



***ACTIONES Handbook on the Techniques of Judicial Interactions in the Application of the EU Charter***

## ***MODULE 7 – CRIMINAL LAW***

**IN THE FRAMEWORK OF THE PROJECT “ACTIVE CHARTER TRAINING THROUGH INTERACTION OF NATIONAL EXPERIENCES” (ACTIONES)**



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## MODULE 7 – JUDICIAL DIALOGUE FURTHERING THE APPLICATION OF THE EU CHARTER IN CRIMINAL LAW

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## PART 1: A FEW MILESTONES IN THE ANALYSIS OF THE LEGAL AREA

EU Criminal Law cooperation is one of the fastest growing areas of EU law, and the evolution of the European Union into an Area of Freedom, Security and Justice (AFSJ) has been one of the most far-reaching constitutional developments in the EU. EU legislative action in the field poses significant challenges to the legal orders of the Member States and is one of the most contested fields of EU action. There are two main reasons for this: First, the development of EU Criminal Law has a significant impact on the protection of fundamental rights and the relationship between the individual and the state. Second, the development of EU Criminal Law poses challenges to state sovereignty and the relationship between the EU and its Member States.<sup>1</sup> There is thus a necessity for further legal analysis of this rapidly evolving field,<sup>2</sup> both from a constitutional law perspective, and a more general EU law perspective.<sup>3</sup>

The coming into force of the Lisbon Treaty with the enhanced legal status of the Charter of Fundamental Rights of the European Union (the EU Charter) is therefore most welcome. The field of application within criminal law, of EU law in general and of the EU Charter in particular, is however not always easy to detect and predict. This *Handbook on Judicial Dialogue Furthering the Application of the EU Charter in Criminal Law*, provides an alternative reading of the field, using landmark European and national jurisprudence to drive our focus of attention. The picture that emerges is both fascinating and multifaceted, sketching a dynamic and multi-layered pattern of fundamental rights protection in the field of criminal law.

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<sup>1</sup> Mitsilegas, V., *EU Criminal Law*, Hart Publishing, 2009.

<sup>2</sup> Important volumes include, Asp, P., *The Procedural Criminal Law Cooperation of the EU – Towards an Area of Freedom, Security and Justice*, Part 2, Jure Förlag, 2016; Asp, P., *The Substantive Law Competence of the EU*, Skrifter utgivna av Juridiska fakulteten i Stockholm, del 79, 2013; Bergström, M., and Jonsson Cornell, A., (eds.) *European Police and Criminal Law Co-operation*, Hart Publishing, 2014; Eckes, C., and Konstadinides, T., (eds.) *Crime within the Area of Freedom, Security and Justice – A New Public Order*, Cambridge University Press, 2011; Fletcher., M., Lööf, R., with Gilmore., B., *EU Criminal Law and Justice*, Edward Elgar, 2008; Herlin-Karnell, E., *The Constitutional Dimension of European Criminal Law*, Hart Publishing, 2012; Klip, A., *European Criminal Law – An Integrative Approach*, 3<sup>rd</sup> ed. Intersentia, 2015; Klip, A., (ed.) *Substantive Criminal Law of the European Union*, Maklu, 2011; Miettinen, S., *Criminal Law and Policy in the European Union*, Routledge, 2013; Mitsilegas, V., *EU Criminal Law*, Hart Publishing, 2009; Mitsilegas, V., *EU Criminal Law after Lisbon – Rights, Trust and the Transformation of Justice in Europe*, Hart Publishing, 2016; Mitsilegas, V., Bergström, M., and Konstadinides, T., (eds.) *Research Handbook on EU Criminal Law*, Edward Elgar, 2016; Peers, S., *EU Justice and Home Affairs Law*, 4<sup>th</sup> ed. Oxford University Press, 2016; and Öberg, J., *Limits to EU Powers – A Case Study of EU Regulatory Criminal Law*, Hart Publishing, 2017.

<sup>3</sup> These perspectives were also analysed in Bergström, M., *EU som lagstiftare inom straffrätten och reglerna mot penningtvätt*, *Svensk Juristtidning*, 2011(4): 357-374, and in Bergström, M. and Cornell, A. (eds.) *European Police and Criminal Law Co-operation*, Hart Publishing 2014.

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Without striving towards completeness, this Handbook is divided into four parts based on some illustrative examples from national courts and the European Court of Justice. The first part thereby provides the reader with a brief background of some of the most important aspects of the development of EU Criminal Law, with its influence upon national criminal law. It focuses on the field of application of EU Law within criminal law and touches upon the current legal bases for harmonising criminal law measures. This first part helps us better understand the development of this multilevel field with its dynamic between EU legislation, case law of the European Court of Justice, and national cases of broader interest. In the second part of the Handbook, a few specific issues concerning harmonising measures built on mutual trust and mutual recognition are discussed and exemplified with cases from the Court of Justice and national courts. The third part provides some examples of interaction between criminal law and other fields of law, again with the help of a few cases. In the fourth and last part, you will find specifics about the *Transnational Workshop on Criminal Law* held at Uppsala University in December 2016. All four parts contain a selection of national and European cases *exemplifying* the use of judicial interaction techniques, important principles, possible solutions, as well as remaining problems in need of further investigation and research. For easier reading and understanding, a specific form or case sheet is inserted for the major cases used in the Handbook. These case sheets are structured in the same way and provide the reader with a brief description of the case, relevant facts and most important legal findings and effects.

## 1. The Field of Application of EU Law within Criminal Law

In the early days and in particular before the coming into force of the Lisbon Treaty in 2009, when there was no specific EU Criminal Law competence, EU law could still be spilling over and influence national criminal law. For the purposes of this Handbook, this could mean that in such cases, EU law, and hence the EU Charter, is applicable.

### 1.1 EU Law Limits on the National Legislators within Criminal Law

On the one hand, EU law would be limiting the room for manoeuvre for the national legislators who cannot introduce or keep in force national rules, including national criminal law, contrary to EU law. This is still the case. For example, in *C-390/12 Pflieger and others*,<sup>4</sup> the Court of Justice ruled that Article 56 of the Treaty on the Functioning of the European Union (TFEU) on free movement of services,<sup>5</sup> must be interpreted as precluding national legislation, such as that at issue in the main proceedings, where that legislation does not actually pursue the objective of protecting gamblers or fighting crime and does not genuinely meet the concern to reduce opportunities for gambling or to fight gambling-related crime in a consistent and systematic manner.<sup>6</sup> In other words, simply referring to fighting crime, which under certain circumstances could be a justified aim to limit free movement, is not enough to give the national legislator unlimited legislative powers introducing or keeping national restrictions to free movement. Irrespective of the existence of explicit EU law competence in the field, this clearly influences the field of application of EU law.

### 1.2 EU Law Demands of Effective, Proportionate and Dissuasive National Measures

Where EU legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Member States are required to take all measures necessary to guarantee the application and effectiveness of EU law. Whilst the choice of penalties remains within their discretion, from early on, the Court of Justice, in *the Greek Maize case*,<sup>7</sup> underlined the importance of effective, proportionate and dissuasive national measures.

#### ***Case 68/88 Commission v Greece (Greek Maize)***

*23 It should be observed that where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 of the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law.*

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<sup>4</sup> C-390/12 *Pflieger and others*, EU:C:2014:281.

<sup>5</sup> Article 56(1) provides: Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

<sup>6</sup> C-390/12 *Pflieger and others*, EU:C:2014:281.

<sup>7</sup> Case 68/88 *Commission v Greece*, EU:C:1989:339.

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*24 For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community 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 .*

*25 Moreover, the national authorities must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws.*

Since then, the focus on effective, proportionate and dissuasive national penalties is a well-established formula that can be found both in secondary EU law measures and in case law from the Court of Justice.<sup>8</sup> In such cases, EU law including the EU Charter possibly apply.

### **1.3 National Judges' Obligation to Interpret National Criminal Law in Conformity with EU Law**

On the other hand, national judges are obliged to interpret national law in conformity with EU law also within the field of criminal law, although the legality principle certainly sets specific limits in relation to offences and penalties. These general rules establish the field of application of EU law in general, and the EU Charter in particular.

Two examples where judicial interpretation techniques, and in particular conform interpretation, have been used and discussed by national courts will follow, where specific reference was made to *Case C-105/03 Pupino*.<sup>9</sup> In the *Pupino* case, which concerned the interpretation of a framework decision, the application of the loyalty principle, previously inserted in the EC Treaty and as such a first-pillar principle, was extended to a third-pillar framework decision. In this case the Framework Decision (FD) was granted *indirect* effect irrespective of the explicit prohibition in former Article 34 TEU to grant *direct* effect to such measures. In brief, in *Pupino*, the Court of Justice made clear that national legislation had to be interpreted in line with EU legislation, and furthermore, that fundamental rights had to be respected. With the coming into force of the Lisbon Treaty and the abolishing of the three pillar structure, the loyalty principle is now a generally applicable principle of EU law, of great importance for national judges.

#### **Case C-105/03 *Pupino***

*58 Moreover, in accordance with Article 6(2) EU, the Union must respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 ('the Convention'), and as they result from the constitutional traditions common to the Member States, as general principles of law.*

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<sup>8</sup> See e.g. *Case C-176/03 Commission v Council*, EU:C:2005:542.

<sup>9</sup> *Case C-105/03 Criminal Proceedings against Maria Pupino*, EU:C:2005:386.

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*59 The Framework Decision must thus be interpreted in such a way that fundamental rights, including in particular the right to a fair trial as set out in Article 6 of the Convention and interpreted by the European Court of Human Rights, are respected.*

*60 It is for the national court to ensure that – assuming use of the Special Inquiry and of the special arrangements for the hearing of testimony under Italian law is possible in this case, bearing in mind the obligation to give national law a conforming interpretation – the application of those measures is not likely to make the criminal proceedings against Mrs Pupino, considered as a whole, unfair within the meaning of Article 6 of the Convention, as interpreted by the European Court of Human Rights (see, for example, ECHR judgments of 20 December 2001, P.S. v Germany, of 2 July 2002, S.N. v Sweden, Reports of judgments and decisions 2002-V, of 13 February 2004, Rachdad v France, and the decision of 20 January 2005, Accardi and Others v Italy, App. 30598/02).*

*61 In the light of all the above considerations, the answer to the question must be that Articles 2, 3 and 8(4) of the Framework Decision must be interpreted as meaning that the national court must be able to authorise young children, who, as in this case, claim to have been victims of maltreatment, to give their testimony in accordance with arrangements allowing those children to be guaranteed an appropriate level of protection, for example outside the trial and before it takes place. The national court is required to take into consideration all the rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the Framework Decision.*



*Casesheet 7.1 – Irish Supreme Court – D<sup>10</sup>*

**1. At a glance**

Country	Area	Reference to EU law	Legal and/or judicial ctors	Judicial dialogue technique
<ul style="list-style-type: none"> <li>Ireland</li> </ul>	<ul style="list-style-type: none"> <li>Criminal procedure</li> </ul>	<ul style="list-style-type: none"> <li>EAW Framework decision</li> <li>Article 40.4 Irish Consitution</li> </ul>	<ul style="list-style-type: none"> <li>CJEU</li> <li>Irish Supreme Court</li> </ul>	<ul style="list-style-type: none"> <li>Conforming interpretation</li> </ul>

**2. Timeline**



**3. Case description**

A European Arrest Warrant (EAW) was issued for the arrest of Mr D for the offence of murder by the Thames Magistrates Court in the United Kingdom (the issuing authority). Mr D was arrested in Limerick, Ireland and appeared before the High Court where a date was fixed for a hearing regarding the decision to execute the EAW. That hearing was adjourned four separate times, in particular to obtain undertakings from the issuing authority. On 14 May 2004 the High Court ordered that Mr D be surrendered. Mr D appealed that order to the Supreme Court which rejected his appeal. On the same day, Mr D issued further proceedings arguing that his detention was unlawful due to the fact that time limits contained in Article 17 EAW FD had not been respected having regard to the various adjournments and appeals. That application was rejected by O’Sullivan J in the High Court and Mr D appealed the issue to the Supreme Court.

Judgments were delivered by three of the judges of the Supreme Court – Denham, Geoghan and Fennelly JJ - rejecting the applicants appeal. Murray CJ and Hardiman J concurred.

Denham J began with an overview of the implementation of the EAW FD and in particular provisions with respect to time limits contained in Article 17 EAW FD in a number of Member States, notably Belgium, the Netherlands and the United Kingdom, before proceeding to analyse the implementation of Article 17 EAW FD by s 13 of the 2003 Act. She noted that in some Member States (Belgium in particular) failure to comply with the time limits resulted in automatic release, whereas in the Netherlands and the UK this was subject to judicial discretion (in the case of the UK by an extension of the time limits in the interests of justice). The Irish implementing legislation

<sup>10</sup> Prepared by LL.M. Lars Karlander, UU, based on a template written by Dr. Stephen Coutts, Dublin City University

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contained no such obligation with respect to the Article 17 time limits, the only obligation being to inform Eurojust and the issuing Member State of any delay and the reasons for such a delay. She also noted that the Framework Decision was subject to the rule of conform interpretation as outlined in Pupino, despite it being a third pillar instrument. While time limits existed there was nothing to suggest that their non-respect would lead to automatic release. Denham J noted that such time limits must also take into account the needs of justice and in particular due process.

Geoghan J provided the principal judgment with which Fennelly, Hardiman JJ and Murray CJ concurred. He found that Article 17 EAW FD was intended to provide internal discipline for member states and did not, in and of itself, create justiciable rights for individuals. Thus the only obligation contained in Article 17 EAW FD was to inform Eurojust and the issuing authority. In any event, even if such rights were created by Article 17 EAW FD, he found that release could not be ordered if the delay was due to actions of the applicant. To allow otherwise in light of the possibility of appeals and adjournments in all European judicial systems, would frustrate the operation of the EAW FD such as to make it virtually inoperable. Finally, he found that while release should not be ordered simply because the time limits were exceeded, that did not prevent application for release based on fundamental rights if such a situation existed (this does not appear to have been argued in the current case where the applicant relied on the simple fact of the time limits being exceeded).

Fennelly J largely concurred with the judgment of Geoghan J and added some considerations regarding the interpretation of the EAW FD, the 2003 Act and the role of fundamental rights. Noting the Court of Justice's judgment in Pupino he found that the 2003 Act should be interpreted in accordance with the principle of conform interpretation, but not to the extent that such an interpretation would result in a contra legem outcome. This duty of conform interpretation applied regardless of the fact that a preliminary reference was not possible due to Ireland's failure to make the appropriate declaration under the then Article 35 TEU. He then found that the EAW FD was ambiguous regarding the role of fundamental rights with Article 1(3) being the only substantive provision mentioning fundamental rights. At the same time various, specific fundamental rights were mentioned in the recitals. However, the 2003 Act was not ambiguous; an EAW could be refused for non-compliance with fundamental rights, including those found in the Irish Constitution (s 37, 2003 Act) and for non-compliance with the EAW FD including its recitals (s 13, 2003 Act). Therefore, despite the existence of the duty of conform interpretation, refusal to surrender must therefore be possible on fundamental grounds under the 2003 Act, any other interpretation being contra legem.

