Hic Sunt Nationes: The Elusive Limits of the EU Charter and the German Constitutional Watchdog

Court of Justice of the European Union

Judgment of 26 February 2013, Case C-617/10

Åklagaren v. *Hans Åkerberg Fransson*

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Introduction

In late February 2013, the ECJ handed down the *Åkerberg Fransson* preliminary ruling (*Fransson*),[1] a ten-page decision which tackled the unresolved issue of the application of the EU Charter of Fundamental Rights (the Charter) to domestic measures. Notwithstanding the Advocate General's effort to investigate the theoretical foundations that legitimise this projection of the Charter upon state acts, the ECJ delivered a judgment which largely followed in the pattern of its own anodyne case-law on general principles. The judgment confirmed that the Swedish measures at stake – cumulating administrative and criminal penalties for tax evaders – 'implemented' EU law insofar as they contributed to the effective collection of VAT, one of the sources of the EU's budget. As a consequence, it is for the Swedish judge to check their compliance with the Charter's norm on *ne bis in idem*. This decision confirms that the Charter applies to national measures that do not transpose EU legislation and happen to fall within its scope only incidentally.

Regardless of the relative conservativeness of this finding, its implications are fated to displease member states and the reasoning of the Court was not compelling enough to prevent distinguishing and criticism. The first attack was promptly brought by the German Constitutional Court, which in its *anti-terror database*

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[1] Case C-617/10 *Åklagaren* v. *Hans Åkerberg Fransson*, judgment of 26 Feb. 2013, nyr.

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decision made clear that it subscribes only to a restrictive reading of *Fransson* and does not accept that the Charter applies to domestic measures whose objectives are set domestically, even if their purposes are shared by EU legislation.

Factual and legal background

Under the Swedish legislation on the prosecution of tax crimes, fiscal fraud can be punished through the imposition of penalties by the Tax Authority (*Skatteverket*) and through criminal prosecution. Mr. Fransson, a self-employed fisherman, was found guilty of providing false information in the tax returns for the years 2004 and 2005, conduct which resulted in the evasion of substantial amounts with respect to income tax and VAT. After being ordered to pay a tax surcharge by the Tax Authority for his misconduct, the public prosecutor launched criminal proceedings against him before the District Court (*tingsrätt*).

Mr. Fransson asked the District Court to dismiss the charges on the ground that he had already been punished for the same acts in other proceedings. He invoked in support of his request the principle of *ne bis in idem*, which is laid down in Article 4 of Protocol No. 7 to the European Convention of Human Rights (ECHR) and Article 50 of the Charter. The Swedish court made a preliminary reference to the European Court of Justice (ECJ), seeking clarification on the EU compatibility of the Swedish system of double penalties. The gateway issue was, naturally, whether the Charter applies at all to the measures challenged. The present comment is mainly concerned with this aspect of the dispute, which is by far the most controversial.

In the event that such application be granted, the Tribunal also interrogated the ECJ about the legality of the Swedish requirement that judges disapply domestic norms for an infringement of the ECHR or the equivalent rights of the Charter only when there is 'clear support in the [ECHR] or the case-law of the [ECtHR]', and sought guidance on the substantive issue of whether the Swedish system is, in fact, compatible with the principle of *ne bis in idem*.

The application of the EU Charter to domestic measures

Article 51(1) of the Charter states that its provisions 'are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity *and to the Member States only when they are implementing Union law*.'[2] The rationale of the second sentence is straightforward: the guarantee that the EU will act in accordance with the human-rights rule of law is extended to

[2] Art. 51(1), emphasis added.

those non-EU entities when, and to the extent that, they act on its behalf.[3] This extension is 'only' warranted when the member states act as agents of the Union. That the Charter does not apply across the board to all domestic measures is also evident from a reading of the *travaux préparatoires* of this clause[4] and of Article 51(2) of the Charter.[5] The latter provision states that the Charter does not expand the competences of the Union; it follows that it should only serve as a human-rights straitjacket for the implementation of EU acts founded on legal bases *other* than the Charter itself. In short, the Charter codifies the EU's responsibility on the protection of fundamental rights but does not implicate any new EU power in this area.

The same reasoning had been used before the adoption of the Charter to justify the obligation that domestic measures comply with the general principles of EU law (which include the protection of fundamental rights).[6] Such compliance is required exclusively in agency-like situations. Over time, however, the ECJ has refined its treatment of agency situations[7] and has extended the reach of fundamental rights to scenarios other than that of transposition. In order to avoid arbitrary distinctions, the case-law has established that general principles bind member states not only when they implement EU law (*see Wachauf*)[8] but also when they act in derogation therefrom (*see ERT*).[9] Regardless of whether the derogation is justified on the basis of a specific exception (like those laid down in Article 36 TFEU or in other pieces of secondary legislation[10]), a public policy or

[3] Public bodies' compliance with general principles, including fundamental rights, is a symptom of the rule of law in action; *see* L. Pech, '"A Union Founded on the Rule of Law": Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law', 6 *European Constitutional Law Review* (2010) p. 359-396, p. 376: '[general principles] are "concrete" emanations of the rule of law as their primary purpose is to regulate public power according to material and substantive standards.'

[4] T. von Danwitz and K. Paraschas, 'A Fresh Start for the Charter: Fundamental Questions on the Application of the European Charter of Fundamental Rights', 35 *Fordham International Law Journal* (2012) p. 1396-1425, p. 1402 ff.

[5] Reading: 'The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.'

[6] For an excellent analysis of the dynamics between general principles and Charter rights, *see* H.C.H. Hofmann and C. Mihaescu, 'The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case', 9 *European Constitutional Law Review* (2013) p. 73-101.

[7] J.H.H. Weiler and N. Lockhart, '"Taking Rights Seriously" Seriously: The European Court of Justice and Its Fundamental Rights Jurisprudence', 32 *Common Market Law Review* (1995) p. 51-92, p. 73.

[8] Case 5/88 *Wachauf* [1989] *ECR* 2609.

[9] Case C-260/89 *Elliniki Radiophonia Tileorassi* [1993] *ECR* I-2925.

