European Arrest Warrant

Court of Justice of the European Communities

Judgment of 3 May 2007, Case C-303/05, *Advocaten voor de Wereld VZW* v. *Leden van de Ministerraad*

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Listening carefully, one might have heard the sigh of relief breathed in Brussels and other EU capitals on 3 May 2007, when the Court of Justice of the European Communities (ECJ or Court) eventually delivered its first judgment on the European arrest warrant (EAW), giving the green light to this flagship instrument of EU judicial co-operation in criminal matters. However, what came as a relief for executive-branch officials, quite likely disappointed some of Europe's judges and legislators, as well as many academics and independent observers. For them, it must have seemed as if a long, tension-filled story had come to a bitter end. Throughout the EU, myriads of articles and position papers had been published, speeches delivered, declarations signed and warnings issued since the Council adopted the Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedure between member states[1] (Framework Decision or EAW Framework Decision).

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[1] *OJ* [2002] L 190/1, 18.7.2002; *see* for an in-depth analysis e.g., N. Keijzer, 'The European Arrest Warrant Framework Decision between Past and Future' in E. Guild (ed.), *Constitutional Challenges to the European Arrest Warrant* (Nijmegen, Wolf Legal Publishers 2006), p. 13; *see also* M. Płachta and W. van Ballegooij, 'The Framework Decision on the European Arrest Warrant and Surrender Procedures between Member States of the European Union', in R. Blekxtoon and W. van Ballegooij (eds.), *Handbook on the European Arrest Warrant* (The Hague, T.M.C. Asser Press 2005), p. 13. *See also*, e.g., D.-J. Dieben, 'The Academic Assessment of the European Arrest Warrant – A Review of the Literature', in E. Guild (ed.), *Constitutional Challenges to the European Arrest Warrant* (Nijmegen, Wolf Legal Publishers 2006), p. 215. It covers articles published in German, English and Dutch until the year 2005.

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On top of this speculation, advocacy and academic activity, a remarkably high number of national constitutional courts had to rule on the compliance of national EAW implementing acts with fundamental rights and constitutional principles;[2] an exercise that in some cases led to the annulment of these acts, putting the states concerned in uneasy situations. When addressing many of the constitutional challenges at the national level, the courts confined their analyses and decisions to their respective country's implementing acts, despite the claimants actually targeting the Framework Decision and the underlying principle of mutual recognition in criminal matters. Although the judges sitting on the EU-members' constitutional courts may have understood the focus of the claims before them, they generally avoided an open confrontation with Community law.[3]

Only the constitutional court of Belgium referred its EAW case to Luxembourg, doing so on 13 July 2005.[4] With that referral, the debate around the EAW and the principle of mutual recognition acquired a new dimension. For the first time, the matter was in the hands of a judicial authority that actually had the legal competence to rule on 'the validity and interpretation of framework decisions' according to Article 35(1) Treaty on European Union (EU).[5] This allowed the ECJ to tackle many of the issues that national constitutional courts, such as Germany's *Bundesverfassungsgericht*, had previously addressed. These ECJ proceedings contribute to the political aim of enhancing and facilitating judicial co-operation in criminal matters, based on the principle of mutual recognition[6] – as

[2] For analyses of the different cases *see* E. Guild (ed.), *Constitutional Challenges to the European Arrest Warrant* (Nijmegen, Wolf Legal Publishers 2006); *see also* V. Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU', 43 *Common Market Law Review* (2006), p. 1277 at p. 1294; J. Komárek, 'European constitutionalism and the European arrest warrant: In search of the limits of contrapunctual principles', 44 *Common Market Law Review* (2007), p. 9; E. van Sliedregt, 'The European Arrest Warrant: Extradition in Transition', 3 *EuConst* (2007), p. 244.

[3] And yet some could not refrain from sending 'dark signals' to Brussels and Luxembourg, *see* Judge Lübbe-Wolff's dissenting opinion criticizing the majority opinion of the *Bundesverfassungsgericht* for doing so, BVerfG 18.7.2005, 2 BvR 2236/04 at para. 159, 160 (an English translation of this judgment is available at <http://www.bverfg.de/en/decisions/rs20050718_2bvr223604en.html>. In the English version the reference is para. 160, 161).

