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CASE NOTES

Dealing with Divergences in Fundamental Rights Standards

Case C-399/11 *Stefano Melloni v. Ministerio Fiscal*, Judgment (Grand Chamber) of 26 February 2013, not yet reported

*Maartje de Visser**

§1. INTRODUCTION

On 26 February 2013, the Grand Chamber of the Court of Justice of the European Union (CJEU) handed down its decision in the case of *Stefano Melloni v. Ministerio Fiscal*.¹ This judgment has been much anticipated by both European and national legal scholars, given that the Court was for the first time provided with the opportunity of authoritatively establishing the meaning of Article 53 of the Charter of Fundamental Rights. More particularly, it was faced with the question whether Member States are allowed, under that provision, to apply higher domestic standards of fundamental rights protection when a situation falls within the scope of Union law. Even more interesting is that the EU legal instrument that prompted the Spanish *Tribunal Constitucional* to engage the CJEU in the former's first ever preliminary reference was the maligned European Arrest Warrant (EAW) Framework Decision (as amended). The EAW had already led to constitutional litigation in a variety of Member States, and a less than satisfactory ruling from Luxembourg in the wake of its adoption in 2002.²

After a summary of the relevant facts and the Court's ruling in *Melloni*, this note offers observations on three issues. First, it briefly explores how the decision bolsters the effect of framework decisions within domestic legal orders. Secondly, it considers the Court's approach to Article 53 of the Charter. The Grand Chamber attributes overriding importance to respect for the doctrine of primacy in interpreting this provision and was accordingly not willing to condone the application of divergent higher national standards in the case at hand. While not unexpected, it is to be hoped that the Court will show some more flexibility in future case law and give Member States some latitude to

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¹ Case C-399/11 *Stefano Melloni v. Ministerio Fiscal*, Judgment of 26 February 2013, not yet reported.

² For an examination see D. Sarmiento, 'European Union: The European Arrest Warrant and the Quest for Constitutional Coherence', 6 *International Journal of Constitutional Law* 1 (2008), p. 171–183.

apply their higher rights standards in certain situations, a possibility that was explicitly mentioned by Advocate General Bot in his Opinion in *Melloni*.

On a related note, the Court's engagement with the Charter, both as regards determining the scope of the procedural rights at issue, as well as the intensity of the review of the contested provision of EU law, was rather superficial. It is submitted that the Court should improve its approach to safeguard the legitimacy of its fundamental rights rulings. Lastly, and adopting a more institutional perspective, I look at the use of the preliminary reference procedure by national constitutional courts: in what can be considered a welcome development the latter would appear to become more enamoured of engaging in a direct dialogue with the CJEU.

§2. RELEVANT FACTS

Stefano Melloni cannot be considered as an upstanding citizen. He was arrested in Spain in 1996 to be extradited to Italy to stand trial there for fraudulent bankruptcy. Having successfully made bail, Mr Melloni fled, whereupon the Italian court decided to direct the relevant notices to the lawyers appointed by him at an earlier stage. In 2003, the Italian court handed down an *in absentia* ruling, sentencing Mr Melloni to 10 years' imprisonment. The appeal that his lawyers instituted against this verdict was dismissed. The Italian prosecutor thereupon issued a European Arrest Warrant for execution of the sentence. After Mr Melloni was again apprehended by the Spanish police, the competent court (*Audiencia Nacional*) decided in 2008 that he should indeed be surrendered to the Italian authorities. Mr Melloni filed a *recurso de amparo* against that decision with the Spanish *Tribunal Constitucional*, asserting a violation of the requirements flowing from that court's interpretation of the constitutional right to a fair trial.³ This case law requires that the surrender of persons convicted *in absentia* of serious offences is conditional on them being able to have their conviction reviewed, as part of 'the essence of a fair trial in a way that affects human dignity'. Framework Decision 2009/299 concerning the European Arrest Warrant,⁴ which has amended the original Framework Decision 2002/584,⁵ however, provides in Article 4a(1) that the execution of an EAW for serving a sentence imposed *in absentia* cannot be refused when the person concerned was aware of the forthcoming criminal proceedings or was duly represented by counsel during the trial. As this appeared to be the case with Mr Melloni's situation, the Spanish *Tribunal Constitucional* was confronted with the question whether it could nevertheless retain its

³ Article 24(2) of the Spanish Constitution.

⁴ 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, [2009] OJ L81/24.

