

VU Research Portal

Implementing Framework Decisions

Borgers, M.J.

published in

Common Market Law Review
2007

document version

Publisher's PDF, also known as Version of record

[Link to publication in VU Research Portal](#)

citation for published version (APA)

Borgers, M. J. (2007). Implementing Framework Decisions. *Common Market Law Review*, 44(5), 1361-1386.

General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal

Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

E-mail address:

vuresearchportal.ub@vu.nl

IMPLEMENTING FRAMEWORK DECISIONS

MATTHIAS J. BORGERS*

1. Introduction

Within the European Union, framework decisions have been developing at a steady pace since the year 2000. Obligations ensue from these framework decisions for the Member States to adjust their own national laws and regulations, if necessary, in the manner prescribed by the framework decisions. The obligation to make the necessary adjustments to national regulations is enshrined in Article 34(2)(b) of the TEU. It stipulates that framework decisions are binding on the Member States as to the result to be achieved, but leaves it up to the Member States to choose the form and methods to achieve that result. The TEU does not give any other rules on implementing framework decisions.

When it comes to implementation, framework decisions show similarities to directives. According to Article 249(3) EC, directives are also binding as to the result to be achieved, and the choice of the form and methods of implementation is left to the Member States. In case law of the European Court of Justice, relatively detailed rules have been developed on implementing directives. That case law defines the freedom of choice that Article 249(3) EC allows the Member States in more detail. This paper centres on the question whether norms (or principles) – similar or otherwise to the rules developed for directives – can also be designated which the Member States must observe in implementing framework decisions.

The search for the existence and content of norms for the implementation of framework decisions follows two lines. First of all, the meaning of Article 34(2)(b) TEU can be worked out in more detail on the basis of a comparison with the Treaty definition of the directive as legal instrument. In section 2, a schematic overview is given of the case law of the Court of Justice on implementing directives, after which in section 3, the Treaty definitions of framework decisions and directives are compared and analysed. The second line of research concerns the evaluation practice that has developed in relation to framework decisions, in which the Commission and Council take positions

* Professor of criminal law and criminal procedure, Law Faculty, VU University Amsterdam.

on the way in which Member States transpose framework decisions. This practice is mapped out in section 4 on the basis of examples, in order to bring to light the rules (implicitly) applied. Finally, in section 5, the findings on the European norms for implementing framework decisions are summarized. The main framework decisions and reports by the Commission on measures taken to comply with them are listed in an Annexe.

2. Rules for implementing directives

The freedom allowed the Member States on the basis of Article 249(3) EC in the choice of form and methods for the transposition of directives is connected with respect (to a certain extent) for the sovereignty and position of the national legislatures; at the same time, it makes it possible for Member States to take account of specific national matters – legal or otherwise – in implementing the directives. Viewed in this light, one could say that it does not matter *how* Member States achieve the intended result, *as long as* they achieve it. The Court of Justice has nevertheless developed fairly detailed rules on the way in which directives have to be implemented.¹ According to established case law:

“... the existence of general principles of constitutional or administrative law may render implementation by specific legislation superfluous, provided however that those principles guarantee that the national authorities will in fact apply the directive fully and that, where the directive is intended to create rights for individuals, the legal position arising from those principles is sufficiently precise and clear and the persons concerned are made fully aware of their rights and, where appropriate, afforded the possibility of relying on them before the national courts.”²

In the case of obligations regarding individuals stemming from a directive, the legal position under national law must also be sufficiently precise and clear for individuals concerned to know their obligations.³

Two main rules can be deduced from the case law of the Court of Justice: *a)* directives must be transposed into national law *in a timely manner*, and *b)* the form and methods chosen to do so must be *effective*, in other words: the

1. See Prechal, *Directives in EC Law*, 2nd ed. (Oxford University Press, 2005), pp. 74–91.

2. Case C-29/84, *Commission v. Germany*, [1985] ECR 1661, para 23. See also Case C-365/93, *Commission v. Greece*, [1995] ECR I-499, para 9; Case C-144/99, *Commission v. Netherlands*, [2001], ECR I-3541, para 17; Case C-455/00, *Commission v. Italy*, [2002] ECR I-9231, para 23; Case C-70/03, *Commission v. Spain* [2004] ECR I-7999, para 15.

3. See e.g. Case C-366/89, *Commission v. Italy*, [1993] ECR I-4201, para 17.

result intended by the directive must be achieved. The Court of Justice does not allow the Member States complete freedom in choosing the form and methods. Member States are expected to transpose the provisions of the directive into *binding* national provisions. Consequently, achieving the intended result but without drafting binding provisions is not sufficient. The full application of directives must be guaranteed “in law and not only in fact” and Member States must therefore establish a specific legal framework.⁴ Implementation of a directive on the basis of administrative practices, circulars and policy rules is rejected by the Court of Justice.⁵ The underlying idea is not only that it is easy for administrative practices, circulars and policy rules to change, but also that a sufficiently specific and clear legal position of the individuals concerned requires the drafting of rules that can be known and enforced.⁶ This leaves little margin for the type of rules into which provisions of directives are transposed. For the sake of completeness, it should be mentioned that transposition of provisions of directives into binding national rules does not in itself suffice as full application of those directives: such application must be guaranteed *in law and in fact*. The binding national rules must be enforced in actual practice.⁷

Besides the binding force of the rules, an additional requirement is that these rules are to be formulated *specifically, precisely and clearly*.⁸ This guarantees that the rights and obligations ensuing from a directive can be known and enforced. In this context, the question arises as to what margin is left in transposing terms from directives into national law. Is there a strong preference for literally taking over the terms of the directives or can they be translated into customary terms and concepts of national law? A relevant ruling of the Court of Justice in this regard states that:

4. Case C-339/87, *Commission v. Netherlands*, [1990] ECR I-851, para 25. See also Case C-340/96, *Commission v. United Kingdom*, [1999] ECR I-2023, para 27; Case C-429/01, *Commission v. France*, [2003] ECR I-14355, para 40; Case C-410/03, *Commission v. Italy*, [2005], ECR I-3507, para 32.

5. Cf. Case C-131/88, *Commission v. Germany*, [1991] ECR 825, para 8; Case C-394/00, *Commission v. Ireland*, [2002] ECR I-581, para 11; Case C-259/01, *Commission v. France*, [2002] ECR I-11093, para 19; Case C-146/04, *Commission v. Netherlands*, judgement of 14 April 2005, nyr, para 6.

6. Cf. Prechal, op. cit. *supra* note 1, pp. 83–84.

7. Cf. Case 14/83, *Von Colson & Kamann*, [1984] ECR 1891, para 18, 23, 28; Case C-68/88, *Commission v. Greece*, [1989] ECR 2965, para 24; Case C-382/92, *Commission v. United Kingdom* [1994] ECR I-2435, para 55; Case C-40/04, *Yonemoto*, [2005] ECR I-7755, para 59. See also Prechal, op. cit. *supra* note 1, p. 54: “There has been a discernible shift in attention towards situations concerning the non-application of the directive which has, as such, been correctly transposed.”