[4] At that time still the Cour d'Arbitrage, arret n° 124/2005; for an analysis *see* T. Vandamme, 'Prochain Arrêt: La Belgique!, in this volume, p. 127.

[5] Consolidated version as amended by the Treaty of Nice, *OJ* [2006] C 321/1 E, 29.12.2006.

[6] *See* Recital 6 of the Framework Decision. On the principle of mutual recognition, cf. V. Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU', 43 *Common Market Law Review* (2006), p. 1277; S. Lavenex, 'Mutual Recognition and the Monoply of Force: Limits of the Single Market Analogy', 14 *Journal of European Public Policy* (2007), p. 762; S. Braum, 'Das Prinzip der gegenseitigen Anerkennung – Historische Grundlagen und Perspektiven europäischer Strafrechtsentwicklung', 152 *Goltdammer's Archiv für Strafrecht* (2005), p. 681; S. Gleß, 'Zum Prinzip der gegenseitigen Anerkennung', 116 *Zeitschrift für die gesamte Strafrechtswissenschaft* (2004), p. 353.

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agreed by the European Council in Tampere 1999 and laid down in Article 69 A(1) of the Lisbon Treaty (which will be the future Article 82 Treaty on the Functioning of the Union).[7] If such co-operation is ever to become a reality, confidence and trust in the legality of the core EU instruments implementing this principle is indispensable. In this respect, it is necessary to recall that the EAW Framework Decision has not only been the first instrument to implement this principle, but also served as a blueprint for other measures thus far adopted, e.g., the Framework Decision on the Execution of Orders Freezing Property and Evidence (2003/577/JHA of 22 July 2003),[8] the Framework Decision on Mutual Recognition of Financial Penalties (2005/214/JHA of 24 February 2005)[9] and the Framework Decision on Confiscation Orders (2006/783/JHA of 6 October 2006).[10] No doubt the reservations expressed by judges, attorneys and academics towards the EAW Framework Decision have created some uneasiness among officials in charge of negotiating, implementing and applying it and other mutual recognition instruments, during the time the case was pending in court. In an official statement, the Finnish Council Presidency testified to such uneasiness.[11]

If the ECJ had accepted the position advanced by the plaintiff, *Advocaten voor de Wereld*, the repercussions would have been more than considerable. If the Court had declared the very first legal instrument incorporating the principle of mutual recognition as incompatible with fundamental rights, it would have sent a devastating signal to the proponents of further EU judicial co-operation based on this principle, but the Court rejected the plaintiff's challenge and upheld the Framework Decision. Doing so, the ruling restored calm to the EU's *third pillar*,[12] paving the way for further developments. From this wider context the *Advocaten voor*

[7] Cf. Annex 'Tables of equivalences referred to in Article 5 of the Treaty of Lisbon', *OJ* [2007], C 306/200, 17.12.2007.

[8] *OJ* [2003], L 196/45, 2.8.2003.

[9] *OJ* [2005], L 76/16, 22.3.2005.

[10] *OJ* [2006], L 328/59, 24.11.2006.

[11] 'During recent times the negotiations on new instruments on mutual recognition have slowed and become more difficult', Finland's EU Presidency, 'Informal JHA Ministerial Meeting, Tampere, 20-22 Sept. 2006', *Press Release*, 4.9.2006, p. 2. On the other hand it is worth mentioning that judicial authorities in member states make increasing use of the surrender procedure established by the EAW Framework Decision. Yet, there are also a number of EAW specific difficulties, cf. I. Pérignon and C. Daucé, 'The European Arrest Warrant: a Growing Success Story', 8 *ERA Forum* (2007), p. 203; *see also* Commission of the European Communities, Commission Staff Working Document, Annex to the Report from the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, SEC(2007) 979, 11.7.2007.