⁵ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, [2002] OJ L190/1.

constitutional case law concerning the right to a fair trial within the scope of EU law. In 2011, it decided to engage the Court of Justice on this matter by referring three preliminary questions that in effect outlined three different ways to arrive at such an outcome.⁶

§3. THE REASONING OF THE COURT

Before being able to consider the three preliminary questions on their merits, the Court had to decide on the argument put forward by several governments and the Council that the reference was inadmissible, given that the decision of the *Audiencia Nacional* to surrender Mr Melloni to the Italian authorities was taken before the expiry of the time-limit for transposition of the amendment of the EAW Framework Decision. Following Advocate General Bot, the Court however reasoned that it is standing case law that procedural rules – like those laid down in Article 4a – apply to all proceedings pending at the time when they enter into force. As Mr Melloni’s proceedings were ongoing, the request for a preliminary ruling was held admissible *ratione temporis*.

Turning to the questions referred by the *Tribunal Constitucional*, the Court of Justice was first invited to consider whether Article 4a of the Framework Decision could be read as allowing national judicial authorities to make the execution of arrest warrants in situations like that of Mr Melloni conditional on the availability of a retrial. Referring to both the wording and purpose of this provision, the Court answered in the negative. Under the 2002 EAW Framework Decision, it was not always clear when national authorities could exercise discretion and refuse or impose conditions on the surrender of suspects or convicted persons to other Member States. With the 2009 amendment, the Council intended to remedy this situation by exhaustively listing the circumstances in which execution of an EAW in relation to an *in absentia* judgment could not be refused, thereby removing legal uncertainty and enhancing the effectiveness of the principle of mutual recognition of judicial decisions.⁷ This answer meant that the Court of Justice also had to confront the second preliminary question, which queried the compatibility of Article 4a with the right to a fair trial and the rights of defence guaranteed by the Charter of Fundamental Rights (Articles 47 and 48). The Grand Chamber needed only five short paragraphs to conclude that these rights had not been breached. It noted that the right of defendants to be present at their trial is not absolute and that this is recognized by Article 4a, which sets out the situations in which they can be taken to have voluntarily and unambiguously waived the right to take part in the criminal proceedings. This interpretation of the fundamental rights at issue was furthermore found to be in line with the case law of the European Court of Human Rights.

⁶ On this reference, see A. Torres Pérez, ‘Spanish Constitutional Court, Constitutional Dialogue on the European Arrest Warrant: The Spanish Constitutional Court Knocking on Luxembourg’s Door’, 8 *European Constitutional Law Review* 1 (2012), p.105–127.

⁷ See in particular Framework Decision 2009/299, recitals 2 to 5.

The upshot was that the Court had to address the third and final question, which had caused a flutter of excitement among European constitutional scholars as it concerned the meaning and impact (if any) of Article 53 of the Charter. This provision states, in its relevant part, that '[n]othing 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 by Member States' constitutions'. The Court held that Article 53 should be read in line with the principle of the primacy of EU law. Member States cannot invoke higher constitutionally guaranteed levels of fundamental rights protection to restrict or circumscribe the application of Union rules fully in compliance with the Charter on their territory. While national authorities and courts continue to be able to apply national fundamental rights standards when implementing EU law, this cannot undermine the Court's interpretation of the level of protection available under the Charter and the 'primacy, unity and effectiveness of EU law'.⁸ The Luxembourg judges furthermore pointed out that the EAW Framework Decision was based on a consensus by all the Member States as to the protection that should be given to the right to a fair trial and the rights of defence of persons convicted *in absentia*: to allow the Spanish *Tribunal Constitucional* to insist on compliance with more stringent constitutional standards would cast 'doubt on the uniformity of [this European] standard', 'undermine the principles of mutual trust and recognition' and ultimately 'compromise the efficacy' of the Framework Decision.⁹

§4. COMMENTS

A. THE LEGAL EFFECT OF FRAMEWORK DECISIONS

As is well known to students of EU law, framework decisions were among the range of instruments that the Council could adopt under the pre-Lisbon third pillar on police and judicial cooperation in criminal matters. They are often likened to directives on account of the need for Member States to implement framework decisions in national legislation. At the same time, a distinctive feature of the former is that they are expressly precluded from having direct effect.¹⁰ The Court has however been unwilling to countenance too general an incursion on established doctrines of EU law. It held in *Pupino*¹¹ that the principle of conformity in interpretation is fully applicable to framework decisions and subsequently reminded national courts in *Da Silva* that, in line with the normal case law

⁸ Case C-399/11 *Melloni*, para. 60.

