Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 2 October 2012 [1]

**Case C-399/11**

**Criminal proceedings**
**against**
**Stefano Melloni**

(Reference for a preliminary ruling from the Tribunal Constitucional (Spain))

(Police and judicial cooperation in criminal matters — European arrest warrant — Surrender procedures between Member States — Decisions rendered at the end of proceedings in which the person concerned has not appeared in person — Execution of a sentence pronounced in absentia — Possibility of review of the judgment — Charter of Fundamental Rights of the European Union — Article 53)

1. This reference for a preliminary ruling requests the Court to interpret and, if necessary, to assess the validity of Article 4a(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, [2] as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, [3] ('the Framework Decision') thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial. It also asks the Court to define, for the first time, the scope of Article 53 of the Charter of Fundamental Rights of the European Union ('the Charter').

2. This case is a good illustration of how the coexistence of the various instruments protecting fundamental rights should be provided for. It has its origin in case-law of the Tribunal Constitucional (Constitutional Court) (Spain) according to which the execution of a European arrest warrant issued for the purposes of executing a judgment *in absentia* must always be subject to the condition that the convicted person is entitled to a retrial in the issuing Member State. However, Article 4a(1) of the Framework Decision provides, inter alia, that, where such a person has been aware of the intended proceedings and has given a mandate to a lawyer to represent him in order to defend him at that trial, surrender may not be subject to a condition of that kind.

3. By the three questions which it has decided to put to the Court, the Tribunal Constitucional invites it to assess the various approaches which might allow it to retain its case-law, including in the implementation of the Framework Decision. Several paths will therefore have to be explored.

1 — Original language: French.
2 — OJ 2002 L 190, p. 1.
3 — OJ 2009 L 81, p. 24.

4. Therefore, may the general application of the condition that the execution of a European arrest warrant issued for the purposes of executing a judgment *in absentia* requires that the convicted person be entitled to a retrial in the issuing Member State be derived from an interpretation of the wording, scheme or objectives of Article 4a of the Framework Decision?

5. If not, is that article compatible with the second paragraph of Article 47 and Article 48(2) of the Charter, which guarantee the accused, respectively, the right to a fair trial and respect for the rights of the defence? In addition, must European Union law grant those fundamental rights more extensive protection than the level of protection given to them by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR')?

6. If the examination of the first two questions shows that Article 4a(1) of the Framework Decision, considered in the light of the second paragraph of Article 47 and Article 48(2) of the Charter, precludes the Tribunal Constitucional from retaining its case-law in the sphere of the European arrest warrant, does Article 53 of the Charter offer it that opportunity?

## I – Legal context

### A – *Primary legislation of the European Union*

7. The second paragraph of Article 47 of the Charter provides:

'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.'

8. Article 48(2) of the Charter states:

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

9. Paragraph 52(3) of the Charter states:

'In so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

10. Article 53 of the Charter states:

'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 Union or all the Member States are party, including the [ECHR] and by the Member States' constitutions.'

### B – *Secondary legislation of the European Union*

11. Article 1 of the Framework Decision provides:

'…

2. Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.

3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.'

12. According to Article 5 of Framework Decision 2002/584:

'The execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions:

1. where the European arrest warrant has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered *in absentia* and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered *in absentia*, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment;

   …'

13. Under Article 2(2) of Framework Decision 2009/299:

'In Article 5 [of Framework Decision 2002/584], paragraph 1 is deleted.'

14. In place of that deleted provision, Article 2(1) of Framework Decision 2009/299 inserts an Article 4a into Framework Decision 2002/584.

15. As stated in Article 1(1) of Framework Decision 2009/299, the objectives of the framework decision are 'to enhance the procedural rights of persons subject to criminal proceedings, to facilitate judicial cooperation in criminal matters and, in particular, to improve mutual recognition of judicial decisions between Member States'.

16. Article 1(2) of Framework Decision 2009/299 also provides that '[t]his Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty, including the right of defence of persons subject to criminal proceedings, and any obligations incumbent upon judicial authorities in this respect shall remain unaffected'.

17. Article 4a of the Framework Decision provides as follows:

'1. The executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the European arrest warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing Member State:

(a) in due time:

   (i) either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial;

   and

(ii) was informed that a decision may be handed down if he or she does not appear for the trial;

or

(b) being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial;

or

(c) after being served with the decision and being expressly informed of the right to a retrial, or an appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed:

(i) expressly stated that he or she does not contest the decision;

or

(ii) did not request a retrial or appeal within the applicable time frame;

or

(d) was not personally served with the decision but:

(i) will be personally served with it without delay after the surrender and will be expressly informed of his or her right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed;

and

(ii) will be informed of the time frame within which he or she has to request such a retrial or appeal, as mentioned in the relevant European arrest warrant.

…'

## II – The main proceedings and the questions referred for a preliminary ruling

18. By order of 1 October 1996, the First Section of the Sala de lo Penal of the Audiencia Nacional (Criminal Division of the High Court) (Spain) authorised the extradition to Italy of Mr Melloni ('the applicant'), in order for him to be tried there in relation to the facts set out in arrest warrants Nos 554/1993 and 444/1993, issued on 13 May and 15 June 1993 respectively by the Tribunale di Ferrara (District Court, Ferrara) (Italy). After being released on bail of ESP 5 million, which he provided the following day, the applicant fled, so that he could not be surrendered to the Italian authorities.

19. By order of 27 March 1997, the Tribunale di Ferrara declared that the applicant had failed to make appearance in court and directed that notice should in future be given to the lawyers who had been chosen and already appointed by him. By judgment of 21 June 2000 of the Tribunale di Ferrara, subsequently confirmed by judgment of 14 March 2003 of the Corte d'appello di Bologna (Bologna Appeal Court) (Italy), the applicant was sentenced, in his absence, to 10 years' imprisonment for bankruptcy fraud. By judgment of 7 June 2004, the Fifth Criminal Division of the Corte suprema di

cassazione (Supreme Court of Cassation) (Italy) dismissed the appeal lodged by the applicant's lawyers. On 8 June 2004, the Procura Generale della Repubblica (Italian Public Prosecutor's Office) in the Corte d'appello di Bologna issued European arrest warrant No 271/2004 for execution of the sentence imposed by the Tribunale di Ferrara.

20. Following the applicant's arrest by the Spanish police, Juzgado Central de Instrucción (Central Investigating Court) No 6 (Spain), by order of 2 August 2008, resolved to refer the matter of European arrest warrant No 271/2004 to the First Section of the Sala de lo Penal of the Audiencia Nacional.

21. The applicant opposed surrender to the Italian authorities, contending, first, that at the appeal stage he had appointed another lawyer, revoking the appointment of the two previous lawyers, despite which notice was still being given to them. Second, he contended that under Italian procedural law it is impossible to appeal against sentences imposed *in absentia*, for which reason the execution of the European arrest warrant should, where appropriate, be made conditional upon the Italian Republic's guaranteeing the possibility of appealing against the judgment.

22. By order of 12 September 2008, the First Section of the Sala de lo Penal of the Audiencia Nacional authorised surrender of the applicant to the Italian authorities in order to serve the sentence imposed upon him by the Tribunale di Ferrara as perpetrator of a bankruptcy fraud. It considered that it was not proved that the lawyers appointed by the applicant had ceased to represent him as from 2001, and that his rights of defence had been respected, since he had been aware from the outset of the forthcoming trial, deliberately absented himself and appointed two lawyers to represent and defend him, who acted, in that capacity, at first instance, and in the appeal and cassation proceedings, thus exhausting all remedies.