[12] The third pillar refers to 'Title VI – provisions on police and judicial cooperation in criminal matters', Treaty on European Union, consolidated version as amended by the Treaty of Nice, *OJ* [2006] C 321/1 E, 29.12.2006.

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de Wereld ruling draws its significance.[13] However, leaving aside the mere outcome and paying a closer look at the reasoning of the Court, doubts arise, whether this judgment actually serves to reassure critics and to restore the confidence, potentially lost, in this long lasting dispute.

The judgment of the European Court of Justice

The questions put to the ECJ

Out of the basically three contentions raised by *Advocaten voor de Wereld*, the Belgian constitutional court formulated two questions that it referred to the ECJ for a preliminary ruling:

1. Is the Framework Decision compatible with Article 34(2)(b) EU, under which framework decisions may be adopted only for the purpose of approximation of the laws and regulations of the member states?
2. Is Article 2(2) of the Framework Decision, insofar as it sets aside verification of the requirement of double criminality for the offences listed therein, compatible with Article 6(2) EU and, more specifically, with the principle of legality in criminal proceedings guaranteed by that provision and with the principle of equality and non-discrimination?

While the first question is one of procedure and the correct legal basis, the second question is substantive and aims at the heart of one of the practical implications of the principle of mutual recognition in criminal matters, i.e., the renunciation of the traditional requirement of double criminality. This issue was directly linked to Article 6(2) EU, the provision that establishes the Union's obligation to respect fundamental rights, thereby turning the dispute also into a test case for the third-pillar scope and reach of the Charter of Fundamental Rights of the Union.[14]

Some preliminary observations

Before turning to the answers the ECJ found to these questions, it is worth looking at some contextual elements/features of the decision.

A first striking peculiarity is the high number of observations submitted by member states in defence of the Framework Decision. Although it can be com-

[13] And which might be the reason why some commentators have stated that the judgment 'is a highly political one', *see* V. Hatzopoulos, *With or without you … judging politically in the field of Area of Freedom, Security and Justice*, Research Papers in Law No. 3, May 2007 (Bruges, College of Europe 2007), p. 14.

[14] *OJ* [2000], C 364/1, 7.12.2000.

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monly observed, that member states tend to participate more actively whenever the ECJ is about to decide on third-pillar matters, that no less than ten governments participated in the proceedings is remarkable. In other third-pillar cases the total number of member state participants tends to be around five to eight.[15] The last third-pillar case that received as much visible attention from member states was the *environmental crime case*,[16] a judgment which undoubtedly led to a major shake-up of the EU criminal law setting. This high level of member state participation underlines the importance of the *Advocaten voor de Wereld* ruling and demonstrates the nervousness in EU capitals about the outcome of the case. Nearly half of the member states that appeared in defence of the EAW joined the EU in May 2004, two years after the Council adopted the Framework Decision.

Another remarkable facet is the ruling's brevity. The Court spent barely 62 paragraphs to resolve the entire matter.[17] Out of these 62 paragraphs it dedicated 20 to the procedural issues and just 18 paragraphs to the substantive, fundamental-rights question.

The answers of the ECJ

Approaching now the ECJ's substantive assessment, it is useful to discern between the two questions referred to the Court.

Concerning the first question as to whether a framework decision constituted the proper legal instrument, *Advocaten voor de Wereld* submitted that the subject-matter of the EAW ought to have been implemented by way of a convention and not by way of a framework decision since, under Article 34(2)(b) EU, framework decisions may be adopted only 'for the purpose of approximation of the laws and regulations of the Member States[,]' which, it had claimed, was not the case. In addition, *Advocaten voor de Wereld* referred to Article 31(1) of the Framework

[15] *See* ECJ 18.7.2007, Case C-288/05, *Kretzinger*: 7 member states; ECJ 18.7.2007, Case C-367/05, *Kraaijenbrink*: 6 member states; ECJ 28.9.2006, Case C-150/05, *Van Straaten*: 8 member states; ECJ 28.9.2006, Case C-467/04, *Gasparini and others*: 5 member states; ECJ 9.3.2006, Case C-436/04, *Van Esbroeck*: 5 member states.

