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EU Fundamental Rights and Member State Action After Lisbon: Putting the ECJ's Case Law in its Context

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Abstract

Early in 2013, the Court of Justice of the European Union ("ECJ") handed down two judgments on the same day which might contain the blueprint for the fundamental rights architecture of the European Union ("EU") for years to come. Much has already been written about those judgments, and it appears appropriate at this time to evaluate their impact in light of their reception and subsequent developments of the case law. To that effect, this contribution will provide some elements of background before briefly presenting the two cases, commenting on their legal solidity, and recalling how they have been received. It will then turn to a critical analysis of the arguments that are most commonly made in favor and against a broad scope of EU fundamental rights. As will be shown, the ECJ has taken a number of these arguments into account in its case law. A final part will evaluate the tools that are available to police the boundaries between EU and national fundamental rights.

KEYWORDS: International Law, European court of Justice, Akerberg Fransson, Fundamental Rights, Human Rights, enforcement

ARTICLE

EU FUNDAMENTAL RIGHTS AND MEMBER STATE ACTION AFTER LISBON: PUTTING THE ECJ'S CASE LAW IN ITS CONTEXT

*Bernhard Schima**

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INTRODUCTION

Early in 2013, the Court of Justice of the European Union (“ECJ”) handed down two judgments on the same day which might contain the blueprint for the fundamental rights architecture of the European Union (“EU”) for years to come. Much has already been written about those judgments, and it appears appropriate at this time to evaluate their impact in light of their reception and subsequent developments of the case law. To that effect, this contribution will provide some elements of background before briefly presenting the two cases, commenting on their legal solidity, and recalling how they have been received. It will then turn to a critical analysis of the arguments that are most commonly made in favor and against a broad scope of EU fundamental rights. As will be shown, the ECJ has taken a number of these arguments into account in its case law. A final part will evaluate the tools that are available to police the boundaries between EU and national fundamental rights.

I. BACKGROUND

A. The Origins of Fundamental Rights in EU law

From the late 1960s¹ until the entry into force of the Lisbon Treaty in December 2009, the main legally-binding source of

1. *Stauder v. City of Ulm*, Case 29/69, [1969] E.C.R. 419, is most commonly cited as the origin. See Bruno de Witte, *The Past and Future Role of the European Court of Justice in the*

fundamental rights in the EU legal order were the general principles of EU law, which were derived from international conventions to which the EU Member States were parties, in particular the European Convention of Human Rights (ECHR), and from the constitutional traditions common to the Member States.² It was the task of the ECJ to identify those general principles in its case law.

The Lisbon Treaty added a binding Charter of Fundamental Rights of the European Union (“Charter”), giving it the same legal value as the Treaties.³ The Lisbon Treaty also foresees an obligation for the EU to become a party to the ECHR, and the ECJ recently delivered its opinion on the compatibility of a draft accession agreement⁴ with the Treaties, holding that the draft agreement was, on a whole series of grounds, not compatible with the Treaties.⁵

B. The scope of Union fundamental rights before the Lisbon Treaty

Both the general principles and the Charter are meant primarily to restrict EU institutions. That application today is largely uncontroversial, in particular because that dimension of fundamental rights means that there will be less interference with the powers of the Member States. Things look different, however, when it comes to applying those fundamental rights in order to constrain Member States. Member State action is already limited by the fundamental rights laid down in each State’s national legal order.⁶ The fact that

Protection of Human Rights, in THE EU AND HUMAN RIGHTS 859, 867 (Philip Alston ed., 1999).

2. See *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11/70, [1970] E.C.R. 1126; *J. Nold, Kohlen- und Baustoffgrosshandlung v. Commission of the European Communities*, Case 4/73, [1974] E.C.R. 492; *Hauer v. Land Rheinland-Pfalz*, Case 44/79, [1979] E.C.R. 3729.

3. A first version of the Charter had been proclaimed at Nice in December 2000. See *Charter of Fundamental Rights of the European Union*, 2000 O.J. C 364/1. But it only acquired the status of the highest-ranking law of the Union with the Lisbon Treaty, by virtue of the reference in Article 6(1). See Consolidated Version of the Treaty on European Union art. 6(1), 2012 O.J. C 326/13 [hereinafter TEU].

4. See COUNCIL OF EUROPE, FIFTH NEGOTIATION MEETING BETWEEN THE CDDH AD HOC NEGOTIATION GROUP AND THE EUROPEAN COMMISSION ON THE ACCESSION OF THE EUROPEAN UNION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2013), available at http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1%282013%29008rev2_EN.pdf (last visited Mar. 1, 2015).

5. *Opinion 2/13*, [2014] E.C.R. I ____ (delivered Dec. 18, 2014) (not yet reported).

6. See generally FEDERICO FABBRINI, *FUNDAMENTAL RIGHTS IN EUROPE: CHALLENGES AND TRANSFORMATIONS IN COMPARATIVE PERSPECTIVE* 6-25 (2014); AIDA TORRES PÉREZ,

States need to accept that fundamental rights imposed through EU membership create additional limits to what they are allowed to do is an important issue of federal distribution of powers.⁷

One justification for applying EU-based fundamental rights to the Member States is that in certain situations, Member States are in fact not acting on their own behalf, but rather as agents for the EU. Indeed, EU legislation is as a rule implemented by the Member States.⁸ Where Member State action gives effect to EU rules, it must respect EU fundamental rights. The ECJ handed down a number of decisions in that sense starting in the late 1980s,⁹ and the Member States by and large seem to have accepted that line of cases.

In addition, the ECJ has taken the position, starting in *ERT*,¹⁰ that Union fundamental rights also apply to the Member States when they act within the scope of Union law, arguably a much broader and at the outset less clear concept.¹¹ It has mostly been used to refer to situations in which Member States wanted to derogate from one of the freedoms of the internal market.

Article 51(1) of the Charter of Fundamental Rights specifically addresses this issue. It foresees, in relevant part, that the provisions of the Charter are addressed to the Member States only when they are implementing EU law. It is arguable that, by this drafting, the authors wanted to limit the application of the Charter to situations of implementation in a narrow sense.¹² Some of the drafters, however,

CONFLICTS OF RIGHTS IN THE EUROPEAN UNION: A THEORY OF SUPRANATIONAL ADJUDICATION 13-26 (2009).

7. See generally Piet Eeckhout, *The EU Charter of Fundamental Rights and the Federal Question*, 39 COMMON MKT. L. REV. 945 (2002); Allard Knook, *The Court, the Charter, and the Vertical Division of Powers in the European Union*, 42 COMMON MKT. L. REV. 367 (2005); Aida Torres Pérez, *The Dual System of Rights Protection in the European Union in Light of US Federalism*, in FEDERALISM IN THE EUROPEAN UNION 110, 113-15 (Elke Cloots et al. eds., 2012).

8. Eeckhout, *supra* note 7, at 952; see Consolidated Version of the Treaty on the Functioning of the European Union art. 291, 2012 O.J. C 336/47 [hereinafter TFEU].

9. This line of cases started with *Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, Case 5/88, [1989] E.C.R. 2609. See, e.g., Francis Jacobs, *Wachauf and the Protection of Fundamental Rights in EC Law*, in THE PAST AND FUTURE OF EU LAW: THE CLASSICS OF EU LAW REVISITED ON THE 50TH ANNIVERSARY OF THE ROME TREATY 133 (Miguel Póiares Maduro & Loïc Azoulai eds., 2010).

10. *ERT v. DEP*, Case C-260/89, [1991] E.C.R. I-2925; see also Zdeněk Kühn, *Wachauf and ERT: On the Road from the Centralised to the Decentralised System of Judicial Review*, in THE PAST AND FUTURE OF EU LAW, *supra* note 9, at 151.

11. See, e.g., Jacobs, *supra* note 9, at 137-38 (voicing criticism).

12. On the drafting history, see Eeckhout, *supra* note 7, at 954-58; Clemens Ladenburger, *European Union Institutional Report*, in REPORTS OF THE XXV FIDE

insisted on the explanation to that Article¹³ making it clear that implementing EU law also covered the broader concept of the Member States acting within the scope of EU law.

The Lisbon Treaty has thus accentuated an existing problem. It has, on the one hand, given fundamental rights a more prominent place, making it more likely that individuals will invoke them, including against the Member States.¹⁴ On the other hand, the limitation in Article 51(1) of the Charter is now also very visible.¹⁵ The Lisbon Treaty has, therefore, raised conflicting expectations.¹⁶

C. *The Enforcement of EU Law in the Member States*

An expansive application of EU fundamental rights to the Member States may lead to a shift of power within the Member States' judicial systems. EU law in general is enforced by the Member States, in particular through the national courts. The founding treaties, as interpreted by the ECJ, empower any national court to exercise judicial review over a Member State's law by setting aside that law as a violation of provisions of EU law, including EU fundamental rights.¹⁷ For the purpose of EU law, there is thus a generalized system of judicial review.¹⁸

CONGRESS TALLINN 2012, 141, 160-61 (Julia Laffranque ed., 2012); Daniel Sarmiento, *Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe*, 50 COMMON MKT. L. REV. 1267, 1275-76 (2013); Daniel Thym, *Separation versus Fusion - or: How to Accommodate National Autonomy and the Charter? Diverging Visions of the German Constitutional Court and the European Court of Justice*, 9 EUR. CONST. L. REV. 391, 393-94 (2013); Angela Ward, *Article 51*, in THE EU CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY 1424, 1425 (Steve Peers et al. eds., 2014).

13. On their status and legal value, see Jean-Paul Jacqu , *The Explanations Relating to the Charter of Fundamental Rights of the European Union*, in THE EU CHARTER OF FUNDAMENTAL RIGHTS, *supra* note 12, at 1715, 1720.

14. Sarmiento, *supra* note 12, at 1270. See generally Alec Stone Sweet, *The European Court of Justice and the Judicialization of EU Governance*, 5 LIVING REVIEWS IN EUROPEAN GOVERNANCE No. 2 (2010).

15. See Sara Iglesias S nchez, *The Court and the Charter: the Impact of the Entry into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights*, 49 COMMON MKT. L. REV. 1565, 1583-85 (2012).

16. See, e.g., Eeckhout, *supra* note 7, at 957-58 (discussing this paradox).

17. See *Amministrazione delle Finanze dello Stato v. Simmenthal*, Case 106/77, [1978] E.C.R. 629; see also Michal Bobek, *The Impact of the European Mandate of Ordinary Courts on the Position of Constitutional Courts*, in CONSTITUTIONAL CONVERSATIONS IN EUROPE: ACTORS, TOPICS AND PROCEDURES 287 (Monica Claes et al. eds., 2012); Jan Kom rek, *The Place of Constitutional Courts in the EU*, 9 EUR. CONST. L. REV. 420, 428 (2013); Aida Torres P rez, *The Challenges for Constitutional Courts as Guardians of Fundamental Rights*

Judicial review over Member State acts that allegedly violate a national fundamental right, by contrast, is often¹⁹ reserved to specialized national constitutional courts.²⁰ When an ordinary court of law in a Member State comes across an issue of national fundamental rights, it normally has to defer to the constitutional court.

