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# The European Arrest Warrant and Applicable Standards of Fundamental Rights in the EU

ECJ Judgment (Grand Chamber) C-399/11 of 26 February 2013

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## Abstract

*This article discusses the ECJ judgment in Case C-399/11 Stefano Melloni v. Ministerio Fiscal, which deals with the European arrest warrant (EAW) from the point of view of applicable standards of fundamental rights, as enshrined in the EU Charter of Fundamental Rights (CFR) and in the ECHR. Especially at stake are the fair trial rights and rights of defence, as laid down in article 47 CFR and in article 6 ECHR. The referring court, the Spanish Constitutional court also wishes to know if it may apply higher national constitutional standards than the ones prescribed in the EAW regime and go beyond the 'minimum standards' of the ECHR-CFR.*

## 1 Introduction: the Shift from Mutual Legal Assistance (MLA) to Mutual Recognition (MR)

Until the coming into force of the Treaty of Amsterdam and the establishment of an area of Freedom, Security and Justice (FSJ) the regime for judicial cooperation in criminal matters, also called mutual legal assistance (MLA), was laid down in multilateral mother conventions of the Council of Europe. It meant that Member States of the EU had to use regional international public law conventions to gather criminal evidence, to obtain extradition or to execute sanctions such as confiscations or prison penalties. Under the Treaty of Maastricht, Council of Europe Conventions were gradually replaced by proper EU Conventions. These were based on direct cooperation between judicial authorities, instead of the cooperation between governments in the mother conventions. Direct cooperation between judicial authorities in the EU does not mean that an extradition warrant from a requesting State automatically has legal value in the Member State that receives the request. As a rule, these warrants must be converted into a national decision in the requested State through *exequatur* proceedings against which legal remedies can be used. Already at the Cardiff European Council in 1998 the Council of Ministers was asked to identify the scope for greater mutual recognition of judicial decisions of the

Member States' courts.[1] The concept of mutual recognition was well-known in community law since the landmark decision of the ECJ in the *Cassis de Dijon* case and has also be applied by the community legislator in many substantive fields of the internal market with the aim of avoiding in detail harmonisation. However, extrapolating it to judicial decisions in criminal matters was not self-evident, as the harmonisation in the area of criminal procedure and applicable safeguards was very minimal or non-existent.

With the coming into force of the Treaty of Amsterdam, the European Council organised a special meeting on the area of FSJ in Tampere in 1999. In the Tampere conclusions mutual recognition (a concept that was not mentioned in the Treaty) had become a cornerstone of judicial cooperation in criminal matters and the aim was to replace all MLA conventions of the Council of Europe by proper EU MR instruments.[2] More specifically, the Council of Ministers and the Commission were asked to adopt, by December 2000, a raft of measures to implement the principle of mutual recognition. In 2000 the Commission published its Communication to the Council and the European Parliament: Mutual recognition of final decisions in criminal matters.[3] MR would apply to both court decisions and pre-trial decisions, as well as orders or warrants to gather evidence or to arrest and hand over suspects. The basic idea was that, despite the differences between the procedural regimes in the member states, they were all party to the ECHR and could thus trust each other. Mutual trust was presupposed and considered a sufficient ground to apply MR, even with little or no harmonisation. This means that MR orders were warrants from an issuing member state which had legal value in the area of FSJ and could thus be automatically executed without an *exequatur* procedure. Legal doubts concerning the order or warrant, linked to for instance, the legality of the evidence that served to justify the order or warrant, could only be challenged in the issuing member state. Were individual rights completely ignored? Not as such, in point no. 33 of the Tampere Conclusions, the European Council expressed the opinion that enhanced mutual recognition would also facilitate the judicial protection of individual rights. It must therefore needed to be ensured that the treatment of suspects and the rights of the defence, would not only not suffer from the implementation of the principle, but that the safeguards could even be improved through the process. The idea was that the Commission and the Council of Ministers should elaborate common minimum standards of procedural law

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1 Presidency conclusion no. 39.

2 See Presidency conclusion no. 33 of the Tampere special European Council. For in depth analysis, see J. Ouwerkerk, *Quid Pro Quo? A comparative law perspective on the mutual recognition of judicial decisions in criminal matters* (Intersentia 2011) and A. Suominen, *The principle of mutual recognition in cooperation in criminal matters: a study of the principle in four framework decisions and in the implementation legislation in the Nordic Member States* (Cambridge, Intersentia 2011).

3 COM(2000) 495 final.

that are considered necessary in order to facilitate the application of the principle of mutual recognition, respecting the fundamental legal principles of the member states.

In 2002 the Council of Ministers adopted the first mutual recognition instrument in criminal matters: the Framework Decision (FD) on the European arrest warrant and surrender procedures between member states (EAW).[4] This instrument was adopted under a fast track procedure following the events of 9/11 in New York and Washington DC, and was not accompanied by proposals on minimum procedural standards or the approximation of procedural safeguards. A European arrest warrant, be it to bring the suspect to trial or to execute the trial sentence, is based on mutual trust and must thus be recognised and executed, unless mandatory or optional grounds of non-recognition apply. The grounds have been strongly restricted in contrast to the refusal grounds under the MLA extradition treaty, and do not contain grounds that are based directly on a human rights clause. Only in the recitals can we find reference to fundamental rights:

'12) 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(7), 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 orientation, 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.

