

The Scales of Justice in Equilibrium

— The ECJ’s Strategic Resolution of Ambiguity in *Stefano Melloni v Ministerio Fiscal* 2013 (Case C-399/11)

Sofiya Kartalova*

Abstract

The *Melloni* preliminary reference demands that the European Court of Justice (ECJ) weighs considerations of fundamental rights and those of mutual trust directly against each other, while deciding whether the principle of primacy of EU law is to be understood in absolute or in conditional terms in this legal context. At the same time, the textual analysis of Article 53 CFREU supports two contrasting, but *equally compelling*, lines of interpretation of the principle of primacy of EU law. Thus, the scales of justice are left in equilibrium. My study will attempt to establish the symmetry between the legal and linguistic aspects of the interpretation of Article 53 CFREU in *Melloni*, in the hope of demonstrating how ambiguity might have shaped the setup for the ECJ’s decision-making process. The issuance of the *Melloni* preliminary ruling is understood as an act of ambiguity resolution by the ECJ that effectively tips the scales of justice in the direction which the ECJ views as strategically more advantageous for the implementation of the authority of EU law. Furthermore, my analysis will show how the ultimate resolution of this binary choice reveals the ECJ’s favoured approach in the implementation of the authority of EU law, namely system-building through concepts (Leczykiewicz, 2008), rather than system-maintenance through acceptability (Paunio, 2013).

Keywords

European constitutional law, pragmatics, strategic ambiguity resolution, authority of EU law, European Court of Justice, national constitutional court

Note: This is part of the JLL special issue “EU Legal Culture and Translation” edited by [Sosoni & Biel 2018](#).

* *Sofiya Kartalova*: PhD Student at the Faculty of Law, Research Assistant at the Research Training Group 1808: *Ambiguity – Production and Perception*, Eberhard Karls Universität Tübingen (Germany), sofiya.kartalova@uni-tuebingen.de. The author would like to thank Wolfgang Forster for his supervision and invaluable advice during the preparation of this case study, which is part of the author’s doctoral thesis (in progress) “*The Strategic Value of Ambiguity for the Authority of EU Law in the Dialogue between the European Court of Justice and the National Courts*”, Martin Nettesheim and Joachim Knape for their supervision as well as anonymous reviewers for their helpful comments on earlier versions of this article. Research for this article was kindly supported by the German Research Foundation (DFG) through Research Training Group (RTG) 1808.

1. Introduction

The *Melloni* preliminary ruling is widely regarded as a leading judgment in European constitutional law, along with another ECJ seminal preliminary ruling, *Åkerberg Fransson*, by virtue of their shared date of issuance and their joint impact on the relationship between national fundamental rights protection and fundamental rights protection at EU level (Reestman & Besselink, 2013). However, in comparison to its counterpart, *Melloni* has attracted relatively less criticism, despite its more interventionist approach (Schima, 2015: 1105–1106). The close proximity between the two preliminary rulings and the highly contentious nature of *Åkerberg Fransson* might have therefore made it challenging to gauge the full extent of the individual contribution of *Melloni* in designing “the blueprint for the fundamental rights architecture in the European Union (‘EU’) for years to come” (Schima 2015: 1098). The following piece will put forward a suggestion to this end, based on an interdisciplinary analytical framework on pragmatics and legal interpretation.

The impact of *Melloni* extends far beyond the confines of the fundamental rights narrative, as it has been subjected to academic scrutiny as a prime example of judicial dialogue where “as the story unfolded, the actors grew more entrenched and quite one-sided” (Torres Perez, 2014: 309). Arguably, the ruling at hand signalled the reawakening of constitutional conflict between the ECJ and a national constitutional court for the first time since the Treaty of Lisbon (Besselink, 2014: 1169). The potential conflict addresses squarely the issue of primacy of EU law – an essential ingredient to the survival of the authority of EU law (Kumm, 2005: 285). With the exception of a few isolated contributions (Chalmers, Davies & Monti, 2010: 184–227; see generally Walker, 2005, and more recently Alter, Helfer & Madsen, 2016), the authority of EU law is a largely underdeveloped concept, lacking a universally recognised and clear-cut definition. However, for the purposes of my study, I define the authority of EU law as: the capacity of the European Court of Justice to regulate and shape the national legal orders in the EU within the scope of its competences.

The third question of the *Melloni* reference poses a direct challenge to the authority of EU law by suggesting that there might be an exception to the principle of primacy of EU law. More specifically, the Spanish Constitutional Court enquired whether Article 53 CFREU allows for a national standard of protection of fundamental rights, higher than the EU standard, to be applicable. An affirmative response would authorize the Member State of Spain to review the execution of a European Arrest Warrant.

This unusual scenario requires the ECJ to balance concerns for fundamental rights protection against those for the promotion of mutual trust. In the EU legal order, mutual trust (mutual confidence) between the Member States is essential to the construction of the Area of Freedom, Security and Justice (Bot, 2012: para. 115–116). In this sense, the effective execution of the European Arrest Warrant is the cornerstone of ECJ’s approach to pursuing this aspiration (Bot, 2012: para. 119).

The balancing act between fundamental rights and mutual trust is by no means a foreign concept to the ECJ (Montaldo, 2016: 966, 984). The ECJ has traditionally showed preference for ruling in favour of the effectiveness of EU law, as manifested by mutual trust in the context of the European Arrest Warrant, most notably in *Jeremy F.* (2013, C-168/13 PPU) and *Radu* (2013, Case C-396/11) (*ibid.*: 966–967, 976). In a more recent strand of case-law, culminating in the case of *Aranyosi* (2016, Joined Cases C-404/15 and C-659/15 PPU), the ECJ has adopted a conflict avoidance approach (*ibid.*: 980–983). Seeing as the clash between concerns for fundamental rights protection and for mutual trust is framed in *Melloni* in terms of the principle of primacy of EU law, *Melloni* stands out as one with particularly high constitutional stakes among its peers in the former category.

The situation is rendered even more complicated by the presence of the linguistic phenomenon of ambiguity in Article 53 CFREU. Typically, ambiguity arises where there is an expression, which carries “two or more distinct denotations” (Wasow *et al.* cited in Winkler, 2015: 1). Moreover, the same ambiguous utterance “can be judged true of one situation and false of another, or the other way around, depending on how it is interpreted” (Kennedy cited in Winkler, 2015: 1). Moreover, as Maduro points out, “[t]he textual ambiguity of EU law is also a function of a deeper normative ambiguity” (2007: 143). To my mind, Maduro’s statement implies a certain congruity between law and pragmatics. Smolka & Pirker (2016: 28) have advocated the establishment of parallels between cognitive pragmatics and legal interpretation in international law. Ambiguity-based linguistic analysis has also prominently featured in the decision-making process of the US courts (Solan, 1993: 64–92). Solan explains this peculiar interdisciplinary approach in the following manner: “Ambiguity results any time that our knowledge of language, in the sense of our internalized system of rules and principles [...], fails to limit to one the possible interpretations of a sentence” (*ibid.*: 64). To sum up, in the case of *Melloni*, ambiguity allows for two parallel autonomous interpretations of the text of Article 53 CFREU to emerge, which cannot be true at the same time. To my mind, the ECJ’s decision in *Melloni* constitutes an act of strategic ambiguity resolution. I adopt the terms “ambiguity resolution” (Winter-Froemel & Zirker, 2015: 315, 317, 321, 332) and “strategic ambiguity” (*ibid.*: 313) in the sense used by Winter-Froemel and Zirker.