[10] *See* Joined Cases *NS* (C-411/10) and *ME and Others* (C-493/10) [2011] *ECR* I-0000, para. 68: 'the freedom of the national lawmaker resulting from an express authorization laid down in

a mandatory requirement,[11] it must always respect EU general principles, including fundamental rights.[12] Once again, the rationale of this extension is the same as that which animates the concept of agency: members routinely enjoy some margin of action when they give effect to EU law or when they intend to use their power to derogate therefrom. In these cases, the EU retains the right to monitor the human-rights compliance of state action that is ultimately attributable to the Union. The discretion that states enjoy in choosing the preferred means of implementation or in operating a justified deviation cannot vest them with the power to violate the fundamental rights recognized by the Union.[13] This annotation is crucial when EU law simply sets out the approximation of national legislation:

> It is for the national authorities and courts responsible for applying the national legislation implementing [EU law] to ensure a fair balance between the rights and interests in question, including the fundamental rights protected by the Community legal order.[14]

In the Præsidium's Explanations to the Charter, which provide an authoritative reading of its provisions, Article 51(1) is understood as an ideal codification of the case-law on general principles and the cases *ERT*, *Wachauf* and *Annibaldi* (*see infra*) are expressly mentioned to explain that the 'implement[ation] of EU law' occurs when member states 'act in the scope of Union law.' This reference to the 'scope of EU law' seems to go beyond the strict implementation/derogation scenario:[15] the decisive element is not the state's intention to implement EU law, but the objective overlap between the effects of the state measure and the field of

Regulation is subject to restrictions resulting from the necessity to respect the fundamental rights' guarantees.' For more dated instances, *see* Case 71-81 *Zuckerfabrik Franken* [1982] *ECR* I-681, paras. 22-28; Joined Cases C-20/00 and C-64/00 *Booker Aquacultur and Hydro Seafood* [2003] *ECR* I-7411, paras. 88-93.

[11] Case C-368/95 *Familiapress* [1997] *ECR* I-3689, para. 24; Case 36/75 *Rutili* [1975] *ECR* 1219, para. 27; Case C-60/00 *Carpenter* [2002] *ECR* I-6279, para. 40.

[12] A comprehensive review of the case-law of the *Wachauf* and *ERT* situations is found in H. Kaila, 'The Scope of Application of the Charter of Fundamental Rights of the European Union in the Member States', in P. Cardonnel et al. (eds.), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart 2012) p. 715-772, p. 731-733.

[13] *See* P. Eeckhout, 'The EU Charter of Fundamental Rights and The Federal Question', 39 *Common Market Law Review* (2002) p. 945-994, p. 977.

[14] C-101/01 *Lindqvist* [2003] *ECR* I-12971, para. 91. *See also* Cases C-465/00, C-138/01 and 139/01 *Rundfunk* [2003] *ECR* I-4989. *See* L. Besselink, 'General Report for the FIDE 2012' (Topic I), in *Reports of the XXV FIDE Congress* (Tartu University Press 2012) p. 107, specifying that in the case of national measures falling within the 'harmonising' effect of EU law, even situations without transborder aspects are deemed to be within the scope of EU law.

[15] Not everyone has seen in the inclusion of *ERT* in the Explanations a clear indication that the Charter applies to derogatory measures. For an overview of the academic views that supported the non-application of the Charter to the derogation scenario (*ERT*), *see* K. Lenaerts, 'Exploring the

application of EU law. In the words of the UK Supreme Court, which endorsed this expansive construction, 'the rubric, 'implementing EU law' is to be interpreted broadly and, in effect, means whenever a member state is acting 'within the material scope of EU law.'[16] This objective link was firstly validated in the *Annibaldi* case,[17] where the Court plainly observed that

> where national legislation *falls within the scope of Community law*, the Court, in a reference for a preliminary ruling, must give the national court all the guidance as to interpretation necessary to enable it to assess the compatibility of that legislation with the fundamental rights.[18]

This nonchalant shift from implementation to material scope of application has challenged the continued viability of the agency model as the decisive yardstick. Can someone qualify as an agent simply in light of the unintended effects of his action? Or should rather his mandate and intentions be the relevant indicators of his role as 'agent'? This alternative is described by Advocate-General Bot as follows:

> While those who favour a restrictive interpretation of the concept of implementation of EU law submit that that concept refers only to a situation in which a Member State acts as a servant of the Union, those who favour a broader view consider that that concept refers more widely to a situation in which national legislation falls within the scope of EU law.[19]

In *Annibaldi*, the Court inserted, at paragraphs 22-24, a safeguard against the possibility that domestic provisions whose primary objective (the centre of gravity) has nothing to do with that of EU legislation be attracted within its scope only because it affects its operation *indirectly*:

> even if the Regional Law be capable of affecting indirectly the operation of a common organization of the agricultural markets, … the park having been created to protect and enhance the value of the environment and the cultural heritage of the area concerned, the Regional Law pursues objectives other than those covered by the common agricultural policy, [and] the Law itself is general in character … Accordingly … national legislation such as the Regional Law … applies to a situation which does not fall within the scope of Community law.

Limits of the EU Charter of Fundamental Rights', 8 *European Constitutional Law Review* (2012) p. 375-404, p. 383-385.

[16] *The Rugby Football Union* v. *Consolidated Information Services Ltd* [2012] *UKSC* 55 (21 Nov. 2012), para. 28. Quotations are from *Zagorski & Baze*, *R* (on the application of) v. *Secretary of State for Business, Innovation and Skills & Anor* [2010] *EWHC* 3110 (Admin) (29 Nov. 2010).

[17] Case C-309/96 *Annibaldi* [1997] *ECR* I-7493.

[18] Para. 13, emphasis added.

[19] Case C-108/10 *Ivana Scattolon* (AG Bot, Opinion of 5 April 2011), para. 117.

The case-law as it stands today, in essence, provides that the Charter cannot apply to those measures that do not fall within the scope of EU law.[20] This is not controversial. The debate concerns rather those domestic measures which fall in some way within the scope of EU law: are they *all* subject to the Charter (and to the general principles at large) or is it possible to build on the reasoning of *Annibaldi* to carve out a category of national measures that are spared from compliance with the Charter, in light of their casual and marginal connection with EU law?[21]

Recently, in *Iida*, the ECJ provided a tentative checklist, which includes a reference to the *Annibaldi* safeguard:

> To determine whether [the national measure] falls within the implementation of European Union law within the meaning of Article 51 of the Charter, it must be ascertained among other things whether the national legislation at issue is intended to implement a provision of European Union law, what the character of that legislation is, and whether it pursues objectives other than those covered by European Union law, even if it is capable of indirectly affecting that law, and also whether there are specific rules of European Union law on the matter or capable of affecting it.[22]

This *obiter* of the *Iida* judgment only needed a hard case to be put into practice. The *Fransson* case was perceived as an ideal testbed. The specifics of the case forced the Court to take a position on whether a tenuous link with EU law could suffice *vel non* to trigger the Charter.

