THE IMPLEMENTATION OF EUROPEAN UNION LAW BY MEMBER STATES UNDER ARTICLE 51(1) OF THE CHARTER OF FUNDAMENTAL RIGHTS

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The precise scope of application of the Charter of Fundamental Rights of the European Union is, in many respects, still uncharted. In particular, it remains largely unclear to which national measures the Charter applies. The relevant instruction contained in art. 51(1), referring to the elusive concept of the “implementation of EU law,” has so far resisted all hermeneutic efforts. As a result, it is difficult to predict whether or not a domestic measure that has legal effects touching upon the sphere of matters regulated by EU law, but that was not adopted to implement EU law directly, will be bound by the Charter. This article traces this state of legal uncertainty to the ambiguous case law of the Court of Justice, which has hesitantly confirmed case law on the application of fundamental rights to national measures as general principles of EU law, and, lately, has sought refuge in the equivalence between the application of the Charter and the application of EU law at large (Fransson, Texdata). It is argued that this minimalist approach simply begs the question of whether or not EU law applies in any specific case, a gateway question that the Court of Justice has been historically ill-equipped to answer. This congenital difficulty has carried over in the interpretation of art. 51(1) of the Charter, and has, so far, left national judges without guidance, an undesirable result for the consistent application of fundamental rights across the Union and its Member States. The analysis is updated as of the Siragusa order of March 2014, which seems to call into question the Fransson precedent, and proposes a new composite test, inspired by several cases of the 1990s.

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I. INTRODUCTION

On December 19, 2013, the Outer House of the Scottish Court of Session issued a decision on a claim based on a peculiar combination of legal issues. Three of them are familiar to anyone even perfunctorily interested in the public debate on UK law: the right of prisoners to vote, the Scottish independence referendum, and

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1 The supreme judicial tribunal in civil matters, which serves as the jurisdiction of first instance.
the bearing of EU law on the protection of fundamental rights. For purposes of this article, one particular element of the claim is of interest. It can be summarized as follows: petitioners argued that Scottish law, which hinders prisoners’ right to vote in the forthcoming referendum on Scottish independence from the United Kingdom, deprives them of the right to influence the possible withdrawal of Scotland from the EU. Since Scotland’s membership in the EU is a precondition for Scottish nationals to have EU citizenship, the prohibition is vested with an EU law dimension and contradicts art. 20 TFEU, which lists the rights accruing to EU citizens.

Lord Glennie, who wrote the opinion, addressed this claim by examining the link between the Scottish provision and EU law in terms of proximity. He distinguished the case of the petitioners from the situation in Rottmann, in which the Court concluded that national measures fall within the scope of EU law—and the jurisdiction of the ECJ—when they affect directly an individual’s right to EU citizenship. Glennie’s opinion reasoned that “[t]he independence referendum relates to the internal affairs of the United Kingdom. What may follow upon the result of the referendum is a matter one or more steps removed from that.”

On a previous occasion, the UK Supreme Court had reached a similar conclusion with respect to a claim brought by the same petitioners. Lord Mance concluded that art. 20 TFEU or arts. 39 and 40 of the Charter do not bestow any enforceable electoral rights on EU citizens. These provisions only guarantee non-discriminatory enjoyment of voting rights of nationals and EU citizens residing outside of their home countries. Because EU law creates no rights for the individual, national laws that hinder the exercise of voting rights cannot be reviewed against the EU benchmarks of fundamental rights protection.

Earlier in 2013, the same petitioners had failed to convince the Scottish Court of Session that the Scottish rules on legal aid could be reviewed under EU law (in particular art. 47(3) of the Charter). In their pleadings, the application of EU law, without which the matter would be classified as purely internal, depended on a thin chain of causal links: refusal to provide legal aid might result in a criminal conviction and, since detainees cannot vote in local and European elections, it might deprive EU citizens of the enjoyment of voting rights conferred by art. 20(2)(b)

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4 The petitioners also challenged the Scottish provisions for incompatibility with the ECHR, namely Article 10 (freedom of expression) and Article 3, Protocol 1 (right to free elections). The ECHR challenge is not discussed in the present article, nor are the germane claims based on the ICCPR and on common law.
6 Moohan, (2013) CSOH 199, ¶ 90 (Scot.) (emphasis added). The court reasoned that “[F]or EU law to apply there has to be an established factual link with a matter covered by EU law, here the alleged potential loss of EU membership and/or EU citizenship. Even putting the petitioners’ case at its highest, I do not accept that that factual link has been established.” Id. at ¶ 91.
8 See id. at ¶ 59.
TFEU, as well as by arts. 39 and 40 of the Charter. Lord Brodie dismissed this claim, but did not assess the relevance of EU law, as construed by the fragile sequence sketched above. He limited himself to noting that the right enshrined in art. 47(3) of the Charter could tolerate reasonable restrictions. For this reason, it could not be considered whether the Scottish practice in the allocation of legal aid could breach the Charter or whether its provisions applied in casu.

These are only three examples, but they illustrate a rising trend and an ongoing problem: the attempt of individuals to practice “charter-shopping.” Multiple instruments promise to take care of the protection of the same rights, with varying degree of effectiveness and through different procedural pathways. This multiplicity encourages the reframing of individual claims so as to make sure that no human-rights-stone is left unturned. The problem is one of legal certainty. The Court of Session has based its assessments regarding the application of EU law alternatively on a value judgment (EU law is too far removed from the matters at hand) or on a reasoning arguendo (EU law would not serve the claimants, even if it applied). The UK Supreme Court on the other hand, has managed to spare the English provisions from the EU-law review only by boldly denying the direct effect of art.20(2)(b) TFEU, and rushing to clarify arguendo that, at any rate, EU law did not outlaw legitimate restrictions such as those provided for by English law, and, in any event, the breach attributable to the UK would not be serious enough to engage its liability for breach of EU law. It follows from these pronouncements that assessing whether or not domestic measures engage EU law is far from a perfect science.

The present article sets out to explore precisely the issue of the consequence of EU law obligations on national measures, and, more specifically, the application of the EU Charter of Fundamental Rights to acts of the member states. The purpose is to highlight the troubles that domestic courts and private parties face in domestic proceedings in which EU fundamental rights are leveraged against state measures. The status of ingrained uncertainty, to which the Court of Justice has contributed by failing to tackle it head-on and bring clarity to the interpretation of art. 51(1) of the Charter, has severe repercussions for the efficiency and predictability of human rights protection in domestic jurisdictions.

It is also argued that the difficulty with the interpretation of art. 51(1) of the Charter is the result of a wider dormant doctrinal problem: the lack of a precise test for determining the inadmissibility of preliminary questions for lack of connection with EU law. If this technical aspect has gone unnoticed until recently, it is because EU Courts can dispose of defective or groundless claims by making use of considerable procedural flexibility. Now that the precise link between national measures and EU law is under strict scrutiny because it triggers the application of the Charter, national and EU courts are forced to improvise and reverse-engineer a

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10 See id. at ¶ 73.


general theory on the application of EU law to domestic measures starting from the “implementation” riddle of art. 51(1) of the Charter. The latest attempts by the Luxembourg Court, resulting in the shallow Fransson/Textdata equivalence-based test and the elusive exception of Siragusa (considered below), have yielded unsatisfactory results.

Part 2 of this article describes the relationship between EU law and the protection of fundamental rights, as well as the role of domestic norms in the judicial review of EU acts for compliance with fundamental rights. Part 3 describes the debate in the scholarship relating to the interpretation of art. 51(1) of the Charter and the distance dispute between the ECJ and the German Constitutional Court on this provision. Part 4 shifts the point of view to the national milieu, and clarifies why a better definition of the “implementation” test is crucial to ensuring the efficient work of national jurisdictions in applying EU law’s fundamental rights. Part 5 suggests a theoretical explanation of the systematic inability of the ECJ to provide a better test and gives a critique of the Fransson doctrine.

II. THE EUROPEAN UNION, DOMESTIC MEASURES AND HUMAN RIGHTS

A. Human Rights, General Principles of EU Law and the ERT and Wachauf Doctrines

Under the doctrine of primacy, when there is a conflict between national law and EU law, EU law will apply and domestic law will not. This protocol was developed to ensure the uniform application of EU law across the member states, as an insurance policy against the potential fragmentation that would inevitably arise if each member state could decide the effects of EU norms within its jurisdiction. When EU law confers rights that are unconditional and sufficiently precise, its norms acquire direct effect, and individuals can invoke them in domestic proceedings. In turn, national judges are required to set aside national norms that violate EU law, even if the former are of constitutional stature.

The story of how EU law has come to take human rights seriously is well-known. Very roughly, it became clear that the economic focus of Community law would not prevent possible encroachment on fundamental rights of the individual, including the right to property, which is at the core of the common market. Because of the primacy-plus-disapplication combination noted above, member states’ courts—in particular, constitutional tribunals—stood up to avert the possibility that human-rights-blind Community law could displace fundamental rights guarantees.

The risk was that the uniformity of EC law would be hostage to national preferences. To defuse this risk, the ECJ issued a reassurance and a promise. The reassurance was that Community law was inherently compatible with fundamental rights, in the form of general principles. The promise was that the ECJ would be tasked with reviewing, centrally, the validity of EC measures in relation to these ingrained principles, without any need for national courts to subject them to peripheral human-rights review.17

To keep up with the promise to monitor and police EC law’s human rights-compliance, the ECJ has had to update and perfect their reassurance that national standards were not needed. Over the decades, the case law has taken up several fundamental rights, clarified their scope, and reviewed the validity of EC law in new light. Famously, this effort has earned the ECJ a benign presumption of “equivalent protection” from the German Constitutional Court, which declared that the maturity of the EC system of safeguards rendered an anxious review by national watchdogs unnecessary (Solange II).

EU general principles, including fundamental rights, do not apply in principle to national measures, which are covered instead by the domestic constitutions and by the ECHR. However, the symbiotic relationship18 between the EU and national members’ legal orders sometimes makes it difficult to distinguish what belongs to the EU and what does not. Domestic judges are undoubtedly also the common judges of EU law, and EU law is undoubtedly part of the domestic legal system, whether it has direct effect or not. Could it be that some national measures are, to some extent, part of EU law, and that Member States’ institutions, in certain circumstances, must be treated as EU bodies? If the answer to these questions is yes,19 then the general principles also apply to the acts of member states when they pass measures that take up, in some way, the substance of EU law.

In fact, there is a situation in which Member States are treated as EU bodies (and national measures as EU measures): when Member States act to secure the domestic implementation of Union law. This situation is sometimes referred to as agency: the Member State is an agent of the EU and acts on its behalf. Therefore, the constraints applicable to the principal apply to the agent. When acts of the Member States are ultimately attributable to the EU, the fundamental rights apply as they normally do to EU measures.

Along these lines, the ECJ has confirmed that EU general principles apply to Member States when they “implement Community rules” (Wachauf).20 Likewise, Member States are bound by the general principles when they pass measures that

19 National courts are, without doubt, part of the EU judiciary. See Allan Rosas, The National Judge as EU Judge: Opinion 1/09, in CONSTITUTIONALISING THE EU JUDICIAL SYSTEM, ESSAYS IN HONOUR OF PERNILLA LINDH 105–21 (Pascal Cardonnel, Allan Rosas, Nils Wahl eds., 2012).
derogate from EU law (ERT)\textsuperscript{21} Whether the derogation occurs under an express exception made available by EU law (e.g., that of art. 36 TFEU, or a specific exception in a regulation or directive that authorizes Member States’ non-compliance with certain obligations)\textsuperscript{22} or is taken in view of a general interest or a mandatory requirement, acts implementing such derogation must comply with EU general principles. As was recently noted in a comment to the N.S. case,\textsuperscript{23} the freedom of the national lawmaker resulting from an express authorization laid down in [EU law] is subject to restrictions resulting from the necessity to respect the fundamental rights’ guarantees.\textsuperscript{24}

Whenever the Member States enjoy some discretion in implementing EU law, there is the possibility that their actions entail a breach of fundamental rights that was not necessitated by the EU source.\textsuperscript{25} Since the agent’s freedom to choose the preferred methods of adoption cannot include the freedom to breach the rules binding the principal, the EU is concerned with the conduct of Member States in the implementation scenario, and is therefore entitled to review implementing acts. This monitoring task is intended to ensure that perfectly legitimate EU law does not generate illegitimate implementing consequences, as far as compliance with fundamental rights is concerned. The classic example is that of directives, which, by definition, require implementing domestic legislation to operate. In particular, when directives bring about a level of minimum harmonization between national regimes, Member States must bear in mind that, although their implementing discretion can be wide, they must “ensure a fair balance between the rights and interests in question, including the fundamental rights protected by the Community legal order.”\textsuperscript{26}

\textsuperscript{25} See, e.g., Clemens Ladenburger, European Union Institutional Report, in REPORTS OF THE XXV FIDE CONGRESS 141.158 (2012) (“[fundamental rights] should apply not only where the transposing legislator has no margin, but also where it uses options or derogations foreseen in the directive.”). This assumption is unequivocal. For an odd declaration that apparently rejects this possibility, relating to the Framework Decision on the European Arrest Warrant, see Case C-168/13 PPU, Jeremy F. v. Premier Ministre, 2013 WL 613CJ0168, ¶ 47 (May 30, 2013) (“the provisions of the Framework Decision themselves already provide for a procedure that complies with the requirements of Article 47 of the Charter, regardless of the methods of implementing the Framework Decision chosen by the Member States.”).
In sum, EU fundamental rights permeate the actions of the EU and the domestic measures that engage EU law. The following paragraph explains how this arrangement plays out in the age of the Charter.

