Article 53

**Level of Protection**

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

**Text of Explanatory Note on Article 53**

This provision is intended to maintain the level of protection currently afforded within their respective scope by Union law, national law and international law. Owing to its importance, mention is made of the ECHR.

**Select Bibliography**


A. Sources of Article 53

53.01 Article 53 is clearly inspired by similar (or apparently similar) provisions in international human rights treaties, such as for example in Article 53 of the European Convention on Human Rights, which states that:

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

53.02 Similar clauses can be found in other human rights instruments. An interesting formula, turning the ECHR sentence around, is the one laid down both in Article 5(2) of the UN Covenant on Economic, Social and Cultural Rights and in Article 5(2) of the UN Covenant on Civil and Political Rights:

No restriction upon or derogation from any of the fundamental rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

53.03 The meaning of Article 53 ECHR has very rarely been considered by the Strasbourg Court,1 but broadly speaking it has been read as allowing the parties to the Convention to offer more protection to the rights protected under the Convention as long as they do not, in this way, act in breach of another provision of the Convention. More precisely, national constitutional rights qualify as ‘rights of others’ which may justify proportional limitations of Convention rights, but they may not be used to ‘trump’ or override Convention rights.

B. Analysis2

53.04 The fact that the Charter added a new layer of protection for fundamental rights in Europe, alongside national constitutions, the European Convention of Human Rights and the European Social Charter (to name only the main other layers) has been widely welcomed as containing the promise for a stronger and more effective protection of the rights of individuals; but this has also increased the potential for discordance between the various legal orders involved. The EU Charter of Rights, which is the latest addition to this multilevel regime, contains language which aims to make it as unobtrusive as possible; it seeks to offer better protection of fundamental rights within the scope of operation of the European Union but does not seek to displace existing protections of fundamental rights. This is the message conveyed by its Article 53. The significance of that provision is indeed, as will be argued below, essentially this

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2 The author wishes to thank Steve Peers and Aida Torres for their ideas and comments.
symbolic one, of indicating that the Charter aims at being a useful addition to the system of fundamental rights protection rather than a threat to the existing regimes of protection and, in particular, that those existing regimes should not be applied and interpreted ‘downwards’ by invoking the language of the Charter.

The official Explanations annexed to the Charter are distinctly unhelpful for this particular Article. They are very short and worded in vague terms. The only meaningful addition made by the Explanations to the text of Article 53 is the word ‘currently’. It is not specified which exact moment in time is meant by ‘currently’, whether it is the time at which the original text of the Charter (and of the Explanations) was adopted, namely in December 2000; or the time when the Charter and the Explanations were updated, namely on 12 December 2007. The main significance of this temporal reference is to emphasise the fact that the adoption of the Charter cannot, by itself, be used as an argument to justify a regression in fundamental rights protection offered by national and international law.

The most controversial bit of Article 53 has proved to be its final words, which state that the Charter does not affect the fundamental rights recognised by the constitutions of its Member States. That statement is qualified by the words ‘in their respective fields of application’, but, as is well known, the fields of application of EU law and of national law are largely overlapping. Many legal acts adopted by national institutions fall both within the scope of EU law and within the scope of national law; this is typically the case for national laws and regulations that transpose or otherwise implement EU legal instruments. The question raised by the final words of Article 53 is what should happen if, within that common field of application, the constitutional rights of a given country give more protection to the individual than the EU Charter. Most of the comments below will be devoted to this question, but, before that, we will briefly comment on the other parts of the Article.

I. Relation with the Rest of European Union Law

The first normative statement contained in Article 53 is that the Charter shall not adversely affect the human rights and fundamental freedoms as recognised by Union law. In other words, the Charter of Rights is supposed to act as a minimum standard of fundamental rights protection within the EU legal order itself. More detailed or further-reaching protection of the Charter rights may be provided by EU primary law or, more likely, by secondary EU law; and EU law may also protect fundamental rights that are not included in the Charter.