[16] ECJ 13.9.2005, Case C-176/03, *Commission* v. *Council*: 11 member states; on this case, *see* D. Spinellis, 'Case Note – Court of Justice of the European Communities – Judgment of 13 September 2005 (Case C-176/03, *Commission* v. *Council*) annulling the Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law', 2 *EuConst* (2006), p. 293; V. Murschetz, 'The Future of Criminal Law within the European Union – Union Law or Community Law Competence?', 38 *Victoria University of Wellington Law Review* (2007), p. 145; House of Lords, 'The Criminal Law Competence of the European Community, 42nd Report (2005–06), HL 227'. This report is available, as well as all the other reports of the House of Lords Select Committees, on <www. publications.parliament.uk>.

[17] This is more or less the size of a judgment Chambers of five judges needed to resolve some comparatively focused and less fundamental *ne bis in idem* cases, *see*, e.g., ECJ 18.7.2007, Case C-288/05, *Kretzinger*; ECJ 28.9.2006, Case C-150/05, *Van Straaten*.

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Decision, according to which a certain number of international-extradition conventions between member states shall be replaced by the Framework Decision. The plaintiffs argued that only a measure of the same kind, i.e., a convention within the meaning of Article 34(2)(d) EU, can validly derogate from a convention in force.[18]

The first part of this argument is a quite technical and EU Treaty-specific approach, based mainly on the wording of Articles 29 (indent 3), 31(e) and 34(2)(b) EU. However, it also goes beyond this, revealing a certain irony. Ultimately, *Advocaten voor de Wereld* did nothing but take the Council at its word. If the principle of mutual recognition in criminal matters was regarded as an *alternative* to harmonisation of criminal law,[19] why should member states still be allowed a legal instrument for the purpose?

The second part of the plaintiff's argument then shifts the focus from the specific terms of the EU Treaty to the general principles of law, namely the classical *actus contrarius* doctrine: an existing legal act can generally only be repealed by a new legal act of the same legal nature and quality.[20]

In line with Advocate-General Colomer's opinion,[21] the Court rejected this argument. It made clear in the first place that to implement the principle of mutual recognition of arrest warrants requires the approximation of the laws and regulations of the member states, in particular the rules relating to the conditions, procedures and effects of surrender.[22] It thereby rejected the notion that mutual recognition is separate and exclusive from approximation. In this respect, the EAW Framework Decision achieved the purpose of framework decisions in general, i.e., the approximation of the laws and regulations of the member states, according to the Court. The judgment then went on to oppose in strong words the *Advocaten voor de Wereld*'s interpretation of the relation between Articles 31(e) and 34(2)(b) EU:

[18] *See* ECJ 3.5.2007, Case C-303/05, *Advocaten voor de Wereld* v. *Leden van de Ministerraad*, paras. 11, 25, 26.

[19] *See* V. Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU', 43 *Common Market Law Review* (2006), p. 1277 at p. 1278.

[20] For an application of this doctrine in European constitutional law *see*, e.g., I. Pernice, *Multilevel Constitutionalism in the European Union*, WHI-Paper 5/02 (Berlin, Walter Hallstein-Institut für Europäisches Verfassungsrecht 2001), p. 7 and in national constitutional law, e.g., L.F.M. Besselink, 'The Role of National Parliaments – The Dutch Experience in Comparative Perspective', <www.icel.ie/Besselink%202.doc>, visited 2 Sept. 2007, p. 17.

[21] Opinion of Advocate-General Colomer, Case C-303/05, *Advocaten voor de Wereld* v. *Leden van de Ministerraad*, 12.9.2006, paras. 38-68.

[22] *See* ECJ 3.5.2007, Case C-303/05, *Advocaten voor de Wereld* v. *Leden van de Ministerraad*, para. 29.