As a result, the ECJ is given the singular opportunity of decision-making on a point of law where the scales of justice are effectively left in equilibrium by the legislator in drafting Article 53 CFREU. Such a setup leaves the ECJ to seek resolution of the legal conundrum of the third question in the *Melloni* reference in the total absence of clear or conclusive guidance on the nature of the principle of primacy by the legislator. Seeing as here the ECJ is left unencumbered by statutory guidance, some might view these circumstances as conducive to the ECJ’s notorious tendency for judicial activism.

Judicial activism is typically seen as an undesirable foray into the realm of politics, a crude interference with national sovereignty or simply an expression of judicial

willfulness, to be contrasted with the legitimate act of judicial interpretation (Pollicino, 2004: 285–286). Pollicino (*ibid.*: 286) rejects the stark distinction between the two as “being based on an old and reductive concept of judicial function, whereby the judge is seen as an inanimate, robot-like spokesman of the law”. Instead, the creative aspect of judicial interpretation finds expression in an innovative interpretative method, labelled as a “revolt against formalism” (*ibid.*: 286). It is defined by a distinct emphasis on systemic interpretation and the importance of choice in judicial reasoning (*ibid.*: 286–287).

Furthermore, moving beyond the conventional discourse of *judicial activism versus judicial restraint* might be advisable. As Horsley points out, scholars such as Conway, Hartley, Neill, and Rasmussen have consistently doubted the legitimacy of the ECJ’s preferred approach to interpretation, because of the Court’s dismissal of the importance of legal tradition and textual evidence in favour of systemic argumentation (Horsley, 2013: 938). In particular, Horsley (2013: 939) expresses disagreement with their overreliance on abstract legal reasoning and lack of attention paid to the concrete constitutional context of the ECJ’s adjudicative activity.

It would seem that the rigid perception of judicial activism mainly stems from an assumption that an EU law provision is effective in laying down a clear and workable norm, which the ECJ simply chooses to intentionally disregard or misinterpret, so as to gain the upper hand in a power play with the ‘masters of the treaty’. However, it is widely known that EU treaty provisions are usually characterised by a high level of abstraction and uncertainty, which invites a more creative approach to judicial law-making (Pollicino, 2004: 288).

Thus, the case of *Melloni* serves as a rare example of how it is possible for ambiguity in a treaty provision to leave the ECJ completely unsupported by deficient statutory wording. In the absence of any indication of statutory intent and through no fault of its own, the ECJ is left with no other option but to resort to engaging in an extreme mode of *meta-teleological interpretation* (Maduro, 2007: 140), in order to adjudicate effectively. Therefore, the *Melloni* case proves that the traditional discourse on judicial activism, with its reliance on the exhaustiveness and clarity of EU treaty provisions as the ultimate source of legitimacy, might rest on shaky foundations in practice.

Additionally, I view the *Melloni* preliminary ruling as an act of ambiguity resolution of the ambiguity found in Article 53 CFREU with strategic implications. Thus, the ECJ effectively tipped the scales of justice in the direction that was the most beneficial for the implementation of EU law on a systemic scale. The systemic understanding of the EU legal order demands that a legal provision is assessed against a combination between its “constitutional telos” and its legal context (Maduro, 2007: 140). The implication behind this contention is that the EU legal order has an “independent normative claim” or a “claim of completeness”, which serve as the basis for the authority of EU law (Maduro, 2007: 140).

From a systemic point of view, the ECJ's binary choice is a matter of showing preference for one of two visions for the implementation of EU law – either system-building through *concepts* (Leczykiewicz, 2008: 782–785) or system-maintenance through *acceptability* (Paunio, 2013: 157, 191, 176). Although these two strategies typically complement each other, the case of *Melloni* exemplifies a clash with grave constitutional ramifications. Favouring fundamental rights protection over mutual trust and the conditional model of primacy over the absolute one, would mean giving priority to *system-maintenance through acceptability*. Conversely, opting for mutual trust instead of fundamental rights protection and the absolute model of primacy over a conditional one is tantamount to giving preference to *system-building through concepts*.

The main aim of the dialogue between the ECJ and the national courts may be seen as gradually moulding “a shared legal paradigm through judicial reasoning” (Paunio, 2013: 192), which increases the stability within the system (Paunio, 2013: 157, 175–176). According to Paunio's (*ibid.*: 157, 191, 176) discursive model of legal certainty, the process is aimed at increasing acceptability, and thus, at implementing the authority of EU law. Acceptability enhances authority by securing the voluntary obedience of the addressee of a judgment, in the absence of coercive methods (Weiler, 1970: 14), which is particularly relevant to the limited coercive powers conferred to the ECJ (Leczykiewicz, 2008: 784).

Alternatively, the authority of EU law could be upheld through judicial activity aimed at “system-building” (Leczykiewicz, 2008: 782–784). Through this method, the authority of EU law is derived from the observance of the rule of law and the coherence within the system (*ibid.*: 784), which is heavily reliant on the creation and usage of legal concepts in the judicial reasoning of the ECJ (*ibid.*: 785, 782).

Finally, my analysis aims to establish the congruity between the linguistic and legal aspects of the relevant sample of ambiguity. In this sense, ambiguity allows us to gain a clearer and fuller appreciation of the ECJ's range of strategic options, along with their corresponding systemic implications.

2. Case Summary of

Stefano Melloni v Ministerio Fiscal (Case C-399/11) of 2013

2.1. The Dispute in the Main Proceedings

Mr Melloni was convicted of bankruptcy fraud *in absentia* by the Bologna Appeal Court in Italy, which was followed by the issuance of a European Arrest Warrant by the same court for the execution of its sentence (Case C-399/11: para. 14). Subsequently, Mr Melloni was arrested by the Spanish police (Case C-399/11: para. 15). However, he resisted

surrender to the Italian authorities on grounds of (a) the fact that his wish to appoint another lawyer at the appeal stage was disregarded, and (b) being deprived of his right to appeal against a conviction *in absentia* under Italian procedural law (Case C-399/11: para. 16). The first argument failed and the First Section of the *Sala de lo Penal of the Audiencia Nacional* proceeded with granting permission for the surrender of Mr Melloni to the Italian court (Case C-399/11: para. 17). In response, Mr Melloni filed a petition for constitutional protection ('recurso de amparo') with the Spanish Constitutional Court (*Tribunal Constitucional*). He contended that the right to fair trial, enshrined in Art. 24(2) of the Spanish Constitution, was encroached upon in such a way that his human dignity was undermined by virtue of the fact that he would be surrendered to a country where he would be unable to appeal against a conviction *in absentia* (Case C-399/11: para. 18).

2.2. The Third Question in the Preliminary Reference

In my analysis, I shall concentrate on the third question referred to the European Court of Justice, as it bears the greatest significance for the authority of EU law. In essence, the Spanish Constitutional Court asked the European Court of Justice to issue an interpretation of Article 53 CFREU:

"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 the Member States' constitutions".

The Spanish Constitutional Court was interested in establishing whether the provision could be interpreted, so as to allow a Member State to review the obligation to execute a European Arrest Warrant, for the purposes of avoiding restricting or adversely affecting a fundamental right recognised by the said Member State's constitution. The Spanish Constitutional Court explicitly stressed the point that this would result in granting a level of protection to that right, which is greater than the one available under EU law (Case C-399/11: para. 26).

