

# TRANSPOSITION OF EUROPEAN LEGISLATION INTO PROSECUTION POLICY GUIDELINES: THE EXAMPLE OF THE DUTCH IMPLEMENTATION OF THE FRAMEWORK DECISION ON THE STANDING OF VICTIMS IN CRIMINAL PROCEEDINGS

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## ABSTRACT

*This article discusses the issue whether European law permits framework decisions and directives to be transposed into prosecution policy guidelines, taking the Dutch implementation of the Framework Decision on the standing of victims as an example. Although this Framework Decision was initially intended to be transposed into guidelines of the Public Prosecution Service, the Dutch Government chose to include transposition in the revision of the Code of Criminal Procedure, combining efforts for improvement of the victim's position. This article discusses the legal status of Dutch victim policy and addresses the implementation of the relevant Framework Decision. This article concludes that it follows from the case law of the Court of Justice that the policy rules of the Public Prosecution Service do not have the legally binding nature that the transposition of the relevant Framework Decision requires.*

**Keywords:** framework decisions; prosecution policy; transposition; victims

## 1. INTRODUCTION

The Framework Decision on the standing of victims in criminal proceedings<sup>1</sup> (hereinafter referred to as 'the Framework Decision') is the first binding international

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<sup>1</sup> Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, *OJ L* 82, 22/3/2001, 1–4.

instrument that addresses the status of victims in criminal proceedings. It so happens that in the Netherlands the victim's position is not primarily laid down by law but in policy rules of the Public Prosecution Service. Originally, the Dutch Government took the view that with these existing victim arrangements, the Framework Decision had been sufficiently transposed. Some time after the European Commission had severely criticized the implementation of the Framework Decision in the Member States, the Dutch Government introduced a legislative proposal, however, designed to further define the victim's position in the Code of Criminal Procedure. According to the Government, this bill was based primarily on rethinking the basic principles of the Code and it was not a reaction to the European Commission's criticism. The date of commencement of this legislative change will be 1 January 2011.

The debate on the implementation of the Framework Decision frequently addressed the question whether in general terms, transposition into policy rules of the Public Prosecution Service is sufficient or whether the statutory rules concerning victims must be amended. The latter would mean that the Public Prosecution Service is no longer free to adopt rules about the victim's position in criminal proceedings. Even though the Code of Criminal Procedure has been supplemented regularly in the course of time by provisions defining the victim's position in criminal proceedings, the nearly complete codification of victim policy rules would narrow the policy-making scope of the Public Prosecution Service even much further, in favour of the legislator.

It remains to be seen, however, whether this shift in powers is dictated by European transposition requirements. This article deals with the question whether European law dictates that framework decisions must be transposed into primary legislation (i.e. Acts of Parliament) rather than policy rules adopted by the prosecution authorities. An affirmative answer may affect the implementation of other framework decisions and directives, for which reason the shift in powers mentioned above could occur in other areas, too. In addition, the question arises whether framework decisions must be transposed according to the same criteria as directives or whether these are subject to different regimes. The latter point is also relevant in view of the introduction of directives on police and judicial cooperation in criminal matters.

For various reasons, the implementation of the Framework Decision in Dutch law provides an example that is pre-eminently suited to illustrate this problem. First, it concerns a rare example of the harmonisation of national criminal procedure and relates not only to cross-border cooperation. Second, from an international perspective, the manner in which policy rules are used in the Netherlands is special in view of the broad discretionary powers of the Dutch Public Prosecution Service based on the expediency principle. Third, the transposition of this Framework

Decision in the Netherlands was only recently completed,<sup>2</sup> which enables the entire implementation process to be assessed. And fourth, experiences relating to the transposition of framework decisions keep their relevance now that they have been replaced by directives as a harmonisation instrument, because the requirements relating to the transposition of these instruments may well be exactly the same.

To provide an answer to the question, whether European law allows legislation to be transposed into prosecution policy guidelines, this article uses the implementation of the Framework Decision on the standing of victims as an example. As a background to the transposition debate, this article summarizes the legal status of Dutch victim policy. Further, it discusses the optimistic approach of the Dutch government and the Commission's implementation report. Next, the subsequent legislative proposal is briefly assessed. The last part of this article addresses the question whether the transposition satisfies the Court's requirements and whether prosecution policy guidelines would have sufficed instead of legislation. The question of European law allowing this method for transposing European legislation, it is found, is dependent on the content of the legislative instrument. Therefore the use of the Framework Decision on victim care as an example can help to provide the necessary material to answer this question.

