
1. The European Court of Justice and fundamental rights in the field of criminal law

*Koen Lenaerts and José A. Gutiérrez-Fons**

1. INTRODUCTION

At the outset of European integration, criminal law was considered to be the exclusive preserve of national sovereigns. Without a clear mandate from the EC Treaty itself, Member States were hostile to the very idea that the European Union (then Community) could enjoy the legislative power to adopt criminal penalties as a means of enforcing substantive EU policies,¹ let alone to harmonize substantive criminal law. This did not mean, however, that criminal law ‘constitute[d] an island beyond the reach of [EU] law’.² First, it follows from the *Greek Maize* case law that ‘where [EU] legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, [the principle of loyal cooperation] requires the Member States to take all measures necessary to guarantee the application and effectiveness of [EU] law’. ‘For that purpose’, the European Court of Justice (ECJ) wrote:

whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of [EU] law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.³

Secondly, the ECJ noted in *Casati* that:

[although] in principle criminal legislation and the rules of criminal procedure are matters for which the Member States are responsible, [it does not follow that this branch of the law cannot be affected by the free movement of capital].⁴

* All opinions expressed herein are strictly personal to the authors.

¹ See Michael Dougan, ‘From the Velvet Glove to the Iron Fist: Sanctions and Penalties for the Enforcement of Community Law’ in Marise Cremona (ed.), *Compliance and Enforcement of EU Law* (OUP, 2012), p. 90.

² See, by analogy, C-120/95 *Decker*, EU:C:1997:399, Opinion of AG Tesauero, para. 17. See also Koen Lenaerts, ‘Federalism and the Rule of Law: Perspectives from the European Court of Justice’ (2009–10) 39 *Fordham Int’l LJ* 1338.

³ 68/88 *Commission v. Greece*, EU:C:1989:339, Judgment, paras 23–4. See, more recently, C-565/12 *LCL Le Crédit Lyonnais*, EU:C:2014:190, Judgment, para. 44 and case law cited.

⁴ 203/80 *Casati*, EU:C:1981:261, Judgment, para. 27. See also 186/87 *Cowan*, EU:C:1989:47, Judgment, para. 19, and C-226/97 *Lemmens*, EU:C:1998:296, Judgment, para. 19. More recently C-61/11PPU *El Dridi*, EU:C:2011:268, Judgment, para. 53.

A joint reading of those two lines of case law suggests that '[n]ational criminal [law] is therefore restricted either "passively" [by the substantive law of the EU] or "actively" through the imposition of specific criminal sanctions deemed necessary to ensure the proper implementation of [EU law]'.⁵

Over the past 60 years, the European Union has changed. Its remit is no longer confined to imposing 'active' and 'passive' limits to the criminal laws of the Member States, but has evolved with successive Treaty reforms to cover substantive and procedural aspects of those laws. With the Maastricht Treaty⁶ and, to a greater extent, the Amsterdam Treaty,⁷ the Member States established the objective of maintaining and developing the EU as an Area of Freedom, Security and Justice (AFSJ). In order for the EU to attain that objective, cooperation in criminal matters among national judiciaries was deemed to be of paramount importance. Whilst the AFSJ was initially to operate in an inter-governmental setting, as years went by, the Member States came to realize that for their citizens to move freely and securely in an area without internal frontiers, further integration was a *conditio sine qua non*. That is why the 'Community method' was extended progressively to the AFSJ. That process of 'Communitarisation' was completed with the entry into force of the Lisbon Treaty that brought about the collapse of the third pillar.⁸

Currently, criminal law is no longer foreign to European integration, as parts of that law may be subject to EU legislation. Judicial cooperation in criminal matters takes place in three different ways. First, it aims to prevent criminals from exploiting free movement as a means for pursuing their illegal activities with impunity.⁹ By facilitating the mutual recognition of judicial decisions, the AFSJ supports the effectiveness of national criminal laws. Secondly, judicial cooperation in criminal matters seeks to establish minimum rules concerning the mutual admissibility of evidence between Member States, the rights of individuals in criminal procedure, the rights of victims of crime, and any other specific aspect of criminal procedure which the Council has identified in advance by a decision.¹⁰ By establishing a 'level playing field' of those aspects of criminal procedure, the authors of the Treaties sought to facilitate the free movement of judicial decisions. They rightly believed that a Member State would be more prompted to recognize and enforce decisions issued in other Member States if the fundamental rights of the person(s) concerned are properly protected throughout the EU. Last, but not least, the EU legislator may adopt Directives establishing minimum

⁵ Andrea Biondi and Roberto Mastroianni, Case Note on *Berlusconi and others* (2006) 43 *CML Rev.* 553, at 559.

⁶ See ex Art. K-K.9 of the Treaty on European Union (TEU) [1992] OJ C191/1.

⁷ See ex Arts 1, point 11, and 2, point 15, of the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and related acts [1997] OJ C340/1.

⁸ See Valsamis Mitsilegas, *EU Criminal Law* (Hart Publishing, 2009), p. 5 *et seq.*, and Steve Peers, 'EU Justice and Home Affairs Law (Non-Civil)' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law*, 2nd edn (OUP, 2011), p. 269. See also Koen Lenaerts, 'The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice' (2010) 59 *ICLQ* 255.

⁹ Article 82(1) TFEU.

¹⁰ Article 82(2) TFEU.

rules concerning the definition of criminal offences and sanctions in the area of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.¹¹ By means of Directives, the EU legislator may also establish minimum rules with regard to the definition of criminal offences and sanctions where EU action proves essential to the effective implementation of an EU policy that has been subject to harmonization measures.¹²

The purpose of our contribution is to provide a comprehensive overview of the situations in which the Charter of Fundamental Rights of the European Union (the ‘Charter’) may apply in the field of criminal law.¹³ To that end, it is divided into three main sections.

Section 2 looks at the application of the Charter in situations where EU law operates as either an active or passive limit to the criminal laws of the Member States. In the light of the rulings of the ECJ in *Åkerberg Fransson*¹⁴ and *Pfleger*,¹⁵ it is submitted that national criminal measures such as those at issue in the *Greek Maize* and *Casati* lines of case law ‘implement EU law’ within the meaning of Article 51(1) of the Charter. Section 3 examines the application of the Charter in the presence of EU criminal law. We explore, in particular, whether the Charter may impose limits on the principle of mutual recognition as defined by the EU legislator. In section 4, by contrasting the rulings of the ECJ in *Melloni* and *Jeremy F*,¹⁶ we argue that subject to respect for the fundamental rights enshrined in the Charter, it is for the EU legislator to decide whether EU criminal law is to set a uniform standard of fundamental rights protection. Finally, a brief conclusion supports the contention that, as is the case under national constitutional law, the effectiveness of EU criminal law and that of national criminal laws falling within the scope of EU law must be balanced against fundamental rights. This shows that the ECJ strives to guarantee that criminal law evolves in harmony with the constitutional traditions common to the Member States.