8. Prechal, op. cit. *supra* note 1, p. 75.

“... the transposition of a directive into domestic law does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation; a general legal context may, depending on the content of the directive, be adequate for the purpose provided that it does indeed guarantee the full application of the directive in a sufficiently clear and precise manner ...”⁹

Satisfaction with a “general legal context” allows the Member States a certain margin, but, on closer analysis, this margin is not very wide. Member States must, as stated above, choose binding provisions which are not only sufficiently knowable and enforceable, but are also formulated specifically, precisely and clearly. The wording of those provisions may not have to be the verbatim terminology used in the directive, but the content may not be different. It also depends on the nature of the subject-matter regulated in a directive and the discretion left to the Member States in this regard whether and to what extent different terminology can achieve the same substantive result.¹⁰ It is, for that matter, conceivable that the implementation of a directive in a Member State will not require new legislation, because the existing legislation already guarantees the result intended by the directive to a sufficient extent.¹¹

This brief discussion makes it clear that the Court of Justice sets fairly stringent requirements for the binding force of transposition provisions. The Member States are allowed somewhat more freedom in formulating those provisions. The determining factor is then whether the actual norm is formulated so specifically, precisely and clearly that the result intended by the directive is adequately guaranteed. Although this does exert a certain amount of pressure to take over the text of a directive fairly literally, this is not always necessary.

3. Article 34(2)(b) TEU

3.1. *An initial comparison with Article 249(3) EC*

The text of Article 34(2)(b) TEU is closely in line with the description of the First Pillar legal instrument of the directive in Article 249(3) EC. In both provisions, the binding force in relation to the result to be achieved and the

9. Case C-363/85, *Commission v. Italy*, [1987] ECR 1733, para 7.

10. Cf. Case C-363/85, *Commission v. Italy*, [1987] ECR 1733; Case C-247/85, *Commission v. Belgium*, [1987] ECR 3029; Case C-233/00, *Commission v. France*, [2003] ECR I-6625.

11. See for example Case C-363/85, *Commission v. Italy*, [1987] ECR 1733.

right to choose the form and methods is stated. At the same time, it must be concluded that Article 34(2)(b) TEU has an addition lacking in Article 249(3) EC: “They [framework decisions; MJB] shall not entail direct effect.” The precise meaning of this addition, certainly after the judgment of the Court of Justice in the *Pupino* case,¹² is rather controversial. It is helpful to explore the similarity of Article 34(2)(b) to Article 249(3) EC and the differences between those provisions, in order to consider on that basis the extent to which the implementation rules developed by the Court of Justice for directives could be applied to framework decisions as well.

3.2. Similarity to Article 249(3) EC

The similarity between Article 34(2)(b) TEU and Article 249(3) EC has already been mentioned. It should be added that, in one respect, the text of Article 34(2)(b) TEU is (or appears to be) formulated more sharply than that of Article 249(3) EC. Framework decisions, according to the text of the TEU, are also for the purpose of approximating the *laws and regulations* of the Member States. It seems to follow from this that the result intended by a framework decision should be achieved by laying down rights and obligations in the form of written rules. This implies a codification requirement, regarding which Article 34(2)(b) TEU still allows the Member States the freedom to determine content by accepting “regulations” in addition to “laws” – in other language versions, “dispositions législatives et réglementaires” and “Rechts- und Verwaltungsvorschriften” are mentioned – as appropriate transposition instruments.

A reference to (the approximation of) laws and regulations is missing in Article 249 EC, but this is referred to explicitly in other EC rules in relation to the drafting of directives.¹³ Moreover, as was evident from section 2 above, the requirement follows from the case law of the Court of Justice that provisions of the directive must be transposed into binding national rules. In view of this case law, and based on the *text* of Article 34(2)(b) TEU, directives and framework decisions have important similarities as legal instruments.¹⁴ In a more general sense, this connection between Article 34(2)(b) TEU and Article 249(3) EC is expressed in the *Pupino* judgment of the Court of Justice. The point of departure of the Court’s reasoning, which leads to the assumption of an obligation for the national court to interpret as far as possible in

12. Case C-105/03, *Pupino*, [2005] ECR I-5285.

13. Art. 46(2), 47(2), 94 and 95(2) EC.

14. Cf. Ligeti, *Strafrecht und strafrechtliche Zusammenarbeit in der Europäischen Union* (Duncker & Humblot, 2005), p. 263.

the light of the wording and purpose of framework decisions, starts with the conclusion that the formulation of Article 34(2)(b) TEU is very closely in line with that of Article 249(3) EC.¹⁵

3.3. *Differences with Article 249(3) EC*

In Article 34(2)(b) TEU, the direct effect of framework decisions is explicitly excluded. The relevant phrase seems primarily intended to exclude the case law of the Court of Justice on the direct effect of directives – in other words: the direct effect of rules of a directive in the national legal order in case that directive is transposed incorrectly, late or not at all.¹⁶ The exclusion of direct effect is often considered in the literature as an emphasis on the essentially intergovernmental nature of cooperation in the Third Pillar. In consequence, the Third Pillar has its own legal order which is less far-reaching and radical than the Community legal order of the First Pillar. It may well be acknowledged that the Third Pillar has a few, mostly weakened, Community characteristics,¹⁷ but there is no question of a Community legal order as such.¹⁸

15. *Pupino*, *supra* note 12, para 33.

16. Monjal, “Le droit dérivé de l’Union européenne en quête d’identité”, (2001) RTDE, 357–358; Baddehausen and Pietsch, “Rahmenbeschlüsse der Europäischen Union – Nach den Entscheidungen zum Europäischen Haftbefehlsgesetz (BVerfG) und in der Rechtssache *Pupino* (EuGH)”, (2005) *Deutsches Verwaltungsblatt*, 1565; Hillgruber, “Unionsrecht und nationales recht – der Fall *Pupino*”, (2005) JZ, 842; Lenaerts and Van Nuffel, *Constitutional Law of the European Union*, (Sweet & Maxwell, 2005), pp. 806–807; Tinkl, “Anmerkung zum Urteil des EuGH vom 16.6.2005 – C-105/03 (*Pupino*)”, (2006) *Strafverteidiger*, 37. See also *Bundesverfassungsgericht* 18 July 2005, nr. 2 BvR 2236/04, (2005) NJW, 2289–2303, para 80.

17. Cf. Fetzer and Groß, “Die *Pupino*-Entscheidung des EuGH – Abkehr vom intergouvernementalen Charakter der EU?”, (2005) *EuZW*, 550; Hecker, *Europäisches Strafrecht*, (Springer, 2005), pp. 158–159; Opinion of A.G. Kokott in *Pupino*, *supra* note 12, para 31.