**B. Enter the Charter, Article 51(1)**

The Charter was originally intended to take stock of the process of incremental development of the rule of (human rights) law of the EU. Its aim was to consolidate and re-organize, in one written instrument the results of the case law and to offer a tangible pledge of the EU’s commitment to abide by human rights obligations when acting within its conferred competences. Adopted as a non-binding declaration in 2000, it was raised to the status of primary law with the entry into force of the Treaty of Lisbon in December 2009. The drafters were overly concerned with the risk of the Charter being used to erode Member States’ competences, and they made it redundantly clear that the Charter would only affect the action of the EU. If anything, the reinforced human-rights straightjacket would limit the EU’s action more than in the past. Several rights and principles of the Charter find no precedent in the case law of the ECJ, while others even expand on that of the ECHR.\(^{27}\)

Because the Charter solidifies the requirement of human rights validity of EU acts, it is primarily intended not to affect national measures. Different from other international human rights treaties, in particular the ECHR, the Charter does not impose fundamental rights obligations on the ratifying states, but only on the EU. In other words, the Charter does not expand the range of competences conferred to the EU, nor does it extend their exercise. Internal measures adopted in the exercise of exclusively domestic competence, therefore, should remain unaffected by the Charter, and, for the most part, this indeed has been the case. However, as was explained above with respect to the general principles of the EU, fundamental rights bind Member States in implementation and derogation scenarios. That is, the Member States, as agents, are bound when they exercise the freedom that the principal (the Union) grants them to perform certain duties, the instructions for which are traceable to EU law. One would assume that this arrangement, applicable to fundamental rights as an unwritten norm, is just as valid for the Charter.

This is precisely the case, as the reading of the first sentence of 51(1) of the Charter reveals:

Field of application. *The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.*\(^{28}\)

This provision confirms that the Charter is just the human rights shadow of Union law, not a self-standing repository of new powers for the Union. Art. 51(2) of the Charter confirms this interpretation: “The Charter does not extend the field of


application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.\textsuperscript{29}

This specification, as has been rightly noted,\textsuperscript{30} aims to prevent bootstrapping attempts worthy of the Baron of Münchhausen (who allegedly pulled himself out of a pond by his own pigtail, though no footage captured the feat). Without art. 51(2) of the Charter, one could argue that the Charter always applies to all national measures, the “implement[ed] Union law” being the Charter itself. For instance, national measures would also comply with the Charter when they regulate the conditions for the exercise of the right to strike, because in so doing they would be implementing art. 28 of the Charter.\textsuperscript{31} Obviously, this is not the case. In order to trigger the Charter, there must be another norm of EU law engaged by the acts of national authorities.\textsuperscript{32} For the sake of simplicity, it will be consistently referred to below as the “trigger EU norm”: the norm that art. 51(1) of the Charter refers to, and which national authorities must implement for the Charter to be engaged. The human rights competence of the court is secondary: it only operates when the Court acts within its primary competence on EU law matters. The trigger EU norm activates the possibility of human rights review.\textsuperscript{33}

The fact that art. 51(1) of the Charter builds on the case law regarding fundamental principles’ application to national measures is evident from the explanations attached by the Praesidium to the Charter, whose authority is expressly vouched by art. 6(1) TEU.\textsuperscript{34} With respect to art. 51(1) of the Charter, the Praesidium observes:

\begin{quote}
\end{quote}

It appears, therefore, that the Charter sanctions the continuity between the pre-Charter and the Charter ages. Art. 51(1) of the Charter condenses two well-
established ideas: fundamental rights operate like all EU general principles\textsuperscript{36} and, therefore, apply to state action when Member States use some measure of discretion in implementing EU law. Accordingly, a closer analysis of the crucial judgments handed down during both eras is provided in the next paragraph.

C. Implementation and Scope of EU Law

The brief reference to \textit{Wachauf} and \textit{ERT}, above, served to specify that these cases envision the application of EU fundamental rights to national measures that, respectively, implement EU law and derogate from it. At a closer look, the contribution of \textit{ERT} is wider, and goes beyond the introduction of the derogation scenario. In \textit{ERT}, the ECJ gave a wider meaning to the “implementation of EU law” formula and held that all national measures are considered to implement EU law when they “fall within the scope of Community law.”\textsuperscript{37} This change in the wording hints at a shift: the focus is not on the aim or effect of the national measure (whether it implements EU law) but on the objective overlap of regulatory regimes (whether the national measure operates within the area affected by EU law).\textsuperscript{38}

The difference can be crucial. As Lord Laws reasoned:

\begin{quote}
On the one hand, a member state may take measures solely by virtue of its domestic law. On the other, a Community institution or member state may take measures which it is authorized or obliged to take by force of the law of the Community. In the former situation I contemplate a measure which is neither required of the member state nor permitted to it by virtue of Community Treaty provisions. It is purely a domestic measure. Even so, it may affect the operation of the common market and, accordingly, be held to be ‘within the scope of application’ of the Treaty[...] In the first situation, the measure is in no sense a function of the law of Europe, although its legality may be constrained by it. In the second, the measure is necessarily a creature of the law of Europe. \textit{Community law alone} either demands it, or permits it.\textsuperscript{39}
\end{quote}

The expansive force exercised by \textit{ERT} on the “implementation” test is evident, and it is sometimes easily accepted. Embracing this wide meaning of art. 51(1) of the Charter, the UK Supreme Court held in 2013:

\begin{quote}
[the Charter] only binds member states when they are implementing EU law - article 51(1). But the rubric, ‘implementing EU law’ is to be
\end{quote}


\textsuperscript{38} In the words of Advocate General Gulmann, to know whether general principles are triggered one must assess “whether [the national measures] are so closely connected to Community law that they fall within [its] scope.” See Case C-292/92, \textit{In re Bostock}, 1993 E.C.R. I-958, ¶ 32 (Opinion of Advocate General Gulmann). The criterion of “close connection,” however, is too vague to bring additional clarity.

interpreted broadly and, in effect, means whenever a member state is acting "within the material scope of EU law".\textsuperscript{40}

The ERT "scope of application" criterion, however, is intuitively in need of further precision, as it was not construed in light of the general categories that Lord Laws borrowed from basic jurisprudence. It cannot mean, obviously, that any national measure that has any link whatsoever to EU law is subject to the application of the general principles of the EU. It is not hard to envision, for any given national measure, a chain of causal, logical, or analogical links that leads ultimately to EU law.\textsuperscript{41} There must be a threshold of relevance for the link to matter, that is, to trigger the application of EU fundamental rights.\textsuperscript{42} A fit early example is the Maurin case (1996), in which the Court held that the mere existence of a directive mentioning labeling was not enough to justify the application of EU fundamental rights in domestic proceedings on the crime of mislabeling.\textsuperscript{43}

This threshold has so far proven elusive, as judges, Advocates General, parties, and scholars have struggled to formulate a better test,\textsuperscript{44} although the third judgment mentioned in the Explanations, Annibaldi, provides at least a minimum indication of which national measures with at least some traceable, trivial link with EU law are nevertheless incapable of engaging EU law general principles (including fundamental rights). The Court held in Annibaldi that:

even if the [domestic act] be capable of affecting indirectly the operation of [a subject matter regulated by the Treaty], it is not in dispute that [. . .] the [domestic act] pursues objectives other than those covered by [the subject matter of the Treaty provision] [. . .]


\textsuperscript{41} This precise concern is expressed forcefully by Judge Rosas. See Rosas, supra note 27, at 1281 ("In the interest of avoiding this risk, it is preferable . . . to use the terminology of Article 51(1) of the Charter rather than that of some of the earlier case law and Article 19(1) TEU (which refers to the ‘fields covered by Union law’, ‘scope of application of Union law’, or the like").


\textsuperscript{43} Case C-144/95, In re Maurin, 1996 E.C.R. I-2914, ¶¶ 10–12. Cf. Case C-276/01, In re Steffensen, 2003 E.C.R. I-3756, ¶ 71. In this case the ECJ was called to assess whether the German rules on the admissibility of evidence in criminal proceedings must be subject to EU general principles (of equivalent protection and effectiveness, \textit{in casu}). The Court confirmed that EU general principles apply to national procedural measures that might frustrate a right granted to the individual by EU law.

Accordingly, as Community law stands at present, national legislation such as [the act at stake] applies to a situation which does not fall within the scope of Community law.45

In Annibaldi, a first definition of what cannot qualify as “implementation” is provided. National norms that affect only indirectly the same subject matter regulated by EU law, and that pursue different objectives, do not qualify under the ERT criterion. This analysis appears more nuanced, and can certainly prove more useful in pinpointing an abstract borderline than the plethora of cases in which the ECJ has simply stated that, since there was no connection whatsoever (no “rattachement”)46 between the situation in the main proceedings and EU law, the national measures engaged would undoubtedly fall outside the scope of EU law.47

A slightly more elaborate test is used in Iida, a judgment in which the ECJ reasoned as follows:

To determine whether [the national measure] falls within the implementation of European Union law within the meaning of Article 51 of the Charter, it must be ascertained among other things whether the national legislation at issue is intended to implement a provision of European Union law, what the character of that legislation is, and whether it pursues objectives other than those covered by European Union law, even if it is capable of indirectly affecting that law, and also whether there are specific rules of European Union law on the matter or capable of affecting it.48

The mention of the Annibaldi doctrine deserves an attentive reading. The Court seems to suggest that the Charter does not apply to a measure affecting indirectly EU law, if “it pursues objectives other than those covered by the European Union law.” A contrario, one could imagine that the Charter applies to national measures that pursue the objectives of EU law, even if they are not designed to implement it (and only affect it indirectly), as well as to measures that, conversely, affect directly EU law, even if they pursue objectives other than those of EU law. In other words, there is enough space to read into Annibaldi and Iida both the upper and the lower limits

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45 Case C-309/96, Annibaldi v. Sindaco del Comune di Guidonia, 1997 E.C.R. I-7505, ¶ 22–24. Although the case is discussed here to demonstrate which cases fall outside the reach of EU law, an a contrario reading of it is equally instructive, and confirms that measures taken within the scope of EU law, but not to execute it, are indeed covered by EU general principles if they simply pursue the same objective pursued by EU law norms. See Ricardo Alonso Garcia, *The General Provisions of the Charter of Fundamental Rights of the European Union* 5 (N.Y.U Sch. of Law, Jean Monnet Working Paper No. 4/02, 2001), available at http://centers.law.nyu.edu/jeanmonnet/archive/papers/02/020401.pdf.


of the concept of implementation under art. 51(1) of the Charter. First, national measures that do in fact have a link with EU law are still not covered by the Charter when the link is too tenuous and there is no correspondence between the purposes of domestic and EU law. Second, and more important for the present discussion, there can be a category of national measures that fall within the scope of EU law and the Charter, even if they do not intend to implement EU law, because they pursue its same objectives. The latter category, inferred from the long checklist of Iida, however, is problematic. In the Polier judgment, the Court appeared to hold precisely that a circumstantial commonality of purposes would not suffice to integrate the “implementation” link: “even if the securing protection to workers in case of dismissal is one way to achieve the objectives of art. 136 TEC [. . .] the situation of the claimant in the main proceedings [. . .] is not governed by Community law.”49

This apparent contradiction is not surprising, and, in any case, the use of a contrario inference would not be an optimal strategy to construe general doctrines.50 The court should undertake the task of clarifying the real boundaries of the ERT criterion, either revamping or jettisoning the Annibaldi-Iida checklists once and for all.51 Instead, the case law is still discouragingly ambiguous, as a comparison between the Fransson/Texdata and Siragusa rulings reveals.