(13) No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.'

The Commission was of the opinion that member states that implemented grounds of non-recognition in their national legislation that went beyond the ones foreseen in the articles were violating EU law. Non-recognition of EAW's based on a fair trial or due process reason were considered as not being in line

4 Council Framework Decision 2002/584/JHA on the European arrest warrant and surrender procedure between Member States of 13 June 2002, *OJ* 2002 L. 190, p. 1). The decision has been amended by Council Framework Decision 2009/299/JHA of 26 February 2009, *OJ* 2009 L 81, p. 24.

with EU duties under the EAW FD.[5] Practice showed however that differences in member states' procedural regimes could lead to serious problems with EAW warrants, for instance when it comes to the execution of convictions *in absentia*, an area in which legal traditions of member states can significantly differ. That which for one is constitutionally barred and thus *ordre public* is for another current practice. In 2009 the EAW FD was amended and a new article 4a was introduced, with the aim of strengthening mutual trust and to bring the practice in line with case law of the ECHR.[6] Article 4a precludes a refusal to execute the EAW issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision where the person concerned, being aware of the scheduled trial, had given a mandate to a legal counselor, who was either appointed by him or by the State to defend him or her at the trial, and was indeed defended by that counselor at the trial. Practice and negotiation on new MR instruments, as the European Evidence Warrant (EEW)[7] showed that blind mutual trust let to a lack of confidence between judicial authorities and that minimal standards were indeed necessary. In the second FSJ programme (the Hague programme) legislative action was required in order to elaborate on the minimum approximation of procedural safeguards. Member states failed however in agreeing upon the draft framework decision[8] and it was not until the Lisbon Treaty that the first results were seen. In the Lisbon Treaty the mutual recognition principle was codified in article 67 (3) and article 82 (1) TFEU. Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and is a tool for achieving the aim of ensuring security (crime prevention and combating of crime) in the area of FSJ. Article 82(2) also links the MR tool to the harmonisation of minimum rules concerning mutual admissibility of evidence and rights of individuals in criminal procedure. MR and article 82(2) were used as legal basis for the first binding directives on procedural safeguards in criminal matters: the directive on right to translation

5 Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (SEC(2005) 267) – COM/2005/0063 final, point 2.2.1

6 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* 2009 L 81/24.

7 Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, *OJ* 2008 L 350/72.

8 T. Spronken & G. Vermeulen, *EU Procedural Rights in Criminal Proceedings* (Intersentia 2009).

and interpretation,[9] the directive on letters of rights[10] and a draft directive on right to access to a lawyer in criminal proceedings.[11] These results are of course only a first step and do not resolve all the human rights protection issues that might arise when issuing and executing EAW's, for instance when it comes to deprivation of liberty, access to the file/disclosure or right to a trial within a reasonable time.

## 2 The Facts of the *Melloni* Case and Proceedings before the National Courts

In 1996 the Criminal Division of the High Court (Audiencia Nacional) of Spain authorised the extradition of Mr Melloni to stand trial in Italy for suspicion of bankruptcy fraud. While awaiting extradition he was released on bail and fled justice. The prosecution in Italy continued and Mr Melloni appointed two bar lawyers for his defence. In first instance (Ferrara in 2000) and in appeal (Bologna in 2003) he was sentenced *in absentia* to 10 year's imprisonment. In 2004 the Italian Supreme Court of Cassation dismissed the appeal in cassation. In 2004 the Prosecutor's Office in Bologna issued an EAW for the execution of the sentence of 10 years imprisonment. Following his arrest in 2008 the Central Investigating Court referred the execution of the EAW to the Audiencia Nacional, which decided in the warrant's favour. The Audiencia Nacional ordered the execution of the EAW and was of the opinion that his rights of defence had been respected, since he had been aware from the outset of the forthcoming trial, deliberately absented himself and appointed two lawyers to represent and defend him in that capacity, at first instance, and in the appeal and cassation proceedings. Mr Melloni filed a constitutional petition (recurso de amparo) against the order of the Audiencia Nacional claiming that his fair trial rights under article 24(2) of the Spanish Constitution has been infringed and that the surrender to Italy would violate Spanish Constitutional case law that makes extradition or surrendering for executions of convictions *in absentia* conditional upon the re-trial of the case. By order of September 2008, the Constitutional Court of Spain declared the petition admissible and suspended enforcement of the EAW. Concerning the merits the Constitutional Court came to the conclusion that a decision of the Spanish judicial authorities to consent to extradition or surrender to countries which, in cases of very serious offences,

9 Directive of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings, *OJ* 2010 L 280/1.

10 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, *OJ* 2012 L 142/1.