18. Denza, *The intergovernmental pillars of the European Union*, (Oxford University Press, 2002), pp. 1–4, 18–20, 287; Jour-Schröder and Wasmeier, in: Von der Groeben & Schwarze, *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft*, Band I, (Nomos, 2003), pp. 273–274; Satzger, in: Streinz (ed.), *EUV/EGV*, (C.H. Beck, 2003), p. 140; Geiger, *EUV/EGV*, (C.H. Beck, 2004), p. 105; Adam, “Die Wirkung von EU-Rahmenbeschlüssen im mitgliedstaatlichen Recht”, (2005) *EuZW*, 558–560; Oppermann, *Europarecht*, (C.H. Beck, 2005), pp. 139, 186–187; Fetzer and Groß, *op. cit. supra* note 17, at 550; Herrmann, “Gemeinschaftsrechtskonforme Auslegung nationalen Rechts in Strafverfahren”, (2005) *EuZW*, 437; Hillgruber, *op. cit. supra* note 16, at 841; Ligeti, *op. cit. supra* note 14, pp. 59, 63, 261–262; Gärditz and Gusy, “Zur Wirkung europäischer Rahmenbeschlüsse im innerstaatlichen Recht. Zugleich Besprechung von EuGH, Urteil vom 16.6.2005”, (2006) *Goltdammer’s Archiv für Strafrecht*, 225–226; Haratsch/Koenig/Pechstein, *Europarecht*, (Mohr Siebeck, 2006), pp. 511–512; Tinkl, *op. cit. supra* note 16, at 37; Von Unger, “*Pupino*: Der EuGH vergemeinschaftet das intergouvernementale Recht”, (2006) *Neue Zeitschrift für Verwaltungsrecht*, 47. On the intention of the authors of the Treaty on European

Within the legal order of the Third Pillar, the sovereignty of the Member States in the area of criminal law is expressly first and foremost. It is also evident from this that within the Third Pillar, unanimity is always required for the adoption of framework decisions, and not qualified majority. Admittedly, unanimous decision making occurs in the First Pillar as well. However, the procedure of Article 251 EC, where a qualified majority suffices, is the most important procedure for the adoption of directives.

The exclusion of direct effect in Article 34(2)(b) TEU has not prevented the Court of Justice from accepting in the *Pupino* judgment the obligation of consistent interpretation for framework decisions. In this way, the Court of Justice extends the obligation developed in Community law for the (judicial) bodies of Member States to interpret in accordance with directives to the legal instrument of the framework decision. This is a remarkable decision for at least one reason. In Community law, the obligation to interpret in accordance with directives is closely connected with the direct effect of directives. Interpretation in accordance with directives is considered as an *indirect* form of the effect of Community law, while direct effect is its direct form. The connection between interpretation in accordance with directives and direct effect is evident from the Community principles, namely: the obligation under Article 249 EC to produce a result, the principle of Community loyalty in Article 10 EC, and the guarantee of useful effect, which together can be traced back to (safeguarding) the Community legal order.¹⁹ The direct effect of framework decisions is ruled out, thus the question arises whether the consequence of this must be that the indirect effect of framework decisions – in the form of the obligation to interpret in the light of framework decisions – must also be covered by the exclusion of direct effect in Article 34(2)(b) TEU.²⁰ In other words, what is the legal basis *in EU law* for the obligation to interpret in conformity with framework decisions? It is true that some national legal orders recognize an obligation to interpret national law in conformity with international public law, but the key question is whether EU law itself – and

Union in relation to the legal order of the Third Pillar, see also extensively Peers, “Salvation Outside the Church: Judicial Protection in the Third Pillar after the *Pupino* and *Segi* Judgments”, 44 CML Rev. (2007) 919–921.

19. See Fletcher, “Extending ‘indirect effect’ to the third pillar: the significance of *Pupino*?”, (2005) EL Rev., 862; Prechal, op. cit. *supra* note 1, pp. 180, 219.

20. Confirming: Fetzner and Groß, op. cit. *supra* note 17, at 550–551; Fletcher, op. cit. *supra* note 19, at 872; Hillgruber, op. cit. *supra* note 16, at 842; Tinkl, op. cit. *supra* note 16, at 39; Von Unger, op. cit. *supra* note 18, at 48. Denying: Lenaerts and Van Nuffel, op. cit. *supra* note 16, p. 712; Adam, op. cit. *supra* note 18, at 561; Herrmann, op. cit. *supra* note 18, at 437; Killmann, “Die rahmenbeschlusskonforme Auslegung im Strafrecht vor dem EuGH”, (2005) *Juristische Blätter*, 569; Lenaerts and Corthout, “Of birds and hedges: the role of primacy in invoking norms of EU law”, (2006) EL Rev., 288–290.

more particularly Article 34(2)(b) TEU – provides a (sufficient) legal basis for such an obligation. It is clear that the Court of Justice is of the view that the exclusion of direct effect in Article 34(2)(b) TEU does not pose an obstacle to requiring the indirect effect of framework decisions. It is nevertheless remarkable that the Court of Justice does not devote any attention at all to the exclusion of direct effect in Article 34(2)(b) TEU. This raises the following question, namely the extent to which the Court of Justice has brought about the “communitarization” of the Third Pillar in the *Pupino* judgment.

Interpreting the implications of the *Pupino* judgment is no simple matter. Interpretations are possible in which the obligation to interpret in accordance with framework decisions is separated from the explicit exclusion of the direct effect of framework decisions.²¹ But it is also possible – we suffice here with the mere observation – to put forth all kinds of plausible arguments against the Court of Justice’s ruling and especially the grounds for that ruling, of which we have already noted the nature of the legal order of the Third Pillar and the apparent intention of the drafters of the TEU regarding the exclusion of direct effect in Article 34(2)(b) TEU. A point on which proponents and opponents of acceptance of the obligation of consistent interpretation with framework decisions agree is, at any rate, that in the *Pupino* judgment, the Court of Justice emphasized – or wanted to emphasize – precisely the connection between directives and framework decisions as legal instruments, and in doing so paralleled the integration of the First and Third Pillar according to the Community model in the Constitution for Europe.²² For the rest, it is nonetheless true that there is no evidence in the *Pupino* judgment that the Court of Justice now considers the “ordinary” direct effect of framework decisions possible, in the sense that framework decisions could directly – outside the frameworks of national legislation – entail rights and obligations for citizens. This difference between framework decisions and directives has not (yet) disappeared.

21. Adam, op. cit. *supra* note 18, at 561; Egger, “Die Bindung der Mitgliedstaaten an die Grundrechte in der III. Säule”, (2005) EuZW, 653–654; Haratsch, Koenig and Pechstein, op. cit. *supra* note 18, p. 511; Fetzer and Groß, op. cit. *supra* note 17, at 551; Herrmann, op. cit. *supra* note 18, at 437; Lenaerts and Corthaut, op. cit. *supra* note 20, at 293; Fletcher, op. cit. *supra* note 19, at 873, 875–876; Killmann, op. cit. *supra* note 20, at 571; Peers, op. cit. *supra* note 18, at 913–924. On the issue of supremacy of Third Pillar law without direct effect, cf. also Dougan, “When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Supremacy”, 44 CML Rev., (2007) 931–963.

22. Chalmers, “The Court of Justice and the Third Pillar”, (2005) EL Rev., 773–774. See also Fletcher, op. cit. *supra* note 19, at 869–870, 877; Hillgruber, op. cit. *supra* note 16, at 844; Tinkl, op. cit. *supra* note 16, at 40; Von Unger, op. cit. *supra* note 18, at 48. Since the EU summit of 21 June 2007, it would seem that the Constitution as such is abandoned, but the integration of First and Third Pillars is still aimed at by other means. See Presidency Conclusions, Council Document 11177/07.

Even if the judgment of the Court of Justice in *Pupino* is accepted without criticism, the last word has not yet been said about the connection between the legal instrument of the directive and that of the framework decision and, in a broader sense, the position of criminal law within European law. The sovereignty of the Member States on this issue must be viewed in the light of other observations as well, including the monitoring mechanisms in relation to the transposition and enforcement of directives and framework decisions.