The difficulties inherent in unpacking the ERT requirement (and the corresponding one of art. 51(1) of the Charter) are well expressed by Bot in his Scattolon opinion. Reading ERT into art. 51(1) of the Charter as the Explanations suggest could mean, alternatively, that the Charter applies to a member state only when it “acts as a servant of the Union” (the restrictive interpretation), or that it applies to all situations “in which national legislation falls within the scope of EU law” (the expansive interpretation).52

D. Other Ways to Engage EU Law without Implementation

The discussion above concerned the hermeneutic doubts regarding art. 51(1) of the Charter, i.e., when EU law can be regarded as being directly engaged by a national measure by way of implementation. In addition to the literal scope of art. 51(1) of the Charter, there are at least two well-established doctrines that create a link between national measures and EU law. The first is the prohibition on the exercise of exclusive domestic competences in a way that violates or frustrates EU

51 On the need for further clarity, and on the duty of the Court to provide the necessary guidance, see Case C-617/10, Åklagaren v. Fransson, 2013 WL 610C26017, ¶¶ 33–34, 42–43 (Feb. 26, 2013) (Opinion of Advocate General Villalón).
52 See Explanations of the Praesidium, supra note 32, at ¶ 117.
rights (of citizens) or obligations (of states). The second, which is no more than a specific application of the first, is the doctrine of the genuine enjoyment of EU rights. Both doctrines are mainly relevant in considering applications of the four market freedoms, non-discrimination, and citizenship rights.

The first doctrine aims to preserve the effet utile of these EU rights and, therefore, can be used to disregard formalistic distinctions that would render a national measure obstructing their exercise untouchable only because its subject-matter falls within the competence of the Member States. A classic enunciation of this doctrine is found in Garcia Avello:

Although, as Community law stands at present, the rules governing a person’s surname are matters coming within the competence of the Member States, the latter must none the less, when exercising that competence, comply with Community law [. . .] in particular the Treaty provisions on the freedom of every citizen of the Union to move and reside in the territory of the Member States. 54

The application of this doctrine, according to some, could “topple[e] the limits to jurisdiction that were so carefully established in the Charter of Fundamental Rights, Article 51 and Article 53, according to the consolidated doctrine of [implementation and derogation of ERT and Wachauft].” 55 Read through the lens of art. 51(1) of the Charter, these cases feature a special link between national measures and relevant substantive EU law—the “hindering” link—that is vague enough to allow for expansive readings. The recent case law, in which the Court has repeatedly accorded importance to remote or hypothetical trans-border aspects of a national situation for the purpose of providing a link to justify the application of EU law (movement freedoms and citizens’ rights), 56 is illustrative of a potential dynamic between national measures and EU law. In similar cases, the application of EU fundamental rights would be legitimate, even if the specific situation would not fit prima facie within the agency scheme of art. 51(1) of the Charter or the doctrine of ERT.


56 Among the many cases, see Case C-370/90, The Queen v. Immigration Appeal Tribunal, 1992 E.C.R. I-4288; Case C-200/02, Zhu v. Sec’y of State for the Home Dep’t, 2004 E.C.R. I-9951. For a comprehensive study of how citizenship rights are pushing the boundaries of the scope of application of EU law, see Dimitry Kochenov, A Real European Citizenship: A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe, 18 COLUM. J. EUR. L. 55, 56–109 (2001); Dimitry Kochenov & Richard Plender, EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text, 37 EUR. L. REV. 369, 369-96 (2012).
The other doctrine in question is that of genuine enjoyment, another application of the principle of *effet utile*. It constitutes a natural evolution of the doctrine described above, and applies only in extreme scenarios.

As spelled out in *Zambrano*, this doctrine provides that the genuine enjoyment of citizenship rights must be protected, even in what appear to be purely internal situations. As a consequence, non-EU citizens (in *Zambrano*, the parents, serving as caretakers for their children) enjoy derivative citizenship rights even if the EU citizens (in *Zambrano*, the children) have never exercised their freedom of movement. In principle, EU citizenship rights should not apply to an EU citizen who has never exercised her freedom of movement. In practice, however, they apply if the EU citizen would otherwise be *de facto* and absolutely compelled to leave the EU and, therefore, prevented from enjoying citizenship rights.

For the sake of completeness, another category of cases in which national measures are brought within the reach of EU fundamental rights must be mentioned: the so-called *Dzodzi* line of cases. In these cases, the ECJ has the competence to issue a preliminary reference about national measures falling outside the scope of EU law when either national law or a contract refers expressly to an EU norm. The purpose of this case law is, of course, to promote the Union’s interest that, “in order to forestall future differences of interpretation, provisions or concepts taken from European Union law should be interpreted uniformly,” even when the EU law’s application is determined unilaterally by a Member State or by private parties. It is reasonable to assume that, even in these cases, the interpretation of EU law must be carried out in light of EU fundamental rights. As a consequence, the Charter will be found to apply to national measures, to the extent that they incorporate or make use of other norms of EU law.

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Note that the “compulsion” criterion is interpreted quite strictly in domestic case law. For instance, in two recent UK cases, the courts held that the *Zambrano*-like right to residence for the non-EU carer did not entail a right to social benefits. See *The Queen v. Sec’y State for Work & Pensions*, [2013] EWHC 3874 (Admin); *R v. Sec’y of State for Home & Pensions*, [2013] EWHC 793 (Admin).


58 This well-established principle can create significant differences in treatment, putting those EU citizens who do not move abroad at a disadvantage. For a critique of this somewhat arbitrary discrimination between “the statics” and “the mobiles,” see Jo Shaw, *Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism* 10 (Eur. Univ. Inst., Working Paper No. RSCAS 2010/60, 2010), available at http://cadmus.eui.eu/bitstream/handle/1814/14396/RSCAS_2010_60_corr.pdf (“the ‘static’ European citizen, in contrast to the mobile transnational one, does not seem to derive many benefits from the institution of citizenship as a fundamental building block of the European Union”).


62 See Bas van Bockel & Peter Wattel, *New Wine into Old Wineskins: The Scope of the Charter of Fundamental Rights of the EU After Åkerberg Fransson*, 38 EUR. L. REV. 866, 868 n.10 (2013).
To conclude, one must mention several additional doctrines, which so far have not been endorsed officially, and, therefore, cannot yet be considered good law. The first doctrine is AG Sharpston’s attempt, in her Opinion to Zambrano, to get rid of the implementation trigger and use instead the whole material extent of the competences of the Union as the field of application of fundamental rights. Under Sharpston’s Opinion, regardless of whether the Union has implemented its legislative competence so as to regulate a certain matter and regardless of whether that competence is shared with the Member States, EU fundamental rights shall apply to all situations touching upon the competences of the Union. The second doctrine is the so-called Heidelberg proposal, which builds upon and surpasses the rationale of Zambrano. It maintains that EU fundamental rights should apply in the absence of any link with the implementation of EU law, whenever a purely internal situation threatens the essence of those rights. In extreme cases, the situation cannot qualify as purely internal because its gravity prejudices the Union project, and therefore EU law comes back into play.

III. VIEWS FROM SCHOLARSHIP AND FRANSSON-BVG

The uncertainty surrounding the application of art. 51(1) of the Charter has been expounded in the previous Section. Now the discussion turns to the solutions advanced by the scholarship to overcome this stalling of interpretation (Section 3.1) and to the Fransson case, which appeared to be the perfect occasion to put an authoritative end to these interpretative doubts (Section 3.2). Section 3.3 comments on the German Constitutional Court’s reaction to Fransson, which revived the dormant fight between the Bundesverfassungsgericht and the ECJ.

A. The Scholarship.

Several commentators have risen to the challenge of pinning down the exact meaning of “implementation” in art. 51(1) of the Charter, in an attempt to provide a reliable test that could moderate the haphazard outcomes of the ERT case law. In

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63 Id.
65 The proposal also recalls the words of Advocate General Maduro in Case C-380/05, Centro Europa 7, Srl v. Ministero delle Comunicazioni e Autorità per le Garanzie nelle Comunicazioni, 2008 E.C.R. 1-349, ¶¶ 17–22.
66 Because of its presumption-exception dynamics, this proposal was labeled reverse-Solange, hinting at the comparable doctrine used by the German Constitutional Court to monitor the level of protection of fundamental rights within the EU order. Likewise, the ECHR has adopted a similar approach with respect to the EU, since the Bosphorus ruling.
68 For a fuller overview of the literature, see Réflets, Édition Special, Charte des Droits Fondamentaux de L’Union Européenne, No. 1/2013, available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-03/13_reflets1.pdf. The careful reader will not fail to notice that several authors cited work at the ECJ, as judges, Advocate Generals or référendaires. If anything, this is testimony to the importance and urgency of the question: even if the Court as such professes confidence and promotes a conservative case law, the fact that several of its members still deem appropriate to
the following section, some scholarly works will be singled out to trace the boundaries of the debate. Other contributions, of no less importance, will be referred to *ad hoc* throughout the remainder of the article.

It is apt to begin with the views of Ladenburger, which mirror the cautious approach held by the Commission. Ladenburger maintained that the relevant trigger for application of the Charter is the existence of a “sufficiently specific link between the national act at issue and a concrete norm of EU law applied.”69 Consciously of the value-judgment inherent in the reference to “sufficient specificity,” he listed some situations in which the link is not sufficiently specific to provide some exemplary guidelines: when states transposing directives add national provisions “not induced by the directive”; when EU law requires generally that national measures be “compatible with the Treaties” without further specifications; when national measures implement a specific equality right (that is, that right is applicable, but other equality rights and the Charter at large will not necessarily be applicable); when a national norm mentions generically a fundamental right included in the Charter, without referring expressly to its EU incarnation.70 Ultimately, Ladenburger held that, for lack of a more sophisticated test that could reliably determine, under the scope of EU law, applicable acts other than implementing and derogating ones, the applicable test is still the ERT. The emergence of a hypothetical ERT-plus test, he pondered, could “only be contemplated if really there were a convincing justification for adding fundamental rights protection at EU level and if a concrete, manageable definition of the acts covered could be found.”71

Another voice worth considering is that of Judge Lenaerts, a towering scholar and current vice-President of the Court. In a careful study on the limits on the application of the Charter, he observed that the implementation situation under art. 51(1) of the Charter arises when national measures are taken by the Member State to “fulfil an obligations imposed by EU law.”72 Keeping the existence of an EU obligation as the decisive criterion, he set out to show that the ECJ, from Annibaldi up to Dereci,73 has consistently refused to apply both the Charter and general principles when EU law imposes no obligation on the Member State.74 Whereas

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69 Id. at 16 (emphasis in the original).
70 Ladenburger uses Case C-482/10, Cicala v. Regione Siciliana, 2011 WL 610CJ0482, ¶¶ 21–30 (Dec. 21, 2011), to illustrate this situation. In this case, the referring court attempted a Münchausen strategy, arguing that the national measure implemented the same Charter provision against which it had to be reviewed. Similarly, the court dismissed for lack of jurisdiction the preliminary question in Joined Cases C-267/10 & 268/10, Rossius v. Belgium, 2011 WL 61000267, ¶ 16 (May 23, 2011), noting that the provision of the Charter invoked could not found the preliminary jurisdiction of the court, in the absence of a link with some other EU act (“L’attribution d’une valeur contraignante à la charte des droits fondamentaux n’emporte pas davantage de conséquences quant à la jurisprudence relative à la compétence de la Cour pour connaître d’une requête”).
performance of an EU obligation is certainly an instance of implementation, it is argued that the test is incomplete: the Charter also applies in cases where the measure does not fulfil any EU obligation but nevertheless falls under the scope of EU law. First of all, it is well-established that the Charter applies to measures that, far from effecting EU obligations, violate them. In addition, there are cases (see for instance N.S. and the other cases adduced by Judge Safjan, below) in which the national measure operates within the legal sphere created by EU law, but relates to the discharging of EU law obligations only indirectly. Conversely, there appear to be cases where obligations stemming from EU law were actually at stake, but the applications of the Charter to the national measures were not granted.

A similar view is adopted by Judge von Danwitz, writing on his own and together with Paraschas. He confirmed the validity of the implementation/derogation test and held that the “other situation cannot be relevant to the scope of application of the Charter, even when the measures adopted by the member states are situated within a field regulated by the Treaties.” He and Paraschas, however, noted that the range of measures affected by EU law is so wide that all situations “that involve national measures determined by obligations under Union law will fall within the Charter’s scope.” Conversely, national measures “liable to have an impact on have an impact on the national authorities’ obligation[s]” under EU law must be subjected to general principles.