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> Contrary to what Advocaten voor de Wereld contends, there is nothing to justify the conclusion that the approximation of the laws and regulations of the Member States by the adoption of framework decisions under Article 34(2)(b) EU is directed only at the Member States' rules of criminal law mentioned in Article 31(1)(e) EU, that is to say, those rules which relate to the constituent elements of criminal offences and the penalties applicable within the areas listed in the latter provision.[23]

In essence, the Court interpreted the relevant treaty provision in a way that leaves the Council with wide discretion as to the choice of the proper legal instruments listed in Article 34(2) EU and established furthermore that this article does not contain any order of priority between these instruments. As to the *actus contrarius* argument, the Court simply found that such an interpretation 'would risk depriving of its essential effectiveness the Council's recognized power to adopt framework decisions in the fields previously governed by international conventions.'[24]

The Court then turned to the second question addressing the fundamental-rights implications of the double criminality requirement and its partial renunciation by Article 2(2) of the Framework Decision. A rule of traditional extradition law,[25] double criminality requires that the acts for which an extradition is requested constitute a criminal offence according to the criminal laws of both the requesting, or issuing[26] state and the requested, or executing[27] state. With regard to thirty-two non-defined categories of offences, Article 2(2) of the Framework Decision removes the possibility of examining double criminality, provided these offences are punishable in the issuing member state by a custodial sentence or a detention order for a maximum period of at least three years.

Advocaten voor the Wereld had challenged this Framework Decision innovation, relying on the principles of (a) legality in criminal matters and (b) equality and non-discrimination. Concerning the first, the claimant complained that the Framework Decision does not provide precise legal definitions of the offences, thereby falling short of the principle that criminal legislation must satisfy conditions as to precision, clarity and predictability, which allow each person to know, at the time when an act is committed, whether that act constitutes an offence. *Advocaten voor de Wereld* did not stop at raising the argument of legality as such. Instead, by comparing the situation of a person being subject to surrender according to

[23] Ibid., para. 32.

[24] Ibid., para. 42.

[25] *See* M. Płachta, 'The Role of Double Criminality in International Cooperation in Penal Matters', in N. Jareborg (ed.), *Double Criminality. Studies in International Criminal Law* (Uppsala, Iustus Förlag 1989), p. 84.

[26] Art. 2(1) Framework Decision.

[27] Art. 2(4) Framework Decision.

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Article 2(2) of the Framework Decision to another person, whose extradition is subject to the double criminality check, *Advocaten voor de Wereld* linked their argument with the principles of equality and non-discrimination.[28] As one finds argued in Thomas Vandamme's contribution to this volume, this is due to the Belgian origin of the case. *Advocaten voor de Wereld* contended that this distinction is not objectively justified, arguing that the Framework Decision establishes a system which

> gives rise to an unjustified difference in treatment as between individuals depending on whether the facts alleged to constitute the offence occurred in the Member State of execution or outside that State. Those individuals will thus be judged differently with regard to the deprivation of their liberty without any justification for that difference.[29]

The claimants failed to convince the Court. While recognising the rule of legality of criminal offences and penalties as a general legal principle underlying the constitutional traditions common to the member states and being enshrined notably in Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the ECJ stated that Article 2(2) of the Framework Decision could not infringe this principle as it does not seek to harmonise the criminal offences in question. Instead, the definitions of the offences and penalties in question continue to be matters determined by the law of the issuing member state. It is therefore up to the criminal laws of the member states to respect the principle of legality.[30]

Turning to the equality and non-discrimination argument, the Court left the question ultimately undecided whether the situations of persons falling under the double-criminality check and those under the new EAW mechanism are actually comparable. Either way, the distinction would be objectively justified, the Court stated. According to the judges, this justification shall follow from the seriousness – in terms of adversely affecting public order and public safety – of the offences listed in Article 2(2) of the Framework Decision. It is also at this point of the ruling, that the principle of mutual recognition became a factor. The Court found that this principle, in light of the high degree of trust and solidarity between the member states, enabled the Council to drop the requirement of double criminality for those serious offences.[31]

[28] *See* ECJ 3.5.2007, Case C-303/05, *Advocaten voor de Wereld* v. *Leden van de Ministerraad*, para. 48.

