Further substantive rights guaranteed by the Charter: focus on rights particularly relevant in criminal proceedings

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Introduction

EU competence in criminal proceedings is much newer than in other areas, save for some Community measures which closely resembled substantive criminal law. Whilst intergovernmental agreement on how to combat cross border crime existed in the form of conventions, resolutions and other types of agreement for some twenty years, it was only in the Treaty of Amsterdam that actual legislative acts became possible in this area. Even then, it was not until the Lisbon Treaty that these measures became enforceable at EU level. It is therefore a developing area of EU law and requires some explanation before looking at how the Charter may operate in this field. The first section of this paper identifies the legal history and basis of EU criminal law; The second looks at some criminal justice instruments that may affect domestic practitioners; The third considers the applicable Charter provisions and how these may be used in criminal proceedings; The fourth looks at recent cases from the Court of Justice of the European Union which interpret the Charter; the fifth considers why practitioners should use the Charter.

1. The history and legal basis of EU criminal law[1]

The Maastricht Treaty[2] created the possibility for cooperation in the field of justice and home affairs which considered judicial cooperation in criminal matters, and other particular issues relating to cross border crime, to be of common interest in achieving the objectives of the Union. Conventions, joint positions and joint actions could be utilized for procedural as well as substantive harmonising measures. The Treaty of Amsterdam[3] clarified the process for the adoption of instruments in the field of police and judicial cooperation and created binding legal acts for the

[1] A very useful publication on the background is Peers, S. *EU Justice and Home Affairs Law*, 3rd Ed. (OUP; 2011)

[2] Treaty on the European Union (1993)

[3] Treaty on the European Union (1997)

adoption of EU action. The Lisbon Treaty removed the pillar structure defining legal competence and process and created an Area of Freedom, Security and Justice to include cooperation in civil and criminal matters.[4] The procedure for adoption of law was regularised across all areas and criminal measures now adopted are either directives or regulations, with the same legal effect as law adopted in other areas.

There are now over 135 legal acts concerning criminal procedure of varying form, the majority of which were passed under the former TEU. Almost all require national legislation to implement them as they are framework decisions, passed under the former treaty. These instruments are binding on the member states as to the result to be achieved but leave choice of form and methods to the national legislature[5]. The purpose of these measures is to ensure investigation and prosecution of cross border crime. It became increasingly apparent to the EU institutions that with free movement of people, comes also the free movement of crime. Member states were reluctant to venture towards harmonised EU criminal law since this would mean ceding a substantial amount of national sovereignty over a particularly contentious area of national control where the differences between member states is still too stark[6]. A mechanism was necessary to prevent and bring to justice this criminal activity.

It was therefore under the UK presidency of the EU in 1998 that the idea was formulised to borrow from the approach adopted in the development of the common market: to utilise the mutual recognition of judicial decisions[7]. The assumption was that in utilising mutual recognition, a mutual trust would be fostered between member states in their differing judicial systems. There is still a long way to go before this mutual trust is realised[8]. Nevertheless, mutual recognition is the premise of most EU criminal justice measures, adopted under article 31 TEU and subsequently article 81 Treaty on the Functioning of the European Union (TFEU).

British and Irish practitioners ought to be aware of two significant protocols negotiated during the passage of the Lisbon Treaty – 21 and 36 TFEU. The first creates a presumption that the UK and Ireland will not take part in future proposals for criminal cooperation measures unless they opt in to them on a case by case basis. They may also opt in once the instrument is adopted, subject to complying with conditions imposed by the Commission. The second relates to existing criminal

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[4] Treaty on the Functioning of the European Union (2009)

[5] Ex article 34 TEU

[6] V. Mitsilegas, *EU Criminal Law* (Hart, 2009), ch. 3; P. Craig, *The Lisbon Treaty* (OUP, 2010), pp 379-378.

[7] Cardiff European Council, Presidency Conclusions, 15 and 16 June 1998, SN 150/1/98 REV 1, pp 14 and 15; *Mutual Recognition of Final Decisions in Criminal Matters*, COM(2000) 495 final 2

[8] G. Vernimmen-Van Tiggelen and L. Surano, Institute for European Studies, Université Libre de Bruxelles ECLAN – European Criminal Law Academic Network, *Analysis of the Future of Mutual Recognition in Criminal Matters in the European Union,* EC DG JLS (20th November 2008)

cooperation measures which under Protocol 36 continue to operate as formerly intended until December 2014, where they will then be 'Lisbonised' – that is receive the enforcement powers available under all other legislative acts (which includes the jurisdiction of the CJEU to arbitrate on infringement proceedings brought by the Commission for a failure to implement EU law correctly, and interpret EU law on a reference from a member state where it is not clear). The UK has the option to no longer engage in these acts and must notify its intention by June 2014. It must opt out en bloc, but it can also indicate its intention to opt back in to certain measures. In this instance it will again have to comply with conditions imposed by the Commission, or obtain the approval of the Council, depending on what type of measure is concerned. The UK may also have to bear direct financial consequences of its decision to opt out.[9]

2. EU criminal justice instruments

Given the volume of legal acts now adopted in this field, it is not possible here to go through all of them. It is at least useful to give an indication of the type of act and coverage these instruments provide. There are three types of instrument:

(1) substantive legal measures, which require criminal offences and sanctions in national law
(2) mutual recognition procedural instruments which require action upon a judicial request of another member state
(3) harmonised minimum standards which must be applied in both domestic and cross border cases to the treatment of suspects and victims of crime

Considering each of these in turn, there are numerous examples of these now operating in the EU acquis.

