

CRAIG AND DE BÚRCA
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FUNDAMENTAL RIGHTS AND THE FINANCIAL CRISIS

This update focuses on significant developments that impact on EU law in two areas, 1. **FUNDAMENTAL RIGHTS** and 2. **THE FINANCIAL CRISIS**

1. FUNDAMENTAL RIGHTS

The CJEU's Grand Chamber has given two important judgments concerning the Charter in 2013, which also have implications for the primacy of EU law and national sovereignty.

*Åkerberg Fransson*¹ is important primarily for the scope of application of the Charter in relation to Member State action. The case concerned the applicability of Article 50 of the Charter, which provides that '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.' This provision replicated that contained in Protocol 7 ECHR. The Swedish court made a preliminary reference to the CJEU, asking whether national enforcement mechanisms for an EU VAT Directive were compatible with Article 50. The Directive allowed Member States to impose obligations which they deem necessary for the correct collection of the tax and for the prevention of evasion. Sweden adopted a system of tax and criminal penalties, which allowed judges to impose criminal sanctions to persons who had already been sanctioned by the tax authorities, albeit the judge in the criminal proceedings could deduct the administrative penalty from the criminal sanction.

Sweden and a number of other governments argued that the case did not fall within the remit of the Charter because Sweden was said not to be implementing EU law for the purposes of

¹ Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, 26 February 2013.

Article 51(1). They contended that because the national law was not directly implementing a provision of EU law it was therefore not caught by the Charter.

There had been considerable academic debate as to whether the wording of Article 51 narrowed the scope of application of the Charter against Member States, by way of comparison with the Court's fundamental rights case law prior to the Charter. The CJEU resolved this issue in *Åkerberg Fransson*, finding against a narrow interpretation of the Charter.

17. It is to be recalled in respect of those submissions that the Charter's field of application so far as concerns action of the Member States is defined in Article 51(1) thereof, according to which the provisions of the Charter are addressed to the Member States only when they are implementing European Union law.

18. That article of the Charter thus confirms the Court's case-law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union.

19. The Court's settled case-law indeed states, in essence, that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations. In this respect the Court has already observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law. On the other hand, if such legislation falls within the scope of European Union law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures (see inter alia, to this effect, Case C-260/89 ERT [1991] I-2925, paragraph 42; Case C-299/95 Kremzow [1997] ECR I-2629, paragraph 15; Case C-309/96 Annibaldi [2007] ECR I-7493, paragraph 13; Case C-94/00 Roquette Frères [2002] ECR I-9011, paragraph 25; Case C-349/07 Sopropé [2008] ECR I-10369, paragraph 34; Case C-256/11 Dereci and Others [2011] ECR I-0000, paragraph 72; and Case C-27/11 Vinkov [2012] ECR I-0000, paragraph 58).

20. That definition of the field of application of the fundamental rights of the European Union is borne out by the explanations relating to Article 51 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the purpose of interpreting it (see, to this effect, Case C-279/09 DEB [2010] ECR I-13849, paragraph 32). According to those explanations, 'the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law'.

21. Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.

22. Where, on the other hand, a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction (see, to this effect, the order in Case C-466/11 *Currà and Others* [2012] ECR I-0000, paragraph 26).

23. These considerations correspond to those underlying Article 6(1) TEU, according to which the provisions of the Charter are not to extend in any way the competences of the European Union as defined in the Treaties. Likewise, the Charter, pursuant to Article 51(2) thereof, does not extend the field of application of European Union law beyond the powers of the European Union or establish any new power or task for the European Union, or modify powers and tasks as defined in the Treaties (see *Dereci and Others*, paragraph 71).

The CJEU's reasoning is contained in the preceding extract, where it made clear that the Charter applies against Member States when they act within the scope of EU law. The reasoning in paragraph 21 is especially forceful in this respect, the CJEU stating that there cannot be situations that are governed by EU law, without fundamental rights as guaranteed by the Charter being applicable.

The CJEU further held that Sweden was acting in the scope of EU law in the instant case, because the tax and criminal penalties were imposed, in part at least, for non-payment of VAT, which was governed by EU law. The fact that the national legislation upon which those tax and criminal penalties are founded was not adopted to transpose the EU Directive did not alter this conclusion, because it was designed to penalize an infringement of the Directive and was therefore intended to implement the obligation imposed on the Member States by the Treaty to impose effective penalties for conduct prejudicial to the financial interests of the European Union.²

² *Ibid* [28].

While the CJEU was therefore clear that the Charter was applicable, it was however willing to accord the national court some latitude in the application of fundamental rights, as is made clear from the following extract. The CJEU's reasoning is that where the case is not determined entirely by EU law national courts can apply national standards of protection on fundamental rights, subject to the twin caveats that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not undermined.