¹¹ Article 83(1) TFEU.

¹² See Art. 83(2) TFEU. Please note that the question whether the new Art. 83(2) TFEU supersedes the rulings of the ECJ in C-176/03 *Commission v. Council (Environmental Crimes)*, EU:C:2005:542 and C-440/05 *Commission v. Council (Ship-Source Pollution)*, EU:C:2007:625, is beyond the scope of this chapter. In this regard, see Dougan, ‘From the Velvet Glove to the Iron Fist’, above n. 1, at 108; Ester Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (Hart Publishing, 2012), p. 63, and Samuli Miettinen, ‘Implied Ancillary Criminal Law after Lisbon’ (2013) 3 *EuCLR* 194.

¹³ See generally Koen Lenaerts and José A. Gutiérrez-Fons, ‘The Place of the Charter in the EU Constitutional Edifice’ in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing, 2014), p. 1557.

¹⁴ C-617/10 *Åkerberg Fransson*, EU:C:2013:105, Judgment.

¹⁵ C-390/12 *Pfleger and others*, EU:C:2014:281, Judgment.

¹⁶ C-399/11 *Melloni*, EU:C:2013:107, Judgment and C-168/13PPU *Jeremy F*, EU:C:2013:358, Judgment.

2. ACTIVE AND PASSIVE LIMITS TO THE CRIMINAL LAWS OF THE MEMBER STATES

With the entry into force of the Lisbon Treaty, the Charter enjoys ‘the same legal value as the Treaties’. However, unlike those rights that are protected in the national constitutions or the European Convention on Human Rights (ECHR), the fundamental rights as enshrined in the Charter are not universally applicable. That is so because the provisions of the Charter ‘are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law’. Whilst in relation to the EU institutions, bodies, offices and agencies, Article 51(1) focuses on guaranteeing compliance with the principle of subsidiarity, this Article makes the Charter applicable to the Member States ‘only when they are implementing Union law’.

According to the explanations relating to Article 51(1) of the Charter, it appears that the expression ‘only when [Member States] are implementing Union law’ should cover all situations where Member States fulfil their obligations under the Treaties as well as under secondary EU law (adopted pursuant to the Treaties), i.e., the Charter applies whenever Member States fulfil an obligation imposed by EU law. In the light of the case law of the ECJ, one may distinguish two different types of obligations that EU law imposes on the Member States, namely, (1) EU obligations that require a Member State to take action (the ‘agency situation’); and (2) EU obligations that must be complied with when a Member State derogates from EU law (the ‘derogation situation’). Conversely, where EU law imposes no obligation on the Member States, the Charter does not apply.

2.1 Agency Situation and the *Greek Maize Case Law*

The question that arises is whether the Charter applies to national criminal penalties that seek to enforce a substantive EU policy.

Pre-Lisbon case law suggested that general principles of EU law, of which fundamental rights are an integral part, applied to criminal penalties such as those at issue in the *Greek Maize* line of case law. In *Berlusconi*, for example, criminal penalties relating to offences for false accounting were adopted by the Italian legislator as a means of enforcing article 6 of the First Companies Directive (68/151). However, that provision did not oblige Member States to adopt criminal penalties for that offence, but stated that ‘Member States shall provide for appropriate penalties’. In this regard, the ECJ held that article 6 of that Directive had to be interpreted in the light of the *Greek Maize* case law which is grounded in the principle of loyal cooperation. In order for a penalty to be ‘appropriate’, the ECJ ruled that it had to comply with the principle of equivalence and be effective, proportionate and dissuasive.¹⁷ Next, the ECJ went on to examine whether in applying those penalties, national courts were also bound by the principle of the retroactive application of the more lenient penalty. It ruled that ‘[that] principle must be regarded as forming part of the general principles of [EU] law which

¹⁷ C-387/02, C-391/02 and C-403/02 *Berlusconi and others*, EU:C:2005:270, Judgment, paras 63–5.

national courts must respect when applying the national legislation adopted for the purpose of *implementing* [EU] law'.¹⁸

In *Åkerberg Fransson*, the ECJ was confronted with that same question, this time, however, in relation to the Charter. In that case, the referring court asked, in essence, whether the *ne bis in idem* principle, enshrined in Article 50 of the Charter, precluded criminal proceedings for tax evasion (VAT) from being brought against a defendant where a tax penalty had already been imposed upon him for the same acts of providing false information.

In order to answer that question, the ECJ had first to determine whether the Charter was applicable in the case at hand. At the outset, it held that Article 51(1) of the Charter 'confirms [its] case-law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the [EU] legal order'.¹⁹ For the case at hand, this meant that in order for Article 50 of the Charter to apply in the situation of the defendant, the ECJ had to determine whether there was a connecting factor between the tax penalties and criminal proceedings to which he had been or was subject and EU law. The question thus became whether Sweden was fulfilling an obligation imposed by EU law.

To begin with, the ECJ found that those tax penalties and criminal proceedings were partially connected to the fact that the defendant had breached his obligations to declare VAT. By imposing those tax penalties and by bringing those criminal proceedings, Sweden was complying with its obligation 'to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion'²⁰ as provided for by articles 2, 250(1) and 273 of Directive 2006/112²¹ and by the principle of loyal cooperation.²² Additionally, since the collection of VAT revenue contributes to the financing of the EU budget, national legislation which seeks to deter individuals from adversely affecting such collection protects the EU financial interests. It followed that by imposing tax penalties and by bringing criminal proceedings against the defendant, Sweden was also fulfilling its obligations under Article 325 of the Treaty on the Functioning of the European Union (TFEU), according to which Member States are 'oblige[d] to counter illegal activities affecting the financial interests of the [EU] through effective deterrent measures and, in particular ... to take the same measures to counter fraud affecting the financial interests of the European Union as they take to counter fraud affecting their own interests'.²³ Accordingly, the ECJ concluded that tax penalties and criminal proceedings such as those of the case at hand 'constitute implementation of Articles 2, 250(1) and 273 of Directive 2006/112 ... and of Article 325 TFEU and, therefore, of [EU] law, for the

¹⁸ *Ibid.* para. 69 (emphasis added).

¹⁹ *Åkerberg Fransson*, above n. 14, para. 18.

²⁰ *Ibid.* para. 25.

²¹ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, [2006] OJ L347/1. Previously, arts 2, 250(1) and 273 of Directive 2006/112 were set out in arts 2 and 22 of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes: common system of value added tax: uniform basis of assessment, [1977] OJ L145/1.

