Course: GV251
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LT Week 9: Justice and Home Affairs policies

PART I) Mutual recognition in the Single Market and in EU criminal law

(a) ***Revision:*** **What does the principle of mutual recognition mean in the context of the Single Market?** _____

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(b) ***Revision:*** **What was the rationale behind applying the principle of mutual recognition in the context of the Single Market?** _____

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(c) ***Revision:*** **In the context of the Single Market, why is the principle of mutual recognition *controversial*?** _____

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(d) What does the principle of mutual recognition mean in the context of judicial cooperation in criminal matters among EU member-states? _____

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(e) What was the *rationale* behind applying the principle of mutual recognition in the context of EU judicial cooperation in criminal matters? _____

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(f) Why is the principle of mutual recognition *controversial* in the context of judicial cooperation in criminal matters? In particular, what makes the application of mutual recognition in Justice and Home Affairs (JHA) policies *even more controversial* than its application in the context of the Single Market? _____

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PART II) Mutual recognition and fundamental rights: Case studies of two ECJ rulings

Working in groups, please consider the rulings of the ECJ in the *Melloni* (2013) and *N.S.* (2011) cases, and answer the following set of questions for each case.

While the *Melloni* case has to do with the implementation of the European Arrest Warrant (cooperation in criminal matters) and the *N.S*. case with the implementation of the Dublin Regulation (cooperation in asylum), both cases concern the possibility of sending a person to another member-state in accordance with EU Justice and Home Affairs (JHA) policies. The trade-off between *enabling EU countries to respond effectively to the challenges generated by the free movement of persons* and *safeguarding fundamental rights* lies at the heart of both cases.

(a) Please provide a brief summary of the key aspects of the case for the benefit of your classmates who didn't work on this case. (i) Which countries were involved? (ii) On what grounds could the extradition of suspects or the return of asylum-seekers have been refused? (iii) In the end, did the ECJ rule that these were valid grounds for refusing the extradition/ return of the persons involved?

(b) In the case that you studied, did the ECJ prioritise the effective implementation of EU JHA policies or the protection of fundamental rights? Do you think this decision was justified?

(c) Is the application of the principle of mutual recognition in Justice and Home Affairs viable in the absence of a minimum level of harmonisation?

Case 1: Stefano Melloni v Ministerio Fiscal (C-399/11, judgment of 26/2/13)

Setting: Mr. Melloni had been sentenced by Italian courts to 10 years' imprisonment for bankruptcy fraud *in absentia*, i.e. in his absence, after he failed to make an appearance in court. In 2004, Italy issued a European Arrest Warrant to execute this sentence. In 2008, Mr. Melloni was arrested in Spain.

Under Italian procedural law, it is impossible to appeal against sentences imposed *in absentia*. As a result, if Mr. Melloni was extradited to Italy, he would be unable to appeal against the sentence imposed on him by the Italian courts. However, in Spain, the right to appeal against sentences imposed *in abstentia* is constitutionally guaranteed.

Legal context: The EU Framework Decision on the European Arrest Warrant (2002) stipulates that extraditions cannot be refused on the basis that a suspect would not have the right to appeal against sentences imposed *in absentia*, when certain conditions about the original trial hold. These conditions were specified by the EU Framework Decision on Judgments in Absentia (2009), which defined a set of harmonised EU-wide minimum standards for procedural rights enjoyed by persons convicted *in absentia*. The ECJ found that these conditions held in the *Melloni* case.

On the other hand, Article 53 of the EU Charter of Fundamental Rights states that the fundamental rights standards set out in the Charter must be interpreted as minimum standards, while member-states retain the right to abide by higher standards as defined by their constitutions.

Question of the Spanish court: Given Article 53 of the Charter of Fundamental Rights, can a country refuse to extradite a person convicted *in absentia* in order to protect the right to a fair trial as defined in its own constitution, if the member-state that issued the European Arrest Warrant would not grant the suspect the right to appeal following an extradition?