In the First Pillar, the Commission monitors the application of the provisions of the EC Treaty and the provisions laid down pursuant to this Treaty. This general task includes monitoring the implementation of directives. If the Commission discovers that a Member State has not adequately implemented a directive, and this Member State fails to follow the Commission's advice in that regard, the Commission can bring a so-called infringement action on the basis of Article 226 EC. Other Member States also have that right (Art. 227 EC), although practice shows that an infringement action is almost always initiated by the Commission. If the Court of Justice finds that a Member State has failed to fulfil obligations resting upon it, and that State subsequently does not comply adequately with the judgment, the Court of Justice may impose the payment of a lump sum or incremental penalty on the basis of Article 228 EC.

The TEU does not provide for a similar monitoring mechanism. There is no specific task set for the Commission at the level of monitoring the implementation of framework decisions. In more general wording, Article 36(2) TEU "only" expresses that the Commission shall be fully involved in the work in the area of police and judicial cooperation. The Commission does not have the right to initiate an infringement action. Monitoring is actually assigned primarily to the Member States together. This follows from Article 35(7) TEU, which relates to "... any dispute between Member States regarding the interpretation or the application of acts adopted under Article 34(2) ...". It is self-evident that a dispute over the way in which a framework decision is applied by the Member States affects the implementation of that framework decision. Insofar as the dispute cannot be settled amicably by the Council, the Court of Justice is authorized to pass judgment. How the judgment of the Court of Justice is supposed to be dealt with subsequently is not worked out in the TEU.

The difference in design of the monitoring mechanisms in the EC and the TEU can be viewed in the light of the legal order enshrined in the two treaties: the Community legal order or intergovernmental cooperation (with some Community elements). It is clear that differences of opinion on implementation in the First Pillar can be brought before the Court of Justice much more easily – especially because the Commission operates independently from the

Member States – than in the Third Pillar. This can be considered as confirmation that the sovereignty of the Member States carries more weight in the Third Pillar than in the First Pillar.

The vitality of the view that the framework decision is a legal instrument having a less drastic effect on the national legal order than the directive seems to be expressed in a certain sense in the debate within the Council on the (possible) consequences of the judgment of the Court of Justice on the Framework Decision on the protection of the environment through criminal law.²³ In this judgment – against the will of a large number of Member States – the authority of the EC in the area of criminal law was accepted.²⁴ This judgment was received enthusiastically by the Commission and the European Parliament.²⁵ The responses from the Member States to this judgment in the Council nevertheless make it clear that Community action in the area of criminal law must be carried out with restraint.²⁶ According to the Member States, although acceptance of the authority of the EC in the area of criminal law entails that the sovereignty of Member States in relation to criminal law has lost some of its importance, this does not stand in the way of such restraint. That is why, if it is up to the Member States, the application of criminal law in the Community legal order will be relatively exceptional.

3.4. *Meaning of similarities and differences*

What implications do the similarities and differences between directives and framework decisions outlined above have for the question whether or not the implementation of these legal instruments is – more or less – governed by the same principles? It seems that the answer to this question is dictated mainly by what one wishes to place in the foreground. The similarities can be used to argue that implementation must be governed by the same norms, so that it is logical to consider the criteria developed for directives applicable by analogy to framework decisions. The *Pupino* case can then be explained in such a way that a restrictive interpretation must be given to the exclusion of direct effect in Article 34(2)(b) TEU: it is “only” about excluding case law on the direct

23. Council Framework Decision 2003/80/JHA of 27 Jan. 2003 on the protection of the environment through criminal law, O.J. 2003, L 29/55.

24. Case C-176/03, *Commission v. Council*, [2005] ECR 2005, I-7879.

25. Communication from the Commission on the implications of the Court's judgment of 13 September 2005 (Case C-176/03 *Commission v. Council*), COM(2005)583 final; European Parliament resolution on the consequences of the judgment of the Court of 13 September 2005 (C-176/03 *Commission v Council*), Document A6-0172/2006.

26. Cf. Council Document 6466/06.

effect of directives, and nothing but that.²⁷ In this context, however, it should be noted that the drafting history of that article does not show that in formulating Article 34(2)(b) the Member States actually intended to incorporate the norms relating to the implementation of directives.

If one looks at the differences between Article 34(2)(b) TEU and Article 249(3) EC in relation to the norms for the implementation of framework decisions and directives, the question at least arises whether, because of the stronger position of the Member States within the Third Pillar, the Member States may or must be allowed more freedom of implementation in comparison with the First Pillar. This question can be answered in two ways. On the one hand, one could say that the stronger position of the Member States is expressed mainly in the requirement that framework decisions may only be adopted unanimously, and that the effect of those framework decisions must be achieved first and foremost through the actions of national legislatures. Once a framework decision has been adopted, one could say that there would be no objection to stringent implementation norms. It is nevertheless striking that not the Commission but the Member States play the leading role in monitoring compliance with the norms. In view of this, it can also be argued that as the Third Pillar relates to criminal law and cooperation in criminal matters, and the Member States want to maintain sovereignty (as far as possible) precisely in the area of criminal law, the Member States must therefore be given sufficient room in implementing framework decisions – and are actually given such room, in view of the absence of an infringement action according to the EC model – to achieve the result intended by the framework decision as they see fit in their own criminal law. In this view, a link should not automatically be sought with the strict norms developed for the implementation of directives.

All in all, a comparison of the definitions of the framework decision and the directive in the TEU and EC, respectively, does not result in an unequivocal conclusion regarding the question which norms apply to the implementation of framework decisions. It is therefore meaningful to take a look at evaluation practice to see whether consensus has been reached on such norms in that practice.

27. Cf. Peers, *op. cit. supra* note 18, at 915.

4. Assessment of the transposition of framework decisions by the Commission and Council

4.1. Background of the evaluation procedure

In the last few years, a practice has developed in which reports are made on the way in which Member States implement framework decisions in their national legal order.²⁸ The basis for this practice is not the TEU, but the provisions included in the individual framework decisions. According to these provisions, the Member States must notify the Council and the Commission after the end of the implementation period of the texts of the provisions by which the relevant framework decision has been transposed.²⁹ The Council's task is to check the extent to which the Member States have taken the measures necessary to comply with the framework decision. That assessment must be made on the basis of, for example, a written report by the Commission. This report is evidence of the substantial role the Commission plays in the evaluation procedure. The Commission itself places this role in the context of Article 36 TEU, on the basis of which the Commission is fully involved in the activities relating to judicial and police cooperation.³⁰ In some framework decisions, besides the general point of interest in a timely and correct transposition, specific instructions are given in relation to evaluation. These concern the indication of special points for attention in the evaluation,³¹ or the instruction (to the Commission) to make legislative proposals where necessary.³²

It follows from the provisions of the framework decisions on evaluation that the objective of the procedure for that purpose is to check the extent to which the Member States have transposed the content of the framework decision promptly and correctly into national law. In that context, the Member States must submit the texts of the provisions transposing the relevant frame-

28. A list of these reports, with sources, is included in the annex. Below (in the footnotes) reference is made only to the source of these reports. The annex also contains the full title as well as the sources of the framework decisions to which these reports relate. These framework decisions are cited briefly below.