⁹ *Ibid.*, para. 64.

¹⁰ Article 34 TEU. This was confirmed by the CJEU in Case C-42/11 *Proceedings concerning the execution of a European arrest warrant issued against João Pedro Lopes da Silva Jorge*, Judgment of 5 September 2012, not yet reported, para. 53.

¹¹ Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285.

on the principle of indirect effect, they must take ‘the whole body of domestic law into consideration’ and apply ‘the interpretative methods recognised by it’.¹² In *Melloni*, the Court seems willing to apply another foundational EU principle, namely that of supremacy, to framework decisions. Its reasoning in relation to the correct interpretation of Article 53 of the Charter (see in more detail below) is premised mainly on the need to safeguard the primacy of EU law – a quality that by implication must be enjoyed by the measure whose effectiveness the Court is so keen to preserve: the EAW framework decision. The Court’s vice-president had in fact argued in favour of the applicability of the supremacy doctrine in his extrajudicial writings, several years prior.¹³ Despite judicial recognition of the fact that framework decisions may not entail direct effect,¹⁴ the Court has strengthened their legal effect within national legal orders. Its apparent willingness to apply the principle of supremacy to these instruments undoubtedly enhances the attractiveness of invoking the existing plethora of framework decisions before domestic courts in order to claim the rights granted thereunder in the face of persistent implementation deficits.

B. ARTICLE 53 OF THE CHARTER AND DIFFERENCES IN LEVELS OF FUNDAMENTAL RIGHTS PROTECTION

The general clauses of the Charter of Fundamental Rights (Articles 51 to 54) had already spawned a respectable body of literature before the Court of Justice was invited to state its understanding of these provisions.¹⁵ Focusing on Article 53, the clause at the heart of the last preliminary question in *Melloni*, it has been questioned whether this provision poses a threat to the doctrine of the primacy of Union law.¹⁶ In fact, the first of the three interpretations of Article 53 put forward by the Spanish *Tribunal Constitucional* in its order for reference did precisely that: it contemplates that there may be limits to the absolute supremacy of Union law in the name of the better protection of human rights. Under this first reading, Article 53 of the Charter is the functional equivalent of Article 53 of the ECHR: national courts are free to enforce higher constitutional standards of human rights protection in situations that fall within the scope of EU law, so as long as they do

¹² Case C-42/11 *Proceedings concerning the execution of a European arrest warrant issued against João Pedro Lopes da Silva Jorge*, para. 56.

¹³ K. Lenaerts and T. Corthaut, ‘Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law’, 31 *European Law Review* 3 (2006), p. 287–315, at p. 289–291.

¹⁴ Case C-42/11 *Proceedings concerning the execution of a European arrest warrant issued against João Pedro Lopes da Silva Jorge*, para. 53.

¹⁵ See e.g. R.A. Garcá, ‘The General Provisions of the Charter of Fundamental Rights of the European Union’, 8 *European Law Journal* 4 (2002), p. 492–514; K. Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’, 8 *European Constitutional Law Review* 3 (2012), p. 375–403; A. Rosas, ‘When is the EU Charter of Fundamental Rights Applicable at National Level?’, 19 *Jurisprudencija* 4 (2012), p. 1269–1288.

¹⁶ For an overview, see J.B. Liisberg, ‘Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?’, 38 *CMLR* 5 (2003), p. 1171–1199.

not fall below the Charter standard. In contrast, according to the second interpretation proffered in the reference order, national courts are only able to apply the (higher) level of protection deriving from domestic constitutional law in cases that lie outside the scope of Union law, while the Charter is exclusively applicable in situations where Union law applies. According to the third suggested reading of Article 53, the Charter as construed by the Court would operate either as a floor of protection or as a ceiling depending on the specific circumstances of the case at hand.