23. The applicant filed a '*recurso de amparo*' [4] before the Tribunal Constitucional against the order of the First Section of the Sala de lo Penal of the Audiencia Nacional of 12 September 2008. In support of that petition, he alleges infringement of the absolute requirements deriving from the right to a fair trial proclaimed in Article 24(2) of the Spanish Constitution. There has been an infringement of the very essence of a fair trial in such a way as to undermine human dignity, as a result of allowing surrender to countries which, in the event of very serious offences, validate findings of guilt made *in absentia*, without making surrender subject to the condition that the convicted party is able to challenge them in order to safeguard his rights of defence. The applicant also contends that his application is of particular constitutional importance because the order of 12 September 2008 departed from the well-established doctrine of the Tribunal Constitucional, whereby, if sentences are imposed for serious offences in the absence of the accused, extradition must be conditional upon the availability of review of the judgment. [5]

24. By order of 18 September 2008, the First Section of the Tribunal Constitucional acknowledged that the '*recurso de amparo*' was admissible and suspended enforcement of the order of 12 September 2008. By order of 1 March 2011, the Plenary Chamber of the Tribunal Constitucional decided, on a proposal from the First Section, that it would itself examine the '*recurso de amparo*'.

25. The national court points out that it recognised, in its judgment 91/2000, that the binding nature of fundamental rights when applied 'externally', that is to say, in a transnational context, is attenuated, since only the most basic or elementary requirements may be linked to Article 24 of the Spanish Constitution and give rise to a finding of 'indirect' unconstitutionality. Nevertheless, a decision of the

4 — This is an action designed to ensure the protection of fundamental rights and freedoms. It protects, inter alia, the rights defined in Sections I and II of Chapter II of Title I of the Spanish Constitution, such as the right to equality (Article 14), the fundamental rights and civil liberties provided for in Articles 15 to 29 of the Constitution, and the right to conscientious objection (Article 30(2)), against adverse actions of the public authorities (Article 53(2)).

5 — The applicant cites, to that effect, judgments of the Tribunal Constitucional 91/2000 of 30 March 2000 and 177/2006 of 5 June 2006.

Spanish judicial authorities to consent to extradition to countries which, in cases of very serious offences, allow convictions *in absentia* without making the extradition conditional upon the convicted party being able to challenge the same in order to safeguard his rights of defence gives rise to an 'indirect' infringement of the requirements deriving from the right to a fair trial, in that such a decision undermines the essence of a fair trial in a way which affects human dignity.

26. The national court also points out that that precedent is also applicable to the system of surrender established by Framework Decision 2002/584, for two reasons, namely that the condition for the surrender of a convicted person is inherent in the essence of the constitutional right to a fair trial and that Article 5 of Framework Decision 2002/584 contemplated the possibility that the execution of a European arrest warrant issued for the execution of a sentence imposed *in absentia* should be subject, 'in accordance with the law of the executing Member State', to, among others, the condition that 'the issuing judicial authority should furnish guarantees that are regarded as sufficient to ensure that the person requested under a European arrest warrant will have an opportunity to apply for a retrial such as to safeguard his rights of defence in the issuing Member State and to be present at the hearing' (judgment 177/2006 of the Tribunal Constitucional).

27. The national court recalls, finally, that in its judgment 199/2009 of 28 September 2009, it upheld the '*recurso de amparo*' filed in relation to an order by which the Audiencia Nacional had consented to extradition of the person concerned to Romania, in implementation of a European arrest warrant, issued for the purposes of execution of a sentence of four years' imprisonment imposed in proceedings held in the absence of the accused, without mentioning the requirement that the conviction in question be amenable to review. In that regard, the Tribunal Constitucional rejected the argument put forward by the Audiencia Nacional to the effect that a conviction *in absentia* had not in fact occurred, since the applicant had given a power of attorney to a lawyer who appeared in the trial as his private defence counsel.

28. According to the Tribunal Constitucional, the difficulty arises from the fact that Framework Decision 2009/299 repealed Article 5(1) of Framework Decision 2002/584 and introduced a new Article 4a. Article 4a precludes a refusal 'to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision' where the person concerned, 'being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial'. The national court points out that, in the case which has given rise to these constitutionality review proceedings, it is established that the applicant had appointed two trusted lawyers, whom the Tribunale di Ferrara notified of the forthcoming trial, so that he was aware of it. It is also established that the applicant was actually defended by those two lawyers at the following trial, at first instance, and in the subsequent appeal and cassation proceedings.

29. For the national court, the question therefore arises whether the Framework Decision precludes the Spanish courts from making surrender of the applicant conditional on the right to have the conviction in question reviewed.

30. In passing, the Tribunal Constitucional rejects the contention of the Ministerio Fiscal to the effect that a request for a preliminary ruling is not necessary because Framework Decision 2009/299 does not apply, *ratione temporis*, to the main proceedings. The object of the main proceedings is to determine not whether the order of 12 September 2008 infringed Framework Decision 2009/299, but whether it indirectly infringed the right to a fair trial protected by Article 24(2) of the Spanish Constitution. Framework Decision 2009/299 must therefore be taken into account for determining what part of that right has 'external' effects, because it constitutes the European Union law applicable at the time constitutionality is assessed. It must also be taken into account by virtue of the principle that national

law is to be interpreted in accordance with framework decisions.[6]

31. In the light of these considerations, the Tribunal Constitucional decided, on 9 June 2011, to suspend the '*recurso de amparo*' proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 4a(1) of … [the] Framework Decision … be interpreted as precluding national judicial authorities, in the circumstances specified in that provision, from making the execution of a European arrest warrant conditional upon the conviction in question being open to review, in order to guarantee the rights of defence of the person requested under the warrant?

(2) In the event of the first question being answered in the affirmative, is Article 4a(1) of … [the] Framework Decision … compatible with the requirements deriving from the right to an effective judicial remedy and to a fair trial, provided for in Article 47 of the Charter …, and from the rights of defence guaranteed under Article 48(2) of the Charter?

(3) In the event of the second question being answered in the affirmative, does Article 53 of the Charter, interpreted schematically in conjunction with the rights recognised under Articles 47 and 48 of the Charter, allow a Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the requesting State, thus affording those rights a greater level of protection than that deriving from European Union law, in order to avoid an interpretation which restricts or adversely affects a fundamental right recognised by the constitution of the first-mentioned Member State?'

32. The Ministerio Fiscal, the Spanish, Belgian, German, Italian, Netherlands, Austrian, Polish, Portuguese and United Kingdom Governments, the Council of the European Union and the European Commission have lodged written observations in these proceedings.

33. The applicant, the Ministerio Fiscal, the Spanish, German and Netherlands Governments, the Council and the Commission presented their oral arguments at the hearing held on 3 July 2012.

## III – My analysis

34. Before examining these three questions, I must respond to the arguments raised by the Ministerio Fiscal, by the Belgian, German and United Kingdom Governments and by the Council, which have maintained that this reference for a preliminary ruling should be considered inadmissible.

### A – *Admissibility of the reference for a preliminary ruling*

35. Two main arguments have been put forward to support the claim that this reference for a preliminary ruling is inadmissible.

36. In the first place, it is argued that Framework Decision 2009/299 is inapplicable *ratione temporis* to the surrender procedure at issue in the main proceedings, so that the Court, in this case, is not competent to interpret it and to assess its validity. In fact, both the date on which European arrest warrant No 271/2004 was issued (8 June 2004) and that on which the Audiencia Nacional decided to surrender the applicant to the Italian authorities (12 September 2008) are prior to the date on which Framework Decision 2009/299 was adopted.

6 — See Case C-105/03 *Pupino* [2005] ECR I-5285, paragraph 43.

37. In the second place, it is argued that the fact that the Italian Republic availed itself of the opportunity offered by Article 8(3) of Framework Decision 2009/299 to defer until 1 January 2014 the application of that framework decision to the recognition and enforcement of decisions, rendered in the absence of the person concerned at the trial, which are issued by the Italian competent authorities [7] supports the view that the questions raised are hypothetical, since a reply to them will have no practical effect on the resolution of the main proceedings.

38. I would point out that, according to the Court, the presumption that questions referred by national courts for a preliminary ruling are relevant may be rebutted only in exceptional cases, where it is quite obvious that the interpretation which is sought of the provisions of European Union law referred to in the questions bears no relation to the actual facts of the main action or to its purpose or where the problem is hypothetical or the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. Save in such cases, the Court is, in principle, required to give a ruling on the questions referred to it. [8]

39. We are not faced, here, with any situation which may, as an exceptional circumstance, justify the inadmissibility of a reference for a preliminary ruling.