The Opinion of the Advocate-General

The Advocate-General did not shy away from pinning down the elusive meaning of Article 51(1) of the Charter.[23] Quite to the contrary, he frankly acknowledged

[20] Case C-457/09 *Claude Chartry* v. *Etat belge* [2011] nyr, order of 1 March 2011, para. 25. For a similar conclusion, *see* Case C-483/09 *Gueye and Salmerón Sánchez* [2011], nyr, paras. 68-69; C-41/11 *Yoshikazu Iida* v. *Stadt Ulm* [2012], nyr, para. 80; Case C-339/10 *Asparuhov Estov and Others* [2010] *ECR* I-11465, para. 14; Joined Cases C-483/11 and C-484/11 *Boncea and Others* [2012], nyr, para. 34; Case C-27/11 *Anton Vinkov* v. *Nachalnik Administrativno-nakazatelna deynost* [2012] nyr, paras. 57-60; Case C-41/11 *Yoshikazu Iida* v. *Stadt Ulm* [2012], nyr, para. 79; Case C-161/11 *Cosimo Damiano Vino* v. *Poste Italiane SpA* [2011] nyr, pars. 38; Case C-466/11 *Gennaro Currà and Others* v. *Bundesrepublik Deutschland* [2012] nyr, para. 26; Case C-370/12 *Thomas Pringle* v. *Government of Ireland et al.* [2012] nyr.

[21] *See also* Case C-361/07 *Polier* [2008] *ECR* I-6, paras. 13-15: 'Bien que la protection des travailleurs en cas de résiliation du contrat de travail soit l'un des moyens pour atteindre les objectifs fixés par l'article 136 CE, … la situation du demandeur au principal… n'est pas régie par le droit communautaire.'

[22] C-41/11 *Yoshikazu Iida, supra* n. 20) para. 79.

[23] *See* Opinion of AG Cruz Villalón of 12 June 2012, in Case No. C-617/10 *Åklagaren* v. *Hans Åkerberg Fransson*, paras. 33-34 and 42-43, where the AG highlighted the necessity that the case-law give order to the protean wording typically used to implement Art. 51(1) of the Charter.

that the case-law had not produced a viable test and expressly offered to fill this gap, suggesting a principled reading of the concept of 'implement[ation] of EU law' capable of general application. The added value of the AG's effort, in his view, was to help in assessing whether the Charter applies to those national measures that member states adopt exercising some degree of regulatory autonomy and are nevertheless connected to the legislation of the EU.

He considered that the very possibility that domestic measures be reviewed against EU law is an exception to the general rule (each member state reviews the acts of its public authorities). This exception is justified in the 'agency' situation, where the EU delegates the performance of its activities to the member states, but maintains upon them the ultimate control or, in other words, 'the original responsibility of the Member States is passed to the Union.'[24] The EU can and must therefore monitor the conformity of national measures with its standards of fundamental rights protection.

Whether this exception occurs can be appraised, the AG suggested, by ascertaining the existence of the EU's 'specific interest'[25] to centralize the human-rights review of certain measures. The conceptualisation of this crucial element, however, falls short of compounding a real test: the AG conceded that his proposal would not be a panacea. Nevertheless, he argued that only on the basis of a principled approach would the case-law develop harmoniously and achieve, through an intensive casuistry exercise, some degree of predictability. As for the case at hand, the AG observed that, in principle, when states impose sanctions based on EU law, it is possible to envisage the transfer of responsibility that would render the general principles and the Charter applicable to those sanctions.[26]

The facts of the main proceedings, however, did not warrant that transfer or, which is the same, did not substantiate the EU's 'specific interest' to review the conformity of Swedish law with the EU guarantees on fundamental rights. Although the double system of penalties contributed to the effective collection of VAT, a matter regulated by Directive 2006/112, the relevant norms were not based on EU law and only accidentally fell within its reach. The AG distinguished the cases in which EU law is the substantial cause for the adoption of state action (*causa*) from those where it is a mere accident (*occasio*) for national measures to be passed. In the second case, even if national measures are 'used to secure objectives laid down in Union law',[27] the presence of EU law is simply an inessential circumstance, a member-specific normative accident that cannot trigger the re-

[24] Para. 37.

[25] Para. 41.

[26] Para. 53: the EU can control whether the 'power to impose penalties is exercised with respect for the basic principles which govern a community established under the rule of law, like the Union.'

[27] Para. 60.

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sponsibility transfer which legitimates human rights-scrutiny at the EU level.[28] The AG thus concluded that the EU had no specific interest in imposing its own conception of '*ne bis in idem*' and, accordingly, domestic authorities retained the exclusive power to review the legality of the domestic measures.[29]

The AG, however, engaged with the possible application of *ne bis in idem* in the specific case on an *arguendo* basis. He turned to the case-law of the ECtHR's law on the principle, which equates tax surcharges like the one imposed on Mr. Åkerberg Fransson to criminal sanctions.[30] However, he observed that the equivalence between the ECHR version of *ne bis in idem* and Article 50 of the Charter cannot be taken for granted, in spite of Article 52(3) of the Charter, because several EU member states have not ratified Protocol No. 7 to the Convention. As a consequence, there must be an autonomous meaning to the principle that is specific to EU law, is compatible with the constitutional traditions of the member states and is not prejudiced by the lack of consensus about its ECHR *alias*.[31]

The AG held ultimately that Article 50 of the Charter does not outlaw the launching of a criminal prosecution after the conclusion of administrative proceedings resulting in an administrative penalty, provided that the second judge, when determining the criminal sanction, can take into account the administrative penalty already imposed. In cases like the one of the main proceedings, it is for the domestic court to ascertain the existence of offsetting devices that avert the risk of two independent criminal sanctions aggrieving an individual for the same conduct, in breach of the *ne bis in idem* guarantee.[32]

The judgment of the Court

In the judgment, the ECJ ignored the AG's suggestion to use the concept of the EU's 'specific interest' as a litmus test. It answered the questions on the Charter at the jurisdictional stage, because its own preliminary competence depended on the application of EU law and it is precisely '[t]he applicability of European Union law [that] entails applicability of the fundamental rights guaranteed by the Charter.'[33] The ECJ reminded that the purpose of Article 51(1) of the Charter is

[28] For a similar finding, *see* the AG's remark in *Gueye*, *supra* n. 20, para. 78: 'Since the Framework Decision is only concerned with the criminal proceedings aspects of victim protection and not the penalties to be imposed on the offender, the facts of the present case do not come within the scope of the Framework Decision and therefore EU law.' The Court confirmed this view in the judgment.