29. That said, where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised (see, in relation to the latter aspect, Case C-399/11 Melloni [2013] ECR I-0000, paragraph 60).

30. For this purpose, where national courts find it necessary to interpret the Charter they may, and in some cases must, make a reference to the Court of Justice for a preliminary ruling under Article 267 TFEU.

On the substance of the case concerning whether there was an infringement of Article 50 of the Charter, the CJEU held that the mere co-existence of tax penalties and criminal sanctions did not per se infringe Article 50. It would only do so if the tax penalty could itself be regarded as criminal in nature, and this was a matter to be decided by the national court in the light of criteria laid down by the CJEU.³

*Melloni*⁴ was also decided by the Grand Chamber and the judgment was handed down on the same day as *Åkerberg Fransson*. *Melloni* is primarily important for its interpretation of Article 53 of the Charter. The case concerned the European Arrest Warrant, EAW, and more particularly the circumstances in which a state could refuse to execute a warrant issued by another state. The basic idea behind the EAW was that, subject to certain conditions, an EAW issued by one state had to be accepted and executed by another state.

³ Ibid [32]-[37].

⁴ Case C-399/11, *Stefano Melloni v Ministero Fiscal*, 26 February 2013.

The circumstances in which the latter state could refuse to execute the EAW were amended in 2009, through what became Article 4a(1) of Framework Decision 2002/584. The 2009 amendment provided in essence that if a person convicted in absentia was aware, in due time, of the scheduled trial and was informed that a decision could be handed down if he did not appear for the trial or, being aware of the scheduled trial, gave a mandate to a lawyer to defend him at the trial, the executing judicial authority was required to surrender that person, and could not make the surrender subject to there being an opportunity for a retrial of the case at which he is present in the issuing Member State.

This was problematic from the perspective of the executing state, Spain, since its Constitutional Tribunal had held that the Spanish Constitution required that there should be some opportunity for retrial of the case in the issuing state, which was Italy, where the original conviction was given in absentia, even if the accused was represented by a lawyer when that initial conviction occurred. It should however be noted that the reason why Melloni was absent from the trial in Italy is that he had been arrested in Spain and was on bail before being sent to Italy for trial, but broke his bail conditions and absconded.

The CJEU held that Article 4a(1) of the Framework Decision was compatible with the right to an effective judicial remedy and the right to a fair trial in Article 47 of the Charter and the rights of the defence in Article 48(2) of the Charter.

49. Regarding the scope of the right to an effective judicial remedy and to a fair trial provided for in Article 47 of the Charter, and the rights of the defence guaranteed by Article 48(2) thereof, it should be observed that, although the right of the accused to appear in person at his trial is an essential component of the right to a fair trial, that right is not absolute (see, inter alia, Case C-619/10 Trade Agency [2012] ECR I-0000, paragraphs 52 and 55). The accused may waive that right of his own free will, either expressly or tacitly, provided that the waiver is established in an unequivocal manner, is attended by minimum safeguards commensurate to its importance and does not run counter to any important public interest. In particular, violation of the right to a fair trial has not been established, even where the accused did not appear in person, if he was informed of the date and place of the trial or was defended by a legal counsellor to whom he had given a mandate to do so.

50. This interpretation of Articles 47 and 48(2) of the Charter is in keeping with the scope that has been recognised for the rights guaranteed by Article 6(1) and (3) of the ECHR by the case-law of the European Court of Human Rights (see, inter alia, ECtHR, *Medenica v. Switzerland*, no. 20491/92, § 56 to

59, ECHR 2001-VI; Sejdic v. Italy [GC], no. 56581/00, § 84, 86 and 98, ECHR 2006-II; and Haralampiev v. Bulgaria, no. 29648/03, § 32 and 33, 24 April 2012).

The CJEU then turned its attention to the most difficult aspect of the case, which concerned the fact that the Spanish Constitutional Tribunal had held that Article 4a(1) was contrary to Spanish conceptions of fundamental rights. The national court asked whether Article 53 of the Charter must be interpreted as allowing the executing Member State to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution. Article 53 of the Charter provides that,

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the [European] Union or all the Member States are party, including the [ECHR] and by the Member States' constitutions.

The CJEU held, however, that Article 53 of the Charter could not allow the Spanish authorities to make execution of the EAW contingent upon conditions other than those laid down in Article 4a(1), even though the extra condition stemmed from an interpretation of the Spanish constitution by the Spanish Constitutional Tribunal.