Although the Court encourages national courts to state their views on the questions referred for a preliminary ruling,¹⁷ its ruling in *Melloni* engages only with the first interpretation suggested by the *Tribunal Constitucional* and firmly rejects this reading as being contrary to the primacy, unity and effectiveness of EU law. The message to national authorities and courts is twofold. The Court confirms – but this was never seriously in doubt – that they are able to concurrently apply the Charter and their own constitutional fundamental rights standards in cases that fall within the scope of Union law.¹⁸ However, the use of domestic standards cannot undermine or detract from (i) core tenets of Union law, notably supremacy and *effet utile* or (ii) the level of fundamental rights protection guaranteed by the Charter as established in CJEU case law. Whether this is the case will ultimately be determined in Luxembourg. In other words, national courts and authorities will, in most cases falling within the scope of Union law, have to refrain from applying domestic standards that offer more protection for fundamental rights. This is also true in the present case: the Spanish *Tribunal Constitucional* cannot, as a matter of EU law, apply its more stringent case law for safeguarding the right to a fair trial guaranteed under the Spanish Constitution and make the surrender of Mr Melloni (or other individuals who find themselves in a similar position) conditional on him being able to challenge his conviction in Italy.

The Court's approach to Article 53 of the Charter does not come as a surprise and fits in with judgments like *Winner Wetten*,¹⁹ *Melki and Abdeli*²⁰ and *Križan*²¹ that demonstrate the overriding importance ascribed to the supremacy doctrine and the effectiveness of EU law, also when this is at the expense of national rules of a constitutional nature or is liable

¹⁷ Recommendations to national courts and tribunals in relation to the initiation of preliminary reference proceedings, [2012] OJ C338/1, para. 24.

¹⁸ In Case C-617/10 *Åklagaren v. Hans Åkerberg Fransson*, Judgment of 26 February 2013, not yet reported – handed down on the same day as the decision in *Melloni* – the Court for the first time interpreted Article 51 of the Charter, more particularly dealing with the question when Member States must act in accordance with the Charter. Although Article 51 states that the Charter is addressed to the latter only when they are 'implementing' EU law, the Court in *Åkerberg Fransson* reaffirmed its pre-Charter case law to the effect that Member States must respect EU fundamental rights in situations that fall within the scope of Union law.

¹⁹ Case C-409/06 *Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim* [2010] ECR I-8015, para. 60–61.

²⁰ Joined Cases C-188/10 and C-189/10 *Aziz Melki and Sélim Abdeli* [2010] ECR I-5667, para. 52–57.

²¹ Case C-416/10 *Jozef Križan and Others v. Slovenská inšpekcia životného prostredia*, Judgment of 15 January 2013, not yet reported, para. 70.

to negatively affect the position of constitutional courts within the domestic order. In view of the Union's efforts to establish a fully operational Area of Freedom, Security and Justice premised on mutual recognition and mutual trust among Member State authorities, the Court's reluctance to allow national courts to circumscribe the full effect of the EAW Framework Decision is also readily understandable. Furthermore, the applicant's appeal to the Spanish *Tribunal Constitucional* was quite clearly a last-ditch attempt to evade justice, there seemingly being no genuine concern with upholding national fundamental rights as a matter of principle. The fact that the applicant in this case was not particularly 'likeable' may also have been on the judges' mind in reaching their decision.

It is submitted that the decision in *Melloni* does not, and should not, foreclose all possibility for Member States to apply higher fundamental rights standards when Union law and the Charter are applicable. In his Opinion, Advocate General Bot draws a useful distinction between situations in which the Union legislature has decided on a common definition of the degree of protection to be afforded to a particular right and situations in which such has not occurred.²² In the latter scenario, he accepts that Member States have greater leeway to apply their own rights standards, 'provided that the national level of protection may be reconciled with the proper implementation of EU law and does not infringe other fundamental rights protected under EU law'. Bot does not discuss this possibility in any great detail, undoubtedly because the case at hand did not fall within this category, but it would appear to cover situations where Member States have some latitude in deciding how to implement Union law. Although the Court does not explicitly endorse this bifurcated approach, it does not reject it either. Precisely because it places so much emphasis on the fact that the pertinent provision of the EAW Framework Decision reflects a harmonized and jointly chosen level of protection, the Court leaves open the possibility of adopting a more lenient approach in future cases where the Member States have not enshrined their shared understanding of a particular human right in the EU legal instrument to be applied. In this context, reference should also be made to Article 4(2) TEU, which requires the Union to respect the identities of its Member States 'inherent in their fundamental structures, political and constitutional'.²³ The Court has already cited this provision in its case law when assessing whether Member States could justifiably derogate from the Treaty's free movement provisions.²⁴ The Spanish *Tribunal Constitucional* had not relied on this provision in its reference order and the judgment

²² Opinion of Advocate General Bot in Case C-399/11 *Melloni*, para. 124 to 128.