Given the primacy of EU law over national law and the possibility for all national courts to take up issues of EU law, it may be quite appealing for the ordinary courts of law in the Member States to discover issues involving the application of EU fundamental rights. By doing so, they become constitutional courts.²¹ At the same time, however, if it is possible to invoke EU fundamental rights instead of national fundamental rights on a big scale, national constitutional courts might perceive their role to be threatened.²²

II. *WHAT HAS THE ECJ DONE SINCE LISBON?*

After the Lisbon Treaty entered into force, the ECJ started by interpreting the scope of EU fundamental rights rather cautiously.²³ In particular, in a series of decisions on EU citizenship and third-country nationals,²⁴ the ECJ clarified that third-country nationals that were family members of EU citizens were not automatically under the protection of EU law. These third-country nationals could not, therefore, necessarily invoke a right to family life under EU law in order to obtain a right to live and work in a Member State.

in the European Union, in *THE ROLE OF CONSTITUTIONAL COURTS IN MULTILEVEL GOVERNANCE* 49, 50-53 (Patricia Popelier et al. eds., 2013).

18. See Alec Stone Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, 1 *GLOBAL CONSTITUTIONALISM* 53, 64 (2012).

19. But not always. For an overview, see Komárek, *supra* note 17, at 423 n.14.

20. See generally Alec Stone Sweet, *Why Europe Rejected American Judicial Review – and Why it May Not Matter*, 101 *MICH. L. REV.* 2744, 2765-69 (2002-2003).

21. See, e.g., Irmgard Griss (Former President of the Austrian Supreme Court), *Die neue Rolle der Höchstgerichte*, in *DIE ÖSTERREICHISCHEN HÖCHSTGERICHTE UND DIE EUROPÄISCHEN GERICHTSHÖFE ZWISCHEN RECHT, WIRTSCHAFT UND POLITIK* 37, 38 (Josef Marko & Wolfgang Schleifer eds., 2012); cf. Karen Alter, *The European Court's Political Power*, 19 *WEST EUR. POLITICS* 458, 466-71 (1996); Marta Cartabia, *Europe and Rights: Taking Dialogue Seriously*, 5 *EUR. CONST. L. REV.* 5, 29 (2009).

22. Bobek, *supra* note 17, at 291-92; Komárek, *supra* note 17, at 427-32; Torres Pérez, *supra* note 17, at 56-57. *But see* Sarmiento, *supra* note 12, at 1298 (claiming that their position within the state might be strengthened).

23. See, for a thorough overview, Iglesias Sánchez, *supra* note 15, at 1583-96.

24. *McCarthy v. Secretary of State for the Home Department*, Case C-434/09, [2011] E.C.R. I-3375; *Dereci and Others v. Bundesministerium für Inneres*, Case C-256/11, [2011] E.C.R. I-11315; *Iida v. Stadt Ulm*, Case C-40/11, ECLI:EU:C:2012:691.

By contrast, in *Melloni v. Ministerio Fiscal*²⁵ and *Åklagaren v. Åkerberg Fransson*,²⁶ the ECJ seemed determined to set out more general principles on the scope of EU fundamental rights. In *Melloni*, the defendant, Mr. Melloni, was pursued for bankruptcy fraud in Italy. He remained in Spain, jumped bail, and was finally sentenced *in absentia* in Italy to ten years in prison. In addition, Italy issued a European arrest warrant against him. Four years later, he was found in Spain, and the following issue arose:

The rules on the European arrest warrant, which are laid down in EU legislation,²⁷ contain a possibility for the executing judicial authority to refuse the execution of the arrest warrant if the defendant did not appear in person at the trial, except in certain situations. One of the justifications for still executing the arrest warrant is that the person has been defended by a legal counselor who he has instructed to appear on his behalf. Mr. Melloni had instructed a lawyer to defend him. The Spanish Constitutional Court, which referred the case to the ECJ, pointed out that under the Spanish Constitution, it was essential for a defendant to be able to challenge a conviction *in absentia* in order to safeguard his rights of defense.

The ECJ held that the EU fundamental right to a fair trial included the possibility for the accused to waive the right to be present where he had given a mandate to a legal counselor to defend him. The EU rules on the European arrest warrant were therefore found to be in line with the EU fundamental rights at issue.²⁸ The ECJ went on to say that the application of a more generous right to a fair trial, namely that the person convicted *in absentia* needed to have a legal remedy in the Member State issuing the arrest warrant, as was apparently required under Spanish constitutional law, would undermine the primacy and effectiveness of EU law and could therefore not be allowed.²⁹

With regard to the relationship between the Charter and a national constitutional rule granting greater protection to the

25. *Melloni v. Ministerio Fiscal*, Case C-399/11, [2013] E.C.R. I _____ (delivered Feb. 26, 2013) (not yet reported).

26. *Åklagaren v. Åkerberg Fransson*, Case C-617/10, [2013] E.C.R. I _____ (delivered Feb. 26, 2013) (not yet reported).

27. Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States, 2002 O.J. L 190/1, as amended by Council Framework Decision 2009/299/JHA, 2009 O.J. L 81/24.

28. *Melloni*, [2013] E.C.R. I _____ (delivered Feb. 26, 2013), ¶¶ 49-50.

29. *Id.* ¶¶ 58-59.

defendant, the ECJ held that, even though Article 53 of the Charter provides in essence that the Charter shall not lower the standards protected by other sources of fundamental rights, including national constitutions, a Member State was not allowed to apply a national fundamental right in a situation that was fully harmonized by Union law and in which the Charter rights were respected.³⁰ In a situation of that kind, the fundamental rights foreseen in EU law may therefore come to function as a ceiling.³¹

The second case, *Åkerberg Fransson*, concerned tax fraud allegedly committed by a Swedish fisherman which implicated value added tax (“VAT”). The Swedish authorities applied administrative sanctions to the defendant, Mr. Åkerberg Fransson, and also instituted criminal proceedings. A Swedish district court asked the ECJ whether a criminal sanction would violate the fisherman’s right not to be tried or punished twice.

The ECJ could only look into that question if the right not to be tried or punished twice, which is laid down in the Charter, applied to that case at all. The question was thus whether a Member State who was punishing a taxpayer for tax fraud was implementing EU law. The substantive rules on VAT are harmonized at the EU level.³² As far as sanctions are concerned, by contrast, Union law only imposes obligations on the Member States to do what is necessary for the correct collection of the tax and for the prevention of evasion.

As distinct from a number of Member States that had made submissions in that case, the European Commission and the Advocate General,³³ the ECJ took the view that that was enough to say that the rules on administrative and criminal sanctions of tax fraud were an implementation of Union law. In interpreting Article 51(1) of the Charter, the ECJ held that the applicability of EU law entailed the applicability of the fundamental rights guaranteed by the Charter.³⁴

Turning to the facts of the case before it, the ECJ found that every Member State was under an obligation to take all legislative

30. *Id.* ¶¶ 63-64.

31. Fabbrini, *supra* note 6, at 41; Emily Hancox, *The Meaning of “Implementing” EU Law Under Article 51(1) of the Charter: Åkerberg Fransson*, 50 COMMON MKT. L. REV. 1411, 1428 (2013).

32. Council Directive 2006/112/EC on the common system of value added tax, 2006 O.J. L 347/1.

33. Opinion of Advocate General Cruz Villalón, *Åklagaren v. Åkerberg Fransson*, Case C-617/10, [2013] E.C.R. I _____ (delivered June 6, 2012) (not yet reported).

34. *Åkerberg Fransson*, [2013] E.C.R. I _____ (delivered Feb. 26, 2013), ¶ 21.

and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion. It followed that tax penalties and criminal proceedings for tax evasion concerning VAT constituted implementation of EU law for the purposes of Article 51(1) of the Charter.³⁵

However, the ECJ added that, in a situation where Member State action is not entirely determined by EU law, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter and the primacy, unity, and effectiveness of EU law are not thereby compromised.³⁶ In a situation of that kind, therefore, EU fundamental rights play the role of a floor of protection.³⁷

III. ANALYSIS OF THE NEW CASE LAW

A. Reception

The reception of the two judgments quoted was rather mixed. In fact, even though *Melloni* might be considered as the more serious intervention in national law, hardly any fundamental criticism appears to have been voiced against it.³⁸ Primacy of EU law, even where it displaces national fundamental rights, seems to be generally accepted. First, in *Melloni*, the ECJ could rely on case law dating more than forty years back.³⁹ Second, the rules on the European arrest warrant were specifically designed to harmonize the right to a fair trial at the EU level, in compliance with EU fundamental rights. The application of higher national standards would undermine the goal of harmonization. Third, Article 53 of the Charter does not change that result.⁴⁰ That provision is limited to providing that nothing in the Charter shall be interpreted as restricting, *inter alia*, human rights as

35. *Id.* ¶¶ 25-27.

36. *Id.* ¶ 29.

37. Fabbrini, *supra* note 6, at 40; Hancox, *supra* note 31, at 1428.

38. Even though it must be noted that the Spanish Constitutional Court certainly did not embrace the ECJ's decision wholeheartedly. See S.T.C., Feb. 13, 2014 (B.J.C. No. 26/2014) (Spain); see also Aida Torres Pérez, *Melloni in Three Acts: From Dialogue to Monologue*, 10 EUR. CONST. L. REV. 308 (2014).

39. *Internationale Handelsgesellschaft*, [1970] E.C.R. 1125, ¶ 3.

40. For a different view, see Nikos Lavranos, *The ECJ's Judgments in Melloni and Åkerberg Fransson: Une ménage à trois difficulté*, EUR. L. REP. 133, 140 (2013).

recognized by the Member States' constitutions.⁴¹ That does not mean, however, that rules of EU law other than the Charter may not preclude the application of more generous human rights.⁴² Those other rules include fully harmonized secondary legislation as well as the principles of primacy, unity, and effectiveness of EU law.

Åkerberg Fransson, by contrast, has been quite severely criticized, not only in academic writings,⁴³ but also in judicial opinions. Barely two months after that judgment, the German Federal Constitutional Court (“GFCC”) took the opportunity to send out a rather stark warning to the ECJ. In a judgment⁴⁴ which it had accompanied by a press release in German and English, the GFCC essentially said that the German Anti-Terrorism Database Act did not constitute an implementation of EU law within the meaning of Article 51(1) of the Charter. According to the press release, which was worded even more strongly than the judgment itself:

Thus, the European fundamental rights are from the outset not applicable. The European Court of Justice’s decision in the case *Åkerberg Fransson* does not change this conclusion. As part of a cooperative relationship, this decision must not be read in a way that would view it as an apparent *ultra vires* act or as if it endangered the protection and enforcement of the fundamental rights in the member states in a way that questioned the identity of the Basic Law’s constitutional order. The Senate acts on the assumption that the statements in the ECJ’s decision are based on the distinctive features of the law on value added tax, and express no general view.

