Legislative Drafting and Human Rights

The Example of the European Arrest Warrant

William Robinson[*]

Abstract

This article considers some of the requirements for good laws, focusing in particular on the drafters' perspective. It looks first in general terms at the requirements forming part of the rule of law that laws be accessible and predictable. It then examines the drafting of laws in the European Union: how it is done; the concern to make EU laws accessible; and specific features of EU legislative drafting rules and practices, illustrated by reference to Framework Decision 2002/584.

Keywords: rule of law, drafting EU legislation, Framework Decision 2002/584 on the European Arrest Warrant.

A. Introduction

The validity of Framework Decision 2002/584 on the European Arrest Warrant[1] was challenged by the Belgian association Advocaten voor de Wereld on the grounds in particular that it listed criminal offences in terms that were too vague and was thus contrary to the principle of legality. The Belgian Arbitragehof referred the case to the European Court of Justice (ECJ) for a preliminary ruling.[2] The Advocate General in that case, Mr Ruiz-Jarabo Colomer, began his opinion by quoting Montesquieu: "The knowledge already acquired ... concerning the surest rules to be observed in criminal judgments is more interesting to mankind than any other thing in the world."[3] The Advocate General could well have continued the quotation from Montesquieu:

* Sir William Dale Visiting Fellow, Institute of Advanced Legal Studies, London.

1 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the Surrender procedures between member states, OJ L 190, 18.7.2002, p. 1.

2 Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633.

3 "Les connoissances que l'on a acquises ... sur les règles les plus sures que l'on puisse tenir dans les jugements criminels, intéressent le genre humain plus qu'aucune chose qu'il y ait au monde", *De l'Esprit des Lois*, 1748, Book 12, Chapter 2.

> It is only on the practice of that knowledge that liberty can be founded; and in a State which has the best possible laws in that respect a man who is tried and who is to be hanged the next day would be freer than a pasha in Turkey.[4]

The preamble to the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10 December 1948 states "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law".[5]

The contracting parties to the European Convention on Human Rights referred in the preamble to that Convention to their "common heritage of political traditions, ideals, freedom and the rule of law" and the European Court of Human Rights (ECHR) has referred to "the notion of the rule of law from which the whole Convention draws its inspiration".[6]

The member states of the European Union have confirmed "their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law".[7] According to Article 2 of the Treaty on European Union (TEU) the European Union "is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights".

What is meant by the Rule of Law?

In 2006 Lord Bingham, then Lord Chief Justice, delivered a lecture on 'The Rule of Law',[8] in which he suggested:

> The core of the existing principle is ... that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts.

He broke the principle down into eight sub-rules, the first being:

> ...the law must be accessible and so far as possible intelligible, clear and predictable. This seems obvious: if everyone is bound by the law they must be able without undue difficulty to find out what it is, even if that means taking

4 "Ce n'est que sur la pratique de ces connoissances que la liberté peut être fondée; et dans un Etat qui auroit là-dessus les meilleures lois possibles, un homme a qui on feroit son procès, et qui devroit être pendu le lendemain, seroit plus libre qu'un bacha ne l'est en Turquie."

5 <www.un.org/en/documents/udhr/>.

6 *Engel v. The Netherlands* (No. 1) (1976) 1 EHRR 647, 672, para. 69.

7 Preamble to the Treaty on European Union (TEU), fourth citation.

8 The sixth annual Sir David Williams lecture at the University of Cambridge. Available at: <http://cpl.law.cam.ac.uk/Media/THE%20RULE%20OF%20LAW%202006.pdf>.He has now expanded and illustrated his analysis *in The Rule of Law*, Allen Lane, 2010.

The rule of law in the European context has been considered in particular by F.G. Jacobs *in The Sovereignty of Law: The European Way*, Cambridge, Cambridge University Press 2007, and Lord Mackenzie Stuart *in The European Communities and the Rule of Law*, London, Stevens 1977.

> advice (as it usually will), and the answer when given should be sufficiently clear that a course of action can be based on it.

What do the requirements that laws be accessible and their effects foreseeable or predictable actually entail?

B. Accessibility

Illustrations of laws being made accessible to those to whom they apply can be found stretching back into antiquity. From the Book of Exodus in the Old Testament of the Bible we remember that the Ten Commandments were handed to Moses on tablets of stone.[9]

In ancient Rome, Livy wrote in *Ab Urbe Condita*, the patricians had kept the laws secret and enforced them severely, especially against the plebeians, but in 462 BC a plebeian named Terentilius proposed that an official legal code should be published, so that plebeians would know the law. The Law of the Twelve Tables was drawn up by a Decemvirate or committee of ten men in 450-449 BC and posted on tablets in the Roman Forum so that all Romans could read and know them.

It has long been generally recognized as a basic requirement of valid law that it must be made public. In the words of Blackstone:

> ...a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it.[10]

The first article of the Code Napoleon, the French Civil Code of 1803, provided:

> The laws are executory throughout the whole French territory, by virtue of the promulgation thereof made by the first consul. They shall be executed in every part of the republic, from the moment at which their promulgation can have been known.[11]

How law must be made public was examined more closely by Bentham: "That a law may be obeyed, it is necessary that it should be known: that it may be known, it is necessary that it be promulgated."[12] He considered the different methods of promulgation, the process whereby, after a law has been validly adopted by the

9 *Exodus*, Book 31, verse 18, Book 34, verses 28-29.

10 Sir W. Blackstone, 'Of the Nature of Laws in General', Introduction, Section 2, *Commentaries on the Laws of England*, Oxford, 1765-1769.

11 "Les lois sont exécutoires dans tout le territoire français, en vertu de la promulgation qui en est faite par le Premier Consul. Elles seront exécutées dans chaque partie de la République, du moment où la promulgation en pourra être connue."

12 J. Bentham, *Of Promulgation of the Laws and Promulgation of the Reasons Thereof*, Section 1.

legislature, a public proclamation or declaration is made in accordance with the forms prescribed for the legal system in question that the law is to take effect.[13]

I. What is Meant by Accessible?

It is not enough simply to put a law in the public domain; the public must have real access to it so that it can effectively take notice of it. The ECHR held in *The Sunday Times* case:

> ...the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case.[14]

There are (I suggest) three elements to giving adequate access: the law must be consultable; it must be findable; and it must be understandable.

