Warrant, we see that it also contains a provision about “rights of a requested person”. It says:

2. A requested person who is arrested for the purpose of the execution of a European arrest warrant shall have a right to be assisted by a legal counsel and by an interpreter in accordance with the national law of the executing Member State.

We have a similar national law proviso here. The rights conferred upon the individual in the Framework Decision are touched upon, even extended considerably by the younger directive, so that in any case it can be said that the Framework Decision is amended by the directive. According to the first opinion – only the amended parts of the Framework Decision obtain the character of a directive – no significant change can be observed. As the more far-reaching rights under the directive are directly applicable, the question whether the similar provisions within the old Framework Decision can be relied upon by the individual is irrelevant.

But if the second view is correct – the King Midas golden touch theory – the example becomes most interesting. As the Directive on the right of information in criminal matters “touches” the European Arrest Warrant Framework at least in one point (the rights of a requested person), the whole Framework decision would share the legal character of a

directive. Thus, any other provision within the EAW-Framework Decision could produce direct effect, provided the Court's conditions are met. And, indeed, there is another provision in the EAW-Framework Decision which could be said to be sufficiently clear and unambiguous and beneficial for the individual: It is Article 3, which provides for the grounds for mandatory non-execution of the European arrest warrant. Thus, a European Arrest Warrant must not be executed if the person concerned cannot, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State.

The mandatory grounds for non-execution are – again – clearly defined, unambiguous and of benefit for the person subject to the arrest warrant. Thus it is capable of direct effect if we follow the second opinion and accept that the whole of the EAW-Framework Decision obtains the character of a directive due to the “golden touch”.

As I said – the problem is, as far as I see it, unsolved. The “King Midas golden touch theory” is to a certain extent supported by Art. 10 para 2 of Protocol No. 36, which provided for the transitional period that:

“[t]he amendment of an act referred to in paragraph 1 shall entail the applicability of the powers of the institutions referred to in that paragraph (= infringement procedure, jurisdiction of CJEU) as set out in the Treaties with respect to the amended act for those Member States to which that amended act shall apply.”

Art. 10 para 2 therefore shows that an amendment brings about a change of legal status of the whole act, not only in relation to the provision amended. On the other hand, Art. 10 para 2 is a very special provision, relating to the transitional period and – which is perhaps more important – only to the two effects: allowing the infringement procedure and affirming the unlimited jurisdiction of the CJEU. This is why Art. 10 para. 2 does not equate the Framework Decision with the amending act in any respect, which is an important argument against the “golden touch theory”.

In addition to that, it must not be forgotten that an easy transformation of a Framework Decision into a directive is also problematic from the point of democratic legitimacy. The former Framework Decisions were rightly criticized for suffering from a weak democratic legitimacy as the European Parliament did not have sufficient influence in the legislative

process.¹⁶ This has changed under the Treaty of Lisbon, but the Lisbonisation of former Framework Decisions can only overcome the democratic deficit if the Lisbonised provisions actually undergo the new procedures. The “King Midas golden touch theory” does not take into account this aspect sufficiently.

5. Further problems arise if not all Member States are legally bound by the amending directive, whether that is because they pull the emergency break or because they can or do not opt in to a certain measure. Then, from the point of view of the majority of Member States which support the amending directive, the FD is amended. As a consequence only the amended provision has – according to my opinion above – the character of a directive and may be directly effective. But: From the point of view of the non-participating state(s), the Framework Decision remains unaltered, with no possibility of direct effect. If you follow the golden touch theory again, the results are even more complex: Then the whole Framework Decision would henceforth be considered a directive, but only for those Member States that supported the amending act. And in relation to the non-participating States? Would the Framework Decision insofar retain its legal character of a Framework Decision (with the consequence that direct effect would be impossible) – whereas the Framework Decision acquires the nature of a directive in relation to the participating states? I can only point to the problems arising out of this very complex legal situation.

III. Interpretation in conformity with EU law

Finally, one short remark on the importance of the Framework Decision, whether amended or not, for the interpretation of national criminal law. In relation to directives, it is well established that there is an obligation under European law to interpret national law in the light of the directive.¹⁷ But the same is true in principle for Framework Decisions – according to the Pupino¹⁸ jurisprudence to the court. The criticism raised against this jurisprudence referred to the special situation of the third pillar at that time and – due to the new Treaty situation – is no longer relevant.¹⁹ As a consequence, a Framework Decision is always to be taken into account when interpreting national law, regardless of whether the Framework

¹⁶ See *Weber*, EuR 2008, p. 95.

¹⁷ *Schroeder* in Streinz, EUV/AEUV, 2nd Ed., Art. 288 AEUV paras. 125 *et seq.*

¹⁸ CJEU, Case C-105/03 “Pupino”, ECR 2005, I-5285.

¹⁹ *Satzger*, International and European Criminal Law, § 7 para. 109.

Decision remains a Framework Decision in nature or acquires – fully or in part – the character of a directive.²⁰

IV. Conclusion

Even after the 30th November 2014, framework decisions still have a certain importance in EU law. Nevertheless, the idea of Lisbonising the law created by framework decisions must be the aim of the EU institutions. It offers the opportunity to critically evaluate the legislation so far, correct incoherent law and in general to base its new law on principles as has also been stressed by the Commission and the European Parliament; such principles have e.g. been elaborated by the European Criminal Policy Initiative in its two Manifestos, the one on European substantive criminal law²¹, the other on European criminal procedure law²².

²⁰ *Lenaerts*, ICLQ 2010, p. 271.

²¹ ZIS 2009, p. 697-747, updated in EuCLR 2011, p. 86-103; available at <http://www.crimpol.eu>.

²² ZIS 2013, p. 412-446; available at <http://www.crimpol.eu>.