## 2. LEGAL STATUS OF VICTIM POLICY IN THE NETHERLANDS

Ever since the 1980s, the victim's position in Dutch criminal law has generated considerable interest and it has been defined particularly in the policy rules of the Public Prosecution Service. These policy rules on victim care address three key areas: they define instructions to ensure the correct treatment of victims, to provide victims with all kinds of relevant information, and to promote compensation payable by perpetrators to victims. At present, these instructions are to be found mainly in the Victim Care Instructions (*Aanwijzing slachtofferzorg*),<sup>3</sup> but increasingly, statutory provisions are being enacted for the purpose of defining the victim's position in criminal proceedings. Examples include the joinder of a party in criminal proceedings to pursue a civil claim (Article 51a of the Code of Criminal Procedure) and the right to speak in court (Article 302 of the Code of Criminal Procedure).

Policy rules reflect the Public Prosecution Service's statutory task of preserving law and order (Article 124 of the Judiciary (Organization) Act) and contain instructions that are binding on all members of the Public Prosecution Service. They are adopted by the Board of Procurators General, which heads the Public Prosecution Service. The instructions are also published in the Netherlands Government Gazette. The Minister

<sup>2</sup> Act of 17 December 2009 to amend the Code of Criminal Procedure, the Criminal Code and the Damages Fund for Violent Crimes Act to strengthen the victim's position in criminal proceedings, Bulletin of Acts and Decrees 2010, 1.

<sup>3</sup> Instruction dated 13 April 2004, Government Gazette 2004, 80, registration number 2004A004.

of Justice is at the pinnacle of the hierarchy and may issue general and special instructions to the Public Prosecution Service (Article 127 of the Judiciary (Organization) Act). Even though this power to issue instructions is hardly ever used in practice, its existence affects mutual relationships.

The Public Prosecution Service is obliged to exercise its tasks and powers in accordance with a policy. If this policy is published, it raises expectations that have to be fulfilled on the ground of the legal principle of legitimate expectations. For this reason, any derogation from such policy, for example, by initiating a prosecution contrary to an instruction, may result in a sanction, the severest form of which that the Public Prosecution Service is barred from instituting criminal proceedings. There is an exception to that, however: it is accepted that the prosecution authorities may derogate from a policy rule if this derogation is sufficiently substantiated. If any derogation from published policy instructions is insufficiently substantiated, the court may bar the Public Prosecution Service from prosecuting a case because it has acted contrary to the duty to state reasons.<sup>4</sup>

A fundamental repositioning of the victim in criminal proceedings is advocated in the reports issued by the *onderzoeksproject Strafvordering 2001* ('Research Project on Criminal Procedure 2001'), a project that reassessed all aspects of Dutch criminal procedure. In view of the victim's special involvement in a criminal offence, his position should be placed on a statutory footing, enabling his interests to be taken into account in criminal proceedings to a sufficient degree.<sup>5</sup> The researchers rejected policy rules, because subjective rights of victims should not be defined indirectly by means of obligations imposed on the police and judicial authorities.<sup>6</sup> This basic principle has been of paramount importance to the legislative change that will soon take effect and that will codify much of the victim policy that still remains.

### 3. IMPLEMENTATION AND EVALUATION OF THE FRAMEWORK DECISION

#### 3.1. THE FRAMEWORK DECISION

The objective of the Framework Decision is to offer a high level of protection to crime victims throughout the EU.<sup>7</sup> It lays specific emphasis on the fact that EU citizens who

<sup>4</sup> For more information on this issue, see P.J.P. Tak, "The Dutch Prosecution Service", in P.J.P. Tak (ed.), *Tasks and Powers of the Prosecution Services in the EU Member States*, Nijmegen, Wolf Legal Publishers, 2004, pp. 355–383.

<sup>5</sup> M.S. Groenhuijsen & G. Knigge, *Het onderzoek ter zitting. Eerste interimrapport onderzoeksproject Strafvordering 2001*, Deventer, Gouda Quint, 2001, pp. 27, 37–39, 46–48.

<sup>6</sup> Idem, p. 46. This phrase can also be found in a section written by M.S. Groenhuijsen on p. 249 of the subreport by A.L.J. van Strien, "De positie van slachtoffers in het strafproces", in idem, p. 233–274.