This is strong language, cautioning the ECJ against a broadening of the approach taken in *Åkerberg Fransson*. It is not altogether

41. By laying down human rights with a certain content in the Charter, the authors did not want to diminish the content of other human rights granted by the Member States. *See generally* Jonas Bering Liisberg, *Does the EU Charter of Fundamental Rights threaten the supremacy of Community law?*, 38 COMMON MKT. L. REV. 1171 (2001).

42. For a similar account, see Bruno de Witte, *Art. 53*, in THE EU CHARTER OF FUNDAMENTAL RIGHTS, *supra* note 12, ¶ 53.17-53.26; *see also* Koen Lenaerts, *Exploring the Limits of the EU Charter of Fundamental Rights*, 8 EUR. CONST. L. REV. 375, 398-99 (2012).

43. *See, e.g.*, Filippo Fontanelli, *Hic Sunt Nationes: The Elusive Limits of the EU Charter and the German Constitutional Watchdog*, 9 EUR.CONST. L. REV. 315 (2013); Dieter Grimm, *Der Datenschutz vor einer Neuorientierung*, 68 JURISTENZEITUNG 585, 590-91 (2013); Thorsten Kingreen, *Die Grundrechte des Grundgesetzes im europäischen Grundrechtsföderalismus*, 68 JURISTENZEITUNG 801 (2013); Hans-Jürgen Rabe, *Grundrechtsbindung der Mitgliedstaaten*, NEUE JURISTISCHE WOCHENSCHRIFT 1407 (2013).

44. Case 1 BvR 1215/07, delivered Apr. 24, 2013, BVerfGE 133, 277 – Anti-Terrorism Database Act, ¶¶ 88-91.

surprising that this warning comes from the GFCC. That court, in the early days of the Federal Republic, firmly established itself as the guarantor of fundamental rights in a series of decisions that could at the time be perceived to be as daring as some of the foundational judgments of the ECJ.⁴⁵ More than any other court, the GFCC may therefore see its position threatened by competing claims of jurisdiction over fundamental rights.

In the United Kingdom, the House of Commons European Scrutiny Committee, disagreeing not only with much of the evidence presented to it, but also with the UK Government, questioned the legitimacy of the EJC's approach in *Åkerberg Fransson*.⁴⁶ It is therefore worth analyzing, firstly, whether the criticism of the ECJ's interpretation of the scope of EU fundamental rights is justified and, secondly, what the ECJ did, if anything, to take the wind out of the sails of its critics.

B. *Legal Accuracy of the ECJ's Ruling in Åkerberg Fransson*

In its judgment, the ECJ did three things that are of interest for the present purpose: it set out the test for determining whether EU fundamental rights applied; it applied that test to the case at hand; and it applied the fundamental right at issue while leaving to the national court the application of a potentially more generous national fundamental right.

With regard to the scope of EU fundamental rights, the ECJ took the view that Article 51(1) of the Charter confirmed its case law relating to the extent to which actions of the Member States must comply with the requirements flowing from EU fundamental rights.⁴⁷

While the reasoning on this point was certainly not abundant, the result was unsurprising. Article 6(3) TEU maintains the earlier rule that fundamental rights derived from the common constitutional principles of the Member States and from international agreements to which they were parties apply as general principles of EU law. In

45. On the scope of fundamental rights review in Germany, see generally Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837 (1991); Wolfgang Zeidler, *Federal Constitutional Court of the Federal Republic of Germany: Decisions on the Constitutionality of Legal Norms*, 62 NOTRE DAME L. REV. 504 (1986-1987).

46. House of Commons European Scrutiny Committee, *The application of the EU Charter of Fundamental Rights in the UK: a state of confusion*, 43rd Report of Session 2013–14, ¶ 167.

47. *Åkerberg Fransson*, [2013] E.C.R. I _____ (delivered Feb. 26, 2013), ¶ 18.

light of the intention of the authors of the Treaties to continue applying fundamental rights as general principles without any indication that their scope should be more limited than under the ECJ's well-known case law, it would seem quite odd to give the Charter a more limited scope.⁴⁸

The ECJ then invoked essentially two arguments to demonstrate that the case at hand came within the scope of EU law. First, a Member State is under an obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion. Second, Article 325 TFEU obliges the Member States to counter illegal activities affecting the financial interests of the EU through effective deterrent measures and, in particular, obliges Member States to take the same measures to counter fraud affecting the financial interests of the EU as they take to counter fraud affecting their own interests. Given that the EU's own resources include revenue from application of a uniform rate to the harmonized VAT assessment bases determined according to EU rules, there is thus a direct link between the collection of VAT revenue in compliance with the EU law applicable and the availability to the EU budget of the corresponding VAT resources.⁴⁹

One might add that the Lisbon Treaty included in Article 291(1) TFEU a provision according to which Member States shall adopt all measures of national law necessary to implement legally binding Union acts. That provision was written into the Treaty to emphasize the broad responsibility of Member States to implement Union law, even in the absence of specific rules to that effect in Union legislation. Where Member States exercise that responsibility, they may retain a significant amount of discretion, but what they do is still to some extent determined by Union law. The corollary of not giving up more discretion is a duty to act within the parameters fixed by the general principles of Union law and by Union fundamental rights.

The ECJ's case law prior to the entry into force of the Lisbon-Treaty also contains a number of useful indications. In *Steffensen*, a case concerning the interpretation of a EU rule on the official control of foodstuffs which gives operators subject to an inspection a right to

48. See, e.g., Paul Craig, written evidence provided to the HOUSE OF COMMONS EUROPEAN SCRUTINY COMMITTEE, *supra* note 46; Ladenburger, *supra* note 12, at 164-65; Ward, *supra* note 12, ¶ 51.40.

49. *Åkerberg Fransson*, [2013] E.C.R. I _____ (delivered Feb. 26, 2013), ¶¶ 25-26.

a second opinion,⁵⁰ the ECJ not only reiterated its earlier decisions according to which the reliance on a right stemming from EU law before the national courts is bolstered by the principles of equivalence and effectiveness, but also addressed the question of the consequences it would have on the admissibility of evidence if the right to a second opinion was infringed. That question raised broader issues of the fundamental right to a fair trial, which the ECJ decided to address in that case.

In *Sopropé*, which the ECJ quoted in *Åkerberg Fransson* without relying on the most relevant element of that judgment, the ECJ had taken the view that the authorities of the Member States were required to respect the rights of the defense when they took decisions which came within the scope of Community law, even though the Community legislation applicable did not expressly provide for such a procedural requirement.⁵¹

Generally speaking, where the general principles of EU law apply, which is the case where a claim based on EU law is enforced in the national courts, it is hard to see why the fundamental rights of EU law should not also apply. In the field of VAT, the Court had already applied the general principles of EU law. In *SFI*, it had emphasized that VAT was incontestably a matter governed by Community law. The fact that, in the absence of Community rules, the Member States were entitled to apply their own procedural rules, did not alter that finding.⁵² In two judgments of 2005⁵³ and 2006,⁵⁴ the ECJ had held that, when collecting that tax, the Member States had to comply with the principle of legitimate expectations. More specifically the right not to be tried or punished twice, the ECJ had already, albeit implicitly, found it to apply in agricultural law, where the question

50. Steffensen, Case C-276/01, [2003] E.C.R. I-3735, ¶¶ 63-71.

51. *Sopropé v. Fazenda Pública*, Case C-349/07, [2008] E.C.R. I-10369, ¶ 38; see *Hancox*, *supra* note 31, at 1420.

52. *Société Financière d'Investissements SPRL v. Belgian State*, Case C-85/97, [1998] E.C.R. I-7447, ¶ 31; see Rüdiger Stotz, *Die Beachtung der Grundrechte bei der Durchführung des Unionsrechts in den Mitgliedstaaten: von Stauder über Wachauf zu Åkerberg Fransson*, in *FESTSCHRIFT FÜR MANFRED A. DAUSES ZUM 70. GEBURTSTAG* 409, 425 (Daniela Heid et al. eds., 2014).

53. *Stichting 'Goed Wonen' v. Staatssecretaris van Financiën*, Case C-376/02, [2005] E.C.R. I-3445.

54. *Elmeka v. Ypourgos Oikonomikon*, Joined Cases C-181/04 & C-183/04, [2006] E.C.R. I-8167.

arose whether national sanctions could be added to the sanctions foreseen under EU law.⁵⁵

It seems to follow rather clearly that, whenever Member States give effect to rules of EU law through national procedural law or a national regime of sanctions, they implement EU law for the purpose of Article 51(1) of the Charter.⁵⁶ To understand the concerns to which *Åkerberg Fransson* gave rise, it thus appears necessary to take into account the policy context in addition to the purely legal arguments.

C. Policy Arguments Regarding the Appropriate Scope of EU Fundamental Rights Review

1. Practical Difficulties and Confusion

Some authors point to the dangers of adding another layer of fundamental rights to the application of provisions of national law, which already contain quite developed guarantees and which are supplemented by the provisions of the ECHR. These authors fear a lack of consistency.⁵⁷

It must be considered, however, that the purpose of the determination of the scope of the Charter is not simply to provide the individual with yet another set of fundamental rights. Rather, allowing the individual to invoke fundamental rights may lead to the setting aside of the ordinary laws that would otherwise apply to that individual. Where the ordinary laws that are meant to be enforced against an individual are, at least partly, rules of EU law, it is also a question of EU law whether those laws should be set aside on grounds

55. Criminal proceedings against Bonda, Case C-489/10, ECLI:EU:C:2012:319. See Jonathan Tomkin, *Article 50*, in *THE EU CHARTER OF FUNDAMENTAL RIGHTS*, *supra* note 12, at ¶¶ 50.29-50.32.

56. See *DEB v. Bundesrepublik Deutschland*, Case C-279/09, [2010] E.C.R. I-13,849, ¶ 30. Ward, *supra* note 12, at ¶¶ 51.91-51.93; Lenaerts & Gutiérrez-Fons, *The Place of the Charter in the EU Constitutional Edifice*, in *THE EU CHARTER OF FUNDAMENTAL RIGHTS*, *supra* note 12, at ¶¶ 55.20-55.22.

57. See, e.g., Thomas von Danwitz & Katherina Paraschas, *A Fresh Start for the Charter: Fundamental Questions on the Application of the European Charter of Fundamental Rights*, 35 *FORDHAM INT'L L.J.* 1396, 1417-18 (2011-2012); Jörn Griebel, *Europäische Grundrechte als Prüfungsmaßstab der Verfassungsbeschwerde*, 129 *DEUTSCHES VERWALTUNGSBLATT* 204, 211 (2013); Peter M. Huber, *Auslegung und Anwendung der Charta der Grundrechte*, *NEUE JURISTISCHE WOCHENSCHRIFT* 2385, 2387 (2011).

of EU fundamental rights.⁵⁸ In the case of *Åkerberg Fransson*, sanctions were requested to be imposed on the applicant, which were meant to enforce fiscal obligations arising under EU law. The limits posed to that enforcement by fundamental rights were therefore also a question of EU law. Arguing, in that situation, that the applicant was already protected by national fundamental rights (which, in fact, he was not) would not do justice to the question at issue.