40. First of all, the first argument, alleging that Framework Decision 2009/299 is inapplicable *ratione temporis* to the surrender procedure at issue in the main proceedings, must be rejected.

41. It is apparent from the wording of Article 8(2) of Framework Decision 2009/299 that the decision 'shall apply as from [28 March 2011] to the recognition and enforcement of decisions rendered in the absence of the person concerned at the trial'. That provision must be understood to mean that, from 28 March 2011, when the executing judicial authority is ruling on the recognition and enforcement of decisions rendered in the absence of the person concerned at the trial, whether those decisions are prior or subsequent to that date, it must apply the relevant provisions of Framework Decision 2009/299.

42. That approach is consistent with the Court's settled case-law, according to which procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying to situations existing before their entry into force. [9]

43. Since Article 4a of the Framework Decision merely sets out the circumstances in which the recognition and enforcement of a decision rendered at the end of a trial at which the person concerned has not appeared must not be refused, the provisions of Article 4a must be regarded as procedural rules. [10]

44. Therefore, Article 4a of the Framework Decision is indeed intended to apply to the surrender procedure at issue in the main proceedings, which is continuing.

7 — See the declaration for the purposes of Article 8(3) of Framework Decision 2009/299 (OJ 2009 L 97, p. 26).

8 — See, inter alia, Case C-467/05 *Dell'Orto* [2007] ECR I-5557, paragraph 40, and, as regards the assessment of the validity of a rule of European Union law, Case C-343/09 *Afton Chemical* [2010] ECR I-7027, paragraphs 13 and 14.

9 — See, inter alia, Case C-296/08 PPU *Santesteban Goicoechea* [2008] ECR I-6307, paragraph 80 and the case-law cited.

10 — See, by analogy, Joined Cases C-361/02 and C-362/02 *Tsapalos and Diamantakis* [2004] ECR I-6405, paragraph 20. In the words of the European Court of Human Rights, the European arrest warrant procedure 'does not concern the determination of a criminal charge' and 'the surrender of the applicant to the [competent] authorities [is] not a penalty inflicted on him for committing an offence, but a procedure intended to permit the execution of a judgment ...' (see the decision of the European Court of Human Rights (ECtHR) in *Monedero Angora v. Spain* (dec.), no. 41138/05, ECHR 2008). In other words, the European arrest warrant procedure has no impact on individual criminal liability, but is designed to facilitate the execution of a decision taken in respect of the convicted person.

45. As regards the declaration by which the Italian Republic availed itself of the opportunity offered by Article 8(3) of Framework Decision 2009/299 to defer until 1 January 2014 the application of that framework decision to the recognition and enforcement of decisions, rendered in the absence of the person concerned at the trial, which are issued by the Italian competent authorities, I do not think that it can result in the inadmissibility of this reference for a preliminary ruling on the ground that, on its own, it makes a reply from the Court for the purpose of resolving the main proceedings pointless.

46. It is not disputed that Article 4a of the Framework Decision is designed, from a substantive point of view, to govern the type of situation at issue in the main proceedings. Moreover, the date of 1 January 2014 is a final deadline, and there is nothing to prevent the Italian Republic choosing an earlier date, or even reversing its declaration.

47. It is therefore certain that a reply from the Court to the questions raised by the Tribunal Constitucional will be useful, by 1 January 2014 at the latest, to enable not only the Tribunal Constitucional to rule on the '*recurso de amparo*' brought before it, but also to allow the executing judicial authority to rule on the surrender procedure.

48. The particular nature of the '*recurso de amparo*' brought before the Tribunal Constitucional also argues in favour of the admissibility of this reference. By this action, that court must carry out a review of constitutionality which must necessarily take account of European Union law and, in particular, of the Charter, as required under Article 10(2) of the Spanish Constitution. As the Tribunal Constitucional states in its order for reference, it is essential to take account of European Union law in order to determine which part of the right to a fair trial is protected by the Constitution. [11]

49. The review to be carried out by the Tribunal Constitucional is comparable to that which a constitutional court may carry out in an a priori review of constitutionality of a law transposing Framework Decision 2009/299. If, in order to carry out such a review successfully, that court were to ask the Court of Justice questions about the interpretation or validity of that framework decision, the Court would probably agree to reply even if the time-limit for transposition of that framework decision had not yet expired. [12]

50. Since this reference for a preliminary ruling should, in my view, be regarded as admissible, I shall examine in turn the three questions raised by the Tribunal Constitucional.

## B – *The first question*

51. By its first question, the Tribunal Constitucional wishes to know, in essence, whether Article 4a(1)(a) and (b) of the Framework Decision is to be interpreted as precluding the executing judicial authority, in the circumstances specified in that provision, from making the execution of a European arrest warrant conditional upon the person who is the subject of the warrant being able to apply for a retrial in the issuing Member State.

11 — See, in that regard, Guillén López, E., 'The impact of the European Convention of Human Rights and the Charter of Fundamental Rights of the European Union on Spanish Constitutional law: make a virtue of necessity', *Human rights protection in the European legal order: the interaction between the European and the national courts*, Intersentia, 2011, p. 309, which states, inter alia, that, 'with the authorisation for the ratification of the Lisbon Treaty, organic law 1/2008 … states in Article 2 that: "Under the provisions of paragraph 2 of Article 10 of the Spanish constitution and paragraph 8 of Article 1 of the Treaty of Lisbon, the rules relating to fundamental rights and freedoms recognised by the constitution shall be interpreted in accordance with the provisions of the Charter of Fundamental Rights"' (p. 334).

12 — See, by analogy, as regards an application for judicial review, made before the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court) (United Kingdom), and seeking to contest the transposition of a directive even though, when the application was made, the period prescribed for implementation of the directive had not yet expired and no national implementing measures had been adopted, Case C-308/06 *Intertanko and Others* [2008] ECR I-4057, paragraphs 33 to 35, and *Afton Chemical*, paragraphs 15 to 17.

52. The Tribunal Constitucional explains as follows its doubts as to the reply to be given to this question. In the first place, it suggests that Article 4a(1) of the Framework Decision could be interpreted literally as precluding the executing judicial authority from refusing to execute the European arrest warrant, but not necessarily from imposing conditions, such as the possibility of a retrial. In the second place, even if such a literal interpretation were to be rejected, Article 1(3) of the Framework Decision might lead to the same result.

53. I do not share the doubts expressed by the Tribunal Constitucional concerning the meaning to be given to Article 4a(1) of the Framework Decision. An examination of the wording, scheme and objective of that provision shows that, in the situations to which it refers, the executing judicial authority cannot, generally, make the execution of a European arrest warrant conditional upon the person who is the subject of the warrant being able to apply for a retrial in the issuing Member State.

54. It is apparent from the wording of Article 4a of the Framework Decision that the Decision provides an optional ground for non-execution of a European arrest warrant issued for the purpose of executing a custodial sentence or a detention order, if the person concerned has not appeared in person at the trial which resulted in the decision. That option is accompanied by four exceptions in which the executing judicial authority may not refuse to execute the European arrest warrant in question.

55. As stated in recital 6 in the preamble to Framework Decision 2009/299, the European Union legislature wished '[to set] conditions under which the recognition and execution of a decision rendered following a trial at which the person concerned did not appear in person should not be refused. These are alternative conditions; when one of the conditions is satisfied, the issuing authority, by completing the corresponding section of the European arrest warrant ..., gives the assurance that the requirements have been or will be met, which should be sufficient for the purpose of the execution of the decision on the basis of the principle of mutual recognition'.

56. The situations referred to in Article 4a(1)(a) to (d) of the Framework Decision may be placed in two categories.

57. The first category groups together points (a) and (b) of that provision. It is apparent that the executing judicial authority cannot refuse to execute the European arrest warrant either when the person concerned was summoned in person or by other means informed of the date and place of his or her trial and was informed that a decision might be handed down if he or she did not appear for the trial, or when the person concerned, being aware of the scheduled trial, gave a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial.