Judge Safjan, on the other hand, observed, with the keen eye of an entomologist, the existence of new species of qualifying national measures, which could not be reduced to the typical implementation/derogation model. These are:

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75 See supra notes 53 and 54, and accompanying text.
76 Moreover, the Dereci case does not appear as a valid prototype of the ECJ’s stand in borderline situations. In Dereci, the Charter did not apply simply because the situation bore no connection with EU law. Rather, the uncertainty was about the potential application of the Zambrano doctrine of the genuine enjoyment of EU citizenship rights, which the Court ultimately discarded.
77 Van Bockel & Wattel, supra note 62, at 878. They refer to the Court’s order in Case C-128/12, Sindicato dos Bancários do Norte v. Banco Português de Negócios, SA, 2013 E.C.R. I-0000 (Mar. 7, 2013), which concerned wage cuts in the public sectors which, apparently, were carried out to discharge the obligations flowing from art. 3(6) of the Council Decision 2011/344/EU, On Granting Union Financial Assistance to Portugal, 2011 O.J. (L 159) 88.
78 See the transcript of his remarks, Judge Thomas von Danwitz, Rapport Général, available at http://www.juradmin.eu/seminars/DenHaag2011/Gen_Report_fr.pdf, where the opinion of Judge Prechal and of Mr Romero (Commission) are also reported. They seem to discard the necessity of a third category of cases beyond ERT and Wachauf.
79 Id. at 9 (own translation from French).
81 Joined Cases C-286/09, C-340/09, C-401/09 & C-47/09, Molenheide v. Belgian State, 1997 E.C.R. I-7281, ¶ 45. This passage, quoted by AG Sharpston in Case C-427/06, Bartsch v. Bosch und Siemens Hausgeräte, 2008 E.C.R. I-7245, ¶ 69, is used by Kaila, supra note 74, to support the equivalence between the scope of application of EU law and that of the Charter.
82 See Safjan, supra note 24.
the exercise of a discretionary power expressly allowed by a regulation (which by definition would need no implementation, but sees, in any case, Member States acting as “trustees” of the Union, a narrower concept than “agents”); the domestic rules on the grant of legal aid (in proceedings on state liability for breach of EU law, a lack of legal aid could frustrate the EU-derived right to compensation); the national measure governing a precondition for the enjoyment of protection granted by a regulation (namely, the right to parental custody, a precondition for protection against illegal removals of children). Safjan detected the “gears” that ensure the engagement of EU law in these cases (the effet utile; the EU law’s reference to domestic measures, which creates a functional relationship or a link of complementarity between the two). He concluded that “the scope of application of the Charter [is] significantly broader than the field of direct application of European law or its formal, technical implementation in national law.” He went so far as to say that, with the support of these recent judgments, the Charter can apply outside the reach of legislative acts of the Union, provided that some connection to them exists and so long as EU law offers some guidance to the Member States regarding the exercise of delegated powers. This occurs when the Court warns the Member States that although EU law expressly grants to them some margin of action, domestic measures must still conform to fundamental rights and general principles. A fourth, atypical category of qualifying measures could be added, as discussed by Groussot, Pech and Petursson. They observed the case law on Directive 2000/78

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84 See Case 804/79, Commission v. United Kingdom, 1981 E.C.R. 1045, ¶¶ 23–30, for an early example of the member states’ obligation to comply with the general principles of the EU when making use of the power to act unilaterally conferred upon them by the EU. This passage is also used by Kaila, supra note 74, to show that national measures fall within the scope of EU law when there is a specific obligation deriving from EU law.

85 A similar approach, referred to as a Directive, is used in Case 276/12 Sabou v. Finanční ředitelství pro hlavní město Praha, 2013 WL 612CJ0276, ¶¶ 42–43 (Oct. 22, 2013) (Opinion of Advocate General Kokott) (“Member states equally implement EU law when they make use of a facultative power granted by EU law, as the one granted in the framework of Directive 77/799 on mutual assistance. . . . If a member state acts on the basis of EU law, by so doing it implements EU law just as well, even if the latter does not impose on the state any obligation.” (own translation)). This view is implicitly confirmed in ¶ 38 of the judgment, in which the ECJ confirms that the EU fundamental right to defence applies to member states when they “take decisions which come within the scope of European Union law.”

86 This new “implementing” link was repeatedly invoked in the recent cases mentioned in the introduction (on prisoners’ voting rights in the UK).

87 Safjan, supra note 24, at 11–12.

88 Id. at 11.

89 Id. at 13 (“This connection should be confirmed by the existence of a norm of European law defining express boundaries in which the national lawmaker, although outside the framework of transposition, establishes its own regulation.”). This specification would be sufficient to distinguish N.S. from Gueye, where the discretionary action taken within the subject matter of a Framework Decision was considered to fall outside the application of the Charter, because the EU instrument did not delimit the members’ autonomy with respect to national measures like the one at issue.

90 He mentions Joined Cases C-611/10 & C-612/10, Hudzyński v. Agentur für Arbeit Wesel - Familienkasse, 2012 WL 610CJ0611 (June 12, 2012) (on non-discrimination in the grant of child benefits to immigrant workers), and Case C-329/11, Achughbabian v. Préfet du Val-de-Marne, 2011 WL 611CJ0329, ¶ 49 (Dec. 6, 2011) (on the need for member states to respect fundamental rights when laying down criminal sanctions for illegal immigrants, as expressly allowed for by Directive 2008/115), to support this opening occurring in the case law.

(on non-discrimination in the workplace) in cases such as Mangold, Bartsch, Kucukdeveci, Römer. In these cases, the Court declares that the national measures contested are brought under EU law (specifically, under the general principle of non-discrimination) by means of the expiry of the Directive’s transposition period. They infer from these precedents that, irrespective of a link of implementation or connection between national measures and EU law, the former will engage the latter automatically every time an act of EU secondary legislation enters into force and regulates the same areas of competence, thus “bringing” the national measures within the scope of EU law. Once EU law has planted its flag on a subject matter through the adoption of secondary legislation, “a national measure should fall within the scope of Union law wherever it is linked to the application, enforcement or even the sole interpretation of EU secondary legislation.” This claim is compelling even now that the ECJ has declared that—without prejudice to the case law on non-discrimination—art. 27 of the Charter cannot have horizontal direct effect. In fact, this did not prevent the Court from acknowledging that “Article 27 of the Charter is applicable to the case in the main proceedings,” triggered by a (badly-transposed) Directive.

Peers apparently agrees with this case-by-case approach, according to which the Charter does not apply exclusively in cases of implementation stricto sensu. In his view, however, nor can it apply due to the mere fact that the Union has a competence in the regulatory field in which the national measures operate (a simplifying proposal advanced by AG Sharpston in her Opinion to Zambrano). The necessary premise for the Charter to apply is that the national measure regulates matters falling within the scope of EU law (ERT). From there, one must ascertain whether EU law does (or can) harmonize national action, and/or whether respect for EU law or fundamental rights requires that the exercise of State powers be subject to some limit. If so, then EU fundamental rights can apply to national measures, because the trigger EU norm is genuinely engaged.

Finally, one should mention the position of those like Judge Rosas; his former référendaire, Kaila; current référendaire Sarmiento (working with AG Cruz Villalón, who also battled—and lost—with art. 51(1) of the Charter, see below); and President Skouris, who root their extra-judicial analysis of art. 51(1) of the Charter on an obvious assumption: since the Charter is but the human-rights shadow of Union’s acts, the scope of application of the Charter is exactly the same as that of

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94 Grousot, supra note 91, at 36.
96 See Association de Médiation Sociale, 2014 WL 612CJ0176.
EU law. Kaila’s concern is to demonstrate *per absurdum* that the Charter cannot have a narrower scope of application than EU law at large, as this would entail paradoxical consequences. Skouris’s opinion will be analyzed below, in Section 5, within the critique of the *Fransson* judgment, which seems to run counter Rosas’s warning signal. For the time being, suffice it to say that this view is formally unexceptionable, but, like all syllogisms, its contribution to knowledge is of a deductive kind. The equivalence doctrine, which the Court validated in *Fransson*, has a certain analytical appeal, but ultimately fails to bring additional clarity to the current situation. Sarmiento’s position is more focused on the outcome of *Fransson*, and will be mentioned below.

B. The *Fransson* Case

1. The Background

The *Fransson* judgment is the text of reference for understanding the current status of the “implementation” doctrine. Because the situation in the main proceedings seemed to have only a remote but undeniable connection to EU law, the submission of the preliminary question to the ECJ made immediately clear that the answer would have to tackle head-on the ERT doctrine. The ECJ was, therefore, expected to clarify whether or not measures that are not directly “implementing” EU law are, nevertheless, subject to the Charter when they operate within the scope of application of EU law, as well as whether or not an indirect relation between the national measure and the trigger EU norm could suffice for this purpose.

The facts of the main proceedings deserve a close look. With respect to tax crimes, Swedish law provides that fiscal fraud can be sanctioned through penalties issued by the Tax Authority and through criminal prosecution. Fransson was found guilty of providing false information in the tax returns and therefore evading the relative income tax and VAT. The Tax Authority ordered him to pay a tax surcharge and criminal proceedings were launched against him. Fransson invoked the principle of *ne bis in idem* of art. 4 of Protocol no. 7 to the ECHR and art. 50 of the

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98 Vassilios Skouris, *Développements Récents de la Protection des Droits Fondamentaux dans l’Union Européenne: Les Arrêts Melloni et Åkerberg Fransson*, *IL DIRITTO DELL’UNIONE EUROPEA* 229–43 (2013); Kaila, supra note 74; Rosas, supra note 27.

99 Kaila, supra note 74, at 735. Namely these unacceptable consequences would be that: (i) EU institutions and national bodies would be under different human rights obligations when interpreting the same EU acts; (ii) Charter’s rights would have a different scope of application from that of general principles, citizenship rights and non-discrimination; and (iii) EU-law rights would be subject to different (and possibly unfavorable) procedural rules only because the member state has not implemented them through a domestic measure, in breach of the principles of effective and equivalent protection.

100 Rosas, supra note 27, at 1284 (“the test is *not* satisfied by the simple fact that it is possible to cite a norm of Union law which on substance covers the same subject area as is at issue in the actual case”).


Charter and asked the District Court to dismiss the criminal case, because he had already been sanctioned for the same misconduct.

The link between the main proceedings and EU law was allegedly the presence of the VAT, which EU law regulates in secondary legislation and whose collection is the subject of specific obligations set in the Treaties which Member States must discharge in the spirit of loyal (“sincere”) cooperation.\(^{103}\)

Consider the 2012 judgment in \textit{Belvedere Costruzioni}.\(^{104}\) The Court declared that, under the Sixth VAT, Directive Member States enjoy a measure of latitude with respect to the means used to ensure the compliance with VAT obligations of taxpayers.\(^{105}\) That notwithstanding, such latitude is “limited by the obligation to ensure effective collection of the European Union’s own resources.”\(^{106}\) That obligation, in turn, cannot run counter to art. 47 of the Charter.\(^{107}\) In other words: national discretionary measures in the field of VAT collection fall under the reach of a triggering EU obligation\(^{108}\) and, just like the obligation, must be respectful of EU fundamental rights.

2. The AG’s Opinion and Rosas’s Warning

AG Cruz Villalón, in his Opinion, frankly acknowledged the unresolved issue of the interpretation of art. 51(1) of the Charter and set out to design a new analytical framework capable of anchoring its application to solid theoretical ground.\(^{109}\) He proposed to read into art. 51(1) of the Charter the implicit requirement of a “specific interest” on the part of the Union to review certain national measures in light of EU fundamental rights.\(^{110}\) Only when such an interest exists is it possible to justify an exception to the default principle that national authorities have the exclusive power to review the legality of domestic acts. In other words, there is genuine “agency” only when the principal retains the responsibility for the acts of the agent,\(^{111}\) and this, in turn, occurs every time the Union has a particular interest in imposing its

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\(^{103}\) See TEU art. 4(3); Council Directive 2006/112/EEC, On the Common System of Value Added Tax, art. 2, 250(1) & 273, 2006 O.J. (L347) 1; TFEU art 325. To give some examples in the case law of the application of EU general principles to domestic measures on the VAT, consider the opposite results reached in Case C-85/97, Société Financière d’Investissements (SFI) v. Belgian State, 1998 E.C.R. I-07447, ¶ 31 (which confirmed that, since VAT is “incontestably a matter governed by Community law,” national measures must comply with the EU general principle of equality) and Case C-36/99, Idéal Tourisme v. Belgian State, 2000 E.C.R. I-06049, ¶¶ 35–38 (in which the fact that the Sixth Directive had not yet fully harmonized certain aspects of the VAT national regimes relieved states from complying with the EU principle of equality when regulating those aspects).