1. Consultable

Cassius Dio described how Caligula, emperor of Rome from 37 AD until his assassination in 41 AD, went from excess to excess and had to raise revenue by levying more and more taxes, even on such things as foodstuffs, porters, prostitutes and marriage, observing:

> The multitude, however, was not greatly displeased by these proceedings, but actually rejoiced with him in his licentiousness and in the fact that he used to throw himself each time on the gold and silver collected from these sources and roll in it. But when, after enacting severe laws in regard to the taxes, he inscribed them in exceedingly small letters on a tablet which he then hung up in a high place, so that it should be read by as few as possible and that many through ignorance of what was bidden or forbidden should lay themselves liable to the penalties provided, they straightway rushed together excitedly into the Circus and raised a terrible outcry.[15]

13 Promulgation is considered in detail *in* G. Bailey, 'The promulgation of law', *The American Political Science Review*, Vol. XXXV No 6, December 1941. Bailey cites further authors in support of the requirement of promulgation:

"Wherefore, in order that a law obtain the binding force which is proper to a law it must needs be applied to the men who have to be ruled by it. Such application is made by its being notified to them by promulgation. Wherefore promulgation is necessary for the law to obtain its force". T. Aquinas, *Summa Theologica* Vol. VIII 7-8: "A law is not really law until it has been made known", Gratian, *Decretum Gratiani*, c. 3, dist.

VII: "In order for a law to exert its force, knowledge of the legislator, and of the law as well, is required on the part of one for whom the law is passed". Pufendorf, *Elementorum Jurisprudentiae Universalis Libri duo* (trans. by W.A. Oldfather), Vol. II 154-155.

14 *Sunday Times v. United Kingdom* (No. 1), judgment of 26 April 1979, Series A no 30, p. 30, para. 49.

15 Cassius Dio, *History of Rome,* Book 59, Chapter 28.

The law must be made public in a suitable place. Tablets of stone may have been suitable for the Ten Commandments and bronze or wooden tablets in the forum for Roman laws but for many centuries the standard form of publication has been the printing of the full text in an official publication which is issued by or on behalf of the legislature, is available to all to buy, and can be consulted by all, generally without charge, in designated places such as public offices or libraries.

A shift from that centuries-old practice is now visible as more and more legal systems move to publication on the internet. Some of the advantages are obvious. Access can be given very quickly to the public the world over with little effort and at low cost. There is hesitation in some legal systems, partly because of concerns that not everyone has access to the internet. However, those concerns can generally be met by ensuring that internet access is made available to all by public offices or libraries. Another concern is guaranteeing the permanence, stability and reliability of any internet publication but – it seems – this concern too can be addressed.

2. Findable

It must be possible to find laws many years, decades or even centuries after their adoption. The laws must be identified in some way, usually by a title or a number. The place of publication must be identifiable too. This makes it possible to compile indexes so that laws can be tracked down using such search terms as subject matter, reference number or publication reference. While in the past users had to consult indexes on paper the arrival of the internet has made it much easier and quicker to find laws.

Law must be stable. To enable citizens and also lawyers to familiarize themselves with the law, it must not change too often. Montesquieu wrote: "Do not change a law without good reason."[16] Any change in legal rules represents a burden on all those concerned since they have to become aware of the change, comprehend it, and – where necessary – adapt their conduct to take account of it. Hence changes should be made to a law only if that is essential and the change should be confined to what is strictly necessary. Any changes must be adopted by the legislator in due form and made public in the same way as the original law itself.

To limit the burden resulting from changes, they are now usually in the form of amendments to the text of the original law. This makes it possible for the user, or the official publisher or a commercial undertaking, to produce a single text with the up-to-date text of the law as amended over time.

3. Understandable

Lord Oliver of Aylmerton has written of the importance of understandable laws:

> ...every legislative enactment constitutes a *diktat* by the state to the citizen which he is not only expected but obliged to observe in the regulation of his

16 "Il ne faut point faire de changement dans une loi, sans une raison suffisante", *De l'Esprit des Lois*, 1748, Book 29, Chapter 16.

> daily life and it is the judge and the judge alone who stands between the citizen and the state's own interpretation of its own rules
>
> That is why it is so vitally important that legislation should be expressed in language that can be clearly understood and why it should be in a form that makes it readily accessible. Edmund Burke observed that bad laws are the worst form of tyranny. But equally, well-intentioned laws that are badly drafted or not readily accessible are also a form of tyranny.[17]

For laws to be understandable, they must use clear language and be well structured. Drafters should write with the reader in mind and express themselves clearly and as simply as is compatible with the requirement of precision. They should use everyday words where possible and if technical words are unavoidable, thought should be given to providing definitions or other explanation. Consistent use of terms and structures will assist readers.

Provisions should be placed in a logical order, which should be apparent to the reader. They should be broken up into short units, which are easy for readers to assimilate. Readers should be assisted by guidance such as headings.

Drafters should keep their sentences short and punctuate carefully. They should avoid too many references to other laws or even to other provisions within the same law, which may make a law impenetrable to non-specialists.

The fact remains though that not all laws can be written simply. Laws often deal with highly complex or technical situations where precision is of paramount importance and they must be drafted in a way that takes account of that.

C. Foreseeability

Many legal texts relate to past situations or existing situations or situations that are about to come into existence and are directed to a finite and often known audience. That is the case of court pleadings or judgments or commercial contracts for example. Characteristics of laws, on the other hand, are that they are forward-looking; they apply to an open-ended category of people; and they serve not just to analyze or inform but to lay down rules governing future conduct.

Part of the challenge when drafting laws is that they must be understood sufficiently well to govern the conduct of all those subject to them for years, decades or even centuries to come. They must not only be clear enough for users to grasp broadly what is meant but sufficiently precise for users to fix their conduct in accordance with the rule.

The requirement of foreseeability was also considered by the ECHR in its judgment in the *Sunday Times* case:

> ...a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if

17 'A Judicial View of Modern Legislation', (1993) 10 *Stat LR* 2.

> need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.[18]

It is essential for drafters to confine themselves to broad formulations because it is simply not possible for them to envisage and expressly deal with all future situations.

First, drafters cannot look into the future and foresee all the circumstances that may arise. As the Italian jurist Piero Calamandrei put it so eloquently "statutes cannot foresee all the cases that reality, much richer than the most fervid imagination, brings before the judge".[19]

Second, attempting to specify all the cases to be covered would lead to voluminous laws with long sentences full of lists of words with similar meaning. Clarity would be lost in the profusion, as must have happened in 1794 when Frederick the Second of Prussia, having ordered that Prussian law be codified, was presented with the Allgemeines Landrecht für die Preußischen Staaten (General State Laws for the Prussian States) consisting of over 19,000 articles!

Third, over-precise texts would become outdated as circumstances evolve.

Similar arguments were presented to the ECHR by the French government in the *Cantoni* case,[20] where it defended its inclusion in a law of a broad definition of 'medicinal product' rather than a list of all the products covered:

> ...the legislature had no alternative but to have recourse to such a definition because to date no more satisfactory definition of medicinal product had been established. The only other solution – the drawing up of exhaustive lists – was not practicable because in this field there were thousands of different products and their number varied on an almost daily basis. A list would therefore never correspond to the reality.[21]

In its judgment in the *Cantoni* case the ECHR, after emphasizing the importance of precision in criminal provisions, recognized the difficulties facing drafters of laws:

18 *Sunday Times v. United Kingdom* (No. 1), judgment of 26 April 1979, Series A no 30, p. 30, para. 49. *See also Silver and Others v. United Kingdom*, judgment of 25 March 1983 (Application no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75), para. 88.