29. See e.g. Art. 11(2) Framework Decision 2003/383/JHA; Art. 18 Framework Decision 2001/220/JHA.

30. E.g. COM(2004)346 final, p. 6.

31. See e.g. Art. 11 Framework Decision 2002/475/JHA; Art. 9(2) Council Framework Decision 2004/757/JHA of 25 Oct. 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, O.J. 2004, L 335/8; Art. 20(7) Council Framework Decision 2005/214/JHA of 24 Feb. 2005 on the application of the principle of mutual recognition to financial penalties, O.J. 2005, L 76/16.

32. Art. 34 Framework Decision 2002/584/JHA.

work decision. This implies that the evaluation concerns strict implementation – transposition into the provisions of laws and regulations – rather than (also) the functioning of the framework decision in legal practice. The provision of information by the Member States enables the Council to assess the transposition. Partly because of this, the Member States can call one another to account for the interpretation and application of framework decisions, and differences of opinion can be discussed in the Council and possibly be brought before the Court of Justice on the basis of Article 35(7) TEU. The Commission does not play a part in this procedure, as noted in section 3.3, above.³³ For the sake of completeness, it should be pointed out that the European Parliament has no – formal – task in the evaluation procedure. Nevertheless, the European Parliament has its own possibilities to make known its position on the way in which the implementation of a framework decision is taking place. For instance, based on the evaluation of the Framework Decision on the European Arrest Warrant, the European Parliament adopted a recommendation on its own initiative.³⁴

4.2. *Procedural course of affairs*

The Commission takes the lead in the evaluation procedure. The conclusion can be drawn from its reports that it makes great efforts to have the necessary information from the Member States at its disposal. Such information is often delivered late – after the period set in the relevant framework decision has expired – and sometimes not at all. The Commission also criticizes the inadequate quality and punctuality of the information delivered.³⁵ In consequence, as the Commission states, the evaluation must be carried out on the basis of a superficial and incomplete picture of the transposition provisions of the various Member States.³⁶ The Commission tries to avoid this consequence to the extent that it also searches independently for additional information, for example by incorporating the answers on questionnaires distributed (in a different context) among the Member States.

33. However, the Commission Report can help to establish a solid factual basis for this procedure. Cf. COM(2006)770 final, p. 4.

34. European Parliament recommendation to the Council with a proposal for a European Parliament recommendation to the Council on evaluation of the European arrest warrant, P6_TA(2006)0083.

35. COM(2001)771 final, pp. 10, 17; COM(2003)532 final, p. 6; COM(2004)54 final, p. 2; COM(2004)230 final, pp. 3, 22, 23; COM(2004)346 final, pp. 3, 19; COM(2004)409 final, p. 3; COM(2005)63 final, p. 2; COM(2005)858 final, p. 4; COM(2006)8 final, p. 2; COM(2006)65 final, p. 7; COM(2006)72, pp. 2, 6; COM(2006)187 final, p. 3; COM(2006)770 final, pp. 3, 6, 8.

36. See e.g. COM(2001)771 final, p. 4.

After the Commission has drafted an evaluation report, an assessment by the Council follows of the extent to which the Member States have taken the necessary measures to comply with the framework decision. The relevant Council documents have essentially the same structure: the findings of the Commission are summarized and the Member States requested to provide additional information where necessary. To date, the decision has been taken as a standard to have the Commission make a supplementary report on the basis of the (additional) information.³⁷ The Commission's objection that the provision of information by the Member States is inadequate is recognized to the extent that the importance of good provision of information is emphasized in some Council documents, especially concerning the implementation of general provisions or use of general definitions, terms and concepts in national legislation.³⁸ The Commission has meanwhile published a second, supplementary report in relation to several framework decisions.

All in all, the Council documents relating to the assessment of the implementation of framework decisions by the Council are not very informative, partly because hardly any substantive debates seem to be held within the Council on those documents.³⁹ One Council document is an exception. This concerns the document in which the (individual) responses of the Member States are given to the report by the Commission on the implementation of the Framework Decision on the European Arrest Warrant. Regarding the procedural course of affairs, two interesting points of view can be derived from these responses. For instance, first of all, a number of Member States expressed the wish for an opportunity to respond to the draft findings of the Commission before the report is published.⁴⁰ The possibility now exists only after the Commission has adopted its (initial) report. It is apparently experienced as annoying that omissions in reports by the Commission cannot be pointed out and remedied prior to publication, perhaps because those reports contain positive and especially negative evaluations of the transposition by the different Member States and therefore have a certain pillory effect. In addition, the objection is expressed that the Commission consults sources independently to obtain information on the way in which the Member States have transposed framework decisions, without it being clear to the Member

37. Council Document 14603/3/01 REV 3, p. 5; Council Document 10371/2/04 REV 2, pp. 6–7; Council Document 14830/2/04 REV 2, pp. 11–12; Council Document 10369/2/04 REV 2, p. 8; Council Document 11685/2/04 REV 2, p. 9; Council Document 11678/2/04 REV 2, p. 11.

38. Council Document 14830/2/04 REV 2, p. 6; Council Document 11685/2/04 REV 2, p. 5; Council Document 11687/2/04 REV 2, p. 6.

39. Cf. Report on the implementation of the Hague programme for 2005, COM(2006) 333 final, p. 11.

40. Council Document 11528/05, pp. 35, 38, 83, 95, 99.

States when they make this information available that the information is used (partly) with a view to evaluation.⁴¹ This indicates a wish on the part of the Member States to monitor the evaluation process.

4.3. *Substantive assessment*

In the first report published by the Commission – the report on the implementation of the Framework Decision on protecting the euro against counterfeiting – the Commission reported extensively on the assessment framework which is supposed to apply to evaluation.⁴² Since then, that framework has been applied in a standard fashion by the Commission in evaluation reports.⁴³ In essence, the Commission equates the legal instrument of the framework decision with that of the directive. In doing so, the Commission points out that both legal instruments are binding with respect to the result to be achieved, but allow the Member States the right to choose the form and methods. The Commission acknowledges that framework decisions do not have direct effect, but does not attach any special consequences to that observation. In consequence, the evaluation criteria for framework decisions are equated with those for directives. More specifically, the Commission lists the following criteria:

1. form and methods of implementation of the result to be achieved must be chosen in a manner which ensures that the directive/framework decision functions effectively with account being taken of its aims;
2. each Member State is obliged to implement directives/framework decisions in a manner which satisfies the requirements of clarity and legal certainty and thus to transpose the provisions of the directive/framework decision into national provisions having binding force;
3. transposition need not necessarily require enactment in precisely the same words in an express legal provision; thus a general legal context (such as appropriate already existing measures) may be sufficient, as long as the full application of the directive/framework decision is assured in a sufficiently clear and precise manner;
4. directives/framework decisions must be implemented within the period prescribed therein.⁴⁴

41. Council Document 11528/05, p. 68.

42. COM(2001)771 final, pp. 4–7.

43. COM(2004)54 final, pp. 3–4; COM(2004)230 final, pp. 4–6; COM(2004)346 final, pp. 3–6; COM(2004)409 final, pp. 4–5; SEC(2005)267, pp. 3–4; SEC(2004)1725, pp. 5–6; SEC(2006)79, pp. 3–4; COM(2006)187 final, pp. 4–5; COM(2006)770 final, p. 4–5; SEC(2007)979, p. 3.