²² Article 4(3) TEU.

²³ *Åkerberg Fransson*, above n. 14, para. 26.

purposes of Article 51(1) of the Charter'.²⁴ Moreover, that conclusion could not be called into question by the fact that the national legislation upon which those tax penalties and criminal proceedings were founded had not been specifically adopted to transpose Directive 2006/112.²⁵

Åkerberg Fransson confirms that the Charter applies to national criminal penalties that aim to enforce substantive EU law. Referring to the *Greek Maize* case law, the ECJ recalled that, when EU legislation does not specifically provide any penalty for an infringement of EU law or refers for that purpose to national laws, regulations and administrative provisions, 'the Member States have freedom to choose the applicable penalties'.²⁶ Accordingly, it is for each Member State to decide whether penalties should 'take the form of administrative penalties, criminal penalties or a combination of the two',²⁷ provided that the resulting penalties comply with the Charter and that they are 'effective, proportionate and dissuasive'.²⁸

Moreover, the application of the Charter to national criminal penalties that seek to enforce substantive EU law does not rule out the fact that Member States may adopt different standards of fundamental rights protection. On the contrary, 'in a situation where action of the Member States is not entirely determined by [EU] law',²⁹ the ECJ held that a national court may apply the standards of protection guaranteed by its Constitution, provided that those standards are not lower than those guaranteed by the Charter and that 'the primacy, unity and effectiveness of [EU] law are not thereby compromised'.³⁰ Since, in *Åkerberg Fransson*, the EU legislator had not struck the balance between the protection of the EU financial interests and the *ne bis in idem* principle, Member States were free to apply higher standards of fundamental rights protection when assessing the lawfulness of combining tax and criminal penalties for the same wrongful conduct, provided that that combination of penalties complied with the Charter and that the three criteria stemming from the *Greek Maize* case law were met (i.e., penalties had to be effective, proportionate and dissuasive for ensuring the collection of VAT). This aspect of the judgment is further discussed in section 4 below.

Obviously, the fact that national criminal penalties are adopted as a means of enforcing an EU measure presupposes that the latter is valid in the light of the Charter. If that is not the case, such a measure 'cannot form any part of the basis for criminal proceedings against the defendant[s]'.³¹

²⁴ *Ibid.* para. 27.

²⁵ *Ibid.* para. 28.

²⁶ *Ibid.* para. 34 (quoting *Commission v. Greece*, above n. 3, para. 24).

²⁷ See, in this regard, the 'Proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law', COM(2012)363 final, which is currently under discussion in the European Parliament and the Council. If adopted, Member States will no longer have that freedom.

²⁸ *Åkerberg Fransson*, above n. 14, para. 36 (quoting *Commission v. Greece*, above n. 3, para. 24). See also C-418/11 *Texdata Software*, EU:C:2013:588, Judgment, paras 50–2, 74 and 75.

²⁹ *Ibid.* para. 29.

³⁰ *Ibid.*

³¹ C-550/09 *E and F*, EU:C:2010:382, Judgment, para. 61.

2.2 National Criminal Law as a Derogation from the Substantive Law of the EU

Pre-Lisbon case law also suggested that national criminal measures must be set aside where they enforced an unjustified restriction on free movement.³² Coupled with the *ERT* case law,³³ this meant that a national criminal measure that derogated from the substantive law of the EU must not only pursue a legitimate interest recognized by EU law, be free from any discrimination and respect the principle of proportionality, but it must also comply with fundamental rights. In *Pfleger*,³⁴ the ECJ confirmed that the *ERT* case law remains good law for the purposes of Article 51(1) of the Charter. It ruled that:

[t]he use by a Member State of exceptions provided for by EU law in order to justify an obstruction of a fundamental freedom guaranteed by the Treaty must ... be regarded ... as “implementing [EU] law” within the meaning of Article 51(1) of the Charter.³⁵

In that case, Austrian legislation provided for the imposition of administrative or criminal penalties against persons who operated gaming machines in the absence of prior authorization. Those penalties included the confiscation and destruction of gaming machines and the closure of the establishment in which those machines were made available to the public. The referring court asked, in essence, whether the system of prior authorization was compatible with Article 56 TFEU as well as with Articles 15 to 17 of the Charter. Referring to its previous case law,³⁶ the ECJ held, first, that a system of prior authorization such as that provided for by Austrian law constituted a restriction of the freedom to provide services.³⁷ Next, it observed that such a restriction could not be justified given that its real purpose was to increase public tax revenue.³⁸ As a result, an infringement of that system by economic operators could not give rise to penalties. Regarding the Charter, the ECJ found that:

an examination of the restriction represented by the national legislation at issue in the main proceedings from the point of view of Article 56 TFEU covers also possible limitations of the exercise of the rights and freedoms provided for in Articles 15 to 17 of the Charter, so that a separate examination is not necessary.³⁹

³² See also Dougan, ‘From the Velvet Glove to the Iron Fist’, above n. 1, at 76.

³³ C-260/89 *ERT*, EU:C:1991:254, Judgment.

³⁴ C-390/12 *Pfleger and others*, EU:C:2014:281, Judgment.

³⁵ *Ibid.* para. 36.

³⁶ C-338/04, C-359/04 and C-360/04 *Placanica*, EU:C:2007:133, Judgment, para. 42.

³⁷ See C-390/12 *Pfleger and others*, EU:C:2013:747, Opinion of AG Sharpston, para. 51 (‘legislation, such as that at issue in the main proceedings, under which only a limited number of licence holders may organise games of chance and all other operators, whether established in Austria or in any other Member State, are prohibited from offering such services, constitutes a restriction on the freedom to provide services’).

³⁸ *Pfleger and others*, above n. 34, para. 54.

³⁹ *Ibid.* para. 60.

2.3 Situations Where the Charter Does Not Apply to National Criminal Law

Where a national criminal measure neither aims to secure compliance with an obligation laid down in EU law nor constitutes a derogation from the substantive law of the EU, such a measure does not fall within the scope of EU law and, accordingly, cannot be examined in the light of the Charter.⁴⁰ This would be the case where a person is imprisoned for a crime that is totally unconnected with EU law.⁴¹ Such a penalty cannot be regarded as ‘implementing [EU] law’ within the meaning of Article 51(1) of the Charter.