<sup>7</sup> Recital 4 of the Framework Decision.

fall victim to criminal offences abroad are relatively worse off. The substantive provisions regulate all important aspects of the procedural position of victims.<sup>8</sup> The Framework Decision provides that it must be transposed into ‘laws, regulations and administrative provisions’ (Article 17), terms that are derived from Article 34 (old) TEU. Article 18 provides that in the context of the evaluation, the Member States have to forward the text of ‘the provisions enacting into national law the requirements laid down by this Framework Decision’, after which the Council will evaluate the national ‘measures’. Based on this formulation, it is by no means certain that Acts of Parliament are the only transposition instrument.

### 3.2. DUTCH NOTIFICATION

According to the Dutch Minister of Justice, the implementation of the Framework Decision ‘does not pose any problem. The victim care regulations comply with the provisions of the Framework Decision.’<sup>9</sup> This position was also taken in the notification from the Dutch Government to the Commission and the Council on the implementation of the Framework Decision.<sup>10</sup> In this notification, the minister refers to the instructions of the Public Prosecution Service many times, but also to practical arrangements and physical adjustments that have been made to court buildings, for example. The minister also speaks a few words on the incorporation of victim rights into a new statutory regulation: ‘Even though the Government is of the opinion that the Netherlands already complies with the provisions of the Framework Decision at this juncture, the possibility of enshrining significant parts of existing policy in Acts of Parliament was contemplated.’ In this context, he considers the option of codifying the policy rules of the Public Prosecution Service, such as the Victim Care Instructions, and expresses his support for the proposals made by the *Strafvordering 2001* research group, one of which concerned including a separate division on the victim in the Code of Criminal Procedure. According to the minister, the best way to improve the situation is by perfecting practice rather than by enshrining victim rights in primary legislation.

### 3.3. THE COMMISSION’S REPORT

In its report, the Commission emphasizes that the implementation of framework decisions is subject to the same requirements as those applicable to the implementation of directives. ‘Both instruments are binding ‘as to the results to be achieved’. It can be

<sup>8</sup> For a detailed discussion on the Framework Decision, see M.S. Groenhuijsen & A. Pemberton, “The EU Framework Decision for Victims of Crime: Does Hard Law Make a Difference?”, *European Journal of Crime, Criminal Law and Criminal Justice* 2009, pp. 43–59.

<sup>9</sup> Parliamentary Papers II, 2000/01, 27 213, no. 2, p. 3.

<sup>10</sup> Letters from the Dutch Government to the Commission and the Council dated 20 March 2002, Reference 5154783/02, not published.

argued that the resultant *de jure* or *de facto* position must do justice to the interests that these instruments are to serve under the Treaty.<sup>11</sup> Accordingly, the case law developed by the Court of Justice on the implementation of directives also applies to framework decisions. With respect to this case law, the Commission distinguishes four criteria. The first criterion is that the form and the means of transposition must be chosen in such a way that the directive has its intended effect, given its object.<sup>12</sup> The second criterion requires the Member States to implement directives in a manner that fully corresponds with legal certainty requirements, and transpose them into mandatory provisions of domestic law.<sup>13</sup> The third criterion is that the provision need not be enacted in precisely the same words in an express legal provision. The existence of general legal principles may suffice if these principles actually guarantee the full implementation of the directive and create a sufficiently precise and clear legal situation.<sup>14</sup> The fourth criterion is that directives must be implemented within the time allowed for the purpose.<sup>15</sup>

In reviewing the implementation, the Commission emphasises that ‘the formulation of the Framework Decision leaves the Member States with considerable room for manoeuvre in transposing it’.<sup>16</sup> In a few cases, an article of the Framework Decision does not require any legislative initiative but only practical implementation.<sup>17</sup> The measures notified by the Member States<sup>18</sup> prompt the Commission to conclude, however, that not a single Member State has fully transposed the Framework Decision. In the evaluation process, the Commission seems to be interested exclusively in the textual transposition of the instrument, and not in any other executive measure implementing the provisions regarding more practical issues.<sup>19</sup> Only with respect to a few national transposition efforts does the report reveal a clear view on the legal nature of national implementation. For example, the Commission says about the Irish ‘Victims’ Charter that it ‘lacks mandatory status’.<sup>20</sup> It concerns a guide that is not intended to interpret existing legislation or confer rights on victims. Scotland does not come up to the mark either. In addition to legislation, the Law Society reported guidelines, which, according to the Commission, ‘although relevant, have no solid

<sup>11</sup> Report from the Commission on the basis of Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, COM(2004) 54 final, p. 4.