44. COM(2001)771 final, p. 5.

Not only from this list, but also from the way in which the Commission applies these criteria in the various reports, it is evident that the Commission seeks a very close connection with the case law of the Court of Justice on the implementation of directives. For instance, whether the Member States have chosen generally binding provisions in transposing framework decisions is strictly monitored. In addition, although no verbatim transposition of provisions from framework decisions is required, there is strict monitoring of whether those positions are expressed clearly and precisely in national law. In this way, the Commission reveals a preference for the most literal possible transposition. This will be explained on the basis of some examples.

The Commission rejects the implementation of framework decisions by way of non-binding rules, such as administrative practices, circulars and policy rules. The evaluation reports show several examples, of which the report on the Framework Decision on victim care is the most striking. This framework decision contains several provisions which the Member States predominantly put into effect by means of practical measures. These include the obligations for Member States to guarantee the safety, privacy and in a certain sense, also the welfare of victims (and their family members), which obligations are formulated in part as specific measures, such as the avoidance of unnecessary contact between victims and offenders in court buildings, to be achieved if necessary by providing separate waiting areas for victims.⁴⁵ The Commission observes that only Germany has transposed this requirement correctly. Other Member States did not notify any transposition provisions or stated that the provisions were incorporated only in practice. The Commission holds: “The problem is that *no national legislation* clearly provides for a victim’s right to avoid contact with the offender.”⁴⁶ The Commission also points out that, as far as the obligation is concerned for the Member States to cooperate in – concisely stated – fostering, developing and improving the protection of victims’ interests,⁴⁷ “no country forwarded legislation.”⁴⁸ The Commission makes similar remarks regarding the obligation under the Framework Decision on money laundering to treat the measures requested in mutual assistance requests with the same priority as similar measures in domestic proceedings.⁴⁹ The Commission notes that the Member States have not notified any specific transposition provisions.⁵⁰

45. Art. 8 Framework Decision 2001/220/JHA.

46. COM(2004)54 final, p. 14.

47. Art. 12 Framework Decision 2001/220/JHA.

48. COM(2004)54 final, p. 16.

49. Art. 4 Framework Decision 2001/500/JHA.

50. COM(2004)230 final, p. 20. See also COM(2006)72 final, p. 5.

The next example relates to the Framework Decision on joint investigation teams. Article 1(3) of this Framework Decision provides that the Member State in which the investigation team operates must, among other things, make the necessary organizational arrangements for it to do so. The Netherlands has transposed and worked out this framework decision in an instruction of the Public Prosecution Service and not in the rules of Articles 552qa-552qe of the Code of Criminal Procedure. The Commission therefore concluded that the obligation to make organizational arrangements in the legislation adopted by the Netherlands had not been dealt with.⁵¹ More examples of this kind can be found in the reports, in which the Commission states in unmistakable terms that provisions from framework decisions must be transposed into generally binding provisions.⁵²

In the evaluation reports, the Commission applies the criterion that the formulation of transposition provisions must be specific, precise, and clear, without verbatim transposition of framework decisions being required.⁵³ The Commission demonstrates that its assessments are stringent. There must be no doubt that the Member States comply with the obligations ensuing from a framework decision. The following example can be given as an illustration. On the basis of Article 3 of the Framework Decision on money laundering, the Member States may exclude the confiscation of property the value of which would be less than €4000. In Finnish legislation, this is expressed in the provision that confiscation need not be carried out if the proceeds or the value of the objects is “negligible”. In the Commission’s opinion, this is not evidence of a correct transposition of the provision of Article 3 of the Framework Decision on money laundering.⁵⁴ More generally speaking, it is striking that in its reports – including the accompanying staff working documents – the Commission goes through the provisions of a framework decision one by one, and checks the extent to which the Member States have transposed the relevant provision correctly. This may perhaps strengthen the tendency to test the transposition provisions rather literally against the framework decision. Only recently have the Commission’s reports stated explicitly that the connection between the transposition provisions must (also) be examined.⁵⁵ It appears from this that the accent has come to lie more on the question wheth-

51. COM(2005)858 final, p. 6.

52. See e.g. COM(2004)54 final, pp. 7, 10, 12, 20; SEC(2005)267, p. 4; SEC(2006)79, p. 4.

53. See e.g. SEC(2004) 1725, p. 29.

54. COM(2004)230 final, p. 16. See for other examples COM(2001)771 final, pp. 12–13; COM(2004)346 final, p. 13; COM(2006)65 final, p. 3; SEC(2004)688, p. 26.

55. SEC(2004)1725, p. 6; COM(2006)187 final, p. 5.

er the transposition provisions as a whole comply with the obligations under the relevant framework decision.

The foregoing shows that the Commission's evaluation reports on the implementation of framework decisions are actually limited to a – strict – monitoring of the *transposition* of provisions from framework decisions into national legislation. In this context, the “result” to be achieved, as stated in Article (34)(2)(b) TEU, is determined first and foremost on the basis of the type of “methods” used by the Member States. Implementation in a broader sense (*compliance*) is not dealt with, for example by explicitly and thoroughly examining implementation practice in the Member States. This approach is, at any rate, in line with the fact that the framework decisions “only” require the Member States to submit *the texts of the provisions* by which the framework decisions are implemented. Reference could also be made to the text of Article 34(2)(b) TEU, from which it is evident that the aim of framework decisions is to approximate the “laws and regulations” of the Member States (see section 3.2 above). The Commission does not mention the latter argument.

At the same time, the examples given above were not chosen by chance. These examples show that the evaluation method used by the Commission mainly reviews the Member States' *compliance on paper*, and not the actual and practical achievement of the result intended by the framework decision. Without underestimating the importance that can generally be attached to written rules unequivocally laying down rights and obligations, one should not lose sight of the fact that it does not always make sense to codify every obligation ensuing from a framework decision;⁵⁶ on the other hand, there is little value in adopting statutory provisions without adequate implementation and enforcement practice.

In Council documents on the evaluation of the implementation of framework decisions, hardly anything is said about the Commission's evaluation method. This is remarkable, because there are indications that the Member States need a more flexible and less stringent evaluation framework. A simple but telling example can be derived from the responses of the Member States to the (first) report by the Commission on the transposition of the Framework Decision on the European Arrest Warrant. This Framework Decision abolishes the formal extradition procedure within the European Union and replaces it by a, more or less, informal, simple and swift procedure, based on the principle of mutual recognition. When a European arrest warrant is is-

56. See also Art. 4, 5, 10, 13, 14 and 15 Framework Decision 2001/220/JHA; Art. 11 and 12 Framework Decision 2001/413/JHA; Art. 10 (2) Framework Decision 2002/475/JHA; Art. 7 (3) Framework Decision 2002/629/JHA.

sued, the Member State on whose territory the person concerned is located, is in principle obliged to arrest and surrender this person to the issuing Member State. Article 30 of the Framework Decision prescribes that the costs made in executing a European arrest warrant on the territory of the executing Member State are to be paid by this Member State. The other costs are payable by the issuing Member State. Several of the eleven Member States criticized by the Commission for not (adequately) codifying this provision⁵⁷ responded rather sharply to this.⁵⁸ The tenor of these responses is that it does not make sense to lay down such a provision by law, because this provision must actually be complied with in an interstate context. It can be concluded as well that, in the opinion of the Member States, the Commission often makes errors in interpreting national provisions, and also that the Commission's assessment is not always considered as balanced.⁵⁹