More detailed and further-reaching protection is offered, above all, by EU legislation which is directly aimed at protecting a fundamental right, such as the anti-discrimination directives based on Article 19 TFEU (or, rather, on its predecessor Article 13 EC Treaty). Fundamental rights may, however, also be given protection by EU legislation which is not primarily or exclusively aimed at the protection of rights. An example in point is the Data Protection Directive of 1995 which, according to its legal basis, is a directive aimed...
at improving the functioning of the internal market (namely, the market for commercially useful data) but which also aims at protecting the right of privacy and its specific sub-right to the protection of personal data, now incorporated in Art 8 of the Charter. This means that the validity of a measure of EU law which limits data protection must be examined, first, in light of Article 8 of the Charter but also, in addition, in light of more detailed norms of data protection laid down in the Directive of 1995.4

The reference in Article 53 is to ‘human rights and fundamental freedoms’ protected elsewhere in EU law. Those terms were simply copied from Article 53 ECHR, but the term ‘fundamental freedoms’ has an additional, and rather specific, meaning in EU law, since the Court of Justice occasionally refers to the free movement provisions of the TFEU as ‘fundamental freedoms’ or ‘fundamental rights’.5 Therefore, when Article 53 of the Charter states that the Charter does not affect the ‘fundamental freedoms’ protected by EU law, this could be read as shielding market integration law from the impact of Charter rights. This reading would, however, be problematic, as can be seen when reflecting on the Laval and Viking judgments, in which the Court was balancing the social right to take collective action (also recognised by the Charter) with the freedom of establishment and the freedom to provide services.6 On one reading of Article 53, one might conclude that Charter rights may never be used as a justification for limiting one of the common market freedoms. But this would contrast with the case law of the CJEU which has often held (not only in Laval and Viking) that restrictions of the common market freedoms may be justified by the invocation of general principles of EU law or, more recently, of Charter rights. So, the correct interpretation seems to be that the words ‘fundamental freedoms’ were simply copied from the text of Article 53 ECHR without any reflection, by the authors of the Charter, on the different meaning which the term ‘fundamental freedoms’ could have in EU law. One should not read in Article 53 any modification of the way in which internal market law and fundamental rights relate to each other in the EU legal order.

II. Relation with International Law

Article 53 states that the Charter does not affect fundamental rights protection given by ‘international law’ and by ‘international human rights treaties’ to which the EU itself or all its Member States are parties. The reference to international law, as something separate from international human rights, is odd but is probably intended to refer to the recognition of human rights norms under customary international law. The restriction to treaties to which all Member States are parties is rather strange too. It should not be read a contrario as meaning that the EU Charter of Rights could affect the protection provided by human rights treaties that have been ratified by fewer than 28 Member

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4 The operation of this cumulative assessment in light of the Charter and of the Directive is shown in Joined Cases C-92/09 and C-93/09 Volker und Marius Schecke, Hartmut Eifert v Land Hessen (Judgment of 9 November 2010).


6 Among the many commentaries of those judgments, the following focus on this question of the conflict between social rights and economic freedoms: P Syrpis and T Novitz, ‘Economic and Social Rights in Conflict: Political and Judicial Approaches to their Reconciliation’ (2008) 33 European Law Review 41; D Ashiagbor, ‘Collective Labor Rights and the European Social Model’ (2009) 3 Law & Ethics of Human Rights 222.
States. For example, the Revised Social Charter of the Council of Europe has not been ratified by all EU Member States, but that circumstance cannot be used for arguing that the EU Charter, by not incorporating one or other of the rights of the Revised Social Charter, would modify the obligations accepted by the countries that have ratified that Revised Social Charter. This would be an absurd consequence in light of the Charter’s aim to improve the protection of fundamental rights in Europe.

The ECHR is specifically mentioned in this context, although it could seem that the particular reference to this international human rights treaty is the one that is least useful, since the relationship between the Charter and the ECHR is already conclusively dealt with in the preceding Article 52. Paragraph 3 of Article 52 states that ‘[I]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.’ Since all Convention rights are also contained in the Charter, this provision deals with any direct discrepancy between the formulations of both instruments. Article 53 remains useful, though, in the (rather remote) hypothesis where a Charter right which does not also figure in the Convention (say, the right of human dignity of Art 1 Charter) could be interpreted as implying a restriction of another fundamental right which is contained in the Convention (say, freedom of expression). In this hypothesis, Article 53 instructs all authorities called to interpret the ECHR (including national courts and the CJEU) not to use the text of the Charter as an argument for giving a restrictive meaning to a Convention right.