In addition, the content of related national or international fundamental rights may not be exactly the same as that of the EU fundamental right, and they cannot necessarily be invoked at the same stage of the procedure.⁵⁹ Drawing simultaneously on fundamental rights from various sources is thus a task from which lawyers and judges should not shy away.

2. Lack of Expertise

Unlike the European Court of Human Rights (“ECtHR”), the ECJ is not a specialized human rights court.⁶⁰ The ECtHR hardly ever assesses fundamental rights in a comparative perspective.⁶¹ The lack of depth of analysis may seem particularly disturbing where the underlying issues are controversial and addressed differently in the various Member States.⁶² It might be tempting to argue that those issues should be allowed to mature in the national courts and not be decided by the ECJ too early.⁶³

At the same time, where a case is directed against the act of an EU institution or concerns the impact of fundamental rights on the

58. See Filippo Fontanelli, *Implementation of EU Law through domestic measures after Fransson: the Court of Justice Buys Time and “Non-Preclusion” Troubles Loom Large*, 39 EUR. L. REV. 682, 685 (2014).

59. In the same vein, some authors see advantages in the overlap between fundamental rights from different sources. See, e.g., Sinead Douglas-Scott, *A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis*, 43 COMMON MKT. L. REV. 629, 664-65 (2006). Brun-Otto Bryde, points out that the multitude of sources of fundamental rights in Europe has created very few problems in practice. See Brun-Otto Bryde, *The ECJ’s Fundamental Rights Jurisprudence – A Milestone in Transnational Constitutionalism*, in THE PAST AND FUTURE OF EU LAW, *supra* note 9, at 119, 127-28.

60. See, e.g., Lenaerts & Gutiérrez-Fons, *supra* note 56, at ¶ 55.05.

61. See De Búrca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*, 20 MAASTRICHT J. OF EUR. AND COMP. L. 168, 170-71 (2013).

62. Cartabia, *supra* note 21, at 26.

63. E.g., Samantha Besson, *European Human Rights, Supranational Judicial Review and Democracy. Thinking Outside the Judicial Box*, in HUMAN RIGHTS PROTECTION IN THE EUROPEAN LEGAL ORDER: THE INTERACTION BETWEEN THE EUROPEAN AND THE NATIONAL COURTS 97, 116-17 (Patricia Popelier et al. eds., 2011); Cartabia, *supra* note 21, at 26.

interpretation of such an act, the ECJ will not be able to avoid the issue, and it sometimes needs to take a courageous step.⁶⁴ Even a careful limitation of the scope of EU fundamental rights will therefore not shield the ECJ from having to deal with potentially the most difficult issues. Rather than trying to keep the ECJ out completely, one should rely on that court being able to tread carefully regarding the substance of those issues.

3. Legitimacy of Fundamental Rights Review

Given that it clearly follows from Article 51(1) of the Charter that some acts of the Member States will in any event have to comply with the fundamental rights of the Union, this is not the place to repeat the general criticism of judicial review of fundamental rights from the perspective of democratic legitimacy.⁶⁵ For the more narrow purpose of distinguishing between Member State acts that should or should not be subject to EU fundamental rights review, democracy might be considered to militate in favor of giving precedence, in each situation, to “the legal norm stemming from the most inclusive institution and decision-making process.”⁶⁶

What should be considered the “most inclusive institution and decision-making process” is, however, open to debate.⁶⁷ In a situation

64. See, e.g., *Digital Rights Ireland v. Minister for Communications, Marine and Natural Resources and Seitlinger and Others*, Joined Cases C-293/12 & C-594/12, [2014] E.C.R. _____ (delivered Apr. 8, 2014) (not yet reported), in which the Court declared the Data Retention Directive (Directive 2006/24/EC of the European Parliament and of the Council 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, 2006 O.J. L 105/54) invalid. See also *Kadi and Al Barakaat International Foundation v. Council and Commission*, Joined Cases C-402/05 P & C-415/05 P, [2008] E.C.R. I-6351, in which the ECJ was later followed in substance by the ECtHR in *Nada v. Switzerland*, No. 10593/08, judgment of Sept. 12, 2012. See Federico Fabbrini & Joris Larik, *The Accession of the EU to the ECHR and its Effects: Nada v. Switzerland, the Clash of Legal Orders and the Constitutionalization of the ECtHR*, 34 YEARBOOK OF EUR. L. (forthcoming). Furthermore *Google Spain and Google v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, Case C-131/12, [2014] E.C.R. I _____ (delivered May 13, 2014) (not yet reported) on the contested “right to be forgotten” on the internet.

65. See, for that purpose, Besson, *supra* note 63, at 126-37.

66. *Id.* at 140. One may note that this argument appears to be linked to a sovereigntist view of the state playing an essential role in the protection of fundamental rights. See Fabbrini, *supra* note 6, at 15-19. It seems less relevant when one emphasizes the universal character of fundamental rights. See *id.* at 20-24 (with further references); Editorial, *After Åkerberg Fransson and Melloni*, 9 EUR. CONSTITUTIONAL L. REV. 169, 170 (2013).

67. See, e.g., Daniel Halberstam, *The Bride of Messina: Constitutionalism and Democracy in Europe*, 30 EUR. L. REV. 775, 797 (2005) (with further references).

in which an individual is affected by the application of EU as well as Member State law which may not be his or her own Member State, that individual may be in particular need of protection against the externalities that the national law in question has created. Only the EU level will then be—at least to some extent—“inclusive” of the interests of that individual.⁶⁸ Admittedly, much EU legislation governs not only cross-border, but also internal situations. Nevertheless, when Member States implement EU legislation, the most inclusive level at which questions of fundamental rights should be addressed would seem to be the level at which the basic rules were adopted, thus the level of the EU. The argument concerning democratic legitimacy thus ultimately serves to underscore the importance of taking Article 51(1) of the Charter seriously, but not more.

4. Respect for National Identities

Rights, even when worded the same way, do not necessarily mean the same thing in different jurisdictions.⁶⁹ Where national fundamental rights are to be kept alive, this is also for the sake of preserving those differences and the national identities of the Member States, which were so dear to the heart of the GFCC in its decision on the Anti-Terrorism Database Act. It is beyond the scope of the present text to assess the way in which the EU in general is required to respect national identities, in particular on the basis of Article 4(2) TEU.⁷⁰ For present purposes, it is proposed to accept that certain fundamental rights may form part of national constitutional identities

68. See Alexander Somek, *The Argument from Transnational Effects I: Representing Outsiders through Freedom of Movement*, 16 EUR. L.J. 315 (2010). The observation that EU law creates a bias in favor of the mobile, thus may be correct in certain circumstances, but such bias may be needed to counteract the bias, in national law, in favor of the “sedentary.” See Komárek, *supra* note 17, at 426

69. In his book, Fabbrini provides various examples of differing standards of protection between the Member States concerning fundamental rights. See Fabbrini, *supra* note 6; see also Cartabia, *supra* note 21, at 28; Komárek, *supra* note 17, at 444; Friederike Lange, *Verschiebungen im europäischen Grundrechtssystem*, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 169, 173 (2014).

70. See, e.g., Armin von Bogdandy & Stephan Schill, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, 48 COMMON MKT. L. REV. 1417 (2011).

and that those fundamental rights are different from those protected at EU level.⁷¹

That fact, however, does not seem to warrant a generally restrictive approach to the scope of EU fundamental rights. A restrictive approach would indeed be disproportionate if the goal was simply to allow for the appropriate development of national fundamental rights that form part of the national identity. That goal can in fact equally be achieved, in many situations, by the simultaneous application of EU and national fundamental rights. Respect for national identities may require particular caution, though, where a national fundamental right works in the opposite direction of an EU fundamental right. In situations of that kind, the origin of the right (EU or national) should not be the main reason to tip the balance in favor of one or the other fundamental right. Rather, a balancing exercise should be carried out that gives weight to all the rights and interests at stake.⁷² Through such a balancing exercise, enough room could be left for the development of national particularities in the application of fundamental rights even when one admits that there is an overlap.

5. Alienation of National Courts

Given the importance of the cooperation of national courts for the enforcement of EU law, the ECJ itself must have a long term interest in securing that cooperation. Strong signals from national courts that they are not willing to go along with an expansive view of the scope of EU fundamental rights are therefore not to be taken lightly. There is, however, evidence to the effect that even the ECJ's most controversial holdings on rights have fared rather well over time.⁷³ Even if constitutional courts are at first reluctant, the ECJ may be able to count on other allies in the national systems, and those

71. See, e.g., von Danwitz & Paraschas, *supra* note 57, at 1418-19. Another view, however, points to the considerable convergence which already exists between European and national fundamental rights. See Alan Rosas, *The Applicability of the EU Charter of Fundamental Rights at National Level*, EUR. Y.B. OF HUM. RTS. 97, 100 (2013).

72. For a similar view, see Thym, *supra* note 12, at 403-04.

73. Alec Stone Sweet & Kathleen Stranz, *Rights Adjudication and Constitutional Pluralism in Germany and Europe*, 19 J. EUR. PUB. POL'Y 92, 100-04 (2012) (using the ECJ's decision in *Mangold v. Helm*, Case C-144/04, [2005] E.C.R. I-9981, and the follow-up to that decision as an instructive case study).

allies might be in a stronger position than the constitutional courts.⁷⁴ Furthermore, while the GFCC stands out as a particularly powerful constitutional court, not all constitutional courts in Member States would seem to have achieved the same standing internally. From the perspective of the likelihood of its decisions being followed, it might therefore seem overly cautious if the ECJ systematically aligned its case law to the reactions of the GFCC. Indeed, in *Melloni* and *Åkerberg Fransson*, the Spanish Constitutional Court⁷⁵ and the Swedish Courts respectively⁷⁶ followed the substance of the ECJ's decisions.

At the same time, greater alienation of national constitutional courts ought to be avoided for broader reasons. Even though these national constitutional courts may find it difficult to resist handing power over to the ECJ when it comes to the protection of fundamental rights, they may still try to retain the upper hand on other issues, claiming a threat to the national constitutional identity or challenging EU action as *ultra vires*. The first preliminary reference from the GFCC⁷⁷ may be evidence of that phenomenon. If the ECJ wants to ensure that its rulings are followed across the board, it thus needs to remain mindful of the general atmosphere of the dialogue which it conducts with national courts.⁷⁸

74. For a number of examples of internal controversies, see Lech Garlicki, *Constitutional Courts Versus Supreme Courts*, 5 INT'L. J. CONST. L. 44 (2007).

75. S.T.C., Feb. 13, 2014 (B.J.C. No. 26/2014) (Spain).

76. Decision B 4946-12 of the Swedish Supreme Court (delivered June 11, 2013) (departing from earlier case-law and considering that the tax penalties in question were criminal in nature). On the overall development in Sweden, see Angelica Ericsson, *The Swedish Ne Bis in Idem Saga - Painting a Multi-Layered Picture*, EUROPARÄTTSLIG TIDSKRIFT 54 (2014).