²³ On this provision, see e.g. A. Saiz Arnaiz and C. Alcobarro Liivina (eds.), *National Constitutional Identity and European Integration* (Intersentia, Antwerp 2013); L. Besselink, 'National and Constitutional Identity before and after Lisbon', 6 *Utrecht Law Review* 3 (2010), p. 36–49; A. von Bogdandy and S. Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty', 48 *CMLR* 5 (2011), p. 1417–1453.

²⁴ Case C-208/09 *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien* [2010] ECR I-13693; Case C-391/09 *Malgożata Runevič-Vardyn en Łukasz Paweł Wardyn v. Vilniaus miesto savivaldybės administracija e.a.* [2011] ECR I-3787. See also the pre-Lisbon ruling in Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

also makes no mention of Article 4(2) TEU, probably because this was unnecessary to decide the matter at hand. The question whether the Spanish constitutional case law on the right to a fair trial could be considered as part of that country's national identity was however raised during the hearing, and was rebutted by the Spanish agent before the Court. Advocate General Bot also took account of Article 4(2) TEU in his Opinion. While he did not consider that Spain's constitutional identity was at stake in the present case, he did acknowledge that, in principle, Member States can challenge the validity of secondary Union law on this basis.²⁵

It is indeed readily imaginable that situations may arise where a Member State (or its principal constitutional guardian) considers that the scope or existence of a particular national constitutional right is part of its constitutional identity, and should be protected from encroachment by Union law. The *Bundesverfassungsgericht*, for instance, has declared that Germany's constitutional identity encompasses a right to informational privacy, meaning that 'citizens' enjoyment of freedom may not be totally recorded and registered'.²⁶ Article 4(2) TEU provides the Court with a tool that it can – and should – use to allow Member States to rely on their domestic standards of rights protection also in situations where the Charter applies. Against this backdrop, it is submitted that it would have been better had the Court placed less emphasis on the idea of the uniform application of Union law in *Melloni*. Generally speaking, in today's Union such unity is more fictional than real: there is a (growing) number of legal instruments and techniques that are specifically designed or at least countenance space for national diversity and variety in many policy areas.²⁷

A related issue that warrants attention is the Court's engagement with the Charter in *Melloni*. Two aspects in particular warrant attention: the way the Court has decided on the proper scope of the provisions guaranteeing the procedural rights in issue and its reasoning in holding that Article 4a of the EAW Framework Decision was compatible with these rights.

As regards the first issue, the more the scope recognized for the rights guaranteed by the Charter is in keeping with national constitutional doctrines, the less significant or potentially problematic the question of the concurrent application of two fundamental rights standards becomes for national authorities and courts (and vice versa). This would militate in favour of the Court publicly engaging in a comparative analysis of national constitutional traditions in establishing the meaning and scope of Charter

²⁵ Opinion of Advocate General Bot in Case C-399/11 *Melloni*, para. 138–145. He also rightly pointed out that a country's national identity is not *ipso facto* at stake simply because a case involves questions regarding the protection of national fundamental rights.

²⁶ BVerfG, 1 BvR 256/08 (2010).

²⁷ Think of the technique of minimum harmonization, the proliferation of opt-outs or the possibility of enhanced cooperation among a group of Member States. See e.g. G. de Búrca, 'Differentiation within the "Core"? The Case of the Internal Market', in G. de Búrca and J. Scott, *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart Publishing, Oxford 2000); B. De Witte, D. Hanf and E. Vos (eds.), *The Many Faces of Differentiation in EU Law* (Intersentia, Antwerp 2001).

rights similar or akin to those protected as a matter of domestic law. Unfortunately, no such comparison is featured in the decision in *Melloni*.²⁸ Although this is in line with the general dearth of comparative work in the Court's case law, it may detract from the acceptability of the Court's interpretation of the meaning and scope of Charter rights, notably in situations where domestic constitutional law recognizes a higher standard of protection. In his Opinion, the Advocate General did refer to 'the constitutional traditions common to the Member States',²⁹ but his reasoning in this respect is not unproblematic. Bot argued that the Court could not rely on such common traditions in the case at hand to apply a higher level of protection than that available under the ECHR: the fact that Framework Decision 2009/299 was adopted by all the Member States 'allows us to presume, with sufficient certainty, that a large majority of the Member States does not share the view taken by the *Tribunal Constitucional* in its case law'.³⁰ This may or may not in fact be the case. For our purposes, the significance of this approach resides in the heavy responsibility that it places on national ministers and civil servants to ensure respect for their constitutional traditions when negotiating in Council on the meaning and scope of fundamental rights to be recognized in Union legal acts. The problem is that government representatives may not always have an incentive to explain and defend the case law of their national constitutional courts – the institutions principally in charge of expounding such traditions in most Member States – at European level. This seems to have been the case with the discussions on the 2009 EAW Framework Decision, and we can here also point to the stance adopted by the Spanish government representative in *Melloni* and that of the Czech counterpart in the earlier *Landtová* case,³¹ who basically denounced their constitutional courts' case law in Luxembourg.