11 Proposal for a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM (2011) 326 final.

allow convictions *in absentia* without making the extradition conditional upon the convicted party being able to challenge the same in order to safeguard his rights of defence, gives rise to an 'indirect' infringement of the requirements deriving from the right to a fair trial, in that such a decision undermines the essence of a fair trial in a way which affects human dignity. In the view of the Constitutional Court it is of no importance that FD 2009/29 does not apply, *ratione temporis,* to the main proceedings. The object of the main constitutional proceedings is to determine not whether the EAW of 2008 violated the Framework Decision of 2009, but whether it indirectly infringed the right to a fair trial protected by article 24(2) of the Spanish Constitution. FD 2009/299 must therefore, in the view of the Constitutional Court, be taken into account for determining what part of that right has 'external' effects. At the time of the assessment of constitutionality the FD was applicable law and national law is to be interpreted in conformity with FD's. In 2011 the Constitutional Court suspended the proceedings and referred to the ECJ the following questions for preliminary ruling:

'1. Must Article 4a(1) of Framework Decision 20022/584/ JHA, as inserted by Council Framework Decision 2009/299/JHA, be interpreted as precluding national judicial authorities, in the circumstances specified in that provision, from making the execution of a European arrest warrant conditional upon the conviction in question being open to review, in order to guarantee the rights of defence of the person requested under the warrant?

2. In the event of the first question being answered in the affirmative, is Article 4a(1) of Framework Decision 2002/584/JHA compatible with the requirements deriving from the right to an effective judicial remedy and to a fair trial, provided for in Article 47 of the Charter ..., and from the rights of defence guaranteed under Article 48(2) of the Charter?

3. In the event of the second question being answered in the affirmative, does Article 53 of the Charter, interpreted schematically in conjunction with the rights recognised under Articles 47 and 48 of the Charter, allow a Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the requesting State, thus affording those rights a greater level of protection than that deriving from Union law, in order to avoid an interpretation which restricts or adversely affects a fundamental right recognised by the Constitution of the first-mentioned Member State?'

## 3 The Advocate General's Opinion

Advocate General (AG) Bot first deals with the question of admissibility of the reference as the Spanish Prosecution Service, several member states (Belgium, Germany and the UK) and the Council have maintained that the reference should be considered inadmissible. Their arguments

are twofold: the inapplicability, *ratione temporis,* of FD 2009/299 and the Italian deferral under article 8(3) of FD 2009/299, by which the FD is only applicable from January 2014, make the raised questions hypothetical. The AG does not subscribe to those arguments. He considers article 4a a procedural rule that applies to the surrender procedure at issue in the main proceedings, which are ongoing. Article 4a is not a substantive rule and can be applied to situations existing before its entry into force. Concerning the Italian time deferral, the AG is not convinced that it makes the ECJ's reply, for the purpose of resolving the main proceedings, pointless. He moreover indicates that January 2014 is a final deadline. Therefore, a reply from the ECJ will be useful to enable the Constitutional Court and the executing judicial authority to rule on the surrender procedure. In addition, he underlines the particular nature of the constitutional petition and review and is of the opinion that in these circumstances the ECJ would probably agree to reply even if the time limit for transposition of that FD had not yet expired.

On the first question related to the compatibility between the Spanish regime, making extradition/surrender conditional upon retrial in case of *in absentia* proceedings, and article 4a(1)(a) and (b) of the FD, the AG does not share the referring Constitutional Court's doubts. In the AG's view article 4a is clear. There is an optional ground for non-execution of an EAW in case of *in absentia* proceedings, but this is accompanied by four exceptions in which the executing judicial authority may not refuse to execute the EAW in question. The situation of *Melloni* falls within these exceptions as he has been summoned and presented by a counselor in trial. In this scenario *Melloni* must be regarded as having waived his right to appear at the trial and can therefore not invoke a right to a retrial. To allow the executing judicial authority to make the surrender of the person concerned conditional upon the possibility of retrial would be tantamount to adding a ground for non-recognition of the EAW. In the view of the AG that would go against the EU legislature's stated intention to provide an exhaustive list, for reasons of legal certainty, of circumstances in which it must be considered that the procedural rights of a person who has not appeared in person at his trial have not been infringed and that the EAW must therefore be executed.

By its second question, the Spanish Constitutional Court asks the ECJ to rule on whether article 4a(1) of the FD is compatible with the requirements deriving from the second paragraph of article 47 and article 48(2) of the CFR, corresponding respectively to article 6(2) and article 6(3) ECHR. By applying article 52 of the CFR, the AG refers to the synthesis of general principles concerning judgments rendered *in absentia* that can be found in the ECrtHR Cases *Sejdovic v. Italy, Haralampiev v. Bulgaria* and *Idalov v. Russia*. Proceedings held in the absence of the accused are not always incompatible with the ECHR. The ECrtHR has elaborated several general principles by which absence of the accused can nevertheless lead to the fairness of the proceedings as a whole (presence of defence lawyer or retrial on the merits in appeal, etc.). The AG considers that article 4a(1) is a codification of these general standards. The ECJ

cannot rely on the constitutional traditions common to the member states to apply a higher level of protection, as FD 2009/299 is the result of an initiative of seven member states and has been adopted by all the member states, by which it can be presumed that a large majority of the Member States does not share the view taken by the Spanish Tribunal Constitucional in its case law. He comes to the conclusion that the validity of article 4a(1) FD is not called into question by the second paragraph of article 47 CFR (fair trial) and article 48(2) CFR (rights of the defence).