The European Court of Justice responded by affirming the Member State's obligation to execute the European Arrest Warrant, regardless of any review of the conviction under its national standard of protection of fundamental rights (Case C-399/11: para. 56, 57). It further reasoned that any interpretation of Article 53 CFREU that allows the Member State to apply its higher national standard 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" (Case C-399/11: para. 58). Furthermore, the European Court of Justice maintained that the interpretation envisioned

by the Spanish Constitutional Court would “undermine the effectiveness of EU law on the territory of [the] State” (Case C-399/11: para. 59).

Moreover, the European Court of Justice contended that such a misguided interpretation of Article 53 CFREU would result in “casting doubt on the uniformity of the standard of protection of fundamental rights as defined in [Framework Decision 2009/29]”, which in turn “would undermine the principles of mutual trust and recognition which that decision purports to uphold...” (Case C-399/11: para. 63). The European Court of Justice also made the role of Framework Decision 2009/29 and Framework Decision 2002/584 clear, namely the promotion of mutual confidence in the area of freedom, security and justice through facilitation of judicial co-operation and harmonisation of national regulations in relation to convictions rendered *in absentia* (Case C-399/11: para. 62, 37).

Lastly, in a succinct summary of its position, the European Court of Justice maintained that the national courts are at liberty to apply their national standard as long as “the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised” (Case C-399/11: para. 60). Such a formulation stands as evidence of a steadfast connection between the primacy, unity and effectiveness of EU law.

3. Prerequisites to the Emergence of Ambiguity in the Case of *Melloni*

3.1. Article 53 CFREU as the Potential Source of Ambiguity

The third question referred to by the Spanish Constitutional Court in the preliminary reference of *Melloni* invites the ECJ to adjudicate on the possibility of a national standard of protection of fundamental rights, higher than the EU standard, to be applied instead of the EU standard, specifically with respect to the European Arrest Warrant. The legislative source of this possibility is identified explicitly by the Spanish Constitutional Court as Article 53 CFREU. By adopting the language of the treaty provision, the Spanish Constitutional Courts further clarifies that such a course of action is intended “...to avoid an interpretation which restricts or adversely affects a fundamental right recognised by [its constitution]” (Case C-399/11: para. 26). In response, the ECJ firmly rejects any such possible interpretation (Case C-399/11: para. 57) and instead rules on the correct interpretation of Article 53 CFREU (Case C-399/11: para. 64), thus unequivocally confirming that its primary point of reference for judicial interpretation remains Article 53 CFREU. Given the shared focus of these two actors on Article 53 CFREU, one can identify in it the source of any potential ambiguity in the case of *Melloni* with rea-

sonable certainty. Therefore, it might be useful to consider if there is anything at all in the drafting history of Article 53 CFREU that might allow for the possible emergence of ambiguity.

In terms of its general function, Article 53 CFREU seems to fit the profile of the so-called “savings clause”, which is intended to ensure that the protection conferred on the individual by the legal instrument at hand will not impede the protection provided by similar preceding pieces of legislation (Widmann, 2002: 349). This would indicate that the underlying concept and function of the provision are largely considered part of the ordinary practice of international law. However, Article 53 CFREU seems to stand out among its peers as a provision operating on a supranational level by virtue of belonging to the EU legal order. In response to these special circumstances, the provision was equipped with the subordinate clause “in their respective fields of application”, which was arguably intended to prevent a clash between the fields of application of EU law and that of the Member States in cases of an overlap (Widmann, 2002: 349). Further, the phrase may have been included in the hopes of safeguarding the principle of supremacy intact, precluding any valid exceptions (Bot, 2012: para. 100).

It is interesting to note that Article 53 CFREU lends itself to multiple interpretations, shared by those who focus plainly on the text of the provision and by those who read it in the specific context of *Melloni*. To illustrate this, Widmann suggests three categories, each offering a different level of protection: (1) “the local standard” – EU law offers a minimum floor of protection, capable of being overridden by a higher national standard, (2) “uniform fixed standard” – a minimum or maximum standard of protection set exclusively on EU law, and (3) “uniform moveable standard” – a maximum level of protection by the national constitutional courts (Widmann, 2002: 346–348). It is evident that these options are indicative of the lack of clarity as to the mode of hierarchical interaction between EU law and the national constitutions when it comes to setting the level of fundamental rights protection. The analysis of Advocate General Bot on the case of *Melloni* partially confirms this account (Bot, 2012: para. 91, 92), but also proposes a substantive extension – the idea that the standard set by the Charter applies only within the areas of application of EU law, while outside of them, the Member State constitutions remain free to regulate matters concerning the protection of fundamental rights (Bot, 2012: para. 93, 94). Given the unusually broad spectrum of interpretations Article 53 CFREU seems to attract, the presence of ambiguity in the legislative text becomes a matter that doubtlessly merits further investigation.

Perhaps a brief exploration of the provision’s legislative history might reveal the motivation behind this peculiarity of drafting. Having been initially charged with the responsibility of governing the relationship between the levels of protection provided by the Charter and the ECHR (Liisberg, 2001: 1172), Article 53 CFREU was intended to mirror Article 53 ECHR (Liisberg, 2001: 1174). Following private consultations between the Secretariat and the Commission and amendments from Convention members, Article 53 CFREU emerged re-conceptualised (Liisberg, 2001: 1174–1181).

Nevertheless, Liisberg found no conclusive indication as to why exactly the phrase “in their respective fields of application” was inserted in the text of the provision, but:

“[a]ccording to officials closely involved in the drafting process, [...] the intention was to foreclose any doubt about the supremacy of Community law over national constitutions. The understanding of [the Convention Secretariat, i.e. the Legal Service of the Council, and the Legal Service of the Commission] was that the revised wording would make it clear that national constitutions could prevail only in the sphere of exclusive national competence” (Liisberg, 2001: 1175–1176).

The issue of supremacy appears to have been dealt with at the drafting stage by transforming the phrase “national law” into the “Member states’ constitutions” and through the subordinate clause “in their respective fields of application” (Liisberg, 2001: 1190). Perhaps that is why the problem of supremacy seems to have been ignored during the discussions at the Convention (Liisberg, 2001: 1190).

This at first glance puzzling acquiescence might be deemed entirely logical, if one considers that the drafting process may have already provided a satisfactory solution for all parties concerned. Besselink offers a plausible explanation as to how this might have come about:

“the state of affairs as to the intention of art. 53 was entirely open and left ambiguous, perhaps consciously. From the EU perspective, one was perhaps able to say primacy was not given up, from the national constitutional perspective, the prevailing national standard of protection was not given up either” (Besselink, 2014: 1181).

Such a formulation might also have the added effect of promoting constitutional dialogue on the issue of primacy, since the ECJ would then be forced to articulate its reasons for setting a particular level of fundamental rights protection (Azoulai cited in Lenaerts, 2012: 398).

Nevertheless, such claims are contested by de Witte’s steadfast conviction that “the wording of Article 53 must [...] be taken at face value” (de Witte, 2013: 213), since in his view there was nothing in the preparatory work preceding the Charter to suggest that the legislator intended to address the issue of the primacy of EU law (*ibid.*: 213). Had that been the case, de Witte continues, the legislator would have drafted the provision “in less ambiguous terms” (*ibid.*: 213). In response, Besselink (2014: 1181) dismisses de Witte’s logic by asserting that a) at the time of drafting the Charter was intended as a non-binding instrument, leaving the drafters with significant leeway as to its contents, and that b) in any case, the drafters would have been reluctant to incorporate the doctrine of absolute primacy in a legally binding document.