ECJ ruling (paragraphs 56-64)[1]: "The interpretation envisaged by the [Spanish] national court at the outset is that Article 53 of the Charter gives general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law. (…) Such an interpretation of Article 53 of the Charter cannot be accepted. That interpretation of Article 53 of the Charter would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution.

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

In the light of the foregoing considerations, the answer to the third question is that Article 53 of the Charter must be interpreted as not allowing a Member State to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution."

[1] The whole text of the ruling is available at http://curia.europa.eu/juris/celex.jsf?celex=62011CJ0399&lang1=en&type=TXT&ancre=EN

In short, provided that the member-state that issued the European Arrest Warrant abides by the minimum procedural rights defined by the 2009 Framework Decision, the executing member-state must extradite the suspect in question, even if the suspect will enjoy lower procedural rights after extradition than those guaranteed in the constitution of the member-state executing the European Arrest Warrant.

Significance of the case: "In *Melloni*, once again the Court has given priority to the effectiveness of mutual recognition based on presumed mutual trust. Secondary pre-Lisbon third pillar law whose primary aim is to facilitate mutual recognition has primacy over national constitutional law which provides a high protection of fundamental rights. (…) By privileging the teleology of mutual recognition and upholding the text of the Framework Decision on judgments in absentia (…), the Court has shown a great – and arguably undue – degree of deference to the European legislator." [Mitsilegas 2015]

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Case 2: N.S. v Secretary of State for the Home Department (C-411/10), judgment of 21/12/11

Setting: N.S. is an Afghan national who came to the UK after travelling through, among other countries, Greece. According to him, the Greek authorities detained him for four days and, on his release, gave him an order to leave Greece within 30 days. He claims that, when he tried to leave Greece, he was arrested by the police and was expelled to Turkey, where he was detained in appalling conditions for two months.

N.S. claimed that if he was returned to Greece, he would be subject to violations of his fundamental rights, including due to the serious shortcomings of Greek asylum procedures and the inadequate reception conditions for asylum-seekers in Greece.

Legal context: The Dublin II Regulation of 2003 identifies the member-state that is responsible for examining the application of each asylum-seeker in the EU. Typically, the responsible country is the asylum-seeker's first country of entry into the EU. For the case of N.S., the responsible country was Greece.

The EU's Reception (2003/9), Qualification (2004/83), and Procedure (2005/85) Directives define a set of harmonised EU-wide minimum standards for the asylum procedures and reception conditions that member-states should make available to asylum-seekers.

Article 4 of the EU Charter of Fundamental Rights states that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment".

Question of the British court: Before transferring asylum-seekers to the EU country that is responsible for examining their asylum applications, do member-states have to check whether the responsible country protects asylum-seekers' fundamental rights?

ECJ ruling (paragraphs 78-86, 104-106)[2]: "Consideration of the texts which constitute the Common European Asylum System shows that it was conceived in a context making it possible to assume that all the participating States, whether Member States or third States, observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol, and on the ECHR, and that the Member States can have confidence in each other in that regard. In those circumstances, it must be assumed that the treatment of asylum seekers in all Member States complies with the requirements of the Charter, the Geneva Convention and the ECHR.

[2] The whole text of the ruling is available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62010CJ0411&from=EN

It is not however inconceivable that that system may, in practice, experience major operational problems in a given Member State, meaning that there is a substantial risk that asylum seekers may, when transferred to that Member State, be treated in a manner incompatible with their fundamental rights. (…).

If the mandatory consequence of ***any infringement*** of the individual provisions of Directives 2003/9, 2004/83 or 2005/85 by the Member State responsible were that the Member State in which the asylum application was lodged is precluded from transferring the applicant to the first mentioned State, [this would deprive the obligations provided for by the Dublin Regulation] of their substance and endanger the realisation of the objective of quickly designating the Member State responsible for examining an asylum claim lodged in the European Union.