The same applies in relation to national criminal measures that are neither incompatible with EU law nor required by that law. This point is illustrated by the ruling of the ECJ in *Gueye*.⁴² In that case, the ECJ found that the mandatory imposition of an injunction to stay away for a minimum period, as prescribed as an ancillary penalty by Spanish criminal law, on persons who committed crimes of domestic violence, even when the victims of those persons oppose the application of such a penalty, did not ‘implement EU law’ within the meaning of Article 51(1) of the Charter. Framework Decision 2001/220/JHA⁴³ on the standing of victims in criminal proceedings did not oppose such an injunction. Although that Framework Decision aimed to guarantee the adequate and effective participation of victims in the criminal proceedings by offering them a suitable protection, the ECJ reasoned that such a protection did not cover the ‘indirect consequences which may, at a later stage, arise as a result of the penalties imposed by the national courts on offenders’.⁴⁴ As Framework Decision 2001/220/JHA neither opposed nor required the mandatory imposition of such an injunction, the latter could not be assessed in the light of the Charter.⁴⁵

3. IN THE PRESENCE OF EU LEGISLATION

As mentioned in the introduction, the establishment of the AFSJ requires the abolition of internal border controls so that individuals can move freely and securely throughout the European Union. However, since such abolition could threaten the effectiveness of national criminal laws whose application remains territorial, the authors of the Treaties entrusted the EU legislator with the task of developing a system of judicial cooperation.

As Mitsilegas notes, this means that the simplification of free movement must go hand-in-hand with the simplification of inter-state judicial cooperation. The automatic recognition and enforcement of national judicial decisions is to be facilitated by EU

⁴⁰ See, e.g., C-27/11 *Vinkov*, EU:C:2012:326, Judgment.

⁴¹ For two pre-Lisbon examples, see C-299/95 *Kremzow*, EU:C:1997:254, Judgment, and order in C-328/04 *Vajnai*, EU:C:2005:596, Judgment.

⁴² C-483/09 and C-1/10 *Gueye*, EU:C:2011:583, Judgment.

⁴³ [2001] OJ L82/1.

⁴⁴ *Gueye*, above n. 42, paras 66–7.

⁴⁵ *Ibid.* para. 69.

legislation that gives concrete expression to the principle of mutual recognition.⁴⁶ In criminal matters, the Framework Decision on the European Arrest Warrant (the ‘EAW Framework Decision’) constitutes the paradigmatic example.⁴⁷

3.1 Vertical and Horizontal Aspects of Mutual Recognition

Mutual recognition can only take place effectively if there is mutual trust between Member States regarding the protection of fundamental rights.⁴⁸ As given expression in the EAW Framework Decision, that principle implies that ‘the Member States are in principle obliged to act upon a European arrest warrant [EAW]’.⁴⁹ In the same way, they must refuse to execute such a warrant only in the cases of mandatory non-execution provided for in article 3 of that Framework Decision and may do so only in the cases of optional non-execution listed in Article 4 thereof.⁵⁰ In addition, the executing judicial authority may make the execution of an EAW subject solely to the conditions set out in article 5 of the EAW Framework Decision.

By virtue of article 1(3) of the EAW Framework Decision, the principle of mutual recognition cannot, however, ‘have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the [TEU]’. Accordingly, the grounds for mandatory or optional non-execution of an EAW must, as all provisions of secondary EU law, be interpreted in the light of the Charter.

For example, in *IB*,⁵¹ the Belgian Constitutional Court asked the ECJ to interpret articles 4(6), 5(1) and 5(3) of the EAW Framework Decision. Article 4(6) of the EAW Framework Decision states that the executing Member State may refuse to execute an EAW issued for the purposes of execution of a custodial sentence or detention order against a person who is staying in, or is a national or a resident of, the executing Member State where that State undertakes to execute the sentence or detention order in accordance with its domestic law. In the same way, article 5(3) provides that the execution of an EAW issued for the purposes of prosecution against a national or resident of the executing Member State may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State. However, article 5(1) of that Framework Decision, which was repealed by Framework

⁴⁶ Valsamis Mitsilegas, ‘The Limits of Mutual Trust in Europe’s Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual’ (2012) 31 *YEL* 319, at 321.

⁴⁷ 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.

⁴⁸ C-411/10 and C-493/10 *NS*, EU:C:2011:865, Judgment, para. 83 (holding that ‘the raison d’être of the European Union and the creation of an [AFSJ] is based on mutual confidence and a presumption of compliance, by other Member States, with [EU] law and, in particular, fundamental rights’). See also Opinion 2/13, EU:C:2014:2454, paras 191 and 192.

⁴⁹ See, e.g., C-388/08PPU *Leymann and Pustovarov*, EU:C:2008:669, Judgment, para. 51.

⁵⁰ *Ibid.*

⁵¹ C-306/09 *IB*, EU:C:2010:626, Judgment.

Decision 2009/299,⁵² stated that the execution of an EAW issued for the purposes of execution of a custodial sentence or detention order against a person convicted *in absentia* could be made conditional upon a retrial in the issuing Member State. Thus, that last provision was silent as to whether the surrender of the person concerned could in these circumstances be made subject to the condition that the person, following retrial, will be returned to the executing Member State in order to serve there the custodial sentence passed on him.

The facts of the case are as follows. Mr IB, a Romanian national living in Belgium, was subject to an EAW for the purposes of executing a sentence of four years' imprisonment finally decided *in absentia* by the Romanian Supreme Court. Under Romanian criminal law, a person who had been sentenced *in absentia* was entitled to a retrial if he so requested.

The Belgian Constitutional Court observed that the Belgian legislator had decided to implement the optional ground for non-execution set out in article 4(6) of the EAW Framework Decision. In addition, it noted that the Belgian law implementing the EAW Framework Decision could be interpreted as introducing the following distinction: whilst the surrender of a person for the purposes of prosecution who is the subject of an EAW and resides in Belgium may, as provided for by article 5(3) of the EAW Framework Decision, be subject to the condition that the person, after being tried, is returned to Belgium in order to serve there the custodial sentence passed against him in the issuing Member State, this is not the case for an EAW issued for the purposes of executing a sentence against which the convicted person still has a remedy as provided for by article 5(1) of that Framework Decision.

Given that the EAW in question was not issued for the purposes of prosecution, the Belgian provision implementing article 5(3) of the EAW Framework Decision did not, *a priori*, apply to the case at hand. Accordingly, this meant for Mr IB that he was caught on the horns of the following dilemma: either he fell within the scope of the Belgian provision implementing article 4(6) of the EAW Framework Decision (meaning that he could serve the sentence in Belgium after waiving his right to request a retrial in Romania) or he fell within the scope of the Belgian provision implementing article 5(1) of that Framework Decision (meaning that if he exercised that right he would have no certainty of being returned to Belgium in order, as the case may be, to serve his custodial sentence there).⁵³ If interpreted in that way, the Belgian law implementing the EAW Framework Decision was incompatible with the principle of non-discrimination as guaranteed under the Belgian Constitution.