Ultimately, both Besselink (explicitly) and de Witte (implicitly) seem to agree that the drafting of Article 53 CFREU, leaves room for ambiguity, whether this is beneficial to the agenda of the primacy of EU law or not. Therefore, there is reason to suspect that the unorthodox drafting of Article 53 CFREU might entail employing ambiguous language to a strategic end.

If that be the case, the evidence presented so far seems to indicate that there are two pre-conditions for recognising a sample of ambiguity in Article 53 CFREU as relevant

to the authority of EU law, as framed by the third referred question in *Melloni*. These are as follows: a) the ambiguity must regulate the interaction between Union law and the Member States' constitutions, and b) the analysis of any such ambiguity must address the impact of the phrase “*in their respective fields of application*” in some capacity. These are the parameters that will necessarily constrain and direct my analysis.

3.2. The Style of Judicial Reasoning Adopted by the ECJ

Taking the unusually contentious drafting of Article 53 CFREU into account, it should come as no surprise to the reader of the *Melloni* preliminary ruling that the ECJ dispenses almost entirely with direct references to the wording of Article 53 CFREU in its reasoning. However, given the great significance of the clause and the fact that this was the first opportunity for clarification presented thus far, it might be argued that the matter deserved more extensive articulation by the ECJ (Torres-Perez, 2014: 318). Instead, the ECJ's argumentation could be characterized as “short and cursory and extremely self-referential” (Rauchegger, 2015: 114). This could be seen as a missed opportunity by the ECJ, as the acceptability of its approach in *Melloni* could have been increased, had it engaged with the reasoning of the Spanish national constitutional court and elaborated on the conceptual basis of its choice to give priority to the EU level of protection (*ibid.*: 114). Disregarding the possible benefits of this approach, the ECJ instead grounds its argumentation in principles of EU law and their implications for the systemic characteristics of the EU legal order.

The ECJ's preference for meta-teleological interpretation (Maduro, 2007: 140) is exhibited in the extreme here, in the absence in the typical accompanying and mitigating techniques of syllogistic, comparative, historical or even linguistic analysis (*ibid.*: 145). Nevertheless, the ECJ relies on two references to precedent – *Internationale Handelsgesellschaft* 1970 (Case 11–70) and *Winner Wetten* 2010 (Case C-409/06) – as well as to a mention of Opinion 1/91 (ECR I-6079: para. 21) and Opinion 1/09 (ECR I-1137: para. 65), all concerning the connection between the principle of primacy and the effectiveness of EU law (Case C-399/11: para. 59). Paragraph 59 of *Melloni* summarises the core issue informing the ECJ's reasoning – the inextricable link between the primacy and the effectiveness of EU law.

This connection was perhaps the reason why the ECJ thought it necessary to conceptually re-frame the divergence of standards of fundamental rights protection in terms of the principle of primacy of EU law. Rauchegger (2015: 113) considers this to be the correct approach in ECJ's balancing exercise between the right to fair trial and the effectiveness of the European Arrest Warrant in the case at hand. She further argues that seeing as this is a systemic issue, endemic to the EU legal order, it must ideally find its solution at EU level (*ibid.*: 113). This view is supported by Itzcovich (2012: 365), who elaborates further to the effect that in general, the resolution of conflicts emerg-

ing from within the legal order must be exclusively done according to criteria set up by the legal order itself, in order to preserve its autonomy and guarantee that such decisions are legally grounded.

In any case, although the ECJ's assertions go to the heart of its main systemic dilemma, they do little to explain the connection between Article 53 CFREU and the ultimate choice of ruling by the ECJ. More importantly, what is particularly striking about the case of *Melloni* is that both of the judicial actors – the ECJ and the Spanish Constitutional Court – considered the exact same text, namely Article 53 CFREU, but reached conclusions which are diametrically opposed to each other. My linguistic analysis of the ambiguity in Article 53 CFREU below will show how this curiosity might have occurred.

4. Linguistic Analysis of Ambiguity in the Case of *Melloni*

4.1. The Relevant Sample of Ambiguity in Article 53 CFREU, in the Context of *Melloni*

It may be argued that the ECJ and the Spanish Constitutional Court may experience ambiguity perception, each in their own right, with respect to their understanding of the text of Article 53 CFREU. That being said, let us turn our attention to the text of Article 53 CFREU:

“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 the Member States' constitutions” (Case C-399/11: para. 6).

I argue that the relevant sample of ambiguity is located in the entire construction “recognised by ... and by ...” (i.e. “as recognised [...] by Union law [...] and by the Member States' constitutions”). This bit of ambiguous language may give rise to two mutually exclusive interpretations. On the one hand, it is possible to read the construction as “as considered together and jointly” (Paraphrase 1). On the other hand, the construction could be given the reading “as considered together and separately” (Paraphrase 2). This assertion is made by virtue of two linguistic rules, resulting in roughly the same readings, with negligible differences.

The first applicable linguistic rule pertains to the usage of the conjunction *and* in relation to Union law and Member States' constitutions. Adams and Kaye argue that ambiguity may arise out of nouns or adjectives linked by *and*, since “[a]nd can convey that the members of a group are to be considered together, but it can also convey that they are to be considered together and separately” (Adams & Kaye, 2006: 1172).

The second applicable linguistic rule concerns Gillon's (1996: 443–444) idea that:

“[I]n English, plural noun phrases in subject position give rise to so-called collective and distributive construals. An example of this is found in the sentence given below which is, in fact, true on both a distributive and a collective construal: (1.0) Whitehead and Russell wrote a book. (1.1) Whitehead and Russell wrote a book together. (1.2) Whitehead and Russell wrote a book each”.

Gillon (1987: 199, 215–216) recognised the collective and distributive construals of plural noun phrases as a form of ambiguity, while adopting the following definition of ambiguity: “A sentence is ambiguous iff, with respect to a given state of affairs, the sentence can be both truly affirmed and truly denied” (*ibid.*: 202). According to this account, Paraphrase 1 of the relevant sample of ambiguity in *Melloni* would be seen as the collective construal, while Paraphrase 2 would be viewed as the distributive construal.

It is also important to note that Gillon argues that the relationship between the plural noun phrase and the verb phrase is of great importance when assessing the contrast between collective and distributive construal (Gillon, 1996: 449–450). The verb *to recognise* is not named in the categories of verbs that enhance the contrast between the two construals (Gillon, 1996: 449–450), which means its usage might leave room for the two construals to co-exist, side by side. Additionally, in Gillon’s view, the change from active to passive voice, along with the accompanying *by*-phrase, of the agentive verb has no effect on the generation of collective and distributive construals (*ibid.*: 450). This means that the use of passive voice is unlikely to undermine the case for ambiguity.

Furthermore, the recognition of “collective-distributive ambiguity” is affirmed by Aone (1991: 32–33), under Gillon’s aforementioned definition of ambiguity (Aone, 1991: 33). A similar phenomenon to collective-distributive ambiguity is discussed by Schwarzschild (1996: 6) in terms of “sets theory” and “union theory” of plural noun phrases united by term conjunction, but only when the sentences “contain a conjoined noun phrase one of whose conjuncts is itself a plural (formed by conjunction or common noun pluralization)” (*ibid.*: 8), which is the case with the plural form of “the Member States’ constitutions”.

