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The Parameters of Constitutional Conflict after Melloni

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Abstract
Melloni makes clear that primacy of EU law is not about citizens' rights: even the core of their constitutional rights under national law has to be set aside in favour of the "primacy, unity and effectiveness" of EU law. Melloni extends the duty to set aside citizens' constitutional rights also to EU law that is not directly effective. The court finds it acceptable that a framework decision that "harmonizes" fundamental rights and falls short of the constitutional standards of a Member State must override constitutional rights if that EU act lines up to the minimum standards of the ECHR in abstract terms. This reopens a path to constitutional conflict in the area of fundamental rights protection that was expected to be closed since the entry into force of the Lisbon Treaty. The court's reasoning shows how easy some authentic "constitutional dialogue", by ignoring the fact that Melloni involves the core of a constitutional right affecting human dignity under Spanish constitutional law. Once again, Melloni also illustrates that constitutional conflict is not merely a matter between a Member State and the Court of Justice, but may exist also between Member State courts and executives, thus making the Court of Justice an arbiter of national constitutional conflict. The Spanish Constitutional Court, in its follow-up judgment, has refused to accept either the constitutional supremacy of EU law or, by implication, the Court of Justice unreserved position on art.53 of the Charter, but managed to avoid actual and overt constitutional conflict by an overall lowering of its autonomous fundamental rights standard. Such practical backing off can hardly be expected to occur with constitutional courts with nationally stronger positions of legitimacy. In more general constitutional terms, Melloni can be understood in the context of competing paradigms of rights, power and the relations between constitutional orders.

Introduction

European integration was the way to overcome the devastation that sovereign powers had brought Europe over centuries. The rationale to overcome the habits of sovereignty largely coincided with that of post-war constitutionalism in the European state orders. The constitutional concerns with power arrangements for the exercise of authority that dominated the "long 19th century" was to be offset by the paradigm of citizens' rights that came to dominate the post-war 20th century discourse, also that of EU law. The European Union is therefore primarily for its citizens and integration is realised through their rights. This is how the history of the Court of Justice's case law, from Van Gend & Loos and Costa v ENEL to the enunciation of European citizenship as destined to be "the fundamental status" of citizens (Grazzyk and its progeny), is usually read. If this were a correct reading, the protection of citizens' fundamental rights would be of prime concern to the Court of Justice. We know, of course, that things are slightly more subtle, both historically and presently. And Melloni confirms this.

1 The article was first produced by Thomson Reuters (Professional) UK Limited in European Law Review (2014) 39 311-321.
3 Melloni v Ministero-Fisco (C-399/11) [2013] 2 C.M.L.R. 40.
Fundamental rights protection was originally a matter on which national constitutional courts held the European Court of Justice to account; the Court of Justice has provided fundamental rights protection that was either substantively, or as to the level of judicial scrutiny, equivalent to that provided by the national courts or by the European Court of Human Rights. In as far as the Union would not provide such protection, EU law would be of fundamental importance. For example, economic and social fundamentals could not have legal effect domestically; in modern post-war European constitutionalism, only law that respects fundamental rights can be valid and effective. The Bundesverfassungsgericht marked off this area of potential constitutional conflict, and Sweden codified it in its Constitution, while many Member States either implicitly or explicitly supported the view that EU law must also respect fundamental rights standards to which autonomous Member State acts are subject. Since the Court of Justice began protecting ECtHR in accordance with minimum Strasbourg standards, and now that the Charter of Fundamental Rights provides even higher standards, any law that can be said to have turned the Court of Justice holds national authorities, including courts, to account as to the protection they provide for EU fundamental rights in national jurisdictions. Whenever Member State authorities act within the scope of EU law, they must observe EU fundamental rights—this is the unequivocal message of Åkerberg Fransson.

From the perspective of the protection of rights, this would appear to be a good thing; power is offset by rights—which, of course, the standard of EU fundamental rights fails short of the national standard. In that case, we are back at the historical starting position: EU law does not guarantee rights as they are protected in a Member State but, to the contrary, infringes fundamental rights—power exercised by Member State authorities is no longer offset by the rights that citizens enjoy in the national legal order. Theoretically, the conflict could be solved by taking the route of the substantive values of constitutionalism, that is, by allowing for higher national standards, as is normally the case under international human rights, and as, in one reading of this provision, would follow from art.53 of the Charter. However, the Melloni judgment of the Court of Justice of February 26, 2012, rejects that reading and holds that art.53 cannot allow for higher levels of national protection if this interferes with the primacy, unity and effectiveness of EU law, thus reducing art.53’s meaning to insignificance. Thus, also, the court reopens the field of constitutional conflict as concerns fundamental rights protection unless, of course, constitutional courts are willing to reduce their standards of fundamental rights protection through recognition, or the contrary, leave power to be used to turn the fundamentals to the facts. The significance of art.53 of the Charter was thought to be that “existing regimes should not be applied and interpreted ‘downwards’ by invoking the language of the Charter,” but, as we shall see, this is necessary with the current case, leave power to be used to turn the fundamentals to the facts. The interpretation “downwards” of the rights of the defendant under the Spanish Constitution.

In this case comment, the ruling in Melloni is summarised, critically analysed and commented upon from the perspective of relations between constitutional orders. To that purpose,

4. ECJ at ST: "This is to say that the Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be enshrined under the laws of any High Contracting Party in respect of any agreement with it, it is a Party," ECJ art.5(2). "These shall no be restriction upon or derogation from any of the human rights and fundamental freedoms which may be on the same footing as the rights protected in the Convention, regulations or custom on the present that the present (Curanta does not recognize such rights or that it recognizes them in a lesser manner.)"

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practice in one Member State is constitutionally barred in another—were reason to replace this provision with another set of more precise provisions of the amending Framework Decision 2009/299.