58. In the light of the description of the facts in the main proceedings as stated in the order for reference, the applicant's situation corresponds more particularly to the circumstances referred to in Article 4a(1)(b) of the Framework Decision. I note, in fact, that the applicant had given a mandate to two trusted lawyers, whom the Tribunale di Ferrara informed of the forthcoming trial, so that he was aware of it. It is also established that the applicant was indeed defended by those two lawyers at the following trial, at first instance, and in the subsequent appeal and cassation proceedings.

59. A reading of Article 4a(1)(a) and (b) of the Framework Decision reveals that the wording of those two points makes no mention of the requirement that the person concerned must, in those circumstances, be able to apply for a retrial in the issuing Member State.

60. An examination of all the provisions of Article 4a(1) of the Framework Decision shows that the situations referred to in points (c) and (d) of that provision, which constitute the second category, are in fact the only cases where the person concerned may be entitled to a retrial.

61. The way in which the European Union legislature wished to conceive those situations is very different from the logic which was at the root of Article 5(1) of Framework Decision 2002/584. I note that that provision allowed the executing judicial authority, in certain circumstances, to make the surrender conditional on the issuing judicial authority giving assurances deemed adequate to guarantee the person who was the subject of the European arrest warrant that he or she would have an opportunity to apply for a retrial in the issuing Member State and be present at judgment. It was for the executing judicial authority to assess whether those assurances were adequate.

62. In contrast, Article 4a(1)(c) and (d) of the Framework Decision removes the discretion of the executing judicial authority, which must rely on the information contained in the European arrest warrant. The executing judicial authority is therefore required to execute the European arrest warrant where this states, in essence, either that the person concerned, after being served with the decision and being expressly informed about the right to a retrial, expressly stated that he or she did not contest the decision or did not request a retrial within the applicable time frame, or that the person concerned was not personally served with the decision but will be personally served with it without delay after the surrender and will be expressly informed of the right to a retrial and of the time frame within which he or she has to request such a retrial.

63. The scheme of Article 4a(1) of the Framework Decision therefore indicates that points (c) and (d) of that provision are the only points that deal with the possibility that the person concerned may be entitled to a retrial and that, conversely, points (a) and (b) of that provision list the situations in which the person concerned may not claim that right. It should be pointed out that, as regards those last two points, the position of the European Union legislature is more specific, but does not differ fundamentally from that which prevailed in connection with Article 5(1) of Framework Decision 2002/584. An opposite reading of that provision shows that it already precluded the possibility of making the surrender conditional on the existence of a retrial if the person concerned had been summoned in person or otherwise informed of the date and place of the hearing which led to the decision given *in absentia*.

64. In points (a) and (b) of Article 4a(1) of the Framework Decision, the European Union legislature confirmed, in essence, that, if the person concerned was aware of the scheduled trial and was informed that a decision might be handed down if he or she did not appear for the trial, or if, being aware of the scheduled trial, he or she had given a mandate to a legal counsellor to defend him or her, that person must be regarded as having waived his or her right to appear at the trial, so that he or she could not invoke a right to a retrial.

65. To allow the executing judicial authority generally, in those situations, to make the surrender of the person concerned conditional on the possibility of a retrial would be tantamount to adding a ground for refusing to execute the European arrest warrant. That would go against the European Union legislature's clearly stated intention to provide an exhaustive list, for reasons of legal certainty, of the circumstances in which it must be considered that the procedural rights of a person who has not appeared in person at his or her trial have not been infringed and that the European arrest warrant must therefore be executed.

66. The objectives pursued by the European Union legislature, when it adopted Article 4a of the Framework Decision, confirm that it did not intend to give the executing judicial authorities the opportunity to make the execution of the European arrest warrant conditional on the person who is the subject of the warrant being able to apply for a retrial in the issuing Member State.

67. By adopting Framework Decision 2009/299, the European Union legislature intended to remedy the defects in the scheme laid down in Article 5(1) of Framework Decision 2002/584 and to perfect it, so as to achieve a better balance between the objective of enhancing the procedural rights of persons subject to criminal proceedings and the objective of facilitating judicial cooperation in criminal matters, in particular by improving mutual recognition of judicial decisions between Member

States. [13]

68. As recital 3 in the preamble to Framework Decision 2009/299 states, the European Union legislature took as its starting point the fact that Framework Decision 2002/584, in its previous version, allowed, under certain conditions, 'the executing authority to require the issuing authority to give an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present when the judgment is given'. The European Union legislature observes that, under that system, '[t]he adequacy of such an assurance is a matter to be decided by the executing authority, and it is therefore difficult to know exactly when execution may be refused'.

69. Faced with those uncertainties which might reduce the effectiveness of the mechanism for mutual recognition of judicial decisions rendered *in absentia*, the European Union legislature considered that it was necessary 'to provide clear and common grounds for non-recognition of decisions rendered following a trial at which the person concerned did not appear in person'. [14] Framework Decision 2009/299 is aimed, therefore, 'at refining the definition of such common grounds, allowing the executing authority to execute the decision despite the absence of the person at the trial, while fully respecting the person's right of defence'. [15]

70. All those statements serve to show that, by removing the possibility of conditional surrender provided for in Article 5(1) of Framework Decision 2002/584, the European Union legislature wished to improve mutual recognition of judicial decisions rendered *in absentia* while enhancing a person's procedural rights. The solution which it found, consisting in providing an exhaustive list of the circumstances in which the execution of a European arrest warrant issued in order to enforce a decision rendered *in absentia* must be regarded as not infringing the rights of the defence, is incompatible with any retention of the possibility for the executing judicial authority to make that execution conditional on the conviction in question being open to review in order to guarantee the rights of defence of the person concerned.

71. In its order for reference, the Tribunal Constitucional raises the issue whether Article 1(3) of Framework Decision 2002/584 and Article 1(2) of Framework Decision 2009/299 might allow for such a possibility.

72. I would point out that it is apparent from those two articles, which are basically the same in content, that those framework decisions do not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU, which include the rights of defence of persons who are the subject of criminal proceedings. The national court's argument amounts to considering that the obligation to respect fundamental rights may allow the executing judicial authorities to refuse to execute the European arrest warrant, including in the situations mentioned in Article 4a(1)(a) to (d) of the Framework Decision, where the person concerned is not entitled to a retrial. That argument raises the question of the validity of that provision in the light of the fundamental rights protected in the legal order of the European Union, on the assumption that that provision may not adequately protect the right to a fair trial or the rights of the defence, which is the subject of the second question.

13 — See Article 1(1) of Framework Decision 2009/299.

14 — See recital 4 of Framework Decision 2009/299.

15 — Idem.

C – *The second question*

73. By its second question, the Tribunal Constitucional asks the Court to rule whether Article 4a(1) of the Framework Decision is compatible with the requirements deriving from the second paragraph of Article 47 and Article 48(2) of the Charter.

74. According to the explanatory remarks relating to those last two provisions,[16] the second paragraph of Article 47 of the Charter corresponds to Article 6(1) of the ECHR, and Article 48(2) of the Charter corresponds more particularly to Article 6(3) of the ECHR. Under Article 52(3) of the Charter, in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights are to be the same as those laid down by the said convention. However, that provision does not preclude European Union law from providing more extensive protection. I shall therefore examine the case-law of the European Court of Human Rights concerning the guarantees which must accompany judgments rendered *in absentia*, before determining whether or not European Union law should afford greater protection in the matter.

75. A synthesis of the general principles concerning judgments rendered *in absentia* can be found in the judgment of the European Court of Human Rights of 1 March 2006 in *Sejdovic v. Italy* [GC],[17] and those principles were recently reaffirmed in its judgments in *Haralampiev v. Bulgaria* and *Idalov v. Russia* [GC], no. 5826/03, 22 May 2012.