\(^{105}\) Id. at ¶ 21.

\(^{106}\) Id. at ¶ 22.

\(^{107}\) Id. at ¶ 23.

\(^{108}\) As it was made clear also in the context of an infringement procedure like that of Case C-132/06, Commission v. Italy, 2008 E.C.R. I-547, ¶¶ 37–39.

\(^{109}\) Fransson, 2013 WL 610CJ0617, at ¶¶ 33–34, 42–43 (where the Advocate General highlighted the necessity that the case law bring some clarity in respect to the protean wording typically used to apply TEU art. 51(1)).

\(^{110}\) Id. at ¶ 41.

\(^{111}\) Id. at ¶ 37.
centralized view for the sake of greater uniformity in the application of its general principles.

Without a “specific interest” of EU law, the subject-matter overlap between EU law and domestic measures would be insufficient to allow for the application of the Charter; it would just be a coincidence, even when national measures are “used to secure objectives laid down in Union law.” In the case at hand, for instance, the AG saw no interest on the part of the Union in ensuring that sanctions imposed by the Member States against VAT evasion be in compliance with EU principles, and warned the Court to refuse application of the Charter to the Swedish measures at issue.

Before turning to the Court’s decision, it is instructive to read Judge Rosas’ thoughts before its delivery, contrasting the situation of Fransson to those of cases N.S. and McB. He perceptively noted that in the latter cases, the triggering effect of the two Regulations derived from their relevance in concreto: the Regulations contained norms capable of affecting the outcome of the main proceedings, quite apart from a real link of “implementation.” He therefore argued that this applicability in concreto of the trigger EU norm should be retained as the decisive benchmark for the purposes of art. 51(1) of the Charter. This approach would prevent the occurrence of situations in which the “scope of application EU law” would cover unconditionally all national measures governing matters affected, in one way or another, by EU law. As an example of the possible application of this criterion, Rosas adduced the Fransson case, then still pending, in which the trigger EU norm invoked would have had only an abstract relevance: “a provision of Council Directive 2006/112 … is cited but does not seem to be directly relevant for the outcome of the case.” He also issued an admonishment: if trigger EU norms relevant only in abstracto were sufficient to engage the Charter’s application to national measures, “[this] wider approach could easily lead to a situation where the Charter is almost always applicable, with the further consequence that the Union Courts would become something close to human rights courts with an almost general competence to apply fundamental rights.”

3. The Decision

The Court disagreed with the Advocate General, and, more importantly, seemed unimpressed by his theoretical effort, which was not echoed in the decision. The judgment joins the questions regarding the application of the Charter with the ascertainment of its jurisdiction to issue a preliminary ruling. The ECJ’s competence to answer the questions raised depended, naturally, on the application of EU law and, in turn, “[t]he applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.” The Court confirmed that the

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112 An occasio, in Latin, as opposed to a causa (cause). See id. ¶ 61.
113 Id. at ¶ 60.
114 Id. at ¶ 63.
115 Rosas, supra note 27, at 1280.
116 Id. at 1280, n.49.
117 Id. at 1281.
application of EU law and the application of the Charter are coextensive. This equation is referred to, throughout this article, as the “Fransson equivalence” (or “equation,” or “parallel”).

In using the Fransson equivalence as a starting point, the Court elegantly got rid of two lingering doubts, namely whether the scope of application of general principles could be wider than that of the Charter (no, they are the same) and, in particular, whether the “implementation” test under art. 51(1) of the Charter implied a narrowing of the ERT test (no, in fact every time EU law is engaged by a national measure the Charter applies; the implementation link must be interpreted widely).

The Court turned then to the trigger EU norms invoked by Fransson to unleash the Charter’s guarantee of ne bis idem. In short, the judgment notes that the VAT is one of the main sources of funding for the EU’s budget and that, therefore, an efficient system of collection and of deterrence against evasion at the national level is fundamental to preserve the financial interests of the Union. Incidentally, the Treaties require member states to “counter fraud and any other illegal activities affecting the financial interests of the Union.” Accordingly, the ECJ completed the syllogism, finding that tax penalties and criminal proceedings for tax evasion, such as those to which the defendant in the main proceedings has been or is subject because the information concerning VAT that was provided was false, constitute implementation of Articles 2, 250(1) and 273 of Directive 2006/112 … and of Article 325 TFEU and, therefore, of European Union law, for the purposes of Article 51(1) of the Charter.

Because EU fundamental rights obligations apply to national measures falling within the scope of EU law (ERT), the fact that the Swedish measures were not intended to transpose Directive 2006/112 was considered irrelevant, because their application was nonetheless “designed to penalise the infringement of that directive” and, therefore, “intended” to implement the obligation to preserve the Union’s financial interests through deterrent measures. The Charter, the Court concluded, applies to the Swedish system.

The ECJ then held that the practice whereby Swedish courts can set aside national provisions in breach of ECHR obligations only when the conflict is “clearly supported” in the Convention or the case law of the ECtHR is potentially illegal under EU law. The ECJ considered the question admissible because there are fundamental rights that are common to the Convention and the EU Charter, like that of ne bis in idem. The ECJ recalled that EU law does not regulate the relationship between the Convention and domestic law and reminded the national judge that

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119 See in particular Section V, infra.
121 See TFEU art. 325(1).
122 Fransson, 2013 WL 610CJ0617, at ¶ 27 (emphasis added).
123 As to whether the ne bis in idem principle was violated, the Court left the final determination to the national judge. See Fransson, 2013 WL 610CJ0617, at ¶¶ 34–37.
the essence of the Simmenthal-mandate\textsuperscript{125} is precisely to remove all obstacles to the full effectiveness of EU law—including the Charter—in domestic courts.\textsuperscript{126} As a consequence, EU law outlaws constraints on domestic judges like the Swedish condition of a “clear support,” which can hamper its effective implementation at the domestic level.\textsuperscript{127}

The Court’s treatment of art. 51(1) of the Charter lends itself to criticism. It appears that some of the provisions of Directive 2006/112 identified as trigger EU norms are hardly “implemented” by the Swedish measures. Art. 2 lists the transactions subject to VAT, and art. 250(1) merely requires all taxable persons to submit the VAT return. Only art. 273 indirectly invokes a link of agency, authorizing member states to impose additional obligations to ensure the collection of VAT and deter evaders. Arguably, art. 2 and art. 250(1) of the Directive cannot qualify as trigger EU norms. They specify the reach of the obligation to whose enforcement art. 273 refers, but they themselves are hardly implemented by the Swedish measures. At most, these provisions are useful to make sure that Fransson’s taxability was necessitated by EU law, but have little to do with the domestic system of sanctions. Quite the opposite, the national measures against evaders, insofar as they aim to “counter fraud and any other illegal activities affecting the financial interests of the Union,” including VAT evasion, are directly implementing the obligation of art. 325 TFEU.

The inclusion \textit{ad abundantiam} of redoubtable, trigger EU norms is not the only slip of Fransson. Another perplexing aspect is the apparent contradiction between the Court’s endorsement of the \textit{objective ERT} criterion (which hinges upon the overlap of regulatory regimes) and the use in the decisive paragraphs of the judgment of verbs like “design” and “intend” to describe the relationship between the Swedish measures and the achievement of EU law’s objectives. These words suggest that the implementation link is fulfilled when there is a subjective intention of the national legislator to use certain measures so as to implement EU law. Emphasis on these terms is misplaced. Simply by noting that the Swedish measures at stake pre-date Sweden’s accession to the EU, it is possible to discard conclusively the ECI’s conclusion that the law-maker designed them intending to implement norms that did not yet bind Sweden.\textsuperscript{128} The Court should make sure that the language used reflects the applicable doctrine: the Charter applies to domestic measures that happen to govern matters touched upon by some generic EU law obligation. As Sarmiento rightly noted, \textit{Fransson} seemed to sound the death-knell of the abstruse checklists of Annibaldi and Iida.\textsuperscript{129}

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\textsuperscript{126}Fransson, 2013 WL 610CJ0617, at ¶ 46.
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\textsuperscript{127}Id. at ¶ 48. The AG had come to the same conclusion. See id. at ¶¶ 114–115. .
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\textsuperscript{129}Sarmiento, \textit{supra} note 101, at 1279. This impression was confuted in the subsequent \textit{Siragusa} judgment, discussed \textit{infra}.
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The test used, however, is not immune from doubt, as is discussed in the last Section of this article. Moreover, national courts might read in Fransson a threat to national sovereignty. The German Constitutional Court, indeed, did not wait long to express its concerns in wake of the Fransson judgment.

C. The Anti-Terror Database Judgment

Less than two months after the Fransson judgment, the German Federal Constitutional Court (the Bundesverfassungsgericht, or BvG) issued a confrontational decision that sent a threatening warning to the ECJ. The judgment regarded the constitutionality of a German statute providing for the establishment and functioning of a database of personal information available to public authorities for the purpose of fighting terrorism. Although the statute was considered to be essentially constitutional, save for certain details, the interesting paragraphs of the judgment for the sake of the present discussion are those devoted to distinguishing the case from Fransson.

The BvG included these paragraphs to justify its refusal to raise a preliminary question to the CJEU. As a result, the legality of the German statute would only be assessed against the constitution's fundamental rights—guarantees, not also in light of the corresponding rights of the EU Charter. The BvG duly recalled that review of a national measure under the Charter depends on an “implementation” link under art. 51(1) of the Charter. In the specific instance, the BvG held forcefully that no such link existed, since the measure in question was defined domestically and its purposes were not determined by EU law.

The German Court openly mentioned—see para. 89—the most credible candidates for triggering EU norms: the Data Protection Directive and Council Decision 2005/671. However, it observed that the German statute related only “in part” to matters governed by EU law. There is indeed a certain commonality of purpose between the German act and the EU law measures mentioned, which could prove decisive under art. 51(1) of the Charter depending on which reading of

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130 BVerG, Apr. 24, 2013, docket number 1 BvR 1215/07 (Ger.). An English summary and the full judgment are available at http://www.jusline.de/index.php?cpid=8d9dec3eece36e05c3417a89eec877615&feed=153512 [hereinafter BVerG].
132 The standard of constitutional review invoked by the claimants related essentially to the right to privacy, as granted by art. 10 of the Grundgesetz für die Bundesrepublik Deutschland [GG], May 23, 1949, BGBI. I (Ger.).
133 In particular, see the Charter of Fundamental Rights of the European Union, arts. 7 & 8, Dec. 12, 2007, 2007 O.J. (C303) 1. Note that the claimant did not seem to raise the matter of EU law, at least as transpires from the summary of his claim, see BVerG, supra note 131, at ¶¶ 41–51. It follows that the German Court embarks on the discussion of the application of the Charter proprio motu, presumably precisely with the intention of sending a strong signal after the Fransson ruling.
134 BVerG, supra note 131, at ¶ 90.
137 BVerG, supra note 131, at ¶ 89. See also id. at ¶ 91, where the idea is confirmed that the German law can affect the functioning of EU law “only indirectly” (nur mittelbar).
Annibaldi, Polier, Iida and Fransson one favors. The BvG acknowledged that the German statute might contribute (literally “flow in,” einfließen) to the discharge of judicial cooperation duties under EU law, and yet refused to refer a preliminary question to the ECJ, invoking the acte claire doctrine.\footnote{See BVerfG, supra note 131, at ¶ 90. Reference is to Case C-283/81, SRL CILFIT v. Ministry of Health, 1982 E.C.R. 3415 (1981).} In so doing, the BvG reserved for itself the last say on the non-applicability of the Charter. Using a classification reminiscent of Lord Laws’s reasoning (see Section 2), the German court noted that EU law neither required nor prohibited the establishment of the database, and did not regulate its functioning either.\footnote{Id. at ¶ 90.} In other words, the subject matter and purpose of the domestic measure were not determined by EU law, and, therefore, whatever indirect link to the latter might exist did not warrant the application of EU fundamental rights.