Accordingly, the Belgian Constitutional Court asked, in essence, whether the Belgian legislator was right to introduce that distinction. If articles 4(6), 5(1) and 5(3) of the EAW Framework Decision were only to be read separately, the ECJ noted, the distinction introduced by the Belgian legislator could stand. However, in order to

⁵² Article 2(2) of 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. Cf. *Melloni*, above n. 16.

⁵³ *IB*, above n. 51, para. 59.

ensure compliance with the EU principle of non-discrimination, the ECJ held that those provisions had to be read jointly.

After recalling that articles 4(6) and 5(3) of the EAW Framework Decision have ‘the objective of enabling particular weight to be given to the possibility of increasing the requested person’s chances of reintegrating into society’,⁵⁴ the ECJ ruled that ‘[t]here is nothing to indicate that the [EU] legislator wished to exclude persons requested on the basis of a sentence imposed *in absentia* from that objective’.⁵⁵ Given that the situation of a person who was sentenced *in absentia* and has the right to request a retrial in the issuing Member State is comparable to that of a person who is the subject of an EAW for the purposes of prosecution, ‘there is no objective reason precluding an executing judicial authority which has applied Article 5(1) of [the EAW Framework Decision] from applying the condition contained in Article 5(3) of that framework decision’.⁵⁶

Accordingly, before the 2009 reform of the EAW Framework Decision, the execution of an EAW issued for the purposes of executing a sentence imposed *in absentia* could be subject to the condition that, where the person concerned had the right to request a new trial organized in his presence in the issuing Member State, that person, who is a national or resident of the executing Member State, should be returned to that Member State in order, as the case may be, to serve there the custodial sentence passed against him, following the new trial.

In *IB*, the ECJ did not favour an interpretation that would have given impetus to integration in criminal matters by endorsing a narrow reading of the conditions that may be attached to the execution of an EAW. Instead, it decided to protect individuals by guaranteeing that similar situations are treated alike. Such a reading of the EAW Framework Decision was confirmed by the ECJ in *Lopes Da Silva Jorge*.⁵⁷ In that case, it held that:

if Member States transpose Article 4(6) of EAW Framework Decision into their domestic law, they cannot, without undermining the principle that there should be no discrimination on the grounds of nationality, limit that ground for optional non execution solely to their own nationals, by excluding automatically and absolutely the nationals of other Member States who are staying or resident in the territory of the Member State of execution irrespective of their connections with that Member State.⁵⁸

Although the EAW Framework Decision must be interpreted in the light of the Charter, this does not mean, however, that the judicial authority of the executing Member State is entitled to scrutinize each and every aspect of the criminal proceedings carried out in the issuing Member State. Without some degree of mutual trust, the effectiveness of the EAW system would be seriously compromised.⁵⁹ The application of the *ne bis in idem* principle – a fundamental right enshrined in Article 50 of the Charter – as applied in the context of the EAW Framework Decision illustrates this point.

⁵⁴ *Ibid.* para. 52.

⁵⁵ *Ibid.* para. 53.

⁵⁶ *Ibid.* para. 57.

⁵⁷ C-42/11 *Lopes Da Silva Jorge*, EU:C:2012:517, Judgment.

⁵⁸ *Ibid.* para. 50.

⁵⁹ C-396/11 *Radu*, EU:C:2013:39, Judgment, para. 41.

In *Mantello*,⁶⁰ the ECJ was called upon to interpret the concept of ‘final judgment’ for the purposes of article 3(2) of the EAW Framework Decision which establishes the *ne bis in idem* principle as a ground for mandatory non-execution of an EAW. In accordance with that provision, the judicial authority of the Member State responsible for executing the EAW must refuse to execute the warrant if it ‘is informed that the requested person has been *finally judged* by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State’.

At the outset, the ECJ found that the concept of the ‘same acts’ denotes an autonomous concept that corresponds to the one laid down in Article 54 of the Convention implementing the Schengen Agreement (CISA).⁶¹ By contrast, ‘[w]hether a person has been “finally” judged’, the ECJ wrote, ‘is determined by the law of the Member State in which judgment was delivered’.⁶² Consequently, whilst the judicial authority of the executing Member State may, in cooperation with the ECJ, apply the concept of the ‘same acts’ within the meaning of article 3(2) of the EAW Framework Decision, the same does not hold true in relation to the concept of ‘final judgment’: when, in response to a request for information made by the executing judicial authority, the authority that issued the EAW has expressly stated on the basis of its national law that the earlier judgment delivered under its legal system is not a final judgment covering the acts referred to in the EAW issued by it, the executing judicial authority cannot, as a general rule, refuse to execute the EAW.⁶³ Accordingly, the executing judicial authority may not rely on the *ne bis in idem* principle as enshrined in article 3(2) of the EAW Framework Decision with a view to second-guessing the determinations made by the issuing judicial authority regarding the concept of ‘final judgment’.⁶⁴

A joint reading of *IB*, *Lopes Da Silva Jorge* and *Mantello* suggests that the interaction between the principle of mutual recognition and the Charter may be

⁶⁰ C-261/09 *Mantello*, EU:C:2010:683, Judgment.

⁶¹ *Ibid.* paras 38–9. In C-129/14PPU *Spasic*, EU:C:2014:586, Judgment, paras 79 and 85, the ECJ held that the concepts of ‘a penalty has been enforced’ and a penalty ‘is actually in the process of being enforced’ required an autonomous and uniform interpretation. Accordingly, it held that Art. 54 CISA ‘must be interpreted as meaning that the mere payment of a fine by a person sentenced by the self-same decision of a court of another Member State to a custodial sentence that has not been served is not sufficient to consider that the penalty “has been enforced” or is “actually in the process of being enforced” within the meaning of that provision’.

⁶² *Ibid.* para. 46.

⁶³ *Ibid.* para. 51.

⁶⁴ In C-398/12 *M*, EU:C:2014:1057, the ECJ reached a similar conclusion regarding the meaning of the words ‘finally disposed of’ laid down in Art. 54 of the CISA. It held that ‘the assessment of the “final” nature of the criminal ruling at issue must be carried out on the basis of the law of the Member State in which that ruling was made’. *Ibid.* para. 36. In addition, ‘any new proceedings, based on [the] possibility of reopening [the criminal investigation if new facts and/or evidence become available], against the same person for the same acts can be brought only in the Contracting State in which that order was made’. *Ibid.* para. 40.