Finally, Lasersohn’s contribution to the debate on plurality and conjunction might be particularly helpful in shedding light on the issue of situating the ambiguity within the structure of the relevant sentence model. Lasersohn (1995: 81–82) presents four main possibilities as to the location of ambiguity within the sentence (and any combinations thereof): 1) the noun phrase; 2) the verb phrase; 3) the combination between the noun phrase and the verb phrase, and 4) the role of quantifier scope. Lasersohn (*ibid.*: 83) establishes that the collective-distributive parallel arises wholly out of the predicate with which the noun phrase is paired. In other words, unlike Gillon, who argues for noun phrase ambiguity, Lasersohn (*ibid.*: 124) favours verb phrase ambiguity. The main argument against noun phrase ambiguity, relevant to my example is that noun phrase ambiguity fails the so-called *zeugma test* (Lasersohn, 1995: 104, 97–98), which means it is considered non-specific, and not truly ambiguous (*ibid.*: 93). In his earlier work, Lasersohn (1989: 133) affirms the same, specifically with reference to Dowty’s example of “John and Mary met in the bar and had a beer” (Dowty cited in La-

sersohn, 1989: 133). In response, Gillon (1990: 482) later demonstrates that such criticism may be unfounded.

Furthermore, one inevitably needs to consider a third option - whether ambiguity might be most comfortably situated in the combination between the verb phrase and the noun phrase. However, Lasersohn (1995: 115–116) also identifies problems with ambiguity arising out of the interaction between the noun phrase and the verb phrase; after considering examples containing conjoined predicates subject to collective and distributive readings, he concludes that the distinction actually originates solely from the predicate itself.

To return to the example at hand, if Lasersohn is indeed correct, the verb *to recognise* should be capable of serving as the basis for verb phrase ambiguity, at least at a rudimentary level. According to Dowty's (1987: 98) classification of predicates between collective, distributive and ambiguous, it would seem that the verb *to recognise* could fit in the category of ambiguous verbs, thus giving rise to both a distributive and a collective reading. In other words, it appears that the act of recognition could very well be performed either by actors, acting in parallel to each other but separately, or by the same actors, acting in collaboration with each other.

Ultimately, it seems to me that in the example at hand ambiguity arises out of the interaction between the verb phrase and the noun phrase in the construction: “as recognised [...] by Union law and international law [...] and by the Member States’ constitutions”. To my mind, the collectivity-distributivity ambiguity in practice appears to flow from the noun phrase, but is only made legally meaningful by virtue of the ambiguous verb *to recognise*. In this sense, there exists a mutual dependence between the two elements, since ambiguity is produced and resolved only on this particular linguistic and legal plain: *by whom the act of recognition is performed*.

4.2. The Subordinate Clause “in Their Respective Fields of Application”

Another fundamental element of the analysis is the opportunity to gain an understanding of the role that the subordinate clause “*in their respective fields of application*” plays with respect to the sample of ambiguity. The impact of this component of Article 53 CFREU is concentrated in a single linguistic feature – the adjective *respective*. As established earlier, the subordinate clause was possibly intended to address the issue of primacy by clarifying the nature of the relationship between the field of application of EU law and the national constitutions. Perhaps the intended effect of the subordinate clause, and specifically of the adjective *respective*, could be illustrated by Gillon’s example of “Jill and Ben visited their uncles” (1996: 452–453). This formulation gives rise to two alternative interpretations: “Jill visited her uncles and Ben’s uncles, and Ben visited his uncles and Jill’s uncles” and “Jill visited her uncles, and Ben visited his uncles” (*ibid.*: 452–453). Gillon further remarks that the latter interpretation of the example

sentence can be “forced” though the use of the adjective *respective* (*ibid.*: 452). In essence, this constitutes one instance of collective and distributive construal applied to a plural noun phrase, in which the adjective *respective* successfully disambiguates the construction in favour of the latter. My analysis in this section will attempt to evaluate to what extent the attempt at disambiguation through the subordinate clause “in their respective fields of application” was successful in the case of Article 53 CFREU.

To begin with, it is important to avoid assuming equivalence between the effect of the adjective *respective* and the adverb *respectively*. The latter is typically perceived as a modifier with strong disambiguating properties. A reading based on the adverb *respectively* is a form of plural predication (Gawron & Kehler, 2002: 87), which stands in stark opposition to a collective reading, much like a distributive reading (Fast, 2005: 17–18).

One point of semantic differentiation between these modifiers can be found in respect of the independent linear ranking of two plural or conjoined constituents (Kay, 1989: 182–183). Moreover, these two categories can be contrasted by virtue of their different semantic functions:

“Respective is an attributive adjective whose scope of modification is restricted to the noun phrase in which it is embedded, and respectively is an adverb that directly affects the semantics of the predicate of a sentence” (Okada, 1999: 872).

Additionally, clause-level *respective* readings attach only optionally to *respective* and compulsory to *respectively* (Gawron & Kehler, 2002: 88). Naturally, this means that for the purposes of the analysis at hand, any arguments stemming by means of association from the disambiguating effect of *respectively* shall be dismissed as irrelevant. More importantly, these comments emphasise that the scope of the *respective* modifier is much more limited than that of the *respectively* modifier. Evidently, this means that however strong the potential disambiguating effect of the adjective *respective*, it needs to be targeted at a specific part of the sentence, in order to fulfill its strategic purpose in any meaningful and linguistically accurate sense.

A closer reading of Article 53 CFREU might assist us in appreciating the actual scope of the modifier used: “human rights and fundamental freedoms...as recognised, in their respective fields of application, by Union law and international law [...] and by the Member States’ constitutions”. Thus, one notices that the adjective *respective* is placed in a subordinate clause, which provides a direct answer to the question “Where do the Member States’ constitutions and Union law recognise human rights and fundamental freedoms?” By this account, it becomes clear that the scope of the adjective *respective* is meaningfully limited to forcing a distributive reading of the relationship between the Member States’ constitutions and Union law and their respective fields of application (i.e. Member States’ constitutions and their own field(s) of application; Union law and its own field of application). Thus, the linguistic analysis reveals that the effect of the adjective *respective* reaches *no further* than the subordinate clause, leaving the possibility for ambiguity in the main sentence open.

The construction “to be recognised [...] by Union law [...] and by the Member States’ constitutions” is left untouched by the disambiguating effect of the adjective *respective* in the subordinate clause. To illustrate that the connection between the two is left intact, one simply needs to formulate the question: “By whom are human rights and fundamental freedoms recognised?” This immediately demands the answer of “by Union law [...] and by the Member States’ constitutions”. In this case, it still remains a matter of ambiguity whether these actors commit the act of recognition together and separately (distributive construal) or together and jointly (collective construal). Finally, Okada has disproved the traditional view that *respective* can successfully function as a predicate distributive operator, which means its scope is limited solely to that of a nominal distributive operator (Okada, 1999: 877–879).

In the face of the evidence presented here, it seems that the controversy surrounding the primacy of EU law in Article 53 CFREU was *not* effectively eliminated with the introduction of the phrase “in their respective fields of application”. The disambiguating effect of the *respective* modifier was solely employed to address issues of scope of application, thus leaving unresolved ambiguity as to the source of authority, inherent in the construction “to be recognised [...] by Union law [...] and by the Member States’ constitutions”.