<sup>12</sup> In this context, the Commission refers to CJEC case 48/75, Royer, ECR 1976, p. 497.

<sup>13</sup> CJEC case 300/81, Commission v. Italy, ECR 1983, p. 449.

<sup>14</sup> CJEC case 29/84, Commission v. Germany, ECR 1985, p. 1661.

<sup>15</sup> CJEC case 52/75, Commission v. Italy, ECR 1976, p. 277.

<sup>16</sup> Report, p. 4.

<sup>17</sup> Report, pp. 15 and 21.

<sup>18</sup> Collected in the Annex to the Commission Report based on Article 18 of the Council framework-decision of 15 March 2001 concerning the status of the victims in criminal procedures (COM/2004/54/F), SEC(2004) 102.

<sup>19</sup> M.J. Borgers, ‘Implementing Framework Decisions’, *Common Market Law Review* 2007, pp. 1361–1386.

<sup>20</sup> Report, p. 9.

legal basis: there are doubts as to the real mandatory status of the Law Society of Scotland's guidelines'.<sup>21</sup> What is lacking in the Commission's report, however, is an express assessment of the status of the victim policy of the Dutch Public Prosecution Service. The Commission states that review is very difficult because of the Member States' considerable room for manoeuvre and the broad objectives of the provisions of the Framework Decision. In this context, it points to the open formulation of Article 8, for example, which requires 'a suitable level of protection for victims'.<sup>22</sup> The Commission invites the Member States to ensure complete transposition and to describe all measures taken and forward these to the Commission with the text of the relevant statutory and administrative provisions. This invitation shows that according to the Commission, the Framework Decision can also be transposed by taking practical measures but that these should be based on statutory and administrative measures.

#### 3.4. CONSIDERATION BY THE COUNCIL

After a discussion in the CATS<sup>23</sup>, one passage was added to the Council's implementation report, which relied heavily on the Commission's report: 'The Commission recalled in this context that Framework Decisions must be transposed by binding legal instruments and that it is not sufficient that this is made by administrative instructions or practical arrangements. This conclusion flows from Article 34 TEU as well as longstanding jurisprudence of the Court of Justice in respect of Directives, which is applicable *mutatis mutandis* in this regard'.<sup>24</sup> This is different from what the Commission said in this respect, because in its report, the Commission pointed out that in the case of some articles, the requirement that the provisions have to be transposed only into legally binding instruments did not apply. In addition, the CATS introduces a distinction between legally binding instruments on the one hand, and administrative instructions or practical arrangements on the other, a distinction that the Commission did not use, at least not in as explicit terms. In its rejection of implementation by means of practical measures, this passage is much more outspoken than the Commission's report.

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<sup>21</sup> Report, p. 7.

<sup>22</sup> Report, p. 21.

<sup>23</sup> The Committee Article Thirty-Six, a Council committee provided for in article 36 (old) TEU, composed of public servants of the Member States. It carries out preparatory duties with regard to the legislative process and other activities of the Council.

<sup>24</sup> Note from the Article 36 Committee to Coreper/Council on the Draft Report on the implementation of the Framework Decision of 15 March 2001, 15 December 2004, number 14830/2/04, pp. 4–5.

## 4. THE LEGISLATIVE PROPOSAL

### 4.1. THE GOVERNMENT'S POSITION

In 2004, the Minister of Justice introduced a legislative proposal designed to define the victim's position in criminal proceedings. In the Explanatory Memorandum<sup>25</sup>, however, the Government took the position that the Framework Decision does not have to be transposed into primary legislation but that transposition into policy rules is sufficient. Even so, it introduced a legislative proposal but apparently, the Government felt that it was important to make it clear that the reason for that did not lie in the requirements placed on the transposition of framework decisions. This is already evident to some extent by its summary of the Commission's evaluation report: 'Unfortunately, the report on the Netherlands justifies the conclusion that the Dutch view that most Framework Decision provisions have already been implemented through existing instructions relating to the working procedures of the Public Prosecution Service and the police in the Victim Care Instructions as adopted by the Board of Procurators General was apparently not presented clearly enough.' The Government refers to current case law: it invokes the freedom to choose form and means, but it also realises that implementation is binding as to the result. At the same time, this result should fit into the statutory system and consistent legal practices: 'This does not necessarily mean, according to the Government, that all obligations should be enshrined in primary legislation.' In its opinion, it is clear that the intended result is achieved; in any case, there is no real difference between implementation as now envisaged in the Code of Criminal Procedure and implementation as originally enshrined in policy rules: 'the codification of a number of policy rules does not entail any substantial change in the efforts of the police and the Public Prosecution Service as already made on the ground of the Instructions.'