(1) substantive legal measures

These instruments concern cross border criminal activity which the EU member states consider worthy of joint action. These include:

Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of drug trafficking;

Council Framework Decision 2002/475/JHA of 13 June 2002 and 2008/919/JHA of 28 November 2008 on combating terrorism;

Council Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and

[9] The House of Lords EU Committee has published a report on the issues involved in the decision to opt-out *EU police and criminal justice measures: The UK's 2013 opt-out decision* HL Paper 159, 13th Report of Session 2012-2013 (TSO, 23 April 2013), available at http://www.publications.parliament.uk/pa/ld201213/ldselect/ldeucom/159/159.pdf

counterfeiting of non-cash means of payment.

(2) mutual recognition procedural instruments

These instruments require a particular action by another member state in order to progress proceedings in another member state. They function by way of a judicial request sent from member state A to member state B (and possibly others) which must then be recognised, subject to certain verification checks and grounds of refusal. These instruments have proven greatly controversial due to their speed, demand for parity with national proceedings, limited remit for scrutiny of the underlying decision and limited role that the suspected or accused person has in challenging the request.

These include:

Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States;

Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties;

Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders;

Council Framework Decision 2008/675/JHA of 24 July 2008 on the taking account of convictions in the Member States of the European Union in the course of new criminal proceedings;

Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purposes of their enforcement in the European Union;

Council Framework Decision 2009/829/JHA of 23 October 2009 on the application between Member States of the European Union of the principle of mutual recognition to decision of supervision measures as an alternative to provisional detention.

The instruments follow general themes with respect to the submission by and to competent authorities of each member state of a certificate, which sets out the agreed information necessary to mount a request. The decision must be taken by a judicial authority (though there is some variance as to what this is at each stage in each member state – be it judge, investigating magistrate or prosecutor). Grounds of refusal under these instruments also follow common themes – *ne bis in idem*, age of criminal responsibility, double criminality, consideration of nationality, immunity, statute of limitations, territoriality, though these vary as to mandatory or optional application.

With respect to the framework decisions on taking account of convictions,[10] and the organisation and content of the exchange of information,[11] there are no grounds of refusal: judges must take into account information that has been obtained concerning previous convictions handed down in other member states in the same way as they would national convictions, at any stage of proceedings, and that 'equivalent legal effects' are attached to them. The exchange of information about a conviction concerning a national of another member state must take place with that other member state upon conviction, and upon request for the provision of information where proceedings are brought against a person who is not a national of that member state. The information transmitted must include information on the conviction (the date, when it became final and the court imposing the conviction), information on the offence (date it took place, and name or classification, reference to applicable legal provisions) and information on the contents of the conviction (sentence and any supplementary measures). Other optional information shall be transmitted if entered on the national database (parents' names, national reference number, place of the offence). Any other information may be transmitted if entered. The European Criminal Records Information System now makes this possible through standardised categorisation codes. These codes firstly concern, level of completion, level of participation and exemption from responsibility (i.e. for insanity or diminished responsibility). Second, categories and sub-categories of offence, and third, penalty or measure imposed.[12] Clearly, in order to give literal equivalent effect to convictions obtained in another member state, trust in the veracity of that conviction is required.

Whilst in none of these instruments, save for the framework decision on the European arrest warrant, and to a certain extent the transfer of sentenced persons, is the involvement of legal counsel and the consent of the affected person contemplated, every instrument does contain the article:

> This Framework Decision shall not have the effect of amending the obligation to respect the fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty.

It may therefore be possible to afford some scrutiny of the request/ information prior to its application. In the context of convictions, therefore, as a defence lawyer,

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[10] Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings OJ (15.08.2008) L220/32

[11] Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States OJ (07.04.2009) L93/23

[12] Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA, OJ (07.04.2009) L 93/33

you would want to know if your client is familiar with the conviction, the circumstances of the offence and if indeed the offence is equivalent to a national offence. You may also be concerned about the sentence that was imposed in the other member state and whether the same sentence would be imposed nationally for the same circumstances. This is of particular relevance where mandatory sentencing provisions apply when a number of prior convictions are held.

(3) harmonised minimum standards

These instruments are the most recent area where activity has finally been achieved, despite lengthy efforts of the European Parliament, civil society and some member states over the past fifteen years.[13] All of these instruments have been adopted post-Lisbon Treaty which means that they are directives, adopted on the votes of both Council and the Parliament, and entertain enforcement proceedings. The Commission can bring an infringement claim against the member state in the Court of Justice of the European Union (CJEU) if it considers that member states have not implemented the directives correctly.[14] Furthermore, where a person affected by an instrument during domestic proceedings considers that domestic law does not give full effect, or that the instrument itself contains objectionable principles, it can ask the national court to make a preliminary reference to the CJEU for clarification. This can take place at the court of first instance or on appeal at the discretion of the judge (though if the point is not clear, the final appellate court must make a reference).[15]

The instruments are significant because they seek to raise standards amongst the member states with regards to procedural safeguards for both suspects and victims of crime. In some ways they go significantly further than the European Convention on Human Rights, particularly with respect to victims. Though in others, they disappointingly create exceptions to their application.