III. Relation with National Constitutions

The most difficult and most widely discussed question of interpretation raised by Article 53 concerns the last six words of the Article: ‘and by the Member States’ constitutions’. As mentioned above, those words must be read together with an earlier part of the sentence referring to the ‘respective fields of application’. When a legal situation is outside the scope of EU law and within the scope of domestic law, there is no problem: Article 53 of the Charter simply confirms the evident rule that national constitutional rights will fully apply to such cases, notwithstanding any divergent formulation of those rights in the Charter. But there are many legal situations that fall both within the scope of application of the Charter and within the scope of domestic law. Indeed, as was confirmed by Article 51 of the Charter, that Charter (like the general principles of EU law before Lisbon) applies to measures adopted by the Member States to implement their EU law obligations. Those same measures of national law must, in principle, also comply with that country’s constitutional rights norms. In cases where the national constitutional standard offers more protection to a given fundamental right than the Charter, Article 53 authorises—in principle—the domestic courts or executive authorities to apply the ‘higher’ national standard.

7 For P Lemmens, the reference to the ECHR in Art 53 is redundant and could better have been omitted: P Lemmens, ‘The Relations between the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights—Substantive Aspects’ (2001) 8 Maastricht Journal of European and Comparative Law 49, 55.
The legal problem that may arise in such a constellation is aptly illustrated by the Melloni case, recently decided by the CJEU. On 9 June 2011, the Spanish Constitutional Court decided to refer a case concerning the execution of a European arrest warrant to the Court of Justice of the European Union for a preliminary ruling. This was the very first reference from the Spanish Constitutional Court, which thus followed in the footsteps of an increasing number of national constitutional courts that have engaged in a direct ‘dialogue’ with the Court of Justice. The reference concerned the question whether Member State authorities can or should make the execution of a European arrest warrant dependent on compliance with the fundamental rights protected by either the EU or national legal order. The implementation of the EU Framework Decision of 2002 creating the European arrest warrant has given rise to legal difficulties in a number of countries, which led to cases before the constitutional or supreme courts of Belgium, Germany, Italy, Poland and the Czech Republic among others, and the Belgian Constitutional Court had already sent two preliminary references about this instrument to the CJEU. Underlying all these cases were doubts about the constitutional acceptability of the principle of mutual recognition which underlies the arrest warrant, with its requirement of speedy and (almost) unconditional surrender of people suspected or convicted of a crime, even when they are nationals of the requested state.

The Melloni case concerns an Italian request for the surrender of Sr Melloni, who had been condemned to a prison sentence in Italy for fraudulent bankruptcy. His trial had been held in absentia, but the defendant knew about the trial and had been represented by his lawyers. Under the EU Framework Decision, an arrest warrant may be refused for the execution of a custodial sentence if the person did not appear in person at the trial and was not defended by a lawyer to whom he had given a mandate. The Spanish Constitutional Tribunal, from its side, had interpreted the constitutional right to a fair trial (Art 24.2 Spanish Constitution) as implying that extradition or surrender of a person to a country where that person had been tried in absentia is only allowed if that person will be entitled to apply for a retrial (even if he or she had been defended by a lawyer at the first trial). This judicially defined constitutional standard is therefore more...
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protective of the rights of the accused than the standard laid down by the Framework Decision. If one would only consider the Spanish constitutional law standard, the surrender to Italy of Sr Melloni would have to be refused.

The Constitutional Tribunal asked the Court of Justice to confirm that the Framework Decision must indeed be interpreted in a way which is more restrictive of defendants’ rights than is the case under current Spanish law; and if so, it furthermore asked, whether the relevant provision of the Framework Decision was invalid for breach of the fair trial right contained in the EU Charter of Rights; and if the CJEU would answer that question in the negative, whether the Constitutional Tribunal could apply its own constitutional right and leave the Framework Decision unapplied, on the basis of Article 53 of the Charter. In other words, the last and crucial question was whether national courts can escape from their duty to apply EU law, and to disapply conflicting national law, when that national law has constitutional rank and gives more protection to fundamental rights than is offered by the EU Charter. This is the precise way the preliminary question was posed by the Tribunal Constitucional in Melloni:

does Article 53, interpreted systematically in conjunction with the rights recognised under Articles 47 and 48 of the Charter, allow a Member State to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the requesting State, thus affording those rights a greater level of protection than that deriving from 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?’

Thereby, the Spanish Constitutional Court squarely raised ‘one of the most challenging questions for the multilevel system of rights protection in Europe: to what extent does European integration require the lowering of the level of constitutional rights protection?’ Or, to put it in another, equally challenging, way: does primary EU law (namely Art 53 of the Charter) now recognise a legitimate exception to the primacy of EU law over national law?