The amended Framework Decision specifies the conditions under which conviction in a trial in absentia cannot constitute a reason for non-surrender of the convicted person (art.4(a)(1) of the amended EAW Framework Decision). The surrender of the person cannot be refused—among other things—in the following circumstances:

- the person was unequivocally aware of the scheduled trial, the date and place of it, and of the fact that a conviction may follow also in this person’s absence;
- the person was defended by legal counsel whom he or she had mandated, appointed either by the person concerned or by the State.

In the case of Mr Melloni, these grounds were relevant: on that basis, his surrender must take place with no right to retrial, a situation that was unconstitutional under Spanish law.

The questions referred to the European Court of Justice

The first of the Tribunal Constitutional’s three questions was whether Framework Decision 2002/584 on the European Arrest Warrant, which does not explicitly allow for making the surrender conditional on retrial, precludes such a condition in order to guarantee the fundamental rights of the person surrendered. Secondly, if the EAW Framework Decision does preclude such a condition, it was asked whether this is compatible with the right to a fair trial and the rights of defence under arts 47 and 48 of the Charter.

The third and final question posed would be relevant if the Framework Decision were to be judged compatible with the Charter, and it concerned art.53 of the Charter. This provision reads as follows:

“Level of protection

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 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.”

The Tribunal Constitutional asked whether this provision allows 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 affecting the right to a fair trial and the rights of defence, or to a greater level of protection than that deriving from European 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.”

Evidently, if a constitutional court in interpreting the autonomous meaning of a national constitutional provision wishes to take EU law into account, the Court of Justice will provide it with the requested information as to the meaning of the relevant EU law, also if this is merely for the purpose of determining the autonomous meaning of national constitutional law. This is in line with earlier admissibility case law, but this time explicitly framed with regard to deciding national constitutional questions autonomously. The particular framing of the court’s judgment in relation to the Spanish Constitutional Court’s task is picked up subsequently by the latter court in its follow-up judgment, as I argue below.

Are there uncodified possibilities of protecting fundamental rights?

The first question submitted was whether art.4(a)(1) of the Framework Decision allows the executing judicial authorities to make the execution of a European arrest warrant conditional upon the conviction rendered in absentia being open to review in the issuing Member State, in order to guarantee the rights of defence of the person surrendered.

Essentially, this question concerns the exhaustiveness of the list of cases in which the national court must execute the arrest warrant in the absence of the right of trial in the requesting state (art.4(a)(1) under (a) and (b)). From the judgment of the Spanish Constitutional Court by which this question was referred—the first reference in its history—it appears that the referring court did not wish to challenge the exhaustiveness of the list of cases of actual non-surrender as such, but only the exceptional situation of conditioning the surrender under circumstances in which the application would lead to an infringement of fundamental rights protected under primary EU law, as the Framework Decision itself provides that it shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty, including the right of defence of persons subject to criminal proceedings, and any obligations incumbent upon judicial authorities in this respect shall remain unaffected” (Framework Decision 2009/299 art.1(2).)
So, in reality, the question posed was whether the necessity of protecting fundamental rights could be considered as a general condition for the application of art.4(a)(1) of the Framework Decision. This is not an odd question. After all, the Framework Decision itself claims that it does not prevent the application of fundamental rights, which are, as the Spanish Constitutional Court emphasised, primary rules to which secondary law (the Framework Decision) is subject especially if an application of secondary EU law is subject to its being in conformity with fundamental rights. Thus, viewed, pieces of legislation of exclusive harmonisation are also always subject to an unwritten exception if they would lead under a particular set of circumstances to an infringement of fundamental rights. In other words, the Spanish Constitutional Court posed a question like that addressed in NO.4 does mutual recognition allow for fundamental rights exceptions not explicitly provided for in secondary legislation? This is a controversial question in EU law since, as is commonly held, it potentially undermines the notion of mutual recognition and restricts the margin for the national authorities.

The Court of Justice sidesteps the issue by rephrasing the question, leaving out entirely the referring court’s explicit reference to the fundamental rights conditionality of secondary law and its application, saying that:

"The Tribunal Constitutional asks, in essence whether Article 4(a)(1) of Framework Decision 2002/584 must be interpreted as precluding the executing judicial authorities, in the circumstances specified in that provision, from making the execution of a European arrest warrant issued for the purposes of executing a sentence conditional upon the conviction rendered in absentia being open to review in the issuing Member State."17

The court’s answer relies heavily on Bada, in which the court did not want to know about fundamental rights conditionality.18 In Melloni, it reiterates that the EAW’s objective is that of replacing a multilateral system of extradition with a simplified and more effective system based on a high degree of confidence that should exist between Member States. The Framework Decision consequently only allows refusal of the execution of a warrant in cases of mandatory non-execution explicitly provided for: The executing judicial authority may make the execution of a European arrest warrant subject solely to the conditions set out in the Framework Decision. Basing itself on the wording of the optional ground for non-execution of a European Arrest Warrant provided in art.4(a)(1), the court concludes that the provision precludes "making the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State."19

The court seeks further confirmation of this "literal interpretation" in the specific objective of the new art.4(a), which is to restrict the opportunities for refusing to execute an arrest warrant and to harmonise the grounds for non-recognition of judgments, allowing "the executing authority to execute the decision despite the absence of the person at the trial, while fully respecting the person’s right of defence". SURRENDER can hence not be made subject to a refusal in the issuing Member State, if the person was aware of the trial while absent or has given a mandate to the legal counsel that defended him or her during that trial.20

Although the court’s rephrasing of the question polished it away, the issue of fundamental rights could not be totally avoided either. The court reasons away, however, the possibility of secondary law being applied in conformity with fundamental rights beyond the text of the Framework Decision, by holding— with reference to the Opinion of the Advocate General—that the EU legislature’s providing for:

18 B. (ex the application of NO) v Secretary of State for the Home Department and ME v Refugee Appellations Commissioner Ministry for Justice Equality and Law Reform (C-411/11 and C-499/12) [2011] ECR 1-12905, [2013] 2 CMLR 43 at [51].
19 Melloni (C-59/13) [2015] 2 CMLR 43 at [51].
20 Criminal Proceedings against Bada (C-598/13) January 29, 2013.
21 Criminal Proceedings against Melloni (C-599/13) [2015] 2 CMLR 43 at [43).
22 Melloni (C-599/13) [2015] 2 CMLR 43 at [41]-[43].
23 R (on the application of NO) v Secretary of State for the Home Department and ME v Refugee Appellations Commissioner Ministry for Justice Equality and Law Reform (C-411/11 and C-499/12) [2011] ECR 1-12905, [2013] 2 CMLR 43 at [51].
24 "The Advocate General in the relevant sections of his Opinion had established the intention of the legislature as apparent from the text of the Framework Decision. In other words, if the EU legislature provides an exhaustive list of cases in which it deems a fundamental right to be duly observed, this is the end of the matter and there can be no further appeal to fundamental rights whatsoever."
25 Finally, the court arrives at the case of the Spanish Constitutional Court’s question, i.e. the obligation to respect fundamental rights as enshrined in art.6 ECHR to which an application of the European Arrest Warrant Framework Decision is subject, and hence might, in appropriate cases affecting the core of a fundamental right, lead to a fundamental rights conditionality of surrender, also in cases covered by art.4(a)(1) of the Framework Decision. The court rejects this view, holding that,

"it should be noted that that argument, in reality, raises the question of the compatibility of Article 4a of Framework Decision 2002/584 with the fundamental rights protected in the legal order of the European Union."26

The court’s conclusion on the first question is that art.4(a)(1) precludes the executing judicial authorities, in the circumstances specified in that provision, from making the execution of a European arrest warrant issued for the purposes of executing a sentence conditional upon the conviction rendered in absentia being open to review in the issuing Member State.27

Is the Framework Decision contrary to the ECHR or the Charter?

The second question of the Spanish Constitutional Court concerned the compatibility of art.4(a)(1) under (a) and (b) with the right to a fair trial and the rights of defence under the Charter. The Court of Justice reiterates, with reference to its judgment in the "Trade agency case,"28 that although the right of the accused to appear in person at his or her trial is an essential component of the right to a fair trial, that right is not absolute. It continues:

"The accused may waive that right of his own free will, either expressly or tacitly, provided that the waiver is established in an unequivocal manner, is attended by minimum safeguards commensurate to its importance and does not run counter to any important public interest. In particular, violation of the right to a fair trial has not been established, even where the accused did not appear in person, if he was informed of the date and place of the trial or was defended by a legal counsellor to whom he had given a mandate to do so."29

16 Melloni (C-599/13) at [46].
17 Trade agency Ltd v Secretary of State for the Home Department (C-479/10) September 6, 2012 at [52] and [55], this concerns "Hindustan in default of appearance in civil cases and the system of flexible review in the enforcement of a foreign civil judgment."
18 Melloni (C-599/13) [2013] 2 CMLR 43 at [43].
This is the court states, in keeping with ECHR case-law, and the court confirms the stated objective of the pending Framework Decision "to enhance the procedural rights of persons subject to criminal proceedings whilst improving mutual recognition of judicial decisions between Member States". On this basis, the court concludes:

"Article 4(1)(c) and (b) of Framework Decision 2002/584 lays down the circumstances in which the person concerned must be deemed to have waived, voluntarily and unambiguously, his right to be present at his trial, with the result that the execution of a European arrest warrant issued for the purposes of executing the sentence of a person convicted in absentia cannot be made subject to the condition that that person may claim the benefit of a retrial at which he is present in the issuing Member State."27

The court then immediately concludes from this that art.4(1)(1) "does not disregard" the right to an effective remedy and the rights of defence under arts 47 and 48(2) of the Charter and is therefore compatible with these provisions.28

Apparently, the court derives the element of a "voluntary and unambiguous" waiver by the convicted person from the case law of the ECtHR, since it is not in the text of art.4(1)(1) of the Framework Decision (which speaks in various places only about "unequivocally" waiving one's right to be present, which does not necessarily imply "voluntarily" waiving that right).

Does Article 53 of the Charter allow Spain's higher level of protection to apply?

Whereas the referring Constitutional Court presented three interpretations of art.53 of the Charter,29 the Court of Justice cuts the judicial dialogue short and dismisses out of hand any interpretation which would allow 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. According to the court, any such reading aims to subject surrender "to conditions intended to avoid an interpretation which restricts or adversely affects fundamental rights recognised by its constitution, even though the application of such conditions is not allowed under Article 4(1) of Framework Decision 2002/584".30 This the court cannot accept:

"That interpretation of Article 53 of the Charter would undermine the principle of the primacy of EU law (inasmuch as it would allow a Member State to dissipate EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution. It is settled case-law that, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order (see Opinion 1/92 [1993] ECR I-6879, paragraph 21, and Opinion 1/99 [2011] ECR I-1337, paragraph 65), rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State (see, to that effect, inter alia, Case 11/70 International Handelsgenosschaft [1970] ECR 11, 25, and Case C-409/06 Winner Wettens [2010] ECR I-8015, paragraph 61). It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised."31

In support of this position, the court points out that a Member State is not allowed to refuse to execute a European arrest warrant when the person concerned is in one of the situations mentioned in art.4(1)(1) of the Framework Decision.32 This provision was intended to solve the difficulties in the area of recognition of verdicts rendered in absentia, and effects,

"a harmonisation of the conditions of execution of a European arrest warrant 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 European arrest warrant."33

The court then refers to the considerations of unity and effectiveness:

"Consequently, allowing a Member State to avail itself of Article 53 of the Charter to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State, a possibility not provided for under Framework Decision 2009/299, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision."34

