From the Editors

These are interesting times for the development of fundamental rights in the EU legal order. On the 26th February 2013 the CJEU delivered its landmark decisions in the cases of *Åkerberg Fransson* (C-617/10) and *Melloni* (C-399/11), which give an answer to two important questions regarding the applicability of the EU Charter of Fundamental Rights (CFR) in the Member States.In *Åkerberg Fransson* – which is commented in this *REALaw* issue by John Vervaele in his case law analysis '*The application of the EU Charter of Fundamental Rights (CFR) and the ne bis in idem principle in the Member States of the EU*' – the Court rejects a restrictive interpretation of the Article 51(1) CFR phrase 'implementing EU law' and declares the CFR binding for the Member States 'when they act in the scope of Union law'. In doing so it prevents a difference between the scope of the CFR and the scope of the EU general principles in its long standing case law in for instance *Wachauf* and *ERT*. According to the Court the applicability of Union law by the Member States and the applicability of the CFR must go hand in hand. Therefore, the principle of *ne bis in idem* laid down in Article 50 CFR in principle applies to the Swedish imposition, for the same acts of non-compliance with VAT-obligations, of the combination of a tax and criminal penalty, although both sanctions are not prescribed by Union law.

In *Melloni* the CJEU deals with the fundamental question to what extent national authorities and courts, when acting in the scope of Union law, remain free under Article 53 CFR to apply national standards of protection of fundamental rights. According to the Court this is allowed 'provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised'. In *Melloni* this restriction of national constitutional autonomy implies that the Spanish judicial authorities are not allowed to make the execution of a European arrest warrant conditional upon the conviction rendered *in absentia* being open to review in the issuing state, although this condition is based on Article 24 Spanish Constitution. According to the Court this condition would compromise the efficacy of the Framework Decision on the European Arrest Warrant. What is important for the decision is that the Court also establishes that the guarantees provided by the Framework Decision are consistent with Article 47 and 48 CFR and with the case law of the ECrtHR concerning Article 6 ECHR. Although for EU lawyers *Melloni* does not come as a surprise, it raises fundamental questions. How will the *Melloni* standard be applied in cases in which more fundamental national constitutional rights are at stake? What will, in future cases, be the importance of Article 4(2) TEU, which obliges the Union to respect the national constitutional identity of the Member States. And, finally, is *Melloni* the beginning of new tension between the CJEU and national constitutional courts? These and other question will be discussed in future issues of *REALaw*.

This issue of *REALaw* contains three articles. In *Between Equity and Efficiency: the European Union's No-Fault Liability* Michiel Tjepkema provides, against the

background of the well-known *FIAMM* case, an in-depth analysis of the pros and cons of accepting no-fault liability claims against the EU. According to the author, *FIAMM* proves that the CJEU is not particularly sensitive to equity-based arguments and favours an instrumental approach to liability. Therefore, the right to damages compensation for no-fault liability may, in the future, be to a large extent determined by the Union's legal policy considerations. Only where compensation of companies can in some way help to fulfill the goals of the EU-institutions, a right to compensation will be given, be it by a special regulation or an individual decision.

In *The Evolution of Administrative Procedure Theory in 'New Governance' Key Point*', Jorge Agudo Gonzáles integrates new governance insights of policy science into the legal theory of administrative procedures. In the article the author distinguishes between simple procedures – procedures characterised by bureaucratic and legalistic decision-making - and complex procedures (for instance in the area of environmental law) – i.e. procedures defined by the exercise of discretionary powers, regulatory strategies and finalists programmes. As regards simple procedures the EU's objective is negative convergence in the Member States by means of the first generation procedural rights of Article 41 CFR. As regards complex procedures the EU promotes positive convergence in the Member States by means of directives. The prescribed procedures are characterised by the concept of proceduralisation and in the provisions principles of new governance, such as objectivity, coordination, participation and effectiveness, are realised.

Henrik Wenander, in *A Network of Social Security Organs – European Administrative Cooperation under Regulation (EC) No 883/2004*, explores the EU regime on the coordination of social security in the light of theories on administrative networks. This regime contains several cooperation structures with the Administrative Commission as central point. Within these structures national social security bodies provide assistance, communicate directly, solve conflicts and exchange information through the infrastructure of the EESI. Wenander concludes that the network structures may increase efficiency and simplify the exercise of the right of free movement. However, the complexity of the system raises questions as regards democratic accountability and legitimacy of the decision-making.

Next to the already mentioned case law analysis of *Åkerberg Fransson* by John Vervaele, this issue contains two other analyses. In *The distance requirement under Article 12(1) of the Seveso II Directive* Wolfgang Köck discusses the case of *Müksch* and the consequence for Germany. From its comment it becomes clear that the German court has solved the tension between German and Union law, resulting from *Müksch*, with an interpretation of the relevant German legislation so as to be consistent with EU law. The case of *Pfeifer & Langen* is commented by Arno Geleijnse and Willemien den Ouden. In this case the CJEU declares that, although the limitation period for the recovery of wrongly received storage cost is governed by Article 3 PIF Regulation, the limitation period with regard

to the additional interest claim is still governed by national (German) law. The case illustrates the complex questions which arise when applying the PIF regulation by national authorities, because of the fact that the Regulation allows the national legislator considerable freedom to add to and depart from it. To solve these problems Geleijnse and Den Ouden are in favour of more detailed European provisions in the PIF Regulation.

This issue of *REALaw* finishes with book reviews by Stéphanie De Somer of Herwig Hofmann and Russel Waever (eds), *Transatlantic Perspectives of Administrative Law*, and by Stephanie ten Kate of the doctorate thesis *Autonomie van de nationale rechter in het Europees recht* (Autonomy of National Courts in European Law) of Herman van Harten.

The editors, Groningen, Luxemburg & Utrecht