IV. An Exception to the Primacy of EU Law?

The debate about the meaning of the final words of Article 53 is thus related to the long-standing doctrinal and jurisprudential controversy about the existence of national constitutional limits to the primacy of EU law. Seen from the point of view of EU law, the primacy of EU law requires that national courts should set aside any norm of national law which conflicts with EU law. One striking characteristic of primacy is its absolute nature, whereby even a minor piece of EU law ranks above the most fundamental national constitutional norm. As early as the Costa v ENEL judgment of 1964, the Court had held that Community law ‘cannot be overridden by domestic legal provisions, however framed’. The classic assertion of the full supremacy of Community law came in the Internationale Handelsgesellschaft case in 1970. Faced with a challenge to the validity of a Community regulation for violation of the German Basic Law, the

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14 A Torres Pérez (n 9) 127.
15 The French text of the judgment is even clearer: Community law ‘ne peut se voir opposer de norme interne quelle qu’elle soit’ (1964) Recueil 1141.

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The Court of Justice held that ‘the validity of a Community measure or its effect within a member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure’. The main reason offered by the Court was that the unity and efficacy of Community law would be gravely affected if one allowed a review of its validity on the basis of particular national legal standards. In several later cases, the Court of Justice confirmed that EU law had to be given precedence over national law even where the relevant national norm had a constitutional character.

The effective application of the primacy rule depends, however, on the attitude taken by national courts and authorities. In fact, the thesis defended by the Court of Justice that Union law has absolute primacy, even over national constitutional provisions, is not fully accepted by most national constitutional and supreme courts. Indeed, those courts tend to recognise the privileged position of EU law, not by virtue of the inherent nature of that law (as the Court of Justice would ideally have it) but by grace of their own constitutional system. This does not matter too much for the relation between EU law and ordinary legislation, because all national courts have found the legal resources to ensure, by and large, the precedence of EU law in this type of conflict. The theoretical basis matters more when it comes to decide a conflict between EU law and a norm of constitutional rank. If the national courts think that European law ultimately derives its validity in the domestic legal order from the authority of the constitution, then they are unlikely to recognise that EU law could flatly prevail over the very foundation from which its legal force derives. In most countries, the constitutional provision allowing for the transfer of powers to international organisations (or to the European Union specifically) is seen as implicitly permitting adaptations of the institutional provisions of the constitution, but not as allowing alterations to its basic principles. The essential question then is where to draw the line between minor adaptations and essential changes, and, consequently, where to set the limits of the penetration of EU law into the domestic constitutional order.

There is now a general convergence around the position that Union law may prevail over conflicting national legislation, and possibly even over conflicting detailed rules of the national constitution, but not over the fundamental provisions of the constitution. Everywhere, the national constitution remains at the apex of the hierarchy of legal norms, and EU law is allowed to trump national law only under the conditions, and within the limits, set by the national constitution.

In light of this two-dimensional reality, whereby both the EU legal order, as interpreted by the Court of Justice, and the constitutional orders of the Member States, as interpreted by their highest courts, claim ultimate supremacy for themselves in the case

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17 See, for a recent example, Case C-409/06 Winner Wetten (Judgment of 8 September 2010) [61]: ‘Rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of Union law.’
of a conflict on ‘important matters’, a current in the legal literature has proposed the adoption of a ‘pluralist’ reading of the relation between EU law and national law, which accepts that there are inherently different viewpoints and that the search for a perfect hierarchical ordering between legal norms and across legal systems may be futile; and that one should accept that the relationship between the EU and national legal orders is, and remains, contested. Therefore, those authors insist on the need for an open attitude both on the side of the European Court (and the EU law doctrine) and on that of national constitutional courts (and constitutional law doctrine), whereby the values and interests of the ‘other side’ are taken seriously, and are seen to be taken seriously. In order to do this, those courts should engage in a structural dialogue, whereby national supreme and constitutional courts are prepared to submit controversial issues to the CJEU rather than solve them solely according to their own preferences, and whereby the Court of Justice, in turn, shows willingness to listen to the constitutional concerns of its national interlocutors.\textsuperscript{19} In particular, the Court to Justice ought to recognise a greater role for national courts and national constitutions in the interpretation and application of EU law. The CJEU had missed a few opportunities, recently, to recognise the special role and importance of national constitutional law in the EU legal order, despite invitations by its Advocate-General to do so.\textsuperscript{20} The question squarely raised by the Melloni reference was whether the relationship between EU law and national constitutional law should be reconsidered by the Court of Justice following the entry into force of the Lisbon Treaty and the integration of Article 53 of the EU Charter in the body of primary EU law. Some legal writers have indeed, when discussing Article 53, proposed such a ‘revisionist’ interpretation.\textsuperscript{21}