The case at the Tribunal Constitutional

On February 13, 2014, the Tribunal Constitutional handed down its follow-up judgment in Melloni, which was published on March 14.35 In the third paragraph of the grounds of its judgment, the Tribunal notes that the answers of the Court of Justice are "very useful" (de gran utilidad), but nonetheless need to be supplemented with the doctrine laid down in the Tribunal’s judgment in the Constitutional Treaty case of 2004.36 It reaffirms that the transfer of powers under the Spanish Constitution is subject to substantive limits, namely "respect of the sovereignty of the State, of our fundamental constitutional structures and of the system of fundamental principles and values concretised in our Constitution, in which fundamental rights acquire their proper substance".37 It then rephrases, with reference to the 2014 judgment, that applying the primacy of EU law is based on the presupposition of respect for fundamental national constitutional structures, which includes fundamental rights.38 It recalls that it is not the Constitution but the European Constitutional Treaty of 1957 which states that the Constitution, "in the exercise of its jurisdiction, shall ensure the protection of fundamental rights, freedoms and the principles of State organisation as prescribed by the constitutional order of the Member States".39

Melloni (C-399/11) [2013] 1 CMLR 43 at [56]-[60].
Melloni (C-399/11) at [61].
Melloni (C-399/11) at [52].
Melloni (C-399/11) at [52]-[53].
T. Melloni, Fundamentos Jurídicos [41], para.3.2.5; the references to ETC 1 (2004, December 13, 2004).
37 The English translation appears to refer to a quote in the original judgment of 2004 that is found in the Tribunal’s judgment.
38 T. Melloni, op. cit., para.3.2.5. "Igualmente destacamos que la primacía del Derecho de la Unión Europea jurídicamente prevalece de aplicación a la Constitución, en el ejercicio de su jurisdicción, para el efecto de la protección de los derechos fundamentales, libertades y principios de organización del Estado de que se trata, en los términos en que para el propio Derecho de la Unión Europea guardará, a través de una serie de mecanismos previstos en los Tratados, el respeto por la aplicación de su propio derecho, que no es otro que el respeto a las estructuras constitucionales.
Melloni (C-399/11) [2013] 1 CMLR 43 at [52] (emphasis added).
Melloni (C-399/11) [2013] 1 CMLR 43 at [53]-[55].
Melloni (C-399/11) [2013] 1 CMLR 43 at [56].
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Treaties that are the framework of validity for Union legislation, "although the Constitution requires that the legislation accepted as the result of the transfer be compatible with its basic values and principles. Moreover, of particular importance in the context of art.53 of the Charter, it repeats that, notwithstanding all this, the Tribunal has held that,

"in the unlikely case in which, in the ulterior development of European Union law, this law would prove to be irreconcilable with the Spanish Constitution, while the hypothetical infringement of European law [of primary European law] is not remedied by the ordinary channels provided [by that law], ultimately, the constitutional value coincides. The Constitution which it has given itself could lead this Court to approach the problems which in such a case would arise, through the corresponding constitutional procedures, problems which under current circumstances are considered inessential."*4

Next, the Tribunal recapitulates its doctrine on "indirect" infringements of the right to a fair trial under art.24 of the Spanish Constitution, as developed in its case law, but emphasises the importance of international human rights treaties, with which the constitutional value system coincides. The constitutional standard by which the order to surrender Mr Melloni needs to be judged includes, therefore, the human rights treaties to which Spain is a party, among which are the ECtHR and Charter of Fundamental Rights as interpreted by the competent organs established by the relevant treaties, and these interpretations in turn are,

"essential elements to interpret the absolute content of the right recognized in Article 24(2) of the Spanish Constitution, the disregard of which would constitute an indirect infringement of the fundamental right by the Spanish authorities."*46

After examining the case law of the ECtHR (including more case law than the Court of Justice mentions in its judgment) and that of Court of Justice, the Tribunal concludes that these interpretations "coincide to a large extent" and can therefore provide it with the interpretative criteria to decide the case.

"Hence, we must now affirm, overturning the doctrine laid down in STC 91/2000, that a conviction in absentia does not involve an infringement of the absolute contents of the fundamental right to a fair trial, even if there is no remedy for the absent defendant, when this absence has been voluntarily and unambiguously decided by a defendant who was duly summoned, and has been effectively defended by an appointed Lawyer (Article 24.2 of the Spanish Constitution).*47

On this basis, the Tribunal rejects the appeal, considering that the Audiencia Nacional had established on the basis of an examination of the documents that legal counsel appointed by Melloni had not stopped representing him, while voluntarily waiving his right to be present at the hearings at all instances; hence, it had decided to surrender Melloni without infringing the requirements derived from the absolute content of this fundamental right under the Spanish Constitution. This judgment of the Tribunal was accompanied by three concurring opinions, to which reference is made only briefly in the comments below.

*4 The reference is to STC 1/2004, of December 13, §14.
*45 TC Melloni, 37, p.24.
*46 TC Melloni, 37, p.56.