19 Quoted *in* Cappelletti, Merryman and Perrillo, *The Italian Legal System*, Standford University Press 1967.

20 *Cantoni v. France*, Judgment of 15 November 1996, *Reports* 1996-V, p. 1627.

21 Para. 28.

> Article 7 (Art. 7) [of the European Convention on Human Rights] embodies, inter alia, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence must be clearly defined in the law. This requirement is satisfied where the individual can know from the wording of the relevant provision (Art. 7) and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable. ...
>
> ... it is a logical consequence of the principle that laws must be of general application that the wording of statutes is not always precise. One of the standard techniques of regulation by rules is to use general categorisations as opposed to exhaustive lists. The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague. The interpretation and application of such enactments depend on practice...
>
> ... When the legislative technique of categorisation is used, there will often be grey areas at the fringes of the definition. This penumbra of doubt in relation to borderline facts does not in itself make a provision incompatible with Article 7 (Art. 7), provided that it proves to be sufficiently clear in the large majority of cases. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain, taking into account the changes in everyday practice.[22]

The standard of foreseeability required is not a single fixed one but "depends to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it is addressed".[23] So a text on complex financial transactions, which is presumably primarily addressed to a small number of specialists, may validly be framed in more complex terms than provisions on keeping dangerous animals, for example.

The ECHR also recognized that in practice those subject to legal texts may be expected to consult lawyers in case of doubt:

> A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[24]

Since the text of laws is of necessity often vague, it will have to be interpreted and applied to individual cases by the administrative authorities. To afford an adequate measure of foreseeability it is incumbent upon those authorities to develop a consistent approach to application of the law, which may itself be made public

22 Paras. 29, 31 and 32.
23 Para. 35.
24 Para. 35.

in the form of guidelines or practice notes. And the authorities' application of the law is subject to review by the courts, which themselves must take a consistent approach to interpretation.

D. How EU Legislation Is Drafted

In the EU system, legislative acts are adopted by the European Parliament and the Council but they can only act on the basis of a draft text submitted by the European Commission. The basic rule is laid down in Article 17 (2) TEU:

> Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise. Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide.

That basic rule is qualified by Article 289(4) of the Treaty on the functioning of the European Union (TFEU):

> In the specific cases provided for by the Treaties, legislative acts may be adopted on the initiative of a group of member states or of the European Parliament, on a recommendation from the European Central Bank or at the request of the Court of Justice or the European Investment Bank.

The other institutions can ask the Commission to present a proposal, but they cannot oblige it to do so since the Commission's independence is guaranteed by the Treaties.[25] It is the Commission that decides on the content of its proposal and on the type of act it will propose (unless the latter is specified in the Treaties).

I. Procedure within the Commission

The preparatory work for a Commission legislative proposal is done by the Directorate General (DG) responsible for the sector of EU activities concerned. It carries out any necessary preliminary steps, such as consultations and impact assessments, and then produces a first draft, which forms the basis of all the subsequent discussions within the Commission. The first drafts are generally produced by experts in the technical sector who are not drafting specialists and may not have legal training. The first drafts must be in French or English to facilitate discussions within the Commission.

The DG's draft is submitted to the other DGs "with a legitimate interest in the initiative by virtue of their powers or responsibilities or the nature of the sub-

25 Art. 17(3) TEU provides: "… The members of the Commission shall be chosen on the ground of their general competence and European commitment from persons whose independence is beyond doubt.

In carrying out its responsibilities, the Commission shall be completely independent. […] the members of the Commission shall neither seek nor take instructions from any Government or other institution, body, office or entity. …"

ject", as part of the Inter-Service Consultation (ISC)[26] which ensures coordination between Commission departments.

The Legal Service, an internal department providing legal advice to the Commission and representing it in all court cases,[27] must be consulted on all draft legal acts.

When the Legal Service is consulted on a draft act, lawyers specializing in different areas of the Commission's work check the substantive legal aspects: the legal basis, the conformity with EU treaties and fundamental principles, compliance with fundamental rights, the coherence with other acts and the conformity with international law. At the same time, the legal revisers in the Legal Service[28] check that the draft is clear and precise and complies with the rules on form and presentation. They also ensure that the text is translatable into all the other official languages.

After revision, the text is sent back to the originating DG, which must take account of the comments from the other departments before submitting the draft for formal adoption by the plenary Commission. The procedure is overseen by the Secretariat General, which is responsible for coordinating the work of the different departments and checking that procedures are properly followed.

Before a draft act can be formally adopted, the text must be translated into the other 22 official languages by the Translation DG.

II. Procedure in the Legislative Authority

Once the proposal has been adopted by the plenary Commission, it is submitted to the legislative authority (generally the European Parliament and the Council) and to consultative bodies such as the European Economic and Social Committee. It is published as a Commission Communication (COM document). The text of that proposal forms the basis for all discussions in the other institutions.[29]

In the Parliament the proposal is assigned to the relevant committee and a *rapporteur* is chosen. The committee submits its report to a plenary session. In some cases, the Parliament and the Council quickly agree on a proposal and the act can be adopted at the first reading; however, a second reading is often necessary, after which, if there is no agreement, a conciliation procedure is launched. In most cases, the Parliament's role consists in suggesting textual changes (known as 'amendments') to the proposal.

Within the Council, the proposal is examined by a working group composed of representatives of all member states and chaired by the representative of the country holding the presidency of the Union. To accommodate the different

26 *See* Art. 23 of the Commission's Rules of Procedure (OJ L 347, 30.12.2005, p. 83).

27 *See* its public website: <http://ec.europa.eu/dgs/legal_service/index_en.htm>.

28 The Legal Revisers' public website is at: <http://ec.europa.eu/dgs/legal_service/legal_reviser_en.htm>.

29 Art. 293(1) of the TFEU states: "Where, pursuant to the Treaties, the Council acts on a proposal from the Commission, it may amend that proposal only by acting unanimously, except in the cases referred to in paragraphs 10 and 13 of Article 294, in Articles 310, 312 and 314 and in the second paragraph of Article 315."

interests of all member states, it is often necessary to make many changes to the Commission's text, in particular in the form of exceptions or derogations.

At the end of the procedure the text is revised to ensure that all the language versions correspond and that the drafting rules have been followed at a meeting attended by one Council legal reviser for each language and representatives from the member states, as well as representatives of the Parliament legal revisers.

If the Commission takes the view that its proposal has been changed to such an extent that it no longer reflects the original intention, it may withdraw its proposal at any time before its adoption,[30] after which the other institutions may no longer adopt an act. That power, while rarely exercised, gives the Commission a stronger position during the negotiations with the other institutions but all three have to make compromises and the Commission may often agree to submit a modified proposal in order to take account of the other institutions' concerns.