The third question is by far the most interesting one, as the Constitutional court asks the ECJ, in essence, to rule on whether article 53 CFR allows an executing judicial authority, in accordance with its national constitutional law, to make the execution of an EAW subject to the condition that the person who is subject of the warrant is entitled to a retrial in the issuing member state, even though the application of such a condition is not authorised by article 4a(1) FD. The Constitutional Court refers itself to three possible interpretations of article 53 CFR. The first is one is qualifying article 53 as a minimum standards of human rights (as in international human rights law), allowing Member States to apply a higher standard. The second one is that article 53 CFR aims to define the scope of the CFR, by indicating in accordance with article 51 CFR that where EU law applies the CFR applies and that where EU law does not apply a higher or lower standard than the CFR can be applied. The third one would be a variation on the first and second one depending on the specific problem and context. The AG strongly rejects the first interpretation, as it infringes the principle of the primacy of EU law. It is settled case law that recourse to provisions of national law, even of a constitutional order, to limit the scope of EU law would have the effect of impairing the unity and efficacy of that law[12] and thus prejudice the uniform and effective application of EU law within the member states as well as undermining the principle of legal certainty. Finally, the interpretation also deviates from the long-standing tradition of protecting of fundamental rights within the EU, that must be ensured within the framework of the structure and objectives of the EU, including the area of freedom, security and justice. Human rights protection must be adjusted to its context. The necessary uniformity of application of EU law and the construction of the area of freedom, security and justice are specific contextual interests that cannot be taken into account by national constitutional standards and can legitimise adjustments to the level of human rights protection, depending on the different interests at stake. In its view the EAW FD has laid down an uniform mechanism of MR, including procedural guarantees, in the cross-border dimension of the area of freedom, security and justice. The AG subscribes to the second interpretation

[12] See, inter alia, Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, paragraph 3; Case C-473/93 *Commission v. Luxembourg* [1996] ECR I-3207, paragraph 38; and Case C-409/06 *Winner Wetten* [2010] ECR I-8015, paragraph 61.

given by the Constitutional Court and proposes that the ECJ answer the question in the negative. In AG's view this answer would not infringe article 4(2) TEU, by which the EU is required to respect the national identities of the Member States, inherent in their fundamental structures. Fair trial rights and rights of defence of judgments rendered in absentia are not covered, in the AG's opinion, by the concept of the national identity of the Kingdom of Spain.

## 4 The Court of Justice's Ruling

As to the admissibility of the referral for a preliminary ruling, the ECJ recalls its standing case law, by which the Court is in principle bound to give a ruling and can only set aside the request exceptionally : the interpretation sought by the national court bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical. This does not apply, according to the ECJ, to this referral. The very wording of article 8(2) of FD 2009/299 makes it clear that, as from 28 March 2011, that decision shall apply without any distinction prior or subsequently to that date. The ECJ also refers to its settled case law, according to which procedural rules, as with those applicable in *Melloni*, are generally held to apply to all proceedings pending at the time they enter into force, whereas substantive rules are usually interpreted as not applying to situations existing before their entry into force.[13] Finally, the mere fact that the Italian state decided that the FD would enter into force on a a later date does not make the request for a preliminary ruling inadmissible, as the national court wished to take into consideration the relevant provisions of EU law to determine the substantive content of the right to a fair trial guaranteed by article 24(2) of the Spanish Constitution. Following all this considerations the ECJ declares the preliminary ruling from the Spanish Tribunal Constitucional admissible.

On the first question related to the compatibility between the Spanish regime, making extradition/surrender conditional upon retrial in case of *in absentia* proceedings, and article 4a(1)(a) and (b) of the FD, the ECJ recalls the purpose of the replacement of MLA by MR and refers extensively to its interpretation of MR and EAW in its judgment in Case C-396/11 *Ciprian Vasile Radu*.[14] The EAW FD seeks, by the establishment of a new simplified and more effective system for the surrender of persons convicted or suspected of a crime, to enhance judicial cooperation with a view to achieving the objectives of the area of FSJ, by basing itself on a high degree of confidence and trust which should exist

13 Joined Cases 212/80 to 217/80 *Meridionale Industria Salumi and others*, 1981, ECR 2735, par. 9; Case C-467/05 *Dell'Orto*, 2007, ECR I- 5557, par. 48 and Case C-296/08 PPU *Santesteban Goicoechea*, par. 80.

