

European Union, CJEU, Melloni, judgment of 26 February 2013

Deciding bodies and decisions

CJEU (Grand Chamber), judgment of 26 February 2013, Case C-399/11, *Melloni*, EU:C:2013:107

The ECJ decided on a reference for preliminary ruling issued by *Tribunal Constitucional* (Spanish Constitutional Court, Spain) which was requested to execute an EAW for criminal prosecution against Mr Melloni issued by the Court of Appeal of Bologna, Italy.

Area of law

Criminal Law - Effective Judicial Protection

Subject matter

European Arrest Warrant (EAW) - reasons for refusal - fundamental rights protection - rights of defence - right to be heard

The ECJ was asked to clarify whether the national court requested to execute an EAW has the power or the duty to check the compatibility with EU fundamental rights of such an execution, in order, eventually, to refuse it, notably with respect to fundamental rights concerns that the EU legislator took into account, to some extent, in the list of compulsory or optional grounds for non execution. In its judgement, the ECJ held that a national authority cannot refuse the execution of an EAW issued for the purpose to enforce a judgment delivered *in absentia*, beyond the specific circumstances where non-execution is permitted (as an optional ground) by the EAW Framework Decision. The CJEU used the Charter as a parameter to review the validity of the choices made by the EU legislator as regards the power/duty of the judicial authorities of the Member States to refuse the execution of an EAW.

Summary Facts Of The Case

The preliminary reference in *Melloni* was issued before the CJEU by the Spanish Constitutional Court (Tribunal Constitucional). In 2004, the Court of Appeal of Bologna (Italy) issued an EAW for the surrender of Mr Melloni, an Italian national, who had been condemned *in absentia* in Italy to ten years' imprisonment for the crime of bankruptcy fraud. Mr Melloni was arrested in Spain and the competent court (the *Audiencia Nacional*) decided to execute the warrant, because the man

had been duly informed about the trial and throughout the trial had been represented by two lawyers of his choice.

Mr Melloni filed an individual complaint (*recurso de amparo*) before the Spanish Constitutional Court invoking the doctrine of the indirect violation of constitutional fundamental rights. In his view, by not making the surrender conditional on the retrial of the case at his presence, the *Audiencia Nacional* had violated his right to a fair trial under Article 24(2) of the domestic constitution. The Spanish Constitutional Court had indeed interpreted Article 24(2) of the Constitution in the sense that the surrender of a person who has been condemned *in absentia*, without conditioning the surrender to the possibility to obtain a retrial, would violate the right to a fair trial.

Yet, this interpretation clashed with the obligations stemming under the EAW Framework Decision, and particularly its Article 4a(1), which provides for an optional ground for non-execution of an EAW issued for the enforcement of a custodial sentence or a detention order, where the person concerned has not appeared in person at the trial that resulted in the conviction. That option is nevertheless accompanied by four exceptions in which the executing judicial authority is prevented from making the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in his presence. In particular, execution cannot be refused when a lawyer represented the person concerned throughout the proceedings that led to her conviction. Therefore, the Spanish Constitutional Court decided to submit three preliminary questions to the CJEU, asking, in essence:

1. *Whether Article 4a of the EAW Framework Decision must be interpreted as preventing precluding the executing judicial authorities, in the circumstances specified in that provision, from making the execution of an EAW issued for the purposes of executing a sentence conditional upon the conviction rendered in absentia being open to review in the issuing Member State;*
2. *Whether Article 4a(1) of the EAW Framework Decision is compatible with the requirements deriving from the right to an effective judicial remedy and to a fair trial, provided for in Article 47 CFR and from the rights of the defence guaranteed under Article 48(2) CFR;*
3. *Whether Article 53 CFR must be interpreted as allowing the executing Member State to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution.*

In *Melloni*, at the outset, the CJEU observed that both the wording and the purpose of Article 4a of the Framework Decision suggests that, once the person convicted *in absentia* was aware, in due time, of the scheduled trial and was informed that a decision could be handed down if he did not appear for the trial or, being aware of the scheduled trial, gave a mandate to a legal counsellor to defend him at the trial, the executing judicial authority is required to surrender that person, with the result that it cannot make that surrender subject to there being an opportunity for a retrial of the case at which he is present in the issuing Member State.