Interestingly, the BvG based its interpretation on the Annibaldi exception, and took pains to argue that the Fransson precedent could not have obliterated it. The German judges explained what Fransson could not have possibly meant: the condition of art. 51(1) of the Charter cannot be met if the domestic measure relates to the “purely abstract scope of EU law,” or when it has a “merely de facto” impact on it.\footnote{Id. at ¶ 91.} To add teeth to its warning, the German court noted that, should the ECJ decide to see it otherwise (that is, hold that the Charter applies to domestic measures determined by EU law, solely by virtue of a circumstantial link between the matters governed by domestic and EU law), such a decision would be ultra vires for encroachment upon domestic sovereignty.\footnote{For the latest account of the ultra vires borderline, see BVerfG, July 6, 2010, docket number 2 BvR 2661/06 (Ger.). See C. Möllers, Case Note, German Federal Constitutional Court: Constitutional Ultra Vires Review of European Acts Only Under Exceptional Circumstances; Decision of 6 July 2010, 2 BvR 2661/06, Honeywell, 7 EUR. CONST. L. REV. 161, 161–67 (2011).}

In truth, the reasoning of the BvG, which certainly carries a politically-laden message, is not beyond question. The German statute’s main objectives are to promote the investigation and combatting of terrorism, purposes shared by Decision 2006/571 and the Data Retention Directive.\footnote{Parliament and Council Directive 2006/24/EC, 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 Parliament and Council Directive 2002/58/EC, 2006 O.J. (L105) 54.} It is, therefore, doubtful that Annibaldi’s exception, which excluded an “implementation” link when “the [domestic act] pursues objectives other than those covered by [the subject matter of the EU law]” could apply.\footnote{Annibaldi, 1997 E.C.R. I-7493, ¶ 22.}

The importance of the BvG’s pronouncement is that it shows how much gray area remains in the interpretation of art. 51(1) of the Charter. The vagueness of the Fransson characterization of the implementation link afforded the BvG ample discretion to issue an authoritative interpretation which drives “implementation” away from the objective test of ERT and tries to narrow it down to Wachauf cases, in which the national measure is determined by EU law in a strict sense. Even now, it is still doubtful that only measures designed to implement EU law must respect the
Charter, or, to the contrary, that EU law also binds internal acts that happen to share the objectives of EU law.\textsuperscript{144} Because the ECJ is, in principle, better equipped than the German constitutional court to solve this riddle, for now, the latter and more inclusive option seems more plausible. This is true, at least, in light of the findings of Fransson, and pending a better definition of the \textit{Annibaldillida} instructions about how to filter out \textit{de minimis} links between domestic and EU law.

The other obvious teaching of the \textit{Anti-Terror Database} skirmishes between the BvG and the ECJ is that the Pilatesque stance of the ECJ, which is often reluctant to specify the limits of its human rights-related jurisdiction,\textsuperscript{145} is sometimes a strategy that backfires. Member States are obviously keen to take advantage of the Court’s inertia and will indulge more easily in self-serving strategies if the opportunity arises. If the ECJ does not do so itself, Member States will let the ECJ know what they consider to be the impassable border beyond which EU law cannot extend its reach at their expenses: \textit{hic sunt nationes}.\textsuperscript{146}

IV. THE CCC TRIANGLE: WHY ARTICLE 51 OF THE CHARTER IS IMPORTANT

The interpretation of art. 51(1) of the Charter is a matter of capital importance for obvious reasons. A better protection of fundamental rights depends on the correct application of this article. A status of legal uncertainty entails a sub-optimal application of the Charter, and individuals will not derive from this instrument as much protection as they are entitled. Therein lies the urgency to bring clarity.

More specifically, as long as it is unclear whether a certain domestic measure is bound by the Charter, it is unclear whether such measure can be reviewed against it. That is to say, it is unclear whether or not the measure is ultimately legal, a crucial matter for a measure that may infringe upon someone’s fundamental rights. Because the task of assessing a domestic measure’s compliance with EU law is mainly entrusted to national judges, it will be in domestic proceedings that the difficulties relating to the research of “some sort of link”\textsuperscript{147} (“\textit{un rattachement}”) with EU law will generate the most damage. The risk is that the national judges will mistakenly apply a national measure that implements EU law and contradicts the Charter or,

\textsuperscript{144} This crucial doubt was registered in AG Cruz Villalón’s opinion in Fransson, who wondered “whether a State legislative activity based directly on Union law is equivalent to the situation in this case, where national law is used to secure objectives laid down in Union law.” See 2013 WL 610CJ0617, at ¶ 60.


\textsuperscript{146} This is the conclusion reached by Fontanelli, supra note 67, which formed the basis of many of the remarks in the present Section. For a more complete discussion, I refer the reader to both the Fransson judgment and to the German decision.

alternatively, set aside a national measure that, in reality, falls outside the scope of EU law.\(^{148}\)

The lack of Charter reliability in policing national measures should not be, in and of itself, an insurmountable problem for ensuring judicial protection. There are other human rights charters that bind national authorities and typically provide for guarantees comparable to those of the Charter. As the ECJ itself noted: “in substantial criminal proceedings [. . . ] which lie outside the scope [. . . ] of European Union law, the Member States are still obliged to respect fundamental rights as enshrined in the Convention or laid down by their national law.”\(^{149}\) Because of the multiple and concurrent duties of consistent interpretation for national judges, the substantive convergence between the rights included in the EU Charter, national constitutions and the European Convention of Human Rights (collectively, “the C-sources”) is a common occurrence. As a result, a domestic act whose illegality under the Charter cannot in practice be enforced will probably be unconstitutional as well, and/or in breach of the ECHR.\(^{150}\)

However, the choice to challenge a national measure under one of the three C-sources is not without consequences, as they do not offer interchangeable protections against the application of illegal domestic measures. In particular, the Simmenthal doctrine provides that a successful challenge under EU law—including the Charter—leads to the immediate disapplication of the illegal measure by the national court.\(^{151}\) On the other hand, when the standard invoked is the constitution or the ECHR, the applicable procedure may vary, as it depends on the constitutional arrangements of each state. Ordinary judges often lack the power to review the legality of domestic legislation and must refer a question of constitutionality or conventionality to a constitutional jurisdiction.\(^{152}\) In other words, all other things being equal, the claim based on the EU-law standard of review is the easiest to cultivate and the quickest in its pay-off if successful. As David Anderson put it while

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\(^{148}\) The other class of false positives (disapplication of norms that fall under the scope of EU law for an alleged, but in fact unfounded – clash with the Charter) is one that could happen even if the doubts regarding Article 51(1) of the Charter were immediately solved.

\(^{149}\) PPU, 2013 WL 613CJ0168, at ¶ 48.

\(^{150}\) This situation, which calls on national courts to review the legality of national acts in light of all three charters, has been referred to as one of three-dimensional review in Monica Claes & Šejla Imamović, Caught in the Middle or Leading the Way? National Courts in the New European Fundamental Rights Landscape, 4 J. EUROPÉEN DES DROITS DE L’HOMME / 4 EUR. J. OF HUM. RTS. 625, 625–653 (2013).


\(^{152}\) Few national systems provide for the judges’ power to set aside national legislation in breach of the ECHR. Besides Sweden (as it was clarified in the discussion in Fransson), they roughly include Austria, Belgium, the Netherlands, Portugal and Spain. The most recent and accurate comparative works on effects of the Convention in domestic courts include THE NATIONAL JUDICIAL TREATMENT OF THE ECHR AND THE EU LAWS: A COMPARATIVE CONSTITUTIONAL PERSPECTIVE (Giuseppe Martinico & Oreste Pollicino eds., 2010) (hereinafter Giuseppe Martinico & Oreste Pollicino 2010); GIUSEPPE MARTINICO & ORESTE POLLICINO, THE INTERACTION BETWEEN EUROPE’S LEGAL SYSTEMS (2012); Giuseppe Martinico, Is the European Convention Going to Be ‘Supreme’? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts, 23 EUR. J. INT’L L. 401, 401–24 (2012).
giving oral evidence before the UK House of Commons, “[t]here is no doubt that the Charter does have that extra turbo power that the Convention does not.”

However, the scope of the application of the Charter does not correspond to that of the other two C-sources. Whereas constitutions and the ECHR apply to all national measures, the Charter, as is clear in light of the discussion so far, applies only to a sub-set of national measures, and, therefore, serves only as a touchstone for the uniformity of the rule of human-rights law of EU sources and implementing acts. The purpose of this Section is to illustrate the complications that arise, in national proceedings, from the application at the national level of the unclear standard of art. 51(1) of the Charter. The current status of uncertainty makes it difficult to juxtapose the function of the Charter—which is very clear—to its scope of application—which is very elusive—when it comes to national measures. The fact that an illegal measure will eventually be struck down under the constitution or the ECHR is not reassuring. When this is the result of the exhaustion of a full cycle of constitutional review, the increase in the length of the proceedings will be unacceptable for an individual who is actually entitled to the remedy of immediate disapplication, and will run counter the principle of effective protection for EU-derived rights.

In this Section, I discuss how ordinary national judges cope with the elusive application of the Charter to domestic measures. Roughly, I examine two courses of action: (1) the effort to make sense of the confused instructions coming from Luxembourg about the “implementation” test, and (2) the attempt to outflank the hermeneutic quicksand of art. 51(1) of the Charter through the creative use of the ECHR.

A. The Charter in National Proceedings

If the first half of this article is accurate, national judges presented with a claim based on the Charter will face a difficult task. In particular, it will be hard to determine whether or not this instrument is applicable to all situations in which the link between the otherwise applicable national measure and EU law is not one of clear implementation (as it is, for instance, when national law expressly implements a directive). This paragraph offers an illustrative overview of national courts' struggle with art. 51(1) of the Charter (in addition to the cases mentioned in the Introduction), taking cues from a little-known Italian judgment that, arguably, could serve well as a prototype for the sake of this research.

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153 See David Anderson et al., Oral Evidence: The Application of the EU Charter of Fundamental Rights in the UK, HC 979, Address Before The European Scrutiny Committee (Jan. 15, 2014), available at http://data.parliament.uk/writtenevidence/WrittenEvidence.svc/EvidenceHtml/5379. Arguably, a successful challenge under the constitution or the Convention will at least have the advantage of a clearer erga omnes effect. A declaration of unconstitutionality or breach of the ECHR will certainly have a spill-over effect on future cases, whereas disapplication only operates to the benefit of the claimant in the specific proceedings, and does not render the domestic norm invalid.

154 Of course the ECHR affords a margin of discretion to states when they act in certain fields, yet these fields fall squarely under the scope of application of the Convention ratione materiae.

1. The Case of Welfare Benefits for Third-Party Nationals in Italy

In 2011, an Italian first-instance civil judge (Tribunale di Pisa) upheld a claim that invoked all of the three C-sources. The applicant, a third-country national, challenged the authorities’ refusal to grant him an attendance allowance pursuant to a domestic statute, which made the grant conditional upon possession of a residence card. He challenged the legality of this statute, alleging its discriminatory effects against foreigners who legally reside in Italy not by virtue of a permanent residence card, but by a (temporary) residence permit. The claim invoked the standards of review of art. 14 of the ECHR and the constitutional principle of equality.

The claim was undoubtedly well-founded. Previously, the Constitutional Court had declared the statute unconstitutional, but only in relation to a different kind of benefit (disability allowance). As both benefits are necessary to attend to the essential needs of a person, the same result was warranted in the case at hand. Taking cues from the constitutional pronouncement, the ordinary tribunal concluded that the domestic regime on attendance allowance should operate on the basis of equality, without distinctions between citizens and all legally resident foreigners.

A clear clash with the Constitution and the Convention, however, would not suffice to entail the disapplication of that statute, in accordance with the Italian judicial system. To vindicate the unconstitutionality of the provision, the only pathway available was to lodge a question of constitutionality before the Constitutional Court. Disapplication would, however, be readily available if the provision clashed also with the EU Charter. From a substantive point of view, this was not an issue. There is a correlation between art. 21 of the Charter and art. 14 of the ECHR, and art. 52(3) of the Charter instructs judges to interpret the rights of the Charter in light of the equivalent ECHR provisions. Nevertheless, for the Charter to apply, the judge also had to verify that the challenged provision implemented EU law in the sense of art. 51(1) of the Charter.