[29] *See* Opinion in *Fransson* (n. 23), para. 63.

[30] *See Zolotukhin* v. *Russia*, judgment of 10 Feb. 2009, No. 14939/03, ECHR 2009.

[31] *See* Opinion in *Fransson*, *supra* n. 23, para. 83.

[32] Para. 101.

[33] *Fransson* judgment, *supra* n. 1, para. 21.

to honour the principle of conferral and prevent human rights from becoming a source of new competences of the EU.

What is remarkable, albeit unsurprising, is that the ECJ took the equivalence between the scope of application of the Charter and of general principles for granted, *pace* the theories which believed that the choice of the word 'implementation' reflected a deliberate curtailment of the *acquis* on fundamental rights, and should be interpreted restrictively.

This prefatory treatment of Article 51(1) of the Charter was not innovative, but its application presented some ambiguous elements. In order to locate the EU law element in the domestic measures at hand, the ECJ enunciated the list of all norms of EU law that flesh out members' obligation, under EU law, to collect VAT and support with its proceeds the budget of the Union, including the principle of sincere cooperation.[34] This κατάλογος νομῶν had the precise purpose of setting the ground for the obvious remark that any failure to perform the duty to collect VAT would entail a diminution of the EU's budget.[35] This vital obligation is reinforced by the policing powers that EU law vests upon member states to 'counter fraud and any other illegal activities affecting the financial interests of the Union.'[36] It follows, in the ECJ's view, that

> tax penalties and criminal proceedings for tax evasion, such as those to which the defendant in the main proceedings has been or is subject because the information concerning VAT that was provided was false, constitute implementation of Articles 2, 250(1) and 273 of Directive 2006/112 (previously Articles 2 and 22 of the Sixth Directive) and of Article 325 TFEU and, therefore, of European Union law, for the purposes of Article 51(1) of the Charter. (emphasis added)[37]

The ECJ then invoked another familiar doctrine from the case-law on general principles, namely the *ERT*-echoing idea (also employed in *Annibaldi*) that fundamental rights obligations are binding on member states not just when they implement Union law, but every time domestic norms 'do fall within the scope of Community law.'[38] Accordingly, it did not matter that Swedish norms were not intended to *transpose* Directive 2006/112 as long as their application '[was] designed to penalise the infringement of that directive' and, therefore, 'intend[ed]' to implement the obligation to protect the EU's financial interests imposing deterrent measures.[39] The ECJ concluded that the Swedish measures could not escape the

[34] Art. 4(3) TEU, Arts. 2, 250(1) and 273 of Directive 2006/112 and Art. 325 TFEU.

[35] Para. 26, referring to Art. 2(1)(b) of Council Decision 2007/436/EC, Euratom of 7 June 2007 on the system of the European Communities' own resources (*OJ* [2007] L 163, p. 17).

[36] *See* Art. 325 TFEU.

[37] Para. 27.

[38] *ERT* judgment, *supra* n. 8, para. 42.

[39] *Fransson* judgment, *supra* n. 1, para. 28.

standard of protection set by the Charter, without prejudice to Sweden's right to rely on standards set domestically (as long as the level of protection granted by the Charter would be preserved and the 'primacy, unity and effectiveness of European Union law are not thereby compromised').[40]

The ECJ then turned to the application of the specific standard of protection (*ne bis in idem*). It noted at the outset that for the principle to apply, even theoretically, it is necessary that both sanctions imposed are of a criminal nature. In the specific case, this meant that the pecuniary penalty that preceded the criminal prosecution of Mr. Åkerberg Fransson had to qualify as criminal, not administrative.[41] To determine whether the tax penalty was criminal three aspects needed examination: its legal qualification according to the domestic regime, the nature of the offence and the nature and gravity of the penalty. Since this determination is for the national court to make, the ECJ concluded that EU law does not preclude (through the Charter) the successive imposition of tax penalties and criminal sanctions, as long as the tax penalty is not criminal in nature.[42]

The referring judge had also asked the ECJ to indicate which hypothetical double system of tax penalties (tax surcharges and criminal liability) would comply with *ne bis in idem*. The ECJ declined to answer, as a ruling would be tantamount to an advisory opinion on a general or hypothetical question.[43]

Finally, the ECJ answered the preliminary question on the Swedish rule whereby the disapplication of domestic law for a breach of the ECHR is possible only when the subsistence of such a conflict is 'clearly supported' in the Convention or the case-law of the ECtHR. The referring judge questioned the conformity of this domestic rule with EU law. The ECJ did not dismiss altogether the question for being irrelevant to EU law because it was at least possible that the Convention right whose application was at stake had an equivalent right in the EU Charter. This was obviously the case of *ne bis in idem*, hence the ECJ was satisfied to ascertain this minimum connection with EU law and addressed the question.

The ECJ noted that EU law does not govern the relationship between the Convention and domestic law[44] and limited itself to remind the national judge that the essence of the *Simmenthal*-mandate[45] is precisely to remove all obstacles

[40] Para. 29, quoting Case C-399/11 *Melloni* [2013], nyr, para. 60, which was published on the very same day and offered a long-awaited interpretation of Art. 53 of the Charter. It is just the case to note that the set of conditions laid down in *Melloni* seemingly make the enforcement of domestic standards an insurmountable task, and that the 'unity' criterion (as opposed to the familiar 'uniformity') betrays the ECJ's federalist inspiration with respect to EU law.

[41] *Fransson* judgment, *supra* n. 1, paras. 33-34.

[42] Para. 37.

[43] Paras. 38-42.

[44] Para. 44. *See* Case C-571/10 *Kamberaj* [2012], nyr, para. 62.