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Mutual recognition sits uneasily with effective fundamental rights protection. The protection of fundamental rights is conceived of not as something that should be realised by each of the authorities involved in recognising the acts of another authority, but by delegating that protection to the authority whose acts are recognised: mutual recognition operates on the basis of a generalised sense of "mutual trust" that the other will take its task seriously, not that rights are actually protected in the concrete case, even if it concerns the general minimal standard enjoined by the ECHR. This is evident in the Court of Justice's case on the EAW, as demonstrated by the principle of mutual recognition does not allow for fundamental rights scrutiny in the concrete case (although some Advocates General have, at least to some extent, thought differently).*52

This interpretation is repeated all the more forcefully in Melloni, where it concerned the application of a specific higher standard of protection: any invocation of fundamental rights protected at national level would undermine the objectives of secondary legislation—this is the starting point of the court in its answer to the first question—when secondary legislation, here, Art.4(1) of the Framework Decision—proclaims its intention to harmonise the cases in which a restriction of a fundamental right is considered to be legitimate. In its second answer, the court finds it sufficient that, totally in the abstract, the provision is in accordance with ECHR and Charter standards. Abstract conformity with European fundamental rights standards, either the minimum standard of the ECHR or the maximum standard of the Charter, prevents fundamental rights review in concrete cases under that legislative provision—such a review, the court seems to find, would undermine mutual recognition and the mutual trust on which it is based.*53

As a matter of fact, attaching this importance to secondary legislation as "harmonisation of EU fundamental rights" risks erasing the difference between the primary law nature of fundamental rights and secondary law as subject to these rights. It also places considerable confidence in the legislature, perhaps too much so.

In this context, it somehow seems to be forgotten that, since the European Union entered the post-Lisbon era, the EAW Framework Decision and the amending decision, which is at the heart of Melloni, is legislative only in substance. It was legislated upon by the Council, not the Parliament. It was a congregation of executives that acted authoritatively in this case. The amending decision, moreover, was not on the initiative of the Commission but of fellow executives. This was the problem inherent in the very nature of decision-making under the Third


*53 The interpretation is reinforced by the contrasting judgment of the Court in Jeremy F v Prosector [C-68/13 P] [2014] 1 CMLR 9 at [27]) F, where the absence of explicit provision in the Framework Decision creates space for fundamental rights considerations.
Pillar. With regard to executive acts, one might expect stronger judicial protection and closer judicial scrutiny than in the case of the products of legislatures with the direct democratic legitimacy of parliaments. In fact, the gradual extension of judicial protection in the course of the 20th century across Europe has generally been considered to be the natural consequence of the increased dominance of the executive.24 But what applies to national legal orders across Europe may not apply to the European Union. Melloni, at least, does not seem to be inspired by the concerns of critically countervailing legislation that is made by an executive assembly only. Quite to the contrary: in Melloni, even executive-made EU law that is non-directly effective is, as I argue presently, granted primacy that had so far only been given to directly effective EU law.

### Primacy

**Primacy of non-directly effective EU law**—setting aside primary EU law?

From Sloendam & Loos onwards, the doctrine of direct effect has been a judicial invention. There is only one exception to this: the text of the EU Treaty from Maastricht until Lisbon originally provided that framework decisions would "shall not entail direct effect" (art.54(2)(b) EU Treaty (2006)). However, after Lisbon, this qualification still applies to the 159 Framework Decision (including the amending Framework Decision 2009/299) under the primary law of Protocol 36 to the Lisbon Treaty.25 Holding that non-directly effective EU law entails the duty to set aside national law is something of a revolution in EU law, and may amount to setting aside primary law. This deserves closer scrutiny.

There has been some controversy in the literature over how direct effect and primary relate to each other. Apart from quasi-metaphysical views of EU law as inherently superior to national law, there is a narrower and a broader notion of primary. The narrower notion, in line with Costa v ENEL and the language of Sommavilla, is that primacy of EU law is essentially the duty to set aside national law in cases of conflict with EU law. The broader notion considers primacy not only as the duty to displace national law but also to the duty to apply national law consistently with EU law.26 The narrower notion of primacy would seem to be conditional on the relevant EU law being directly effective, whereas the broader notion might also apply to EU law that is not directly effective. From the perspective of the broader notion, saying that primacy applies also to non-directly effective EU law is no big deal as long as there is no duty to set aside and out of the national legal order. Also in this view, a real novelty, if not a revolution, would reside in Melloni were it to entail that national law is to be set aside in favour of non-directly effective EU law. It is therefore important to establish whether that is really the case.

On its surface, Melloni does not seem to impose such a duty. The court does not refer to Sommavilla and it does not use its language of "setting aside" conflicting national law. Moreover, there is a curious treatment of "primacy, unity and effectiveness" when it comes to applying this trinitarian formula to the case at hand. In fact, it seems that the court applies only two of the three essential characters of EU law: unity and effectiveness. At [63], the court explains that a reading of art.53 of the Charter that would allow the Spanish higher level of protection would "cast doubt on the uniformity and the effectiveness of the Framework Decision. It does not say that it would infringe the primacy of EU law. And this might confirm the strict formulated by various authors that art.53 of the Charter is not a clause about primacy in the first place. In what follows, I briefly go into this view, which Melloni subverts, before arguing that primacy is indeed

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15 Protocol [No.36] on transitional provisions art.9: "The legal effects of the acts of the institutions, bodies, offices and agencies of the Union shall be interpreted as if such acts were direct acts of the Union in accordance with the text of the Treaty of Amsterdam. The Union shall not be bound by and shall not be deemed to be bound by acts that are repealed, amended or amended in implementation of the Treaty."  
16 Also known as "indirect effect", both or regards directives or other non-directly effective EU law, as e.g. in Generali Versicherungs-gruppe v. Papier (C-181/05) [2006] ECR I-5280; [2005] 2 C.M.L.R. 85, see K. Lenzoni and T. Corti, "Oft Bird and Stooge, the Role of Primacy inAvoiding Burdens of EU Law" (2006) 31 E. Rev. 207.
17 The Lisbon Treaty, the parties did not want to settle a direct duty of primary law in a legally binding text,38 and it is hard to deny that they had the power to change that as they liked, but they wanted to do so. The history of the making of art.53 clearly shows concern for its potential effect on primary, which some of thedrafters found a good thing, others not.39 In other words, the Charter law, and may amount to setting aside primary law. Given the formally non-binding nature of the original Charter text, the members of the first Convention, notwithstanding the terms of their mandate, could have written into it whatever they liked. Moreover, by the time of the Lisbon Treaty, the parties did not want to lay down a doctrine of absolute primacy in a legally binding text, and it is hard to deny that they had the power to change that as they liked, but they wanted to do so. The history of the making of art.53 clearly shows concern for its potential effect on primary, which some of the drafters found a good thing, others not. After the adoption of the Charter, the Commission found it necessary to issue a statement that the Charter would not require constitutional amendments, apparently considering art.53 as a provision that prevented collisions between national constitutions and the Charter, but without specifying how.40 In short, the state of affairs as to the intended effect of art.53 was entirely open and left ambiguous, perhaps consciously. From the EU perspective, one was perhaps able to say primacy was not given up; from the national constitutional perspective, the prevailing national standard of protection was not given up at all.