77. Gauweiler and Others, Case C-62/14 (pending case). See, among the numerous critical commentaries, Jürgen Bast, *Don't Act Beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's Ultra Vires Review*, 15 GER. L.J. 167 (2014); Werner Heun, *Eine verfassungswidrige Verfassungsgerichtsentscheidung – der Vorlagebeschluss des BVerfG vom 14. 1. 2014*, 69 JURISTENZEITUNG 331 (2014); Mattias Kumm, *Rebel Without a Good Cause: Karlsruhe's Misguided Attempt to Draw the CJEU into a Game of "Chicken" and What the CJEU Might Do About It*, 15 GER. L.J. 203 (2014); Franz C. Mayer, *Rebels Without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference*, 15 GER. L.J. 111 (2014); Alexander Thiele, *Friendly or Unfriendly Act? The "Historic" Referral of the Constitutional Court to the ECJ Regarding the ECB's OMT Program*, 15 GER. L.J. 241 (2014).

78. On the importance of that atmosphere, see, e.g., Peter Jacob Wattel, *Köbler, CILFIT and Welthgrove: We Can't Go on Meeting Like This*, 41 COMMON MKT. L. REV. 177 (2004); Boštjan Zalar, *Basic Values, Judicial Dialogues and the Rule of Law in the Light of the Charter of Fundamental Rights of the European Union: Judges Playing by the Rules of the Game*, 14 ERA FORUM 319 (2013). See generally the various contributions in

6. Reverse Solange

In EU legal discourse, “Solange”—in a narrow sense—stands for the GFCC’s reservations against the unlimited primacy of EU law on grounds of fundamental rights.⁷⁹ It denotes the concept that fundamental rights review at the national level is not exercised as long as the protection of fundamental rights is ensured at the EU level. In recent years, the argument has repeatedly been made that the ECJ should apply a “reverse Solange” formula in the sense that it should step in and ensure the protection of fundamental rights where that protection was deficient in a Member State.⁸⁰ Notably, the legal basis for the protection of fundamental rights at EU level in such cases does not lie in the fact that the Member States are implementing EU law within the meaning of Article 51(1) of the Charter. The jurisdiction of the ECJ would rather have to find a broader and more horizontal basis.

Given that the ECJ in *Melloni* and *Åkerberg Fransson* ruled on more narrow issues of interpretation of Articles 53 and 51(1) of the Charter, describing that case law as the adoption of “reverse Solange” by the ECJ⁸¹ would therefore not convey a complete picture. However, were the ECJ ever willing to endorse a broader “reverse Solange” formula, a rather broad understanding of the “ordinary” scope of EU fundamental rights would seem to be a more coherent

CONSTITUTIONAL CONVERSATIONS IN EUROPE, *supra* note 17. On some of the more subtle forms of pursuing dialogue with the national courts, see Giuseppe Martinico, *Judging in the Multilevel Legal Order: Exploring the Techniques of ‘Hidden Dialogue’*, 21 KING’S L.J. 257 (2010); Daniel Sarmiento, *The Silent Lamb and the Deaf Wolves: Constitutional Pluralism, Preliminary References and the Role of Silent Judgments in EU Law*, in CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND 285 (Matej Avbelj & Jan Komárek eds., 2012).

79. Daniel Halberstam, *Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States*, in RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 326, 351 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009); Erich Vranes, *German Constitutional Foundations of, and Limitations to, EU Integration: A Systematic Analysis*, 14 GER. L.J. 75 (2013).

80. Halberstam, *supra* note 79, at 352-53; Halberstam, *Pluralism in “Marbury” and “Van Gend”*, in THE PAST AND FUTURE OF EU LAW, *supra* note 9, at 26, 34-35; Armin von Bogdandy, Carlino Antpöhler, Johanna Dickschen, Simon Hentrei, Maja Smrkolj & Matthias Kottmann, *Reverse Solange - Protecting the Essence of Fundamental Rights against EU Member States*, 49 COMMON MKT. L. REV. 489 (2012); *see also* Opinion of Advocate General Poiares Maduro in *Centro Europa 7 v. Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni*, Case C-380/05, [2008] E.C.R. I-349, ¶¶ 20-22.

81. *See, e.g.*, Sarmiento, *supra* note 12, at 1295.

way to prepare the ground than a narrow reading. It should therefore not be excluded that the ECJ intended, already at this point, to send a signal to certain Member States that EU fundamental rights will act as a backstop in many situations.⁸²

On the other hand, from the perspective of a Member State which considers itself to be at the forefront of protection of fundamental rights, a reference to the ECJ's approach in *Melloni* and *Åkerberg Fransson* as the introduction of some kind of “reverse Solange” might be considered as a sign of mistrust.⁸³

7. Relationship Between EU Law and the ECHR

The ECJ held in *Åkerberg Fransson* that EU law does not govern the relations between the ECHR and the legal systems of the Member States, nor does the ECJ determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law.⁸⁴

In its Opinion 2/13 on the accession of the EU to the ECHR, the ECJ emphasized, conversely, that it should not be possible for the ECtHR to call into question the ECJ's findings in relation to the scope *ratione materiae* of EU law, for the purposes, in particular, of determining whether a Member State is bound by fundamental rights of the EU.⁸⁵ The ECJ recalled that it had interpreted Article 53 of the Charter as meaning that the application of national standards of protection of fundamental rights must not compromise the level of protection provided for by the Charter or the primacy, unity, and effectiveness of EU law.⁸⁶

It concluded from that position that, in so far as Article 53 of the ECHR essentially reserves the power of the Contracting Parties to lay

82. See CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA: THEORY, LAW AND POLITICS IN HUNGARY AND ROMANIA (Armin von Bogdandy & Pal Sonnevend eds., 2015). Some recent constitutional amendments in Hungary, concerning the compulsory early retirement of judges (Commission v. Hungary, Case C-286/12, ECLI:EU:C:2012:687) and the independence of the data protection authority (Commission v. Hungary, Case C-288/12, [2014] E.C.R. I _____ (delivered Apr. 8, 2014) (not yet reported), have reached the ECJ and led to a declaration of infringement.

83. See, e.g., Rupert Scholz, *Nationale und europäische Grundrechte: Umgekehrte “Solange-Regel”?*, 129 DEUTSCHES VERWALTUNGSBLATT 197, 201 (2014).

84. *Åkerberg Fransson*, [2013] E.C.R. I _____ (delivered Feb. 26, 2013), ¶ 44; see Giuseppe Martinico, *Two Worlds (Still) Apart? ECHR and EU Law before National Judges*, in THE EU ACCESSION TO THE ECHR 141 (Vasiliki Kosta et al. eds., 2014).

85. Opinion 2/13, [2014] E.C.R. I _____ (delivered Dec. 18, 2014), ¶ 186.

86. *Id.* ¶ 188, referring to *Melloni*, [2013] E.C.R. I _____ (delivered Feb. 26, 2013), ¶ 60.

down higher standards of protection of fundamental rights than those guaranteed by the ECHR, that provision should be coordinated with Article 53 of the Charter, as interpreted by the ECJ, so that the power granted to Member States by Article 53 of the ECHR is limited—with respect to the rights recognized by the Charter that correspond to those guaranteed by the ECHR—to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity, and effectiveness of EU law are not compromised. The ECJ thus took the view that the fact that no provision in the draft accession agreement envisaged to ensure such coordination was one of the elements that rendered that agreement incompatible with the Treaties.⁸⁷

In hindsight, one might therefore say that the ECJ's interpretation of Article 53 of the Charter in *Melloni* paved the way for its insistence on the above mentioned coordination mechanism. That such a mechanism would indeed be required in the accession instruments to preserve the autonomy of the EU legal order seems, however, highly questionable.⁸⁸ It is not the task of the ECtHR to rule on the extent of the power of the Contracting Parties to lay down higher standards of protection. Whether their power is limited under EU law is a purely internal question of EU law and it can therefore appropriately be addressed by the ECJ in a preliminary reference⁸⁹ or, as the case may be, infringement procedure.

D. *The ECJ's Answer to Those Policy Arguments*

1. *Åkerberg Fransson*

As if it had anticipated some of the objections set out in the previous section, the ECJ has, in *Åkerberg Fransson*, managed the relationship between EU fundamental rights and national fundamental rights in a way which, at least on its face, allows national courts a certain amount of breathing space.⁹⁰

87. *Id.* ¶¶ 189-190.

88. See also Editorial Comments, *The EU's Accession to the ECHR – A “NO” from the ECJ*, 52 COMMON MKT. L. REV. 1, 11 (2015). For a more sympathetic view on this aspect, see Jean-Paul Jacqué, *Non à l'adhésion à la Convention européenne des droits de l'homme?*, <http://www.droit-union-europeenne.be/412337458> (last visited March 1, 2015).

89. As it was, regarding the interpretation of Article 53 of the Charter, in *Melloni*.

90. Thym, *supra* note 12, at 404.

The ECJ explained that, since EU law did not fully determine the scope of Member State action, national fundamental rights could in principle be applied in addition to EU fundamental rights.⁹¹ It may be noted that the choice of *Åkerberg Fransson* as a case in which to make this statement was rather shrewd, for at least five reasons. First, in some respect, namely on the meaning of *idem*, the ECJ's case law on *ne bis in idem* had influenced the ECtHR.⁹² Second, differently from *ne bis in idem* in Article 4 of Protocol No. 7 to the ECHR, *ne bis in idem* under Article 50 of the Charter applies not only within a single Member State, but also between Member States.⁹³ Third, Protocol No. 7 to the ECHR has not yet been ratified by Germany and the Netherlands, while a number of Member States have issued declarations according to which the meaning of criminal offenses is to be understood as limited to criminal offenses so qualified under national law.⁹⁴ Fourth, the draft agreement on the accession of the EU to the ECHR does not foresee an accession to Protocol No. 7.⁹⁵ Fifth, the ECJ was certainly aware that there was no more protective right of *ne bis in idem* to be found in the Swedish legal order. *Ne bis in idem* thus seemed to be an excellent case in which to affirm the autonomy of the EU legal order and the added value of EU fundamental rights.⁹⁶

That affirmation of autonomy was toned down, however, by an apparently rather light touch in the ECJ's substantive assessment: after having recalled that Article 50 of the Charter precluded criminal proceedings in respect of the same acts from being brought against the same person only if a previously imposed tax penalty was criminal in nature and had become final and mentioned the three criteria relevant for the purpose of assessing whether tax penalties are

91. *Åkerberg Fransson*, [2013] E.C.R. I _____ (delivered Feb. 26, 2013), ¶ 29.

92. ECtHR, *Sergey Zolotukhin v. Russia*, No. 14,939/03, [2009] (explicitly referring to the case law of the ECJ); see Hancox, *supra* note 31, at 1414; Lenaerts, *supra* note 42, at 396; Lenaerts & Gutiérrez-Fons, *supra* note 56, at ¶ 55.62.