76. According to the European Court of Human Rights, 'the object and purpose of [Article 6 of the ECHR] taken as a whole show that a person "charged with a criminal offence" is entitled to take part in the hearing'.[18] It considers that, '[a]lthough proceedings that take place in the accused's absence are not of themselves incompatible with Article 6 of the [ECHR], a denial of justice nevertheless undoubtedly occurs where a person convicted *in absentia* is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that he has waived his right to appear and to defend himself ... or that he intended to escape trial'.[19]

77. Moreover, that court considers that 'the duty to guarantee the right of a criminal defendant to be present in the courtroom – either during the original proceedings or in a retrial – ranks as one of the essential requirements of Article 6 [of the ECHR] ... Accordingly, the refusal to reopen proceedings conducted in the accused's absence, without any indication that the accused has waived his or her right to be present during the trial, has been found to be a "flagrant denial of justice", rendering the proceedings "manifestly contrary to the provisions of Article 6 [of the ECHR] or the principles embodied therein"'.[20]

78. It is also apparent from the case-law of the European Court of Human Rights that '[n]either the letter nor the spirit of Article 6 [of the ECHR] prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial ... However, if it is to be effective for [ECHR] purposes, a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance ... .

16 — See explanatory remarks on the Charter of Fundamental Rights (OJ 2007 C 303, p. 17).

17 — No. 56581/00, ECHR 2006-II.

18 — ECtHR, *Sejdovic*, cited above, § 81, and *Haralampiev v. Bulgaria*, no. 29648/03, § 30, 24 April 2012.

19 — ECtHR, *Sejdovic*, cited above, § 82.

20 — ECtHR, *Sejdovic*, cited above, § 84, and *Haralampiev*, cited above, § 31.

Furthermore, it must not run counter to any important public interest'.[21] The Court of Human Rights has also held that 'before an accused can be said to have, through his conduct, waived implicitly an important right under Article 6 [of the ECHR], it must be shown that he could reasonably have foreseen the consequences of his conduct in this regard'.[22]

79. When it assesses whether the national proceedings at issue satisfy the requirements of a fair trial within the meaning of Article 6 of the ECHR, the European Court of Human Rights attaches great importance to the fact that the accused is not penalised for his absence from his trial by being denied the right to legal assistance.[23] Indeed, '[a]lthough not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial. A person charged with a criminal offence does not lose the benefit of this right merely on account of not being present at the trial'.[24] According to the European Court of Human Rights, '[i]t is of crucial importance for the fairness of the criminal justice system that the accused be adequately defended, both at first instance and on appeal'.[25] Therefore, '[e]ven if the legislature must be able to discourage unjustified absences, it cannot penalise them by creating exceptions to the right to legal assistance',[26] and '[i]t is for the courts to ensure that a trial was fair and, accordingly, that counsel who attends trial for the apparent purpose of defending the accused in his absence is given the opportunity of doing so'.[27]

80. In the light of those considerations, I consider that Article 4a(1) of the Framework Decision observes not only the requirements thus identified by the European Court of Human Rights, but also codifies them in order to ensure that they are applied in the event of execution of a European arrest warrant issued for the purpose of executing a judgment rendered following a trial at which the person concerned has not appeared in person.

81. Accordingly, points (a) and (b) of that provision lay down the circumstances in which the person concerned must be deemed to have waived, voluntarily and unambiguously, his or her right to be present at his or her trial, so that he or she cannot claim the benefit of a retrial. Article 4a(1)(b) of the Framework Decision constitutes a variation of Article 4a(1)(a), referring to the situation in which the person concerned, having been aware of the scheduled trial, has deliberately chosen to be represented by legal counsel instead of appearing in person at the trial,[28] which shows that that person has waived the right to appear in person at his or her trial, while protecting his or her right to be defended. Finally, Article 4a(1)(c) and (d) of the Framework Decision are designed to apply to cases in which the person concerned, who does not fall within the scope of Article 4a(1)(a) or (b), is entitled to a retrial or to appeal.

82. In accordance with the objectives established by Article 1(1) of Framework Decision 2009/299, Article 4a(1) of the Framework Decision therefore makes it possible to enhance the procedural rights of persons who are the subject of criminal proceedings, by bringing European Union law into line with the level of protection defined by the European Court of Human Rights in its case-law, while facilitating legal cooperation in criminal matters, in particular by improving mutual recognition of judicial decisions between Member States.

21 — See ECtHR, *Sejdovic*, cited above, § 86, and *Haralampiev*, cited above, § 32. See also ECtHR, *Idalov*, cited above, § 172.

22 — See ECtHR, *Idalov*, cited above, § 173. See also, to the same effect, ECtHR, *Sejdovic*, cited above, § 87, and *Haralampiev*, cited above, § 33.

23 — See, inter alia, ECtHR, *Medenica v. Switzerland*, no. 20491/92, ECHR 2001-VI, in which the Court points out, with regard to the person concerned, who had been informed in good time of the proceedings brought against him and of the date of his trial, that '[his] defence at the trial was conducted by two lawyers of his own choosing' (§ 56).

24 — See, inter alia, ECtHR, *Krombach v. France*, no. 29731/96, § 89, ECHR 2001-II. See also ECtHR, *Sejdovic*, cited above, § 91.

25 — See, inter alia, ECtHR, *Sejdovic*, cited above, § 91.

26 — See, inter alia, ECtHR, *Van Geyseghem v. Belgium* [GC], no. 26103/95, § 34, ECHR 1999-I, *Krombach,*cited above, § 89, and, to the same effect, *Sejdovic,*cited above, § 92.

27 — See, inter alia, ECtHR, *Sejdovic,*cited above, § 93.

28 — See recital 10 in the preamble to Framework Decision 2009/299.

83. I consider that the level of protection provided by the European Union legislature is adequate and appropriate for achieving the aforementioned objectives and that observance of the second paragraph of Article 47 and Article 48(2) of the Charter did not require it to opt for a more extensive protection of the right to a fair trial and the rights of the defence, for example by making the right to a retrial an absolute requirement irrespective of the conduct of the person concerned.

84. Apart from the fact that I do not discern reasons for going further than the balanced attitude taken by the European Court of Human Rights, the Court of Justice cannot rely on the constitutional traditions common to the Member States in order to apply a higher level of protection. Indeed, the fact that Framework Decision 2009/299 is the result of an initiative by seven Member States and that it has been adopted by all the Member States allows us to presume, with sufficient certainty, that a large majority of the Member States do not share the view taken by the Tribunal Constitucional in its case-law. [29]

85. In my view, the validity of Article 4a(1) of the Framework Decision is therefore not called into question by the second paragraph of Article 47 or by Article 48(2) of the Charter.

86. I would also point out that, since Article 4a(1) of the Framework Decision governs exhaustively, and adequately from the point of view of the protection of fundamental rights, the matter of the right to a retrial in connection with the execution of a European arrest warrant issued for the purpose of executing a decision rendered following a trial at which the person concerned has not appeared in person, Article 1(3) of Framework Decision 2002/584 and Article 1(2) of Framework Decision 2009/299 may not be understood as allowing executing judicial authorities to disapply Article 4a(1) of the Framework Decision in favour of a stricter notion of the right to a fair trial, by systematically requiring that it be possible to have a retrial in the issuing Member State, where the European arrest warrant states that the person concerned is in one of the situations covered in points (a) to (d) of that provision.

87. It is now necessary to determine whether Article 53 of the Charter gives the Tribunal Constitucional the possibility of retaining, when implementing the Framework Decision, its interpretation of Article 24(2) of the Spanish Constitution, according to which the surrender of a person convicted *in absentia* must be subject to the condition that the conviction be open to review in the issuing Member State.

## D – *The third question*

88. By its third question, the national court asks the Court of Justice, in essence, to rule whether Article 53 of the Charter allows an executing judicial authority, in accordance with its national constitutional law, to make the execution of a European arrest warrant subject to the condition that the person who is the subject of the warrant is entitled to a retrial in the issuing Member State, even though the application of such a condition is not authorised by Article 4a(1) of the Framework Decision.

89. That question therefore invites the Court to define the legal substance and scope to be given to Article 53 of the Charter.

90. In its order for reference, the Tribunal Constitucional refers to three possible interpretations of that article.

29 — To put it another way, in the words used by the Court in paragraph 74 of its judgment in Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* [2010] ECR I-8301, the hearing held before the Court in these proceedings has revealed 'no predominant trend' in the legal systems of the 27 Member States in favour of the interpretation accepted by the Tribunal Constitucional.

