

Report on the results of the Working Group on the Area of Freedom, Security and Justice

Professor Valsamis Mitsilegas

General *Rapporteur*

This year's FIDE Congress provided an ideal forum to discuss in detail and in a critical manner the legal and constitutional issues arising from the transformation of the European Union into an Area of Freedom, Security and Justice. The contribution of Professor Laffranque and her colleagues to the success of this endeavour has been invaluable, as has been the contribution of the four panel moderators in the field, chosen to reflect a wide range of expertise on EU Justice and Home Affairs from a judicial, prosecutorial, institutional and academic perspective (Professor Voskuhle, Ms Sepp, Mr Nilsson and Professor Ziller respectively). Heartfelt thanks are also due to the national *Rapporteurs* who have worked so hard to produce such detailed and comprehensive reports and who enriched panel discussions with their insightful contributions. Last, but not least, I am immensely grateful to the EU *Rapporteur*, Judge Perillo, whose contribution and insights have added immense value to our work.

Notwithstanding having inevitably to compete with two Working Groups on highly important, topical and (in the case of fundamental rights) complementary areas of EU law, the sessions on the Area of Freedom, Security and Justice were extremely well attended and generated a lively debate among participants. The engagement of the audience reflects the growing importance of the Area of Freedom, Security and Justice as a distinct field of EU law, but also the fact that European integration in the field raises a number of complex challenges for both the individual and the state: as regards the individual, EU action in Justice and Home Affairs has the potential to undermine the protection of fundamental rights and to alter the balance of the relationship between the individual and the state in favour of the latter; as regards the state, EU action in sensitive matters such as immigration, asylum, criminal law and police cooperation may result into significant inroads on state sovereignty and power. This complexity is further reflected in the difficult constitutional path of the Area of Freedom, Security and Justice from a largely intergovernmental area of EU law to a largely supranational one after the entry into force of the Lisbon Treaty.

These fundamental rights, institutional and constitutional tensions were all present in one way or another in the Working Group discussions. In an attempt to do justice to the wealth of comments and interventions in the Working Group, I will attempt to summarise our discussion by grouping comments under three general themes which have emerged throughout our work: constitutional change, implementation challenges, and the impact of EU law on fundamental rights and the values of the Union.

Constitutional Change

The topic of **constitutional change** after the entry into force of the Lisbon Treaty has been addressed at three levels: at the level of *changes in the inter-institutional balance*; at the level of *competence changes*; and at the level of *changes in the legislative instruments*.

- The Working Group noted the far-reaching *institutional changes* brought about by the Lisbon Treaty in the field of EU criminal law, in particular the strengthening of the role of the European Parliament as co-legislator and the enhanced scrutiny of EU criminal law by the Commission and the Court of Justice. The potential of the Court of Justice developing autonomous concepts in the field was highlighted. However, the Working Group noted that the move towards supranationalism is not absolute, and that a number of intergovernmental elements remain. These include in particular the enhanced role of the European Council in drawing up the strategy for the Area of Freedom, Security and Justice and the emphasis of Lisbon on respecting national diversity and on the control of subsidiarity. Moreover, it has been pointed out that the move towards co-decision has not necessarily resulted in greater transparency, with the European Parliament increasingly negotiating EU law with the Council behind closed doors with the aim of reaching first reading agreement.
- On the topic of the *evolution of EU competence*, the Working Group noted that the Lisbon Treaty conferred to the Union for the first time expressly the power to legislate in the field of criminal procedure, including on the rights of the defence (Article 82(2) TFEU)- however this is not a self-standing, autonomous competence to legislate in the field, but it is a functional competence existing only if necessary to facilitate mutual recognition. In the field of substantive criminal law, it was noted that the attempt to achieve legal certainty and determine conclusively the extent of EU competence to define criminal offences and impose criminal sanctions in Article 83(1) TFEU is undermined by the extension of EU power to criminalise again on a functional basis if EU action is essential to achieve the effective implementation of other EU policies (Article 83(2) TFEU).
- On the topic of *changes in legislative instruments*, it was noted that the main AFSJ legal instrument post-Lisbon is the Directive. The Working Group noted a two-fold tension as regards the use of **Directives** in criminal law. Firstly, there is a tension between the nature of Directives (which are binding as to the outcome but leave Member States the choice as to how they will achieve this objective) and the enhanced requirement of **legal certainty** in the field of criminal law. Secondly, there is a tension between the need to ensure the enforcement of EU criminal law and the protection of fundamental rights in the light of the potential for Directives to have **direct effect**. The Working Group welcomed the fact that, a number of EU law provisions in the field of criminal procedure (in particular on defence rights such as the right to an interpreter or the right of access to a lawyer) are likely to have direct effect and thus offer additional protection to affected individuals. However, the Group had a lively debate on whether direct effect could be extended (according to the view of the EU *Rapporteur*) also to EU measures imposing criminal offences and