Endorsing the findings of Advocate General Bot, the CJEU observed that the solution chosen by the EU legislature (ie, the provision of an exhaustive list of circumstances in which the execution of an EAW issued in order to enforce a decision rendered *in absentia* must be regarded as not infringing the rights of the defence) is incompatible with any discretion for the executing judicial authority to make that execution conditional on the conviction in question being open to review.

The CJEU then moved to assessing whether Article 4a of the Framework Decision is compatible with the fundamental rights guaranteed by EU law, in particular the right to an effective judicial remedy and to a fair trial provided for in Article 47 CFR, and the rights of the defence guaranteed by Article 48(2) CFR. The Court observed that the right of the accused to appear in person at his trial is an essential component of the right to a fair trial, but is not absolute. The accused may indeed waive that right of his own free will, either expressly or tacitly, provided that the waiver is established in an unequivocal manner, is attended by minimum safeguards commensurate to its importance and does not run counter to any important public interest. Nor that right is violated where the accused, who did not appear in person, was informed of the date and place of the trial or was defended by a legal counsellor to whom he had given a mandate to do so.

The Court therefore answered the second question in the sense that Article 4a of the Framework Decision 2002/584 does not disregard either the right to an effective judicial remedy and to a fair trial or the rights of the defence guaranteed by Articles 47 and 48(2) CFR.

Finally, as regards the third question, the CJEU dismissed the interpretation whereby Article 53 CFR gives general authorisation to a Member State to apply the domestic standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law. Such an interpretation would indeed undermine the principle of the primacy of EU law, because a Member State could disapply EU law provisions that are fully in compliance with the Charter where they conflict with the domestic standard of fundamental rights' protection. According to the CJEU, Article 53 CFR rather allows a Member State (court) to apply the domestic level of fundamental rights protection when:

- The EU law provisions (other than those of the Charter) applicable to the case do not specify the level of protection that must be granted to the fundamental rights at issue; and
- 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 compromised.

By contrast, when the EU legislator determined the level of protection to be granted to the fundamental rights concerned, there is no further space for the application of the domestic standard of fundamental rights protection, including where this provides for a broader protection than the Charter. It must be borne in mind, however, that the standard established by the EU legislator must be compatible with the Charter, which acts as a validity ground.

Since the Framework Decision has harmonised the conditions of execution of a European arrest warrant in the event of a conviction rendered *in absentia*, leaving no further discretion to the Member States, Article 53 CFR does not allow a Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State.

Relation to the scope of the Charter

Right to an effective remedy and to a fair trial (Article 47 EU Charter)

Presumption of innocence and right of defence (Article 48 EU Charter)

The relation with the Charter of this case is quite obvious, given that it concerned the execution of an EAW, which is an instrument of judicial cooperation in the criminal law field that is governed by EU law (notably, by the EAW Framework Decision).

Whilst, in principle, all cases concerning the issue and the execution of an EAW fall within the scope of the Charter, the “intensity” of the connection may vary, with implications on the relevant standard of protection. The CJEU made this point clear in *Melloni*. When a situation is “completely governed by EU law” (in the sense that the EU legislator determined the specific level of fundamental rights protection to be guaranteed), the relevant standard is that established by the EU legislator, provided that it complies with the Charter. By contrast, if the situation “is not completely governed by EU law” (in the sense that the EU legislator did not determine the specific level of fundamental rights protection to be guaranteed, and there is only the general parameter offered by the Charter), the relevant standard is the domestic one, insofar as it does not compromise the level of protection provided for by the Charter, as interpreted by the Court, nor the primacy, unity and effectiveness of EU law.