5. ECJ’s Strategic Resolution of Ambiguity in the Case of *Melloni* and Its Significance for the Authority of EU Law

5.1. The Normative Implications of the Sample of Ambiguity

Through the preliminary reference by the Spanish Constitutional Court, the ECJ is invited to interpret Article 53 CFREU. To my mind, this constitutes an offer for ambiguity resolution, which the ECJ chooses to accept in the case at hand. In issuing the preliminary ruling, the ECJ essentially commits the act of ambiguity resolution. More importantly, the case of *Melloni* presents an opportunity for the ECJ to engage in strategic ambiguity resolution. Due to the ambiguous language arguably contained in Article 53 CFREU, there exist two equally legitimate paraphrases of the relevant sample of ambiguity, enabling the ECJ to plausibly and convincingly argue in either direction. Nevertheless, the ECJ selects the option that is more favourable for the EU legal order from a systemic point of view, even at the expense of foregoing the grounding effect of more traditional forms of legal reasoning nearly altogether.

To reiterate, in the preliminary reference of *Melloni*, the Spanish Constitutional Court (SCC) essentially sought answer to the following question (paraphrased): “May a national standard of fundamental rights protection in the area of the European Arrest

Warrant, which is higher than the EU standard, be applied instead of the EU standard?” Paraphrase 1 (“as considered together and jointly”) implies that the Charter provides a homogenous level of protection, which leads to the negative answer favoured by the ECJ. In contrast, Paraphrase 2 (“as considered together and separately”) implies that the Charter provides a heterogenous level of protection, which allows for the affirmative answer favoured by the SCC. The European Court of Justice held that the only standard of protection of fundamental rights it finds acceptable to implement is the one prescribed by EU law, which resulted in the rejection of the application of a higher standard enshrined in the Member State’s constitution. Paraphrase 1 was preferred over Paraphrase 2 in the outcome of the *Melloni* preliminary ruling, implying a homogenous level of protection was ultimately established.

Let us examine the legal implications flowing from this linguistic phenomenon in further detail. I argue that even if one accepts that the fields of application of the two sources of law are distinctly separate, as the modifier *respective* suggests, the provision leaves the matter of the prevailing authority in cases of overlap ambiguous. The text provides for only two plausible interpretations as to the interaction between the EU standard and the national standard of protection (i.e. *together and separately* or *together and jointly*). However, the provision does nothing to resolve this ambiguity, thus resulting in a peculiar manifestation of pluralism (Walker, Maduro, Kumm & Komarek cited in Lenaerts, 2012: 398), whereby the legal text suggests the same “human rights and fundamental freedoms” are recognised by two sources simultaneously, with each source being supreme in its own domain. In other words, the sources of law need not actually overstep the boundaries of their respective field of application to come into conflict. In the area of overlap, they remain two separate, but parallel planes. In this sense, the *Melloni* preliminary ruling is a particularly apt illustration of the lack of hierarchy between parallel sources of authority, with the resulting overlap between the existing and the succeeding regimes often left unregulated in treaties – a trend identified by Alter, Helfer & Madsen (2016: 4–5) in their recent work on the authority of international courts.

Let us consider the notion of an overlap in relation to the goals Article 53 CFREU was set to achieve. De Boer contends that not only is an overlap between the scope of application of the Charter and that of the Member States’ constitutions already existent in the case-law of the national constitutional courts, but also that without even the mere theoretical possibility of an overlap, Article 53 CFREU would be obsolete (de Boer, 2013: 1092–1093). More importantly, after expressing his agreement with the views of Liisberg and of Advocate General Bot in relation to the underlying purpose of Article 53 CFREU, he states any reliance on the subordinate clause found therein, instead of on the principle of the primacy of EU law, to be “confusing” (de Boer, 2013: 1093). Therefore, one may conclude that the issue of the primacy of EU law is unlikely to be unequivocally resolved by the subordinate clause of Article 53 CFREU, since its obligatory distributive reading “would deprive Article 53 of the Charter of its *effet utile*” (Lenaerts,

2012: 398). Logically, the primacy of EU law must be dealt with elsewhere in the contents of the provision, to allow for the Spanish Constitutional Court and the European Court of Justice to speculate on the problem on the basis of Article 53 CFREU. The construction “to be recognised [...] by Union law [...] and by the Member States’ constitutions” seems to be an appropriate contender, as it reflects the interaction between the two different standards in a legally and linguistically faithful manner.

5.2. The ECJ’s Strategic Decision-Making

The case of *Melloni* arguably produces a disappointing result for the individual – Mr Melloni, as he is left to enjoy the lower standard of protection of their fundamental rights, provided by the EU, when there is a higher national standard available. This demonstrates what the European Court of Justice is prepared to sacrifice to affirm its core systemic values – “the primacy, unity and effectiveness of EU law” (Case C-399/11: para. 60). As Besselink succinctly puts it, “the court settles for absolute primacy as a greater concern than substantive rights” (Besselink, 2014: 1189).

Furthermore, in *Melloni*, the European Court of Justice may be said to be making an implied affirmation of absolute primacy (Besselink, 2014: 1180–1183). The rejection of both a lower and a higher national standard is meant to effectively lead to only one outcome: an affirmation of the EU standard as the only valid standard, under which national rights are protected. Torres Perez also supports the view that the ECJ’s reasoning in para. 60 of the *Melloni* preliminary ruling amounts to an absolute conception of primacy, meaning that the Charter “is not just a floor, but it might also become in practice a ceiling” (Torres Perez, 2014: 317).

However, Advocate General Bot insists on a different interpretation of the value of the case, namely one that concentrates on the strategic goals behind the need to ensure the effectiveness of the European Arrest Warrant. Advocate General Bot argues this point as follows:

“There is [...] 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” (Bot, 2012: para. 114).

The European Arrest Warrant demands a high level of mutual confidence, which could be achieved by promoting and speeding up judicial cooperation (Bot, 2012: para. 115). The ultimate goal is 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.” (Bot, 2012: para. 115). Evidently, the European Arrest Warrant is merely a procedural manifestation of a much grander purpose.

Thus, the following question arises: How does one reconcile these two diverging conceptual frameworks (absolute primacy v. mutual trust) for the reasoning and outcome in *Melloni*? In other words, what exactly is the strategic value of the case of *Mello-*

ni for the authority of EU law? It seems to me that the ECJ purposefully uses the well-known language and rhetoric of primacy to pave the way for the principle of mutual trust – a relatively new and vulnerable concept in comparison. Advocate General Bot summarises the challenge the EU legal order faces in this respect:

“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” (Bot, 2012: para. 117).

To sum up, the ECJ is determined to fortify the doctrine of mutual trust within the Area of Freedom, Security and Justice by effectively allowing no exceptions to the principle of primacy, even at the expense of a potential backlash from the national constitutional courts (Ostropolski, 2015: 175–176).

5.3. The Response by the Spanish Constitutional Court

It is questionable to what extent the ECJ’s risky strategy was justified, since after preliminary ruling was issued, the Spanish Constitutional Court made clear its displeasure with the ECJ’s approach of asserting absolute primacy, albeit not explicitly. The fact that the national constitutional court confirmed the outcome of the *Melloni* preliminary ruling with a significant delay of nearly a year (Torres Perez, 2014: 319) was perhaps telling of the mounting tension between the participants in the judicial dialogue (Pliakos & Anagnostaras, 2015: 119).