E. Concern for the Accessibility of EU Legislation

As long ago as 1992, the European Council adopted the Birmingham Declaration with the pithy demand: "We want Community legislation to be clearer and simpler." Meeting at Edinburgh later that year, it called for the quality of Community legislation to be improved by better drafting and for it to "be made more readily accessible in a concise and intelligible form".[31]

In response to that call from the European Council, in 1993 the Council adopted a Resolution on drafting quality referring to the "general objective of making Community legislation more accessible" and laying down 10 drafting guidelines.[32]

In 1997, the Amsterdam Intergovernmental Conference adopted Declaration No 39 on the quality of the drafting of Community legislation[33] stating:

> The Conference considers that the three institutions involved in the procedure for adopting Community legislation, the European Parliament, the Council and the Commission, should lay down guidelines on the quality of drafting of the said legislation. It also stresses that Community legislation should be made more accessible.

In 1998 the Parliament, the Council and the Commission accordingly adopted an Interinstitutional Agreement on common guidelines for the quality of drafting of Community legislation.[34] It laid down 22 guidelines on drafting, based partly on suggestions from member states. Those guidelines are not binding but they form

30 *See* Art. 293(2) of the TFEU: "As long as the Council has not acted, the Commission may alter its proposal at any time during the procedures leading to the adoption of a Union act."
31 Conclusions of the Presidency, DN: DOC/92/8 of 13.12.1992.
32 Council Resolution of 8 June 1993 on the quality of drafting of Community legislation (OJ C 166, 17.6.1993, p. 1).
33 OJ C 340, 10.11.1997, p. 139.
34 OJ C 73, 17.3.1999, p. 1.

the common basis for the work carried out by the legal revisers of the three institutions to improve the drafting of acts.

Further to the Lisbon Strategy adopted by the European Council in 2000, the high-level Mandelkern Committee recommended measures to produce regulation adapted to needs, to improve access to EU law and provide sound administrative structures.[35]

The European Commission's governance initiative launched in 2001 to enhance democracy and increase the legitimacy of the EU institutions called for the EU to "pay constant attention to improving the quality, effectiveness and simplicity of regulatory acts".[36]

Responding to an invitation from the European Council in 2002, the Parliament, the Council and the Commission adopted another Interinstitutional Agreement in 2003 [37] to improve the quality of lawmaking and to promote simplicity, clarity and consistency in the drafting of laws. The institutions committed themselves in particular to: better preparation of legislation, greater transparency, improved accessibility of EU legislation, keeping the regulatory burden as light as possible, and improved follow-up to legislation adopted.

F. Steps Taken by the EU to Make its Law Accessible

The rules on the formalities for adoption and publication of EU acts are laid down in Article 297 TFEU. It requires the publication in the *Official Journal of the European Union* of all legislative acts and also of most non-legislative acts.[38]

Article 15(3) TFEU lays down rules on access to EU documents:

> Any citizen of the Union, and any natural or legal person residing or having its registered office in a member state, shall have a right of access to docu-

35 <http://ec.europa.eu/governance/better_regulation/documents/mandelkern_report.pdf>.

36 White Paper on Governance (COM (2001) 428), at point 3.2.

37 Interinstitutional Agreement on better law-making of 16 December 2003 (OJ C 321, 31.12.2003, p. 1).

38 Art. 297 provides: "1. Legislative acts adopted under the ordinary legislative procedure shall be signed by the President of the European Parliament and by the President of the Council.

Legislative acts adopted under a special legislative procedure shall be signed by the President of the institution which adopted them.

Legislative acts shall be published in the *Official Journal of the European Union*. They shall enter into force on the date specified in them or, in the absence thereof, on the twentieth day following that of their publication.

2. Non-legislative acts adopted in the form of regulations, directives or decisions, when the latter do not specify to whom they are addressed, shall be signed by the President of the institution which adopted them.

Regulations and directives which are addressed to all Member States, as well as decisions which do not specify to whom they are addressed, shall be published in the *Official Journal of the European Union*. They shall enter into force on the date specified in them or, in the absence thereof, on the twentieth day following that of their publication.

Other directives, and decisions which specify to whom they are addressed, shall be notified to those to whom they are addressed and shall take effect upon such notification."

ments of the Union institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.

General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure.

Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph. [...].

In 2001 the Parliament and the Council had adopted Regulation (EC) No 1049/2001 on access to the documents of the EU institutions which aimed:

(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to [the EU institutions'] documents ... in such a way as to ensure the widest possible access to documents,
(b) to establish rules ensuring the easiest possible exercise of this right, and
(c) to promote good administrative practice on access to documents.[39]

That regulation is currently being revised.

Specific rules on access to Council documents are laid down in its Rules of Procedure.[40]

I. Language Rules

Article 290 TFEU provides: "The rules governing the languages of the institutions of the Union shall ... be determined by the Council, acting unanimously by means of regulations."

Those rules were laid down by Council Regulation No 1, as amended by successive Acts of Accession.[41] Article 1 lists the official languages, of which there are now 23.[42] Article 4 provides that regulations and other documents of general application must be drafted in the official languages and Article 5 that the Official Journal must be published in those languages.

39 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43); *see* Art. 1.

40 OJ L325, 11.12.2009, p. 35. *See* in particular Art. 5 to 10 (openness of legislative proceedings and other deliberations), Art. 17 (publication in the Official Journal), Art. 22 (quality of drafting) and Annex II (detailed provisions on public access to Council documents).

41 EEC Council Regulation No 1 determining the languages to be used by the European Economic Community (OJ 17, 6.10.1958, p. 385/58).

42 "The official languages and the working languages of the institutions of the Union shall be Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish."

II. Publication

A key role in ensuring access to EU legislation is played by the Publications Office of the European Union. Since the inception of the Communities it has published the Official Journal on paper, still the only source for the authentic text of EU legislation. Since 1998 it has also published the Official Journal online but the electronic versions are not authentic.

In addition, in response to the calls for improved accessibility of EU law over the years, the Publications Office has created a single portal, called EUR-Lex, for accessing all information on EU law which is now available without charge.[43] It gives access in particular to: the electronic version of the Official Journal; collections of the treaties, international agreements, legislation in force, legislation in preparation, and case-law, accessible via hyperlinks; search engines; and a database on the interinstitutional decision-making process.

An important contribution towards making EU law accessible is the consolidation and publication on EUR-Lex of EU legislation in all the official languages. Consolidation means combining in a single text an initial act and all amendments to it. The consolidated texts are not authentic but offer citizens and professionals rapid and generally reliable information about the current state of the law. They also serve as the basis for the codification and recasting of EU legislation. Some 3,000 acts have been consolidated in this way.