By contrast, if there are substantial grounds for believing that there are ***systemic flaws*** in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, ***resulting in inhuman or degrading treatment***, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision.

In those circumstances, the presumption underlying the relevant legislation, stated in paragraph 80 above, that asylum seekers will be treated in a way which complies with fundamental rights, must be regarded as rebuttable.

Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment."

In short, if the systemic deficiencies in asylum procedures and reception conditions in the EU member-state that is responsible for examining an asylum application under the Dublin Regulation are so grave that they constitute a threat to the asylum-seeker's fundamental rights, other member-states may not return the asylum-seeker to the member-state responsible for examining the asylum application.

Significance of the case: N.S. was the first case where the ECJ found that the presumption of respect of fundamental rights in the intra-EU inter-state cooperation mechanism set out in the Dublin Regulation could not be taken for granted, and that Dublin returns could be refused on fundamental rights grounds.

Aftermath: Greece was placed under a lot of pressure to improve its asylum procedures and reception conditions. Responsibility for examining asylum applications was taken away from the Police and was given to a new semi-independent authority, the Asylum Service. As a result, asylum recognition rates rose from 0.9% in 2012 (by far the lowest in the EU) to 43% in the third quarter of 2017 (which was exactly the same as the EU-28 average that year). Greece has also been placed under pressure and has received substantial funds to improve reception conditions. At the end of 2016, the Commission recommended a "gradual resumption" of Dublin transfers to Greece from March 2017 on, while also listing a set of measures that Greece would have to undertake for a "full resumption" of Dublin transfers to become possible.

PART III) The European Arrest Warrant in the news

During your own time, please read the materials below and answer the relevant questions.

(a) *Judicial cooperation in criminal matters between the UK and the EU after Brexit*: Should the UK government aim to continue to participate in the European Arrest Warrant (EAW) system after Brexit? If so, at what cost in terms of national sovereignty? Should Britain agree to be subject to the jurisdiction of the ECJ in the context of the implementation of the EAW?

Excerpts from the report of the EU Committee of the House of Lords on "Brexit: Judicial Oversight of the European Arrest Warrant" (27/7/17)[3]:

"The European Arrest Warrant (EAW) was adopted by the European Union to facilitate the extradition of individuals between Member States to face prosecution for a crime, or to serve a prison sentence for an existing conviction. The Government recognises the importance of the EAW. The Home Secretary, Rt Hon Amber Rudd MP, has called it an "effective tool that is essential to the delivery of effective judgment on … murderers, rapists and paedophiles", and stressed that "it is a priority for [the Government] to ensure that we remain part of the arrangement". It has brought significant benefits to the United Kingdom. Annually, around 1,000 individuals per year are surrendered to other EU Member States under the EAW while, on average, the UK issues over 200 European Arrest Warrants seeking the extradition of individuals to this country. The EAW has brought high-profile criminals back to the UK, such as the fugitive bomber, Hussain Osman, who, along with accomplices, attempted to carry out a terror attack in London on 21 July 2005.

Yet following the referendum on the UK's membership of the EU, the Government has stated that it intends to remove the jurisdiction of the European Court of Justice (CJEU) in the UK. What this will mean has been the subject of much debate and discussion. But it is clear from the evidence that we received that the Government's plans for the CJEU create a tension with the operational necessity to deport serious criminals from the UK quickly and effectively, and to ensure that those who are wanted by the UK answer for their crimes here. We heard, for instance, that if the CJEU is not to be a final arbiter on any instruments of mutual recognition between the UK and EU on future extradition matters, it is unclear how such instruments would operate in practice. (…)

In Protocol 36 to the Lisbon Treaty, the UK had secured a right to decide, by 31 May 2014, whether or not it should continue to be bound by the approximately 130 police and criminal justice measures adopted prior to the entry into force of the Treaty. The EAW was one of 35 such measures that the UK chose to re-join in December 2014, following the exercise of the Protocol 36 block opt-out.14 In choosing to re-join these measures, and as provided for in the Lisbon Treaty, the UK accepted that the measures would be subject to the jurisdiction of the CJEU and the enforcement powers of the Commission (under Article 258 TFEU) from 1 December 2014. This means that, in effect, the UK has already had to decide—within the last three years—whether to accept the jurisdiction of the CJEU in this area in return for continued use of tools like the EAW. (…)