The CJEU did explicitly refer to the ECHR and Strasbourg case law in *Melloni*, holding that its interpretation of the scope of the right to a fair trial and the rights of defence under the Charter is in line with that provided for under the Convention.³² It is noteworthy that the Court did not consider whether Union law should provide more extensive protection for these procedural rights, given that the Charter explicitly acknowledges this possibility.³³ In my view, we should be able to expect more from the Court: regardless

²⁸ The Court did refer to its earlier judgment in Case C-619/10 *Trade Agency v. Seramico Investments Ltd*, Judgment of 6 September 2012, not yet reported. In that case it found (at para. 52) that the right to a fair trial 'results from the constitutional traditions common to the Member States' and was reaffirmed in Article 47(2) of the Charter, without however discussing the precise scope of this right in the various Member States.

²⁹ Opinion of Advocate General Bot in Case C-399/11 *Melloni*, para. 84.

³⁰ Bot also mentioned that the hearing before the Court revealed 'no predominant trend' in the domestic legal orders: however, only nine of the then 27 Member States intervened before the Court.

³¹ Case C-399/09 *Marie Landtová v. Česká správa sociálního zabezpečení* [2011] ECR I-5573.

³² ECtHR, *Medenica v. Switzerland*, Judgment of 14 June 2001, ECHR 2001-VI; ECtHR, *Sejdovic v. Italy*, Judgment of 1 March 2006, ECHR 2006-II; ECtHR, *Haralampiev v. Bulgaria*, Judgment of 24 April 2012.

³³ Article 52(3) Charter. See also the discussion about the application of the so-called 'mirror principle' by English and Dutch courts, on which e.g. R. Masterman, 'Deconstructing the Mirror Principle',

of whether it opts for an interpretation of fundamental rights that is fully aligned with the Convention and Strasbourg case law or whether it makes use of the possibility to offer more protection, its interlocutors should be able to see that the choice on the meaning and scope of the relevant fundamental right has been established in an informed and thoughtful manner.³⁴ This is all the more so given that the ECHR is intended to operate as a floor for the protection of rights: recall that after *Melloni*, Member States in many cases will not be able to invoke higher domestic standards, so that when the Court is content that it is in line with Strasbourg and nothing more, the floor established under the Convention in effect becomes the ceiling in situations that fall within the scope of EU law, thereby depriving Member States from the freedom granted to them by Article 53 of the Convention to apply a higher standard of human rights protection.

The second issue concerns the intensity of review. The Court in *Melloni* did not wish to be seen to second-guess policy determinations for which there exists broad support among the Member States, as can be seen in the superficial and scant reasoning on the question of Article 4a's validity as well as in its characterization of that relevant provision as reflecting 'the consensus reached by all Member States' regarding the scope to be given under EU law to the procedural rights of persons convicted *in absentia*. The deferential attitude adopted in this case fits in a long tradition in which the Court is quite strict when examining whether national measures comport with Union law, but is considerably less assertive when adjudicating challenges to EU legislative measures, including for alleged fundamental rights violations. The Court has been lambasted for being too lenient³⁵ and in the wake of the Charter acquiring binding force, several commentators expressed the hope that the Court would adopt a more critical approach in determining the validity of European legal measures, notably legislative acts.³⁶

It did so in two fairly recent cases, actually striking down legislative provisions for infringing the right to the protection of personal data and the equality principle respectively.³⁷ It is disappointing that the Court appears to revert to its traditional

in R. Masterman and I. Leigh, *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives* (Oxford University Press, Oxford 2013); J.H. Gerards, 'Samenloop van nationale en Europese grondrechtenbepalingen – hoe moet de rechter daarmee omgaan?', *Tijdschrift voor Constitutioneel Recht* 3 (2010), p. 224–255.