The Europa website includes SCADPlus, a collection of fact sheets on EU legislation which are updated daily. The 2,500 fact sheets are divided into 32 subject areas and cover both existing measures and legislative proposals. [44] Also available on Europa are pages of information from the EU institutions, in particular sites operated by the sectoral DGs of the Commission, containing plentiful material on law in their respective sectors, including citizen's summaries of new legislation and other explanatory materials.

III. Tidying up the Statute Book

As long ago as 1974, a codification programme began to tackle the problem of legislation that had been amended and was therefore harder to consult. [45] In EU law 'codification' consists of merging an original act and all amendments to it in a new act which replaces the original act and the amending acts. The new act is fast-tracked through the legislative procedure.

In 2001 an ambitious project was launched to codify the whole of the *acquis communautaire* (estimated to amount to some 100,000 pages of the Official Journal) to reduce the volume of legislation to be translated by new member states.

43 <http://eur-lex.europa.eu/en/index.htm>.

44 <http://europa.eu/scadplus/scad_en.htm>.

45 *See* Council Resolution of 26 November 1974 concerning consolidation of its acts (OJ C 20, 28.1.1975, p. 1) and the Interinstitutional Agreement of 20 December 1994 on an accelerated working method for official codification of legislative texts (OJ C 102, 4.4.1996, p. 2).

The Communication on the project repeatedly stressed the value of making EU law more accessible.[46]

At the same time, the three institutions recognized that codification was not producing all the desired results and adopted an agreement on a procedure for recasting acts as "part of the measures undertaken by the institutions to make Community legislation more accessible".[47] Recasting consists in the adoption of a new legal act which incorporates in a single text an original act and any amendments already made to it while at the same time making any further changes that are necessary, including restructuring. As in codification, the new act has to pass through the full legislative procedure but the Parliament and Council commit themselves not to reopen discussions on provisions which remain unchanged.[48]

A programme is also under way to further reduce the bulk of EU law by identifying and repealing all acts which are obsolete. [49]

G. Framework Decision 2002/584

We can now look more closely at Framework Decision 2002/584 to see how well it meets the requirements of accessibility and foreseeability. In particular does it comply with all the rules and principles of legislative drafting set out in the guidelines in the Interinstitutional Agreement of 1998[50] ('Guidelines') and the Joint Practical Guide (JPG).

I. How Accessible is Framework Decision 2002/584?

1. Public

Framework Decision 2002/584 has been published in the Official Journal and on the EUR-Lex site it is available in two different formats: PDF and HTML. Unfortunately it is not available in Word with formatting.

In fact, though, in the EU system the only authentic version of the Official Journal is the paper version. The ECJ has held that even if in practice many users consult legislation on the internet, that does not justify overlooking the formal requirements laid down for promulgation of legislation:

46 "It will allow citizens and the business sector, in both the EU and the Candidate Countries seeking membership to benefit from a more accessible and transparent legislative framework. The codification of that acquis will clarify the law by bringing together in a single new legal act all the provisions of the basic act and its subsequent amendments. This process also renders the law more accessible by the deletion of obsolete provisions and the harmonization of the terminology used. It enables the mass of the legislation to be reduced whilst maintaining its substance, yet facilitating its readability." Communication on the Codification of the Acquis communautaire (COM (2001) 645).

47 Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts (OJ C 77, 28.3.2002, p. 1).

48 This commitment in principle is proving harder to maintain in practice.

49 Under the Communication on Updating and simplifying the Community acquis (COM (2003) 71).

50 OJ C 73, 17.3.1999, p. 1.

> ...although Community legislation is indeed available on the internet and individuals are using this means more and more frequently to acquaint themselves with it, making the legislation available by such means does not equate to a valid publication in the *Official Journal of the European Union* in the absence of any rules in that regard in Community law.

Moreover, it must be emphasised that although various member states have adopted electronic publication as a valid form, it is the subject of legislation or regulations which organise it in detail and set out exactly when that publication is valid. Accordingly, as Community law now stands, the Court cannot consider that form of making Community legislation available to be sufficient for it to be enforceable.

The only version of a Community regulation which is authentic, as Community law now stands, is that which is published in the *Official Journal of the European Union*, such that an electronic version predating that publication, even if it is subsequently seen to be consistent with the published version, cannot be enforced against individuals.[51]

The ECJ has recognized a rebuttable presumption that the paper version of the Official Journal was available on the date printed on it:

> The Official Journal is published by the Office for Official Publications of the European Communities, situated in Luxembourg, which has received formal instructions from the Council intended to ensure that the date of publication borne by each issue of the Official Journal corresponds to the date on which that issue is in fact available to the public in all the languages at the said Office.
>
> These provisions give rise to a presumption that the date of publication is in fact the date appearing on each issue of the Official Journal.
>
> However, should evidence be produced that the date on which an issue was in fact available does not correspond to the date which appears on that issue, regard must be had to the date of actual publication.[52]

Framework Decision 2002/584 is available on EUR-Lex in all the official languages, as required by Regulation No 1. [53] The ECJ has consistently held, on the basis of the principle of legal certainty, that if one of the language versions of legislation is not actually available, the legislation is unenforceable against citizens

51 Case C-161/06 *Skoma-Lux* [2007] ECR I-10841, paras. 48–50.

52 Case 98/78 *Racke* [1979] ECR 69, para. 15.

53 Because of the difficulty of recruiting and training linguists for less widely spoken languages, transitional measures may be adopted derogating from the requirement to draft and publish acts in all official languages. When Irish was added to the list of official languages with effect from 1 January 2007 by Council Regulation (EC) No 920/2005 (OJ L 156, 18.6.2005, p. 3) a transitional period of five years was laid down.

of the member state concerned.[54] Partial publication is not sufficient; the ECJ has held that if part of an act is not published that part "has no binding force in so far as it seeks to impose obligations on individuals".[55]

2. Findable

All EU legislation bears a title including a number of standard elements such as the name of the adopting institution, a serial number, the date of adoption, and an indication of the subject matter, in accordance with basic rules on a standard format for acts set out in the Rules of Procedure of the Council.[56]

The EUR-Lex site includes fast databases enabling legislation to be found using various criteria, notably: serial number, date of adoption, subject matter, and publication reference. Lay users searching for Framework Decision 2002/584 by its serial number may perhaps be surprised that they cannot find it as a 'decision' but only under the generic term 'legislation'.

EUR-Lex provides a page of bibliographical data with hyperlinks to the documents referred to. It shows, first of all, that Framework Decision 2002/584 has been corrected three times and amended once.

Corrections to legislation are unfortunately a fairly common occurrence in the EU system, partly no doubt because of the use of 23 official languages. Even if all those corrections are adopted by a prescribed procedure, they make access to EU legislation more complicated (because it is necessary to look at more than one document to find the true text) and undermine legal certainty.