91. The first interpretation consists in equating Article 53 of the Charter to a clause providing for a minimum standard of protection, characteristic of the international instruments protecting human rights, such as that contained in Article 53 of the ECHR.[30] The Charter thus imposes a minimum standard, allowing Member States to apply a higher standard of protection deriving from their constitution, thus avoiding a reduction in the level of protection of fundamental rights.

92. On that assumption, Article 53 of the Charter would enable a Member State to make the execution of a European arrest warrant issued in order to execute a judgment rendered *in absentia* subject to conditions designed to avoid an interpretation which limits or infringes the fundamental rights recognised by its constitution, without that higher level of protection in force within that Member State necessarily being extended to the other Member States by being adopted by the Court of Justice. That approach is tantamount to considering that, in a situation in which the Court does not consider it necessary for European Union law to accord a higher level of protection to the fundamental rights than the level deriving from the ECHR, Article 53 of the Charter allows a Member State to apply such a higher level of protection of that fundamental right in accordance with its constitution.[31]

93. The second interpretation of Article 53 of the Charter is that that provision aims to define the scope of the Charter and, in particular, the constitutions of the Member States, respectively, by indicating in accordance with Article 51 of the Charter that, where European Union law applies, the level of protection of fundamental rights which must be applied is that which derives from the Charter. On the other hand, outside the scope of European Union law, the Charter does not prevent the application of the level of protection of fundamental rights established by the constitution of a Member State. According to the Tribunal Constitucional, this interpretation of Article 53 of the Charter, which is explained by the requirement for the uniform application of European Union law, would have the drawback, on the one hand, of depriving that article of its own legal substance, meaning it had no effect independent of Article 51 of the Charter and, on the other, of recognising that the Charter might result, in the Member States, in a reduction in the level of protection of fundamental rights deriving from their constitutional rules.

94. That interpretation of Article 53 of the Charter would mean that the Tribunal Constitucional would have to adapt its case-law concerning the interpretation of Article 24 of the Spanish Constitution when applying Article 4a of the Framework Decision. On the other hand, outside the scope of the Framework Decision, it would be free to apply a higher level of protection of fundamental rights.

95. The third interpretation of Article 53 of the Charter proposed by the Tribunal Constitucional consists in applying one or other of the first two interpretations depending on the characteristics of the specific problem of protection of fundamental rights at issue and the context in which the assessment of the level of protection which must prevail is made.[32]

96. In my view, the first interpretation proposed by the Tribunal Constitucional should be firmly rejected.

30 — Under Article 53 of the ECHR, '[n]othing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party'.

31 — The Tribunal Constitucional refers, in that regard, to Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 74; Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* [2007] ECR I-10779, paragraph 45; and Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraph 93. It is apparent from the aforementioned paragraphs in those judgments that the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by European Union law, even with regard to a fundamental freedom guaranteed by the Treaty such as the free movement of goods or the freedom to provide services.

32 — The Tribunal Constitucional refers, in that regard, to Case C-36/02 *Omega* [2004] ECR I-9609, paragraphs 37 and 38, and *Pupino*, paragraph 60.

97. That interpretation infringes the principle of the primacy of European Union law inasmuch as it would mean, in each case, giving priority to the legal rule affording the highest level of protection to the fundamental right at issue. In some cases, national constitutions would therefore be given primacy over European Union law.

98. However, it is settled case-law that recourse to provisions of national law, even of a constitutional order, to limit the scope of European Union law would have the effect of impairing the unity and efficacy of that law and consequently cannot be accepted. [33]

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

100. I would point out, in that regard, that it is by no means apparent from the wording of Article 53 of the Charter that it is to be considered as establishing an exception to the principle of the primacy of European Union law. On the contrary, it may be argued that the words 'in their respective fields of application' were chosen by the drafters of the Charter in order not to infringe that principle. [34] Moreover, that principle as it derives from the Court's case-law is confirmed in the declarations annexed to the final act of the Intergovernmental Conference which adopted the Treaty of Lisbon signed on 13 December 2007. [35]

101. The first interpretation proposed by the Tribunal Constitucional would also prejudice the uniform and effective application of European Union law within the Member States.

102. As regards the present case, it would have the effect, in particular, of seriously undermining the uniformity of the level of protection defined in Article 4a(1) of the Framework Decision and might hinder the execution of European arrest warrants issued for the purposes of executing judgments given *in absentia*.

103. In fact, the consequence of that interpretation would be to give the Member States considerable discretion to refuse surrender in the case of judgments rendered *in absentia*. In view of the level of protection of the right to a fair trial in the case of a judgment given *in absentia* deriving from the case-law of the European Court of Human Rights and also from the adoption of Framework Decision 2009/299, most Member States probably do not grant a person convicted *in absentia* the right to a retrial if that person has unequivocally renounced his or her right to appear at his or her trial. The proposed interpretation would therefore paralyse the execution by the Spanish judicial authorities of European arrest warrants issued for the purposes of executing judgments rendered *in absentia*, unless

33 — See, inter alia, Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, paragraph 3; Case C-473/93 *Commission* v *Luxembourg* [1996] ECR I-3207, paragraph 38; and Case C-409/06 *Winner Wetten* [2010] ECR I-8015, paragraph 61.

34 — See, to that effect, Ladenburger, C., 'European Union Institutional Report', *The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions*, Tartu University Press, reports of the XXVth FIDE Congress, Tallinn, 2012, Vol. 1, p. 141, especially p. 175 and footnote 124.

35 — See declaration 17 concerning primacy.

the issuing Member States could guarantee the persons concerned a retrial. Moreover, the creation of a variable geometry system of that kind would encourage offenders to take refuge in the Member States whose constitutional rules offer better protection than the others, thus undermining the effectiveness of the Framework Decision. [36]

104. That first interpretation of Article 53 of the Charter would also undermine the principle of legal certainty, since a provision of secondary law, which is nevertheless in accordance with the fundamental rights guaranteed by the Charter, could be set aside by a Member State on the ground that it infringed one of its constitutional provisions.

105. More generally, the first interpretation proposed by the Tribunal Constitucional runs counter to the traditional methods of evaluating the level of protection which must be afforded to fundamental rights within the European Union.

106. Although it is true that the interpretation of the rights protected by the Charter must tend towards a high level of protection, as may be inferred from Article 52(3) of the Charter and from the explanatory remarks concerning Article 52(4) of the Charter, it is nevertheless important to state that this must be a level of protection which accords with European Union law, as is stated, moreover, in those same explanatory remarks.

107. That is a reminder of a principle that has long guided the interpretation of fundamental rights within the European Union, namely that the protection of fundamental rights within the European Union must be ensured within the framework of the structure and objectives of the European Union. [37] In that regard, it is not irrelevant that the preamble to the Charter refers to the main objectives of the European Union, including the creation of an area of freedom, security and justice.

108. It is therefore not possible to reason only in terms of a higher or lower level of protection of human rights without taking into account the requirements linked to the action of the European Union and the specific nature of European Union law.

109. The fundamental rights to be protected and the level of protection to be afforded to them reflect the choices of a society as regards the proper balance to be achieved between the interests of individuals and those of the community to which they belong. That determination is closely linked to assessments which are specific to the legal order concerned, relating particularly to the social, cultural and historical context of that order, and cannot therefore be transposed automatically to other contexts. [38]

110. To interpret Article 53 of the Charter as allowing Member States to apply, in the field of application of European Union law, their constitutional rule guaranteeing a higher level of protection for the fundamental right in question, would therefore be tantamount to disregarding the fact that the exercise of determining the level of protection for fundamental rights to be achieved cannot be separated from the context in which it is carried out.

36 — See Tinsley, A., 'Note on the reference in case C-399/11 Melloni', *New Journal of European Criminal Law*, Vol. 3, Edition 1, 2012, p. 19, especially p. 28. The author refers to the article by M. Arroyo Jiménez, entitled 'Sobre la primera cuestión prejudicial planteada por el Tribunal Constitucional – Bases, contenido y consecuencias', *Revista Para el Análisis del Derecho*, Barcelona, October 2011.