There is nothing though, in the \textit{preparatory work} of the Charter, to indicate that its authors wanted to introduce a limitation to the primacy of EU law by means of the final words of Article 53.\textsuperscript{22} One may think that if the Charter’s authors had wanted to change


\textsuperscript{20} Case C-213/07 Michaniki, Opinion of Advocate-General Poiares Maduro [31]–[33] (but no reference was made to national constitutional law in the judgment of 16 December 2008); Case C-127/07 Arcelor, Opinion of Advocate General Poiares Maduro [15]–[17] (but no reference was made to national constitutional law in the Court’s judgment of 16 December 2008).


such a prominent feature of Community law, which the Court of Justice has constantly affirmed over the years, they would have formulated it in clear terms; but even if they had wished to do so, the authors of the Charter did not have the legal authority to modify primary EU law. The wording of Article 53 also does not imply a limitation of the primacy rule; what the Article literally says is that the text of the Charter should not be used as an argument to limit the protection given by national constitutions to the rights of persons. It does not make the broader claim that ‘nothing in EU law should be interpreted as restricting the application of national constitutional rights’.23

53.22 The purpose of the final words of Article 53 is therefore a narrower one, namely to make sure that the way in which the Charter guarantees certain rights should not be used as an argument for decreasing the level of protection offered by other rights instruments. This is also, unsurprisingly, the interpretation adopted by Advocate General Bot in the Melloni case, and then also by the Court of Justice in its judgment. According to the Advocate General:

Article 53 of the Charter is not to be regarded as a clause designed to regulate a conflict between, on the one hand, a provision of secondary [EU] law which, interpreted in the light of the Charter, sets a given level of protection for a fundamental right and, on the other hand, a provision drawn from a national constitution which provides a higher level of protection for the same fundamental right. In such a situation, that article has neither the objective nor the effect of giving priority to the more protective rule deriving from a national constitution. To accept otherwise would be tantamount to disregarding the settled case-law of the Court concerning the primacy of European Union law.24

53.23 As for the Court of Justice, it held that national courts and authorities remain free, under Article 53 of the Charter, to apply national standards of protection of fundamental rights, but only ‘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.’25 A different interpretation of Article 53 ‘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 EU fundamental rights guaranteed by that State’s constitution.’26

53.24 From an EU law perspective, the question whether an instrument of EU law (such as, in the Melloni case, the Framework Decision on the arrest warrant) respects fundamental rights is a question to be ultimately decided by the Court of Justice, possibly after a preliminary question on its validity posed by a national court. The standards to be used for assessing this compatibility are the EU Charter of Rights, the general principles of EU law and the European Convention of Human Rights, which together form the largely overlapping human rights regime that applies to EU action. If the EU law instrument is found to be in compliance with EU fundamental rights, then it must be applied by the Member States and enforced by their courts, without those national authorities and courts being allowed to refuse that application by invoking their own constitutional standard of protection. Article 53 of the Charter does not modify this

23 M Bleckmann, Nationale Grundrechte im Anwendungsbereich des Rechts der Europäischen Union (Tübingen, Mohr Siebeck, 2011) 25 (emphasis added).
24 Opinion of Advocate General Bot in the Melloni case (n 8) [99].
25 Melloni (n 8) [60] (emphasis added).
26 Melloni (n 8) [58].
basic ‘rule of the game’. If national courts were to refuse to enforce EU law by invoking their own constitution, they would do so in violation of their European obligations, and Article 53 could not serve as an excuse.

This legal position can be illustrated by the following example, drawn from a recent judgment of the Court of Justice (in which, however, the role of Article 53 of the Charter was not openly raised). In the Sky Österreich case, the Court was asked by an Austrian court to examine the validity of a provision of the Audiovisual Media Services Directive in the light of the Charter. Article 15(6) of that Directive allows all broadcasters to diffuse short extracts relating to ‘events of high interest to the public’, even where those events form the object of an exclusive right held by another broadcaster. The Austrian court asked whether this provision constituted an excessive interference with the freedom to conduct a business, which is a fundamental right protected by Article 16 of the Charter. The CJEU found the interference with the Charter right to be justified by the interest of ensuring the general public’s access to information, and consequently upheld the validity of the Directive. When receiving this reply from the CJEU, the referring court is bound by the assessment made by the CJEU. It is not allowed to decide that its own constitutional system offers greater protection of the same right, and that therefore Article 15(6) of the Directive cannot be applied in Austria.