### **4. Analysis**

#### **a. Relation to the Scope of the Charter**

Passing mention of the Charter only occurs in citations of provisions of the EAW FD. However, the judgment is relevant to the role of fundamental rights in the operation of the EAW FD, techniques of interpretation and judicial dialogue (conform interpretation and inability to make a preliminary reference) and to the interaction of legal orders (refusal based on Irish Constitutional provisions).

#### **b. Judicial interaction**

- Comparative analysis of implementing measures by Denham J, noting a Belgian Court decision on the issue of release following expiry of time limits.

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- Conform interpretation per Pupino (see Denham and Fennelly JJ) although with Fennelly J in particular noting that such conform interpretation does not extend to a contra legem interpretation.
- Inability for the Irish Supreme Court to make a preliminary reference. Fennelly J in particular noting this fact at para 70, p 546. [Note: no longer relevant post-Lisbon]

### **c. Impact of the CJEU decision**

#### Consistent interpretation

It is worth mentioning that the national judges' reasoning concerning time limits and fundamental rights have later been confirmed by the Court of Justice, e.g. in *Case C-237/15 PPU Minister for Justice and Equality v Francis Lanigan*.<sup>11</sup>

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<sup>11</sup> Case C-237/15 *PPU Minister for Justice and Equality v Francis Lanigan*, EU:C:2015:474.

**Casesheet 7.2 – Irish Supreme Court – O<sup>12</sup>**

**1. At a glance**

Area	Country	Reference to EU law	Legal and/or Judicial Actors	Judicial dialogue technique
<ul style="list-style-type: none"> <li>• Criminal procedure</li> </ul>	<ul style="list-style-type: none"> <li>• Ireland</li> </ul>	<ul style="list-style-type: none"> <li>• EAW Framework Decision</li> <li>• Art 8 ECHR</li> </ul>	<ul style="list-style-type: none"> <li>• CJEU</li> <li>• Irish Supreme Court</li> </ul>	<ul style="list-style-type: none"> <li>• Conform interpretation</li> </ul>

**2. Timeline**



**3. Case description**

Mr O moved to Ireland from Poland with his family in 2004. In 2006 on a holiday to Poland he was found in possession of 0.72 g of marijuana and was detained and released. After a first European Arrest Warrant was refused for technical reasons a second EAW was issued by the Polish authorities for the arrest of Mr O. The second EAW was duly endorsed but the surrender of Mr O was refused by the High Court citing a general lack of proportionality. In its proportionality assessment the High Court took into account a number of factors including the gravity of the offence, the likely sanction, the family life Mr O enjoyed in Ireland and delays in the overall procedure.

The state appealed the decision and requested that a point of law appeal on the issue of whether the High Court as an executing authority could refuse the execution of an EAW on the grounds of proportionality.

The Court was composed of five judges: Denham CJ, Murray, O’Donnell, McKechnie and MacMenamin JJ with Denham CJ, McKechnie and MacMenamin JJ delivering judgments allowing the appeal with the remaining two judges concurring.

Denham CJ reversed the judgment of the High Court finding that the EAW FD and the 2003 Act both established an automatic system of surrender that did not provide for a general proportionality assessment, based as it was on a system of mutual recognition and respect between legal orders. The gravity of the offence was already taken into account by the Framework Decision in imposing

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<sup>12</sup> Prepared by LL.M. Lars Karlander, UU, based on a template written by Dr. Stephen Coutts, Dublin City University

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thresholds in relation to the minimum maximum sentences. Section 37 of the 2003 Act did provide that surrender must be refused where to do so would be incompatible with fundamental rights under the constitution or under the European Convention of Human Rights (ECHR). However, in the present instance, while all occasions of extradition and surrender involve some infringement of fundamental rights to liberty and at times family life, this was a natural consequence of an extradition/surrender system and in and of itself did not outweigh the public interest in the efficient operation of such a system. The present case did not present any unusual or exceptional circumstances that would render the infringement of Mr O's rights under the ECHR disproportionate.

McKechnie J provided the lengthiest judgment and considered various issues under national and European law. Considering the main question to be the application of the proportionality principle in the context of an assessment of the possible violations of fundamental rights under the constitution or ECHR during the surrender process, McKechnie J engaged in a lengthy discussion of the source and operation of the proportionality principle under Irish law and in particular under Irish Constitutional law and ECHR concluding that a flexible, variable approach should be taken to the test, allowing for the consideration of various public and individual interest.

In applying the law to the present case he found that a considerable public interest was present in the effective operation of a system of extradition/surrender and that considerable infringements of individual rights would have to be present. These infringements, in particular in relation to family life, were not present in the case of Mr O.

McKechnie J also engaged in a broad assessment of the general question of whether the executing judicial authority should or was empowered to conduct a proportionality assessment when deciding whether or not to surrender an individual, discussing the German case of *General Public Prosecution Services v C*. He found that there were considerable problems with the use of the EAW FD for trivial offences that had been noted by the European Council and the European Commission and expressed serious misgivings about how such an overuse may undermine the operation of the EAW FD. Nonetheless he found that the general consensus was that any proportionality assessment should be conducted by the issuing authority, a possibility that was permitted under the EAW FD. The mandatory nature of the EAW FD as it currently stands however precluded the operation of a proportionality assessment at the stage of execution. In this regard he decline to following the ruling of the Higher Regional Court in Stuttgart in *General Public Prosecution Services v C* on various grounds including the fact that the text of the judgment could not be located and uncertainty regarding the precise role of national and European law in the judgment of the German Court.

Finally, McKechnie J discussed whether an obligation of conform interpretation applied and if so that would alter his conclusion regarding the application of a proportionality assessment at the stage of execution. He found that *Pupino* (establishing the principle of conform interpretation in relation to Framework Decisions) was not binding on Ireland. Ireland had not accepted the Court's jurisdiction under the then Article 35 TEU and hence was not bound by the Court's interpretations of Framework Decisions. However, a similar obligation to interpret Irish legislation implementing international law in conformity with the goals and text of that international law does exist in common law and should be applied in the case of Framework Decisions. Nonetheless, in light of the fact that the Framework Decision operated a system of automatic surrender, it did not affect the overall conclusion that a general proportionality assessment at the stage of execution was possible.

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MacMenamin J in a brief judgment concurred with the operative finding of Denham CJ that the act established a system of automatic surrender and that there is no possibility of a general proportionality assessment. He also expressed agreement with the sentiments of McKechnie J regarding the problematic use of the EAW system for trivial offences.

### 4. Analysis

#### a. Relation to the Scope of the Charter

The Charter as such was not considered beyond a brief description of the use of the Charter by the High Regional Court of Stuttgart in *General Public Prosecution Services v C*.

#### b. Judicial interaction

Citations are made of numerous UK cases in particular in relation to proportionality and its application in the context of possible infringements of family life in extradition contexts. In particular:

- R (On the application of Razgar) v Secretary of State for the Home Department [2004] 2 AC 368
- R (Ullah) v Special Adjudicator, Do v Immigration Appeal Tribunal [2004] 2 AC 323

Discussion of the German case of *General Public Prosecution Services v C* 1 Ausl. (24) 1246/2010 (OLG Stuttgart). Not followed for reasons outlined above in the summary of the judgment. Discussion of the Court of Justice's judgment in *Pupino* and its binding quality in Ireland.

#### c. Impact of the CJEU decision

Consistent interpretation

It is worth noting that in contrast to Fennelly J in case D above who concluded that the principle of conform interpretation of Framework Decisions as established in *Pupino* were binding, MacMenamin J in case O argued against the binding nature of *Pupino* upon Ireland. However, since a similar obligation exists in common law, but this was not decisive for the outcome of the case, it remains to be seen how Irish courts will argue this point in the future.

### 1.4 Limits to National Judges' Obligation to Interpret National Criminal Law in Conformity with EU Law

Within the field of criminal law, the principle of legality (Article 49 EU Charter) and the presumption of innocence (Article 48 EU Charter) are particularly strong. Hence, although, in general, national courts are obliged to interpret national law in conformity with EU law, the effects of EU law on the national legal order are still somehow limited within the field of criminal law. For example, EU law may not be interpreted in a way 'which would give rise to national implementing measures being applied retroactively or by analogy'.<sup>13</sup> In this respect, 'textualism and compliance with the principle of the legality of criminal offences and penalties (*nullum crimen, nulla poena sine lege*),'<sup>14</sup> are recognised both by national courts and by the Court of Justice.

In *Joined Cases C-387/02, C-391/02 & C-403/02 Berlusconi*,<sup>15</sup> the Court of Justice clearly established that EU Directives could not determine or increase criminal liability of accused persons.

#### ***Joined Cases C-387/02, C-391/02 & C-403/02 Berlusconi***

*78 In the light of all of the foregoing, the answer to the questions referred for preliminary ruling must be that, in a situation such as that in issue in the main proceedings, the First Companies Directive cannot be relied on as such against accused persons by the authorities of a Member State within the context of criminal proceedings, in view of the fact that a directive cannot, of itself and independently of national legislation adopted by a Member State for its implementation, have the effect of determining or increasing the criminal liability of those accused persons.*

Since then, with the coming into force of the Lisbon Treaty in 2009, the EU was provided with explicit criminal law competences.

## 2. Current Legal Bases for Harmonising Criminal Law Measures

With the coming into force of the Lisbon Treaty, the new criminal law competences, as well as the transformation of criminal law cooperation from a 'third pillar issue' to one area of cooperation

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<sup>13</sup> Lenaerts, K. and Gutierrez-Fons, J.A, To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice, Academy of European Law, Distinguished Lectures of the Academy, AEL 2013/9, p 13, with reference to the following cases: See, e.g., Case 63/83 *Kirk* [1984] ECR 2689, paras 21 and 22; Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, para. 44; *Joined Cases C-387/02, C-391/02 and C-403/02 Berlusconi and Others* [2005] ECR I-3565, paras 74 to 78, *E and F*, above n 1, para. 59.

<sup>14</sup> *Ibid*, p 13, with reference to the following cases: See, e.g., *Joined Cases C-74/95 and C-129/95 X* [1996] ECR I-6609, para. 25, and *Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, paras 215 to 219; Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, para. 49, and Case C-308/06 *Intertanko and Others* [2008] ECR I-4057, para. 70.

<sup>15</sup> *Joined Cases C-387/02, C-391/02 & C-403/02 Berlusconi*, EU:C:2005:270.

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among others, clearly shows the birth and establishment of the field of EU Criminal Law. Article 82 TFEU (on mutual recognition and criminal procedural harmonisation), Article 83 TFEU (on harmonisation of substantive criminal law), Article 86 (on the European Public Prosecutor) and Article 325 (on the protection of the financial interests of the union) are particularly important.

Amongst these, Article 83(1) TFEU provides the Union with a clear legal mandate to establish minimum rules concerning the definition of criminal offences and sanctions in the area of particular serious crime with a cross-border dimension. When carefully read, Article 83(1) may, however, have a limiting effect, since all the requirements stipulated in this Article need to be fulfilled when the Union legislature wishes to have recourse to this legal basis.

Much have been written about EU law competencies within EU Criminal Law,<sup>16</sup> but for the purposes of this Handbook, focus is set on whether and when the EU Charter is applicable. In short, where there is applicable EU secondary legislation, EU law, and the EU Charter is applicable also within the Member States.<sup>17</sup>

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<sup>16</sup> See above footnote 2.

<sup>17</sup> Article 51(1) of the Charter provides: The provisions of this 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. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.



## **PART 2: SPECIFIC ISSUES CONCERNING HARMONISING MEASURES BUILT ON MUTUAL TRUST AND MUTUAL RECOGNITION**

According to Article 82(1) TFEU, judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in Article 82(2) TFEU and in Article 83 TFEU. According to Article 82(2) TFEU, to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules.

There are a few issues concerning such harmonising measures built on mutual trust and mutual recognition worth lifting even if only briefly. Many but not all of the examples provided below concern the Framework Decision on the European Arrest Warrant (EAW FD),<sup>18</sup> but many of the examples of judicial interaction techniques are relevant also in relation to other instruments and situations.

### **3. Ex Officio**

Arguably, although applicable in theory, the question of whether national judges are obliged to take note of the EU Charter *ex officio*, depends on three factors: the EU law instrument itself, the national implementation, and specifics of the national legal orders. As exemplified by the Irish Supreme Court cases above, valuation has to be made by the national judge in each individual case.

### **4. Margin of Appreciation, Non-execution and Strengthened Duties of Co-operation**

Second, when it comes to the margin of appreciation, non-execution and strengthened duties of co-operation for national judges, the EAW FD and the possibility for the executing judicial authority to refuse to execute an EAW will serve as an illustrating example. The starting point is the EU law instrument itself. In this respect, the FD contains rules on mandatory non-execution (Article 3 EAW FD) as well as non-mandatory non-execution, in the FD and implementing measures (Article 4 EAW FD). Besides these, as recently clarified by the Court of Justice in Joined Cases C-404/15 and C-659/15 *Aranyosi and Căldăraru*,<sup>19</sup> the EAW FD should be interpreted in conformity with the EU Charter. As a result, in certain circumstances, the execution of an EAW must be postponed and, possibly, even refused with reference to Article 4 EU Charter (prohibition of inhuman or degrading

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<sup>18</sup> 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, was adopted before the Lisbon Treaty and subsequently not based on any Article in the TFEU.

<sup>19</sup> Joined Cases C-404/15 and C-659/15 *Aranyosi and Căldăraru*, EU:C:2016:198.

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treatment).<sup>20</sup> Arguably, in this case, the Court of Justice within the field of the EAW, gave substance to the limit of ‘exceptional circumstances’ that justify the non-operation of mutual recognition mechanisms.<sup>21</sup> The following three case sheets analysing cases from the Court of Justice and a Swedish District Court will provide examples of interaction between levels in general, and between EU law instruments and case law of the Court of Justice in particular, as well as providing illustrating examples of judicial dialogue of three different dimensions.

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<sup>20</sup> Cf Joined Cases C-411/10 and C-493/10 *NS and ME*, EU:C:2011:865 (migration cases). In this case the Court ruled that Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the ‘Member State responsible’ within the meaning of Regulation No 343/2003 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 that provision.

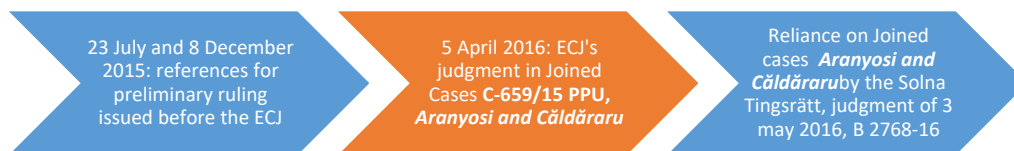
<sup>21</sup> See further N. Lazzarini, in the analysis of the case below.