[45] M. Claes, *The National Courts' Mandate in the European Constitution* (Hart 2006) p. 69, p. 108 ff.

that could prevent national courts from giving full effect to EU law, including the Charter, if necessary setting aside domestic norms contrary to EU law.[46] It followed from these premises that the Swedish condition of 'clear support' is contrary to EU law, insofar as it might hinder its effective implementation by domestic judges.[47]

Comment and analysis

The more is not the merrier

The impression is that the ECJ came to the right decision, but failed to provide a convincing reason for it. On the one hand, it is easy to follow the descriptive section of the judgment, where the Court highlights the thread that runs through the criminal prosecution of VAT evasion at the domestic level and the corresponding obligations imposed on member states to safeguard the integrity of EU finances. On the other hand, the group of norms instantiated to display this link is uneven and patched. Taken separately, some of these EU norms fail to come across as the result of domestic implementation in the sense of Article 51(1) of the Charter, and their inclusion could only stand scrutiny if declassified to the function of padding material, i.e., of reasoning *ad abundantiam*.

Specifically, it is possible to argue that among the provisions of Directive 2006/112 that were mentioned some are less 'implemented' than others. Article 2 simply lists the transactions subject to VAT and Article 250(1) merely lays down the obligation to submit the VAT return for all taxable subjects. The only one that obliquely refers to an agency situation is Article 273, under which 'Member States may' impose additional obligations to ensure the correct collection of VAT and prevent evasion. Of the three, only Article 273 seems to bear a link with the Swedish system of sanctions for tax evaders, whereas the other two are only useful to identify who is under the obligation to pay VAT, for which transactions, and through which assessment procedure. The ECJ, it is argued, should have kept Article 2 and Article 250(1) of the Directive out of the discussion on the relationship between the Swedish scheme of sanctions and EU law. To be sure, these provisions clarify the reach of the obligation to whose enforcement Article 273 refers, but they are hardly implemented by the Swedish measures. As to Article 325 of the TFEU, instead, it is arguably uncontroversial that the national provisions sanctioning tax evasion, in so far as they also apply to VAT evasion, act as a deterrent and therefore implement the EU-imposed obligation to 'counter fraud and any other illegal activities affecting the financial interests of the Union.'

[46] *Fransson* judgment, *supra* n. 1, para. 46.
[47] Para. 48. The AG had come to the same conclusion, *see* para. 48 of his opinion.

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If one tried to derive from each of these provisions, including Articles 2 and 250(1) of the Directive, the ECJ's ideal-type of the concept of implementation in the sense of the Article 51(1) of the Charter, it should be concluded that for every EU norm there is an area of state competences that are touched upon by the operation and effect of that norm, and all national measures falling within that area equally 'implement EU law' for the purpose of Article 51(1) of the Charter. This assumption would turn Article 51 of the Charter, a clause that expressly defines itself as a safeguard against competence-creep, into a sort of 'implicit powers' portal; this cannot be correct, also in light of the finding of *Poriel*, whereby the simple contribution to the achievement of an EU objective is not sufficient to attract a situation under the scope of EU law, if EU law does not govern it.[48]

Mind the gap between aims and effects

Moreover, the ECJ apparently stumbled into a semantic *lapsus*. While heralding the objectiveness of the test applied and confirming that domestic measures implement EU law also when they happen to fall, even in part, within its scope, the ECJ made a generous use of words like 'designed' and 'intended' to describe the link between the application of national measures and the implementation of EU obligations. This inadvertent contradiction is unfortunate because it sends a mixed signal on a matter that was waiting for a clear solution; it is particularly lamentable because it paves the way for a strategic slicing of the judgment. It is now relatively easy for national authorities to put the emphasis on these words that evoke a precise intention of the domestic legislator, with a view to escaping EU obligations. Arguably, this is what the German Constitutional court has already done to claim immunity from the Charter for the Anti-terror Database Law (*see infra*).

As a matter of fact, the Swedish provisions on tax offences refer to fiscal evasion at large and contain no reference to VAT and all reference to 'intention' and 'design' is clearly misplaced if one simply notes that they predate the Swedish accession to the EU.[49] It would be hard to agree with the ECJ's implicit remark that the Swedish legislator *designed* them *intending* to implement obligations that did not bind Sweden yet. A shift from the semantic area of aims and intentions to that of results and effects would be apposite.[50] In *Fransson*, the ECJ confirmed that what matters under Article 51(1) of the Charter is not the *subjective* nature of the domestic act

[48] *See Poriel*, *supra* n. 21, paras 13-15.

[49] *See Fransson* judgment, *supra* n. 1, paras. 7-11. The Swedish provisions quoted in the judgment are from 1971 and 1990, and Sweden joined the Union in 1995.

[50] On the classic debate on the relevance of the aims and effects of national measures in international trade law, *see* R. Hudec, 'GATT Constraints on National Regulation: Requiem for an "Aim and Effects" Test', 32 *The International Lawyer* (1995) p. 623-638.

but its *objective* contribution towards the implementation of EU law. This position should be reflected in the language of the Court's judgments, at least to account for cases like the Swedish one, in which national measures happen to regulate matters that are, more or less unintentionally, governed by some generic obligation of EU law and for this reason are attracted under its influence.

Accidental implementation requires reverse engineering

In the Court's view, the Charter could catch certain domestic provisions only in part. This acknowledgment is implicit in the specification that the subsequent determination of the Swedish judge on the EU legality of the domestic provisions would only operate 'in the field of VAT.'[51] This qualification reveals the ECJ's awareness that national measures which also regulate matters that fall outside the purview of EU law may be 'caught' under the scope of EU law unintentionally, hence the need to limit the effect of the judicial review to the EU-relevant bits of the norms at stake (in the *Fransson* case, only the VAT component of the national regime would be concerned, not the part dealing with tax crimes in general).

From this remark, and from the discussion above on the fictive reference to the 'implementing intention' of the national measures, one last comment is in order. Although the wording of Article 51(1) of the Charter clearly indicates that the vector of implementation runs from the national measures to EU law, in reality the fact that there are measures that *also* implement EU law and/or implement EU law *by chance* makes it reasonable to devise a test that, for the sake of convenience, goes backwards. In other words, to see whether the condition of Article 51(1) of the Charter is met, one might find it easier to examine whether there exist EU law provisions capable of imposing state obligations for the achievement of the same objectives that are pursued by the national measures, instead of examining closely the latter, in the attempt of glimpsing the imprint of EU implementation.