These include:

Resolution of the Council of 30 November 2009, on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, under which the EU has thus far adopted:

Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the Right to Interpretation and Translation in Criminal Proceedings

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[13] See UK House of Lords European Union Committee, *Breaking the deadlock: what future for EU procedural rights?*, 2nd Report of Session 2006-2007, HL Paper 20 (TSO, 2007) and UK House of Lords European Union Committee, *Procedural rights in EU criminal proceedings - an update*, 9th Report of Session 2008-2009, HL Paper 84 (TSO, 2009)

[14] Pursuant to article 265 TFEU

[15] Article 267 TFEU

Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the Right to Information in Criminal Proceedings

The proposed directive on the right of access to a lawyer and to communicate upon arrest is nearing the point of adoption after two years of consideration by the Council and Parliament.[16] In the autumn we anticipate measures on the right to legal aid, special measures for vulnerable persons, and the presumption of innocence, though it is not yet known what form these will take. These instruments require from the point where a person is made known that they are a suspect of crime until final appeal that certain rights are available to ensure an effective defence is possible. They do not apply to the most minor offences where court proceedings are not instituted (though the proposed directive on the right of access to a lawyer will nevertheless apply where the person is deprived of liberty). The directive on the right to information will require all member states to have a letter of rights setting out the rights available to a suspect held in police detention which they can take to their cell with them to consider. This is a significant improvement for many member states where the rights are delivered orally by the custody officer.[17] The directive provides an example letter of rights which the member states are invited to use as a starting point for their own. This letter takes its lead from the English and Welsh Notice of Rights and Entitlements.[18]

With respect to victims, Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime has also been adopted. Significantly this instrument requires information about the proceedings to be given to the victim, including reasons for discontinuance of proceedings, and for their views to be taken into account with respect to the progress of the case and sentencing outcome. It requires special measures to be made available to assist victims in giving evidence and, post conviction, services for mediation and compensation to be available.

It is important to note that these instruments have an implementation window of two or three years which means that once adopted, member states still have a lengthy period to pass domestic legislative giving effect to them in national law.

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[16] For the original proposal see COM(2011) 326 final (Brussels, 8.6.2011); and most recent publicly available text, Presidency, *Progress Report,* 16521/12 (Brussels, 3.12.2012)

[17] See Spronken T., *EU Wide Letter of Rights in Criminal Proceedings: Towards Best Practice* (2010), available on the University of Maastricht website, http://arno.unimaas.nl/show.cgi?fid=20056

[18] Available here https://www.gov.uk/notice-of-rights-and-entitlements-a-persons-rights-in-police-detention

3. Charter provisions applicable in criminal cases

The Charter of Fundamental Rights provides distinct rights which are applicable in criminal cases, subject to the need for EU law to be in issue (pursuant to article 51 CFR). The majority of these rights are found in Title VI of the Charter, which relates to justice, and provide as follows:

Article 47

Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Article 48

Presumption of innocence and right of defence

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.

2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

Article 49

Principles of legality and proportionality of criminal offences and penalties

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.

3. The severity of penalties must not be disproportionate to the criminal offence.

Article 50

Right not to be tried or punished twice in criminal proceedings for the same criminal offence

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.

But other important rights are found elsewhere. In Title V, Citizen's Rights:

Article 41

Right to good administration

Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

2. This right includes:

(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

(c) the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

Article 42

Right of access to documents

> Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.

It is also worth being aware of article 4 CFR on the prohibition of torture and inhuman and degrading treatment or punishment, and article 6 CFR on the right to liberty and security of the person.

Article 52(3) requires that where rights in the Charter correspond with rights guaranteed by the European Convention on Human Rights, the meaning and scope with be the same as that provided by the ECHR and the jurisprudence of the European Court of Human Rights. However this standard acts as a floor and not a ceiling, since the article goes on to state that the provision 'shall not prevent Union law providing more extensive protection'.

The Explanations

Guidance for the interpretation of these articles is found in the Explanations to the Charter,[19] which confirm that article 4 and 6 CFR must be interpreted in accordance with the ECHR. In particular, article 6 CFR is to be respected when measures in the area of judicial cooperation in criminal matters are adopted, and notably, where they 'define common minimum provisions as regards the categorisation of offences and punishments and certain aspects of procedural law.'

The explanation to article 41 on the right to good administration clarifies that it is based on the existence of the Union as subject to the rule of law, whose characteristics were developed in the case-law of the Court of Justice which has enshrined, inter alia, good administration as a general principle of Union law. It confirms in accordance with article 52(2) CFR, that the right is guaranteed and therefore defined by article 296 TFEU; paragraph 3 by article 340 TFEU; and paragraph 4 by article 20(2)(d) and 25 TFEU.

The explanation to article 42 on the right of access to documents is to be exercised within the limits for which provision is made in article 15(3) TFEU. That article relates only to acts of the Union institutions rather than the member states. However, given that the Directive on the right to information has now been adopted, it may be argued that the obligation extends to the member states, at least indirectly and in conjunction with the Justice rights.

[19] OJ C 303/17 (14.12.2007)

With respect to article 47 CFR, on the right to an effective remedy and a fair trial, the explanations confirm that Union law has gone further than the ECHR in that the right to an effective remedy is guaranteed before a court,[20] not just a national authority, pursuant to article 13 ECHR. The article also provides the right to a fair trial, which is to correspond with article 6(1) ECHR save that it is not confined to disputes relating to civil law rights and obligations, which is significant when invoking certain citizenship rights.