[29] Ibid., para. 55.

[30] Ibid., paras. 52-53.

[31] Ibid., paras. 57-58.

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Referring finally to the risk of disparate implementation of the Framework Decision within the various national legal orders, due to the lack of precision in the definition of the categories of offences in Article 2(2) of the Framework Decision, the Court considered it enough to point out

> that it is not the objective of the Framework Decision to harmonise the substantive criminal law of the Member States and that nothing in Title VI of the EU Treaty, Articles 34 and 31 of which were indicated as forming the legal basis of the Framework Decision, makes the application of the European arrest warrant conditional on harmonisation of the criminal laws of the Member States within the area of the offences in question[.][32]

Based on these findings, the Court ruled that there are no grounds capable of affecting the validity of the EAW Framework Decision.

Comments

Four aspects of the judgment shall be further addressed.

Asserting the Council's procedural freedom of choice

The Court's answer to the first question might not raise too many objections. From a position emphasising democratic legitimacy, however, a third-pillar convention might appear preferable to a framework decision as only the former requires ratification in the member states. Adopting a convention might therefore ease the democratic setback originating in the powers limited to consultation assigned to the European Parliament under Article 39 EU. Whatever position one takes in this respect, chances are that this part of the judgment will ultimately not be of any major importance for the foreseeable future. Asserting the Council's discretion as to which legal instrument – framework decision or convention – to choose, and rejecting the idea of any order of priority between the third-pillar instruments of Article 34(2) EU are aspects intrinsically linked to the special third-pillar regime. With the impending amendment of the EU Treaties by the Lisbon Treaty the current third-pillar *toolbox* will disappear, making way for the application of the well-known legal instruments of the current first pillar. In addition, the European Parliament's powers will be extended, the co-decision procedure becoming standard also in police and judicial co-operation, thereby reducing the existing democratic deficit.[33]

[32] Ibid., para. 59.

[33] *See* S. Carrera and F. Geyer, *The Reform Treaty & Justice and Home Affairs – Implications for the Common Area of Freedom, Security and Justice*, CEPS Policy Brief No. 141, Aug. 2007 (Brussels, Centre for European Policy Studies 2007), p. 2.

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It is therefore mainly with respect to the *actus contrarius* argument, that the Court's reasoning appears somewhat terse. Additional analysis – beyond relying on pure effectiveness – would have been particularly beneficial in light of the extended controversy that existed between the Commission's and the Council's Legal Services as to the conversion of the EUROPOL convention. While the Council's Legal Service maintained that a formal protocol ratified by the member states is required to repeal the old EUROPOL convention before transforming its substance into a decision or framework decision, the Commission's Legal Service considered this unnecessary.[34] Although this concrete dispute has been settled in the meantime, others might evolve; the ECJ would have therefore done well to share some more thoughts on its perception of the *actus contrarius* doctrine, especially after the Advocate-General had examined the issue in his opinion.[35]

Acknowledging the EU Fundamental Rights Charter

Turning to one of the positive, substantive aspects of the judgment, it is worth noting that the Court once more paid tribute to the Union's Charter of Fundamental Rights. Having done so for the first time in its judgment on the Family Reunification Directive[36] the Court now even refrained from underlining the Charter's non-binding legal quality. Instead, its reference to Articles 49, 20 and 21 of the Charter serves to substantiate the finding that the principles of legality in criminal law, of equality and of non-discrimination are general principles of law that must be respected according to Article 6(2) EU.[37] This strengthening of the Charter's importance by the Court must be particularly satisfying for Advocate-General Colomer who had undertaken considerable efforts in his opinion to highlight the relevance of the Charter for the case at issue, culminating in his instigation that:

> […] the Court must break its silence and recognise the authority of the Charter of Fundamental Rights as an interpretative tool at the forefront of the protection of the fundamental rights which are part of the heritage of the Member States. That

[34] *See* Commission of the European Communities, Commission Staff Working Document, Converting the Europol Convention into a Council Decision – Legal Analysis, SEC(2006) 851, 21.6.2006, p. 5.