*Casesheet 7.3 – Aranyosi and Căldăraru*<sup>22</sup>

**1. At a glance**

Area	Country	Referencet to EU law	Judicial dialogue technique	Legal and/or judicial actors	Remedy
<ul style="list-style-type: none"> <li>Criminal law - European Arrest Warrant</li> </ul>	<ul style="list-style-type: none"> <li>Germany</li> </ul>	<ul style="list-style-type: none"> <li>art. 4 CFREU</li> <li>EAW Framework decision</li> </ul>	<ul style="list-style-type: none"> <li>Mutual trust/mutual recognition</li> <li>Preliminary ruling</li> <li>Interpretation of EU legislation in conformity with the Charter</li> </ul>	<ul style="list-style-type: none"> <li>national court</li> <li>ECJ</li> <li>ECTHR</li> </ul>	<ul style="list-style-type: none"> <li>Interpretation of EU legislation in conformity with the Charter</li> <li>Duties of cooperation (sub specie of iexchange of information) between the State that issues the EAW and the State that should execute it)</li> </ul>

**2. Timeline**



**3. Case description**

Mr Aranyosi, a Hungarian national, and Mr Căldăraru, a Romanian national, were the addressees of two European arrest warrants (EAW), issued – respectively – by the Hungarian and Romanian authorities in order to execute a sentence (Aranyosi) or to exercise the criminal action (Căldăraru). The two men were arrested in Bremen, Germany.

Before the Hanseatisches Oberlandesgericht in Bremen (Higher Regional Court of Bremen), the Court that had to decide on their surrender to Hungary and Romania, Mr Aranyosi and Mr Căldăraru claimed that, in the event of surrender, they would be subject to conditions of detention in breach of Article 3 ECHR (“Prohibition of torture”, which corresponds to Article 4 of the EU Charter, “Prohibition of inhuman or degrading treatment”) and of the fundamental rights granted by EU law. They relied on judgments where the European Court of Human Rights had found Hungary and Romania to be in breach of Article 3 ECHR, because of the overcrowding of their prisons and the inhuman detention conditions therein. They also referred to a report issued by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

The national legislation transposing the EAW Framework Decision in the German legal order states that “mutual legal assistance shall be unlawful if contrary to the principles stated in Article 6 TEU”. Therefore, the national court considered that the surrender could be granted lawfully only if, under the EAW Framework decision, it was possible to make the surrender conditional on obtaining assurances by the issuing Member State on the detention conditions to which the persons concerned

<sup>22</sup> Prepared by Dr Nicole Lazzerini, University of Parma

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would have been subject to. Accordingly, the Higher Regional Court of Bremen decided to refer to the ECJ a reference for preliminary ruling, asking, in essence:

whether the national judicial authority requested to execute a European Arrest Warrant (EAW) may or shall refuse execution where there is solid evidence that detention conditions in the issuing Member State are incompatible with fundamental rights, in particular with Article 4 of the EU Charter, or, rather, the national judicial authority may or must make the surrender conditional on obtaining information from the issuing Member State showing that detention conditions are compatible with fundamental rights.

### Reasoning of the ECJ

The ECJ recalled that the principle of mutual recognition, on which the EAW system is based, presupposes the mutual confidence between the Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at EU level, particularly in the Charter. Indeed, save in exceptional circumstances, Member States shall consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by the Charter.

The EAW Framework Decision gives effect to the principle of mutual recognition by providing, in its Article 1(2) that Member States are in principle obliged to execute a EAW. The executing judicial authority must refuse to execute such a warrant only in the cases, exhaustively listed, of obligatory non-execution, laid down in Article 3 of the Framework Decision. Moreover, the optional non-execution grounds and the conditions on which the execution may be made subject are listed exhaustively in the Framework Decision (see Articles 4, 4a and 5).

The risk to be the subject of inhuman detention conditions does not correspond to any of the obligatory or optional non-execution grounds or to the conditions for suspension of the execution. Yet, the principle of mutual recognition can be limited “in exceptional circumstances”, and Article 1(3) of the Framework Decision points out that the same Framework Decision shall not have modify the obligation to respect fundamental rights as enshrined in, inter alia, the Charter. Article 4 of the Charter, concerning the prohibition of inhuman or degrading treatment or punishment, corresponds to Article 3 ECHR: this is an absolute and non-derogable provision, and so is Article 4 of the Charter.

According to the ECJ, Article 4 of the Charter does not imply that, where there exists objective, reliable, specific and properly updated evidence which highlights deficiencies as regards the detention conditions in the issuing Member State (systemic or generalised, affecting certain groups of people or certain places of detention), the executing national judicial authority shall tout court bring to an end the EAW procedure. Rather, such an authority has a duty to assess the existence of a risk that, in case of surrender, there may be a violation of Article 4 of the Charter in respect of the person concerned.

In particular, the requesting national judicial authority shall request to the judicial authority of the issuing Member State - pursuant to Article 15(2) of the EAW Framework Decision – to provide all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained in that Member State. A time limit for the receipt of the requested information may be fixed.

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If this assessment phase leads to excluding the existence of a risk that surrender may entail the violation of Article 4 of the Charter in respect to the person concerned, the executing national judicial authority shall go ahead with the surrender.

By contrast, if, in the light of the information received, the executing judicial authority finds that there exists a risk of violation of Article 4 of the Charter for the individual concerned, the execution of the EAW must be postponed until it obtains the supplementary information that allows it to discount the existence of such a risk.

Within this timeframe, the person concerned can be held in custody only insofar as the procedure was carried out in a sufficiently diligent manner, and taking into account that – in light of Article 52(1) of the Charter – any limitation to fundamental rights (such as Article 6 on the right to liberty and Article 48(1) on the presumption of innocence) must comply with the principle of proportionality. However, if the executing judicial authority decides to bring the detention to an end, it shall attach to the provisional release all necessary measures aimed to prevent the person concerned from absconding and to ensure that the material conditions necessary for the surrender remain fulfilled until the final decision on the execution of the EAW has been taken.

If the existence of the individual risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end

### **4. Analysis**

#### **a. Relation to the Scope of the Charter**

By relying on Article 4 of the Charter in combination with Article 1(3) of the Framework Decision, the ECJ gave substance – within the field of the EAW – to the limit of “exceptional circumstances” that justify the non-operation of mutual recognition mechanisms.

The interpretation of the EAW Framework Decision in light of the EU Charter led the ECJ to introduce – basically – a new situation where the execution of an EAW must be postponed and, possibly, even refused.

Moreover, in order to ensure the respect of the EU Charter, the ECJ strengthened the duties of cooperation between the Member State issuing the EAW and the Member State requested to execute it, with the view to establishing the existence of a serious risk of a breach of Article 4 of the Charter with respect to the addressee of a EAW.

It is also interesting to note that, whilst the national court referred the case to the ECJ because the main proceedings involved national provisions transposing in the German legal order the EAW Framework Decision, on close inspection the ECJ had to decide on the validity of the EAW Framework Decision itself: in light of the Charter. Indeed, by relying on the reference to the prevalence of EU fundamental rights on the EAW Framework Decision, contained in Article 1(3) of this latter, and by engaging in an operation of consistent interpretation of the Framework Decision with the Charter, the ECJ avoided having to declare the EU act invalid.

In a different field, notably the European Common Asylum System, an interesting case where the ECJ (Grand Chamber) avoided a declaration of invalidity of an EU act (notably, the Regulation

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343/2003, the so so-called Dublin II Regulation), by interpreting it in conformity with the EU Charter (and intensifying the duties of the Member States) is Joined cases C-411/10 and C-493/10, N.S., ECLI:EU:C:2011:865.

### **b. Judicial interaction**

This case involves at least three dimensions of judicial dialogue.

#### *I – Vertical dialogue national court/ECJ through the preliminary reference procedure*

The question for preliminary ruling issued by the Higher Regional Court of Bremen gave to the ECJ the occasion to interpret the EAW Framework Decision in compliance with EU fundamental rights, identifying a new situation where the execution of the EAW must be postponed and, eventually, refused.

#### *II – (Indirect) Horizontal dialogue ECJ/ECtHR through reference to the latter's case law*

The ECJ relied on the case-law where the European Court of Human Rights found that the detention condition in one of the High Contracting Parties amounted to a violation of Article 3 ECHR, in particular judgment of 8 January 2013, *Torreggiani and Others v. Italy*, app. nos, 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10, and 37818/10.

Article 4 of the Charter corresponds to Article 3 ECHR. Thus, the ECJ abided to the duty laid down by Article 52(3) of the Charter, whereby 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 (without prejudice to the possibility that a higher protection is granted under EU law).

#### *III – (Direct) Horizontal dialogue between national courts of the Member States issuing/executing the EAW*

The ECJ ensured the compatibility of the EAW system in a situation such as that of Mr Aranyosi and Mr Mr Căldăraru by strengthening the duties of cooperation between the national authorities of the Member State that is requested to execute the EAW and the Member State that issued the warrant.

### **c. Remedies**

The ECJ added a precision as regards the effective judicial protection of persons in the situation of Mr Aranyosi and Mr Căldăraru, by pointing out that the decision of the Bremen court to authorise the surrender, following to the assessment that no individual risk was at issue, would have not affected the possibility for the person(s) concerned, after the surrender, to challenge the lawfulness of the conditions of detention before the competent court of the Member State that issued the EAW

### **d. Impact of CJEU decision**

#### **Petruhhin**

The ECJ, deciding again in the Grand Chamber composition, relied on its judgment in *Aranyosi and Căldăraru* in its decision in Case C-185/15 *Petruhhin*, ECLI:EU:C:2016:630, concerning the request for extradition to a non-EU Member State of an EU citizen with the nationality of a different

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Member State than that receiving the request. Also in this case, the ECJ strengthened the duties of the authorities of the Member States to cooperate within the framework of the European Arrest Warrant mechanism, by relying on their duties to ensure the protection of the fundamental rights guaranteed by the Charter.’

*Casesheet 7.4 – Solna DC, Sweden* <sup>23</sup>

**1. At a glance**

Area	Country	Reference to EU law	Judicial dialogue technique	Legal and/or judicial actors
<ul style="list-style-type: none"> <li>• Criminal procedure</li> </ul>	<ul style="list-style-type: none"> <li>• Sweden</li> </ul>	<ul style="list-style-type: none"> <li>• Article 4 CFREU</li> <li>• EAW Framework decision</li> </ul>	<ul style="list-style-type: none"> <li>• Consistent interpretation</li> </ul>	<ul style="list-style-type: none"> <li>• CJEU</li> <li>• Solna District Court</li> </ul>

**2. Timeline**



**3. Case description**

A person was convicted of a crime in Romania. He was arrested in Sweden with regard to the European Arrest Warrant. The Swedish court was to decide whether this was a breach of the ECHR.

**4. Analysis**

**a. Role of the Charter**

The court referred to the judgments of *Aranyosi and Căldăraru*, stating that to refuse extradition with regard to Article 4 of the Charter and Article 3 of the ECHR, there has to be a real danger of a breach of basic human rights and that it is up to the executing Member State to search for information from the issuing Member State, to make sure that there is no such risk. The Swedish court finds that there are several cases from the European Court of Human Rights where the court has found that there have been breaches of Article 3 of the ECHR in Romanian prisons. According to the Swedish court, there are good reasons to believe that anyone serving time in a Romanian prison faces the risk of being exposed to treatment that would be in breach of Article 3 of the ECHR. Therefore, the extradition is refused. The court also considered a conditional extradition, if Romania could provide binding guarantees that Article 3 would not be overridden. Such a solution, however, was considered not compatible with the EU Court of Justice judgment C-399/11, *Melloni*.

<sup>23</sup> Prepared by Dr Erik Svensson, Uppsala University (UU)



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### **b. Judicial interaction**

The case falls within the scope of the Charter. The Swedish court uses Article 3 of the ECHR rather than Article 4 of the EU charter. Several cases from the European Court of Human rights are taken into consideration when the Swedish court decides whether the conditions in the Romanian prisons are acceptable or not.

### **c. Impact of the CJEU decision**

Consistent interpretation.

*Casesheet 7.5 – Petruhhin<sup>24</sup>*

**1. At a glance**

Area	Countries involved	Referencet to EU law	Judicial dialogue technique	Actors	Remedy
<ul style="list-style-type: none"> <li>•Criminal law - European Arrest Warrant and extradition</li> </ul>	<ul style="list-style-type: none"> <li>•Latvia</li> <li>•Estonia</li> <li>•Russia</li> </ul>	<ul style="list-style-type: none"> <li>•Article 4CFREU</li> <li>•Article 19 CFREU</li> <li>•EAW Framework decision</li> </ul>	<ul style="list-style-type: none"> <li>•Mutual trust/mutual recognition</li> <li>•Preliminary ruling</li> </ul>	<ul style="list-style-type: none"> <li>•national court</li> <li>•ECJ</li> <li>•ECtHR</li> </ul>	<ul style="list-style-type: none"> <li>•Interpretation of EU legislation in conformity with the Charter</li> <li>•Duties of cooperation</li> </ul>

**2. Timeline**



**3. Case description**

Mr Petruhhin, an Estonian national, was arrested and put in provisional custody in Latvia following to a priority notice by Europol. The Latvian authorities received an extradition request from the Office of the Prosecutor-General of the Russian Federation, stating that Mr Petruhhin was accused of attempted large-scale, organised drug-trafficking. Under Russian law, that offence is punishable with a term of imprisonment of between 8 and 20 years.

Against the decision to authorise his extradition to Russia, Mr Petruhhin contended that, in light of the treaty on judicial assistance and judicial relations between the Republic of Estonia, the Republic of Latvia and the Republic of Lithuania (1992), he should enjoy in Latvia the same rights as Latvian citizens; hence, he could not be extradited to Russia.

According to the Supreme Court of Latvia, who had to decide on the appeal, neither this Treaty nor the similar Treaty concluded by Latvia with the Russian Federation did prevent Mr Petruhhin’s extradition, because those instruments granted protection only against extradition to a third country of Latvian nationals. Yet, the Supreme Court wondered whether the lack of protection of Union citizens against extradition was contrary to the essence of European citizenship (a notion introduced by the CJEU in its judgment on Case C-34/09 Zambrano). Accordingly, it decided to ask the CJEU, through the preliminary reference procedure:

<sup>24</sup> Casesheet prepared by Dr Nicole Lazzarini, University of Parma

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“whether Article 18 TFEU and Article 21 TFEU must be interpreted as meaning that, for the purposes of applying an extradition agreement concluded between a Member State and a third State, nationals of another Member State must benefit from the rule which prohibits the extradition by the first Member State of its own nationals”.

In addition, the Latvian Supreme Court also asked

“whether, where the requested Member State intends to extradite a national of another Member State at the request of a third State, that first Member State must verify that the extradition will not prejudice the rights referred to in Article 19 of the Charter and, as the case may be, which criteria must be taken into account for the purposes of that verification”.