4.4. *Interpretation of framework decisions in evaluation reports*

A potential function of the evaluation reports has not yet been dealt with above. The reports can function partly as a "discussion forum" for the interpretation of framework decisions. The evaluation procedure was not established with the (explicit) intention of creating such a forum, but anyone who studies the evaluation reports comes across interesting and sometimes singular interpretations by the Commission of provisions from framework decisions. These interpretations could often serve very well as starting points for debate over the meaning of provisions from framework decisions. Partly with a view to the Court of Justice's answers to preliminary questions, such a debate would contribute to the development of law in the EU. At the same time, it should be noted that this debate function is hardly used at all in Council documents.⁶⁰

To illustrate this, we mention several interpretation issues that come to the fore in the Commission's evaluation reports. Regarding the Framework Decision on combating terrorism, the question arises whether the penalization of "participating in the activities of a terrorist group" (Art. 2(b)) requires the

57. SEC(2005)267, p. 31; SEC(2006)79, p. 33. See also SEC(2007)979, p. 36.

58. Council Document 11528/05, pp. 66, 89, 101, 113.

59. Cf. the remark of the Dutch government in Council Document 11528/05, p. 67: "The evaluation in the staff working document lacks consistency. Conclusions at both the beginning and end of that document highlight the fact that national legislation conflicts with the FD [framework decisions; MJB] on a number of points. The central section does mention discrepancies but gives no evaluation of them. Nor does the document reflect a balanced assessment of the various Member States."

60. An exception is Council Document 11528/05.

penalization of participation as such, or whether it is sufficient to penalize terrorist acts in relation to a terrorist group. In the staff working document accompanying the Commission's evaluation report, the consequences of both interpretations are thoroughly discussed.⁶¹ One of the *optional* grounds for refusal contained in the Framework Decision on the European Arrest Warrant is that the judicial authorities of the executing Member State have decided either not to prosecute or to halt proceedings. The Commission points out that this ground for refusal must be applied as *mandatory* if prosecution has been halted because the suspect has fulfilled certain conditions, given the judgment of the Court of Justice in the *Gözütok and Brugge* cases.⁶²

Another example concerns the interpretation of Article 3 of the Framework Decision on combating trafficking in human beings, regarding the application of a maximum penalty that is not less than eight years. The Commission poses the question of how the aggravating circumstances referred to in this provision should be interpreted in relation to the different forms of trafficking in minor children in the light of the International Convention on the Rights of the Child. The Commission argues in this context that consideration of the victim as particularly vulnerable should not be limited to victims of sexual exploitation, even though only that form of trafficking in human beings is explicitly mentioned in Article 3(2)(b) of the Framework Decision on combating trafficking in human beings.⁶³

5. Findings

5.1. *European norms for the implementation of framework decisions?*

The views of the institutions emerging explicitly or implicitly from the evaluation procedures on the norms for the implementation of framework decisions can be linked fairly easily to the results of the comparison made in section 3 between Article 34(2)(b) TEU and Article 249(3) EC. The Commission proceeds on the basis of the similarity between these provisions, including the criteria developed by the Court of Justice for the implementation of directives, and in this way gives shape to the norms for implementing framework decisions. The Commission's approach basically amounts to the requirements that framework decisions must in principle be transposed as precisely as pos-

61. SEC(2004)688, pp. 14–15.

62. SEC(2005)267, p. 10, with reference to Cases C-187 & 385/01, *Gözütok and Brugge*, [2003] ECR I-1345.

63. COM(2006)187 final, p. 7.

sible into binding legislation. This approach can be supported by the fact that the framework decisions only require the Member States to submit the texts of the provisions by which the framework decision in question is transposed, and by the reference to laws and regulations in Article 34(2)(b) TEU. On the other hand, the Council claims – usually by way of individual Member States – a much broader margin in transposing framework decisions, amounting to the requirement that the intended result must be achieved without stringent requirements being set on the type of methods used to do so. For example, non-binding rules and existing practices should count as adequate methods for achieving the result. The Council apparently assumes that Article 34(2)(b) TEU, partly in view of the prominent role of the Member States' sovereignty in the area of criminal law, leaves sufficient room on this point and that, at any rate, the reference to “laws and regulations” in that provision does not imply that this must be in line with the stringent implementation norms for directives. Yet other arguments may play a part in the background. One could argue that the material governed by the framework decisions is less technically legal in nature, or is at least experienced as such, compared to the average directive. It is also important that framework decisions prescribe obligations of which it does not make sense to transpose them into binding regulations, because primarily practical measures have to be taken. Nor can it be ruled out that the Member States' dissatisfaction is partly aroused by the idea that the implementation criteria in the First Pillar have become too rigid in the course of the years.

Taking a look at the whole, it becomes clear that there is a lack of consensus regarding the (contents of) the prevailing principles for the implementation of framework decisions. It is true that the Commission's approach is based on valid arguments. At the same time, another approach to the evaluation procedure – more flexible and less stringent – can be advocated. The most important argument for a different approach is that the focus will shift from the use of certain methods to the achievement of the result, thus from a more procedural to a more substantive point of view. Such a change of focus would probably contribute to the achievement of the objectives of European framework decisions. While at the moment opinions differ on the need of a change in approach, the developments in the European Union could be seen as a guidance for the design of evaluation procedures in the near future.

5.2. *Where do we go from here?*

In view of the modest role the Court of Justice plays in the Third Pillar, particularly because of the lack of a fully-fledged infringement action, the debate over the norms for the implementation of framework decisions cannot be ex-

pected to be decided soon. At the same time, it should be borne in mind that, owing to the judgment of the Court of Justice on the Framework Decision on environmental criminal law,⁶⁴ criminal law is no longer exclusively a matter for the Third Pillar. Although the Member States have not shown any enthusiasm for the time being for the positioning of criminal law in the First Pillar, it is nevertheless a fact that, should criminal law issues increasingly become the subject of directives, the evaluation of those directives will be based on the criteria developed by the Court of Justice. This could be an argument for applying these criteria to framework decisions as well.

The future of the Third Pillar cannot be ignored either. It is clear that the Constitution for Europe is no longer likely to become effective as such, but that does not forestall the integration of the First and Third Pillar according to the Community model in the near future.⁶⁵ This would in fact mean (among other things) that the legal instrument of the framework decision would give way to the directive. With that, the evaluation and monitoring mechanism from the EC would relate to legal instruments in the field of judicial and police cooperation. The likely effect of this would be a shift in accent from evaluations to infringement actions, in which the strict criteria for the transposition of directives are applied. That scenario could come about mainly if the Member States do not choose at any time to develop the process of evaluation and assessment further and in that context give further shape to the norms for the implementation of framework decisions.

5.3. *Another manner of evaluation and assessment?*

If the choice is made to adjust and improve the procedure for evaluation and assessment of the implementation of framework decisions – or in more general terms: EU criminal law instruments –, the starting point could be that the *nature* of the provision in a framework decision would determine the manner in which evaluation takes place. A provision for the purpose of (minimum) harmonization of penal sanctions should be transposed into statutory provisions as a matter of course. In that context, the current approach in which special attention is devoted – on paper – to the transposition of provisions from framework decisions into statutory provisions can be used, although several practical improvements are possible. In that context, these could in-

64. Case C-176/03, *Commission v. Council*, [2005] ECR 2005, I-7879.

65. Besides the Presidency conclusions referred to in note 22 *supra*, one may also refer to the recent debate on the “bridge” provision of Art. 42 TEU. See COM(2006)211 final, p. 6. Cf. also Jour-Schröder and Konow, “Die Passerelle des Art. 42 EU-Vertrag – Macht sie die Regeln des Verfassungsentwurfs für einen europäischen Raum der Freiheit, der Sicherheit und des Rechts obsolet?”, (2006) *EuZW*, 550–555.

clude a more streamlined provision of information from the Member States to the Commission,⁶⁶ and giving them the opportunity to correct mistakes in draft reports by the Commission. The latter is especially important for facilitating a constructive tone of the evaluation procedure, so that the forum function of this procedure discussed in section 4.4 above better comes into its own.