In its White Paper on The United Kingdom's exit from and new partnership with the European Union, the Government confirmed that it plans to "bring an end to the jurisdiction in the UK of the Court of Justice of the European Union". (…) This change leaves open the question of how the role of the CJEU in providing a level playing field between the UK and EU in criminal justice matters is to be provided for in any future agreement between the two parties, and what status the case law of the CJEU will have post-Brexit."

[3] Available at: https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/16/16.pdf

(b) *EAW and the Catalan crisis*: (i) What trade-offs did the Belgian courts face when Spain issued a European Arrest Warrant for Carles Puigdemont, the former President of Catalonia who fled to Belgium after the Spanish government imposed direct rule on Catalonia in October 2017? (ii) Why did the Spanish authorities withdraw the European Arrest Warrant for Puigdemont in December 2017?

Excerpts from Auke Willems' blog post on "Understanding Spain's decision to revoke the European Arrest Warrant for Carles Puigdemont" (12/12/17)[4]:

On 5 December, Spain revoked a European Arrest Warrant (though a national arrest warrant remains in place) for ousted Catalan President Carles Puigdemont, who fled to Belgium in October. (…)

A few weeks ago, I wrote that the case had brought EU law into the debate over the constitutional turmoil generated by Catalonia's push for independence, and by the Spanish government's violent refusal to allow a referendum. Given the rapid unfolding of events since, an update to this analysis is now warranted.

As I wrote in my original piece, there were some sound reasons for Puigdemont to choose Belgium when he opted to leave Catalonia, most notably the country's extradition history with Spain. There are a number of important cases involving alleged ETA terrorists which have relevance, most recently the case of Jauregui Espina, an ETA suspect who had been on the run for 32 years and was living in Belgium. The Belgian courts refused his surrender to Spain, primarily because of the risk that he would face inhumane and degrading treatment, as the defence submitted reports that showed deplorable conditions under which ETA suspects were detained. The Belgian court of appeal held that there is no presumption that Spain is fully fundamental rights compliant: a bold decision, breaking with the presumption of mutual trust that lies at the heart of the European Arrest Warrant and Europe's broader criminal justice project.

Nevertheless, as I also noted, it would have been difficult for the Belgian court to refuse extradition in the case of Puigdemont, and the situation was likely to put pressure on bilateral relations and the wider system of European criminal justice cooperation. (…)

It appears that all parties involved in a sense 'caved', i.e. gave in to pressures that might have resulted in a situation where all sides would have become 'losers': Belgium being 'forced' to (partially) extradite, Puigdemont being extradited, and Spain being able to charge him only for 'lesser crimes'. (…)

As to the Belgian Court, at the 4 December hearing it anticipated that for some of the crimes charged the so-called 'double criminality' requirement was missing, which requires that for a crime to be extraditable it must be criminalised in both jurisdictions. While a major innovation of the European Arrest Warrant has been to abolish this key rule of extradition law, it has only done so for a list of 32 crimes, leaving Member States the option to require dual criminality for other crimes. This could have led to a situation where the request for extradition would have been partially granted, so on the basis of some crimes, but not all. If he was extradited solely on the grounds of 'misuse of public funds', and not 'rebellion', a much more serious crime, it would have significantly tied the hands of Spanish prosecutors.

(…) So, the stakes remain as high as they were, and the matter is as unresolved as it was. However, the Belgian courts, European law, and possibly the EU's institutions have been given a break, which they will all surely welcome.

[4] Available at: http://blogs.lse.ac.uk/europpblog/2017/12/12/understanding-spains-decision-to-revoke-the-european-arrest-warrant-for-carles-puigdemont/