### Reasoning of the CJEU

As regards the first question, the Court observed, as a starting point, that the rules on extradition fall within the competence of the Member States, unless the Union entered into an international agreement with the third country concerned. However, as was stated in the judgment in Case C-135/08 Rottmann, in situations covered by EU law, the national rules concerned must have due regard to the latter. Since Mr Petruhhin was an Estonian citizen who, had exercised his right to move freely within the European Union, his situation fell within the scope of application of the Treaties, so that he could rely on Article 18 TFEU, which sets out the principle of non-discrimination on grounds of nationality. The Latvian provisions on the prohibition of extradition of Latvian nationals indeed resulted into an unequal treatment of the citizens of other Member States.

That said, the Court recalled, however, that such an unequal is not prohibited (only) if it is based on objective considerations and is proportionate to the legitimate objective of the national provisions concerned. In this case, the legitimate objective pursued is that to prevent the risk of impunity. The rule of the non-extradition of a State’s own nationals is indeed counterbalanced by the circumstance that the requested Member State has the possibility, generally, to prosecute such nationals for serious offences committed outside its territory, whereas as a rule this possibility does not exist with respect to other States’ nationals.

This consideration, however, did not lead the Court to conclude that the national provisions at stake were justified. Rather, the CJEU recalled that, in light of Article 4(3) TEU, “the EU and the Member States are, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties” (para 42). As regards surrender procedures, this cooperation is shaped by the European Arrest Warrant Framework Decision (2002/584). The Court thus held that, “in order to safeguard EU nationals from measures liable to deprive them of the rights of free movement and residence provided for in Article 21 TFEU, while combatting impunity in respect of criminal offences, [the Member States shall] apply all the cooperation and mutual assistance mechanisms provided for in the criminal field under EU law”. In particular, in a case such as that of Mr Petruhhin, the Member State that receives an extradition request from a third State concerning a citizen of another Member State must inform this latter and, should that Member State so request, surrender that citizen to it, in accordance with the provisions of the EAW, provided that that Member State has jurisdiction, pursuant to its national law, to prosecute that person for offences committed outside its national territory.

Coming to the second question, the Court pointed out that the decision of a Member State to extradite a Union citizen, in a situation such as that of the main proceedings, falls within the scope

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of the Charter (according to Article 51, par. 1), because it comes within the scope of Articles 18 TFEU 21 TFEU. The requested Member State is therefore bound to respect the Charter, in particular its Article 19, whereby “no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment”.

Relying on its previous judgment in Joined Cases C-404/15 and C-659/15 PPU Aranyosi and Căldăraru, the Court affirmed that, “in so far as the competent authority of the requested Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals in the requesting third State, it is bound to assess the existence of that risk when it is called upon to decide on the extradition of a person to that State” (para. 58).

To do this, it must rely “on information that is objective, reliable, specific and properly updated[, which] may be obtained from, inter alia, judgments of international courts, such as judgments of the ECtHR, judgments of courts of the requesting third State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the United Nations” (para 59); by contrast, the fact that the State concerned acceded to international treaties guaranteeing respect for fundamental rights is not as such sufficient to exclude the existence of such a risk. In the latter respect, the Court relied on the judgment of the European Court of Human Rights of 28 February 2008 in Saadi v. Italy.

Accordingly, the Court replied to the second preliminary question in the sense that “where a Member State receives a request from a third State seeking the extradition of a national of another Member State, that first Member State must verify that the extradition will not prejudice the rights referred to in Article 19 of the Charter”.

### **4. Analysis**

#### **a. Role of the Charter**

The Charter was relevant because Mr Petruhhin was in Latvia after exercising his right to free movement under Article 21 TFEU, and the national provisions at issue created an unequal treatment between Latvian nationals and nationals of other Member States, so that Article 18 TFEU (prohibition of nationality discrimination within the scope of the Treaties could be invoked). The main outcome of the judgment is the extension of the reasoning brought forward by the Court in the previous judgment in Joined Cases C-404/15 and C-659/15 PPU Aranyosi and Căldăraru, which now applies also to cases of request of extradition of nationals of other Member States submitted by third countries. It must be stressed, however, that the practical application of Aranyosi and Căldăraru is not without problems, particularly from the point of view of national judges, and notably when these come to the conclusion that there exists a risk of violation of Article 4 or 19 of the Charter, or this risk cannot be excluded within a reasonable time (see more in the case sheet on Aranyosi and Căldăraru in this Handbook).

#### **b. Judicial interaction**

This case involves at least three dimensions of judicial dialogue.

*I – Vertical dialogue national court/ECJ through the preliminary reference procedure*

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The question for preliminary ruling issued by the Latvian Supreme Court gave to the CJEU the occasion to strengthen – by relying on the EU citizenship and the Charter – the duties of cooperation of the Member States in the context of extradition procedures, which in principle fall outside the scope of EU law.

### *II – (Indirect) Horizontal dialogue ECJ/ECtHR through reference to the latter’s case law*

The judgment in *Petruhhin* is strongly based on the previous judgment in *Aranyosi and Căldăraru* CJEU, where the CJEU had relied on the case-law of the European Court of Human Rights interpreting Article 3 ECHR (which corresponds to Article 4 of the Charter).

Moreover, some case law of the ECtHR interpreting Article 3 ECHR was codified in Article 19 of the Charter. Thus, also this provision can be regarded as a “corresponding provision” under Article 52(3) of the Charter. In *Petruhhin*, the CJEU indeed referred to the judgment of the European Court of Human Rights of 28 February 2008 in *Saadi v. Italy* when interpreting Article 19 of the Charter to the effect that the risk of its violation cannot be excluded simply on the ground that the State concerned acceded international agreements on the protection of fundamental rights.

### *III – (Direct) Horizontal dialogue between national courts of the Member States issuing/executing the EAW*

As anticipated under I, the CJEU imposed specific duties of cooperation between the Member States authorities, in order to ensure that the right connected to European citizens are not frustrated.

#### **c. Remedies dimension**

One of the most important aspects of the judgment is that the CJEU, by relying on European citizenship and the connected rights (in particular the prohibition of nationality discrimination), extended the duties of cooperation of the Member States in the context of extradition procedures, which, in principle, fall outside the scope of EU law.

### 5. The Principle of Procedural Autonomy and Autonomous Concepts of EU Law

A third issue of particular interest concerning harmonising measures built on mutual trust and mutual recognition is the complicated intermixture of the sometimes illusory division of competence between levels in general, and the actual relationship between the principle of national procedural autonomy and autonomous concepts of EU law in particular. Besides, even though questions of fact are in principle the responsibility of national courts, in reality there is certainly a grey zone which requires more attention. In this respect, the following cases will exemplify how the interpretation of specific provisions of EU Law determines and actually limits the room for manoeuvre of the Member States but also the reach of the EU Charter.

In *Case C-261/09 Mantello*,<sup>25</sup> which concerned the possibility for the executing judicial authority to refuse to execute a European arrest warrant, the Court of Justice referred to the concept of ‘same acts’ as an autonomous legal concept that national courts have to comply with when applying its national law.

#### ***Case C-261/09 Mantello***

45 *In that regard, a requested person is considered to have been finally judged in respect of the same acts within the meaning of Article 3(2) of the Framework Decision where, following criminal proceedings, further prosecution is definitively barred (see, by analogy, Joined Cases C-187/01 and C-385/01 Gözütok and Brüggge [2003] ECR I-1345, paragraph 30, and Case C-491/07 Turanský [2008] ECR I-11039, paragraph 32) or where the judicial authorities of a Member State have adopted a decision by which the accused is finally acquitted in respect of the alleged acts (see, by analogy, Van Straaten, paragraph 61, and Turanský, paragraph 33).*

46 *Whether a person has been ‘finally’ judged for the purposes of Article 3(2) of the Framework Decision is determined by the law of the Member State in which judgment was delivered.*

47 *Thus, a decision which, under the law of the Member State which instituted criminal proceedings against a person, does not definitively bar further prosecution at national level in respect of certain acts cannot, in principle, constitute a procedural obstacle to the possible opening or continuation of criminal proceedings in respect of the same acts against that person in one of the Member States of the European Union (see, by analogy, Turanský, paragraph 36).*

48 *In that regard, as is the case with the cooperation arrangements provided for under Article 57 of the CISA, Article 15(2) of the Framework Decision allows an executing judicial authority to request from the judicial authority of the Member State in whose territory a judgment has been delivered legal information on the precise nature of that judgment in order to decide whether, under the national law of that State, the judgment must be considered as having definitively barred further prosecution at national level (see, by analogy, Turanský, paragraph 37).*

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<sup>25</sup> Case C-261/09 *Mantello*, EU:C:2010:683.

## MODULE 7 – JUDICIAL DIALOGUE FURTHERING THE APPLICATION OF THE EU CHARTER IN CRIMINAL LAW

49 *In the main proceedings, the referring court specifically used the cooperation arrangements provided for in Article 15(2) of the Framework Decision. In its reply, the issuing judicial authority expressly stated that, under Italian law, the accused had been finally judged in respect of the individual acts consisting in illegal possession of drugs but that the criminal proceedings covered by the arrest warrant were based on different acts related to organised crime offences and other offences of illegal possession of drugs intended for resale, which were not covered by its judgment of 30 November 2005. Thus, although the investigating authorities held certain factual information concerning those offences, it was clear from the reply given by the issuing judicial authority that the first judgment of the Tribunale di Catania could not be regarded as having definitively barred further prosecution at national level in respect of the acts referred to in the arrest warrant issued by it.*

50 *Consequently, in circumstances such as those at issue in the main proceedings, where the issuing judicial authority, in response to a request for information within the meaning of Article 15(2) of the Framework Decision made by the executing judicial authority, expressly stated and explained that its earlier judgment did not cover the acts referred to in the arrest warrant issued by it and therefore did not preclude the criminal proceedings referred to in that arrest warrant, that executing judicial authority was obliged to draw all the appropriate conclusions from the assessments made by the issuing judicial authority in its response.*

51 *Taking all the foregoing considerations into account, the answer to be given to the referring court is that, for the purposes of the issue and execution of a European arrest warrant, the concept of ‘same acts’ in Article 3(2) of the Framework Decision constitutes an autonomous concept of European Union law. In circumstances such as those at issue in the main proceedings where, in response to a request for information within the meaning of Article 15(2) of that Framework Decision made by the executing judicial authority, the issuing judicial authority, applying its national law and in compliance with the requirements deriving from the concept of ‘same acts’ as enshrined in Article 3(2) of the Framework Decision, expressly stated that the earlier judgment delivered under its legal system did not constitute a final judgment covering the acts referred to in the arrest warrant issued by it and therefore did not preclude the criminal proceedings referred to in that arrest warrant, the executing judicial authority has no reason to apply, in connection with such a judgment, the ground for mandatory non-execution provided for in Article 3(2) of the Framework Decision.*

Likewise, in *Case C-129/14 Spasic*,<sup>26</sup> the Court of Justice underlined the importance of an autonomous and uniform application of provisions which do not make reference to the law of the Member States, even in the absence of harmonisation of the criminal laws of the Member States, having regard to the context of the provision of which it forms part and the objective pursued.<sup>27</sup>

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<sup>26</sup> Case C-129/14 *Spasic*, EU:C:2014:586.

<sup>27</sup> Case C-129/14 *Spasic*, EU:C:2014:586, para 79.

In this respect, the Court held that where a custodial sentence and a fine are imposed as principal penalties (as in Mr Spasic’s case), the payment of the fine alone is not sufficient to consider that the penalty has been enforced or is in the process of being enforced within the meaning of the CISA.

***Case C-129/14 Spasic***

*The second question*

75 *By its second question, the referring court asks, in essence, whether Article 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 sufficient to consider that the penalty ‘has been enforced’ or is ‘actually in the process of being enforced’ within the meaning of that provision.*

76 *In order to answer that question, it must first be noted that the substantive and procedural criminal laws of the Member States have not been harmonised at EU level.*

77 *The ne bis in idem principle set out in Article 54 CISA is intended not only to prevent, in the area of freedom, security and justice, the impunity of persons definitively convicted and sentenced in the European Union but also to ensure legal certainty through respect for decisions of public bodies which have become final, in the absence of harmonisation or approximation of the criminal laws of the Member States.*

78 *In the context of the main proceedings, as the Italian government confirmed at the hearing, Mr Spasic was sentenced to two principal penalties: a custodial sentence and a fine.*

79 *Even in the absence of harmonisation of the criminal laws of the Member States, the need for uniform application of EU law requires, according to settled case-law, that a provision which does not make reference to the law of the Member States must be given an autonomous and uniform interpretation throughout the European Union, having regard to the context of the provision of which it forms part and the objective pursued (see, to that effect, Case C-436/04 van Esbroeck EU:C:2006:165, paragraph 35, Case C-261/09 Mantello EU:C:2010:683, paragraph 38, and Case C-60/12 Baláz EU:C:2013:733, point 26).*

80 *Although Article 54 CISA lays down the condition, using the singular, that the ‘penalty ... has been enforced’, that condition clearly covers the situation where two principal punishments have been imposed, such as those at issue in the main proceedings, namely a custodial sentence and a fine.*

81 *A different interpretation would render the ne bis in idem principle set out in Article 54 CISA meaningless and would undermine the effective application of that article.*



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82 *It must be concluded that, since one of the two penalties imposed has not been ‘enforced’, within the meaning of Article 54 CISA, that condition cannot be regarded as having been fulfilled.*

83 *As regards the question whether the situation at issue in the main proceedings fulfils the condition, also laid down in Article 54 CISA, that the *ne bis in idem* principle is applicable if the penalty is ‘actually in the process of being enforced’, it is not disputed that Mr Spasic has not even begun to serve his custodial sentence in Italy (see, to that effect, Kretzinger EU:C:2007:441, paragraph 63).*

84 *As regards the two principal punishments, it also cannot be considered that, as a result of the payment of the fine, the penalty is ‘actually in the process of being enforced’, within the meaning of Article 54 CISA.*

85 *In view of the foregoing, the answer to the second question is that Article 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.*

In *Spasic*, the Court of Justice also held that the additional enforcement condition laid down in the Convention Implementing the Schengen Agreement (CISA) constitutes a limitation of the *ne bis in idem* principle that is compatible with the Charter of Fundamental Rights.<sup>28</sup> The CISA provides that a person whose trial has been finally disposed of in one State may not be prosecuted in another State for the same acts (the *ne bis in idem* principle). However, the CISA specifies that the *ne bis in idem* principle is applicable only if the penalty imposed has been enforced, is actually in the process of being enforced, or can no longer be enforced under the laws of the sentencing State. Although the EU Charter does not make any express reference to such a condition, the explanations relating to the Charter make express reference, as regards the *ne bis in idem* principle, to the CISA, with the result that the latter lawfully limits the *ne bis in idem* principle enshrined in the Charter.<sup>29</sup>

Moreover, the Court considered that the enforcement condition laid down in the CISA does not call into question the *ne bis in idem* principle as such, since its only purpose is to avoid a situation in which persons finally convicted in a Member State go unpunished. The Court further considered that the enforcement condition is proportional to the objective pursued (ensuring a high level of security within the area of freedom, security and justice) and did not go beyond what is necessary to prevent a situation in which convicted persons go unpunished.