Article 48 CFR is to be interpreted in accordance with article 6(2) and 6(3) ECHR.

Article 49 CFR is said to follow the traditional rule of non-retroactivity, unless it is a more lenient penal law, in accordance with article 15 of the International Covenant on Civil and Political Rights. It is also to be interpreted in accordance with article 7 ECHR. The third paragraph incorporates the general Union principle of proportionality.

Article 50 CFR is to be read in accordance with article 4 of Protocol 7 to the ECHR. The *ne bis is idem* rule in any event applies in Union law and has been repeatedly interpreted by the CJEU. With respect to its application between the different jurisdictions of the member states, articles 54 to 58 of the Schengen Convention and the case of *Gözutök*[21] confirm its meaning.

4. Recent cases of the CJEU interpreting the Charter

Since the jurisdiction of the CJEU in relation to criminal matters is optional in respect of pre-Lisbon measures, and the Charter only became binding in 2009, there has as yet been little application of the Charter rights in the context of criminal law. This jurisprudence is beginning to grow however and there are some cases worthy of note which are set out below.

Gözutök

The aim of the Schengen Agreement and the Convention Implementing the Schengen Agreement is to abolish checks at the common borders of the member states on the movement of persons, and the protocol integrating the Schengen *acquis* into Union law is aimed 'at enhancing European integration and, in particular, at enabling the European Union to develop more rapidly into an area of freedom, security and justice'. Proceedings against G in the Netherlands in relation to the seizure of marijuana were discontinued when he accepted an offer by the prosecutor to pay a fine. In Dutch law, this acts as a bar to further prosecution, when all conditions imposed are fulfilled. Subsequently, G's bank in Germany noticed large

[20] Case 222/84 *Johnston* [1986] ECR 1651 *et seq.*

[21] Case C-187/01 [2003] ECR I-1345

sums of money passing through it and, the German police having obtained information from the Netherlands, he was arrested in Germany and charged with dealing in narcotics in the Netherlands. The preliminary question to the CJEU was whether there is there a bar to prosecution in Germany under Article 54 CISA if, under Netherlands law, a prosecution on the same facts is barred in the Netherlands? In particular, is there a bar to prosecution where a decision by the Public Prosecutor's Office to discontinue proceedings after the fulfillment of the conditions imposed, which under the law of other Contracting States requires judicial approval, bars prosecution before a Netherlands court?'

Article 54 CISA prevents prosecution in a member state for the same acts as those in respect of which the person's case has been finally disposed of in another member state.

The Court considered that since further prosecution was definitively barred in the Netherlands, the case must be seen as 'finally disposed of.' Once the conditions are fulfilled, the penalty has also been enforced; It did not matter that the procedure had not culminated in a judicial decision, since procedure and form did not impinge on the effect of the decision, nor did the TEU require harmonisation of criminal law for the application of article 54. The Court observed that there is a necessary implication that member states must have mutual trust in their criminal justice systems, even where the outcome would be different in their own. The other interpretation would mean that only defendants accused of serious offences for which a simplified method of disposal is not available (which was the case here) would benefit from the *ne bis in idem* principle.

The case did not raise the Charter, since the right was enshrined in CISA in any event. However, the case is helpful with regard to determining the breadth of the *ne bis in idem* principle.

Bank Mellat[22]

This is the latest in the CJEU's review of sanctions cases where the right to reasoned decisions is in issue in the context of individuals and organisations being listed pursuant to UN Security Council resolutions imposing restrictive measures as a threat to international peace and security. The measures include restrictions on travel and freezing of assets. The EU has adopted these resolutions through EU Council regulations.

In this particular case, the concern regards Iranian nuclear proliferation. The bank brought a claim in the General Court that the Council had firstly infringed the

[22] Case T-496/10 *Bank Mellat v Council of the European Union,* General Court, Fourth Chamber (unreported, 29th January 2013)

obligation to state reasons, the rights of the defence, and the right to an effective judicial protection, secondly error of assessment in the adoption of restrictive measures, and thirdly infringement of its right to property and the principle of proportionality. This raises articles 17, 41 and 47 CFR.

The case is significant as the Court finds with respect to the jurisdictional scope of the Charter, it can apply to legal persons who are emanations of non-EU member countries. In fact, the Charter guarantees to 'everyone' the rights enshrined within it (though it was not disproved that the applicant was an emanation of the Iranian state in any event). It is worth quoting directly from the judgment to explain the Court's reasoning:

> 49 *Firstly, it must be recalled that the purpose of the obligation to state the reasons for an act adversely affecting a person, as provided for by the second paragraph of Article 296 TFEU and, more particularly in this case, by Article 24(3) of Decision 2010/413, Article 15(3) of Regulation No 423/2007, Article 36(3) of Regulation No 961/2010 and Article 46(3) of Regulation No 267/2012, is, first, to* ***provide the person concerned with sufficient information to make it possible to determine whether the measure is well founded or whether it is vitiated by an error which may permit its validity to be contested*** *before the Courts of the European Union and, secondly,* ***to enable the latter to review the lawfulness of that measure****. The obligation to state reasons therefore constitutes an essential principle of European Union law which may be derogated from only for compelling reasons. The statement of reasons must therefore in principle be notified to the person concerned at the same time as the act adversely affecting him, for failure to state the reasons cannot be remedied by the fact that the person concerned learns the reasons for the act during the proceedings before the Courts of the European Union (see, to that effect, Case T-390/08 Bank Melli Iran v Council [2009] ECR II□3967, paragraph 80 and case-law cited).*
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> *50 Consequently, unless there are compelling reasons touching on the security of the European Union or of its Member States or the conduct of their international relations which prevent the disclosure of certain information, the Council is required to inform the entity covered by restrictive measures of the* ***actual and specific reasons*** *why it considers that those measures had to be adopted.* ***It must thus state the matters of fact and law which constitute the legal basis of the measures concerned*** *and the considerations which led it to adopt them (see, to that effect, Bank Melli Iran v Council, cited above in paragraph 49, paragraph 81 and case-law cited).*
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> *51 Moreover, the statement of reasons* ***must be appropriate to the measure at issue*** *and to the context in which it was adopted. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the statement of reasons to specify all the relevant matters of fact and law, since the question whether the statement of reasons is adequate must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. In particular, the reasons given for a decision are sufficient if it*

was adopted in circumstances known to the party concerned which enable him to understand the scope of the measure adversely affecting him (see Bank Melli Iran v Council, cited above in paragraph 49, paragraph 82 and case-law cited).

52 Secondly, according to settled case-law, observance of the rights of the defence, especially the right to be heard, in all proceedings initiated against an entity which may lead to a measure adversely affecting that entity, is a fundamental principle of European Union law which must be guaranteed, even when there are no rules governing the procedure in question (Bank Melli Iran v Council, cited above in paragraph 49, paragraph 91).

53 The principle of respect for the rights of the defence requires, first, that the entity concerned ***must be informed of the evidence adduced against it*** *to justify the measure adversely affecting it. Secondly,* ***it must be afforded the opportunity effectively to make known its view on that evidence*** *(see, by analogy, Case T-228/02 Organisation des Modjahedines du peuple d'Iran v Council [2006] ECR II 4665, paragraph 93)…*

56 Thirdly, the principle of effective judicial protection is a general principle of European Union law, stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR and in Article 47 of the Charter of Fundamental Rights of the European Union. The effectiveness of judicial review means that the European Union authority in question is bound to disclose the grounds for a restrictive measure to the entity concerned, so far as possible, either ***when that measure is adopted or, at the very least, as swiftly as possible after that decision, in order to enable the entity concerned to exercise, within the periods prescribed, its right to bring an action****. Observance of that obligation to disclose the grounds is* ***necessary both to enable the persons to whom restrictive measures are addressed to defend their rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in their applying to the Courts of the European Union, and also to put the latter fully in a position to carry out the review of the lawfulness of the measure*** *in question which is the duty of those courts (see, to that effect and by analogy, Joined Cases C-402/05 P and C-415/05 P Kadi and Al Barakaat International Foundation v Council and Commission [2008] ECR I□6351, paragraphs 335 to 337 and case-law cited).*[23]

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[23] By way of indication as to what the Court considers sufficient explanation, the reasons provided by the Council were as follows:

1. according to Decision 2010/413 and Implementing Regulation No 668/2010, the applicant is a State-owned Bank;
2. the applicant engages in a pattern of conduct which supports and facilitates Iran's nuclear and ballistic missile programmes;
3. the applicant has provided banking services to UN and EU listed entities, to entities acting on their behalf or at their direction, or to entities owned or controlled by them;
4. the applicant is the parent bank of First East Export [Bank] ('FEE'), which is designated under [United Nations Security Council Resolution] 1929 [2010];
5. the applicant provides banking services to the Atomic Energy Organisation of Iran ('AEOI') and to Novin Energy Company ('Novin') which are subject to restrictive measures adopted by the

The judgment provides clear guidance as to the parameters of the duty to give reasons and the effective operation of an affected person's defence. However, this is in an action against the Council in relation to decisions of the EU regarding freezing of assets. It is not clear whether the Court would apply the principles in the same way with regards to the judicial cooperation instruments under former articles 31-34 TEU and now Title V TFEU, since the Union has specifically endorsed the mutual recognition concept in this area. Would the Court find that, notwithstanding the requirement to give mutual recognition to a request of another member state, nevertheless, sufficient detail is required to enable the affected person to mount a defence against the punitive effect of the request? In this regard, it may be that a challenge to the information provided on the standard certificate in any of the mutual recognition instruments could be mounted, where insufficient detail is provided for the affected person to challenge the request.

However, the outcome of two cases before the Grand Chamber concerning the interpretation of the European arrest warrant cast some doubt on this possibility.

Radu[24]

Radu is a significant case because of the Advocate General's Opinion, and it demonstrates the value of reading AGOs as a helpful tool for the construction of future arguments, though it also demonstrates that despite their best efforts, Advocates General cannot always convince the CJEU as to the approach it should take with regards to the outcome of a case.

The case concerned a preliminary reference from the Romanian court of appeal on the interpretation of the European arrest warrant in conjunction with the Charter, in a request for the surrender of Radu to Germany. The Romanian court referred the following questions to the CJEU (in summary):

1) Whether the ECHR and Charter constitute primary EU law
2) Is the arrest and detention by an executing state of a person requested for surrender an interference with the right to liberty?
3) Must that interference with the right to liberty be necessary and

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United Nations Security Council;

6. the applicant manages the accounts of officials of the Aerospace Industries Organisation and an Iranian procurement agent;
7. that since at least 2003 the applicant has facilitated the movement of millions of dollars for the Iranian nuclear programme.