93. See John Vervaele, *The Application of the EU Charter of Fundamental Rights (CFR) and its Ne bis in idem Principle in the Member States of the EU*, 6 REV. OF EUR. ADMIN. L. 113, 133 (2013); see also Antoine Bailleux, *Entre droits fondamentaux et intégration européenne, la Charte des droits fondamentaux de l'Union européenne face à son destin*, in REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 215, 227 (2014).

94. See Hancox, *supra* note 31, at 1414; Vervaele, *supra* note 93, at 115; see also Bailleux, *supra* note 93, at 227-28.

95. Hancox, *supra* note 31, at 1429-30.

96. For the reference to that autonomy, see Lenaerts & Gutiérrez-Fons, *supra* note 56, at ¶ 55.64, even though the authors generally refer to Article 50 of the Charter as an example of convergence.

criminal in nature,⁹⁷ the ECJ tasked the referring court to determine, in the light of those criteria, whether the combining of tax penalties and criminal penalties that was provided for by national law should be examined in relation to national standards of protection, which could lead it to regard their combination as contrary to those standards, as long as the remaining penalties were effective, proportionate, and dissuasive.⁹⁸

The ECJ then answered the question by stating that the *ne bis in idem* principle laid down in Article 50 of the Charter did not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of VAT, a tax penalty, and a criminal penalty in so far as the first penalty was not criminal in nature, a matter which was for the national court to determine.⁹⁹

It is worth noting, firstly, that the ECJ limited itself to listing, in the briefest possible form, the elements of interpretation of Article 50 of the Charter. Secondly, the ECJ emphasized, even in its answer to the question, the role incumbent upon the national judge when applying those elements to the case at hand. Thirdly, the ECJ expressly gave an opportunity to the national judge to apply a potentially more generous national rule of *ne bis in idem*. These elements appear to indicate the ECJ's willingness to respect the role of national fundamental rights even at the expense of—some—effectiveness of EU law. It is true that the ECJ pointed out that the penalties remaining after the potential application of a national fundamental right still needed to be effective, proportionate, and dissuasive. Assuming, *quod non*, that the national court reached the conclusion that the first penalty was not criminal in nature and that Article 50 of the Charter did not preclude the application of a criminal penalty, but that it then found a more generous national fundamental right which precluded even the combination of administrative and criminal penalties, the application of that national fundamental right would have been subject to an assessment whether the administrative penalty alone was effective. There was thus clearly not a blank check to apply the national fundamental right.¹⁰⁰

97. *Åkerberg Fransson*, [2013] E.C.R. I-____ (delivered Feb. 26, 2013), ¶¶ 33-35.

98. *Id.* ¶ 36.

99. *Id.* ¶ 37.

100. As a consequence, Bailleux doubts that the national court could apply a potential national fundamental right at all. *See Bailleux, supra* note 93, at 231.

It is submitted, though, that the limits to the application of national fundamental rights are a mere consequence of the—correct—finding that the case was within the scope of EU law: there was a duty under EU law to apply effective, proportionate, and dissuasive sanctions to violations of VAT law. EU fundamental rights confined that duty. This duty could also be confined by national fundamental rights, but this could not lead to a disregard for the primacy of EU law.¹⁰¹ It is difficult to see how the ECJ could have gone any further than that.

The ECJ's vision for the future of EU fundamental rights is thus one of coexistence with national fundamental rights rather than one of exclusive spheres.¹⁰² Coexistence is possible whenever the primacy, unity, and effectiveness of EU law do not require the application of EU fundamental rights only.¹⁰³ The idea of exclusive application of either EU or national fundamental rights in separate spheres had been championed in particular by the GFCC,¹⁰⁴ but the ECJ has, unsurprisingly, rejected it.¹⁰⁵

2. In Subsequent Case Law

The ECJ has in the meantime shown itself mindful of the need not to create too much overlap between the scopes of EU and national fundamental rights. *Siragusa v. Regione Sicilia*¹⁰⁶ concerned a requirement under national law to demolish unauthorized building works in a landscape conservation area. The ECJ referred to *Åkerberg Fransson* as containing relevant principles, but then went on to set out in detail the elements that may point to a case coming within the scope of Union law. The ECJ stressed that the concept of “implementing EU law” requires a certain degree of connection above

101. Cf. Lenaerts & Gutiérrez-Fons, *supra* note 56, ¶ 55.85.

102. On the two positions, see Kingreen, *supra* note 43, at 802-04; Thym, *supra* note 12, at 401-09; see also Daniel Thym, *Vereinigt die Grundrechte*, 70 JURISTENZEITUNG 53 (2015) (in favor of coexistence).

103. See Ladenburger, *supra* note 12, 173-76; Lenaerts & Gutiérrez-Fons, *supra* note 56, ¶ 55.76.

104. See Thym, *supra* note 12, at 404-07.

105. Lenaerts & Gutiérrez-Fons, *supra* note 56, ¶ 55.86.

106. *Siragusa v. Regione Sicilia*, Case C-206/13, [2014] E.C.R. I _____ (delivered Mar. 6, 2014) (not yet reported).

and beyond the matters covered being closely related or one of those matters having an indirect impact on the other.¹⁰⁷

In order to determine whether national legislation involves the implementation of EU law for the purposes of Article 51(1) of the Charter, the ECJ declared that it would rely on a whole series of points, some of which are whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it.¹⁰⁸

The ECJ further pointed out that the reason for pursuing the objective of protecting fundamental rights in EU law was the need to avoid a situation in which the level of protection of fundamental rights varied according to the national law involved in such a way as to undermine the unity, primacy, and effectiveness of EU law.¹⁰⁹ That last part of the reasoning, which is reminiscent of the origins of the protection of fundamental rights in EU law, underscores the point that, where the application of EU fundamental rights is triggered, the primacy, unity, and effectiveness of EU law will normally not allow for the concomitant full application of national fundamental rights.

It is worth noting, on the one hand, that the ECJ spelled out these elements in a decision of a chamber of three judges, thereby clearly signaling that it was not deviating from *Åkerberg Fransson*, but merely drawing the almost self-evident conclusions from that judgment. On the other hand, the Court in *Siragusa* referred to practically all the leading cases in which, prior to the entry into force of the Lisbon Treaty, it had found that the situation before the national judge did not come within the scope of EU law.¹¹⁰ The test it applied had been formulated in *Iida*,¹¹¹ one of the citizenship cases

107. *Siragusa*, [2014] E.C.R. I _____ (delivered Mar. 6, 2014), ¶ 24. At that paragraph, the ECJ refers to *Kremzow v. Republik Österreich*, Case C-299/95, [1997] E.C.R. I-2629, ¶ 16. The language used is, however, quite close to that of the GFCC in the Anti-Terrorism Database Act, Case 1 BvR 1215/07, delivered Apr. 24, 2013, BVerfGE 133, 277, ¶ 91.

108. *Siragusa*, [2014] E.C.R. I _____ (delivered Mar. 6, 2014), ¶ 25.

109. *Id.* ¶ 32 (referring to *Internationale Handelsgesellschaft*, [1970] E.C.R. 1125, ¶ 3, and *Melloni*, [2013] E.C.R. I _____ (delivered Feb. 26, 2013), ¶ 60).

110. *Kremzow*, [1997] E.C.R. I-2629, ¶ 16; *Annibaldi v. Sindaco del Comune di Guidonia and Presidente Regione Lazio*, Case C-309/96, [1997] E.C.R. I-7493, ¶¶ 21-23; *Criminal proceedings against Maurin*, Case C-144/95, [1996] E.C.R. I-2909, ¶¶ 11-12.

111. *Iida*, ECLI:EU:C:2012:691.

that might have seemed to be overruled by *Åkerberg Fransson*.¹¹² The intention certainly was to assuage concerns over too broad a scope of EU fundamental rights.

The same intention is visible in *Julian Hernández*,¹¹³ where the ECJ, perhaps more surprisingly, ruled that a claim of an employee against the State for remuneration not paid by the employer in a situation in which the employee was subrogated to a right to the payment of remuneration which has become due during proceedings challenging a dismissal after the sixtieth working day following the date on which the action was brought granted in favor of the employer who was insolvent, did not come within the scope of Directive 2008/94/EC¹¹⁴ and thus neither within the scope of EU fundamental rights.

Having announced the basic principles in *Åkerberg Fransson* and *Melloni*, the ECJ thus reverted to a case-by-case assessment of the scope of EU fundamental rights.¹¹⁵ The line of reasoning followed in that case-by-case assessment would seem to converge with the position expressed by the GFCC. EU fundamental rights apply where Member State action is at least partly determined by EU law. That leaves room for saying that Member State action is not determined by EU law on the facts of a given case. The more one is prepared to focus on the facts of the case, the easier it becomes to say that the decisive element of the case is ultimately not determined by EU law. *Åkerberg Fransson* may thus be reconciled with the long list of cases which the ECJ did not consider to come within the scope of EU

112. Sarmiento, *supra* note 12, at 1276. Other citizenship cases decided after *Åkerberg Fransson* confirmed that there was no change of line for those cases. *Ymeraga and Others v. Ministre du Travail, de l'Emploi et de l'Immigration*, Case C-87/12, [2013] E.C.R. I _____ (delivered May 8, 2013) (not yet reported); *Alokpa and Others v. Ministre du Travail, de l'Emploi et de l'Immigration*, Case C-86/12, [2013] E.C.R. I _____ (delivered Oct. 10, 2013) (not yet reported); *O v. Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v. B*, Case C-456/12, [2014] E.C.R. I _____ (delivered Mar. 12, 2014) (not yet reported).

113. *Julian Hernández and Others v. Reino de España*, Case C-198/13, [2014] E.C.R. I _____ (delivered July 10, 2014) (not yet reported).

114. Directive 2008/94/EC of the European Parliament and of the Council on the protection of employees in the event of the insolvency of their employer, 2008 O.J. L 283/36.

115. For other examples and a critical evaluation of the subsequent case law, see Filippo Fontanelli, *supra* note 58, at 682; Daniel Thym, *Blaupausenfallen bei der Abgrenzung von Grundgesetz und Grundrechtecharta*, 67 DIE ÖFFENTLICHE VERWALTUNG 941 (2014). The ECJ has in particular confirmed the application of EU fundamental rights derogating from fundamental freedoms of the internal market. See Proceedings brought by *Pfleger and Others*, Case C-390/12, [2014] E.C.R. I _____ (delivered Apr. 30, 2014) (not yet reported).

law.¹¹⁶ Given that factual determinations are in any event to be made by the national courts, those courts are therefore given some leeway for finding that EU fundamental rights do not apply without even making a preliminary reference to the ECJ.

In the light of the ECJ's willingness to respect the role both of national fundamental rights and of national courts, fears that the protection of national fundamental rights might be reduced to a marginal role seem exaggerated. Indeed, it is hard to find a single case decided by the ECJ since the entry into force of the Lisbon Treaty in which it held without good reason that the Union fundamental rights applied to the Member States.¹¹⁷ For the reasons set out above, *Åkerberg Fransson* is at any rate not such a case.