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<sup>28</sup> Case C-129/14 *Spasic*, EU:C:2014:586.

<sup>29</sup> See further Gullicksson, M., on *Ne bis in idem*, Manuscript for Doctoral Dissertation, University of Uppsala, 2018.

**6. *Ne bis in idem* and Disapplication of National Law**

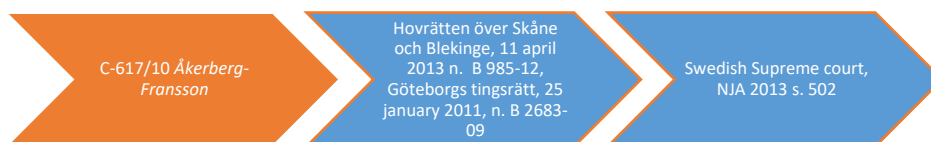
Article 50 of the Charter of Fundamental Rights of the EU, amongst other instruments, enshrines the *ne bis in idem* principle: ‘No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.’ The following cases provide some examples where national law and previous national case law have been disapplied by national courts with reference to the EU Charter and case law of the Court of Justice.

**Casesheet 7.6 – Gothenburg DC, Skåne and Blekinge CoA, Sweden<sup>30</sup>**

**1. At a glance**

Area	Country	Reference to EU law	Judicial dialogue technique	Legal and/or judicial actors
<ul style="list-style-type: none"> <li>• Criminal procedure</li> </ul>	<ul style="list-style-type: none"> <li>• Sweden</li> </ul>	<ul style="list-style-type: none"> <li>• Ne bis in idem, Article 50 CFR</li> </ul>	<ul style="list-style-type: none"> <li>• Consistent interpretation</li> </ul>	<ul style="list-style-type: none"> <li>• CJEU</li> <li>• Gothenburg District Court</li> <li>• Skåne and Blekinge Court of Appeal</li> </ul>

**2. Timeline**



**3. Case description**

The two cases from the Swedish lower courts were both part of the so called “lower court rebellion” with regard to the Swedish Supreme Court’s interpretation of the ne bis in idem rule, which ended with NJA 2013 s. 502, through which the Supreme Court adapted its stance to the views expressed by the European Court of Justice in Case C-617/10, Åkerberg Fransson.

In the case from the Gothenburg district court (Göteborgs tingsrätt dom den 25 januari 2011 i mål B 2683-09) the defendant was prosecuted for grave tax crime, but a tax surcharge had already been imposed for the same circumstances as those constituting the crime.

The case from Skåne and Blekinge Court of appeal (Hovrätten över Skåne och Blekinge dom den 11 april 2013 i mål B 985-12) was very similar. A private party was prosecuted for grave tax crime in respect of incorrect information, wilfully submitted in tax revenues, on value added tax charged by that party. However, a tax surcharge had already been imposed for the same act.

**4. Analysis**

**a. Role of the Charter**

i) In the cases from Gothenburg District Court, the court concluded that EU law, and in particular Article 50 of the Charter, was applicable to the case. The District Court also noted, pursuant to

<sup>30</sup> Prepared by Dr Erik Svensson, UU, based on templates written by Dr Magnus Strand, UU

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Article 6 TEU, that the Charter had the same legal value as the EU Treaties and that it therefore was a superior norm to Swedish national legislation. Accordingly, the District Court held, the Charter had primacy over Swedish law, notwithstanding the qualifications to the setting aside of statutory law laid down in the Swedish Instrument of Government (a constitutional act).

The District Court held that it was contrary to EU law to try or to convict the defendant for tax crime as a tax surcharge had already been imposed for the same action as constituted the crime. The District Court therefore rejected the prosecution for grave tax crime brought before it.

ii) In the case from the Skåne and Blekinge Court of Appeal, the court recognised that Article 4 of the 7th Amendment ECHR and Article 50 Charter prohibit double trials and punishments for the same act. The Court of Appeal also noted that, under Article 51 Charter, the Charter applies when Member States apply Union law but does not extend the scope of application of Union Law. The Court also noted Article 52(3) Charter according to which Charter rights having an equivalent in the ECHR shall have the same meaning and scope as those in the ECHR.

The Court of Appeal cited national case law according to which the Swedish system of penalising incorrect tax information with both a tax surcharge and criminal liability was considered compatible with the ECHR. However, the Court continued, more recent ECtHR case law would support no other conclusion than to consider the two proceedings as relating to the same crime. By reason of Article 52(3) Charter, the Court held that the ECJ would likely interpret the law in the same way. The Court of Appeal thus concluded that the imposition of a tax surcharge and the prosecution for tax crime were double proceedings relating to the same act.

The Court of Appeal continued to cite case C-617/10 Åkerberg Fransson and to consider the reasoning of the ECJ in that case. The Court of Appeal held that the Swedish system with both a tax surcharge and criminal liability for the same incorrect information was called into question by that ECJ judgment. In that regard, the Court of Appeal recognised that the prosecution brought before it related to value added tax rules derived from Directive 2006/112/EC. Thus the case was within the scope of Union law, and Article 50 Charter was applicable in parallel with Article 4 7th Amendment ECHR.

Citing relevant ECtHR case law, the Court of Appeal came to conclude that the tax surcharge imposed on the defendant was a criminal penalty within the meaning of the ECHR. In light of that case law, and in light of the judgment of the ECJ in case C-617/10 Åkerberg Fransson, the Court of Appeal held that the imposition of the tax surcharge barred any subsequent prosecution for tax crime in respect of the same act. Therefore, the Court of Appeal dismissed the prosecution.

### **b. Judicial interaction**

In both cases, there was a disapplication of national case law in favour of interpretation consistent with EU law.

### **c. Impact of the CJEU decision**

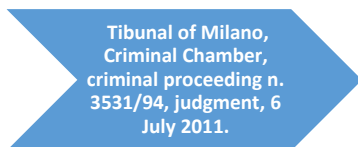
The Swedish lower courts used the decision from the CJEU in Åkerberg Fransson to dismiss earlier Swedish case law.

*Casesheet 7.7 – Criminal first instance court, Italy<sup>31</sup>*

**1. At a glance**

Area	Country	Referencet to EU law	Judicial dialogue technique	Legal and/or judicial actors
<ul style="list-style-type: none"> <li>Criminal procedure</li> </ul>	<ul style="list-style-type: none"> <li>Italy</li> </ul>	<ul style="list-style-type: none"> <li>Article 50 CFREU</li> <li>Convention Implementing the Schengen Agreement</li> <li>EAW Framework agreement</li> </ul>	<ul style="list-style-type: none"> <li>Consistent interpretation</li> </ul>	<ul style="list-style-type: none"> <li>Tribunale di Milano</li> </ul>

**2. Timeline**



**3. Case description**

The defendants were two EU citizens who had been tried and convicted in Germany, their country of nationality, for the murder of an Italian national. The offence was committed in Italy, thus Italian authorities had started a criminal proceeding.

However, since the sentence had already been served in Germany, the defendants and even the State prosecutor claimed the application of the principle of ne bis in idem and the disapplication of Article 7 of Law n. 388/1993.

**4. Analysis**

**a. Role of the Charter**

At the outset, the court focused on the principle of ne bis in idem in Italian law: it is a fundamental principle, whose scope has progressively become wider. For example, not only final decisions fall within its scope of application, but also the cases of lis pendens.

As the Tribunal of Milano underscored, the principle of ne bis in idem prevails on some principles of the Italian legal order such as territoriality, provided by Article 11 of the Italian Penal Code. Italian case law has recognized it as a general principle of the national legal order - therefore it offers an essential support for interpretation, in accordance with Article 12 of the “Preleggi”.

At the international level, the principle of ne bis in idem is generally recognized as a fundamental right by many sources – such as Article 4 of Protocol Nr. 7 to the ECHR - that the court recalled.

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<sup>31</sup> Prepared by Dr Erik Svensson, UU, based on template prepared by University of Cagliari in the CharterClick! Project, available at <http://www.charterclick.eu/>.

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The *ne bis in idem* principle is enshrined in Article 50 of the Charter and is often contemplated in the EU framework: the Convention Implementing the Schengen Agreement (CISA) is relevant to the case. It deals with the principle of *ne bis in idem* at Articles 54 and 55, and allows some reservations that States Parties can make, including the case where “the acts to which the foreign judgment relates took place in whole or in part in its own territory”.

Italy made this reservation upon the ratification of the CISA, by Law n. 388/1993. However, because a common judicial area was created, based on the principles of mutual trust and mutual recognition of decisions in criminal matters, reservations have to be interpreted strictly.

A similar view was expressed also by the ECJ in its case law. ECJ, judgment of 11 February 2003, Criminal proceedings against Hüseyin Gözütok and Klaus Brügge, C-187/01 and C-385/01, 2003 I-01345, ECLI:EU:C:2003:87; ECJ, judgment of 28 September 2006, Criminal proceedings against Giuseppe Francesco Gasparini and Others, C-467/04, 2006 I-09199, ECLI:EU:C:2006:610; ECJ, judgment of 11 December 2008, Klaus Bourquain, C-297/07, 2008 I-09425, ECLI:EU:C:2008:708 are emblematic rulings in this respect.

The Programme of measures to implement the principle of mutual recognition of decisions in criminal matters has expressed the purpose of reconsidering the limitations of the *ne bis in idem* principle, especially the scope for making reservations allowed under Article 55 and Articles 54 to 57 of the CIAS. It helps creating an area of freedom, security and justice in the EU.

The European Arrest Warrant, governed by the Framework Decision 2002/584/JHA, plays an essential role. The court stressed that Article 3(2) of the Framework Decision provides that the surrender of the requested person can be refused on grounds of the *ne bis in idem* principle. It provides 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” (similarly to Article 54 of the CISA) non-execution of the European Arrest Warrant is mandatory.

Law n. 69/2005, which implemented the Framework Decision into the domestic order, contemplates the same provision. The Framework Decision, thus, enshrines an absolute duty to refuse to surrender the requested person where it undermines the *ne bis in idem* principle; this duty prevails on the reservations allowed by Article 55 of the CISA.

The court assessed this issue thoroughly. At first, it underscored that this is a settled view at EU level (see Framework Decision 2008/909/JHA and the Opinion of General Attorney Ruiz-Jarabo Colomer in the case of Van Straaten, C-150/05). Then, it focused on the Charter, after making the premise that the Lisbon Treaty has created a common area of freedom, security and justice and that it pursues the aim of the approximation of national legislations, in accordance with Article 82 TFEU. *Ne bis in idem* principle is essential for achieving these goals and for States’ cooperation. The Charter has recognized the absolute nature of the *ne bis in idem* principle and no derogation is allowed. It entails mutual recognition of the decisions issued within the EU, as Member State share the same general principles and the same patterns to protect fundamental rights at EU level. After the Lisbon Treaty, the Charter has the same legal value as the Treaties: thus, it is a primary source of EU law and the *ne bis in idem* principle it enshrines applies directly at the domestic level. It is also derives from the primacy of EU law, which entails the conforming interpretation and, when it is not possible, the disapplication of the conflicting national legislation. The transitory provisions of

## MODULE 7 – JUDICIAL DIALOGUE FURTHERING THE APPLICATION OF THE EU CHARTER IN CRIMINAL LAW

the Lisbon Treaty do not affect this view, which led the court to the conclusion that the derogations allowed and foreseen by Article 55 CISA do not apply to Article 50 of the Charter.

The court recalled that the *ne bis in idem* is enshrined in the Schengen acquis; therefore, the national legislation relying on the derogations allowed by Article 55 of the CISA did no longer apply as it was at odds with the principle at issue. The court pointed out that *ne bis in idem* is an EU citizens' fundamental right according to Article 6(2) TEU.

This view is in line with the Explanation on Article 50 of the Charter, which clarifies that the principle applies also to the relations between Member States. The limitations to the exercise of the rights recognised by the Charter, that Article 52(1) allows, does not apply to the principle at issue. In particular, derogations allowed by Article 55 of the CISA do not seem to help pursuing Union's interest and are at odds with fundamental rights' essence. Derogations do not apply anymore, as the Amsterdam Treaty incorporated the CISA (as part of the Schengen acquis) into EU law but not States' reservations.

To conclude, Article 50 of the Charter applied to the case. In accordance with the *ne bis in idem* principle, the defendants could not be tried before the Italian court.

### **b. Judicial interaction**

The Tribunal of Milano concluded that the case fell inside the Charter's scope of application: the court disapplied the relevant national provision, namely Article 7 of Law n. 388/1993 – which provided the derogations allowed by Article 55 of the CISA -because it was at odds with the principle of *ne bis in idem* enshrined in Article 50 of the Charter.

The key point of the court's legal reasoning was that the Charter was considered directly applicable in the domestic legal order, as it is a primary source of EU law in accordance with Article 6 of the TEU. Indeed, this provision states that the Charter has the same legal value as the Treaties.

It is necessary to recall that Law n. 388/1993 ratified and implemented into the Italian legal order the Convention on the Implementation of the Schengen Agreement (CISA), whose Articles 54 and 55 were relevant to the case.

In fact, as Article 54 foresees, the defendants had already been tried and convicted for the same offence by the authorities of another Contracting Party and the sentence had been served.

As stated in the previous Section, the court had thoroughly set out the reasons why the derogations that Italy had relied on in accordance with Article 55 of the CISA, making the pertinent reservations upon the ratification of the Convention, did not apply anymore at both European and national level.

The court stated that principle of *ne bis in idem* prevailed on these derogations, because it is enshrined in the Charter and, thus, in an EU law primary source and, therefore, it disapplied Article 7 of Law n.388/1993.

### **7. The Harmonised Field of Law and Decisions in Absentia**

By judgment of 29 January 2013 the Court of Justice in case C-396/11 *Radu*,<sup>32</sup> held that the EU Charter does not allow a refusal to execute an EAW on the basis that the requested person was not heard by the issuing authority. The outcome achieved on the national level was consistent with the decision of the Court of Justice as the High Court ordered the execution of the EAW and the surrender of the requested person. At the same time, neither the Court of Appeal nor the High Court considered closely the guidance of the Court of Justice. More than that, the High Court analysis of the ruling of the Court of Justice is limited to a brief mentioning of the referral without any further consideration to the latter. As a result, the following case sheet highlights the multifaceted relationship between the Court of Justice and national courts, even in cases where the outcome of the rulings seem to correspond and the factual circumstances within the harmonised field of law fall within the scope of application of the EU Charter.

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<sup>32</sup> C-396/11 *Radu*, EU:C:2013:39.