37 — *Internationale Handelsgesellschaft*, paragraph 4.

38 — See Widmann, A.-M., 'Article 53: undermining the impact of the Charter of Fundamental Rights', *Columbia Journal of European Law*, Vol. 8, 2002, No 2, p. 342, especially p. 353, and also Van De Heyning, C., 'No place like home – Discretionary space for the domestic protection of fundamental rights', *Human rights protection in the European legal order: the interaction between the European and the national courts*, op. cit., p. 65, especially p. 81.

111. Accordingly, even though the objective is to tend towards a high level of protection for fundamental rights, the specific nature of European Union law means that the level of protection deriving from the interpretation of a national constitution cannot be automatically transposed to the European Union level nor can it be relied upon as an argument in the context of the application of European Union law.

112. As regards the assessment of the level of protection for fundamental rights which must be guaranteed within the legal order of the European Union, the specific interests which motivate the action of the European Union must be taken into account. The same applies, inter alia, to the necessary uniformity of application of European Union law and to the requirements linked to the construction of an area of freedom, security and justice. Those specific interests cause the level of protection for fundamental rights to be adjusted depending on the different interests at stake.

113. Framework Decision 2009/299 specifically shows that the level of protection of fundamental rights must be fixed not in the abstract, but rather in a manner adapted to the requirements connected with the construction of an area of freedom, security and justice.

114. There is, in that regard, a clear link between the approximation of the laws of the Member States concerning the rights of individuals in criminal proceedings and the enhancement of mutual confidence between those States.

115. As stated in recital 10 in the preamble to the Framework Decision, 'the mechanism of the European arrest warrant requires a high degree of confidence between the Member States'. Moreover, the Court has had occasion to state that the Framework Decision aims to facilitate and accelerate judicial cooperation and that it thus seeks to contribute to the objective set for the European Union to become an area of freedom, security and justice by basing itself on the high degree of confidence which should exist between the Member States. [39]

116. From that point of view, the definition at European Union level of a common, high degree of protection for the rights of the defence increases the confidence placed by the executing judicial authority in the quality of the procedure applicable in the issuing Member State.

117. As the Spanish Government rightly points out, Framework Decision 2009/299 seeks to resolve the problem posed by the existence of different levels of protection in the context of execution of a European arrest warrant in the case of conviction *in absentia.*That framework decision forms part of the measures designed to create a common procedural framework at European level, which is essential for rendering the mechanisms of judicial cooperation within the European Union more effective. In the absence of harmonisation of procedural guarantees, it would be difficult for the European Union to progress in the application of the principle of mutual recognition and in the construction of a real area of freedom, security and justice. That is also the reason why Article 82(2) TFEU provides that, '[t]o the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may ... establish minimum rules', which may concern, inter alia, the rights of individuals in criminal proceedings.

118. Framework Decision 2009/299 fits into that scheme by seeking not only to ensure the execution of European arrest warrants in connection with convictions *in absentia*, but also to guarantee that the fundamental rights of the persons concerned, such as the right to a fair trial and the rights of the defence, are adequately protected.

39 — See, inter alia, Case C-192/12 PPU *West* [2012] ECR, paragraph 53 and the case-law cited.

119. In order to reconcile those objectives, the European Union legislature set the level of protection for the fundamental rights in question so as not to compromise the effectiveness of the mechanism of the European arrest warrant.

120. In that regard, I share the opinion of the Spanish Government which points out that, although it is necessary to ensure the execution of judicial decisions adopted by the Member States, in strict and complete observance of the fundamental rights of the defendants in criminal proceedings, the procedural guarantees they enjoy must not be used simply to place oneself outside the reach of the law. It is indeed necessary to observe fundamental rights, but at the same time to act in such a way that, in the cross-border dimension of the area of freedom, security and justice, procedural guarantees are not used to hinder the execution of legal decisions.

121. Article 4a of the Framework Decision is a specific response to that concern to ensure better execution of European arrest warrants issued for the purposes of executing judgments rendered *in absentia* while enhancing, in a manner appropriate to that objective, the procedural rights of the persons concerned.

122. An interpretation of Article 53 of the Charter which would allow an executing judicial authority, in accordance with a national constitutional rule, generally to make the execution of a European arrest warrant issued for the purposes of executing a judgment rendered *in absentia* subject to the condition that the person subject to the warrant be entitled to a retrial in the issuing Member State would upset the balance thus achieved by Article 4a of the Framework Decision and cannot therefore, be allowed.

123. I would also point out that recital 12 in the preamble to the Framework Decision cannot be construed as a confirmation of the first interpretation proposed by the Tribunal Constitucional. According to that recital, the Framework Decision 'does not prevent a Member State from applying its constitutional rules relating to due process'. In my view, that recital must be read in relation to Article 1(3) of the Framework Decision. However, we have already seen that the effectiveness of that provision is substantially impaired since, for the purposes of executing a European arrest warrant issued with a view to executing a judgment rendered *in absentia*, the level of protection of the right to a fair trial has been the subject of a common definition within the European Union with the adoption of Article 4a(1) of the Framework Decision.

124. As well as the interpretation of Article 53 of the Charter, the third question raised by the Tribunal Constitucional raises the question, in actual fact, of the scope for manoeuvre enjoyed by the Member States in fixing the level of protection for the fundamental rights which they wish to guarantee in the implementation of European Union law. In that regard, it is necessary to differentiate between situations in which there is a definition at European Union level of the degree of protection which must be afforded to a fundamental right in the implementation of an action by the European Union and those in which that level of protection has not been the subject of a common definition.

125. In the first case, the fixing of the level of protection is, as we have seen, closely linked to the objectives of the European Union action concerned. It reflects a balance between the need to ensure the effectiveness of European Union action and the need to provide adequate protection for fundamental rights. In that situation, it is clear that, if a Member State were to invoke, a posteriori, the retention of its higher level of protection, the effect would be to upset the balance achieved by the European Union legislature and therefore to jeopardise the application of European Union law.

126. In the context of the Framework Decision, Article 4a(1) thereof is the expression of an agreement between all the Member States to determine when a person convicted *in absentia* must be surrendered without that leading to the infringement of his or her right to a fair trial and his or her rights of defence. That consensus between the Member States leaves no room for the application of divergent national levels of protection.

127. On the other hand, in the second case, the Member States have more room for manoeuvre in applying, within the scope of European Union law, the level of protection for fundamental rights which they wish to guarantee within the national legal order, provided that that level of protection may be reconciled with the proper implementation of European Union law and does not infringe other fundamental rights protected under European Union law. [40]

128. Those points having been made, it is now necessary to identify the role of Article 53 of the Charter within the Charter.

129. In so doing, I think we must not underestimate the political and symbolic importance of that article. [41] Furthermore, the article must, in my view, be read in close conjunction with Articles 51 and 52 of the Charter, which it complements.

130. In the words of the explanatory remarks relating to Article 53 of the Charter, '[t]his provision is intended to maintain the level of protection currently afforded within their respective scope by Union law, national law and international law. Owing to its importance, mention is made of the ECHR'.

131. The drafters of the Charter could not have been unaware of the existence of a plurality of sources of protection for fundamental rights binding the Member States and therefore had to provide a way for the Charter to coexist with them. That is the main objective of Title VII of the Charter, which contains the general provisions governing its interpretation and application. From that point of view, Article 53 of the Charter supplements the principles stated in Articles 51 and 52 thereof, by pointing out that, in a system in which the pluralism of sources of protection of fundamental rights prevails, the Charter is not intended to become the exclusive instrument for protecting those rights and, also, that it cannot have the effect, on its own, of adversely affecting or reducing the level of protection resulting from those different sources in their respective fields of application.