The interpretation of the final words of Article 53 adopted by the Court of Justice in Melloni may appear disappointing, as it could seem to ‘deprive Article 53 of any meaning and would not fit in adequately with the pluralist structure of the European legal order’. I would argue instead that the primacy-conform interpretation of Article 53 is not only the correct one (in light of the text and the drafting history), but also an interpretation which still leaves a meaningful legal role for Article 53 to play.

V. The Legal Significance of Article 53

The main significance of the final words of Article 53 is the confirmation that national protection of rights is not displaced by the entering into force of the Charter. National protection of rights can perfectly coexist with EU protection of rights, and supplement it, as long as this does not affect the effective application of EU law. This complementary role for national constitutional rights arises in particular where EU law leaves to the Member States a degree of discretion in the implementation of EU law, which indeed happens very often. The Court of Justice was able to point to an example of this situation in a

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27 Case C-283/11 Sky Österreich GmbH v Österreichischer Rundfunk (Judgment of 22 January 2013).
28 There is, in fact, a hint, in the Court’s rendering of the preliminary reference, that Austrian and German constitutional law would indeed give more protection to the broadcaster’s exclusive right than the Charter, as interpreted by the ECJ (see para 23 of the judgment).
29 For a similar situation, see the judgment of the CJEU in Joined Cases C-468/10 and C-469/10 Asociación Nacional de Establecimientos Financieros de Crédito et al (Judgment of 24 November 2011) (the Data Protection Directive of 1995 harmonises the required level of protection for the right of privacy and does not allow the Member States to add further conditions for the processing of personal data, based on their own national preferences regarding data protection).
30 A Torres Pérez (n 9) 118.
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judgment decided on the very same day as Melloni. In paragraphs 29 and 36 of Åkerberg Fransson, the Court makes clear that national fundamental rights may serve as a standard of review to be used by national courts when ‘the action of the Member States is not entirely determined by EU law’. In the case at hand, the VAT Directive did not specify which penalties the Member States ought to use in order to ensure its effective application; thus, the choice made by Sweden to use a combination of tax sanctions and criminal penalties was neither imposed nor prohibited by EU law, and could thus be subject to review against Swedish constitutional standards of ne bis in idem.32

A further example is provided by the Data Retention Directive of 2006 which harmonises the obligations imposed on telecommunication and internet service providers to retain, for a certain period of time, all the communication data of their clients for the purpose of facilitating the investigation of serious crimes.33 The Directive does not, however, define what a serious crime is, nor does it spell out the procedures that must be followed by police or judicial authorities in order to accede to the data held by the service providers. This matter was left (perhaps wrongly) for each Member State to decide. The use of this discretionary room for manoeuvre is subject to control by national courts as to whether national constitutional rights are respected in the process. Such control was indeed exercised by the constitutional courts of Germany, Romania and the Czech Republic, when each of them decided that the national implementing laws of the Data Retention Directive were invalid for violation of the national constitution.34 This was permissible under EU law (as long as the national courts do not indirectly review the validity of the Directive itself35), and the text of Article 53 of the Charter confirms that this is indeed permissible: national authorities and national courts cannot rely on the text of the Charter to claim that, in a situation with an EU-law connotation of the kind described above, national constitutional rights must be interpreted restrictively. National law can thus offer more protection to the rights of individuals than the EU Charter (or than the general principles of EU law) in situations in which the course of action of the Member State is not strictly defined by the country’s EU law obligations.

It may also happen that EU legislation itself allows the Member States to apply their own constitutional rights. A prominent example is Article 1(7) of the Services Directive,36 which states that ‘[t]his Directive does not affect the exercise of fundamental rights as

32 Case C-617/10 Åklagaren v Hans Åkerberg Fransson (Judgment of 26 February 2013. See also Case C-168/13 PPU Jeremy F v Premier ministre (Judgment of 30 May 2013) [51] et seq, in which the CJEU explicitly allowed for the application of national fair trial standards within the limits of the Member States’ discretion under the European arrest warrant.