### 4.2. PARLIAMENTARY DISCUSSION

According to the minister, the necessity of a statutory regulation lies primarily in the recognition of the victim as an interested party in criminal proceedings and certainly not in the requirements placed on the transposition of the Framework Decision.<sup>26</sup> However, a statutory regulation has an extra normative effect and provides a clearer guide than an instruction, 'as the latter allows the option to derogate from it'. Remarkably, the minister raises the power to derogate in this context. Below, it will be shown that it is the existence of this power that deprives the policy rules of the Public Prosecution Service from the legally binding nature that the valid transposition of the Framework Decision requires.

<sup>25</sup> Parliamentary Papers II, 2004/05, 30 143, no. 3, particularly p. 2.

<sup>26</sup> Parliamentary Papers II, 2005/06, 30 143, no. 8, p. 2.



The minister issued a remarkable statement in the Senate, however: ‘The [legislative proposal] is important from the perspective of the victim’s position in criminal proceedings and from the perspective of the implementation of the underlying Framework Decision. In this context, it is also important to note that it is not sufficient to draw up policy rules for the purpose of implementing the Framework Decision. Regulating the position of victims requires a formal statutory basis.’<sup>27</sup> Apparently, the minister was now convinced that for the purposes of implementing the Framework Decision, it is not sufficient to enable the Public Prosecution Service to adopt policy rules. He failed to advance any arguments for this position, however, which could be due to the reshuffle at the ministry: by now, a new minister has taken office and he may hold different views on this subject.

## 5. ASSESSMENT OF THE TRANSPOSITION

### 5.1. ARE REQUIREMENTS FOR TRANSPOSING FRAMEWORK DECISIONS AND DIRECTIVES IDENTICAL?

The treaty texts describing framework decisions and directives suggest that they must be transposed according to identical rules. According to Article 288 TFEU, a directive is ‘binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.’ This formulation is identical to that of Article 249 (old) TEC and nearly the same words are used with respect to framework decisions in Article 34 (old) TEU. Even so, a number of differences between the two instruments stand out. For example, in Article 34 (old) TEU, the direct effect of framework decisions is excluded. In spite of the foregoing, the Court of Justice has ruled that in specific circumstances the national courts are obliged to interpret national law in conformity with framework decisions.<sup>28</sup> For this reason, the courts may and must rectify simple implementation defects.

It is sometimes claimed that as far as their legal status is concerned, framework decisions are very different from directives, because they are made in another context. In the context of police and judicial cooperation, the Member States have entered into an intergovernmental alliance, which allows them to retain much of their sovereignty.<sup>29</sup> Also in view of the indeterminate nature of many articles in framework decisions, another transposition framework would have to be used. According to Article 34 (old) EU, framework decisions could be adopted, however, for the harmonization of statutory and administrative measures, just like directives. The Court of Justice concludes from the foregoing that framework decisions are of an equally mandatory

<sup>27</sup> Proceedings I, 2008/09, 1, p. 20.

<sup>28</sup> CJEC case C-105/03, Pupino, ECR 2005, p. I-5285.

<sup>29</sup> M.J. Borgers, ‘Implementing Framework Decisions’, *Common Market Law Review* 2007, pp. 1361–1386.

nature as directives, from which the obligation of interpretation in conformity with the framework decision follows. The most important differences between directives and framework decisions relate primarily to the way in which they are made and the relevant regulatory controls. Based on the wording of the relevant treaty articles, there is no reason to assume that there is any difference with respect to transposition requirements. This means that the Member States do have some room for manoeuvre at the time of the deliberations in the Council, but not at the transposition stage.<sup>30</sup>