14 C-396/11 *Ciprian Vasile Radu*, Judgment of 29th January 2013.

between the member states. Under article 1(2) of the EAW FD member states are in principle obliged to execute an EAW, unless exceptions are provided as mandatory or optional grounds for non-executions in articles 3, 4 and 4a. Moreover, the execution of an EAW can be made subject solely to the conditions set out in article 5 FD EAW. In order to determine the scope of article 4a(1) the ECJ is examines its wording, scheme and purpose. Concerning the wording, the ECJ fully follows the opinion of the AG and also confirms this through the analysis of the purpose of the provision, the aim of which is the execution of the EAW *in absentia* cases provided certain conditions are fulfilled to guarantee fair trial and defence rights. Finally, the ECJ finds that the objectives pursued by the EU legislature, as expressed in the recitals 2-4 FD EAW also confirm the AG's opinion. The ECJ concludes that the FD EAW solution in relation to *in absentia* decisions does not infringe the rights of the defence. The FD EAW must be interpreted as precluding the executing judicial authorities from making the execution of an EAW, for the purpose of executing a sentence, conditional upon the conviction rendered *in absentia* being open to review in the issuing Member State.

By its second question, the Spanish Constitutional Court asks the ECJ to rule on whether article 4a(1) of the FD is compatible with the requirements deriving from the right to an effective judicial remedy and to a fair trial, provided for in articles 47 and 48(2) CFR, corresponding respectively to article 6(2) and article 6(3) ECHR. The ECJ underlines that the right of the accused to appear in person at his trial is an essential component of the right to a fair trial, but that that right is not absolute. In case the accused did not appear in person, but was informed of the date and place of trial or was defended by a legal counselor to whom he had given a mandate to do so, there is no violation of the right to a fair trial in EU law and that interpretation is in line with case law of the ECHR. The very objective of the FD EAW was to enhance the procedural rights of persons subject to criminal proceedings whilst improving mutual recognition of judicial decisions between Member States and this has been laid down in article 4a(1)(a) and (b) of the FD EAW. It follows from the reasoning that article 4a(1) is compatible with the requirements under Articles 47 and 48(2) CFR.

As to the third question the ECJ rephrases it slightly, but without changing the content or narrowing it down:

'The national court asks, in essence, whether Article 53 of the Charter must be interpreted as allowing the executing Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution'.[15]

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15 Point 55.

The ECJ summarises first the interpretation envisaged of article 53 by the Spanish Constitutional Court: article 53 would give general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law. This would *in casu* make it possible to apply higher constitutional standards to the EAW than the ones foreseen in article 4a(1) FD EAW and thus to widen the grounds of non-recognition or to impose new requirements for the execution of the EAW. The ECJ rejects this interpretation categorically:

'That interpretation of Article 53 of the Charter would undermine the principle of primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights by that State's constitution'.[16]

The ECJ underlines that it is settled case-law that, by virtue of the principle of primacy, which is an essential feature of the EU legal order, rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of a Member State. When it comes to the interpretation of article 53 CFR the ECJ recognises that national authorities and courts remain free to apply national standards of protection of fundamental rights. However the ECJ restricts this freedom very clearly, as the level of protection provided by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law cannot thereby comprised. The ECJ underlines that the adoption of FD 2009/299 was intended to remedy the difficulties associated with the mutual recognition of decisions rendered in absence of accused, arising from the differences in fundamental rights protection in the Member States. The FD 2009/299 effect a harmonization of the conditions of execution of a EAW in the event of a conviction rendered *in absentia*, which reflects the consensus reached by all the Member States regarding the scope to be given under EU law to the procedural rights enjoyed by persons convicted *in absentia* who are the subject of a EAW. *In casu,* if the Spanish Constitutional Court would apply a higher standard of protection it would cast doubt on the uniformity of the standard of protection of fundamental rights as defined in the FD, undermine the principles of mutual trust and recognition and therefore comprise the efficacy of the FD EAW. The ECJ comes thus to the conclusion that article 53 CFR must be interpreted as not allowing a Member State to make the surrender a of person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State. In other words the FD EAW

16 Point 58.

and article 4a(1) in particular contains an exhaustive and harmonised system of non-recognition grounds and requirements that has strike a balance between due process and judicial efficiency.

## 5 Case Commentary

In the first two questions the ECJ deals with the compatibility of the *in absentia* requirements under the FD EAW. In line with the AG's reasoning the ECJ comes to the convincing conclusion that the provisions contained in art 4a(1) are fully compatible with the requirements of effective judicial remedy and fair trial under articles 6(2) and 6(3) ECHR and articles 47 and 48(2) CFR. The ECJ refers to relevant decisions of the ECrtHR, as ECrtHR, *Medenica v. Switzerland*, no. 20491/92, § 56 to 59, ECHR 2001-VI; *Sejdovic v. Italy* [GC], no. 56581/00, § 84, 86 and 98, ECHR 2006-II; and *Haralampiev v. Bulgaria*, no. 29648/03, § 32 and 33, 24 April 2012.