Another argument used for the view that primacy is not what art.53 is about, was that the text does not allow for a restriction from primary law as it only says that "nothing in this Charter can restrict national constitutional protections", thus allowing for such a restriction.
on the basis of either EU law, both primary and secondary, as interpreted by the court. This result is disadvantageous to art.53 as it devalues the primacy of EU law and undermines the essence of the Charter; at least since the Charter acquired primary status, it is obligatory to consider secondary law by virtue of being superior to it. Secondary law, notwithstanding its primary vis-à-vis national law, must surely be subject to the superior primary law of the Charter. In other words, owing to its superior rank under EU law, the Charter can necessarily qualify secondary law’s primacy, just as it can qualify its applicability and validity.

The fact is, of course, that Melloni sweeps aside any doubts that art.53 of the Charter might raise about primacy, whether they were intended or not, as in Winner Wetten,52 the court switches into a different mode when it thinks that primacy might be interfered with. Although as [63] of Melloni, the court seems only to have an eye to “unity” (“uniformity”) and “effectiveness” (“efficacy”), it frames the totality of the argument in terms of primacy. Its answer to the question on art.53 immediately presents the conclusion that the interpretation suggested by the Spanish Constitutional Court “would undermine the principle of the 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 guaranteed by that State’s constitution” 53; it next states that it is “by virtue of the principle of primacy of EU law”54 that rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of (non-directly effective) EU law.

Moreover, Melloni not only holds to an absolute concept of primacy, it indeed entails the duty to set aside national constitutional law. Although the court does not refer to Simmenholf, it does refer to Winner Wetten, which, if anything, only reinforces the Sinntemholf language (arguably quite unnecessarily). Instead of more ironic approaches such as those of Omega55 and Sign Wittgenstein,56 the ruling in Winner Wetten introduces the polemic term of “ousting effect”, which the court found to be entailed by both primacy and the duty of Union loyalty of Member States (in Winner Wetten, more specifically, the German Federal Constitutional Court). Winner Wetten may well be read as an act of open warfare,57 and Melloni may well be considered its continuation in a more overtly constitutional context. Winner Wetten concerned the prospective overruling of Länder legislation on the basis of the general principle of legal certainty. Melloni concerns the core of a constitutional fundamental right in a particular Member State. In Winner Wetten, primacy is explicitly the primacy of directly effective secondary EU law, which has an “ousting effect” regarding national law, even if that “ousting” creates a legal void and legal uncertainty. Melloni is about non-directly effective EU law. Thus, the reference to Winner Wetten [and Internationale Handelsgeellschaft] implies that this type of EU law also has the effect of setting aside national law, in the sense that the Spanish norm concerning the rights of the defence of a person convicted in absence must be dispelled, even if the court did not need to say this in so many words in Melloni.

Fields of application and “primacy, unity and effectiveness”

At first glance similar to art.53 ECHR and art.2 of the International Covenant on Civil and Political Rights, which stipulate that the protection afforded by those international instruments cannot do away with the protection of fundamental rights provided at national level, art.53 of the Charter is dissimilar as regards the addition of the expression “in their respective fields of application”:

52 Winner Wetten GmbH & Co. Bogenwerfordverwerkshaft (C-499/06) [2010] ECR-I-8015;
55 Omega II-9609; [2005]; see L. Bensel", "Respecting Constitutional Identity in the EU" (2012) 49 CMLR 677, 689-691.
56 Omega II-9609; [2005]; see L. Bensel", "Respecting Constitutional Identity in the EU" (2012) 49 CMLR 677, 689-691.
manifestly contrary to public policy in the Member State in which recognition is sought.46 The Court of Justice has held that this burden is not to be regarded as a legal obligation of the Member State in which enforcement is sought or of a right recognised as being fundamental within that legal order.47 This clearly sets a limit to the mutual recognition and enforcement of EU law in civil and commercial matters, and it has to be regarded as an important element of the enforcement of EU law or its recognition.48 In both cases, however, the recognition and enforcement of an EU judgment in the Member State in which it is sought can be subject to the satisfaction of a condition of public policy, but this cannot be regarded as a condition of legal recognition.49

Secondly, the difference between the enforcement of judgments in civil and commercial matters, and the enforcement of judgments in public policy cases, is that the former is subject to the principle of subsidiarity, whereas the latter is subject to the principle of direct effect.50

The "unity, uniformity and effectiveness" exception to the principle of direct effect is a limited exception that is not applicable in all cases.51 The principle of direct effect is applicable in all cases where the relevant provisions of EU law are directly applicable in the Member State in which the judgment is sought. However, the principle of direct effect is not applicable in all cases where the relevant provisions of EU law are not directly applicable in the Member State in which the judgment is sought.52

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Advocate General comes to the conclusion that they are not [at 137]-[145] of the Opinion. To that effect, he states: “Apart from the fact that the determination of what constitutes the ‘essence’ of the right to defend oneself remains contested in the Tribunal Constitutional, the Kingdom of Spain is placed in the hearing, relying inter alia on the exceptions in Spanish law to the holding of a retrial following a judgment rendered in absentia, that the participation of the defendant at his trial is not covered by the concept of the national identity of the Kingdom of Spain.”