The Court concluded that reasons 2, 3, 6 and 7 were excessively vague as they gave no details of the conduct alleged; did not identify the persons concerned; and provided no details of the entities and transactions concerned.

[24] Case c-396/11 *Curte de Apel Constanța (Romania) v Radu,* Grand Chamber (unreported, 29th January 2013)

proportionate to the objective being pursued?

4) Can the executing state judicial authority refuse the request because of an interference with the right not to be deprived of liberty and interference with defence rights?
5) …
6) Is the domestic law incompatible with the ECHR and Charter and have they properly transposed the EAW framework decision?

AG Sharpston engaged with these questions in her opinion. She observed that there can be no assumption that simply because the surrender is requested by another member state that their human rights will be guaranteed. Since article 6 TEU enshrines fundamental rights as guaranteed by the Convention, as well as the Charter, member states are bound also to respect those rights. She drew upon the case law of the CJEU to confirm that 'measures incompatible with respect for human rights are not acceptable in the Community.'[25] As to what this should mean in practice, she looked to the justifications within article 5 ECHR affording a deprivation of liberty, and in particular article 5(1)(f) which provides for extradition procedures; The essential issue is whether detention pursuant to a warrant is proportionate, and to avoid being arbitrary must be carried out in good faith, in accordance with national procedure and grounds for detention, in appropriate conditions and not exceed a reasonable length for the required purpose.[26] Article 6 CFR is to be read in light of this, and therefore, so must the Framework Decision. Given that article 1(3) of the Framework Decision makes clear that the decision does not affect the obligation to respect fundamental rights and principles, the duty to respect those rights permeates through the Framework Decision.[27] She then considered the jurisprudence of the ECtHR as to when a breach of a Convention right might lead to an extradition refusal. She also considered the CJEU's decision in *NS v Belgium*[28]*:*

> *…the Court had to consider the effect of Article 4 of the Charter on the duties of the national authorities under, inter alia, Regulation No 343/2003. In the same way as the Framework Decision, that regulation lays down rules for the movement of persons – in that case, asylum seekers – from one Member State to another in accordance with specified procedures and time-limits. The Court held that 'it cannot be concluded … that any infringement of a fundamental right by the Member State [to which the asylum seeker would fall to be transferred under the provisions of the regulation] will*

[25] At [47]-[52]. See Cases C-402/05 and C-415/05 P *Kadi and Al-Barakaat* [2008] ECR I-6351, and as early as Case 29/69 *Stauder* [1969] ECR 419 and Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125

[26] At [56], citing *A and Others v UK* application no. 3455/05 (judgment 19th February 2009)

[27] At [70]

[28] Joined Cases C-411/10 and C-493/10 [2011] ECR I-0000. This case is also significant as it confirms that, despite Protocol 30 to the Lisbon Treaty which sets parameters to the application of the Charter in the UK and Poland, the Charter does have binding effect in those member states as in all others.

> *alter the obligations of the other Member States to comply with the provisions of [the Regulation]'. If the threshold were to be set at such a low level, the objectives of the legislation would risk being undermined. It went on to hold that: '[in order] to ensure compliance by the European Union and its Member States with their obligations concerning the protection of the fundamental rights of asylum seekers, 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 Article 4 of the Charter.'*[29]

AG Sharpston looked at the threshold test for finding an infringement of Convention rights and the standard of proof with respect to the evidence used to demonstrate that breach. *NS* is helpful in showing the extent of evidence required to demonstrate a right is being infringed as there were many authoritative reports on conditions in asylum reception centres and the delays and treatment of asylum seekers. Significantly AG Sharpston considered that more extensive protection was appropriate within the EU than wider Council of Europe. She recommended a less stringent test which criterion should be that '*the deficiency(ies) in the trial process should be such as to fundamentally destroy its fairness*.' Furthermore, she suggests that the standard of proof of 'beyond reasonable doubt' has no role to play in the context of establishing an interference with an individual's human rights, where it may impose too onerous a standard to satisfy, particularly where someone is impecunious. Therefore she proposes that the objections must be '*substantially well founded.'*

However, the CJEU largely ignored her opinion and instead focused on the narrow factual context before the national court rather than the generality of the questions it posed to the CJEU on the reference. The argument raised by Radu before the national court was that his right to a defence had been infringed because he had not had the opportunity to be heard before the issuing authority made the request for his surrender. The Court recalled the purpose of the EAW is to replace the multilateral system of extradition between member states with a system of surrender based on the principle of mutual recognition and that member states are obliged to act upon an EAW. It concluded that there is no defence right to be heard prior to issue of an EAW envisaged by the Framework Decision or EU law. The decision could be interpreted as giving a disappointingly narrow reading of the Framework Decision by stating that the only grounds of refusal are set out in articles 4, 4a and 5, and that the rights of the defence are provided by the right to legal counsel in the executing state before a decision to consent to surrender can be made and the entitlement to be heard where the requested person does not consent.