Relation between the Charter and EHCR

According to its official explanation to the EU Charter, the first paragraph of Article 47 of the EU Charter corresponds to Article 13 of the ECHR, while the second paragraph corresponds to Article 6 (1) of the ECHR. With regard to the third paragraph, the explanation of Article 52(3) points out

that “Article 47(3) corresponds to Article 6(1) of the ECHR, but the limitation to the determination of civil rights and obligations or criminal charges does not apply as regards Union law and its implementation”. Thus, the scope of legal aid under the Charter is broader than under the ECHR. Article 48 of the EU Charter corresponds to Article 6, paras. 2 and 3 of the ECHR. It follows from Article 52(3) of the EU Charter and the related official explanation that Charter provisions that correspond to fundamental rights already granted by the ECHR shall be interpreted as having the same scope and meaning afforded by the ECHR to their correspondents, taking into account also the case law of the European Court of Human Rights. However, a higher level of protection can be granted under EU law (meaning that the ECHR only sets a minimum standard of protection – non-derogable *in peius* – for corresponding Charter provisions).

Notes on the remedies dimension

Vertical Judicial Interaction

Vertical dialogue national court/ECJ through the preliminary reference procedure

For the first time, the question for preliminary ruling was issued by the Spanish Constitutional Court. Interestingly, the referring court did not show much deference to the CJEU: the Spanish Court aligned itself to the solution of the CJEU, but avoided quoting it.

Horizontal Judicial Interaction

Horizontal dialogue ECJ/ECtHR through reference to the latter's case law

In its judgement, the ECJ refers to the case law of the ECtHR, though this was used to confirm the Court's interpretation (notably, see judgements *Medenica v. Switzerland*, no. 20491/92; *Sejdovic v. Italy* [GC], no. 56581/00; *Haralampiev v. Bulgaria*, no. 29648/03) rather than to shape it. This is not completely convincing in light of Article 52(3) CFR, which suggests a different way of reasoning, with the case law of the ECHR as a starting point when Charter provisions guaranteeing rights already protected by the ECHR are at stake.

Strategic use of judicial interaction

The Spanish Tribunal Constitucional issues a reference for preliminary ruling before the CJEU, doubting the compatibility with the Charter of the execution of an EAW.

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Impact on Jurisprudence

The Spanish Constitutional Court achieved the outcome indicated by the CJEU in *Melloni*, going even beyond the implementation of this judgment. In fact, the Spanish Court modified the interpretation of Article 24 of the Constitution also with respect to extradition proceedings, rather than only as regards EAW surrender procedures.

Impact on Legislation / Policy

Impact at the EU level

It is worth paying attention to the implications of the *Melloni* test in terms of judicial interaction. Where the EU legislator established the specific level of fundamental rights protection, this must comply with the Charter. In case of doubts, a national court could challenge the choice of the EU legislator – as expressed in the relevant EU secondary law provisions – through a reference for preliminary ruling of validity of those provisions with respect to the Charter. By contrast, where the EU legislator did not establish a specific standard of fundamental rights' protection, a national court may need clarifications from the CJEU with respect to the two conditions which, according to *Melloni*, the application of the domestic standard is dependent on (namely, that standard shall not compromise the protection offered by the Charter, "as interpreted by the Court", nor the "primacy, unity and effectiveness of EU law").

Sources - EU and national law

National Law

- the right to a fair trial proclaimed in Article 24(2) of the Spanish Constitution
- Case-law of the Spanish Constitutional Court according to which the execution of a European arrest warrant issued for the purposes of executing a judgment *in absentia* must always be subject to the condition that the convicted person is entitled to a retrial in the issuing Member State.

EU Law

- Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190/1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81/24)
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Sources - CJEU Case Law

- C-396/11, *Radu*, EU:C:2013:39
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Comments

After *Melloni*, in its decision STC 26/2014 of 13 February 2014, the *Tribunal Constitucional* reversed the previous interpretation of the constitutional right to a fair trial (Article 24 of the Constitution), achieving the outcome indicated by the CJEU.