IV. HOW TO MANAGE THE COEXISTENCE OF HUMAN RIGHTS FROM VARIOUS SOURCES

The role the ECJ should play from a substantive and a procedural point of view for the protection of fundamental rights in Europe raises important questions, which are quite closely linked. In fact, the more the ECJ determines the content of an EU fundamental right, the less room it will leave for the simultaneous application of coexisting national fundamental rights. By managing the relationship between EU and national fundamental rights, the ECJ is therefore at the same time managing the relationship between the various courts that are supposed to uphold those rights. A number of tools seem to be available to the ECJ. At the present stage, those tools that allow for flexible, reversible solutions should be preferred over rigid, permanent ones.

116. For the references given by von Danwitz, see Thomas von Danwitz, *The Rule of Law in the Recent Jurisprudence of the ECJ*, 37 *FORDHAM INT'L L.J.* 1311, 1339 n. 94 (2014).

117. If anything, it would rather seem that the Court erred on the side of caution. For an important recent example, see *Dano and Dano v. Jobcenter Leipzig*, Case C-333/13, [2014] E.C.R. I _____ (delivered Nov. 11, 2014) (not yet reported), ¶¶ 88-90, in which the Court—in the certainly highly delicate context of what has come to be termed “welfare tourism” by the media—limited itself to explaining very briefly that, since the conditions creating the right to the social benefits at issue did not result from secondary EU legislation and the Member States thus had competence to determine the conditions for the grant of those benefits, they were not implementing EU law when they were exercising that competence.

A. Substantive Deference

Depending on the extent to which a situation is determined by EU law, the ECJ might go into more or less depth regarding the analysis of fundamental rights.¹¹⁸ In *Åkerberg Fransson*, the Court, as discussed above, indeed appears to have taken a quite deferential approach.

Such deference seems appropriate whenever a case is not entirely determined by EU law. It must be kept in mind that, quite often, more than one fundamental right may come into play and it may become necessary to balance those different fundamental rights.¹¹⁹ A fundamental right protected at the EU level might then compete with another fundamental right protected either also at the EU or only at the national level. If the ECJ went into great detail elaborating the contours of one of the fundamental rights at stake, the primacy of EU law might lead to that fundamental right prevailing even though a thorough balancing at the national level might have produced a different outcome.¹²⁰ A light touch review by the ECJ would allow the result of the national balancing test to prevail¹²¹ and at the same time avoid the impression that the effectiveness of EU law is undermined.

The ECJ could, for that purpose, take its cue from the ECtHR and the lesson that court has drawn from its, partly indirect, interaction with the GFCC in the *Princess of Hannover*¹²² and *Görgülü*¹²³ cases, which resulted in the ECtHR acknowledging a large

118. *Accord* Besson, *supra* note 63, at 115; Thym, *supra* note 12, at 403-07; *see also* Torres Pérez, *supra* note 6, at 168-77; Torres Pérez, *supra* note 7, at 129; Torres Pérez, *supra* note 17, at 65-66.

119. Lange, *supra* note 69, at 173; Thym, *supra* note 12, at 407; Torres Pérez, *supra* note 7, at 127.

120. This would seem to be the outcome envisaged by Sarmiento. *See* Sarmiento, *supra* note 12, at 1296.

121. *Accord* Sarmiento, *supra* note 12, at 1294.

122. *Von Hannover v. Germany*, No. 59,320/00, judgment of June 24, 2004, ECHR 2004-VI; GFCC, Case 1 BvR 1602/07, judgment of Feb. 26, 2008; *see* Corinna Coors, *Headwind from Europe: The New Position of the German Courts on Personality Rights after the Judgment of the European Court of Human Rights*, 11 GER. L.J. 527 (2010); *Von Hannover v. Germany* (No. 2), No. 40,660/08 & 60,641/08, judgment of Feb. 7, 2012; Rainer Grote, *The ECHR's Rulings in von Hannover v. Germany (No. 2) and Axel Springer AG v. Germany: Rebalancing Freedom of the Press with the Respect of Privacy*, 55 GER. Y.B. INT'L L. 639 (2013). Bailleux, *supra* note 93, at 226.

123. GFCC, Case 2 BvR 1481/04, judgment of October 14, 2004, BVerfGE 111, 307. *See* Lech Garlicki, *Cooperation of Courts: The Role of Supranational Jurisdictions in Europe*, 6 INT'L J. CONSTITUTIONAL LAW 509, 518-21 (2008); Christoph Grabenwarter, *Das*

margin of appreciation of the Member States when balancing different fundamental rights and limiting itself to a control over whether a proper balancing test had been carried out.

At the same time, one needs to bear in mind that the procedural position of the ECJ is rather different from that of the ECtHR: the latter court will only pronounce itself in a case which has already been finally decided at national level, and in full knowledge of the decisions of the national courts, including, where appropriate, the constitutional court. The ECJ, by contrast, may be called to step in at any stage of the national proceedings, even before any national court has taken a position on the interpretation of fundamental rights in the case at hand.¹²⁴ The ECJ could thus not exercise deference in exactly the same way as the ECtHR.

Because it is not the task of the ECJ to rule on the national dispute, however, it might appropriately limit its reply to pointing to the relevant elements of interpretation of the EU fundamental rights that come into play, while leaving the final balancing to the referring court.¹²⁵ One might object to that approach that it will not meet the needs of the referring court, which wanted to get an answer to its question and will now have to decide the case itself.¹²⁶ Its benefit would, however, remain that national courts might feel more encouraged to refer to national constitutional courts as far as national fundamental rights are concerned.

mehrpolege Grundrechtsverhältnis im Spannungsfeld zwischen europäischem Menschenrechtsschutz und Verfassungsgerichtsbarkeit, in VÖLKERRECHT ALS WERTORDNUNG/COMMON VALUES IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF CHRISTIAN TOMUSCHAT 193 (Pierre-Marie Dupuy et al. eds., 2006); Gertrude Lübke-Wolff, *ECtHR and National Jurisdiction – The Görgülü Case*, *HUMBOLDT FORUM RECHT* 138 (2006); Stone Sweet, *supra* note 18, at 71; Christian Tomuschat, *The Effects of the Judgments of the European Court of Human Rights According to the German Constitutional Court*, 11 *GER. L.J.* 513 (2010).

124. See Wim Voermans, *Protection of European Human Rights by Highest Courts in Europe: the Art of Triangulation*, in *HUMAN RIGHTS PROTECTION IN THE EUROPEAN LEGAL ORDER: THE INTERACTION BETWEEN THE EUROPEAN AND THE NATIONAL COURTS* 365 (Patricia Popelier et al. eds., 2011).

125. Thym also points to the ECJ's decision in *F v. Premier ministre*, Case C-168/13 PPU, [2013] E.C.R. I _____ (delivered May 30, 2013) (not yet reported), as a good example of deference. Thym, *supra* note 12, at 403-04; see also *DEB*, [2010] E.C.R. I-13849. The ECJ has already deferred to balancing by the referring court in earlier cases, notably in *Promusicae v. Telefónica de España*, Case C-275/06, [2008] E.C.R. I-271, ¶ 68. But see Bruno de Witte, *The Use of the ECHR and Convention Case Law by the European Court of Justice*, in *HUMAN RIGHTS PROTECTION IN THE EUROPEAN LEGAL ORDER*, *supra* note 124, at 17, 28 (criticizing deference).

126. Bailleux, *supra* note 93, at 225-26; Komárek, *supra* note 17, at 431.

Substantive deference should not, by contrast, go as far as giving only a minimum content to EU fundamental rights.¹²⁷ This would certainly not be in line with the intentions behind the drawing up of the Charter of Fundamental Rights of the EU.

B. *Better Reasoning of Judgments*

If the ECJ has to engage in an interpretation of fundamental rights more frequently, a recurring suggestion is that it ought to reason its judgments more thoroughly, drawing, in particular, on a comparative method.¹²⁸ It should be noted that the suggestions of more deference and better reasoning appear to point in different directions. If one wants the ECJ to engage in a thorough debate on the meaning of a particular fundamental right, taking into account the relevant comparable provisions of national and international law, one should expect the outcome of that debate to be the solution to the relevant issue, with preference being given to one particular interpretation. That approach seems called for only in situations in which there is no room left for the simultaneous application of EU and national fundamental rights, for instance where the validity of secondary EU law is at stake. In those situations, it would also seem to be the role of the European Commission, when making its submissions to the ECJ, to provide the ECJ with all the necessary comparative elements.

Even though more thoroughly reasoned judgments may enjoy greater legitimacy, and even though the ECJ is in principle equipped to do comparative studies, one should remain mindful of what can realistically be achieved with the available means. The number of cases brought before the ECJ has risen from 560 in 2009 to almost 700 in 2013, out of which 450 were preliminary references from national courts, compared with around 300 preliminary references in

127. The efforts of Advocate General Cruz Villalón seem to go in the direction of giving a minimum content to *ne bis in idem* in view of the different situations in the Member States. See Opinion of Advocate General Cruz Villalón, *Åklagaren v. Åkerberg Fransson*, Case C-617/10, [2013] E.C.R. I _____ (delivered June 6, 2012), ¶¶ 83-86; see also Tomkin, *supra* note 55, at ¶¶ 50.81-50.86 (providing a critical assessment).

128. *Cartabia*, *supra* note 21, at 30; *De Búrca*, *supra* note 61, at 176-82; *Torres Pérez*, *supra* note 17, at 65; see also *de Witte*, *supra* note 42, at ¶ 53.33, and *von Danwitz*, *supra* note 116, at 1317-21.

2009.¹²⁹ Under this current situation, a very strong rationale would be needed to convince the ECJ to issue longer judgments.

C. Stricter Scrutiny of the Admissibility of Preliminary References on Fundamental Rights

Mindful of the systems of procedural law and court jurisdiction in the Member States, the ECJ might want to consider, in the medium term, tightening the conditions of admissibility of references that try to push it to making broad statements on the application of EU fundamental rights to particular national measures. Given that it may take national courts quite some time and effort to refer questions concerning the protection of national fundamental rights to national constitutional courts,¹³⁰ one may also expect them to provide the ECJ with all the material needed to give an informed answer. The ECJ should not allow itself to be manipulated,¹³¹ and it is indeed not likely to do so. Since the Lisbon Treaty's entry into force, the ECJ has in numerous cases refused to reply to questions related to fundamental rights or general principles of EU law for the reason that the main case did not come within the scope of EU law.¹³² In a number of cases, the ECJ has done so, *inter alia*, on the grounds that the referring court had not explained why the case pending before it was within the scope of EU law.¹³³ A more searching inquiry into the admissibility of preliminary references should, however, only be practiced with great circumspection. Indeed, a parallel procedure for

129. For statistics, see ANNUAL REPORT FOR 2013, ECJ, *available at* <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-06/qdag14001enc.pdf> (last visited Mar. 1, 2015).