Framework Decision 2002/584 was amended by Framework Decision 2009/299/JHA.[57] While any amendment makes the original text less accessible, the amendment here consists of text to be inserted into Framework Decision 2002/584, the technique prescribed by Guideline 18.[58] The amending act was of course adopted and published in all the languages and its title immediately establishes the link to Framework Decision 2002/584. A hyperlink in EUR-Lex leads to a consolidated text of Framework Decision 2002/584 which was produced one month after the amendment.

Another feature of the bibliographical data provided by EUR-Lex is a list of all other documents mentioning the target document; in the case of Framework Decision 2002/584 the list currently includes 39 items.

EUR-Lex contains a list of all cases before the ECJ concerning Framework Decision 2002/584 with hyperlinks. It also contains links to other relevant data-

54 *See* Case C-370/96 *Covita* [1998] ECR I-7711, paras. 26 and 27, and Case C-161/06 *Skoma-Lux* [2007] ECR I-10841, paras. 37 and 38.

55 *See* Case C-345/06 *Heinrich* [2009] ECR I-1659, para. 63.

56 Council Decision 2009/937/EU of 1 December 2009 adopting the Council's Rules of Procedure (OJ L 325, 11.12.2009, p. 35). *See* in particular Annex VI.

57 Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (OJ L 81, 27.3.2009, p. 24).

58 "Every amendment of an act shall be clearly expressed. Amendments shall take the form of text to be inserted in the act to be amended ..."

bases run by the EU institutions. The EP's database Oeuil is described as the legislative observatory. It sets out, again with hyperlinks, the various stages in the pre-adoption procedure and provides information on the work in the EP Committee, the discussions in the Council and the reaction of the EP and access to any official documents.

Some of the same information and documents are available from the Commission's Pre-Lex database on the monitoring of the decision-making process between the institutions. It does, however, contain more Commission material including in particular access to the Commission's proposal, which includes an explanatory memorandum setting out in detail the background to the proposal and an article-by-article commentary.[59]

3. *Understandable*

a. *Clear Language*

Article 1(1) and (2) of Framework Decision 2002/584 explain what an EAW is and how it works and Article 2(1) sets out the scope of an EAW. They use fairly plain language although laypersons may have difficulty with terms such as 'surrender' and 'execute' unless they are familiar with their technical meanings. Article 1(2) refers to "the principle of mutual recognition" which is not explained.

Apart from the explanation of EAW in Article 1(1), Framework Decision 2002/584 does not contain an article setting out definitions, although the Commission proposal did contain an article with six definitions and such articles are called for by Guideline 14.[60] Definitions are increasingly considered necessary in EU legal acts to ensure that terms used in 23 official languages are understood in the same way in all 27 member states. It was precisely the lack of precision in the list of offences for which verification of double criminality cannot be required that constituted one of the grounds for the challenge to the validity of that Framework Decision in the *Advocaten voor de Wereld* case.[61]

One disadvantage of the EU's decentralized drafting system, in which each draft act is passed from one institution to another like a baton in a relay race, is

59 COM/2001/0522 final (OJ C 332E, 27.11.2001, p. 305).

60 "Where the terms used in the act are not unambiguous, they should be defined together in a single article at the beginning of the act."

61 Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633:"Advocaten voor de Wereld further argues that the Law of 19 December 2003 also fails to satisfy the conditions of the principle of legality in criminal matters in that it lists, not offences having a sufficiently clear and precise legal content, but only vague categories of undesirable behaviour. The judicial authority which must decide on the enforcement of a European arrest warrant will, it submits, have insufficient information to determine effectively whether the offences for which the person sought is being charged, or in respect of which a penalty has been imposed on him, come within one of the categories mentioned in Article 5(2) of that Law. The absence of a clear and precise definition of the offences referred to in that provision, it contends, leads to a disparate application of that Law by the various authorities responsible for the enforcement of a European arrest warrant and, by reason of that fact, also infringes the principle of equality and non-discrimination" (para. 13).

the danger of inconsistencies in terminology or substance.[62] Users may be confused even by merely formal inconsistencies.

Examples of formal inconsistencies in Framework Decision 2002/584 are:

- in referring to persons the articles use almost invariably the pronouns 'he or she' and the possessive adjectives 'his or hers' but in Article 27(3)(f) 'his/her' appears more than once and Article 23(5) refers to 'he' and Article 25(1) refers to 'him';[63]
- most of the articles use the auxiliary 'shall'[64] but Article 17 twice uses 'should' and once 'must';
- numerous articles provide for information to be communicated to the 'General Secretariat of the Council'; if that denomination is correct, the two provisions in Article 31(2) requiring member states to 'notify the Council' of certain arrangements may well be incorrect; Article 34 distinguishes carefully between 'General Secretariat of the Council' (3 references) and 'Council' (2 references).

An apparent example of a more substantive inconsistency is in Article 31(2) in which the first subparagraph lays down provisions for "agreements and arrangements in force when this Framework Decision is adopted" while the second lays down provisions for agreements and arrangements concluded "after this Framework Decision has come into force". Since Framework Decision 2002/584 was adopted on 13 June 2002 but did not come into force until 7 August 2002 there is a potential legal void for almost two months. It might not present any real problem but it could easily have been avoided at the drafting stage.

It may also be noted that the reason Framework Decision 2002/584 and four other acts had to be amended by Framework Decision 2009/299 was that the acts were inconsistent in their treatment of judgments *in absentia*.[65]

b. Structure

Framework Decision 2002/584 follows the standard structure set out in Guideline 7: a preamble consisting of citations indicating the legal basis and procedural steps and a statement of reasons precedes the enacting terms.

62 *See* Guideline 6: "The terminology used in a given act shall be consistent both internally and with acts already in force, especially in the same field.

Identical concepts shall be expressed in the same terms, as far as possible without departing from their meaning in ordinary, legal or technical language."

63 It may also be observed that shortcuts such as 'his/her' or 'unlawful seizure of aircraft/ships' in Art. 2(2) cannot be translated into some other languages. *See* Guideline 5 and point 5.2.1. JPG.

64 *See* Guideline 3: "The drafting of Community acts shall be appropriate to the type of act concerned and, in particular, to whether or not it is binding." *See also* point 2.3.2 JPG.