This is rather unconvincing approach on both counts. The fact that the core of a right is contested clearly does not imply that there is no such core, as explained above. A superficial glance at the relevant Spanish constitutional case law places it beyond doubt that the relevant constitutional right at stake did not concern the finer points of the right or its outer margin, but its very core only. In the terminology of the Spanish Constitutional Court, its violation affects “human dignity”—a legal concept that was reason for the Court of Justice in Omega to accept the differentiated effect of the free movement of services in different Member States. The importance of the core right was not picked up by the Court of Justice: a symptom of Melloni as a dialogue among the deaf?

Holding subsequently that it was “the Kingdom of Spain itself” that had stated that rights of the defence in a trial in absentia do not belong to the national identity of Spain is rather naïve. It was the government speaking, not the Member State—the same government that had violated its Constitution [as it was then interpreted] when agreeing to the Framework Decision. The situation was similar to that faced by the Court of Justice in Landtová, where the Czech Government had a fundamental—and outspoken—constitutional conflict with the Czech Constitutional Court. One would expect the Court of Justice to be alert to such problems. Perhaps the court avoided getting into the quagmire of arbitrating between national constitutional institutions by avoiding the issue of constitutional identity altogether—but it had got itself into it already by total deference to the Council’s [i.e., the Member State governments] intentions with the 2009 Framework Decision. Indeed, the Council in its (in case exclusive) legislative act has an important task to respect national constitutional identities. This could possibly legitimate deference by the court towards the legislature. However, when the Council cannot do so because one of its members chooses to act in conflict with a constitutional obligation, resulting in a failure for the European Union to respect its obligation under art 4(2) TEU, such deference is problematic.

A different way to look at the court’s silence on the issue of constitutional identity is that this may still be an option out of future constitutional conflict in the context of art 53 of the Charter. This would lead to a quite different understanding of primacy: although EU primacy is the “normal” case of a conflict between a national and an EU fundamental rights standard, this would allow that an exceptional national standard pertains to constitutional identity of a Member State; and this escape route of constitutional identity is left open in Melloni.

In this regard, art 53 of the Charter only applies to the uncontroversial care of Member State discretion, but the higher national standard can only apply when national constitutional identity is at stake. In this last case, it is not art 53 of the

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Chaser but art 4(2) TEU that is the basis of this prevalence of the national standard. The meaning of art 53 of the Charter remains trivial.

Another objection is that national constitutional courts do clearly not take the approach of distinguishing between fundamental rights that belong to the constitutional identity of the Member State and fundamental rights that do not belong to that identity. In principle, fundamental rights are by definition fundamental and by their nature pertain to that identity. Indeed, national constitutional courts are able to distinguish, but that distinction turns on the crucial criterion of equivalence. This is famously codified in art 23 of the German Basic Law and also articulated by the Italian Constitutional Court in Figured, the language of which is echoed in the Spanish Constitutional Court in Melloni. And, clearly, there is no equivalence whatsoever between the Spanish constitutional case law as it stood before Melloni and the European Arrest Warrant as interpreted by the Court of Justice.

The judicial dialogue

The Court of Justice’s Melloni judgment has been received critically in the literature, in particular as regards the quality of the court’s reasoning, which has been characterised by one German scholar with epithets such as “too global analyst”, “astonishing”, “again an inadequate approach of the problem”, “unfounded”, “half-hearted”. On the quality of the judicial dialogue on the part of the Court of Justice, a Spanish scholar cautiously remarked that “the institutional empathy shown by the court is equivalent to that of a potato”; he remarked on “the striking absence” of a balanced assessment of the arguments put forward by the referring court, which is “a prerequisite of legal empathy”: “there is no clear manifestation of deafness or the Asperger syndrome of the Court of Justice, it is this.” However, the reproach of a refusal to engage in a serious dialogue was made to the Spanish Constitutional Court too, notably in the concurring opinion of Judge Encarnación Roca Trías in the follow-up judgment, in which she complains that the majority failed to engage in “an effective and not merely apparent judicial dialogue”.

The series of judicial utterances in Melloni ended with the Spanish Constitutional Court generally lowering the standard of protection previously provided by art 24 of the Spanish Constitution, both in cases of surrender within the European Union and in cases of extradition to any other non-EU state. The Constitutional Court found a basis for doing so in an Spanish provision of the Constitutional Constitution, which provides that “the norms concerning fundamental freedom and liberties recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights.” Whether this is to be understood as an exception primacy or not, see L. Bostelrot, “National and Constitutional Identity before and after Lisbon” (2010) 6 Dutch Law Review 36 [see http://www.mechelenuniversity.eu/index.php/ulr/article/viewFile/139/135; see L. Landtová, 29 CJEU, 2010] 541, “Overriding Absolute Primacy: Respect for National Identity under the Lisbon Treaty” (2011) 40 CML Rev., 111.

Human Rights and with international treaties and agreements on the same matter ratified by Spain.68

This provision—art.10(2) of the Constitution—also takes on board EU law whenever that is relevant to the Spanish legal order. As the Court of Justice acknowledged in its considerations of the admissibility issue, it is precisely in the autonomous interpretation by the Spanish Constitutional Court of the meaning of the Spanish Constitution’s provisions relevant to the Melleni case that the Court of Justice’s interpretation of the Charter and the RAW Framework Decision comes in; that is to say, within the autonomous interpretation by the Constitutional Court of national constitutional law.