132. The Charter is not an isolated instrument, unconnected with the other sources of protection of fundamental rights. The Charter itself provides that its provisions must be interpreted taking due account of other legal sources, whether national or international. Accordingly, Article 52(3) of the Charter makes the ECHR a minimum standard below which European Union law cannot fall and Article 52(4) of the Charter provides that, in so far as the Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights must be interpreted in harmony with those traditions. [42]

133. Article 53 of the Charter, supplementing those provisions, makes clear that, within the framework of the coexistence of the various sources of protection for fundamental rights, the Charter cannot, on its own, result in a reduction in the level of protection for those rights in the different legal orders. That article therefore seeks to confirm that the Charter imposes a level of protection for fundamental rights only within the field of application of European Union law.

40 — For examples of fundamental rights enjoying a higher level of protection in certain Member States compared with the level of protection afforded under the ECHR and European Union law, see Besselink, L.F.M., 'General Report', *The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions*, op. cit., p. 63, especially p. 70. See also Ladenburger, C., op. cit., who considers that, 'where Union law leaves several ways of implementation without its effectiveness being undermined, then it is hard to see why the national authority should not be authorised to select only such modes of implementation that respect its own constitution' (p. 173).

41 — See Bering Liisberg, J., 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? – Article 53 of the Charter: a fountain of law or just an inkblot?', *Jean Monnet Working Paper* No 4/01, pp. 18 and 50.

42 — The message borne by Article 52(4) of the Charter is summarised as follows by Ladenburger, C., op. cit., p. 179:

'[T]he step of incorporating a written catalogue into primary law should not lead to construing Union fundamental rights in complete abstraction from the Member States' constitutional traditions and laws.'

Article 52(6) of the Charter, which provides that '[f]ull account shall be taken of national laws and practices as specified in this Charter', follows the same reasoning.

134. The Charter thus cannot have the effect of requiring Member States to lower the level of protection of fundamental rights guaranteed by their national constitution in cases which fall outside the scope of European Union law. Article 53 of the Charter also expresses the idea that the adoption of the Charter should not serve as a pretext for a Member State to reduce the protection of fundamental rights in the field of application of national law.

135. In that regard, the words 'in their respective fields of application' seek, inter alia, to reassure Member States of the fact that the Charter is not designed to replace their national constitution with regard to the level of protection which this guarantees within the scope of national law. [43] At the same time, the inclusion of those words means that Article 53 of the Charter cannot undermine the primacy of European Union law since the assessment of the level of protection for fundamental rights to be achieved is carried out within the framework of the implementation of European Union law.

136. In the light of my interpretation of Article 53 of the Charter, I therefore propose that the Court rule that that article is to be interpreted as meaning that it does not allow the executing judicial authority, pursuant to its national constitutional law, to make the execution of a European arrest warrant subject to the condition that the person who is the subject of the warrant be entitled to a retrial in the issuing Member State, where the application of that condition is not authorised by Article 4a(1) of the Framework Decision.

137. I would make it clear that the position which I propose that the Court should adopt in the present case does not mean that account is not to be taken of the national identity of the Member States, of which constitutional identity certainly forms a part. [44]

138. I do not overlook the fact that the European Union is required, as Article 4(2) TEU provides, to respect the national identity of the Member States, 'inherent in their fundamental structures, political and constitutional'. [45] I also note that the preamble to the Charter points out that, in its action, the European Union must respect the national identities of the Member States.

139. A Member State which considers that a provision of secondary law adversely affects its national identity may therefore challenge it on the basis of Article 4(2) TEU. [46]

140. However, we are not faced with such a situation in the present case. The proceedings before both the Tribunal Constitucional and the Court of Justice persuade me that the determination of the scope of the right to a fair trial and of the rights of the defence in the case of judgments rendered *in absentia* does not affect the national identity of the Kingdom of Spain.

43 — See Bering Liisberg, J., op. cit., pp. 16 and 35. Within the Member States, the national courts are able to determine the level of protection which must be applied according to the cases brought before them and to the applicable law. See, in that regard, Besselink, L.F.M., op. cit., who notes that, 'in federal states courts are acquainted with the distinction between areas of competence and the differentiated standards which accompany each. At the same time there is little doubt that the various "layers" overlap' (p. 77).

44 — See, inter alia, in that regard, Simon, D., 'L'identité constitutionnelle dans la jurisprudence de l'Union européenne', *L'identité constitutionnelle saisie par les juges en Europe*, Éditions A. Pedone, Paris, 2011, p. 27; Constantinesco, V., 'La confrontation entre identité constitutionnelle européenne et identités constitutionnelles nationales, convergence ou contradiction? Contrepoint ou hiérarchie?', *L'Union européenne: Union de droit, Union des droits – Mélanges en l'honneur de Philippe Manin*, Éditions A. Pedone, Paris, 2010, p. 79, and, in the same work, Mouton, J.-D., 'Réflexions sur la prise en considération de l'identité constitutionnelle des États membres de l'Union européenne', p. 145.

45 — The Court referred to that provision in Case C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13693, paragraph 92; Case C-391/09 *Runevič-Vardyn and Wardyn* [2011] ECR I-3787, paragraph 86; and Case C-51/08 *Commission* v *Luxembourg* [2011] ECR I-4231, paragraph 124. See, also, point 59 of the Opinion delivered by Advocate General Jääskinen in Case C-202/11 *Las*, pending before the Court, and also paragraph 60 et seq. of the reference for a preliminary ruling in Case C-253/12 *JS*, pending before the Court.

46 — See Besselink, L.F.M., op. cit., who states that 'divergent fundamental rights standards may not be resolved explicitly via provisions like Article 53 of the Charter and of the ECHR, but by reference to Article 4(2) EU. Reliance on divergent fundamental rights standards is then made dependent on whether it forms part of the constitutional identity of a Member State' (p. 136).

141. Apart from the fact that the determination of what constitutes the 'essence' of the right to defend oneself remains contested before the Tribunal Constitucional, the Kingdom of Spain itself stated, at the hearing, relying inter alia on the exceptions in Spanish law to the holding of a retrial following a judgment rendered *in absentia*, that the participation of the defendant at his trial is not covered by the concept of the national identity of the Kingdom of Spain.

142. Moreover, in my view, a concept demanding protection for a fundamental right must not be confused with an attack on the national identity or, more specifically, the constitutional identity of a Member State. The present case does indeed concern a fundamental right protected by the Spanish Constitution, the importance of which cannot be underestimated, but that does not mean that the application of Article 4(2) TEU must be envisaged here.

143. It is also important to state that the taking into account of the distinctive features of the national legal orders is part of the principles which must guide the construction of an area of freedom, security and justice.

144. Article 67(1) TFEU provides that '[t]he Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States'. Moreover, Article 82(2) TFEU provides that the minimum rules which may be adopted by the Parliament and the Council concerning, inter alia, the rights of individuals in criminal procedures, must take into account 'the differences between the legal traditions and systems of the Member States'. I would also point out that Article 82(3) TFEU provides that '[w]here a member of the Council considers that a draft directive as referred to in paragraph 2 would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council', in which case the legislative procedure is suspended and may lead, in the event of continuing disagreement, to enhanced cooperation.

145. The adoption by the European Union legislature of Article 4a of the Framework Decision shows that the Member States wished to take a joint approach to the execution of European arrest warrants issued for the purposes of executing judgments rendered *in absentia* and that that joint approach was compatible with the diversity of the legal traditions and systems of the Member States.

## IV – Conclusion

146. In the light of the foregoing, I propose that the Court answer the Tribunal Constitucional as follows:

(1) Article 4a(1)(a) and (b) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, is to be interpreted as precluding the executing judicial authority, in the circumstances specified in that provision, from making the execution of a European arrest warrant conditional upon the person who is the subject of the warrant being entitled to a retrial in the issuing Member State.

(2) Article 4a(1) of Framework Decision 2002/584, as amended by Framework Decision 2009/299, is compatible with the second paragraph of Article 47 and Article 48(2) of the Charter of Fundamental Rights of the European Union.

(3) Article 53 of the Charter of Fundamental Rights of the European Union does not allow the executing judicial authority, pursuant to its national constitutional law, to make the execution of a European arrest warrant conditional upon the person who is the subject of the warrant being

entitled to a retrial in the issuing Member State, where the application of such a condition is not authorised by Article 4a(1) of Framework Decision 2002/584, as amended by Framework Decision 2009/299.