65 *See* Recital (2) in the preamble to Framework Decision 2009/29: "The various Framework Decisions implementing the principle of mutual recognition of final judicial decisions do not deal consistently with the issue of decisions rendered following a trial at which the person concerned did not appear in person. This diversity could complicate the work of the practitioner and hamper judicial cooperation."

c. Preamble

The citations show that the specific legal basis is just Article 31(a) and (b) and Article 34(2)(b) TEU, while in the Commission's proposal Article 29 TEU was cited as well.[66]

The citations also indicate that Framework Decision 2002/584 was adopted on a proposal from the Commission but it may be noted that the amending Framework Decision 2009/299 was adopted on the initiative of seven member states.[67]

The recitals make the act more accessible by setting out clearly the reasons that led to its adoption.[68] The ECJ has observed that the obligation to state reasons for acts is not merely a formal consideration but:

> ...seeks to give an opportunity to the parties of defending their rights, to the Court of exercising its supervisory functions and to Member States and to all interested nationals of ascertaining the circumstances in which the [institution] has applied the Treaty.[69]

The recitals were particularly important in the EU's early years when legislative acts were generally adopted by the Council alone and EU citizens did not have the possibility they enjoyed in most national systems of ascertaining why legislation was adopted by consulting the transcripts of proceedings in parliament. Even though the EP is now part of the legislative authority for most EU legislation – and most of its proceedings are accessible to the public – the recitals still perform a valuable function by summarizing in clear language the legal and factual context for a new act and giving concise reasons for the scheme of the act.[70]

In the case of Framework Decision 2002/584 the recitals are comparatively short. Users might regret that there is no commentary on reasons for individual provisions as can be found in the explanatory memorandum.

Recital (12) in the preamble states:

> This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union ..., in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orienta-

66 COM/2001/522 (OJ C332E, 27.11.2001, p. 305).

67 OJ L 81, 27.3.2009, p. 24; *see* the second citation in the preamble.

68 *See* the second para. of Art. 296 TFEU: "Legal acts shall state the reasons on which they are based".

69 Case 24/62 *Germany v. Commission* [1963] ECR 63.

70 *See* Guideline 10: "The purpose of the recitals is to set out concise reasons for the chief provisions of the enacting terms ..."

> tion, or that that person's position may be prejudiced for any of these reasons.
>
> This Framework Decision does not prevent a member state from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.

A purist might argue that since recitals merely serve to give reasons for the enacting terms, Recital (12) has no effect and should have been omitted in accordance with the drafting rules.[71]

d. Enacting Terms

To make the enacting terms of Framework Decision 2002/584 more accessible to the reader, they are divided into 35 articles,[72] each of which has a heading for ease of navigation. The articles appear to follow the standard order called for by Guideline 15[73] with, in particular, introductory articles setting out the basic concept and scope of the EAW and final articles on transitional provisions and implementation and entry into force.[74]

Many of the sentences in Framework Decision 2002/584 are much longer than is usual in modern EU legislation. Each of the following provisions includes a sentence well over 100 words in length, the longest being over 400 words: Article 2(2), Article 3, Article 4, Article 5, Article 8(1), Article 27(1), and Article 28(2). Contrast this with Guideline 4[75] and also the recommendation in some Nordic countries that sentences should not exceed 20 words.

Article 2(2), which is a most important provision, contains a list of 32 items. Under Guideline 15 the items should have been numbered to make it easier to refer to each item in other provisions and to make it easier to amend individual items as the need arises.[76]

On a more substantive point, Article 1(3) of Framework Decision 2002/584 provides:

71 *See* Guideline 10: "The purpose of the recitals is to set out concise reasons for the chief provisions of the enacting terms, without reproducing or paraphrasing them. They shall not contain normative provisions or political exhortations."

Point 10.7 of the JPG elaborates: "Any recital not serving to give the reasons for the enacting terms should be omitted …"

72 *See* Guideline 15. The Commission proposal was divided into 53 articles.

73 "As far as possible, the enacting terms shall have a standard structure (subject matter and scope – definitions rights – and obligations – provisions conferring implementing powers – procedural provisions – implementing measures – transitional and final provisions)."

74 *See* Guideline 20.

75 "Provisions of acts shall be concise and their content should be as homogeneous as possible. Overly long articles and sentences, unnecessarily convoluted wording and excessive use of abbreviations should be avoided".

76 "When an article contains a list, each item on the list should be identified by a number or a letter rather than an indent".

> This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.
>
> A purist might suggest that such a provision is devoid of normative force and therefore should have been omitted.[77]

In fact it might be thought self-evident that an ordinary legal act adopted by the Council cannot modify an obligation to respect fundamental rights that has been recognized by the ECJ in numerous cases. That was the view taken by the Advocate General in his Opinion in the *Advocaten voor de Wereld* case.[78]

In its judgment in that case, the ECJ, on the other hand, seemed to attach significance to the reference in Article 1(3) of Framework Decision 2002/584 to the obligation to respect fundamental rights.[79]

Perhaps, then, such a reference serves as an extra safeguard comparable to the requirement under the Human Rights Act in the United Kingdom whereby a Minister presenting new legislation to Parliament must make a statement confirming that the legislation is compatible with the European Convention.[80]

77 *See* Guideline 12: "The enacting terms of a binding act shall not include provisions of a non-normative nature".

78 At point 70: "Article 1(3) of the Framework Decision contains a solemn declaration which, had it not been included, would have been implicit since one of the founding principles of the European Union is respect for human rights and fundamental freedoms (Article 6(1) EU), enshrined as general principles of Community law, with the scope which they derive from the Rome Convention and the constitutional traditions common to the Member States (Article 6(2) EU)".

79 "[W]hile Article 2(2) of the Framework Decision dispenses with verification of double criminality for the categories of offences mentioned therein, the definition of those offences and of the penalties applicable continue to be matters determined by the law of the issuing Member State, which, *as is, moreover, stated in Article 1(3) of the Framework Decision*, 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" (para. 53, emphasis added).

80 Human Rights Act 1998 (c. 42), s. 19:

> (1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill—
>
> (a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights ("a statement of compatibility"); or
>
> (b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.
>
> (2) The statement must be in writing and be published in such manner as the Minister making it considers appropriate.

II. Is the Application of Framework Decision 2002/584 Foreseeable?

The ECJ has long applied the principle of legal certainty to EU laws to require their application to be foreseeable (or predictable).[81]

A recent formulation of the principle was given in the *Plantanol* case:

> ...the principle of legal certainty, the corollary of which is the principle of the protection of legitimate expectations, requires, on the one hand, that rules of law must be clear and precise and, on the other, that their application must be foreseeable by those subject to them ... . That requirement must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which those rules impose on them.[82]

The second sentence of that passage shows that in this case, as in many of the others, the issue was a charge or tax. The ECJ has had fewer occasions to consider rules of criminal law (in particular because it is generally the member states that are responsible for adopting the necessary measures to ensure that EU legislation is enforced).