³⁴ The Court could have usefully followed Advocate General Bot in this regard, who explicitly addressed the issue of higher protection, even though he concluded that this was not required in the case at hand.

³⁵ See e.g. J. Coppel and A. O'Neill, 'The European Court of Justice: Taking Rights Seriously?', 29 *CMLR* 4 (1992), p. 669–692; U. Everling, 'Will Europe Slip on Bananas? The Bananas Judgment of the Court of Justice and National Courts', 33 *CMLR* 3 (1996), p. 401–437.

³⁶ See e.g. S. Iglesias-Sanchez, 'The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights', 49 *CMLR* 5 (2012), p. 1565–1611, particularly at p. 1580 et seq.; A. Albi, 'From the *Banana* Saga to a Sugar Saga and Beyond: Could the Post-Communist Constitutional Courts Teach the EU a Lesson in the Rule of Law?', 47 *CMLR* 3 (2010), p. 791–829.

³⁷ Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR and Hartmut Eifert v. Land Hessen* [2010] ECR I-1063; Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v. Conseil des ministres* [2011] ECR I-773.

light touch approach in the present case. In my view, there are good reasons for the Luxembourg judges to exercise their powers of review in a more robust manner, notably when it comes to assessing whether the Union legislature has duly protected or respected fundamental rights. From a legitimacy perspective and the acceptability of EU law in the domestic legal orders, it is proper for the Union legislature to be seen to be actually kept in check by the judiciary, akin to the way in which national constitutional courts hold national parliaments to account,³⁸ particularly given that the Court perceives itself as a constitutional court.³⁹ A higher intensity of review is furthermore appropriate as the EU is becoming more actively involved in areas with a clear (classical) fundamental rights dimension, such as immigration, asylum and criminal law. As a counter-majoritarian institution, the Court has a particular responsibility to see to it that the rights of vulnerable groups in societies do not lose out in situations where political institutions are mainly guided by the general interest or political objectives.

C. THE USE OF THE PRELIMINARY REFERENCE PROCEDURE BY NATIONAL CONSTITUTIONAL COURTS

National constitutional courts have, generally speaking and subject to a few exceptions, been reluctant to request preliminary rulings from the Court of Justice. Their reticence has been attributed to a 'fear of losing freedom, sovereignty and independence'.⁴⁰ In the years following the adoption of the EAW Framework Decision in 2002, national implementing measures were challenged in several countries as incompatible with the constitutional prohibition on the extradition of citizens and respect for fundamental rights. The Polish and German constitutional courts and the Cypriot Supreme Court found that the contested statutes indeed violated constitutional principles,⁴¹ while the Czech constitutional court held that it was possible to engage in conforming interpretation to save the national legislation from annulment.⁴² These rulings indirectly cast doubt on the validity of the underlying Framework Decision and raised questions about the

³⁸ See e.g. W. Sadurski, *Rights before Courts – A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer, Dordrecht 2005); D.P. Kommers and R.A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edition, Duke University Press, Durham 2012).

³⁹ See e.g. B. Vesterdorf, 'A Constitutional Court for the EU?', 4 *International Journal of Constitutional Law* 4 (2006), p. 607–617; O. Due, 'A Constitutional Court for the European Communities' and F. Jacobs, 'Is the Court of Justice of the European Communities a Constitutional Court?', in D. Curtin and D. O'Keefe, *Constitutional Adjudication in European Community and National Law* (Butterworths Law, Dublin 1992).

⁴⁰ M. Cartabia, 'Europe and Rights: Taking Dialogue Seriously', 5 *European Constitutional Law Review* 1 (2009), p. 5–31, at p. 25.

⁴¹ Decision P 1/05, *Europejski Nakaz Aresztowania*, OTK ZU No 4/A/2005, poz. 42; BVerfG 113, 273 (2005) and Decision of 7 November 2005, A. No. 294/2005 respectively.