130. For the case of concrete judicial review in Germany with further references, see DONALD P. KOMMERS & RUSSELL A. MILLER, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 13 (3d ed. 2012); *see also* Lange, *supra* note 69, at 173.

131. To borrow Karen Alter's image of national courts as children deciding whether to ask Mom or Dad certain questions, with Mom being the national constitutional court and Dad being the ECJ, one may imagine Dad getting many more questions if he is much more prepared to answer them than Mom. If this becomes too much for him, Dad might ultimately decide to follow Mom's strategy. *See* Alter, *supra* note 21, at 466-67.

132. *See* von Danwitz, *supra* note 116, at 1339 n. 94.

133. *See, e.g.*, Proceedings brought by Zakaria, Case C-23/12, [2013] E.C.R. I _____ (delivered Jan. 17, 2013) (not yet reported); Sky Italia v. Autorità per le Garanzie nelle Comunicazioni, Case C-234/12, [2013] E.C.R. I _____ (delivered July 18, 2013) (not yet reported), ¶¶ 28-32; Sociedade Agrícola e Imobiliária da Quinta de S. Paio v. Instituto da Segurança Social, Case C-258/13, [2013] E.C.R. I _____ (delivered Nov. 28, 2013) (not yet reported), ¶ 21; Široká v. Úrad verejného zdravotníctva Slovenskej republiky, Case C-459/13, [2014] E.C.R. I _____ (delivered July 17, 2014) (not yet reported), ¶¶ 23-25.

referring questions on national fundamental rights to a national constitutional court does not exist in all Member States. As a consequence, the risk that a very low threshold to the admissibility of references to the ECJ would lead to a more frequent bypassing of national constitutional courts does not arise in all Member States. Furthermore, national courts should not be discouraged in principle from referring questions on the interpretation of EU fundamental rights to the ECJ.

D. Procedural Deference to National Systems of Protection of Fundamental Rights

A recurring request is that the ECJ reconsider its approach to national provisions, foreseeing that priority be given to the review of compliance with national constitutional law, including fundamental rights. The ECJ should, it is said, recognize the special role of national constitutional courts instead of antagonizing and marginalizing them.¹³⁴ So far, the ECJ has taken the view that national provisions must not stand in the way of the interaction between all national courts and the ECJ in the preliminary reference procedure.¹³⁵ It softened its stance ever so slightly in *Melki and Abdeli*,¹³⁶ in which the ECJ in essence allowed “prior” review of constitutionality at the national level to be carried out subject to the preservation of the full right of ordinary courts to make preliminary references at any time. Ordinary courts were further empowered to grant interim relief and to set aside national provisions that they considered to be contrary to EU law even after the review of constitutionality had been concluded.

Going further than that would mean allowing national constitutional courts to have a first say either on the interpretation of national fundamental rights (a different question from the one potentially to be submitted to the ECJ) or on the interpretation of EU fundamental rights (the same question). In the first scenario, the procedure before the national constitutional court could have several outcomes: it could uphold the claim based on fundamental rights, in which case there would indeed be no reason to continue the

134. Bobek, *supra* note 17, at 307-08; Cartabia, *supra* note 21, at 29; Komárek, *supra* note 17, at 431-32; Torres Pérez, *supra* note 17, at 64-65.

135. *Simmenthal*, [1978] E.C.R. 629.

136. *Melki and Abdeli*, Joined Cases C-188/10 & C-189/10, [2010] E.C.R. I-5667.

proceedings and look at EU fundamental rights.¹³⁷ It could also, and this is probably the more frequent scenario, dismiss the claim, in which case EU fundamental rights would remain as the last recourse. However, whether EU fundamental rights get examined at all in that situation is then in the hands of the ordinary court. That court might take the view that it is not worth going through the trouble of looking for potential nuances that might allow the EU law claim to succeed and it might equally be discouraged from making yet another time-consuming reference in the same case. If, on the other hand, it does make that reference, the eventual success of the claim based on EU fundamental rights might highlight a divergence of interpretation which national constitutional courts apparently so much dread.

Furthermore, it needs to be recalled that EU fundamental rights never apply in isolation, but always in conjunction with other rules of EU law. As the ECJ has underlined, the objective of protecting fundamental rights in EU law is the need to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved in such a way as to undermine the unity, primacy, and effectiveness of EU law.¹³⁸ Where the facts of a case are within the scope of EU law, the application of a national fundamental right is thus conditioned upon respecting the unity, primacy, and effectiveness of EU law and will often require an interpretation of rules of EU law other than fundamental rights. It would thus seem more expedient—and also more prudent—to clarify the reach of EU law and EU fundamental rights before turning to the application of national fundamental rights.

In the second scenario, in which a national constitutional court considers itself competent to rule on the interpretation of EU fundamental rights,¹³⁹ there seems to be even less reason to give priority to that assessment before addressing the ECJ: the national constitutional court has in that case acknowledged itself that EU law is relevant to the outcome of the case. Article 267 TFEU thus gives

137. The national constitutional court may, however, when upholding the claim, have disregarded the unity, primacy, and effectiveness of EU law.

138. *Siragusa*, [2014] E.C.R. I _____, ¶ 32.

139. This is what the Austrian Constitutional Court did in a much-commented decision of March 14, 2012, Cases U 466/11 and U 1836/11. For an overview in English, see Reinhard Klaushofer & Rainer Palmstorfer, *Austrian Constitutional Court Uses Charter of Fundamental Rights of the European Union as Standard of Review: Effects on Union Law*, 19 *EURO. PUB. L.* 1 (2013); Konrad Lachmayer, *The Austrian Approach towards European Human Rights*, 7 *VIENNA J. INT'L CONST. L.* 105 (2013); see also Komárek, *supra* note 17, at 421-22, 444.

any national court the possibility and imposes on national courts of last instance a duty to refer to the ECJ any relevant question on the interpretation of the EU fundamental right at stake. The national constitutional court seized with the question of EU fundamental rights could, it is true, make a preliminary reference itself. While that would appear to be the best scenario, the hesitation with which many national constitutional courts have so far referred questions to the ECJ¹⁴⁰ would not seem to make these courts the ideal filter for the application of EU fundamental rights. If the national constitutional court does not make a reference, but upholds or dismisses the claim, in the latter case possibly on the basis of an interpretation of Article 51(1) of the Charter which leads it to conclude that EU fundamental rights do not apply, the case reverts to the ordinary court, which may evidently take a different view. If the case subsequently reaches the ECJ, possible divergences of interpretation will emerge with full force.

Why would a national constitutional court then insist on giving an interpretation of EU fundamental rights that will, on grounds of EU law, not be finally binding on the ordinary courts? The hope would seem to be that the ECJ would gain so much trust in the interpretation of EU fundamental rights by the national constitutional courts that the ECJ would hardly ever have to disagree. To justify their attitude, national constitutional courts might be tempted to point to the prior involvement procedure on which the ECJ has insisted in the context of the accession of the EU to the ECHR.¹⁴¹ That comparison, however, would be unconvincing. While the system of protection set up by the ECHR is indeed based on the subsidiarity of review by the ECtHR with regard to review at internal level, there is no such subsidiarity regarding the protection of rights following from EU law. Given that the application of fundamental rights and other rules of EU law is always interwoven, it would not seem appropriate to introduce subsidiarity of the application of some rules of EU law which clearly enjoy the highest rank in the EU legal order, namely fundamental rights.

140. See generally BOBEK, *supra* note 17.

141. For a thorough discussion of that mechanism, see Tobias Lock, *End of an Epic? The Draft Agreement on the EU's Accession to the ECHR*, 31 Y.B. EUR. L. 162 (2012); see also Aida Torres Pérez, *Too Many Voices? The Prior Involvement of the Court of Justice of the European Union*, EUR. J. HUM. RTS. 565 (2013) (providing critical analysis).

There are a number of other reasons for which a privileged position of national constitutional courts compared with ordinary courts does not appear desirable. In fact, still today, the great majority of preliminary references come from national courts of lower instance and hardly any come from the national constitutional courts.¹⁴² Limiting the free access of all national courts to the ECJ risks seriously reducing the possibility of any issues of EU law being brought up by national courts, not just issues of fundamental rights. Furthermore, at least some constitutional courts might be more politicized and more deferential to the position of a national government.¹⁴³ In addition, the enforcement of EU law in the Member States would necessarily become less uniform. In those Member States with mechanisms under national law obliging ordinary courts to seek access to the national constitutional court first, the enforcement of EU law would become contingent upon the use of those mechanisms.

Modifying the general pattern of interaction between the ECJ and national courts therefore does not seem to be a good solution and the ECJ itself does not appear to find it very attractive either. In a recent decision concerning the position of the Austrian Constitutional Court, it did not go any further than in *Melki and Abdeli*.¹⁴⁴ Unlike the Advocate General,¹⁴⁵ the ECJ left open whether the reasoning, based on EU law, which led the Austrian Constitutional Court to establish a duty of ordinary courts to refer to it, was correct. However, the possibility for the latter courts to seize the ECJ first and await its answer, by which the Constitutional Court will also be bound, would seem to deprive the Constitutional Court of the first say in those

142. In 2014, of the slightly over thirty preliminary references decided by the Grand Chamber of the Court (an indication that the ECJ considered the questions to be of particular importance or difficulty), less than one-third came from courts of last instance. Only two came from constitutional courts. The reference in *Åkerberg Fransson* came from the Haparanda Tingsrätt, a district court in a town of around 5000 inhabitants on the Finnish border. Admittedly, some national constitutional courts may have preferred that reference never to have been made, but it seems difficult to deny the constitutional significance of the questions submitted to the ECJ.

143. See Monica Claes & Maartje de Visser, *The Court of Justice as a Federal Constitutional Court: A Comparative Perspective*, in *FEDERALISM IN THE EUROPEAN UNION* 83 (Elke Cloots et al. eds., 2012).

144. *A v. B and Others*, Case C-112/13, [2014] E.C.R. I _____ (delivered Sept. 11, 2014) (not yet reported).

145. Opinion of Advocate General Bot, *A v. B and Others*, Case C-112/13, [2014] E.C.R. I _____ (delivered Apr. 2, 2014).

cases, which may have been an important driving factor for that court to hold that ordinary courts were under a duty to refer to it.

CONCLUSION

In the early days of European integration, the EU's minimal protection of fundamental rights was an argument often invoked against the claim of absolute primacy of EU law over national law. Today, too much protection of fundamental rights by the EU is invoked as a threat to the constitutional identity of the Member States and, as a consequence, also as a potential reason to reject the primacy of EU law.¹⁴⁶ There are, however, no compelling reasons why the ECJ should change its course significantly. The risk that, in pursuing the current course of action, it might crush the vibrant development of fundamental rights at the national level seems less important on closer inspection than it may appear at first glance and can be countered by a sufficiently flexible approach that the ECJ has so far been quite willing to take.

¹⁴⁶ Angela Ward has already pointed to this irony. See Ward, *supra* note 12, at ¶ 51.123.