56. The interpretation envisaged by the national court at the outset is that Article 53 of the Charter gives general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law. Such an interpretation would, in particular, allow a Member State to make the execution of a European arrest warrant issued for the purposes of executing a sentence rendered in absentia subject to conditions intended to avoid an interpretation which restricts or adversely affects fundamental rights recognised by its constitution, even though the application of such conditions is not allowed under Article 4a(1) of Framework Decision 2002/584.

57. Such an interpretation of Article 53 of the Charter cannot be accepted.

58. That interpretation of Article 53 of the Charter would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution.

59. It is settled case-law that, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order (see Opinion 1/91 [1991] ECR I-6079, paragraph 21, and Opinion 1/09 [2011] ECR I-1137, paragraph 65), rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State (see, to that effect, inter alia, Case 11/70 Internationale Handelsgesellschaft [1970] ECR 1125, paragraph 3, and Case C-409/06 Winner Wetten [2010] ECR I-8015, paragraph 61).

60. It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.

61. However, as is apparent from paragraph 40 of this judgment, Article 4a(1) of Framework Decision 2002/584 does not allow Member States to refuse to execute a European arrest warrant when the person concerned is in one of the situations provided for therein.

62. It should also be borne in mind that the adoption of Framework Decision 2009/299, which inserted that provision into Framework Decision 2002/584, is intended to remedy the difficulties associated with the mutual recognition of decisions rendered in the absence of the person concerned at his trial arising from the differences as among the Member States in the protection of fundamental rights. That framework decision effects a harmonisation of the conditions of execution of a European arrest warrant in the event of a conviction rendered in absentia, which reflects the consensus reached by all the Member States regarding the scope to be given under EU law to the procedural rights enjoyed by persons convicted in absentia who are the subject of a European arrest warrant.

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

64. In the light of the foregoing considerations, the answer to the third question is that Article 53 of the Charter must be interpreted as not allowing a Member State to make the surrender of a person

convicted in absentia conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution.

There is no doubt that the *Melloni* ruling is controversial, and the reaction of national constitutional courts remains to be seen. The case throws into stark relief the difficulties that can arise from differences in interpretation of constitutional rights as between different Member States and as between a particular Member State and the EU.

2. THE FINANCIAL CRISIS

The financial crisis, and resulting crisis with the Euro, has had profound effects on the EU, and its Member States, even those that do not form part of the Euro zone.⁵ It has generated a welter of measures to combat the ‘problem’ and this flurry of initiatives has not yet come to an end, nor is it likely to do so in the short term.

The origins of the crisis can be traced back to the foundations of Economic and Monetary Union, EMU, laid down in the Maastricht Treaty. The schema was predicated on a dichotomy between monetary and economic union, and this remained largely unchanged in the Lisbon Treaty. Monetary union was all about the single currency and the Treaty regime established an independent European Central Bank, governance by experts and the primacy of price stability. The Maastricht settlement in relation to economic policy was markedly different. It was built on two related assumptions, preservation of national authority and preservation of national liability. The former was reflected in the fact that Member States retained fiscal authority for national budgets, subject to limited oversight and coordination from the EU designed to persuade Member States, with the ultimate possibility of sanctions, to balance their budgets and not run excessive deficits. The latter, preservation of national liability, was

⁵ P Craig, ‘*Pringle*: Legal Reasoning, Text, Purpose and Teleology’ (2013) 20 Maastricht Journal of European and Comparative Law 1; P Craig, ‘The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism’ (2012) 37 ELRev 231; S Peers, ‘The Stability Treaty: Permanent Austerity or Gesture Politics?’ (2012) 8 EuConst 404; C Barnard, ‘The Charter, the Court and the Crisis’, Cambridge Legal Studies Research Paper Series, 18/2013.

the consequence of the former. It finds its most powerful expression in the no bail-out provision, Article 125(1) TFEU. This provides in essence that the EU should not be liable for, or assume the commitments of, central governments, regional, local or other public authorities, or other public bodies, and nor should a Member State be liable for, or assume the commitments of such bodies within another Member State.

The Member States recognized the proximate connection between economic and monetary policy. They understood that the economic health of individual Member State economies could have a marked impact on the valuation of the Euro, hence the need for some oversight and coordination of national economic policy. They were, however, mindful of the policy decisions made in and through national budgets, including those of a redistributive nature, and were unwilling to accord the EU too much control over such determinations. The very fact that EU control over national budgetary policy was relatively weak meant however that there were limits as to the EU's capacity to intervene to prevent Member States from running budget deficits. The specific problem for the EU began in earnest with the fact that Greece's credit rating to repay its debt was down-graded. This then led to problems for the Euro, and to concerns about the budgetary health of some other countries that used the currency. The net impact of these developments was downward pressure on the Euro, which was only alleviated when Euro countries provided a support package for Greece that satisfied the financial markets. The sovereign debt crisis was overlaid by, and interacted with, the banking crisis that affected some lending institutions that were heavily committed to economic sectors, such as housing, which were hit badly by the downturn in the economic markets.