sanctions. While such move might address deficits in national implementation, it has been noted that it is contrary to CJEU case-law and that the impact on individual freedoms may be substantial.

Implementation

National reports have demonstrated that implementing AFSJ law in Member States is challenging. Discussions in the Working Group reflected these challenges, in particular the challenge of how to accommodate EU law within the specific domestic criminal justice systems while at the same time respecting domestic constitutional law and the coherence of criminal justice systems. A number of participants were of the view that to evaluate national implementation one needs to take a step back and look *ex ante* at the drafting of EU law as such. AFSJ law was deemed to be at times too imprecise and vague reflecting the political will of Member States to be seen to act in the field of law enforcement in particular but this political will resulting in legislation which leaves much to be desired in terms of legal certainty (EU law on the rights of victims of crime was mentioned as an example in this context). Enhancing the quality of EU legislation was viewed by a number of participants as the best way forward in addressing implementation challenges at national level.

Fundamental rights

The impact of EU law in the field of the Area of Freedom, Security and Justice on fundamental rights was omni-present in the discussions of the Working Group. The Group noted that so far the evolution of EU law in the field has been marked by a prioritisation of security concerns resulting in enforcement legislation with limited fundamental rights safeguards. The Working Group focused in particular on two AFSJ areas in this context: the area of mutual recognition in criminal matters, where quasi-automatic inter-state cooperation has been privileged and specific EU fundamental rights standards (such as defence rights legislation) has only recently taken off and still consists of minimum standards; and the area of personal data collection and exchange, where the proliferation of data collection mechanisms including at the level of inter-state cooperation, European Union databases, and cooperation between the private sector and the state, has been accompanied by only a limited and fragmented data protection framework. The Working Group noted the **need for the development of specific secondary EU law on fundamental rights** to accompany enforcement measures in the Area of Freedom, Security and Justice.

Along with the need for further fundamental rights legislation in the field, members of the Working Group noted the need to revisit the current approach privileging automaticity in inter-state cooperation based on uncritical mutual trust. It has been noted that **the recent CJEU ruling in NS (on the operation of the Dublin Regulation) may have significant consequences for the operation of the system of mutual recognition in criminal matters** in general, and the European Arrest Warrant in particular. The Court's finding that there is no conclusive presumption of respect of fundamental rights by all Member States in all

circumstances may lead to a more nuanced approach, where the specific position of the individual will be examined by national authorities on a case-by-case basis before cooperation is granted. The future interpretation of EU law in the light of the Charter of Fundamental Rights will be crucial in this regard.

The main challenge for the future is for the European Union to develop into an Area of Freedom, Security and Justice in a manner which respects fully fundamental rights and pays due attention to the impact of measures in the field on the individual. Vice-President Reding opened this year's Congress by reminding us that 'Europe has a heart'. Professor Laffranque backed this statement up throughout the Congress by stressing the importance of the European Union working for the citizen. No other field of EU law will test these claims more rigorously than the evolution of the EU into an Area of Freedom, Security and Justice.