In Regulation (EEC) No. 1408/71 on social security schemes, the judge found a trigger EU norm that brought the situation into the realm of EU law. Even if the

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157 Legge 23 dicembre 2000, n. 388, art. 80, ¶19 (It.).
158 Prohibiting discrimination in the enjoyment of Convention rights.
159 Art. 3(1) Constituzione [Const.] (It.) (“All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinions, personal and social conditions.”). Note that the reference to citizens does not prevent the principle of equality from extending to foreigners, in compliance with Italian supra-national obligations. See, e.g., Corte Cost., 23 Novembre 1967, n. 120, G.U. 1967 (It.).
161 On the jurisdictional mandate of Italian judges, and how they cope triple obligation of consistent interpretation (with the constitution, EU law, and the ECHR), see Elisabetta Lamarque, Presentation for AIC Associazione Italiana dei Costituzionalisti: The Italian Courts and Interpretation in Conformity with the Constitution, EU Law and the ECHR, (Nov. 13, 2012), available at http://www.associazionedecostituzionalisti.it/sites/default/files/rivista/articoli/allegati/Lamarque.pdf.
162 Council Regulation 1408/71, On the Application of Social Security Schemes to Employed Persons and Their Families Moving within the Community, 1971 O.J. (L 149) 2 (EEC) [hereinafter...
Regulation itself could not apply *ratione personae* (it applies only to EU workers and their families), it delimited, in the view of the judge, the reach of EU law in social security matters. As a result, the Italian court found that Member States act within the scope of EU law (an *ERT*-inspired test of implementation) when they set the conditions for the granting of social benefits referred to in the Regulation (such as those granted automatically in case of sickness and disability):

[C]ivil invalidity allowances granted by the Italian system are certainly among the social benefits the concession of which is conditional upon the occurrence of one of the risk-related grounds of Art. 4 of Regulation EEC No 1408/71. Therefore, they fall within the notion of social security, as defined by the Court of Justice, and their discipline belongs to the scope of application of Union law.

The claim was therefore upheld, through the disapplication of the discriminatory Italian statute for clashing with art. 21 of the Charter. In so doing, the judge averted perpetuating the application of the discriminatory statute and spared the applicant from a cycle of constitutional review. This decision did face the risk of a reversal, should an appeal jurisdiction consider the situation a purely internal one (a probable scenario, in view of the tenuous implementation link identified). A reversal in appeal would have led eventually to the launch of constitutional proceedings, years after the original claim was brought, and it would have taken years before the Constitutional Court could issue a final ruling. The Italian judge was, therefore, between a rock and a hard place. The lengthiness of the constitutional-review pathway made it an unsatisfactory alternative to disapplication, and yet the uncertainty surrounding art. 51(1) of the Charter made the decision regarding EU law a difficult one. Yet, short of a preliminary question (i.e., another incidental two-year extension of the proceedings), there was no way for the judge to ignore the possible use of the Charter. No matter how difficult the interpretation of law is in practice, the judge is expected to meet the task (*jura novit curia*).

The Constitutional Court, presented with a question of constitutionality just months after this judgment, declared the same provision unconstitutional for discriminating unfairly against foreigners with a residence permit in the granting of yet another social benefit (child disability allowance). This decision implies, *a contrario*, that the first-instance court’s decision regarding the implementation of EU law was mistaken. If the Constitutional Court had agreed with the Tribunal’s finding of a conflict between the impugned statute and EU law, it would have simply

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163 Note, however, that the coordination scheme of Regulation 1408/71 was extended to third country nationals legally residing in one Member State. See Council Regulation 859/2003, Extending the Provisions of Regulation (EEC) No. 1408/71; Regulation (EEC) No. 574/72 to Nationals of Third Countries Who Are Not Already Covered by those Provisions Solely on the Ground of their Nationality, 2003 O.J. (L 124) 1 (EC).

164 See Regulation 1408/71, art. 3; Regulation 883/2004, art. 4.

165 Own translation.

166 As a matter of fact, the judgment was not appealed. Information is on file with the author, thanks to Judge Dr. Tarquini.


168 On the pitfalls of *a contrario* argumentation, see Canale & Tuzet, supra note 50.
rejected the question of constitutionality as inadmissible for lack of relevance. Because the conflict with directly applicable EU law obligations renders domestic norms inapplicable in judicial proceedings, a referral to the Constitutional Court is both prohibited under EU law169 and unnecessary under Italian law. A doubt of constitutionality regarding a norm that cannot apply is moot and neither party is interested in its submission to constitutional review.170 Domestic judges are invited, therefore, to first assess the EU-legality of national norms, and only thereafter consider their constitutionality.171 By simply accepting the question of constitutionality as admissible, the Constitutional Court either disavowed the first-instance judge’s interpretation of art. 51(1) of the Charter or, more simply, ignored the possible relevance of EU law to retain jurisdiction over a question that, technically, lay outside of its competence.

To explain why the second hypothesis is plausible, a brief explanation is in order. The Constitutional Court, by limiting the review to domestic and ECHR law, excluded the possibility of disapplication of national law in ordinary proceedings. The process that led to the current arrangement between ordinary judges and the Constitutional Court with respect to European human rights guarantees deserves a mention. Since 2007, the Constitutional Court has enforced, with respect to national judges, a doctrine prohibiting the disapplication of internal provisions in light of the implementation of ECHR obligations.172 According to the Constitutional Court, international norms—including the ECHR’s—have an intermediate rank in the system of domestic sources, between statutory and constitutional law. Therefore, the Convention cannot trump constitutional norms. In turn, because by virtue of a constitutional provision173 ordinary law must respect Italy’s international obligations, the Convention can serve as a standard of indirect constitutional review for statutes. The consequence of this theoretical arrangement is that the Constitutional Court has absorbed the review of conventionality of national law within its powers of constitutional review, and, therefore, retains the exclusive power to invalidate

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169 See Simmenthal, 1978 E.C.R. 629; Kucikdeveci, 2010 E.C.R. I-365. But see Case C-112/13, European Commission, pending, (presenting the question by the Austrian Oberster Gerichtshof, seeking to understand what the right course of action is when there is a question of constitutionality and one of compliance with the Charter).


173 See Art. 117(1) Costituzione [Const.] (It.) (“Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations.”) (emphasis added).
domestic law for breach of the ECHR. In particular, it has suppressed the sporadic practice of ordinary judges who had started to set aside ECHR-illegal norms,\textsuperscript{174} on the model of their duties under EU law.\textsuperscript{175}

The reasons for this approach might have to do with an attempt to counter marginalization in matters that once constituted the main mandate of the Constitutional Courts, in particular the enforcement of fundamental rights guarantees,\textsuperscript{176} Through the system of preliminary references and the practice of disapplication, the Constitutional Court is virtually without competence over the relationship between domestic and EU law. In the field of international obligations like those of the Charter, however, the Constitutional Court actively affirmed its continued function as the one-stop-jurisdiction for the purpose of fundamental rights protection at the domestic level.\textsuperscript{177} Over time, the increased application of the Charter in domestic proceedings brought more and more fundamental-rights cases within the reach of EU law,\textsuperscript{178} further eroding the Constitutional Court’s jurisdiction in the field.\textsuperscript{179} This drainage of power could be slowed down by minimizing the impact of EU law on domestic measures, that is, by endorsing a narrow construction of art. 51(1) of the Charter.\textsuperscript{180} Alternatively, as might have been the case in the judgment mentioned above, a self-serv ing strategy would be to ignore the influence of EU law altogether—hence the suggestion above regarding the Constitutional Court’s telling silence on the Charter’s application in the review of discriminatory domestic provisions.

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\textsuperscript{174} For a recent confirmation of this prohibition, see Corte Const., 29 novembre 2012, n. 264, G.U. 2012 (It.).

\textsuperscript{175} Note that the ECHR does not require member states to afford its provisions with direct effect and neither does the Italian Constitution. See Enzo Cannizzo, Diretti “Diretti” e Diritti “Indiretti”: I Diritti Fondamentali tra Unione, CEDU e Costituzione Italiana, in IL DIRITTO DELL’UNIONE EUROPEA 23, 37 (2012). Nevertheless, it is fair to note that, on one hand, the Convention does not prevent States from granting direct effect to its provisions and, on the other hand, the Italian constitutional provisions relating to the effects of international commitments are generic and would not represent an obstacle should the Constitutional Court so decide.


\textsuperscript{177} See Cannizzo, supra note 176, at 35–36. See also Corte Const., 29 novembre 2012, n. 264, G.U. 2012 (It.), where the Italian judges went as far as to set aside certain ECHR obligations, de facto attributing to themselves the identification of Italy’s margin of appreciation.

\textsuperscript{178} Peers, supra note 97.

\textsuperscript{179} On the evolving role of the Italian Constitutional Court in light of the EU Charter, see Marta Cartabia, La Carta di Nizza, i Suoi Giudici e l’Isolamento della Corte Costituzionale Italiana, and Alfonso Celotto, La Carta di Nizza e la Crisi del Sistema Europeo di Giustizia Costituzionale, both in RIFLESSI DELLA CARTA EUROPEA DEI DIRITTI SULLA GIUSTIZIA E LA GIURISPRUDENZA COSTITUZIONALE: ITALIA E SPAGNA A CONFRONTO, respectively, 201 & 227 (Alessandro Pizzorusso, et. al eds., 2003); see also Cartabia & Celotto, La Giustizia Costituzionale in Italia Dopo la Carta di Nizza, in GIURISPRUDENZA COSTITUZIONALE 4477 (2002).

\textsuperscript{180} See, e.g., the conservative reading (implementation plus derogation) of Article 51(1) of the Charter in Corte Const., 7 marzo 2011, n. 80 G.U. 2011, ¶ 5.5 (It.).
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2. A Selection of Other National Decisions and Home-made Criteria

In this section, I offer a sample of national decisions applying art. 51(1) of the Charter. Although their value is little more than anecdotal, it is possible to see, at times, reliance on home-made doctrines to deal with the issue of implementation, a clear warning sign that the guidance of the ECJ has so far failed to provide national judges with an understandable set of applicable criteria. It is important to note that at least two of the UK cases in the introduction would fit well here, adding to the list of creative factors excluding the application of the Charter: (1) the remoteness of EU law from the situation in the main proceedings; and (2) the lack of direct effect of the Charter provisions invoked.

In several cases, the judges declare a lack of implementation without providing reasons. These cases cannot be the subject of a specific analysis.

a. The Time Factor; The Lack of Full Harmonization

In a recent ruling, the Irish High Court, after lamenting the inherent condition of uncertainty regarding art. 51(1) of the Charter “in the absence of further guidance by the Court of Justice,” distinguished the case at hand from a previous one regarding the implementation of the EAW Framework Decision and held that the domestic Immigration Act of 1999 did not constitute implementation of EU law. In particular, it noted that the national measure pre-dated the relevant EU Directives, and that they did not provide for full harmonization in the area. Therefore, the Irish authorities’ decision to deport the claimant—who had unsuccessfully sought asylum upon arrival in Ireland—was not tantamount to a use of discretionary powers within

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181 Some of the cases are reported in Réflets 1/2013, the periodical bulletin prepared by the study services of the ECJ. Réflets, supra note 68.
186 Id. at ¶ 29.
the scope of EU law, but just the “implementation of an item of autochthonous legislation.”\footnote{A.O. v. Minister for Justice, Equality and Law Reform, Ireland and the Attorney General (No. 3), [2012] I.E.H.C. 104 (H. Ct.) (Ir.), ¶ 33.} 

b. No Bearing on the Real Dispute

The German Federal Labour Court reached a similar conclusion in December 2011. It held that art. 1(1) of the Consumer Protection Act, which spares employers from the duty to provide reasons for dismissal during the probation period, did not fall within the scope of EU law.\footnote{See Bundesarbeitsgericht [BAGE][Federal Labor Court] Dec. 8, 2011, 6 [AZN] 1371/11, ¶ 4, available at http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&sid=58acf1f47c2451ae944331bb3331b624&nr=15620&pos=0&anz=1.} It noted that the remote link ratione materiae with the acts of the Union (those on workers’ safety: the claimant had been dismissed after he had suffered a work accident) had no influence on the dispute between the parties, which focused instead on the legality of the dismissal conditions.\footnote{Id. at ¶ 12.}

c. No Reverse-Rottman

The Irish High Court held that the refusal of a naturalization application by a Syrian national could not be challenged under art. 41(2) of the Charter (duty to give reason), because it did not implement EU law under art. 51(1) of the Charter. The applicant invoked a reverse-Rottmann argument that refusal foreclosed his potential access to EU citizenship, and therefore was capable of depriving him of a fundamental EU-right. The High Court rejected this argument, observing that, unlike Janko Rottman, the applicant in the present case had never possessed EU citizenship to begin with.\footnote{Mallak v. Minister for Justice, Equality & Law Reform, [2011] I.E.H.C. 306 (H. Ct.) (Ir.), ¶ 30, available at http://eudoc-citizenship.eu/caselawDB/docs/IRE_22_07_2011.pdf.}

d. No EU Law Obligation

The Swedish Supreme Court, in June 2011, discarded the application of the Charter in a case that, for all relevant purposes, was identical to that in the main proceedings of Fransson (invocation of art. 50 of the Charter in the context of tax evasion penalties).\footnote{Nytt Juridiskt Arkiv [NJA] [Supreme Court] 2011–6–29, B5302–10 (Swed.), available at http://www.hogstandomstolen.se/Domstolar/hogstandomstolen/Avgoranden/2011/2011–06–29%20B%205302–10%20beslut%20skiljaktig.pdf.} The reason for excluding the implementation link was that Directive 2006/112 “does not prescribe any obligation on Member States to adopt administrative or criminal sanctions to ensure compliance.”\footnote{Id. at ¶ 12.} In other words, the Swedish Court, unaware of the future test adopted by the ECJ (based on the objective contribution to the purposes of EU law), simply noted that the measures challenged had not been adopted to discharge an obligation under EU law.
e. Anticipated Fransson