This first step is a very important one, as the FD EAW aims achieve mutual trust and confidence between the judicial authorities not only in order to enhance effective judicial cooperation, but also to enhance the procedural safeguards of suspects involved. The in absentia requirements of the FD EAW are a harmonised compromise that aims to combine crime control and due process. That the ECJ considers it in line with the requirements of the case-law of the ECrtHR comes as no surprise given that the content of the amended FD EAW in 2008 is a codified version of the ECrtHR case-law to the related subject. The ECJ sees no necessity to go beyond the minimum requirements of the ECrtHR. That the ECJ finds the solution is a reasonable balance between judicial efficiency and human rights comes also as no surprise, as the FD EAW was deliberately amended in 2008 for that purpose.

Significantly more complicated and of a more fundamental nature is the third question related to article 53 CFR, certainly taking into account that the EAW has been the object of constitutional review and clashes in several Member States in the past.[17] Article 53 CFR stipulates that:

'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions'.

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17 J. Komarék, 'European constitutionalism and the European arrest warrant: contrapunctual principles in disharmony', 44 *CML Rev.*, 2007, 9-40.

Such a reference is a classic one in international human rights treaties. Article 53 ECHR for instance stipulates:

'Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party'.

The aim of article 53 ECHR is clearly to establish a mandatory minimum standard, which means that existing or new higher standards of Contracting Parties are allowed. The main interpretation of the Spanish Constitutional Court did in fact follow this reasoning, but applied to article 53 CFR. This would mean that the Spanish Constitutional Court could apply its more protective human rights protection, which goes beyond the minimum standard of the ECHR and of the equivalent standard under the CFR. This interpretation made by the Spanish Constitutional Court is fully in line with its opinion of 2004[18] on the relationship between the ECHR/CFR and national constitutional law. In its opinion, at the request of the Spanish Government, the Spanish Constitutional Court declared the draft Constitutional Treaty in line with the Spanish Constitution and did not see great difficulties with the CFR as it contained, in its opinion, only minimum standards in the same way as the ECHR.[19, 20]

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18 *Declaración del Pleno del Tribunal Constitucional 1/2004, de 13 de diciembre de 2004. Requerimiento 6603-2004*. http://www.boe.es/boe/dias/2005/01/04/pdfs/T00005-00021.pdf, punto 6. For comments see A. Rodriguez, '¿Quién debe ser el defensor de la Constitución española? Comentario a la DTC 1/2004, de 13 de diciembre', *Revista de derecho constitucional europea* 2005, nr. 3, http://www.ugr.es/~redce/ReDCE3/18angelrodriguez.htm; Antonio López Castillo, Alejandro Saiz Arnaiz & Víctor Ferreres Comella, *Constitución Española y Constitución Europea, Análisis de la Declaración del Tribunal Constitucional* (DTC 1/2004, de 13 de diciembre) (Madrid: CEPC 2005).

19 Idem, point 6: 'Significa, sencillamente, que el Tratado asume como propia la jurisprudencia de un Tribunal cuya doctrina ya está integrada en nuestro Ordenamiento por la vía del art. 10.2 CE, de manera que no son de advertir nuevas ni mayores dificultades para la articulación ordenada de nuestro sistema de derechos. Y las que resulten, según se ha dicho, sólo podrán aprehenderse y solventarse con ocasión de los procesos constitucionales de que podamos conocer. Por lo demás no puede dejar de subrayarse que el artículo II-113 del Tratado establece que ninguna de las disposiciones de la Carta "podrá interpretarse como limitativa o lesiva de los derechos humanos y libertades fundamentales reconocidos, en su respectivo ámbito de aplicación, por el Derecho de la Unión, el Derecho internacional y los convenios internacionales de los que son parte la Unión o todos los Estados miembros, y en particular el Convenio Europeo para la Protección de los Derechos Humanos y de las Libertades Fundamentales, así como por las Constituciones de los Estados miembros", con lo que, además de la fundamentación de la Carta de derechos fundamentales en una comunidad de valores con las constituciones de los Estados miembros, claramente se advierte que la Carta se concibe, en todo caso, como una garantía de mínimos, sobre los cuales puede desarrollarse el contenido de cada derecho y libertad hasta alcanzar la densidad de contenido asegurada en cada caso por el Derecho interno'.

20 Idem, point 6: 'Significa, sencillamente, que el Tratado asume como propia la jurisprudencia de un Tribunal cuya doctrina ya está integrada en nuestro Ordenamiento por la vía del art. 10.2 CE, de manera que no son de advertir nuevas ni mayores dificultades para la articulación ordenada de nuestro sistema de derechos. Y las que resulten, según se ha dicho, sólo podrán aprehenderse y solventarse con ocasión de los procesos constitucionales de que podamos