In its judgment, the Spanish Constitutional Court set out to implicitly, but decisively, reassert its authority in matters of fundamental rights protection, to the effect that the last word in case of constitutional conflict with the ECJ would belong to the Spanish Constitutional Court (Torres Perez, 2014: 320). In its determination to achieve this end, the *Tribunal Constitucional* was prepared to effectively treat the ECJ’s reasoning in the *Melloni* preliminary ruling as “a mere hermeneutic tool” (Torres Perez, 2014: 323). Therefore, it resolutely put forward its own constitutional argumentation on a revised interpretation of the right to fair trial, which is not without substantial defects (Torres Perez, 2014: 322–323). It is also worth noting that despite its otherwise extensive argumentation, the Spanish Constitutional Court remained “strikingly defiant” (Torres Perez, 2014: 320) in keeping its silence on the interpretation of Article 53 CFREU. Such a decision is consistent with its approach of largely ignoring the ECJ’s reasoning in *Melloni*.

Additionally, it may be argued that by endeavouring to re-conceptualise the case as a mere exercise in interpreting the national constitution, the Spanish Constitutional Court completely disregards the impact of the *Melloni* preliminary ruling as an expression of the authority of EU law on the national constitutional order (Pliakos & Anagnostaras, 2015: 119–120). Moreover, Perez (2014: 322) also shares the view put forward by Pliakos & Anagnostaras (2015: 120) that the national constitutional court

fails to conceal that it reconsidered its constitutional standard not by its own initiative or by virtue of other international law instruments, but because of the *Melloni* preliminary ruling.

6. Conclusion

The ambiguity at the heart of Article 53 CFREU, viewed concurrently through the prism of both pragmatics and legal interpretation, *sets the scene* for the ECJ's decision-making based on strategic ambiguity resolution in *Melloni*. The strategic value of this act lies in establishing equivalence between two competing lines of interpretation, thus placing the law-making initiative firmly in the hands of the ECJ. This characteristic of a key treaty provision robs the Court of guidance on a point of law integral to the implementation of the authority of EU law and forces it to rely on meta-teleological interpretation to an extreme degree. Thus, *Melloni* demonstrates that the constitutional peculiarities of the EU legal order demand the employment of creative judicial interpretation. It seems that the canonical understanding of judicial activism is too limiting and thus inadequate to faithfully and effectively respond to the judicial interpretation needs of the system.

Moreover, by framing the legal problem in terms of a binary choice, ambiguity facilitates a deeper understanding of the ECJ's priorities. It is through an acknowledgment of the available alternative that one can fully appreciate the corresponding constitutional cost the ECJ is prepared to pay for the fulfillment of its goals. This is true for the reinforcement of the doctrine of mutual trust at the expense of the level of fundamental rights protection granted to the individual. It is also valid in terms of taking the risk of aggravating the relationship with a national constitutional court for the sake of promoting the trinity of concepts, essential to the implementation of the authority of EU law on a systemic level. The ECJ's insistence on safeguarding the concepts of "the primacy, effectiveness and unity of EU law" (Case C-399/11: para. 60) shows its preference for system-building through concepts, rather than system-maintenance through acceptability. The reaction of the Spanish Constitutional Court confirms that the ECJ's decision was taken to the detriment of acceptability.

References

- Adams, Kenneth A. & Kaye, Alan S. (2006). Revisiting the Ambiguity of "And" and "Or" in Legal Drafting. *St John's Law Review*, 80, 1167–1198.

- Alter, Karen J. & Helfer, Laurence R. & Madsen, Mikael Rask (2016). How Context Shapes the Authority of International Courts. *Law and Contemporary Problems*, 79(1), 1–36. Available at scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4765&context=lcp.
- Aone, Chinatsu (1991). *Treatment of Plurals and Collective-Distributive Ambiguity in Natural Language Understanding*. Doctoral dissertation. Department of Linguistics. The University of Texas at Austin.
- Besselink, Leonard F. M. (2014). The parameters of constitutional conflict after *Melloni*. *European Current Law*, 10, 1169–1189. Available at pure.uva.nl/ws/files/2333580/167471_447061.pdf.
- Bot, Yves (2012). Opinion of Advocate General, *Case C-399/11: Criminal proceedings against Stefano Melloni*, delivered on 2 October 2012. ECLI:EU:C:2012:600.
- Chalmers, Damian & Davies, Gareth & Monti, Giorgio (2010). *European Union Law*. Cambridge: Cambridge University Press. DOI: [10.1017/CBO9780511841408](https://doi.org/10.1017/CBO9780511841408).
- De Boer, Nik (2013). Addressing rights divergences under the Charter: *Melloni*. *Common Market Law Review*, 50, 1083–1104.
- De Witte, Bruno (2013). Tensions in the Multilevel Protection of Fundamental Rights: The Meaning of Article 53 EU Charter. In Silveira & Madeira Froufe & Canotilho (Eds.), *Citizenship and Solidarity in the European Union: From the Charter of Fundamental Rights to the Crisis, the State of the Art* (pp. 205–217). Brussels: Peter Lang.
- Dowty, David R. (1987). Collective predicates, distributive predicates, and ‘all’. In Marshall et. al. (Eds.), *Proceedings of the 1986 Eastern States Conference on Linguistics (ESCOL)* (pp. 97–116). Columbus: Ohio State University. Available at stanford.edu/~lelia/dowty_1987.pdf.
- Fast, Jakub (2005). Structurally underspecified semantics for distributive plural predication: Respectively constructions in Lexical Resource Semantics. In Blaho & Schoorlemmer & Vicente (Eds.), *Proceedings of ConSOLE XIII* (pp. 17–38). Leiden: Leiden University Centre for Linguistics.
- Gawron, Jean Mark & Kehler, Andrew (2002). The Semantics of the Adjective Respective. In Mikkelsen & Potts (Eds.), *WCCFL 21 Proceedings* (pp. 85–98). Somerville, MA: Cascadilla Press.
- Gillon, Brendan S. (1987). The Readings of Plural Noun Phrases in English. *Linguistics and Philosophy*, 10, 199–219. DOI: [10.1007/BF00584318](https://doi.org/10.1007/BF00584318).
- Gillon, Brendan S. (1990). Plural Noun Phrases and Their Readings: A Reply to Lasersohn. *Linguistics and Philosophy*, 13, 477–485. DOI: [10.1007/BF00630751](https://doi.org/10.1007/BF00630751).
- Gillon, Brendan S. (1996). Collectivity and Distributivity Internal to English Noun Phrases. *Language Sciences*, 18(1–2), 443–468. DOI: [10.1016/0388-0001\(96\)00029-0](https://doi.org/10.1016/0388-0001(96)00029-0).
- Horsley, Thomas (2013). Reflections on the Role of the Court of Justice as the “Motor” of European Integration: Legal Limits to Judicial Lawmaking. *Common Market Law Review*, 50, 931–964.
- Itzcovich, Giulio (2012). Legal Order, Legal Pluralism, Fundamental Principles. Europe and Its Law in Three Concepts. *European Law Journal*, 18(3), 358–384. DOI: [10.1111/j.1468-0386.2012.00604.x](https://doi.org/10.1111/j.1468-0386.2012.00604.x).
- Kay, Paul (1989). Contextual Operators: respective, respectively, and vice versa. In Hall, Meacham & Shapiro (Eds.), *BLS 15: General Session and Parasession on Theoretical Issues in Language Reconstruction* (pp. 181–193). Berkeley: Berkeley Linguistics Society. DOI: [10.3765/bls.v15i0.3359](https://doi.org/10.3765/bls.v15i0.3359).
- Kumm, Matthias (2005). The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty. *European Law Journal*, 11(3), 262–307. DOI: [10.1111/j.1468-0386.2005.00260.x](https://doi.org/10.1111/j.1468-0386.2005.00260.x).
- Lenaerts, Koen (2012). Exploring the Limits of the EU Charter of Fundamental Rights. *European Constitutional Law Review*, 8, 375–403. DOI: [10.1017/S1574019612000260](https://doi.org/10.1017/S1574019612000260).
- Lasersohn, Peter (1989). On the Readings of Plural Noun Phrases. *Linguistic Inquiry*, 20(1), 130–134. DOI: [10.1017/S1574019612000260](https://doi.org/10.1017/S1574019612000260).
- Lasersohn, Peter (1995). *Plurality, Conjunction and Events*. Studies in Linguistics and Philosophy (Vol. 55). Dordrecht, Boston, London: Kluwer Academic Publishers.
- Leczykiewicz, Dorota (2008). Why Do the European Court of Justice Judges Need Legal Concepts? *European Law Journal*, 14(6), 773–786. DOI: [10.1111/j.1468-0386.2008.00438.x](https://doi.org/10.1111/j.1468-0386.2008.00438.x).