[35] Opinion of Advocate-General Colomer, Case C-303/05, *Advocaten voor de Wereld* v. *Leden van de Ministerraad*, 12.9.2006, paras. 57-60.

[36] ECJ 27.6.2006, Case C-540/03, *Parliament* v. *Council*, para. 38; *see* R. Lawson, 'Case Note – Family Reunification Directive – Court of Justice of the European Communities – Family Reunification and the Union's Charter of Fundamental Rights, Judgment of 27 June 2006, Case C-540/03, *Parliament* v. *Council*', 3 *EuConst* (2007), p. 324 at p. 329.

[37] ECJ 3.5.2007, Case C-303/05, *Advocaten voor de Wereld* v. *Leden van de Ministerraad*, para. 46; *see* Lawson, *supra* n. 36, p. 324 at p. 335-336.

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> undertaking must be approached with caution and vigour alike, in the full belief that, while the protection of fundamental rights is an essential part of the Community pillar, it is equally indispensable in the context of the third pillar, which, owing to the nature of its subject-matter, is capable of affecting the very heart of individual freedom, the foundation of the other freedoms.[38]

In addition to the immediate impact of this development, with regard to the future constitutional setting of the EU, this case-law is likely to become very important. This might seem surprising when considering that the Charter will be directly legally binding, once the Lisbon Treaty has entered into force, but the United Kingdom and Poland have secured special treatment in respect of the Charter, making it very difficult to assess a clear cut legal impact throughout the Area of Freedom, Security and Justice.[39] Chances are that future disputes on this matter will recur to ECJ case-law that referenced the Charter prior to it becoming legally binding and prior to the activation of the Protocol on the Application of the Charter on Fundamental Rights of the European Union to Poland and the United Kingdom and thereby neutralise the intended effect of that Protocol.

The principle of legality

Two further observations can be made in relation to the Court's dealing with the principle of legality in criminal matters. As outlined earlier, the Court refused to apply the legality principle to Article 2(2) of the Framework Decision as it considered that this norm does not seek to harmonise criminal offences. In essence, it therefore assigned the responsibility to guarantee this seminal principle to the member states. This is an argument similar to one raised in previous debates, stating that extradition is not genuine criminal prosecution but mere procedural assistance to prosecution by another state.[40] Technically speaking this appears correct and also reflects the Advocate-General's opinion, which relied, *inter alia*, on judgments of the European Court of Human Rights, 'exclud[ing] extradition from the concept of punishment[.]'[41] However, others have put forward that such a technical view would undermine material principles of constitutional and criminal law. They state that the EAW opens national criminal law systems to material provisions of 'foreign' criminal law, serving as a legal basis for the appre-

[38] Opinion of Advocate-General Colomer, Case C-303/05, *Advocaten voor de Wereld* v. *Leden van de Ministerraad*, 12.9.2006, para. 79.

[39] *See* Carrera and Geyer, *supra* n. 33, p. 3 and 7.

[40] Cf. for this argument, e.g., J. Vogel, 'Abschaffung der Auslieferung?', 56 *Juristenzeitung* (2001), p. 937 at p. 942.

[41] Opinion of Advocate-General Colomer, Case C-303/05, *Advocaten voor de Wereld* v. *Leden van de Ministerraad*, 12.9.2006, para. 105.

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hension and arrest of persons. Characterising the Framework Decision as merely procedural is therefore not justifiable according to these critics.[42] Regrettably the Court preferred, once more, to be as brief as possible and refrained from even mentioning the controversy.