The ECJ rejects firmly this interpretation of article 53 CFR. In fact, although the function of article 53 CFR can be compared to the function of article 53 ECHR, it does function in another context. That is also why, in my opinion, article 53 CFR refers to the 'respective field of application' of inter alia Union law. This point has been extensively elaborated by the AG, who underlines that the CFR is not to be regarded as a clause designed to regulate a conflict between, on the one hand, a provision of secondary law which, interpreted in the light of the Charter, sets a given level of protection for a fundamental right and, on the other hand, a provision drawn from a national constitution which provides a higher level of protection for the same fundamental right. It is also in his opinion, that it is by no means apparent from the wording of article 53 of the Charter that it is to be considered as establishing an exception to the principle of the primacy of European Union law. The words 'in their respective fields of application' were chosen by the drafters of the Charter in order not to infringe the principle of primacy, which was explicitly confirmed in declaration 17 to the Treaty of Lisbon signed on 13 December 2007.[21] From the historical analysis of the drafting[22] of article 53 CFR it becomes clear that the wording 'in their respective fields of application' have been deliberately inserted at the demand of the European Commission with the aim to uphold primacy. The ECJ does not analyse the wording 'in their respective fields of application' but jumps directly and in firm wording to the importance of primacy in this respect. The ECJ clearly accepts that member states can, when applying Union law, offer a higher protection than that provided for by the ECHR/CFR. However, this higher level of protection cannot comprise the primacy, unity and effectiveness of EU law. This reasoning can of course only be applied when the EU itself does apply with the minimum standards of the ECHR/CFR (as in the case of *Melloni*). In other words, higher standards are only allowed when compatible with the

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conocer. Por lo demás no puede dejar de subrayarse que el artículo II-113 del Tratado establece que ninguna de las disposiciones de la Carta "podrá interpretarse como limitativa o lesiva de los derechos humanos y libertades fundamentales reconocidos, en su respectivo ámbito de aplicación, por el Derecho de la Unión, el Derecho internacional y los convenios internacionales de los que son parte la Unión o todos los Estados miembros, y en particular el Convenio Europeo para la Protección de los Derechos Humanos y de las Libertades Fundamentales, así como por las Constituciones de los Estados miembros", con lo que, además de la fundamentación de la Carta de derechos fundamentales en una comunidad de valores con las constituciones de los Estados miembros, claramente se advierte que la Carta se concibe, en todo caso, como una garantía de mínimos, sobre los cuales puede desarrollarse el contenido de cada derecho y libertad hasta alcanzar la densidad de contenido asegurada en cada caso por el Derecho interno'.

21 See http://eur-lex.europa.eu/en/treaties/dat/12007L/htm/C2007306EN.01025602.htm; by declaration 17 the content of article I-6 of the Draft Constitutional Treaty was kept on board: 'The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States'.

22 J. Bering Liisberg, 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? – Article 53 of the Charter: a fountain of law or just an inkblot?', *Jean Monnet Working Paper* No 4/01.

primacy, unity and effectiveness of EU law, a reasoning that was also used in the ruling of the same day in the Case *Åkerberg Fransson*.[23] The question arises how this interpretation should be read in the light of primary and secondary Union law that refers to constitutional traditions.

First of all article 4(2) TEU stipulates:

'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State'.

This article does however not apply in the Case *Melloni*. Neither the AG nor Spain qualify the procedural requirement on *in absentia* sentencing as affecting the national identity of the Kingdom of Spain, which is the reason why the ECJ does not deal with article 4 TEU at all in its ruling. In future, the ECJ will however have to face cases in which member states are of the opinion that EU law is infringing upon their national identity. We can thus conclude that not all fundamental rights are covered by the notion of national identity.

The TFEU also deals with constitutional standards in the framework of the Area of FSJ. Article 67 TFEU states clearly:

'The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States'.

Article 82 TFEU, dealing with mutual recognition and harmonisation of criminal procedure, also underlines that the harmonised minimum rules shall take into account the differences between the legal traditions and systems of the member states. Finally, Recital 12 of FD EAW contains an explicit reference to national constitutional rules:

'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'.

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[23] Case C-617/10 (Grand Chamber), Judgment of 26th February 2013, see J.A.E. Vervaele, 'The Application of the EU Charter of Fundamental Rights (CFR) and its *Ne bis in idem principle* in the Member States of the EU', [2012/1] *REALaw*, vol 6, 113-134.

The AG dealt with these concerns in his opinion,[24] but considers them taken into account by the amended FD EAW when introducing the harmonised article 4a(1). Under the third pillar regime approval of every member state was indeed necessary. The ECJ did not deal at all with the articles mentioned and could do so because they do not impose any hierarchy in applicable fundamental rights and are of no direct use for the interpretation. However, given the complexity of the area of conflicting standards of fundamental rights, the ECJ has been quite straightforward in its wording. Some authors qualify the ruling as one that sacrifices the highest level of fundamental rights protection for the benefit of the primacy and *effet utile* scope of Union law and imposes the supremacy of the CFR.[25] Others are afraid that constitutional plurality will suffer or that the national constitutional courts will rebel and trigger the Solange-clause.[26]

I do believe that is it too early to derive these conclusions from the *Melloni* ruling. First of all, as also stated by the AG, article 53 is not an isolated article, but has to be read in the light of articles 51 and 52 CFR, which refer to the existence of the plurality of sources of protection for fundamental rights binding the member states. Art 52(3) makes the ECHR a minimum standard and minimum threshold, as the EU can provide more extensive protection. Article 53 supplements the principles stated in article 51 and 52. The Charter is thus not intended to become the exclusive instrument for protecting those rights.