This setting can also explain why the Constitutional Court found it legitimate to "supplement" its interpretation of the Constitution with its remarks about the prevalence of the Spanish Constitution in cases where EU law would conflict with it. For all intents and purposes, this means that if EU law conflicts with the fundamental rights standard of the Spanish Constitution, and this conflict cannot be resolved otherwise, the latter will prevail. In sum, the interpretation of art.5 of the Charter by the Court of Justice in Melleni will not, if it really came to it, be followed by the Constitutional Court. That this is not a fanciful interpretation of the Constitutional Court’s final judgment in Melleni is witnessed by the concurring opinion of Justice Encarnación Begoña Trías, which criticizes the majority precisely for making this interpretation at least possible if not the only one intended. For her, the dialogue would have been successful if the Constitutional Court had simply accepted and followed the line of reasoning of the Court of Justice, even though that would seem to be the one-way traffic of "obedience" rather than a plurilateral "dialogue".69

The degree of principled judicial disobedience compensates for the judicial obedience and compliance in lowering the protection provided by what allegedly was the core of a constitutional right. A more "dialectic" element in the Constitutional Court’s judgment inheres in its statement that "in the unlikely case70 of a hypothetical infringement by EU law of the Spanish Constitution which "is not remedied by the ordinary channels provided [by EU law]", the Constitutional Court would have to respect the principle of popular sovereignty and its expression in the Spanish Constitution. This is another way of saying: "Court of Justice, be sensitive and responsive to the implosion of values of national constitutions!" Evidently, the Constitutional Court found that the Court of Justice’s judgment in Melleni incriminated the making of such a remark.

The particular dynamics of the "dialogue" in Melleni may, on the part of the Court of Justice, perhaps be understood in the absence of clear Straubing case law concerning mutual recognition in the context of trial in absentia that would have given support to the point of the earlier Spanish constitutional case law. Under such circumstances, the court was ready for a conflict with an embattled constitutional court like the Spanish, which is pretty much in competition with ordinary Spanish courts. That the Court of Justice is not likely to do the same with more powerful constitutional courts, like the Bundesverfassungsgericht, is shown by its case on data protection.71 A legal field that the German Federal Constitutional Court has declared to concern its constitutional identity at an early stage in its data retention judgment.72

Conclusion

The Preamble to the EU Charter of Fundamental Rights states that the Union "places the individual at the heart of its activities". That is not apparent from the Court of Justice’s judgment in Melleni. The court was evidently less concerned with protecting the fundamental rights of individuals granted by primary law than with safeguarding the intentions of the legislators, notably government, when they made secondary legislation.

Its shear concern for the primary of secondary law, even though it was not directly effective, led it to a mode of judging which is more like that of making a statement than that of careful consideration of various arguments. As the court’s later judgment in Riegger makes plain in an obiter dictum, citing Melloni as authority, the objective of fundamental rights protection is not the concern for the rights of the individual but, "the need to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved in such a way as to undermine the unity, primacy and effectiveness of EU law."73

So the Preamble to the Charter was wrong; it is not rights themselves that are important, primacy is the real issue. Fifty years after Costa v ENEL, the court settles for absolute primacy as a greater concern than substantive rights. It is not the citizen and his rights that move the court; it is the primary of EU law over national law, even non-directive effective EU secondary law over national constitutional law.

On the more specific legal context of art.53 of the Charter, we in the meantime have to wonder what Melloni has brought. Although it has been suggested that the main purpose of this provision was that "existing regimes should not be applied and interpreted 'downwards' by invoking the language of the Charter",74 this is precisely what the interpretation of art.53 of the Charter in Melleni effected: the interpretation "downwards" of the rights of the defendant under the Spanish Constitution by the Spanish Constitutional Court, which considered itself forced to do so under the influence of the Court of Justice’s interpretation of the rights of defence under the Charter. For the moment, this has avoided overt constitutional conflict, but new material for an outbreak of such conflict is provided by the Court of Justice in Melloni itself.

Might there still be a way out? I agree with some commentators that the issue of constitutional identity provides one way out, although there are clear objections as to the manner in which this was (or rather was not) handled in Melloni. Instead of the language of some 40 or 50 years ago, when EU law still needed to establish itself in the Member State legal orders, the court would at any rate have to revert to the different, more mature, subtle, balanced and nuanced ways of Omega and Soym Wittgenstein—however, the chances of its doing so seem somehow reduced after Melloni.

In terms of the general constitutional situation in Europe, we may understand this state of affairs in terms of shifts within constitutional paradigms. The paradigm of rights prevailing in post-war Western European states, and in Middle and Eastern European Member States since the fall of the Berlin Wall, is in the context of European integration shaped by the paradigm that dominated the "long 19th century" of European constitutionalism, that of power allocation: the insertion of primacy is the main concern of the Court of Justice not only in the age of the early establishment of EU law (the 1960s and 1970s) but even in the 21st century. This may explain the strongly doctrinaire reflex in Melloni that fits into a line of more or less recent cases like Wiener Wohnen, of which the polemic tone contrasts with the more ironic, accommodating and conciliatory approach of Omega and Soym Wittgenstein. It may also be an indication that the constitutional paradigm of the 21st century will unavoidably be that of neither right nor powers in the exclusive terms it had in the 19th century, but that of relations between constitutional orders.

68 Spanish Constitution art.10(2).
70 This language is exactly identical to that of the Italian Constitutional Court in Pugita C202/1991 April 12, 1995.
71 Most recently, Digital Rights Ireland v Minister for Communications, Marine and Natural Resources (C-291/12 and C-344/12) April 6, 2013.
73 Strasburg (C-206/13) March 6, 2014 at [31]-[32].
74 See White, "Article 53 of the EU Charter of Fundamental Rights (2014), 14 SCL. Similarly, Opinion of A.O. Bt in Riegger (C-390/13) 2014 C M R 43 at [49]. "The Charter thus cannot have the effect of requiring Member States to leave the level of protection of fundamental rights guaranteed by their national constitution in cases which still fall outside the scope of European Union law. Article 53 of the Charter also expresses the idea that the adoption of the Charter should not serve as a pretext for a Member State to reduce the protection of fundamental rights in the field of Fundamental Rights of national law."