In 1996, though, in a case concerning the extent of liability in criminal law under national legislation adopted for the specific purpose of implementing an EU directive,[83] the ECJ, citing case-law of the ECHR and its own earlier judgments in cases somewhat indirectly touching on criminal law,[84] stated:

> ...the principle that a provision of the criminal law may not be applied extensively to the detriment of the defendant, which is the corollary of the principle of legality in relation to crime and punishment and more generally of the principle of legal certainty, precludes bringing criminal proceedings in respect of conduct not clearly defined as culpable by law. That principle, which is one of the general legal principles underlying the constitutional traditions common to the Member States, has also been enshrined in various international

81 *See* in particular: Case 325/85 *Ireland v. Commission* [1987] ECR 5041; Case C-143/93 *Gebroeders van Es Douane Agenten* [1996] ECR I-431; Case C-63/93 *Duff* [1996] ECR I-569; Case C-209/96 *United Kingdom v. Commission* [1998] ECR I-5655, para. 35; Case C-301/97 *Netherlands v. Council* [2001] ECR I-8853; Case C-17/01 *Sudholz* [2004] ECR I-4243, para. 34; Case C-17/03 *Vereniging voor Energie, Milieu en Water (VEMW)* [2005] ECR I-4983; Case C-255/02 *Halifax* [2006] ECR I-1609; Case C-409/04 *Teleos* [2007] ECR I-7797; Case C-158/06 *ROM-projecten* [2007] ECR I-5103, para. 25; Case C-288/07 *Isle of Wight Council* [2008] ECR I-7203; Case C-347/06 *ASM Brescia* [2008] ECR I-5641; Case C-158/07 *Förster* [2008] ECR I-8507; Case C-345/06 *Heinrich* [2009] ECR I-1659; Case C–168/08 *Hadadi* [2009] ECR I-6871; Case C-29/08 *SKF* [2009] ECR I-10413; Case C-358/08 *Aventis Pasteur* [2009] ECR I-3305.

82 Case C-201/08 *Plantanol* [2009] ECR I-8343, para. 46.

83 Joined Cases C-74/95 and C-129/95 *Criminal proceedings against X* [1996] ECR I-6609.

84 Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969; Case C-168/95 *Arcaro* [1996] ECR I-4705. *See also* Case 14/86 *Pretore di Salò* [1987] ECR 2545.

> treaties, in particular in Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms.[85]

That was echoed in 2005 in the *Dansk Rørindustri* case[86] in which the applicant claimed that Commission guidelines on fines in competition proceedings had been applied to it retroactively. The ECJ again referred to Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms and to the case-law of the ECHR and stated:

> Although that provision, which enshrines in particular the principle that offences and punishments are to be strictly defined by law (*nullum crimen, nulla poena sine lege*), cannot be interpreted as prohibiting the gradual clarification of the rules of criminal liability, it may, according to that case-law, preclude the retroactive application of a new interpretation of a rule establishing an offence.
>
> That is particularly true, according to that case-law, of a judicial interpretation which produces a result which was not reasonably foreseeable at the time when the offence was committed, especially in the light of the interpretation put on the provision in the case-law at the material time.[87]

In 2007 in the *Advocaten voor de Wereld* case the applicant association had claimed that the list in Article 2(2) of Framework Decision 2002/584 of offences for which verification of double criminality cannot be required was contrary to the principle of legality because of its vagueness and lack of precision. The ECJ first made the following general analysis:

> It must be noted at the outset that, by virtue of Article 6 EU, the Union is founded on the principle of the rule of law and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and as they result from the constitutional provisions common to the Member States, as general principles of Community law. It follows that the institutions are subject to review of the conformity of their acts with the Treaties and the general principles of law, just like the Member States when they implement the law of the Union ..
>
> It is common ground that those principles include the principle of the legality of criminal offences and penalties ..

85 At para. 25.

86 Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C 213/02 P *Dansk Rørindustri and Others v. Commission* [2005] ECR I 5425, paras. 215 to 219.

87 At paras. 217 and 218.

> This principle implies that legislation must define clearly offences and the penalties which they attract. That condition is met in the case where the individual concerned is in a position, on the basis of the wording of the relevant provision and with the help of the interpretative assistance given by the courts, to know which acts or omissions will make him criminally liable.[88]

Turning to Article 2(2) of Framework Decision 2002/584 and the contentious list of offences, the ECJ found that it was not invalid for breach of the principle of legality since:

> ...even if the Member States reproduce word-for-word the list of the categories of offences set out in Article 2(2) of the Framework Decision for the purposes of its implementation, the actual definition of those offences and the penalties applicable are those which follow from the law of 'the issuing Member State'. The Framework Decision does not seek to harmonise the criminal offences in question in respect of their constituent elements or of the penalties which they attract.
>
> Accordingly, while Article 2(2) of the Framework Decision dispenses with verification of double criminality for the categories of offences mentioned therein, the definition of those offences and of the penalties applicable continue to be matters determined by the law of the issuing Member State, which, as is, moreover, stated in Article 1(3) of the Framework Decision, 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.[89]

H. Concluding Remarks

It was seen earlier that all legislation has to be vague enough to cover all present and future situations but in the EU context there are a number of complicating factors. One – relating to the interpretation of legislation – is that the EU system operates in 23 official languages. Whenever courts need to ascertain the meaning of a provision of EU law they must not just look at the text in their own language. The ECJ has reminded them that they should have regard to other language versions and bear in mind that EU terminology is specific and a legal term may have

88 At paras. 45, 46 and 50.
89 At paras. 52 and 53.

a different meaning in EU law from national law, with that meaning depending on the context in which the term is used.[90]

Another complicating factor – relating to the drafting of EU legislation – is the need to cover quite different factual situations in the various member states and to reconcile many divergent or even conflicting national interests. The negotiation process is geared to producing a text that is sufficiently general to be capable of working in 27 member states, with all their specific legal systems and cultures, and sufficiently vague to be acceptable to all the governments.

Can that process lead to a text that is sufficiently precise and clear to serve as a legal act?

The problem is a general one for EU acts and one that we have become used to over the years but now the EU is moving into new areas, some of which present new problems, and in the field of criminal law those problems become especially acute. Perhaps it is time that some aspects of the process of drafting EU legislation were reviewed.

Finally, the question is often asked whether legislative drafting rules are really very important or are they just excessive formalism. The best answer was given by Advocate General Geelhoed in 2005 when he said:

> The mutual obligations which the institutions entered into in respect of the quality of drafting of Community legislation are not intended primarily to achieve the linguistic aestheticism dear to legislative draftsmen. In a Community of law, such as the European Union, which is governed by the principles of the *Rechtsstaat,* there are two aspects to a legislative act as an expression of the legislature's will. On the one hand, it is an instrument for pursuing and, if possible, achieving justified objectives of public interest. On the other hand, it constitutes a guarantee of citizens' rights in their dealings with public authority. Qualitatively adequate legislation is characterised by a balance between both aspects. The wording and the structure of the legislative act must strike an acceptable balance between the powers granted to the implementing authorities and the guarantees granted to citizens.[91]

90 Case 283/81 *CILFIT* [1982] ECR 3415: "the existence of such a possibility must be assessed on the basis of the characteristic features of Community law and the particular difficulties to which its interpretation gives rise. ... To begin with, it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions. ... It must also be borne in mind, even where the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States. ... every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied" (paras. 17-20).

91 Opinion in Joined Cases 154 and 155/2004 *Alliance for Natural Health and Nutri-Link* [2005] ECR I-6451, at point 88.