Second, the ruling of the ECJ in *Melloni* is not particularly surprising when it comes to the relationship between primacy and national law. The ECJ has settled case-law on primacy, including of primacy on rules of national constitutional law. The ECJ refers in *Melloni* to primacy as an essential feature of the EU legal order, by which national rules, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State.[27]

Third, the *Melloni* case is a very specific one, in which all member states have agreed upon balanced harmonisation that does not infringe, neither the ECHR, nor the CFR and in which one Constitutional Court does want to apply higher constitutional standards that risk severely undermining the concepts of mutual trust and recognition, being Treaty based principles in the area of FSJ.

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24 Point 144.

25 N. Lavranos, 'The ECJ's Judgments in Melloni and Åkerberg Fransson: Une ménage à trois difficultés', *European Law Reporter* April 2013, no 4, 133-141.

26 J.H. Reestman & L.F.M. Besselink, 'Editorial after Åkerberg Fransson and Melloni', *European Constitutional Law Review*, 2013,1-5 and Besselink, Fide 2012 'General report', The protection of fundamental rights Post-Lisbon: The interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and national constitutions, available at www.fide2012.eu; Besselink, 'Entrapped by the maximum standard: On fundamental rights, pluralism and subsidiarity in the EU', 5 *CML Rev.* (1998) 629-680.

27 Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, paragraph 3, and Case C-409/06 *Winner Wetten* [2010] ECR I-8015, paragraph 61).

This is the reason why *Melloni* cannot be compared to the *Omega* case,[28] where national constitutional standards (*in casu* human dignity) could be used to fill in the exceptions to the freedom of services and goods. It concerns the content of derogations that already existed under EU law.

Fourth, the way in which the ECJ accepts or excludes a margin in the application of national fundamental rights within the EU legal order has not completely changed. Also in relation to other general principles of EU law, such as the principle of effective enforcement or the protection of legitimate expectations, the ECJ has used primacy as an essential feature of Union law and combined it with notions of effectiveness, assimilation and unity. It is surprising that the ECJ does not elaborate on this in the specific framework of the area of FSJ. The AG has rightly underlined that the construction of the area of FSJ is a specific context in which interest are at stake that cannot be taken into account by national constitutional standards and can legitimise adjustments to the level of human rights protection, depending on the different interest at stake.[29] In other words there are situations in which European interests legitimise a proper balance for the common area of FSJ. Unfortunately, the ECJ did not elaborate this and did not take into account either the sensitivity of the issues at stake. The Spanish Constitutional Court, when advising the Government on the draft Constitution Treaty, gave poor legal advice by considering the CFR in all situations as a minimum standard.[30] There can be situations where the CFR is the maximum standard, only of course when in line with the ECHR. It is important for national constitutional Courts to know if and to which extent their constitutional standards can play a role in the EU legal order. It is important to underline that under the Lisbon Treaty the unanimity voting in criminal matters has been replaced by qualified majority voting. This means that member states can end up with a binding solution to which they did not agree. However, member states have the possibility of using an emergency break (referral to European Council) when they believe that the adoption of a directive with criminal (procedural) law content would affect fundamental aspects of its criminal justice system. What if they do not use this political tool? Does it mean that they cannot claim any respect under the Treaties for their constitutional traditions? The ECJ will undoubtably have opportunities to elaborate on this point in future case-law and will have to deal with article 4(2) TEU and let's hope that the ECJ will give us more insight in its reasoning.

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28 Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgemeísterin der Bundesstadt Bonn* [2004] ECR I-9609.

29 Point 112.

30 T. Pérez, 'Constitutional Dialogue on the European Arrest Warrant: The Spanish Constitutional Court Knocking on Luxembourg's Door; Spanish Constitutional Court, Order of 9 June 2011, ATC 86/2011', *European Constitutional Law Review* 2012, 105 ss.; M.P. Manzano, 'The Spanish Constitutional Court and the Multilevel Protection of Fundamental Rights in Europe; Matters Relating to ATC 86/2011, of 6 June', *European Criminal Law Review* 2013, 79 ss.

As it stands the mutual recognition programme in criminal matters and the EAW will continue to be at the forefront of case-law of the national Constitutional Courts, the ECJ and the ECHR, as the mutual trust is still to a large extent based on confidence and not on harmonisation of applicable procedural safeguards. In that sense *Melloni* was an exception to the rule, as it dealt with a harmonised system of *in absentia* requirements. Member States are negotiating for instance a new mutual recognition instrument on the transnational gathering of evidence, the so called European Investigation order[31], that should replace the unsuccessful European evidence warrant.[32] The text that is currently being negotiated in the trilogue at the European Parliament contains no substantial harmonisation of procedural safeguards and will, once adopted, be one of the MR instruments that will constantly challenge the interaction between the ECHR, the CFR and the national constitutions, as it deals with coercive measures and rights and liberties of citizens and legal persons.

31 Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters, Brussels 29 April 2010 Inter-institutional File: 2010/0817 (COD) 9145/10.

32 Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, *OJ* 2008 L 350/72.