## 5.2. TRANSPOSITION REQUIREMENTS OF DIRECTIVES

What requirements are imposed by Article 288 TFEU and what does it mean that directives 'leave to the national authorities the choice of form and methods'? First and foremost, Member States are obliged to choose the most appropriate form and methods to ensure that the directive has its intended effect, given its object.<sup>31</sup> They are under the obligation to adopt all measures of national law that are necessary to implement legally binding legislative acts of EU law (Article 291 TFEU). Member States must ensure that the directive is transposed fully and accurately and they may not confine themselves to transposing it for the most part.<sup>32</sup> The Court of Justice rejected the way in which Belgium had transposed directive provisions, because it had used 'mere administrative practices, which by their nature can be changed as and when the authorities please and which are not publicized widely enough'.<sup>33</sup> The Court of Justice ruled that the totality of the directive provisions and the nature of the measures prescribed showed that they were intended to be transposed into national provisions 'which have the same legal force as those which apply in the Member States'. This means that a Member State has not complied with the requirements of Article 249 (old) EC if it 'simply relies on existing practices or even just the tolerance which is exercised by the administration'.<sup>34</sup> According to the Court of Justice, this is not permitted because it is contrary to the requirement of legal certainty. In its decisions, the Court of Justice holds that 'each Member State must implement directives in a manner which fully meets the requirement of legal certainty and must consequently transpose their terms into national law as binding provisions'.<sup>35</sup>

<sup>30</sup> B. Kurcz & A. Łazowski, 'Two Sides of the Same Coin? Framework Decisions and Directives Compared', *Yearbook of European Law* 2006, pp. 177–203.

<sup>31</sup> CJEC case 48/75, *Royer*, ECR 1976, p. 497.

<sup>32</sup> CJEC case 91/79, *Commission v. Italy*, ECR 1980, p. 1099; CJEC case 92/79, *Commission v. Italy*, ECR 1980, p. 1115.

<sup>33</sup> CJEC case 102/79, *Commission v. Belgium*, ECR 1980, p. 1473, point 11.

<sup>34</sup> Point 10. This assessment framework was repeated in CJEC case 300/81, *Commission v. Italy*, ECR 1983, p. 449; CJEC case 168/85, *Commission v. Italy*, ECR 1986, p. 2945; CJEC case 429/85, *Commission v. Italy*, ECR 1988, p. 843; CJEC case C-236/91, *Commission v. Ireland*, ECR 1992, p. I-5933; CJEC case C-381/92, *Commission v. Ireland*, ECR 1994, p. I-215 and CJEC case C-242/94, *Commission v. Spain*, ECR 1995, p. I-3031.

<sup>35</sup> CJEC case 239/85, *Commission v. Belgium*, ECR 1986, p. 3645.

According to the Court of Justice, the implementation of directives does not necessarily require legislative action in every Member State. 'In particular the existence of general principles of constitutional or administrative law may render implementation by specific legislation superfluous.' The Court of Justice does attach quality requirements to these general principles. These must ensure the full application of the directive and the legal situation arising from these principles must be sufficiently clear and precise where the directive intends to create rights for individuals. In addition, the beneficiaries must be able to ascertain the full extent of their rights and rely on them before the national courts. The latter is especially important where rights are conferred on citizens of other Member States, who are less familiar with the principles.<sup>36</sup> Later, the Court of Justice ruled that 'a general legal context may, depending on the content of the directive, be adequate for the purpose' of the directive. This general legal context is subject to the same quality requirements.<sup>37</sup> This case law was applied to the Netherlands in cases where directives had been transposed into ministerial regulations, *inter alia*.<sup>38</sup> The Netherlands had not transposed a number of directive provisions, arguing that ministerial practice substantively complied with these provisions, because the relevant ministry exercised great restraint in granting licences. The Court of Justice did not approve of this because it was inconsistent with the requirement of legal certainty, and it ruled that simple administrative practices that may be changed at the administration's discretion do not constitute correct fulfilment. Irrespective of whether such administrative practices are in line with the directive provisions, the conditions relating to the granting of licences must be laid down in normative rules.<sup>39</sup> In one of these cases, the Court of Justice even stated quite bluntly that Member States have to create a clear legal framework to ensure the full application of directives, not only in fact but also in law.<sup>40</sup>

Where administrative regulations allowing derogations in exceptional cases are used, problems may arise. In a case against Germany, the Commission stated that its transposition was defective because 'administrative circulars need not necessarily be observed when an atypical situation arises, that is to say, a situation which the author of the administrative provisions could not, or did not wish to, resolve by reason of the fact that he had to settle the problem in a general way.' In addition, these administrative regulations bind only the government and cannot be enforced by individuals. The Court of Justice agreed with that position and ruled that the directive had therefore not been 'implemented with unquestionable binding force, or with the specificity, precision and clarity required by the case-law of the Court in order to satisfy the

<sup>36</sup> CJEC case 29/84, *Commission v. Germany*, ECR 1985, p. 1661.