⁴² Judgment Pl. ÚS 66/04 of 3 May 2006.

relationship between EU third-pillar instruments and national constitutions. None of the courts however availed themselves of the possibility to seek the Court's guidance on either of these matters. In the end, the latter was able to hand down a preliminary ruling upholding the EAW Framework Decision after the traditionally Euro-friendly Belgian *Cour constitutionnelle* decided to refer questions to that effect to the Kirchberg.⁴³

There are signs that we are now witnessing a change in approach to the use of Article 267 TFEU. The Spanish *Tribunal Constitucional* had for a long time opined that it was the responsibility of ordinary Spanish judges to submit questions of EU law to Luxembourg.⁴⁴ *Melloni* is noteworthy for marking a break with that line of reasoning – thereby mirroring the evolution evident in the case law of its Italian counterpart which since 2008 demonstrates a similar willingness to engage in a direct dialogue with Luxembourg.⁴⁵ Then, about a month after the Court's ruling in *Melloni*, the French *Conseil constitutionnel* made its first ever request for a preliminary ruling, which, interestingly, also concerned the EAW Framework Decision and the interpretation of several provisions contained therein in light of the principle of effective judicial protection.⁴⁶

What can explain the growing readiness of constitutional courts to avail themselves of the preliminary reference procedure? It has been noted that a shared concern for those courts when called upon to address EAW issues was 'whether fundamental rights are properly protected by the EAW and what scope of action (...) member states have under the third pillar when protecting fundamental rights in EAW cases'.⁴⁷ To be sure, when the Framework Decision was adopted in 2002, fundamental rights were available as grounds for review of EU legal instruments in the guise of general principles of EU law. The fact of an unwritten bill of rights and the manner of judicial enforcement may however have led constitutional courts to wonder about the comparative effectiveness of the Court of Justice as a human rights guardian. We should further not forget that at the time, the latter could only exercise its preliminary reference jurisdiction when a Member State had made a declaration to that effect.⁴⁸ Matters are very different today. On the one hand, pre-existing limitations on the Court's competences in the former third pillar realm have been removed, thereby broadening the possibilities for judicial review. On the other hand, the Charter of Fundamental Rights confirms the Court's fundamental rights mandate and provides

⁴³ Case C-303/05 *Advocaten voor de Wereld VWZ v. Leden van de Ministerraad* [2007] ECR I-3633.

⁴⁴ See in particular *sentencia* 28/1991 of 14 February 1991 and *sentencia* 372/1993 of 13 December 1993.

⁴⁵ In *ordinanza* 103/2008 of 13 February 2008 the Italian constitutional court decided that it is competent to refer preliminary questions in direct actions, in contrast to its earlier case law in which it denied such a competence, notably in *ordinanza* 536/1995 of 15 December 1995.

⁴⁶ Case C-168/13 PPU *Jeremy F. v. Premier ministre*, Judgment of 30 May 2013, not yet reported.

⁴⁷ D. Sarmiento, 6 *International Journal of Constitutional Law* 1 (2008), p. 177.

⁴⁸ Article 35 TEU.

more ammunition when it comes to questioning the legality or the correct reading of provisions of EU law.

Furthermore, under the Court's reading of Article 53 of the Charter in *Melloni*, constitutional courts have a clear incentive to enter into a dialogue with Luxembourg about the degree of protection afforded under the Charter, with a view to trying to minimize discrepancies with the level of protection granted to similar rights under national constitutional law, and about the possibility of enforcing higher national standards in particular circumstances. It is thus to be hoped that constitutional courts will continue to heed Advocate General Ruiz Colomer's call in *Advocaten voor de Wereld* to 'enter into a dialogue with the Court of Justice' and thereby permit the 'foundations to be laid for a general discussion' on the protection of fundamental rights in a multilevel legal order.⁴⁹ At the same time, also in light of the Court's insistence in *Melloni* on the doctrines of supremacy and uniformity, it is reasonable to expect instances where the European and national courts will have (radically) different views about the level of protection to be awarded to a certain fundamental right. In such cases, the tone and success of judicial dialogues are liable to be (seriously) affected and it cannot be excluded that the different courts engage in futile attempts to convince each other, thus sharpening the contrast between their positions.

In any event, where engagements between the CJEU and national constitutional courts have in the past focused on the need for, and the former's capacity to offer protection of fundamental rights, the ruling in *Melloni* may herald judicial debates on the precise meaning and scope of particular fundamental rights. In doing so, the Court would do well to engage more with and make explicit reference to national constitutional law in its decisions to avoid the impression that fundamental rights at Union level are construed 'in complete abstraction from the Member States' constitutional traditions and laws'.⁵⁰

⁴⁹ Opinion of AG Ruiz Colomer in Case C-303/05 *Advocaten voor de Wereld v. Leden van de Ministerraad*, para. 28, 81–82.

⁵⁰ C. Ladenburger, 'European Union Institutional Report', in *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* (Tartu University Press, Tallinn 2012), p. 179.