The reaction of the *Bundesverfassungsgericht*

The judgment

Even if the *Fransson* judgment confirmed that the Charter applies only to measures falling within the scope of EU law, as per the *ERT*, *Wachauf* and *Annibaldi* precedents, there are commentators who read this decision as an instance of competence-creep that the ECJ validated through an expansive use of Article 51(1) of

[51] Para. 37.

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the Charter. Also, the German Constitutional court (*Bundesverfassugsgericht*) reacted vehemently to *Fransson* and revived the dormant war with the ECJ that had recently broken out after *Mangold*[52] and had led to the qualified truces of the *Lissabon-Urteil* and *Honeywell* decisions.

In late April 2013, the Karlsruhe judges handed down the decision in the 'anti-terror database' case.[53] This judgment contains some confrontational statements that are purposely formulated to rebuke the ECJ's thrust or, *rectius*, what the German Court perceives to be risk of an abusive thrust encroaching on member states' sovereignty.

The German court was seized of the constitutional review of the Act on Setting up a Standardised Central Counter-Terrorism Database of Police Authorities and Intelligence Services of the Federal Government and the *Länder*.[54] This statute regulates the exchange of information between the police and intelligence agencies. The claimant challenged its conformity with the constitutional right to privacy of those people whose personal information are collected and exchanged, which allegedly were unduly restricted.[55]

The German judges recalled that the statute pursues aims that are defined domestically, 'are not determined by EU law' and concern the facilitation of data exchange to combat international terrorism. The domestic law, nevertheless, relates 'also', but only 'in part' to matters regulated by EU law.[56] As a consequence, since the act was not adopted to implement EU law in the sense of Article 51(1), the Charter cannot apply[57] and the ECJ cannot be the statutory judge for its human-rights review.[58] The *Bundesverfassungsgericht* candidly listed the numerous links between the substance of the Anti-terror Database and EU legislation. The EU has legislated in the field of data protection and in particular on the limitations on the use and retention of personal data, which includes an exception for data processed by public authorities 'in areas of criminal law.'[59] Moreover, it has passed

[52] R. Herzog and L. Gerken, 'Stoppt den Europäischen Gerichtshof', *Frankfurter Allgemeine Zeitung*, 8 Sept. 2008, p. 8.

[53] Judgment 1 BvR 1215/07 of 24 April 2013, an English summary and the link to the full judgment are available at <www.jusline.de/index.php?cpid=8d9dec3ece36c05c3417a89eec877615&feed=15351>.

[54] Anti-terror database law of 22 Dec. 2006 (*Federal Law Gazette* I p 3409), as amended by Art. 5 of the Law of 26 Feb. 2008 (*Federal Law Gaze*tte I, p. 215).

[55] This comment is not concerned with the outcome of this judgment, in which the German court concluded that, save for some secondary clauses, the statute was essentially compatible with the Constitution.

[56] BvR 1215/07 (n. 53), para. 89. At para. 91, the concept is repeated: the statute can 'only indirectly' (*nur mittelbar*) affect the functioning of EU law.

[57] Para. 90.

[58] Para. 91, referring to Art. 101 of the *Grundgesetz*.

[59] *See* Art. 3(2) of Directive 95/46/EC of the European Parliament and of the Council of 24 Oct. 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, *OJ* [1995] L 281/31.

a decision (2005/671/JHA) on the exchange of information and cooperation concerning terrorist offences, which requires states to share all the information collected 'in accordance with national law' with Europol and Eurojust.[60] Even if it is not mentioned in the decision, another relevant piece of EU legislation is the Data Retention Directive,[61] which sets certain obligations on telecommunications operators to store users' personal information and share them with law enforcement authorities for the purposes of investigating, detecting and prosecuting serious crime and terrorism.[62]

Using the reasoning of the ECJ in *Annibaldi* and *Fransson*, it is possible to notice that the Anti-terror Database and certain pieces of EU law share the same purposes, and that the former appears *prima facie* to regulate matters that fall within the scope of application of EU law.

In spite of the recognition that the effects of the domestic law might contribute (literally 'flow in', *einfließen*) to the performance of the obligations on judicial cooperation stemming from EU law,[63] the German tribunal declined to lodge a question to the ECJ pursuant to the *acte claire* doctrine and, by doing so, kept the last word on the non-application of the Charter for itself. It noted that whatever accidental link could exist between the measure and EU law it was too weak to warrant the Charter's application. After all, Germany is under no obligation under EU law to establish the Database, nor does EU law prohibit its establishment or regulate its substantive features.[64]

The judgment then turned to the exception set by the ECJ in *Annibaldi*, para. 22. In that passage, reported above, the ECJ excluded the application of fundamental principles to national legislation which, despite 'be[ing] capable of affecting indirectly the operation of an [EU norm]', 'pursues objectives other than those covered by [the latter].' The use of this exception is not surprising, since it is the only one that the case-law on general principles has to offer, when there is some link between the national statute and EU law. Indirectly, it also constituted an

[60] *See* Art. 2 of Council Decision 2005/671/JHA of 20 Sept. 2005 on the exchange of information and cooperation concerning terrorist offences, *OJ* [2005] L253/22.

[61] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, *OJ* [2006] L105/54.

[62] The German court had the opportunity of reviewing the domestic legislation implementing this Directive in the judgment BVerfGE 2 March 2010 – 1 BvR 256/08 – 1 BvR 263/08 – 1 BvR 586/08, *Data Retention* (2010), *see* A.B. Kaiser, 'German Federal Constitutional Court: German Data Retention Provisions Unconstitutional in Their Present Form; Decision of 2 March 2010, NJW 2010, p. 833', 6 *European Constitutional Law Review* (2010) p. 503-517.

[63] *See* the last sentence of para. 89, referring to the reporting obligations imposed by Decision 2005/671.

[64] Para. 90.

implicit admission that EU law, to some extent, applied – otherwise, *Annibaldi*'s exception would not be necessary.