examined from two different, albeit interconnected, perspectives.⁶⁵ Vertically, the legislator of the executing Member State may not overstep the limits of its discretion in implementing the grounds for non-execution of an EAW as well as the conditions attached to the execution of such a warrant. This means that national measures implementing the EAW Framework Decision must be compatible with the Charter. The same holds true for the EU legislator. In the *Melloni* and *Jeremy F* cases, which are discussed in detail below, the ECJ had to determine whether the balance between mutual recognition and the right to effective judicial protection as given expression in the EAW Framework Decision complied with Articles 47 and 48 of the Charter read in conjunction with Article 52(1) thereof. The ECJ thus examined whether the EU legislator had placed too much weight on mutual recognition to the detriment of fundamental rights.⁶⁶ Horizontally, the ECJ is called upon to determine whether the judicial authority of the executing Member State may oppose the execution of an EAW on the ground that, in its view, the standard of fundamental rights protection applied in the issuing Member State is not appropriate. This was the reason that led the referring court in *Mantello* to make a reference to the ECJ: referring to its own law, the German court expressed its doubts as to the compatibility of a subsequent prosecution by Italian authorities with the *ne bis in idem* principle. In *Mantello*, by upholding the principle of mutual recognition as the cornerstone of the EAW Framework Decision, the ECJ told the German court to trust the findings of its Italian counterpart. It follows from *Mantello* that it is difficult, if not impossible, for national courts to cooperate in criminal matters if they do not trust each other. Horizontal mutual trust is vital for the establishment and functioning of the AFSJ. Still, this begs a question of constitutional importance, i.e., whether horizontal mutual trust must be absolute or whether it can be subject to limitations.

3.2 Limits to ‘Horizontal’ Mutual Trust

It is worth noting that neither article 3 nor article 4 of the EAW Framework Decision includes non-compliance with fundamental rights in the issuing Member State as a ground for non-execution of an EAW. However, this has not prevented some Member States from doing so.⁶⁷ In this regard, some scholars and Advocates General have argued that article 1(3) of the EAW Framework Decision could be interpreted as providing the normative authority to oppose execution where the issuing Member State does not comply with fundamental rights.⁶⁸ The Commission also appears to share that view.⁶⁹

⁶⁵ Mitsilegas, ‘The Limits of Mutual Trust in Europe’s Area of Freedom, Security and Justice’, above n. 46, at 336.

⁶⁶ In the context of the CISA, see also judgment in *Spasic*, above n. 61, where the ECJ held that Art. 54 CISA was compatible with Art. 50 of the Charter.

⁶⁷ See generally Valsamis Mitsilegas, ‘General Report’ in Julia Laffranque (ed.), *The Area of Freedom, Security and Justice, including Information Society Issues*, FIDE XXV Congress, vol. 3 (Tartu University Press, 2012).

⁶⁸ See Fenella Billing, ‘The Parallel Between Non-removal of Asylum Seekers and Non-execution of a European Arrest Warrant on Human Rights Grounds: The CJEU Case of *N. S. v. Secretary of State for the Home Department*’ (2012) 2 *EuCLR* 77, at 84; Alex Tinsley, ‘The

In *Radu*, the referring court asked, in essence, whether the EAW Framework Decision, read in the light of Articles 47 and 48 of the Charter and of Article 6 of the ECHR, must be interpreted as meaning that the executing judicial authority can refuse to execute an EAW issued for the purposes of conducting a criminal prosecution on the ground that the issuing judicial authority did not hear the requested person before that EAW was issued. Advocate General Sharpston argued that article 1(3) of the EAW Framework Decision had to be read as obliging the executing judicial authority ‘to have regard to the fundamental rights set out in the [ECHR] and the Charter when considering whether to execute a [EAW]’.⁷⁰ She also posited that such a reading of article 1(3) of the EAW Framework Decision had gained impetus with the ruling of the ECJ in the seminal *NS* case which concerned the Common European Asylum System, in particular the Dublin Regulation.⁷¹

In the *NS* case, the ECJ held that whilst the AFSJ is built upon the principle of mutual trust according to which all Member States are deemed to comply with the fundamental rights recognized by the Charter, that principle is subject to some limits in extreme cases.⁷² Allow us to quote in full what is probably the most important passage of that judgment:

the Member States, including the national courts, may not transfer an asylum seeker to the ‘Member State responsible’ within the meaning of [the Dublin Regulation] where they *cannot be unaware that systemic deficiencies* in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to *substantial grounds for believing* that the asylum seeker would face a *real risk* of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.⁷³

The argument then runs that the findings of the ECJ in *NS* are not limited to matters relating to asylum, but apply to the entire AFSJ. Drawing on that judgment, those

Reference in Case C-396/11 *Radu*: ‘When Does the Protection of Fundamental Rights Require Non-execution of a European Arrest Warrant?’ (2012) 2 *EuCLR* 338, at 339–40. As to Advocates General, see C-42/11 *Lopes Da Silva Jorge*, EU:C:2012:151, Opinion of AG Mengozzi, para. 28, and C-396/11 *Radu*, EU:C:2012:648, Opinion of AG Sharpston, para. 73 *et seq.*

⁶⁹ European Commission, *Report on the Implementation since 2007 of the [EAW Framework Decision]*, COM(2011)175 final, p. 7.

⁷⁰ Opinion of AG Sharpston in *Radu*, above n. 68, para. 73.

⁷¹ Council Regulation (EC) 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, [2003] OJ L50/1. Repealed by Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 (recast) (‘New Dublin Regulation’), [2013] OJ L180/31.

⁷² *N.S.*, above n. 48, paras 78 to 80. See also Opinion 2/13, above n. 48, para. 191, where the ECJ held that ‘the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, *save in exceptional circumstances*, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law’ (emphasis added).

⁷³ *NS*, above n. 48, para. 94 (emphasis added).

scholars and Advocate General Sharpston support the contention that the Charter precludes the automatic application of mutual recognition. The EU legislator must, in the light of the *NS* judgment, place a limit to the mutual trust between the Member States where fundamental rights are at stake. In the AFSJ, the EU legislator would, as Canor notes, be obliged to allow room for a ‘horizontal *Solange*’ test.⁷⁴ However, in order not to render the principle of mutual recognition devoid of purpose, they all concur in that the threshold of application of such a test should be a high one.⁷⁵

In *Radu*, the ECJ did not examine the question whether the EAW Framework Decision allows room for the application by analogy of the *NS* judgment. This was so because respect for the rights of the defence of the requested person did not oblige the issuing judicial authority to hear that person before issuing an EAW for the purposes of conducting a criminal prosecution. In that regard, the ECJ reasoned that such an obligation would almost inevitably lead to the failure, in practice, of the very system of surrender provided for by the EAW Framework Decision, in so far as such an EAW must have a certain element of surprise, in particular in order to prevent the person concerned from absconding. In addition, when adopting the EAW Framework Decision, the EU legislator had laid down a number of safeguards which sufficiently protect the rights of the defence of the requested person. Regarding in particular EAWs issued for the purposes of conducting a criminal prosecution, the ECJ considered that the right to be heard had to be weighed against the imperative need of preventing the person concerned from absconding. This was achieved by shifting the responsibility for ensuring compliance with fundamental rights to the executing Member State. However, it does not follow from *Radu* that the ECJ foreclosed the possibility of applying by analogy its findings in *NS* to the EAW Framework Decision.