<sup>37</sup> CJEC case 363/85, *Commission v. Italy*, ECR 1987, p. 1733, CJEC case 252/85, *Commission v. France*, ECR 1988, p. 2243 and CJEC case C-360/87, *Commission v. Italy*, ECR 1991, p. I-791.

<sup>38</sup> CJEC case 236/85, *Commission v. the Netherlands*, ECR 1987, p. 3989 and CJEC case 339/87, *Commission v. the Netherlands*, ECR 1990, p. I-851.

<sup>39</sup> Repeated in CJEC case C-131/88, *Commission v. Germany*, ECR 1991, p. I-825.

<sup>40</sup> CJEC case 339/87, *Commission v. the Netherlands*, ECR 1990, p. I-851.

requirement of legal certainty'. The Court of Justice stated explicitly that there has to be 'a specific legal framework'.<sup>41</sup> It also rejected a method of transposition used by Germany by which, without any legislative action, individual operators had been informed about the contents of a directive by means of circulars and local instructions.<sup>42</sup> An important view in this regard was that the relevant individuals could not, perhaps, rely on these circulars.<sup>43</sup>

Even though a statutory regulation is not necessary, the application of the provisions of the directive has to be ensured by means of such a specific and clear legal context that if individuals may derive rights from this directive, they must be able to know these rights in the national situation and rely on them before the national courts.<sup>44</sup> This is all the more true where these individuals are citizens of other Member States.<sup>45</sup> This strict scrutiny of the use of non-legislative transposition methods, resulting from the requirement that implementing measures are fully legally binding, is derived by the Court of Justice from the high-valued principles of legal certainty and enforceability before the national courts. Reliance on general principles of constitutional or administrative law is therefore not readily accepted.<sup>46</sup>

### 5.3. ASSESSMENT OF POLICY RULES AGAINST TRANSPOSITION REQUIREMENTS

Can it be concluded that the policy rules of the Public Prosecution Service, considering their legal status, comply with the transposition requirements of the Framework Decision? The objective of the Framework Decision is important in this context: the harmonization of statutory and administrative provisions relating to the status and the most significant rights of the victim.<sup>47</sup> It is clear that the Framework Decision requires at least the harmonization of normative provisions: the provisions are intended to be transposed into national provisions that carry the same force of law as those applied in the Member States.<sup>48</sup> The provisions have to be transposed into regulations that are at least as binding as existing regulations.

Do the policy rules come under the prohibition against simple administrative practices which, by their nature, can be changed at the administration's discretion and which have not been publicized widely enough? The public access requirement

<sup>41</sup> CJEC case C-59/89, *Commission v. Germany*, ECR 1991, p. I-2607.

<sup>42</sup> CJEC case C-58/89, *Commission v. Germany*, ECR 1991, p. I-4983.

<sup>43</sup> Also in CJEC case C-306/89, *Commission v. Greece*, ECR 1991, p. I-5863.

<sup>44</sup> CJEC case C-190/90, *Commission v. the Netherlands*, ECR 1992, p. I-3265.

<sup>45</sup> CJEC case C-365/93, *Commission v. Greece*, ECR 1995, p. I-499, CJEC case C-96/95, *Commission v. Germany*, ECR 1997, p. I-1653 and CJEC case C-144/99, *Commission v. the Netherlands*, ECR 2001, p. I-3541.

<sup>46</sup> S. Prechal, *Directives in EC Law*, Oxford: Oxford University Press 2005, p. 84–85.

<sup>47</sup> Recitals 4 and 8 of the Framework Decision.

<sup>48</sup> Cf. *Commission v. Belgium*, see above.

seems to be fulfilled through the publication of the policy rules in the Government Gazette. This means that the first condition has been fulfilled, but what about the other criteria? It may be a problem that the policy rules are drawn up and changed by the Public Prosecution Service itself, but the policy is formed centrally and is not mere practical implementation. The adopted rules have binding force within the hierarchy of the Public Prosecution Service and as such they are more than simple practice. It remains to be seen, however, whether they satisfy the requirement of legal certainty, because this means that that directives must be transposed into mandatory provisions of domestic law. Do the policy rules of the Public Prosecution Service satisfy this requirement?

Are the policy rules perhaps sufficiently mandatory because their placement in a general legal context ensures the actual and full application of the Framework Decision in a sufficiently determinate and clear way? In this context, it is important that the recognition of the principle of legitimate expectations means that the Public Prosecution Service may be barred from prosecuting a case if it acts contrary to a published policy rule. The question arises whether this is sufficient.<sup>49</sup> In this context, it is problematic that the Public Prosecution Service is empowered to derogate from a published policy rule, provided that its decision to so do is sufficiently substantiated. The Court of Justice ruled against Germany on the ground of a similar administrative power of derogation.<sup>50</sup> So this is a negative indication.