The German court distinguished *Fransson* to justify the apparent difference of its conclusions on the Charter's application to the domestic statute. By offering a narrow qualification of *Fransson* the *Bundesverfassungsgericht* obliquely suggested that any other interpretation would be wrong precisely because it would do away with the *Annibaldi* safeguard. In other words, an extensive interpretation of the *Fransson* rationale, through a generous construction of Article 51(1) of the Charter, would lead to destabilizing effects: the German judges noted that *Fransson* would then be tantamount to an 'obvious' *ultra vires* act threatening the system of fundamental rights protection in member states, as foreshadowed in the recent *Lissabon-Urteil*[65] and *Honeywell* judgments.[66] In a similar scenario, the German court would be forced to disobey the decision of the ECJ.[67] Consequently, the *Bundesverfassungsgericht* offered a circumstantial reading of *Fransson* to avert this risk, through an original exercise of *reverse consistent interpretation* (i.e., how to interpret Article 51(1) of the Charter in conformity with the core values of the German *Grundgesetz*). Article. 51(1) of the Charter, the judgment argued, cannot operate when the domestic measure relates to the 'purely abstract scope of EU law' nor when it has a 'merely *de facto*' impact upon it.[68]

Annibaldi *revived*

In any event, the careful treatment of *Fransson* seems to be a red herring, flashed by the Karlsruhe tribunal to shield its decision behind a principled and wise-sounding facade. The *Bundesverfassungsgericht* declared that it cared about conflict prevention and promoted a hermeneutic solution 'in the spirit of cooperative coexistence.'[69] However, it might be argued that it simply attempted to rationalise its reluctance to submit the Anti-terror Database statute to the review of the ECJ.

[65] BVerfG 30 June 2009 – 2 BvE 2/08, *Treaty of Lisbon* (2009). *See* T. Lock, 'The Bundesverfassungsgericht on the Lisbon Treaty and Why the European Union Is Not a State: Some Critical Remarks', 5 *European Constitutional Law Review* (2009) p. 407.

[66] BVerfG 6 July 2010 – 2 BvR 2661/06, *Honeywell* (2010). *See* C. Möllers, 'German Federal Constitutional Court: Constitutional *Ultra Vires* Review of European Acts Only under Exceptional Circumstances; Decision of 6 July 2010, 2 BvR 2661/06, *Honeywell*', 7 *European Constitutional Law Review* (2011) p. 161-167.

[67] As in the case of the 2012 ruling by the Czech Constitutional Court, *see* Jan Komárek, 'Czech Constitutional Court Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU *Ultra Vires*; Judgment of 31 Jan. 2012, Pl. ÚS 5/12, *Slovak Pensions XVII*', 8 *European Constitutional Law Review* (2012) p. 323-337.

[68] Para. 91.

[69] Literally, 'im Sinne eines kooperativen Miteinanders' a formula reminiscent of that used in *Honeywell*, *supra* n. 66, para. 57: 'wechselseitige Rücksichtnahme', which corresponds roughly to 'mutual consideration.'

This uplifting panegyric, in effect, seems a bit misplaced if one considers that, arguably, the *Annibaldi* exception did not apply to begin with (and therefore its application was not hindered by an expansive reading of *Fransson*). Granted, the German measure was adopted to pursue domestically-determined purposes, but these purposes correspond – as a matter of fact – to those pursued by EU law. There is no *other* primary purpose of the anti-terror database which makes the EU ones ancillary: the measure operates 'within the scope of EU law', although only indirectly, and shares its aims. The centre of gravity of the German statute is the facilitation of investigation and combating terrorism, an objective shared by Decision 2006/571 and the Retention Directive. This remark is sufficient to doubt the applicability of *Annibaldi*'s exception.

One possible way to save the BvG's approach would be to acknowledge that the EU legislation in place has *also* other objectives, which might prevail over the one shared with the German statute (a reverse-*Annibaldi*, focusing on the centre of gravity of EU law, rather than of the national act). For instance, the Data Retention Directive aimed primarily at the harmonization of the data retention obligations imposed on private operators, along with its objective of facilitating the fight against organized crime (hence the ECJ's approval of its adoption on the basis of Article 114 TFEU).[70] This line of defense, however, would not go very far: in 2013 the new PNR Directive is set for adoption and features prominently the stated purpose of preventing, detecting, investigating and prosecuting terrorist offences and serious crime, through the establishment of a database storing personal information. Even if it were argued that the Anti-terror Database had planted the flag on this objective, it is only a matter of months before the twelve-star flag supplants the German one, and the statute is definitely absorbed under the scope of application of EU law. Another way to validate the German judgment would be to zoom in on the national law's objective so as to define it more narrowly. In this sense, the 'facilitation of the data-exchange between public domestic authorities for the purpose of assisting them in the fight against terrorism' can be a sub-objective that is to some extent different from that of 'regulating the duties of private telecommunication operators for the purpose of supporting the fight against terrorism' or that of 'requiring states to collect information relevant to the investigation of terrorism and share it with EU bodies.' This kind of hair-splitting, however, seems a bit far-fetched: not only is it not clear to which degree of detail this pigeon-holing of national and EU objectives would be still tolerable, but it would seem all the more inappropriate if its only purpose is to escape compliance with the human rights obligation of the Charter.

[70] *See* S. Poli, 'European Court of Justice. The Legal Basis of Internal Market Measures with a Security Dimension. Comment on Case C-301/06 of 10/02/2009, *Ireland* v. *Parliament/Council*, nyr', 6 *European Constitutional Law Review* (2010) p. 137-157.

Predictable skirmishing?

Ultimately, it seems that the *Bundesverfassungsgericht* decided to act as the champion of constitutional gatekeepers in the Union, in the immediate wake of a couple of decisions (*Melloni*[71] and *Fransson*) whose combined effect is perceived to further the inexorable marginalization of constitutional tribunals in an area where they have long lost the home-field advantage: the review of domestic norms for human rights' compliance. National constitutions are sidelined when EU law applies even remotely or when domestic measures *happen* to fall within its scope (*Fransson*). In addition, State-specific constitutional guarantees stand no chance of survival when they collide with the standards set by the Charter (*Melloni*). It is fair to say that, even if neither decision seems to constitute the kind of *ultra vires* act feared by the German Constitutional Court in the *Honeywell* judgment,[72] certainly the irreversible expansion of the application of the Charter is eroding the jurisdiction of constitutional tribunals with an apparent disregard of the principle of subsidiarity. The *Bundesverfassungsgericht* served Luxembourg with a notice of warning: the terms of the peaceful *entente* cannot act always in favour of the EU regime, lest national judiciaries be ready to denounce the contract (the constitutional synallagma)[73] and renegotiate the terms of the well-studied status of constitutional tolerance.[74]