On other parts, concerning the structure of implementation practice or more “intangible” provisions, such as those relating to sanctions, a manner of evaluation should be chosen in which implementation in a broad sense is examined – with attention for the practical functioning of the implementation legislation and the fulfilment of tasks by the responsible authorities. The evaluation method most indicated at present is perhaps *mutual* evaluation by Member States. Quite some experience has already been gained with this in the EU.⁶⁷ The central point in this regard is that a committee of experts consults as many relevant sources of information as possible and also visits the different Member States to exchange ideas on the spot with (among others) the responsible officials. Such mutual evaluation was recently set up in relation to the practical application of the European Arrest Warrant.⁶⁸ To this extent, the improvement advocated here has already become reality. It is advisable to make mutual evaluation, where meaningful, a systematic part of the standard evaluation procedure.⁶⁹

The adjustments and improvements advocated here in the procedure for evaluating and assessing the implementation of framework decisions is in line to a certain extent with recent proposals by the Commission in relation to the evaluation of EU policy on freedom, security and justice.⁷⁰ In these proposals, a distinction is made between, on the one hand, monitoring the implementation of European measures, including the transposition of framework decisions into national legislation and, on the other, evaluation of the actual results of those measures.⁷¹ The Commission presents an evaluation mechanism that goes beyond an assessment of the transposition of legal instruments into national legislation, and which focuses on mapping out the implementa-

66. Cf. COM(2001)771 final, p. 18; COM(2004)346 final, p. 19.

67. Cf. e.g. Joint Action of 5 Dec. 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime, O.J. 1997, L 344/7.

68. See e.g. Council Document 6206/06.

69. Cf. COM(2007)407 final, p. 10.

70. Evaluation of EU Policies on Freedom, Security and Justice, COM(2006)332 final

71. COM(2006)332 final, pp. 4–5, 99–100.

tion *and* effects of EU policy in the practice of the Member States.⁷² With that, the Commission acknowledges that in current evaluation practice, such as that developed for framework decisions, the actual results that framework decisions bring about in the Member States are almost completely disregarded.⁷³ The evaluation mechanism proposed by the Commission seems able to give a better view of those results. At the same time, it should be noted that transposition into national legislation as a separate point for attention has not been abandoned and that the Commission will continue to report separately on this transposition. There is no evidence that the Commission will use different criteria in assessing this transposition. This means that mapping out the actual results – the effects of EU policy – will not take the place (wholly or in part) of the strict review of the transposition of provisions from framework decisions, but that both approaches will be used alongside each other.

The Member States could also exert more influence on the manner in which evaluation is carried out. Framework decisions could, for example, indicate the way in which provisions are to be transposed and the procedure applied in evaluating the implementation of the relevant framework decision. In this way, the Member States would already give themselves a certain implementation margin and avoid being “surprised” in a certain sense by the way in which the Commission gives shape to evaluation. Besides this, the Member States should guard against the use of vague terms in framework decisions, because these could result in much debate at the evaluation stage concerning the way in which the relevant provisions should be transposed.

A relevant question in this regard is still whether, in the event that the evaluation procedures are developed further, it would also be appropriate to increase the role of the Court of Justice. This could be achieved, for example by making an infringement action on the initiative of the Commission possible. The development and adoption of norms for the implementation of framework decisions would then largely be in the hands of the Court of Justice. Given the dissatisfaction that can be observed with respect to the Commission’s current manner of evaluation, it is not likely that the Member States would be willing to grant this role to the Court of Justice any time soon. After all – partly in the light of the *Pupino* judgment⁷⁴ – it must be taken into account that the Court of Justice considers the norms developed for directives applicable by analogy to framework decisions. Nevertheless, if (more) consensus is reached on the norms for the implementation of framework decisions and those norms are codified in some form, it could be considered

72. COM(2006)332 final, pp. 2–13.

73. COM(2006)332 final, pp. 93–94.

74. *Pupino*, *supra* note 12.

appropriate to strengthen the role of the Court of Justice. Member States are ultimately required to achieve the result intended by a framework decision. The fact that a monitoring mechanism exists for this, ending in a court action, is not problematic in itself.

6. In conclusion

This paper has shown that the question of which norms apply to the implementation of framework decisions at European level is difficult to answer unequivocally. There is a debate over the contents of the norms, as well as over the way in which the implementation is evaluated. In my opinion, it would be helpful to continue the debate over the question of which norms actually apply to the implementation of framework decisions – or in more general terms: EU criminal law instruments – and what the most appropriate manner of evaluation is. In that area, much is still to be gained.

Annex

Reports by the Commission on measures taken to comply with the framework decisions

- a) Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, O.J. 2000, L 140/1
– Commission Report, 13 December 2001, COM(2001)771 final
– Second Commission Report, 3 September 2003, COM(2003)532 final; Commission Staff Working Paper, SEC(2003)936
- b) Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, O.J. 2001, L 82/1
– Report of the Commission, 3 February 2004, COM(2004)54 final; Commission Staff Working Paper, SEC(2004)102
- c) Council Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment, O.J. 2001, L 149/1
– Commission Report, 30 April 2004, COM(2004)346 final; Commission Staff Working Paper, SEC(2004)532
– Second Commission Report, 20 February 2006, COM(2006)65 final; Commission Staff Working Paper, SEC(2006)188
- d) Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation

- of instrumentalities and the proceeds of crime, O.J. 2001, L 182/1
– Commission Report, 5 April 2004, COM(2004)230 final; Commission Staff Working Paper, SEC(2004)383
– Second Commission Report, 21 February 2006, COM(2006)72 final; Commission Staff Working Paper, SEC(2006)219
- e) Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams, O.J. 2002, L 162/1
– Commission Report, 7 January 2005, COM(2005)858 final; Commission Staff Working Paper, SEC(2004)1725
- f) Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, O.J. 2002, L 164/3
– Commission Report, 8 June 2004, COM(2004)409 final; Commission Staff Working Paper, SEC(2004)688
- g) Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, O.J. 2002, L 190/1
– Commission Report, 23 February 2005, COM(2005)63 final; Commission Staff Working Paper, SEC(2005)267
– Revised Commission Report, 24 January 2006, COM(2006)8 final; Commission Staff Working Paper, SEC(2006)79
– Second Commission Report, 11 July 2007, COM(2007)407 final; Commission Staff Working Paper, SEC(2007)979
- h) Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings, O.J. 2002, L 203/1
– Commission Report, 2 May 2006, COM(2006)187 final; Commission Staff Working Paper, SEC(2006)525
- i) Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, O.J. 2002, L 328/1
– Commission Report, 6 December 2006, COM(2006)770 final; Commission Staff Working Paper, SEC(2006)1591