33 Directive 2006/24 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks [2006] OJ L105/54.


35 It would seem that the Romanian Constitutional Court did cross this line in one point of its judgment. Although the judgment was expressly limited to an examination of the constitutionality of the Romanian implementing law, it indirectly challenged the validity of the EU Directive itself by stating that the principle of across-the-board collection of the data of all persons (which is inherent in the approach adopted by the Directive) was in conflict with the Constitution. On this point see Murphy (n 34 above) 939.

recognised in the Member States and by Community law.’ The words ‘does not affect’ echo the language of Article 53, but their effect could be more radical in that—unlike Article 53—they seem to allow national courts and authorities to make the application of the Services Directive subject to compliance with their national fundamental rights standard.37 A more specific example is that of the EU Framework Decision on racist speech.38 This legal instrument harmonises national criminal laws in relation to racist speech, but contains the following derogation clause in its Article 7(2):

This Framework Decision shall not have the effect of requiring Member States to take measures in contradiction to fundamental principles relating to freedom of association and freedom of expression, in particular freedom of the press and the freedom of expression in other media as they result from constitutional traditions or rules governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where these rules relate to the determination or limitation of liability.

Sometimes, the room left by an EU legislative act for the application of national constitutional rights is less obvious but can be discovered on a closer look of the text. Take for example Article 3(2) of the Dublin Regulation on the allocation of responsibility for asylum applications.39 This article states, in its relevant part, that ‘each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation.’ This is sometimes termed the ‘sovereignty clause’, since it leaves to each state an unfettered freedom to examine an asylum application even if, according to the ‘Dublin’ criteria, the asylum-seeker could be transferred to another state for examination of the application.40 The Court of Justice held, in its NS and ME judgment of December 2011, that an EU Member State is required to make use of this clause when there is serious evidence of a systematic breach of the asylum-seeker’s fundamental rights, as recognised by the Charter, in the country of destination.41 But the same sovereignty clause, because of the way in which it is worded, also allows a Member State to process an asylum request when transferring the asylum seeker to another EU country would cause a breach of the state’s own constitution—say, a breach of the right to health, in the case of an asylum-seeker who needs special treatment that would be unavailable in the country of destination. In this context, the limited protection offered by the Charter of Rights (as interpreted by the Court in NS

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37 It is not entirely clear, though, whether this Art 1(7) is a descriptive sentence (‘the Services Directive does not actually infringe constitutional rights’) or a normative standard (‘the Services Directive must not be applied if that would affect constitutional rights’). From an effet utile perspective, the latter interpretation seems preferable. See discussion of this point by V Kosta, ‘Internal Market Legislation and the Private Law of the Member States—The Impact of Fundamental Rights’ (2010) 6 European Review of Contract Law 409, 422–23.


39 Regulation 343/2003 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.

40 The fact that the Member States are granted complete discretion by this provision was confirmed by the Court of Justice in Case C-528/11 Halaf (Judgment of 30 May 2013) [36]–[37].

41 Joined Cases C-411/10 and C-493/10 NS v Secretary of State for the Home Department and ME and others v Refugee Applications Commissioner and others (Judgment of 21 December 2011).
and ME\(^{42}\) does not preclude the application of more generous national constitutional rights, and such application would not conflict with the primacy of EU law.

53.31 In other cases, though, the room for ‘national constitutional manoeuvre’ left by EU legislation is less than clear. A particularly sensitive area is that of the austerity measures taken by a number of eurozone countries in the framework of conditionality programmes which they have agreed in return for European loans. In particular, loans granted under the European Financial Stabilisation Mechanism (adopted in 2010) are EU-law measures that have been implemented by Council Decisions specifying a number of reform obligations imposed on beneficiary countries.\(^{43}\) In the case of Portugal, the Constitutional Court recently declared a number of those austerity measures unconstitutional for breach of the principle of equality (essentially, as between public and private sector employees).\(^{44}\) The Portuguese Court seems to consider that the unconstitutional measures had not been dictated by European Union law, but had been adopted by the Portuguese government within the limits of the discretion left by EU law. To that extent, the application of national constitutional standards was legitimate, from an EU law point of view. To the extent, however, that EU law instruments would dictate a particular legal solution which is held contrary to the country’s fundamental rights,\(^{45}\) we would find ourselves in a Melloni-type constellation: the national courts would not be allowed to unilaterally apply their own constitutional standards, but they would have the possibility of sending a preliminary reference to the Court of Justice querying whether the European Union’s austerity measure was, itself, in breach of the (social) rights protected by the Charter.