**Casesheet 7.8 – Radu** <sup>33</sup>

**1. At a glance**

Area	Country	Referencet to EU law	Judicial dialogue technique	Legal and/or judicial actors
<ul style="list-style-type: none"> <li>• Criminal procedure</li> </ul>	<ul style="list-style-type: none"> <li>• Romania</li> </ul>	<ul style="list-style-type: none"> <li>• Article 6 CFREU</li> <li>• Article 48 CFREU</li> <li>• EAW Framework decision</li> </ul>	<ul style="list-style-type: none"> <li>• Consistent interpretation</li> </ul>	<ul style="list-style-type: none"> <li>• CJEU</li> <li>• Court of Appeal Constanta</li> <li>• The High Court of Romania</li> </ul>

**2. Timeline**



**3. Case description**

The dispute arose before the Court of Appeal of Constanța, which was requested to admit the execution of four EAWs issued by German authorities against Mr Radu. Mr. Radu did not consent to his surrender and in order to avoid the execution of the warrants used two instruments. First, R.C.V. invoked the exception of unconstitutionality of provisions of the national law implementing the EAW Framework Decision 2002/584/JHA. He argued that these provisions violate Art 23(5) of the Constitution (preventive arrest during criminal investigations) and Art 24(1) (the right to a fair trial), as well as Art 6(3) ECHR concerning the rights of the accused. The Constitutional Court rejected the exception of unconstitutionality by decision nr.1290/14.10.2010. Second, R.C.V. requested the Court of Appeal of Constanta to refer a preliminary reference to CJEU.

In this context the Court of Appeal Constanta referred a preliminary question to the ECJ asking the EU court whether national courts have the right to decide on the conformity of EAW with fundamental rights and, if this is not the case, to refuse execution, even if such a cause of refusal is neither provided by the Framework Decision 2002/584/JHA nor by the national implementing law.

The CJEU by judgment of 29 January 2013 of Grand Chamber (C-396/11) held that the Charter does not allow a refusal to execute an EAW on the basis that the requested person was not heard by the issuing authority.

**4. Analysis**

**a. Role of the Charter**

<sup>33</sup> Prepared by Dr Erik Svensson, UU, based on template prepared by Dr. Nicole Lazzarini, University of Parma, for CharterClick! Project, available at <http://www.charterclick.eu/>.

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Following the preliminary ruling of the CJEU on January 2013 (C-396/11), the referring Court of Appeal Constanta, by Decision no. 26/P/11.03.2013, disregarded the guidance of the ECJ and rejected the execution of the four EAWs and the surrender of Mr Radu.

For one of the warrants, the Court of Appeal based its refusal on the *ne bis in idem* principle, since R.C.V. had been already sentenced for the same act by the Romanian authorities and was serving the sentence (see Article 3 (2) EAW Framework Decision 2002/584/JHA, grounds for mandatory non-execution).

For the other three warrants, the Court of Appeal based its refusal on two main arguments: First, the Court reasoned that the principle of mutual recognition and the application of EAW Framework Decision 2002/584/JHA is subject to the limits of Article 6 TEU and the EU Charter. As such, the Court of Appeal appreciated that a judicial authority of the executing state might refuse the surrender and execution of an EAW in exceptional cases, other than the ones limitatively provided for by the EAW Framework Decision 2002/584/JHA and the national transposing norm. The respect of fundamental rights was appreciated such an exceptional case.

Second, the Court of Appeal held that the surrender would constitute a disproportionate interference with the right to liberty and right to family life, taking into account the long period of time between the offence and prosecution of R.C.V. – 12 years. Moreover, the prosecution in Romania would ensure a better exercise of the right to defence.

The State prosecutor appealed the decision of the Court of Appeal in front of the High Court. The High Court annulled the Court of Appeal's decision by Judgment no. 2372 of 17 July 2013, giving priority to the principle of mutual recognition. The High Court found that the decision of the Court of Appeal was unlawful as it makes a wrong application of the law and the ECJ's interpretation. Further on, the High Court decided that the limitations to the fundamental rights were necessary and proportionate, given the gravity of the offences. Based on the above findings, the High Court ordered the execution of three EAWs and the surrender of Mr Radu to the German authorities. One EAW execution was rejected, according to *ne bis in idem* principle.

The surrender was authorized under the condition that if found guilty the requested person would be transferred to Romania for serving the sentence.

### **b. Judicial interaction**

The outcome achieved by the national judge is consistent with the decision of the ECJ as the High Court ordered the execution of the EAW and the surrender of the requested person. Nevertheless, neither the Court of Appeal nor the High Court considered closely the guidance of the ECJ. More than that, the High Court analysis of the ECJ ruling is limited to a brief mentioning of the referral without any further consideration to the latter.

Likewise, the following case was also within the scope of EU law, since the national legislation on the EAW implements the corresponding Framework Decision. Yet, in this case, the Charter was used as a hermeneutic tool. The Spanish Constitutional Court argued that constitutional fundamental rights need to be interpreted according to both the ECHR and the Charter, and quoted decisions from the ECtHR (*Sejdovic v Italy*, 1 March 2006) and the CJEU (C-399/11, *Melloni*).

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As a result, the preliminary ruling from the Court of Justice triggered the reversal of the settled national constitutional interpretation of the right to a fair trial to lower the standard of protection, not only in the field of the EAW, but regarding extradition more generally. The Spanish Constitutional Court expressly reversed previous case law regarding the interpretation of the right to a fair trial in the context of trial in absence.

**Casesheet 7.9 – Melloni<sup>34</sup>**

**1. At a glance**

Area	Country	Referencet to EU law	Judicial dialogue technique	Legal and/or judicial actors
<ul style="list-style-type: none"> <li>• Criminal procedure</li> </ul>	<ul style="list-style-type: none"> <li>• Spain</li> </ul>	<ul style="list-style-type: none"> <li>• Article 47 CFREU</li> <li>• Article 48(2) CFREU</li> </ul>	<ul style="list-style-type: none"> <li>• Consistent interpretation</li> </ul>	<ul style="list-style-type: none"> <li>• CJEU</li> <li>• Spanish Constitutional Court</li> </ul>

**2. Timeline**



**3. Case description**

The case concerned the surrender of a person who had been convicted in absentia. The Spanish Constitutional Court made a preliminary reference regarding the interpretation and validity of Article 4a(1) of the Framework Decision on the European arrest warrant (EAW) and the interpretation of Charter Article 53.

According to the constitutional court's interpretation of Article 24(2) of the Spanish Constitution, 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. This interpretation clashed with the obligations stemming under the Framework Decision, and particularly Article 4a(1), which did not allow rejecting the execution of the EAW in the circumstances of the case.

Mr. Melloni had been condemned in absentia in Italy to ten years' imprisonment for the crime of bankruptcy fraud. Throughout the trial, he had been represented by two lawyers of his choice. An EAW for the execution of the sentence was issued and four years later he was detained in Spain. The competent Court decided to execute the EAW, but Mr. Melloni submitted a complaint (amparo) before the Constitutional Court arguing that his surrender would amount to a breach of the right to a fair trial.

The Constitutional Court decided to stay proceedings and make a reference to the CJEU regarding the interpretation and validity of Article 4a(1) of the Framework Decision in light of Charter Articles 47 and 48(2) and the interpretation of Charter Article 53.

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<sup>34</sup> Prepared by Dr. Erik Svensson, UU, based on template written by Professor Aida Torres Pérez, Pompeu Fabra University

#### **4. Analysis**

##### **a. Role of the Charter**

The CJEU confirmed the validity of the Framework Decision under Articles 47 and 48(2) of the Charter. The CJEU referred to the ECtHR case law and concluded that the right to appear in person at the trial was not an absolute right and that the accused may waive that right, expressly or tacitly, under certain conditions.

Regarding Charter Article 53, the CJEU acknowledged that state courts may apply national standards of protection of fundamental rights in reviewing national implementing measures, as long as the level of protection provided for by the Charter, and the primacy, unity and effectiveness of EU law are not compromised.

In the resolution of the case, the Constitutional Court referred to the Charter as a hermeneutic criterion for the interpretation of Article 24(2) of the Constitution. Hence, the Charter was not directly enforced, but the Constitutional Court followed the interpretation given by the CJEU to overrule the previous constitutional interpretation of the right to a fair trial.

##### **b. Judicial interaction**

This case was within the scope of EU law, since the national legislation on the EAW implements the corresponding Framework Decision. The Charter was used as a hermeneutic tool. The Constitutional Court argued that constitutional fundamental rights need to be interpreted according to both the ECHR and the Charter, and quoted decisions from the ECtHR (*Sejdovic v Italy*, 1 March 2006) and the CJEU (C-399/11, *Melloni*).

For the first time, the Constitutional Court submitted a preliminary reference. Following the CJEU ruling, the Constitutional Court reversed the previous interpretation of the constitutional right to a fair trial. At the same time, the Constitutional Court reduced the impact of the Charter to being a hermeneutic criterion for the interpretation of the Constitution, in the same way as the ECHR. The Constitutional Court argued that constitutional rights had to be interpreted according to international human rights treaties. The Court explicitly referred to the ECHR and the Charter, and the respective case law. In particular, the Constitutional Court quoted *Sejdovic v Italy* and *Melloni* in order to interpret the constitutional right to a fair trial regarding the surrender of people condemned in absentia.

The Constitutional Court made use of the preliminary reference to confront the conflict between the settled constitutional interpretation of the right to a fair trial and the obligations stemming from the Framework Decision on the EAW. The level of protection granted by the Spanish Constitution to the right to a fair trial was higher than the protection granted under EU law. The Constitutional Court challenged the validity of the Framework Decision in light of the Charter, but the CJEU held that the Framework Decision was compatible with Charter Articles 47 and 48(2).

Also, the Constitutional Court made a question about Charter Article 53, to explore the extent to which this Article would allow for the enforcement of more protective constitutional rights. The CJEU acknowledged that possibility, as long as, the primacy, unity and effectiveness of EU law were not undermined. In this case, the CJEU held that the enforcement of the constitutional standard would undermine the effectiveness and uniformity of EU law.

**c. Impact of the CJEU decision**

The preliminary ruling triggered the reversal of the settled constitutional interpretation of the right to a fair trial to lower the standard of protection, not only in the field of the EAW, but regarding extradition more generally. The Constitutional Court expressly reversed previous case law regarding the interpretation of the right to a fair trial in the context of trial in absence.

**PART 3: INTERACTION BETWEEN CRIMINAL LAW AND OTHER FIELDS OF LAW**

This third part provides three examples of interaction between criminal law and other fields of law and the role of the EU Charter. First, two cases within the field of consumer protection are presented and analysed, directly followed by a case concerning the specific issue of non-discrimination and hate speech.

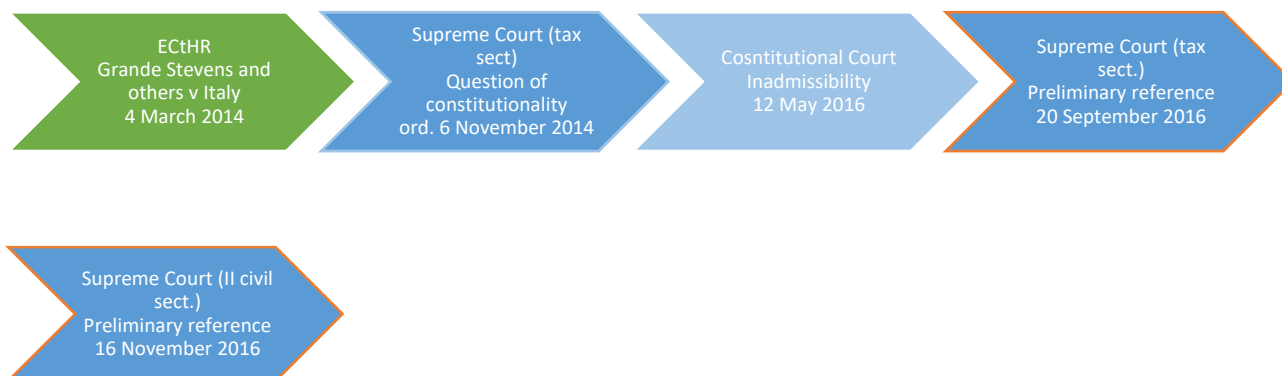
**8. Consumer Protection**

**Casesheet 7.10 – Supreme Court of Italy<sup>35</sup>**

**1. At a glance**

Area	Country	Referencet to EU law	Judicial dialogue technique	Legal and/or judicial actors
<ul style="list-style-type: none"> <li>• criminal law</li> </ul>	<ul style="list-style-type: none"> <li>• Italy</li> </ul>	<ul style="list-style-type: none"> <li>• art 50</li> </ul>	<ul style="list-style-type: none"> <li>• preliminary ruling</li> <li>• consistent interpretation</li> </ul>	<ul style="list-style-type: none"> <li>• CJEU</li> <li>• ECtHR</li> <li>• supreme court</li> <li>• Constitutional court</li> </ul>

**2. Timeline**



**3. Case description**

Market abuse is regulated in Italy under a so called “dual-track system” (doppio binario) which provides for administrative and criminal sanctions as a result of two different proceedings. The Italian Financial Services Act (IFSA)<sup>36</sup> provides in Article 185 that “any person who disseminates false information or sets up sham transactions or employs other devices...likely to produce a significant alteration in the price of financial instruments” may be subject to criminal sanctions, including imprisonment and fines. Moreover, Article 187-ter IFSA provides for the application of

<sup>35</sup> Prepared by Dr. Federica Casarosa, European University Institute

<sup>36</sup> I-bis of Part V of Legislative Decree No. 58 of 24 February 1998.

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pecuniary sanctions for primary liability “without prejudice to the penal sanctions applicable when the action constitutes a criminal offence”.

On 4 March 2014, the European Court of Human Rights ruled in *Grande Stevens & others v Italy*<sup>37</sup> that the aforementioned Italian provisions are not consistent with basic principles enshrined in the European Convention on Human Rights (the Convention) and the relevant Protocols, in particular: (i) the right to a fair trial (Article 6 §1 of the Convention); and (ii) the application of the *ne bis in idem* principle or double jeopardy (Article 4 § 1 of Protocol No. 7), concerning market abuse proceedings initiated by administrative and criminal authorities. The ECtHR affirmed that the sanctions imposed by the Financial Markets Authority (CONSOB), though defined as administrative in the relevant regulation, are to be interpreted as criminal penalties given the punitive nature of the offences and the severity of the punishment.<sup>38</sup> The decision of the ECtHR triggered then several doubts regarding the constitutionality of the double track system in several

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<sup>37</sup> *Grande Stevens & Others v Italy* – 18640/10, 18647/10, 18663/10 et al dated 4 March 2014.

<sup>38</sup> As recognised by the ECtHR, the Italian legal system does not contain a provision similar to section 84 of the German OWiG or Article 79 of the Portuguese RGCO and provides for “undetermined pecuniary and non-pecuniary penalties, which are classified as administrative sanctions and applied by “independent” administrative authorities in inquisitorial, unequal and prompt proceedings”.



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other situations and also if and how system may be compliant, on the one hand, with art 117 Cost.<sup>39</sup> and with art 50 CFREU (if applied to areas falling into EU law).

Two cases emerged among several others.

The first case focus on a market manipulation offence against an entrepreneur and his two parent companies. The CONSOB issued against the entrepreneur a fine of over 10 millions euro for the administrative offense of market manipulation pursuant art. 187-ter IFSA, in relation to some market operations and to public disclosure of information aimed at supporting the price of securities listed on regulated markets.