- Liisberg, Jonas Bering (2001). Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? *Common Market Law Review*, 38, 1171–1199.
- Maduro, Miguel P. (2007). Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism. *European Journal of Legal Studies*, 1(2), 137–152. Available at ejls.eui.eu/issues/judging-judges-winter-2007-volume-1-issue-2.
- Montaldo, Stefano, (2016). On a Collision Course! Mutual Recognition, Mutual Trust and the Protection of Fundamental Rights in the Recent Case-Law of the Court of Justice. *European Papers*, 1(3), 965–996.
- Okada, Sadayuki (1999). On the function and distribution of the modifiers *respective* and *respectively*. *Linguistics*, 37(5), 871–903. DOI: [10.1515/ling.37.5.871](https://doi.org/10.1515/ling.37.5.871).
- Ostropolski, Tomasz (2015). The CJEU as a Defender of Mutual Trust (Opinion). *New Journal of European Criminal Law*, 6(2), 166–178. DOI: [10.1177/203228441500600202](https://doi.org/10.1177/203228441500600202).
- Paunio, Elina (2013). *Legal Certainty in Multilingual EU Law: Language, Discourse and Reasoning at the European Court of Justice*. Farnham: Ashgate.
- Pliakos, Asteris & Anagnostaras, Georgios (2015). Fundamental Rights and the New Battle Over Legal and Judicial Supremacy: Lessons from *Melloni*. *Yearbook of European Law*, 34(1), 97–126.
- Pollicino, Oreste (2004). Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint. *German Law Journal*, 5(3), 283–317. Available at germanlawjournal.com/s/GLJ_Vol_05_No_03_Pollicino.pdf.
- Rauchegger, Clara (2015). The Interplay Between the Charter and National Constitutions after *Akerberg Fransson* and *Melloni*: Has the CJEU Embraced the Challenges of Multilevel Fundamental Rights Protection? In De Vries & Bernitz & Weatherhill (Eds.), *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (pp. 93–131). Oxford and Portland, Oregon: Hart Publishing.
- Reestman, Jan-Herman & Besselink, Leonard (2013). After *Åkerberg Fransson* and *Melloni* (Editorial). *European Constitutional Law Review*, 9, 169–175. DOI: [10.1017/S1574019612001095](https://doi.org/10.1017/S1574019612001095).
- Schima, Bernhard (2015). EU Fundamental Rights and Member State Action After Lisbon: Putting the ECJ's Case Law in Its Context. *Fordham International Law Journal*, 38, 1097–1133. Available at ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2397&context=ilj.
- Schwarzschild, Roger (1996). *Pluralities*. Studies in Linguistics and Philosophy, Vol. 61. Dordrecht: Kluwer Academic Publishers.
- Smolka, Jennifer & Pirker, Benedikt (2016). International Law and Pragmatics – An Account of Interpretation in International Law. *International Journal of Language & Law*, 5, 1–40. DOI: [10.14762/jll.2016.001](https://doi.org/10.14762/jll.2016.001).
- Solan, Lawrence M. (1993). *The Language of Judges*. The University of Chicago Press: Chicago and London.
- Torres Perez, Aida (2014). *Melloni* in Three Acts: From Dialogue to Monologue. *European Constitutional Law Review*, 10(2), 308–331. DOI: [10.1017/S1574019614001199](https://doi.org/10.1017/S1574019614001199).
- Walker, Neil (2005). Legal Theory and The European Union: A 25th Anniversary Essay. *Oxford Journal of Legal Studies*, 25(4), 581–601. DOI: [10.1093/ojls/gqj031](https://doi.org/10.1093/ojls/gqj031).
- Weiler, Paul (1970). Legal Values and Judicial Decision-Making. *Canadian Bar Review*, 48(1), 1–46.
- Widmann, Anne-Marieke (2002). Article 53: Undermining the Impact of the Charter of Fundamental Rights. *Columbia Journal of European Law*, 8, 342–358.
- Winkler, Susanne (2015). Exploring Ambiguity and the Ambiguity Model from a Transdisciplinary Perspective. In Winkler (Ed.), *Ambiguity: Language and Communication* (pp. 1–25). Berlin/Boston: De Gruyter Mouton.
- Winter-Froemel, Esme & Zirker, Angelika (2015). Ambiguity in Speaker-Hearer Interaction: A Parameter-Based Model of Analysis. In Winkler (Ed.), *Ambiguity: Language and Communication* (pp. 283–339). Berlin/Boston: De Gruyter Mouton.

ECJ Preliminary Rulings

17 December 1970, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11–70, ECLI:EU:C:1970:114.

8 September 2010, *Winner Wetten GmbH v Mayor of Bergheim*, Case C-409/06, ECLI:EU:C:2010:503.

29 January 2013 (Grand Chamber), *Proceedings relating to the execution of European arrest warrants issued against Ciprian Vasile Radu*, Case C-396/11, ECLI:EU:C:2013:39.

26 February 2013, *Åklagaren v Hans Åkerberg Fransson*, Case C-617/10, ECLI:EU:C:2013:105.

26 February 2013, *Stefano Melloni v. Ministerio Fiscal*, Case C-399/11, ECLI:EU:C:2013:107.

30 May 2013 (Second Chamber), *Jeremy F. v Premier minister*, Case C-168/13 PPU, ECLI:EU:C:2013:358.

5 April 2016 (Grand Chamber), *ál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, Joined Cases C-404/15 and C-659/15 PPU. ECLI:EU:C:2016:198.

Note: JLL and its contents are Open Access publications under the [Creative Commons Attribution 4.0 License](#).



Copyright remains with the authors. You are free to share and adapt for any purpose if you give appropriate credit, include a link to the license, and indicate if changes were made.

Publishing Open Access is free, supports a greater global exchange of knowledge and improves your visibility.