In addition, strict requirements are placed on a 'general legal context' if individuals should be able to derive rights from it, certainly where they are citizens of other Member States. The Framework Decision provides, *inter alia*, that Member States must take account of 'the disadvantage of living in a different Member State from the one in which the crime was committed'.<sup>51</sup> It also contains special rules for victims who live in another Member State (Article 11). The notion that foreign victims understand how to invoke before the Dutch courts obligations of the police and judicial authorities that are enshrined in the policy rules of the Public Prosecution Service should be dismissed as improbable. Besides, it is not at all in the interests of the victim if the Public Prosecution Service is barred from prosecuting a case as a sanction; by contrast, this conflicts with his own interests. These considerations inevitably lead to the conclusion that the Framework Decision intends to guarantee rights, partially with regard to foreign victims. The Court's case law does not demand that directives contain concrete individual rights, as a prerequisite for the invocation of the requirement of fully legally binding force concerning the transposition measure. It requires particularly that the individuals' legal position is safeguarded as a result of the implementation process.<sup>52</sup>

<sup>49</sup> A question that is answered in the affirmative by Groenhuijsen & Pemberton, *op. cit.*, p. 49–50.

<sup>50</sup> CJEC case C-59/89, *Commission v. Germany*, ECR 1991, p. I-2607, see above.

<sup>51</sup> Recital 8 of the Framework Decision.

<sup>52</sup> S. Prechal, *Directives in EC Law*, Oxford: Oxford University Press 2005, p. 109–110.

## 6. CONCLUSION

The question this article addressed was whether European law allows Member States to transpose European legislation into prosecution policy guidelines. An answer to this question can be provided with a view to the Dutch implementation of the Framework Decision on the standing of victims in criminal procedure. The Dutch Government's original position that the Framework Decision could be transposed into policy rules was not explicitly rejected by the European Commission in its implementation report. However, the Government decided to draft a legislative proposal, partly because of its reflection on the role of victims in criminal proceedings. Dutch researchers took the view that the position of victims should not be expressed in terms of obligations of means resting on the police and the Public Prosecution Service, but as subjective rights of the victim himself, laid down in the Code of Criminal Procedure. The Public Prosecution Service must therefore give up part of its scope for policy-making in favour of the legislator.

The question is whether this shift in powers also necessarily follows from the European law relating to the Member States' transposition obligations. As far as the Framework Decision is concerned, the conclusion must be drawn that it cannot be transposed into policy rules of the Public Prosecution Service. The requirements placed by the Court of Justice on the transposition of directives, and that are applicable to framework decisions, do not exclude the use of policy rules, provided that these satisfy strict quality requirements. It is in this respect that the policy rules of the Public Prosecution Service, such as the Victim Care Instructions, are inadequate, however. The binding status of policy rules is insufficient and they are not suitable to be relied on by victims, particularly if they live abroad. A statutory regulation such as the one proposed, however, will without doubt satisfy the requirements based on Article 288 TFEU.

In general, this assessment does not show that transposing European legislation into policy rules of the Public Prosecution Service is never permitted, for the nature of the measures implementing European instruments depends on more than one factor. A significant factor is the degree to which individuals are able to derive rights from the provisions of the directive or the framework decision. Particularly where these individuals come from another country, strict requirements are placed on the legal nature of the implementation. Prosecution policy guidelines will, in these cases, lack the full legally binding force that is required by the Court of Justice's case law.

This conclusion keeps its relevance despite the entry into force of the Treaty of Lisbon. A first reason for that lies in the above claim that the transposition of framework decisions and of directives are subject to the same requirements. This means that the transposition of the directives that will be issued in the field of criminal law in the future must satisfy the same conditions as the transposition of framework decisions. A second reason is that with effect from 1 November 2014, the Court of Justice will have jurisdiction in the entire field of police and judicial cooperation, and

Pim Geelhoed

the Commission will be able to institute infringement proceedings with respect to all instruments adopted before the first of November 2009, too.<sup>53</sup> In these circumstances, transposing framework decisions into policy rules will immediately come under fire as well.

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<sup>53</sup> Protocol (No. 36) on transitional provisions, Article 10, to the Treaty of Lisbon.