The change from courtesy to stiffness is visible via a detail of *Honeywell*: in 2010 the German judges had reassured that they would not adopt an *ultra vires* judgment before affording the ECJ to clarify the real meaning of EU law through a preliminary ruling.[75] In the 2013 judgment, apparently, the German tribunal chose the carrot over the stick and did not bother affording the ECJ with a chance to clarify. To dispel the risk that the clarification would be different from the one hoped for, the *Bundesverfassungsgericht* invoked *CILFIT* and refused to refer a question. This move is far-fetched: not only did the German court ignore its own promise in *Honeywell*, but it used *CILFIT* in creative way. The constitutional court

[71] *See* A. Torres Pérez, 'Spanish Constitutional Court, Constitutional Dialogue on the European Arrest Warrant: The Spanish Constitutional Court Knocking on Luxembourg's Door; Spanish Constitutional Court, Order of 9 June 2011, ATC 86/2011', 8 *European Constitutional Law Review* (2012) p. 105-127. In the judgment, delivered on 26 Feb. 2013, the ECJ held that the Spanish constitutional guarantees against trials *in absentia* cannot be invoked to refuse the execution of a European arrest warrant.

[72] *See* judgment *Honeywell*, *supra* n. 66, para. 66.

[73] G. Martinico, *The Tangled Complexity of the EU Constitutional Process* (Routledge 2012) p. 44 ff.

[74] J.H.H. Weiler, 'Federalism and Constitutionalism: Europe's Sonderweg', *Harvard Jean Monnet Working Paper* No. 10/00, 2001. D. Chalmers, *European Union Law: Cases and Materials* (CUP 2010) p. 194.

[75] *See* judgment *Honeywell*, *supra* n. 66, para. 60.

allegedly relied on the *clarité* of Article 51(1) of the Charter (a veritable bluff) but in fact contradicted itself in the reasoning, when it took pains to explain how *Fransson* should be read. In so doing, the German Constitutional court implicitly conceded that Article 51(1) of the Charter is not *claire* and created a new '*CILFIT*+' doctrine, whereby a preliminary reference would not be necessary when the EU act is a) *claire* or b) *éclairé* by the ECJ, or when c) the *éclaircie* of the ECJ is further *éclairée* by the *Bundesverfassungsgericht*.

This process of continuous adjustment (a contrapunctual exercise)[76] is not necessarily an act of belligerence. The very President of the German Constitutional Court has plainly discouraged observers from indulging in dramatization:

> Those who talk all the same about 'imminent judicial conflicts', a 'war of the judges' or 'complete supervision by Karlsruhe' basically fail to see that the relationship between the Court of Justice and the Federal Constitutional Court is not about superiority or subordination but about appropriately sharing and assigning responsibilities in a complex multilevel system.[77]

The judgment on the anti-terror database is, at the very least, a prominent example of a pronouncement whose purpose is to 'assign responsibilities' and draw some boundaries. In other words, one of the 'occasional notes of discord always resulting in productive power for new developments.'[78]

Conclusions

Fransson leaves one essential question unanswered: does Article 51(1) of the Charter require that the 'implementation' link be supported by some element of purpose or not? A lesson might be drawn from WTO and EU law, which had to solve a similar question in the attempt at identifying and striking down discriminatory domestic measures in the field of trade. In both systems the subjective, and elusive, intention of the national legislator is ultimately irrelevant; the *effects* of the measures are what matter. One would believe that this should also be the case when it is necessary to ascertain whether national measures are implementing EU law or not.

Yet, when it comes to interpreting Article 51(1) of the Charter it is still unclear whether only measures *designed* to implement EU law must conform to the Charter or, instead, it applies also to measures that *happen* to share the objectives of EU

[76] M. Poiares Pessoa Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. Walker (ed.), *Sovereignty in Transition* (Hart 2003) p. 501-537.

[77] A. Voßkuhle, 'Multilevel Cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund', 6 *European Constitutional Law Review* (2010) p. 175-198, p. 185 (footnotes omitted).

[78] Ibid., p. 197.

law. This crucial doubt was registered by the AG, who wondered 'whether a State legislative activity based directly on Union law is equivalent to the situation in this case, where national law is used to secure objectives laid down in Union law.'[79] Currently most hints point to the second, more inclusive solution. This must be considered the applicable test, in the absence of a better definition of the *Annibaldi* exeption. This means that unless the ECJ clarifies when the mere overlap between the purposes of the domestic and EU laws is insufficient to trigger Article 51(1) of the Charter, the only scenario where the Charter does not apply is when EU law itself does not apply.

The identification of an intermediate area, in which the state is not deemed to act as an agent of the EU in spite of its potential contribution towards the realisation of EU purposes, has triggered significant academic speculation.[80] However, the question has other, far-reaching implications, which transcend the need for legal certainty and go to the core of the EU's mission and authority.[81] If it is not the concern of the ECJ to define with precision the limit of its human-rights duties (and powers),[82] member states will take the opportunity to make up their mind and send signals to Luxembourg to let the ECJ know what they consider to be the insurmountable border beyond which EU law cannot extend its reach: *hic sunt nationes*.

[79] *See* Opinion in *Fransson*, *supra* n. 23, para. 60.

[80] Alongside the works referred to in the rest of the present comment, several other authors have engaged with this issue, including several judges and *référendaires* writing extrajudicially. *See* for instance X. Groussot et al., 'The Scope of Application of EU Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication', *Eric Stein Working Paper* No. 1/2011 (2011); S. Peers, 'The Rebirth of the EU's Charter of Fundamental Rights', 13 *Cambridge Yearbook of European Legal Studies* (2012) p. 283-310. Of particular interest is C. Ladenburger, 'The Interaction between the Charter of Fundamental Rights, the European Convention of Human Rights and National Constitutions', *FIDE* 2012.

[81] M. Safjan, 'Areas of Application of the Charter of Fundamental Rights of the European Union: Fields of Conflict?', *EUI Working Paper* 22 (2012), p. 1.

[82] And there are cases in which the answer of the ECJ is surprisingly Pilate-like, *see* Cases C-434/10 *Aladzhov* and C-430/10 *Gaydarov*, judgment of 17 Nov. 2011, nyr, para. 48; Case *Gueye*, *supra* n. 20, para. 69; Case C-256/11 *Dereci and Others* [2011] nyr, para. 72.