3.3 Proportionality vs Mutual Recognition

In *Radu*, Advocate General Sharpston also opined that an EAW should not be issued for offences which, despite the fact of falling within the scope of application of the EAW Framework Decision, are not serious enough to justify the preventive detention and surrender of the requested person. Some Member States and the Commission appear to share that same view.⁷⁶ In that regard, it is worth noting that more recent instruments adopted in the field of judicial cooperation in criminal matters require the issuing of judicial authority to carry out a proportionality check.⁷⁷

⁷⁴ Iris Canor, ‘My Brother’s Keeper? Horizontal *Solange*: “An Ever Closer *Distrust* among the Peoples of Europe”’ (2013) 50 *CML Rev.* 383.

⁷⁵ See, in this regard, Mitsilegas, ‘The Limits of Mutual Trust in Europe’s Area of Freedom, Security and Justice’, above n. 46, at 362; Cathryn Costello, ‘Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored’ (2012) 12 *HRLR* 287, at 331; Gráinne Mellon, Case Note on *NS* (2012) 18 *EPL* 655, at 662. See also Opinion of AG Sharpston in *Radu*, above n. 68, para. 81.

⁷⁶ Dan Helenius, ‘Mutual Recognition in Criminal Matters and the Principle of Proportionality: Effective Proportionality or Proportionate Effectiveness?’ (2014) 5 *NJECL* 349, at 359, and European Commission, *Report*, above n. 69, at 7 *et seq.*

⁷⁷ See, e.g., Art. 7 of Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use

However, the fact remains that the EAW Framework Decision does not include any obligation for an issuing Member State to conduct such a check. This absence may explain why, in 2010, the Council decided to revise ‘the European handbook on how to issue a [EAW]’ that now includes a number of non-binding guidelines that aim to secure compliance with that principle.⁷⁸ It is logical to ask, therefore, whether compliance with the Charter would militate in favour of interpreting the EAW Framework Decision so as to include such a check.

Another aspect of proportionality that merits attention relates to Article 49(3) of the Charter. May the judicial authority of the executing Member State refuse to execute an EAW issued for the purposes of executing a sentence which is, under the law of that Member State, disproportionate in the light of the seriousness of the offence in question? As Helenius notes, the answer to that question should, in principle, be in the negative, given that ‘[t]he rationale behind the principle of mutual recognition ... implies that the executing Member State must accept ... variations in sentencing levels’.⁷⁹ This means that the executing judicial authority is prevented from second-guessing the proportionality of penalties by referring to its own criminal laws.

4. BETWEEN EUROPEAN UNITY AND NATIONAL DIVERSITY IN CRIMINAL MATTERS

National diversity is ruled out where the EU legislator has defined the precise level of protection that should be granted to a particular fundamental right. Needless to say, the policy choices made by the EU legislator must provide a level of protection which is at the very least equal to that provided for by the Charter. The ruling of the ECJ in *Melloni* illustrates this point.⁸⁰

In that case, the EU legislator laid down a list of circumstances in which, in spite of the fact that the person concerned was convicted *in absentia*, the EAW must nevertheless be executed. This will be the case where the person concerned, who is

in proceedings in criminal matters, [2008] OJ L350/72, and Art. 10(3) of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, [2014] OJ L130/1.

⁷⁸ Council of the European Union, *Revised Version of the European Handbook on How to Issue a European Arrest Warrant*, COPEN 275 EJM 72 EUROJUST 139 (17 December 2010).

⁷⁹ Helenius, ‘Mutual Recognition in Criminal Matters and the Principle of Proportionality’, above n. 76, at 368.

⁸⁰ See Lenaerts and Gutiérrez-Fons, ‘The Place of the Charter in the EU Constitutional Edifice’, above n. 13, at 1557. See also Vassiliou Skouris, ‘Développements récents de la protection des droits fondamentaux dans l’Union européenne: les arrêts *Melloni* et *Åkerberg Fransson*’ (2013) *Il diritto dell’Unione Europea* 229, at 241. See also Nick de Boer, Case Note on *Melloni* (2013) 50 *CML Rev.* 1083, at 1096; D. Ritleng, ‘De l’articulation des systèmes de protection des droits fondamentaux dans l’Union: les enseignements des arrêts *Åkerberg Fransson* et *Melloni*’ (2013) *RTDE* 267, at 283, and Daniel Sarmiento, ‘Who’s Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe’ (2013) 50 *CML Rev.* 1267.

aware of the scheduled trial, appointed legal counsel, and he or she was in fact defended by that counsel at the trial.

The Spanish Constitutional Court asked whether the EAW Framework Decision allowed for value diversity, given that, under the Spanish Constitution, the execution of a custodial sentence issued *in absentia* is always subject to retrial. The ECJ replied in the negative. In striking the balance between enhancing mutual recognition in criminal justice matters and the rights of the defence, the EU legislator had defined the precise level of fundamental rights protection with which all Member States were to comply.

The Spanish Constitutional Court also asked whether the EAW Framework Decision was compatible with the Charter, to which the ECJ replied in the affirmative. Indeed, the balance struck by the EU legislator was held to comply with the rights enshrined in Articles 47 and 48 of the Charter. In so ruling, the ECJ noted that the fundamental right to effective judicial protection and the rights of the defence are not absolute but may be subject to limitations, provided that those limitations pursue a legitimate objective and are compatible with the principle of proportionality. This was indeed the case. The strengthening of mutual recognition in criminal justice matters is an objective recognized by the Treaties. As to the principle of proportionality, the EAW Framework Decision lays down the circumstances in which the person concerned must be deemed to have waived, voluntarily and unambiguously, his or her right to be present at the trial. Hence, the ECJ ruled that the EAW Framework Decision complied with the Charter.⁸¹

It follows from *Melloni* that there is room for national diversity in the absence of a European legislative act that determines the precise level of protection that must be given to a fundamental right. This means that when such a determination is lacking, it is for each Member State to make it. However, the level of protection granted to a fundamental right by a national legal order must comply with primary EU law. In the realm of fundamental rights, this means that national diversity may be expressed, provided that ‘the level of protection provided for by the Charter, as interpreted by the Court [of Justice], and the primacy, unity and effectiveness of European Union law are not ... compromised’.⁸²

The absence of EU legislation implies, of course, that there is room for national diversity, but the existence of EU legislation does not necessarily mean that the EU legislator has determined the precise level of protection that must be given to a fundamental right. Sometimes, the EU legislator adopts measures which seek to harmonize a policy field and, at the same time, lays down a uniform standard of fundamental rights protection. This was the case in *Melloni*, where the EU legislator decided to enhance the principle of mutual recognition in criminal justice matters whilst providing for a uniform standard of protection of the rights of the defence of

⁸¹ The Spanish Constitutional Court gave effect to this ruling of the ECJ by altering its traditional interpretation of the relevant provision of the Spanish Constitution when that provision was applied in the context of the execution of a European Arrest Warrant issued by a court of another EU Member State. See Tribunal Constitucional, Judgment of 13 February 2014, not yet reported.