The decision was appealed before the Court of Appeal of Rome, which reduced the fine to 5 millions euro. Then both parties appealed before the Supreme Court (tax section).

Before the Supreme Court decided the case, the entrepreneur concluded the parallel criminal proceedings, focused also on market manipulation crime pursuant art. 185 IFSA in relation to the same conduct for which was sanctioned by CONSOB. The proceeding ended with a plea bargain judgment, which later became final.

The Supreme Court then raised a question of constitutionality before the Constitutional Court as regards the compliance of art. 187-ter IFSA with the art. 177(1) Const. The Supreme Court, took as

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<sup>39</sup> Art 117(1) Cost on Legislative powers provides that:

“Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations. The State has exclusive legislative powers in the following matters:

- a) foreign policy and international relations of the State; relations between the State and the European Union; right of asylum and legal status of nonEU citizens;
- b) immigration;
- c) relations between the Republic and religious denominations;
- d) defence and armed forces; State security; armaments, ammuniton and explosives;
- e) the currency, savings protection and financial markets; competition protection; foreign exchange system; state taxation and accounting systems; equalisation of financial resources;
- f) state bodies and relevant electoral laws; state referenda; elections to the European Parliament;
- g) legal and administrative organisation of the State and of national public agencies;
- h) public order and security, with the exception of local administrative police;
- i) citizenship, civil status and register offices;
- l) jurisdiction and procedural law; civil and criminal law; administrative judicial system;
- m) determination of the basic level of benefits relating to civil and social entitlements to be guaranteed throughout the national territory;
- n) general provisions on education;
- o) social security;
- p) electoral legislation, governing bodies and fundamental functions of the Municipalities, Provinces and Metropolitan Cities;
- q) customs, protection of national borders and international prophylaxis;
- r) weights and measures; standard time; statistical and computerised coordination of data of state, regional and local administrations; works of the intellect;
- s) protection of the environment, the ecosystem and cultural heritage. ”

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reference the interpretation of Article. 4 prot. 7 ECHR provided by the ECtHR in its judgment *Grande Stevens c. Italy*.<sup>40</sup>

The Constitutional Court, however, in its decision dismissed the question as not clearly presented by the Supreme Court.<sup>41</sup>

Given this situation, the Supreme Court decided to present a preliminary reference to the CJEU,<sup>42</sup> implying (without clearly stating in the decision) that the provisions addressing the sanctions for market abuse fall within EU law, being subject to specific regulation at the level of secondary legislation, i.e. Directive 2014/57/EU and Regulation 596/2014.

The Supreme court asked the following questions:

- (1) If in the case presented the Italian provision must be interpreted in the light of ECHR jurisprudence and in particular in the decision *Grande Stevens c. Italy*.
- (2) If the national courts can directly apply the Union principle of 'ne bis in idem', under article. 50 CFREU, interpreted in the light of Article. 4 prot. n. 7 ECHR, the relevant case law of the European Court of Human Rights and the national legislation.

The question is currently pending.

The second case focus on the coordination between administrative and criminal sanctions related to the abuse of privileged information pursuant art 187(a) IFSA. The entrepreneur was sanctioned by CONSOB for the administrative offence in 2012, the appeal against the decision was rejected by the Court of Appeal of Milan and then appeal again before the Supreme Court (II civil section).

Before the Supreme Court decided the case, the applicant informed the court that in the meantime he was acquitted by the Criminal Court of Milan as regards the crime of abuse of privileged information pursuant to art. 184 IFSA. Given that the public prosecutor did not appeal against the decision this was then final (*res judicata*). Hence the applicant asked the Supreme Court an immediate declaration not to proceed further on the basis of Art. 4 prot. 7 ECHR and Article. 50 CFREU.

The Supreme Court found that the material conduct was the same for the criminal and the administrative proceedings, thus, taking into account the fact that the sanctions imposed by CONSOB may be defined as criminal one, this may result in a violation of the *ne bis in idem* principle. Moreover, the Supreme court acknowledged that the specific case falls into EU law field, thus there is no need to ask a question of constitutionality before the Constitutional Court, but it is possible for the court to directly disapply the provision in case of conflict with EU law principles. However, the CJEU did not provide a clear guidance as regards the level of protection of Art. 50 CFREU vis-à-vis the one provided by art. 4 prot. 7 ECHR. Thus, the Supreme court presented a preliminary reference<sup>43</sup> to the CJEU asking the following:

- (1) If, in case of a final decision regarding the absence of a criminal offence, art 50 CFREU is to be interpreted as preventing the national court to carry out any further appreciation and start or continue another procedure aimed to impose administrative sanctions, which by their nature and gravity are to qualify criminal;

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<sup>40</sup> Cass., sez. trib. civ., ord. 6 novembre 2014 (dep. 21 gennaio 2015).

<sup>41</sup> Corte cost., sent. 12 maggio 2016, n. 102.

<sup>42</sup> Cass., sez. trib. civ., ord. 20 settembre 2016 (dep. 13 ottobre 2016).

<sup>43</sup> Cass., II sez. civ., ord. 15 novembre 2016, 23232/16.

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- (2) If the national court, when evaluating the proportionality, effectiveness and dissuasiveness of the sanctions in a case of potential violation of the *ne bis in idem* principle, should take into account the limits imposed by Directive 2014/57/EU.

The question is currently pending.

### 4. Analysis

#### a. Relation to the Scope of the Charter

The Supreme Court in both cases uses the Charter so as to determine if and how the conundrum created by Italian double track system can be solved through the direct application of art 50 on the *ne bis in idem* principle. If art 50 CFREU corresponds to art. 4 Prot. 7 ECHR, the same fundamental guarantees should be provided. In particular, the ECtHR case-law on the point should apply, thus a criminal proceeding relating to facts that have already been the subject to administrative proceeding are illegitimate. However, the definition of the *ne bis in idem* principle as interpreted by the CJEU is not deemed as sufficiently clear as providing the possibility for the national court to disapply directly the relevant provisions.

#### b. Judicial interaction

The Supreme Court in the two cases shows a different approach, taking also into account that the sections involved in the two cases are different.

In the first case, it followed a clear path of dialogue with national and European courts. First, following the difficulties in interpreting the national provisions in compliance with ECHR it addressed the question of constitutionality to the Constitutional court. However, after the missed opportunity of dialogue, the Supreme Court raised the question of compatibility of national provisions with EU law.

Where in the dialogue with the Constitutional Court, the Supreme Court seeks guidance so as to formally consistently apply the national provision (or to disapply upon confirmation of the Constitutional Court the national provision); with the CJEU, the objective is a clarification regarding the guarantee provided by art. 50 CFREU vis-à-vis art. 4 Prot. 7 ECHR. The Supreme court thus asks is it may directly apply art. 50 CFREU closing the proceeding before the court - despite the absence of any national standard that confers such power.

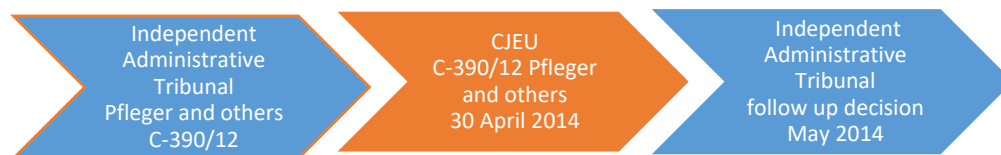
In the second case, taking as a point of reference the fact that the issue falls into the EU law field, the Supreme court deemed unnecessary the question of constitutionality and immediately asked a preliminary ruling before the CJEU, presenting a similar question to the one presented in the first case.

**Casesheet 7.11 – Independent Administrative Tribunal, Austria<sup>44</sup>**

**1. At a glance**

Area	Country	Referencet to EU law	Judicial dialogue technique	Legal and/or judicial actors	Remedy
<ul style="list-style-type: none"> <li>•criminal law</li> <li>• consumer protection</li> </ul>	<ul style="list-style-type: none"> <li>• Austria</li> </ul>	<ul style="list-style-type: none"> <li>•art 47 CFREU</li> <li>•art 50 CFREU</li> </ul>	<ul style="list-style-type: none"> <li>•preliminary ruling</li> </ul>	<ul style="list-style-type: none"> <li>•CJEU</li> <li>•first instance court</li> </ul>	<ul style="list-style-type: none"> <li>•proportionality of criminal sanctions</li> </ul>

**2. Timeline**



**3. Case description**

Austrian law limits the possibility of running gambling establishments by issuing only a limited number of licenses. The justification for such legislation is the need to protect consumers from gambling addictions and to prevent crime related to gambling. However, the legislation regarding advertising of game of chance may run counter these arguments, providing a positive image of gambling and encouraging consumers to engage in such activities. This led some unlicensed operators of gambling establishments to question the compliance of the Austrian law with Art. 56 TFEU, which prohibits unjustified restrictions on the freedom to provide services.

In particular, since 2012, several controls of Austrian financial police led to the seizure and confiscation of on-line fruit machines, which were held in pubs and bars across that did not hold any licence for gambling establishments. Four of them were joined together before the Independent Administrative Tribunal of the Province of Upper Austria as requiring the application of national administrative criminal law.

As the Austrian court was not certain if the national legal system was capable of guaranteeing the coherence required by the Court’s case-law and compatible with the freedom to provide services guaranteed by Article 56 TFEU, decided to present a preliminary reference. The court took also into account the compatibility with Articles 15 to 17, 47 and 50 CFREU, due to the fact that national legislation defines the operator of unauthorised gaming machines in a very broad manner and that there is a high level of unpredictability associated with the application of administrative and criminal penalties.

The national court presented the following questions:

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<sup>44</sup> Casesheet prepared by Dr. Federica Casarosa, European University Institute

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- ‘1. Does the principle of proportionality laid down in Article 56 TFEU and in Articles 15 to 17 of the Charter preclude national legislation such as the relevant provisions in the main proceedings, namely Paragraphs 3 to 5 and Paragraphs 14 and 21 of the GSpG, which permits the organisation of games of chance using machines only on the condition — which may be enforced by both criminal penalties and direct intervention — of the prior issue of a licence, which are available only in limited numbers, even though — as far as can be seen — the State has not shown thus far in a single judicial or administrative procedure that associated crime and/or addiction to gambling actually constitute a significant problem which cannot be remedied by a controlled expansion of authorised gaming activities to a large number of individual providers, but only by a controlled expansion, coupled with only moderate advertising, by one monopoly holder (or a small number of oligopolists)?
2. If the first question is to be answered in the negative: Does the principle of proportionality laid down in Article 56 TFEU and in Articles 15 to 17 of the Charter preclude national legislation like Paragraphs 52 to 54 of the GSpG, Paragraph 56a of the GSpG and Paragraph 168 of the [Criminal Code] by which, as a result of imprecise legal definitions, there is almost complete criminal liability, even for many forms of only very remotely involved (possibly resident in other European Union Member States) persons (such as the mere sellers or lessors of gaming machines)?
3. If the second question is also to be answered in the negative: Do the requirements relating to democracy and the rule of law on which Article 16 of the Charter is clearly based and/or the requirement of fairness and efficiency under Article 47 of the Charter and/or the obligation of transparency under Article 56 TFEU and/or the right not to be tried or punished twice under Article 50 of the Charter preclude national rules such as Paragraphs 52 to 54 of the GSpG, Paragraph 56a of the GSpG and Paragraph 168 of the [Criminal Code], the delimitation between which is scarcely foreseeable or predictable *ex ante* for a citizen, in the absence of clear legislative provision, and can be clarified in each specific case only through an expensive formal procedure, but which are associated with extensive differences in terms of competences (administrative authority or court), powers of intervention, the connected stigmatisation in each case and the procedural position (e.g. reversal of the burden of proof)?
4. If one of the first three questions is to be answered in the affirmative: Does Article 56 TFEU and/or Articles 15 to 17 of the Charter and/or Article 50 of the Charter preclude the punishment of persons who have one of the close connections with a gaming machine mentioned in Paragraph 2(1)(1) and Paragraph 2(2) of the GSpG and/or the seizure or confiscation of such machines and/or the closure of the entire undertaking owned by such persons?’

On April 30 2014, the CJEU decided the case affirming, on the basis of the existing case law that EU Member have a certain margin of discretion to regulate the gambling sector, without any limitation regarding the particular form of form of regulation to be used, including the possibility to introduce monopoly structures sanctioned through criminal enforcement. However, the national regulation of gambling must comply with the basic principle of free movement of trade within the EU, in particular the principles of non-discrimination and proportionality, including the principle of inconsistency, the application of which is particularly strict in the gambling sector.

Thus, the CJEU stated that the Austrian gambling regulation was in breach of EU law and the sanctions designed to protect are not enforceable, affirming that:

“Article 56 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, where that legislation does not actually pursue the objective of protecting gamblers or fighting crime and does not genuinely meet the concern to reduce opportunities for gambling or to fight gambling-related crime in a consistent and systematic manner.”

In May 2014, the referring court held that the GSpG pursues the aims of player protection and combatting gambling-related crime merely on a superficial level. The court affirmed that the monopoly primarily seems to aim at maximising revenues for the state budget - which must not be considered an overriding public interest objective capable of justifying restrictions of the EU market freedoms and, hence, does not meet the CJEU's stringent '4- part-test'- and, in conjunction with the strict sanctioning system, must be considered disproportionate.

#### **4. Analysis**

##### **a. Relation to the Scope of the Charter**

The CJEU in this case applied for the first time the Charter to gambling activities and held that where legislation restricts the fundamental freedom to provide services, it is also capable of limiting the freedom to choose an occupation, the freedom to conduct a business and the right to property under Articles 15, 16 and 17 of the Charter. The CJEU provided further guidance, stating that restrictions on such rights and freedoms would be permitted if national legislation is proportional, "*necessary and genuinely meet[s] objectives of general interests recognised by the European Union or the need to protect the rights and freedoms of others*".

##### **b. Judicial interaction**

The national court seeks the help of the CJEU as regards the lack of compliance of the national legislation and the possibility to legitimately disapply the provisions of the basis of EU law.

##### **c. Remedies dimension**

The national court seeks to receive confirmation by the CJEU regarding the proportionality of the Austrian gambling legislation on the basis of the previous CJEU decisions in *Placanica*<sup>45</sup> and *Dickinger*<sup>46</sup> cases where the court affirmed that criminal and other sanctions can only be applied if the national gambling regulation is compatible with EU law and the sanctions themselves are non-discriminatory and proportionate, i.e. in particular commensurate with the seriousness of the alleged crime.

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<sup>45</sup> Case C-359/04 and C-360/04, *Placanica* [2007] ECR I-1891.

<sup>46</sup> Case C-347/09, *Dickinger and Ömer* [2011] ECR I-8185.