However, by shifting the responsibility for the principle of legality to the member states the Court might have opened a new chapter in EU judicial control over national criminal law. One wonders what might happen if in a future EAW procedure at national level the argument is raised that surrender is requested for an offence falling short of the principle of legality in criminal matters. Which legal standards would apply to resolve this contention and which would be the judicial body in charge of finally doing so? The Court stated that it is for 'the law of the issuing Member State, which […] must respect fundamental rights and fundamental legal principles as enshrined in Article 6 EU, and, consequently the principle of the legality of criminal offences and penalties.'[43] Explicitly referring to Article 6 EU the Court may have hinted that it is not willing to let the assessment of whether the principle of legality has been observed be guided exclusively by national standards. Although it seems unlikely under the current structure,[44] who can foretell whether this judgment might not be cited as authority for a claim challenging a national provision of criminal law, applied within a mutual recognition context, as infringing Article 6 EU, due to its lack of precision, clarity and predictability?

The principles of equality and non-discrimination

As stated earlier, the final part of the judgment in which the ECJ addressed the arguments raised in connection with the principles of equality and non-discrimination is the shortest. Most likely it is also the least satisfactory. The Court started by referring to its case-law, stating that the principle of equality and non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way, unless such treatment is objectively justified. However, in applying this, the Court did not even take the time to establish whether there was actually a risk of differentiated treat-

[42] *See*, e.g., B. Schünemann, 'Die Entscheidung des Bundesverfassungsgerichts zum Europäischen Haftbefehl: Markiges Ergebnis, Enttäuschende Begründung', 25 *Der Strafverteidiger* (2005), p. 681 at p.684; M. v. Unger, '"So lange" nicht mehr: Das BVerfG behauptet die normative Freiheit des deutschen Rechts', 23 *Neue Zeitschrift für Verwaltungsrecht* (2005), p. 1266 at p. 1272; S. Braum, 'Das Prinzip der gegenseitigen Anerkennung – Historische Grundlagen und Perspektiven europäischer Strafrechtsentwicklung', 152 *Goltdammer's Archiv für Strafrecht* (2005), p. 681 at p. 690.

[43] ECJ 3.5.2007, Case C-303/05, *Advocaten voor de Wereld* v. *Leden van de Ministerraad*, para. 53.

[44] Characterised by the Court's limited competences in police and judicial co-operation in criminal matters, Art. 35 EU.

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ment inherent in the case at hand. Instead, the Court was content in referring to the seriousness of the offences listed in Article 2(2) of the Framework Decision.

One wonders whether the issue is not in fact one of proportionality. The seriousness of offences cannot always be considered as an objective justification for any kind of unequal treatment. Such an understanding would render the legal test inane and could serve to justify any obvious discrimination. Instead, whether something qualifies as an objective justification seems to eventually depend on the concrete circumstances of the dispute. The Court's analysis would therefore be much more convincing if it actually had elaborated on whether there is a different treatment of persons being surrendered according to the new system and those being surrendered under the traditional double criminality requirement. If yes, the Court should have investigated into the underlying reason for this unequal treatment (to which end?) and the impact on the individuals concerned (to which price?): what are the differences that lead to the unequal treatment and *how unequal* is the unequal treatment in fact? Only after having gathered this material the Court should have developed its conclusion. 'Seriousness of the offences' is undoubtedly one important element, yet, merely stated as such and not brought into relation with the other issues at stake, it is barely sufficient.

Concluding remarks

In the introduction to this case note the question was raised whether the judgment will actually reassure critics and restore confidence, potentially lost. The answer proposed here is: probably not.[45] In spite of some of the positive and reassuring elements of the judgment, this case which has drawn so much public attention and which is so decisive for the further development of EU judicial co-operation in criminal matters deserved a more exhaustive judicial examination. To a certain extent the impression prevails that the Court chose somewhat easy arguments to dispose of some rather difficult issues

Without doubt, one major factor which contributed to this was the abstract setting of the proceedings. There was no concrete surrender situation which gave rise to the case. If confronted with some of the factual legal difficulties generated by the EAW's 'system of surrender' the Court's assessment might have made a different turn. Sooner or later such an individual case will make its way to Luxembourg.

[45] Similarly doubtful R. Michalke, 'EU-Vertragskonformität des Rahmenbeschlusses über Europäischen Haftbefehl', 18 *Europäische Zeitschrift für Wirtschaftsrecht* (2007), p. 373 at p. 378.

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