However, the Court in drawing its conclusions focused on the right to be heard in

[29] At [76]

the context of the factual circumstances complained of, such that articles 47 and 48 CFR do not require that a warrant be refused on the ground that the requested person was not heard by the issuing judicial authority before it was issued. Indeed, that would lead to the failure of the very system of surrender established by the framework decision. The Court did not consider the question of whether article 1(3) of the Framework Decision (the general fundamental rights override) and/or the Charter or Convention can provide additional grounds for refusal. To this end the question remains open. The AGO provides a good starting point for any future case concerning the refusal of a mutual recognition request based upon human rights grounds.

Melloni[30]

The Spanish Constitutional Court sought a preliminary reference in this case concerning the guarantees that must be given in relation to a trial having taken place *in absentia* on a request for a conviction EAW, and whether a refusal can be given in accordance with article 53 CFR. This provides that:

> 'nothing in the 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 Union or all the Member States are party, including the ECHR and by the Member States' constitutions.'

Melloni had been aware of the trial against him in Italy and appointed lawyers, but fled to Spain and was not himself present at the trial or appeal stages. He was represented by lawyers. Under Spanish constitutional law, it has been decided (though not unanimously) that the right to a fair trial is absolute and a person must be able to attend their trial. The questions referred to the CJEU from the Constitutional Court concerned whether the executing court had to interpret the Framework Decision as precluding the execution of the warrant conditional upon the conviction being open to review, in order to guarantee the rights of the defence. If so, is the procedure therefore compatible with articles 47 and 48 CFR and also article 53 CFR, thereby protecting a constitutional right derived from national law?

The Court referred to *Radu* to confirm the intention underlying the Framework Decision. The Court considered that the Framework Decision, as amended by a further framework decision on trials *in absentia*, precluded, in four situations, the making of surrender conditional upon a review of the conviction. In particular, article 4a provides in essence, that, once the person convicted *in absentia* was aware, in due time, of the scheduled trial and was informed that a decision could be handed down if he did not appear for the trial or, being aware of the scheduled trial,

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30 Case 399/11 *Stefano Melloni v Ministerio Fisca,* Grand Chamber *l* (unreported 26th February 2013)

gave a mandate to a legal counsellor to defend him at the trial, the executing judicial authority is required to surrender that person, with the result that it cannot make that surrender subject to there being an opportunity for a retrial of the case at which he is present in the issuing Member State. The provision of this exhaustive list must be considered compatible with the rights of the defence and also preclude the executing judge demanding further conditions.[31]

The Court observed that the right to a defence pursuant to article 48 CFR in conjunction to the right to a fair trial and an effective judicial remedy pursuant to article 47 CFR, although providing the right for the accused to appear in person as an essential right, is not absolute. This right can be waived '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.'[32] This interpretation conforms with ECHR jurisprudence. The Court concluded that the exhaustive list provided in article 4a of the Framework Decision also conforms to these conditions. To this end, the Framework Decision complies with the Charter.

With respect to article 53 CFR, the Court observed that the interpretation envisaged by the national court was to give 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.

This interpretation could not be accepted as it would undermine the primacy of EU law in as much as it would allow member states to disregard EU legal rules that are fully in compliance with the rights set out in the Charter. The Court considered it a settled principle of EU law that national rules cannot undermine the effectiveness of EU law on the territory of that state (considering *Internationale Handelsgesellschaft* amongst other decisions). But is article 53 CFR thereby devoid of any meaning? The Court interprets the provision as follows:

> *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.*[33]

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[31] See [40] to [46]

[32] At [49]

[33] At [60]

The Court considers that given article 4a of the Framework Decision provides particularl grounds intended to remedy the problems of *in absentia* trials in the context of surrender requests, it thereby harmonises national procedures to protect defence rights. Allowing a member state to use article 53 CFR to undermine that agreement and apply national procedure would undermine the principles of mutual trust and recognition that the instrument purports to uphold.[34]

However, one may well wonder whether this interpretation of article 53 CFR actually accords with the content of the article. Conversely, the article, in essence, states that the Charter cannot restrict higher rights afforded by the constitutional orders of the member states. Given that this article follows consecutively from article 51 CFR which sets out the fundamental premise that the Charter only applies to the member states when implementing EU law, is it not implicit that higher constitutional protection should take precedence?

Clearly the CJEU is focusing on ensuring the efficacy of EU law over national law, given the scrutiny that the issue of *in absentia* trials had received from the EU legislative process, particularly since it could only be adopted by unanimity of the member states. But in doing so it arguably renders an important Charter provision ineffective.

Åkerberg Fransson[35]

On the same day, the Court gave judgment on a preliminary reference concerning the *ne bis in idem* principle. Åkerberg Fransson was accused of serious tax offences, by way of providing false information with regard to income tax and VAT. He had already been ordered to pay surcharges in respect of those failings before another court two years earlier. He therefore argued that the new accusations infringed his right not to be tried twice for the same offence under article 50 CFR. The details are fairly technical, but the essence of the questions to the CJEU surrounded the scope of the *ne bis in idem* rule and when a national court must apply the Charter.

The case is interesting as to when it may be understood that a member state is implementing EU law.[36] In this case (1) EU competence exists because of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and article 4(3) TEU, that every member state is under an obligation to

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[34] At [62] and [63]

[35] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson,* Grand Chamber (unreported 26th February 2013)

[36] Case C-27/11 *Vinkov* [2012] ECR I-0000 was an application to concerning whether a member state had to provide an appeal from the administrative imposition of penalty points for a driving offence. This was outside the scope of EU law because thus far, the EU has only legislated for the mutual recognition of judgments in driving matters, not the procedures to be adopted.

take all legislative and administrative measures appropriate for ensuring collection of the VAT due on its territory and for preventing evasion; and (2) article 325 TFEU obliges member states to counter illegal activities affecting the financial interests of the EU, and the EU's own resources include revenue from application of the harmonised VAT assessment bases, such that there is a direct link between the collect of VAT revenue in accordance with EU law and the availability of VAT resources to the EU budget.