⁸² Åkerberg Fransson, above n. 14, para. 29. Cf. Leonard F.M. Besselink, ‘The Parameters of Constitutional Conflict after *Melloni*’ (2014) 39 *EL Rev.* 531.

persons convicted *in absentia*. This is not, however, always the case: it happens that the EU legislator decides to harmonize a policy field, while nevertheless allowing room for a cumulative application of EU and national fundamental rights. Let us illustrate this point by looking at the ruling of the ECJ in *Jeremy F*.

In that case, the French Conseil constitutionnel asked, in essence, whether the EAW Framework Decision had to be interpreted as precluding the executing Member State from providing for a constitutional right which would enable the person concerned to bring an appeal having suspensive effect against a decision agreeing to a request made by the issuing Member State in accordance with article 27 thereof.

The ECJ reached the conclusion that the EAW Framework Decision did not preclude such a right of appeal. Nor did it require Member States to make provision for it. The Charter led to the same conclusion: its Article 47 affords an individual a right of access to a court but not to a particular number of levels of jurisdiction. Regarding the possibility of bringing an appeal, both the EAW Framework Decision and the Charter were 'neutral'. As a consequence, it was for each Member State to decide whether its constitutional law permitted the national legislator to rule out such an appeal. But in making provision for such an appeal the national legislator could not call into question the system of mutual recognition set out in the EAW Framework Decision. This meant, in particular, that the appeal should not prevent the executing judicial authority from adopting a decision within the time-limits prescribed by the EAW Framework Decision.⁸³

It follows from a joint reading of *Melloni* and *Jeremy F* that it is not for the ECJ to decide when or how national diversity is to be displaced by European unity. That is a decision to be made by the EU's political institutions. Since the EU is governed by the principle of democracy, it is for the EU political process to draw the line between unity and diversity. As a court that upholds the rule of law, the ECJ may only verify that, in drawing that line, the EU political institutions have complied with primary EU law, and notably with the Charter.

5. CONCLUDING REMARKS

In European liberal democracies, criminal law may be examined from two different, albeit closely related, perspectives. On the one hand, it operates as a last resort instrument that protects citizens, individually considered or as a group, from violations of their fundamental rights. On the other hand, criminal law imposes limitations on the fundamental rights of the person against whom criminal proceedings are brought. It

⁸³ Three weeks after the ECJ delivered its judgment, the French Conseil constitutionnel ruled on the *Jeremy F* case. It found that, in light of the principles of non-discrimination and effective judicial protection as protected by the French Constitution, the expression 'not subject to appeal' laid down in art. 695-46 of the French Code of Criminal Procedure was unconstitutional. Whilst the French Constitution does not require a second level of jurisdiction, it does guarantee that limitations to any right of appeal, which amount to a limitation on the right to effective judicial protection, must be justified. However, the French Conseil constitutionnel found that neither EU law nor French law provided for such a justification. See Conseil constitutionnel, Decision no. 2013-314 QPC of 14 June 2013.

follows from those two perspectives, common to the constitutional traditions of the Member States, that criminal law must be effective in protecting the fundamental rights of each and every member of society, whilst, at the same time, not depriving the person charged with a criminal offence of any judicial protection. Therefore, the effectiveness of criminal law must be balanced against fundamental rights. As Blackstone famously wrote, '[i]t is better that ten guilty persons escape, than that one innocent suffer'.⁸⁴

The same holds true at EU level. National criminal penalties that seek to enforce substantive EU law 'implement EU law' within the meaning of Article 51(1) of the Charter. The same applies to national criminal measures that derogate from the substantive law of the EU. Accordingly, the Charter may limit the effectiveness of national criminal laws falling within the scope of EU law. However, in the absence of EU legislation, Member States may apply the standards of protection guaranteed by their Constitution, provided that those standards are not lower than those guaranteed by the Charter and that 'the primacy, unity and effectiveness of [EU] law' are not thereby compromised. For national criminal penalties such as those at issue in the *Greek Maize* line of case law, this means that those penalties must comply with the Charter, with the principle of equivalence and be 'effective, proportionate and dissuasive'. As to national measures that derogate from the substantive law of the EU, it follows from *Pfleger* that, where a national measure constitutes an unjustified restriction under the law of free movement, it is also an unjustified limitation for the purposes of the Charter.

As to EU criminal law adopted in the AFSJ, the ECJ is called upon to engage in a balancing exercise between two constitutional principles, i.e., the principle of mutual recognition and fundamental rights. That balance can be examined from two different perspectives. Vertically, cases such as *Melloni* illustrate the fact that the ECJ will examine whether the EU legislator has placed too much weight on the principle of mutual recognition. In the same way, the Charter may also be relied upon with a view to determining whether national law implementing EU criminal law is compatible with the Charter. Horizontally, the Charter does not, in principle, oppose the fact that Member States should trust each other. Mutual trust is the touchstone of the AFSJ. However, an application by analogy of the rationale underpinning the ruling of the ECJ in the *NS* case supports the contention that mutual trust is subject to some limits in *extreme* cases. If the ECJ were to endorse that contention in the context of the EAW Framework Decision, it would inevitably have to address a number of questions of paramount importance, such as the type of violations that may be qualified as 'systemic deficiencies', the burden of proof, and which, if not all, fundamental rights may trigger the application by analogy of the *NS* judgment.

Those two perspectives are, moreover, deeply intertwined, given that the EU legislator may improve the mutual trust between the Member States by passing legislation that lays down minimum rules concerning the protection of the fundamental rights of the persons concerned by criminal proceedings. Thus, by establishing a level playing field of fundamental rights protection, it is ultimately for the EU legislator to improve mutual trust.

⁸⁴ Sir William Blackstone, *Commentaries on the Laws of England, Book the Fourth* (Strahan, 1825), p. 358.

Finally, the presence of EU criminal law does not exclude a cumulative application of fundamental rights. National diversity is to be ruled out only where the EU legislator has set a uniform standard of fundamental rights protection that complies with the Charter. Since the EU is governed by the principle of democracy, it is for the EU's political process to draw the line between unity and diversity. As a court that upholds the rule of law, the ECJ may only verify that, in drawing that line, the EU political institutions have complied with the Charter.