There will doubtless be continued debate as to the ascription of responsibility for the crisis. The reality of the crisis was not however to be denied, and it generated a whole raft of legal responses from the EU. These can broadly be divided into measures that were designed to provide assistance to Euro-area Member States, and those where the primary objective was to strengthen oversight of national budgetary policy.

The principal mechanism for provision of assistance is now the European Stability Mechanism, ESM, which entered into force on 8 October 2012. Article 136 TFEU was amended through recourse to the simplified revision procedure, the result being a new paragraph 3, which stated that 'the Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro-area

as a whole'.⁶ However this amendment was not in force when the ESM was established and could not therefore form the legal basis for the ESM, which came into force on October 8 2012. The ESM thus took effect as an intergovernmental organization based on an international treaty between the Euro-area Member States, and is located in Luxembourg. The ESM has a total subscribed capital of €700 billion, €80 billion of which is in the form of paid-in capital provided by the Euro area Member States in five instalments of €16 billion. The legitimacy of the ESM was challenged on a variety of grounds in *Pringle*,⁷ but the CJEU rejected the challenge and upheld the legality of the ESM.

Increased supervision over national financial institutions has assumed various forms. The regulatory apparatus for banking, securities, insurance, and occupational pensions has been thoroughly overhauled.⁸ There have also been major changes to increase oversight over national economic policy, because of the proximate connection between economic and monetary union. The driving force behind these changes was to tighten EU control over national economic policy in order to prevent the sovereign debt and banking crises that precipitated the crisis with the Euro. The legislative framework for economic union was amended through the 'six-pack' of measures in 2011,⁹ which were enacted pursuant to Articles 121, 126 and 136 TFEU.¹⁰ The measures were designed to render economic union

⁶ European Council Decision 2011/199 of 25 March 2011 amending Art 136 TFEU with regard to a stability mechanism for Member States whose currency is the euro [2011] OJ L91/1.

⁷ Case C-370/12 *Pringle v Government of Ireland, Ireland and the Attorney General*, judgment of 27 November 2012.

⁸ Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority) [2010] OJ L331/12; Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority) [2010] OJ L331/84; Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority) [2010] OJ L331/4.

⁹ http://ec.europa.eu/economy_finance/economic_governance/index_en.htm .

¹⁰ Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [2011] OJ L306/12; Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure [2011] OJ L306/33; Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area [2011] OJ L306/1; Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States [2011] OJ L306/41; Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of

more effective by tightening the two parts of the schema, surveillance and excessive deficit, the details of which were contained in the Stability and Growth Pact.¹¹ Further measures, the two-pack, were enacted on May 21 2013.¹² The rules on oversight over national economic policy analysis have also been affected by the Treaty on Stability, Coordination and Governance,¹³ also known as the Fiscal Compact, which was signed by 25 contracting states in March 2012.¹⁴ The budgets of the contracting parties must be balanced or in surplus. While the obligation to balance the national budget is the core of the TSCG, it is nonetheless arguable that almost everything therein might have been done under the existing Lisbon Treaty provisions, including those on enhanced cooperation.

The provisions concerning assistance and those concerning oversight are ‘joined at the hip’, in the sense that grant of assistance under the ESM is conditional from 1 March 2013 on ratification by the applicant state of the Fiscal Compact.

The measures enacted to combat the financial crisis have constitutional implications concerning the manner and legitimacy of legal change within the EU; the doctrinal legal form through which this change is effectuated; and resultant issues of transparency and complexity for the overall body of law in this area. There is moreover little doubt that the crisis has severely shaken confidence in the EU.

macroeconomic imbalances [2011] OJ L306/25; Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct macroeconomic imbalances in the euro area [2011] OJ L306/8; Results of in-depth reviews under Regulation (EU) No 1176/2011 on the prevention and correction of macroeconomic imbalances, COM(2013) 199 final.

¹¹ Council Regulation (EC) 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [1997] OJ L209/1; Council Regulation (EC) 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure [1997] OJ L209/6.

¹² Regulation (EU) 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States experiencing or threatened with serious difficulties with respect to their financial stability in the euro area [2013] OJ L140/1; Regulation (EU) 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area [2013] OJ L140/11.

¹³ P Craig, ‘The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism’ (2012) 37 *EL Rev* 231; S Peers, ‘The Stability Treaty: Permanent Austerity or Gesture Politics?’ (2012) 8 *EuConst* 404.

¹⁴ Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, 1-2 March 2012, available at <http://www.european-council.europa.eu/eurozone-governance/treaty-on-stability?lang=en> .