Furthermore, despite the Swedish legislation having been passed well before the EU legislation, it could still be seen as implementing EU law since its application is designed to penalise an infringement of the Council Directive and is therefore intended to implement the obligation irrespective of when it was passed.[37] The purpose of this conclusion must be that where member state law is already sufficient to give effect to EU law without amendment, the member state ought not to be able to evade the application of the Charter due to a narrow interpretation of 'implementing EU law' for the purposes of article 51 CFR. It makes clear that prior law which by happenstance already complies with future EU law, is also caught by the Charter.

The Court then reiterated the principle it set out in *Melloni* at paragraph 60 (above) with regard to when national law may take precedence over the Charter; in this case, it cannot, despite what may be considered to be a very tenuous link between EU competence and national procedure. Perhaps the context is the most significant reason for the Court's decision here – fraud upon the EU budget has been a matter of EU concern since inception. It will be interesting if in other cases which appear to have equally little to do with the EU, the Court is as willing to allow the Charter to apply.

As to the application of the *ne bis in idem* principle, the Court observed that this depends upon whether the tax penalty is criminal in nature or only administrative, and if criminal, has become final.[38] Three criteria determine whether penalties are criminal in nature: (1) the legal classification of the offence under national law, (2) the very nature of the offence, and (3) the nature and degree of severity of the penalty that the person concerned is liable to incur.[39] That is a matter for the national court to determine.

Finally the Court reiterated former guidance on the legal effect of both the Convention for the purposes of member states implementing EU law, and the Charter. It is helpful to set this out in full:

> *44 As regards, first, the conclusions to be drawn by a national court from a conflict*

[37] At [26] – [28]

[38] At [34]

[39] At [35], citing Case C-489/10 *Bonda* [2012] ECR I-0000, paragraph 37

between national law and the ECHR, it is to be remembered that whilst, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of the European Union's law and whilst Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law. Consequently, ***European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law*** *(see, to this effect, Case C-571/10 Kamberaj [2012] ECR I-0000, paragraph 62).*

45 As regards, next, the conclusions to be drawn by a national court from a conflict between provisions of domestic law and rights guaranteed by the Charter, it is settled case-law that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of European Union law is ***under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such a provision by legislative or other constitutional means*** *(Case 106/77 Simmenthal [1978] ECR 629, paragraphs 21 and 24; Case C-314/08 Filipiak [2009] ECR I□11049, paragraph 81; and Joined Cases C-188/10 and C-189/10 Melki and Abdeli [2010] ECR I□5667, paragraph 43).*

46 Any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of European Union law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent European Union rules from having full force and effect are incompatible with those requirements, which are the very essence of European Union law (Melki and Abdeli, paragraph 44 and the case-law cited).

Accordingly, it is for the member states to determine when the Convention must be complied with in national law, but the Charter, as primary EU law must be given direct effect and any national law that seeks to impose a further condition prior to that effect being applicable is contrary to EU law. National courts must therefore strike down national legislation which does not comply with the Charter.

Why use the Charter in criminal proceedings?

Practitioners will undoubtedly be slow to use the Charter in their domestic cases, particularly since article 6 ECHR has become so entrenched in this area as a standard to meet.

However, the above cases go some way to illustrating the benefit of pleading the Charter over the Convention in domestic proceedings where EU law is in issue. There are four good reasons that I can distill here for doing so:

(1) The Charter must be interpreted in accordance with the Convention when the rights in the Charter replicate those in the Convention, such that the Convention jurisprudence can be directly imported into submissions relying upon Charter provisions;
(2) The Charter has direct effect before all national courts whereas the member states need only have regard to the Convention, unless incorporated otherwise by national law, and often it requires an appellate decision of a national court to interpret the application of the Convention in a domestic case;
(3) If the meaning or scope of EU law is not clear, a reference can be made to the CJEU for interpretation at any stage of the proceedings and not only after domestic remedies have been exhausted, as with an application to the ECtHR;
(4) The process of obtaining a determination from the Luxembourg Court is (currently) much quicker than waiting for the Strasbourg Court.

However, as the cases above indicate, the CJEU may not always provide the interpretation that the applicant desires. It cannot be assumed that the Court will always agree that a Charter right is in issue or that it should be interpreted in the way the applicant wishes.

As the jurisprudence on criminal justice is thus far underdeveloped, it will be necessary for applicants to take risks in order to build that jurisprudence. Where an article 6 ECHR argument would currently be argued, it is at least worthy of consideration that the equivalent and wider Charter provisions should be pleaded in conjunction with article 6, and if EU law is not clear, a preliminary reference be sought to gain clarification of how the framework decision or directive ought to be interpreted. In this way, the Charter's application in the interpretation of these provisions can be advanced. The opportunity to incorporate defence rights into predominantly prosecution orientated instruments by implying conformity with the Charter cannot be underestimated. It is open to defence practitioners to try.

Jodie Blackstock
JUSTICE
21 May 2013