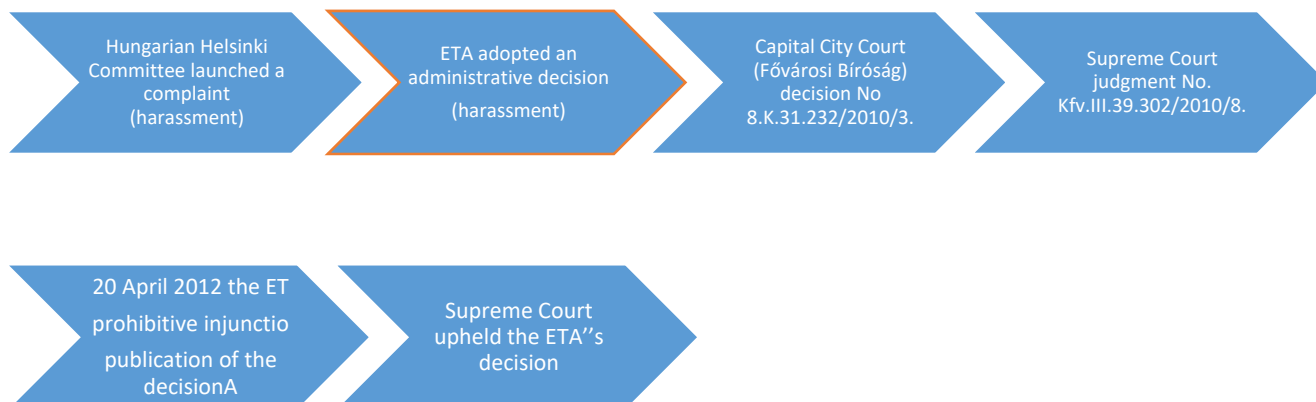
## 9. Non-discrimination and Hate Speech

### Casesheet 7.12 - Supreme Court of Hungary<sup>47</sup>

#### 1. At a glance

Area	Country	Reference to EU law	Judicial dialogue technique	Legal and/or judicial actors
<ul style="list-style-type: none"> <li>• Non-discrimination/Hate speech</li> </ul>	<ul style="list-style-type: none"> <li>• Hungary</li> </ul>	<ul style="list-style-type: none"> <li>• CJEU caselaw</li> </ul>	<ul style="list-style-type: none"> <li>• consistent interpretation</li> </ul>	<ul style="list-style-type: none"> <li>• Hungarian Helsinki Committee</li> <li>• ETA</li> <li>• Capital City Court</li> <li>• Supreme Court</li> <li>• CJEU</li> </ul>

#### 2. Timeline



#### 3. Case description

On 28 November 2008, following the murder of a teenage girl, the local government convened a meeting at which the mayor proclaimed that it was ‘enough of the Roma violence ... we are still the majority.’

In the March 2009 edition of the local newspaper, he published an article in which he alluded to the fact that the government was responsible for continuing to discuss racism in the face of growing and brutal criminal acts evidently committed by the Roma. ‘Unfortunately, we must state that in Kiskunlacháza overt, institutional racism is being inflicted on the Hungarians. We cannot condone the fact that certain individuals, under the pretense of minority existence, can access more rights than the majority society.’

<sup>47</sup> Prepared by Dr. Rita De Brito Gao Hanek, European University Institute.

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In the October edition, the mayor published an open letter addressed to the Prime Minister, calling on him to ban Gypsy paramilitary groups in the same manner his government banned the Hungarian Guards - an extremist and openly racist paramilitary organization founded by the extreme right wing party leader.

On 19 October 2009, the Hungarian Helsinki Committee - intervening on the side of the ETA before the courts - launched a complaint with the latter, alleging that the mayor had committed harassment.

On 19 January 2010 the ETA adopted an administrative decision in which it established that the mayor's conduct amounted to harassment against individuals belonging to the Roma minority.

The Capital City Court (Fővárosi Bíróság), in its judgment No 8.K.31.232/2010/3. found the administrative decision null and void, ordering the ETA to repeat its proceedings. The Supreme Court in essence upheld this judgment in its judgment No. Kfv.III.39.302/2010/8. While agreeing that the Equal Treatment Act's personal scope covered the mayor in the particular case, the Supreme Court instructed the ETA to investigate whether his actions constituted a legal relationship otherwise falling under the Act's material scope. It noted the necessity of examining whether the definition of harassment prohibited under Article 10 paragraph 1 covered instances in which not only an individual, but a group of individuals suffered such treatment - bearing in mind that the Act specifically mentioned groups in certain other dispositions, but not in relation to harassment.

On 20 April 2012 the ETA once again established the mayor's liability for harassment against persons belonging to the Roma minority, imposed on him a prohibitive injunction and ordered the publication of the decision on its website for a period of 60 days.

The Capital City Court found the decision null and void in its judgment No. 12.K.31.431/2012/9. The Supreme Court, however, quashed this verdict in its judgment No. Kfv.III.37.773/2012/6. and ordered the retrial of the case, because the Capital City Court had not provided reasons for its finding purporting to establish that the prohibition of harassment did not extend to groups.

Following retrial, the Capital City Administrative and Employment Court (Fővárosi Közigazgatási és Munkaügyi Bíróság) rejected the mayor's claim and upheld the administrative decision with reference to, inter alia, the CJEU's judgment in the case *Firma Feryn* and the European Court of Human Rights' judgment in *Feret v Belgium*.

The Commentary attached to the Act supports a finding of harassment also in cases it is inflicted on a group, which clarifies the legislative purpose. This purposive interpretation is supported by the CJEU's judgment in *Feryn*.

The mayor sought this judgment's judicial review from the Supreme Court, claiming that the mayor's statements do not constitute a legal relationship under the Act, that harassment can only be inflicted on an individual and the Commentary cannot serve as a legal basis on a par with a legal act - nor can the *Feryn* judgment be invoked.

According to judgment No. Kfv.V.35.460/2011/5, the general judicial practice is that once a lower court is instructed to retry a case, it must also follow the guidelines provided for such retrial. This has been followed in the present case. It rightly concluded that the defendant mayor's claim is unfounded. Earlier, the Supreme Court had established that the mayor fell under the personal scope



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of the Act. The Supreme Court agrees with the ETA in that his conduct in the present case also falls under the material scope of the Act.

The definition of harassment under the Act cannot flow from the interpretation or analogy with definitions in criminal and civil law, because of the diverse personal and material scopes.

Other than the strict linguistic interpretation favoured by the plaintiff, the Act must also be examined by way of purposive and doctrinal interpretation. No Act can be attributed a meaning that is contrary to its purpose and it is relevant in this respect that the Equal Treatment Act under Article 1 sets out to prohibit discrimination against individuals as well as against groups of individuals. Moreover, Article IX paragraph 5 of the Fundamental Law curtails the freedom of expression if it aims at violating a national, ethnic or racial community. Limiting protection under the Act to an individual in case of harassment would run counter to the fundamental principles expressed in the Act. Thus, on 29 October 2014 the Supreme Court upheld the final judgment

Following a long legal battle, the Supreme Court upheld the ETA's decision in which it found the mayor liable for harassment against a member of the Roma national minority, and ordered the publication of its decision.

### **4. Analysis**

#### **a. Role of the Charter**

Although the Supreme Court did not cite the Charter, it did rely on the Equal Treatment Act which transposes not only the anti-discrimination directives, but also gender directives into Hungarian law. Moreover, it relied on Article IX of the Fundamental Law which - similar to the Charter - protects free speech.<sup>48</sup>

#### **b. Judicial interaction**

Vertical cooperation (national courts – CJEU)

Both lower courts made strategic use of consistent interpretation. The Supreme Court agreed with the lower court in relying on *Feryn*, mainly in order to provide judicial protection for a collective claim pertaining to a speech act.

Moreover, it relied on *Feret v Belgium* to provide an interpretation of the constitutional provision on free speech in a manner that curtails it in relation hate speech on the grounds of racial or ethnic origin.

#### **c. Remedies dimension**

It is particularly interesting that the publication of the decision is in this case part of the set of remedies strengthening the idea that sanctioning hate speech implies sending a strong message to the community, of not condoning the discriminatory behaviour and preventing escalation.

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<sup>48</sup> Act No CXXV of 2003 on equal treatment and the promotion of equal opportunities, particularly Article 1, 4, 7, 8, 10 paragraph 1 and Article IX paragraph 5 of the Fundamental Law.

## **PART 4 – Hypotheticals**

### **Introduction**

*The idea is that the hypotheticals below should serve as a basis for reflection and discussion of some of the issues that may arise when fundamental rights are applicable in criminal proceedings partly governed by EU law. You are especially encouraged to study the EU Charter of Fundamental Rights and the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).*

*Assume that you are a judge in your own country (YC) applying national procedural and criminal law as well as EU law on the scenarios below. Consider especially the following questions:*

- *Is the Charter of Fundamental Rights applicable?*
- *Can any of the rights in the Charter be claimed?*
- *Can any of the rights in the European Convention on Human Rights or in the national constitution be claimed?*
- *How would you handle a situation where several fundamental rights instruments are applicable?*
- *How do you think a court in your country would act in this situation?*
- *Should a request for a preliminary ruling be sent to the CJEU?*

## **MUTUAL TRUST AND RECOGNITION**

### **Hypothetical n. 1**

Mr X is citizen of your country (YC). During a visit in the EU Member State Mandia, he seriously injures another person and is convicted for assault, resulting in a sentence of five years imprisonment. Before he starts serving the sentence he flees Mandia and returns to YC. The authorities in Mandia issues a European arrest warrant (EAW) for Mr X but it takes two years before the police in YC is able to locate and apprehend him. During these years X has founded a family with Ms Y and has become a father to Z.

Mr X objects to the execution of the arrest warrant by arguing that it would destroy all possibilities to have a family life since he would be imprisoned 3000 kilometers from his wife and child. Therefore, he argues that YC's judicial authorities should deny the execution of the arrest warrant and allow him to serve his sentence in a YC prison.

### **Hypothetical n. 2**

Ms Y is a citizen of YC but has lived and worked in the EU Member State Deeland for several years. In September 2014 her apartment is stormed by a SWAT-team that takes her away to the local police station while her house is being searched. During the interrogation at the station it quickly becomes apparent that the police have made a mistake; the search warrant (which is needed for the police to enter a home without the consent of the owner) was for Ms Y's neighbor's house. The police apologizes, but before Ms Y has been released the police that were conducting the search of Ms Y's house calls in and tells the interrogating officer that five grams of cocaine has

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been found. Ms Y is later charged and convicted for possession of narcotics. She is sentenced to one year of imprisonment. During the trial the judge acknowledges that the evidence was obtained illegally and in violation of her right to a private life, but that this fact in itself does not make the evidence inadmissible.

Ms Y returns to YC before she is supposed to start serving her sentence. The authorities in Deeland issue a European arrest warrant (EAW) and Ms Y is apprehended in YC. Ms Y opposes the execution of the EAW by arguing that her fundamental right to a fair trial was violated when illegally obtained evidence was used in her trial in Deeland.

### **Hypothetical n. 3**

Mr D is caught shoplifting while on vacation in the EU Member State Dostria. Due to the risk of him leaving the country, he is put in detention while waiting for the trial to commence two weeks later. The trial is, however, postponed two weeks since the trial judge has fallen ill. Mr D gets to leave detention under the condition that he stays in the country and reports to the police twice per day until the new trial date. After one week Mr D's funds are drying out due to the costs for accommodation. He decides that he has had enough and leaves Dostria for his home state YC.

The judicial authorities in Dostria issue a European arrest warrant (EAW) and Mr D is apprehended in YC. Due to the risk of Mr D absconding again, he is put in detention awaiting the surrender hearing. The hearing is held after ten days. Mr D argues that execution of the EAW should be refused on fundamental rights grounds. His main argument is that he has already been punished through the detention in Dostria and YC as well as through him having, at significant cost, to stay in Dostria after the detention. Moreover, if he does not get back to his job within the week, he will be fired.

## **NE BIS IN IDEM**

### **Hypothetical n. 4**

In June 2016 Ms B is convicted for tax crimes and sentenced to one-month imprisonment. In December the same year she gets a letter from the local police authority saying that her license for a hunting rifle has been revoked since she, as a convicted felon, is no longer considered suitable to own a fire weapon. The police's decision is based on a law transposing the EU Weapons Directive (91/477/EEC)<sup>49</sup>.

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<sup>49</sup> The relevant articles of the Directive:

#### **Article 5**

Without prejudice to Article 3, Member States shall permit the acquisition and possession of firearms only by persons who have good cause and who:

- (a) are at least 18 years of age, except in relation to the acquisition, other than through purchase, and possession of firearms for hunting and target shooting, provided that in that case persons of less than 18 years of age have parental permission, or are under parental guidance or the guidance of an adult with a valid firearms or hunting licence, or are within a licenced or otherwise approved training centre;
- (b) are not likely to be a danger to themselves, to public order or to public safety. Having been convicted of a violent intentional crime shall be considered as indicative of such danger.

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Ms B argues that this is wrong since she has already been punished, and can see no reason why she should not be able to continue pursuing her passion for hunting just because she made some mistakes in her tax return. She therefore appeals the police's decision to a court.

### **Hypothetical n. 5**

Ms C, a citizen and resident of YC, is active in the hacker community 'Information wants to be free'. In August 2015 she publishes documents on her blog about how the government in the EU Member State Gornia has tried to sell missiles to a country outside the EU that has a well-documented history of continuing human rights violations. The documents get a lot of attention and due to a popular outcry, the minister of foreign affairs in Gornia leaves office. In November 2015 Ms C is awarded a prize by a Gornian human rights NGO. She is arrested by the Gornian police shortly after the award ceremony and is convicted in February 2016 for exposing state secrets.

After having served her sentence in Gornia, she returns to YC. In June 2016 she is called to an interrogation at the local police station. The police have been able to find out that the documents relating to the missile sales had been obtained through the hacking of an email account belonging to a YC consulting firm specialized in making financial analysis of international trade deals. In October 2016 the prosecutor decides to prosecute Ms C for hacking into the consulting firm's email accounts.

### **Hypothetical n. 6**

In 2012 a district court in Deeland convicts Mr F for assaulting a Dostrian citizen in Deeland. Mr F absconds before the prison sentence has been served. In 2014 he is arrested and tried for the same assault, but this time by a district court in Dostria. The Dostrian court dismissed a claim from Mr F that the second trial conflicted with the *ne bis in idem* principle. According to the court, Art 54 of the Convention Implementing the Schengen Agreement<sup>2</sup> allows for a second trial for the same action if the sanctions from the first judgment have not been enforced or are not in the process of being enforced. However, and much to Mr F's relief, he is acquitted since the Dostrian court regards the evidence as unconvincing.

Mr F then leaves Dostria for his home state YC. In November 2016, the judicial authorities in Deeland decide to issue a European arrest warrant (EAW) for Mr F in order to get him back to Deeland to serve his sentence. He is arrested by the police in YC but opposes the execution of the EAW.

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Member States may withdraw authorisation for possession of a firearm if any of the conditions on the basis of which it was granted are no longer satisfied.

Member States may not prohibit persons resident within their territory from possessing a weapon acquired in another Member State unless they prohibit the acquisition of the same weapon within their own territory.

### **Article 3**

Member States may adopt in their legislation provisions which are more stringent than those provided for in this Directive, subject to the rights conferred on residents of the Member States by Article 12 (2).