53.32 Ultimately, the interpretation of Article 53 proposed here means that the adoption of EU legislation can indeed lead to reduced levels of fundamental protection at the national level. The example of the arrest warrant shows this rather well. Prior to the adoption of the Framework Decision in 2002, the EU Member States were free to subject extraditions to conditions of respect for fundamental rights in the requesting state. Today, some of those conditions can no longer be used, in view of the fact that the Framework Decision has expressly harmonised the relevant rules (for example, as regards trials in absentia); in those matters, the EU legislator has decided on the appropriate balance between the needs of judicial cooperation and the individual rights of suspected or convicted persons, and has not left discretion to the Member State authorities. The fact that such partial harmonisation of national laws may affect the national standard of fundamental rights protection is, of course, problematic. It can mean that increased European integration leads to a lowering of the protection of rights.

53.33 In order to avoid this happening, both the EU legislative organs and the Court of Justice of the EU should pay greater attention to the question of whether room should be left


44 Constitutional Court of Portugal, Decision no 187/3013 of 5 April 2013.

45 Indeed, some of the obligations contained in the Council decisions are quite concrete. For example, the above mentioned Council Decision of 30 May 2011 requires, in its Art 3(6)(h), a ‘reduction of the maximum duration of unemployment insurance benefits to 18 months’. This could possibly be considered, from a national constitutional perspective, to be an illegitimate regression in the guarantee of the right to social security which, as a fundamental social right, must be ‘progressively realised’.
for additional protection of fundamental rights by national law. The EU legislative organs should clearly justify the restrictions which they impose on individual rights, and should indicate, possibly in the preamble of the legislative act, to what extent the act leaves room for more advanced protection of rights at the national level. As for the Court of Justice of the European Union, it has the duty to take a hard look at whether the EU institutions have genuinely complied with the rights of the Charter and of the ECHR. When interpreting the Charter, the European Court must take account of its Article 52(4) which affirms that ‘in so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.’ This means that, in a case such as Melloni, the Court of Justice should not ignore the meaning which the Spanish Constitutional Court has given to the right to fair trial in the context of extradition or surrender. It should rather examine whether the Framework Decision is compatible with the fair trial right contained in the Charter (and in Art 6 ECHR), and in doing so it must consider whether the ‘Spanish interpretation’ might reflect a common constitutional tradition among the EU Member States. The CJEU is thus faced with a ‘duty of pluralist interpretation’, it should also, arguably, show in its judgment that it has undertaken this examination of national constitutional law.

Based on the preceding reflections, the Court could have made its interpretation of Article 53 more palatable, and more in tune with the spirit of constitutional pluralism, if its answer to the third question in Melloni had contained language of the following sort:

Article 53 of the Charter does not allow a Member State to refuse to execute an arrest warrant for reasons that are not recognised by EU law itself, such as an alleged contrast with constitutional rules of that Member State. Reasons recognised by EU law include those expressly laid down in the Framework Decision, but also reasons based on norms of primary EU law. In particular, an arrest warrant may not be executed if the person's fundamental rights guaranteed under the Charter would be breached. In interpreting the relevant provisions of the Charter, the Court of Justice and the courts of the Member States must have due regard to the level of protection offered by similar rights contained in international human rights conventions such as the ECHR and in the common constitutional traditions of the Member States.

C. Conclusion

The Lisbon Treaty, and the recognition of the Charter of Rights as part of primary EU law, do not lead to major formal changes in the multilevel protection of fundamental rights in Europe—at least as long as the European Union has not complied with the duty imposed on it by Article 6 TEU to accede to the European Convention of Human Rights. The existing tension between the European Union’s claim for absolute primacy of EU law over conflicting national law, and the constitutional courts’ counterclaim for supremacy of the fundamental parts of their constitution over any other legal norm,

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remains unresolved. Article 53 of the Charter is not to be seen as a provision through which EU law authorises national courts to give priority to their own constitutional law when that law gives more protection to individual rights than EU law. That article is, however, a signal that national constitutional law must be taken seriously by the European Union institutions, when read in combination with Article 52(4) of the same Charter and with Article 4(2) TEU which calls for the Union to respect the national constitutional identity of its Member States. At the same time, those new provisions are an invitation to national courts, especially the constitutional courts, to ‘play the European game’ more actively than before and confront the Court of Justice and the other EU institutions with their own national conception of fundamental rights as a possible source of inspiration for legal reform or judicial review at the European level.