The Austrian administrative court, on the other hand, in January 2013, reached the same conclusion as the ECJ in Fransson, through much simpler reasoning. Because all things VAT fall under EU law by way of Directive 2006/112, fiscal proceedings regarding VAT deductions must comply with the guarantee of art. 47 of the Charter.

f. Public Security as Exclusive State Responsibility

In the ZZ case, the Court of Appeal of England and Wales rejected the Charter-based claim of the appellant. Appellant sought disclosure, under art. 47, of the reasoning behind the UK’s refusal to grant him entry into the country. The majority invoked the importance of state security in support of non-disclosure and noted that, under art. 4(2) TEU, national security “remains the sole responsibility of each Member State.” This assertion, in conjunction with art. 346 TFEU, was deemed sufficient to conclude that the subject matter was removed from the competence of the EU, and, therefore, art. 51(2) of the Charter precluded the application of EU law guarantees. In truth, Lord Carnwath reframed the issue in his opinion and considered the acts of British authorities as an implementation of art. 30(2) of the Citizens Directive, allowing certain information to remain undisclosed on grounds of state security. This exercise of express derogation granted by EU law meets the test of art. 51(1) of the Charter, as it was later confirmed by the AG and the ECJ in ZZ.

g. No General State Action; No Absurd Consequences

The Court of Appeal (Civil Division) used yet another criterion to deny that EU law was implemented by the Secretary of State’s decision not to provide legal aid to a UK citizen facing criminal trial and the death penalty in Indonesia. The appellant had claimed that the British authorities chose not to apply UK jurisdiction extraterritorially to her crime, pursuant to art. 8(2) of Framework Decision 2004/757. In the appellant’s view, the decision of the Secretary of State was an instance of

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196 Id. at ¶ 4.
199 ZZ, [2011] EWCA at ¶ 44.
200 Case C-300/11, ZZ v. Sec’y of State for the Home Dep’t, 2013 WL 611CJ0300, ¶ 73 (Sept. 12, 2012) (Opinion of Advocate General Bot), available at http://curia.europa.eu (“it is clear that reliance by a Member State on interests of State security does not rule out the application of EU law and, in particular, the fundamental rights protected by the Charter”).
implementation comparable to that of Zagorski,\textsuperscript{202} hence the Charter guarantees applied to her situation, including that of art. 47 of the Charter on legal aid.

The court rejected this claim on the basis of several novel criteria: the choice of the Secretary of State could not qualify as a “decision” since it had not taken the form of a legislative act or a bilateral treaty;\textsuperscript{203} moreover, if the appellant’s argument had been correct, it would have obliged the Secretary of State “to do everything in his power to secure that UK nationals who face charges for any drug trafficking offence committed anywhere in the world should have the possibility of being advised, defended and represented” [and of being provided legal aid].\textsuperscript{204} In other words, there are cases in which the form of the national measure and the costliness of the Charter’s application exclude, for no other apparent reason, the implementation of EU law under art. 51(1) of the Charter.

\textbf{B. The Attempts to Hijack the Convention}

The ECJ’s judgment in Kamberaj\textsuperscript{205} is the necessary starting point to introduce the debate on the post-Lisbon (but pre-accession) relationship between EU and ECHR law. The ruling was issued in response to the preliminary question of an Italian judge who sought to know whether art. 6(3) TEU\textsuperscript{206} turns the ECHR into a source of EU law and, accordingly, requires national judges to set aside domestic acts unlawful under ECHR law.

This apparently eccentric question is, in fact, the reflection of an understandable concern, which the previous paragraphs have tried to expose. Since attempting to set aside domestic law under the Charter is an obstacle course (the main obstacle being, of course, art. 51(1) of the Charter), a pragmatic judge will try to achieve the same result through a different legal pathway. In the Kamberaj case, the national court asked in practice whether the substantive affinity between EU fundamental rights and the Convention (certified by art. 6(3) TEU and art. 52(3) of the Charter) could also imply that the two laws have a similar scope of application. In other words, the judge tried to see if it would be possible to smuggle EU law’s direct effect into the Convention by carrying out its Union-ification. This regime shift\textsuperscript{207} would enter into effect, according to the referring judge’s hypothesis, by equipping EU fundamental principles (and the Charter) with the universal reach \textit{ratione materiae} of the Convention, unhindered by the “implementation” straitjacket.

This construction is evidently wrong. At least so long as the EU accession to the ECHR has not been finalized, the Convention is not a source of EU law even if its rights correspond to (or, better, inspire the interpretation of) EU general

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{202} Id.
\item \textsuperscript{203} Id. at ¶ 26–27.
\item \textsuperscript{204} Id. at ¶ 28.
\item \textsuperscript{206} That reads “Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.” TEU art. 6(3).
\item \textsuperscript{207} The concept of regime shift is well explained in Laurence R. Helfer, \textit{Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking}, 29 \textit{Yale J. Int’l L.} 1, 1-83 (2004).
\end{itemize}
\end{footnotesize}
principles. The Court summarily rebuked the attempt to conflate the two human rights regimes to carve out a shortcut for disapplication, in two paragraphs that are worth relating in full:

62. Article 6(3) TEU does not govern the relationship between the ECHR and the legal systems of the Member States and nor does it lay down the consequences to be drawn by a national court in case of conflict between the rights guaranteed by that convention and a provision of national law.

The Court then added a remark:

63. [T]he reference made by Article 6(3) TEU to the ECHR does not require the national court, in case of conflict between a provision of national law and the ECHR, to apply the provisions of that convention directly, disapplying the provision of national law incompatible with the convention.

The specification of paragraph 63, in my view, goes beyond what the ECJ should have said. To be sure, the careful reader will be able to deduce that, although art. 6(3) TEU “does not require” disapplication, neither does it prohibit the setting aside of domestic norms that are in breach of the Convention. But the truth is that art. 6(3) TEU does not require disapplication simply because it does not, and could not, require anything regarding the domestic effects of ECHR law, and this is made already exhaustively clear in paragraph 62. “EU law does not require EU citizens to eat more vegetables” is also a formally correct statement, and yet it is one that intuitively appears gratuitously one-sided. The same happens with paragraph 63 of Kamberaj.

In fact, certain member states allow or even require their judges to disapply ECHR-illegal provisions. The fact that EU law and ECHR law are not the same does not mean that member states cannot decide to unilaterally treat them alike. It is argued that the ECJ got slightly carried away. In rejecting the equation between EU fundamental rights and the ECHR under EU law, it betrayed a veiled hostility towards the member states’ unilateral power to treat them similarly, for instance, instructing their domestic jurisdictions to set aside acts illegal under the EU and ECHR alike. This ungrounded hostility, it goes without saying, serves too well the concern of jurisdictions like the Italian Constitutional Court, whose self-centered insistence about the different treatment of EU law and the ECHR is hardly commendable, as it has the main effect of preserving the exclusive competence over the conventionality review of domestic law, at the cost of greater inconsistency in

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208 The reverse is also plausible: even if the Convention is not a source of EU law, yet fundamental rights are general principles of the EU. See e.g., 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: THE INTERACTION BETWEEN THE EUROPEAN AND THE NATIONAL COURTS 33, 17–34 (Patricia Popelier, et al. eds., 2011). (“the ECHR, which is now still binding by way of its incorporation in the general principles, but which will become directly binding on the EU after the Union’s accession”).


210 See generally, Martinico & Pollicino 2010, supra note 152.

211 See Martinico, supra note 152, at 422–24.
the application of fundamental rights.\textsuperscript{212} It would have been better for the ECJ not to comment at all on the disappllication hypothesis,\textsuperscript{213} which, after all, bore no relation to EU law, as paragraph 62 aptly recognized.

Alas, the irreprensible refusal to smuggle the Convention into EU law did not motivate the ECJ to clarify whether EU fundamental rights—or even EU law at large—applied in the main proceedings. The referring judge asked, among other things, whether the EU principle of equality would apply to the national measures on the allocation of housing benefits to third-country nationals. The trigger EU norm identified would have been Directive 2003/109 on the treatment of long-resident third-country nationals.\textsuperscript{214} The Court, however, remanded the issue on the application of EU law (and therefore of the principle of equality) to the national judge. It observed that the Directive links the categories of social security, social assistance and social protection to the definition of national law, and that art. 34(3) of the Charter (on housing benefits) expressly subjects its application also to “national laws and practices.” Therefore, “it is for the referring court” to assess whether the benefit at stake in the main proceedings fell under the benefits covered by the Directive.

The bottom line is that the national court must autonomously delimit the scope of EU law obligations on “social security, social assistance and social protection,” as the ECJ is reluctant to provide guidance. Maybe the Tribunale di Pisa’s choice not to consult with the ECJ regarding the application of EU law to the situation at hand was, indeed, the wisest one, for the sake of saving time.\textsuperscript{215} These hands-off responses are not rare in the recent case law of the ECJ,\textsuperscript{216} and one should agree with AG Kokott, who labels this trend as “surprising.”\textsuperscript{217} Whereas in Kamberaj, the ECJ might have acted in this way only because of the renvoi to national law in the relevant directive, consider, for instance, the case of Dereci, in which answering the question of whether or not art. 20 TFEU precluded the national measures applied in the main proceedings the Court decided:

\begin{quote}
if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law (that is, by art. 20
\end{quote}


\textsuperscript{215} See supra, Section IV.A.1.


\textsuperscript{217} See Case C-489/10, Bonda, 2012 WL 610CJ0489 (June 5, 2012), ¶ 72 n.18 (Opinion of Advocate General Kokott ) (referring to the conclusion on this point of Dereci).
The Implementation of European Union Law

TFEU], it must examine whether the [national measure] undermines the [right in the Charter].

This is hardly an answer. One can only sympathize with the ECJ for trying to avoid false steps in a mine-field scenario: a different answer might have amplified or frustrated the Zambrano revolution, and/or certified that EU citizenship is a sufficient EU trigger for the Charter to apply to otherwise purely internal situations. If such caution is understandable, however, the resulting exercise in issue-avoidance is disheartening.

The ECJ, technically, invokes the established principle that it is the duty of the national courts to “assess the scope of national provisions and the manner in which they must be applied.” Nevertheless, this principle seems to trigger circular reasoning, because the question referred is often exactly about the reach of Union law and whether the latter is engaged by the domestic norms, not vice versa. It is fair to assume that domestic courts need more help in trying to gauge the scope of EU law than in appraising the limits of domestic legislation. Moreover, a question on the clear delimitation of EU law in a particular scenario is a legitimate question on the interpretation of EU law under art. 267 TFEU. Even if the answer were that EU law in fact does not apply, the Court has a duty to provide an answer.

A concluding note for this paragraph is in order. I have criticized the ECJ for the inclusion of paragraph 63 in Kamberaj, in which it unnecessarily talks about disapplication for breach of the Convention, a matter that is not for EU law or the ECJ to regulate. The ECtHR deserves comparable blame for obiter dictum in the recent Michaud judgment. The Strasbourg Court was called to determine whether certain regulations adopted by the bar council (and implementing EU law) breached art. 8 of the Convention. The ECtHR confirmed the Bosphorus doctrine of equivalent protection and accepted review of the French acts—adopted to observe certain French statutes implementing an EU directive—only to identify possible serious breaches of the Convention.

The ECtHR, therefore, examined the ECHR-legality of the Conseil d’Etat’s refusal to raise a preliminary question regarding the impugned act’s compatibility with human rights guarantees, to make sure that the equivalent protection of EU law had in fact been exhausted, and the Bosphorus presumption could apply. The ECtHR agreed to scrutinize this act attributable to France, but qualified it in a surprising way, as the refusal of “the Conseil d’Etat [. . .] to submit the applicant’s request to the Court of Justice for a preliminary ruling on whether the obligation for lawyers to report suspicions was compatible with Article 8 of the Convention.”

This formula does not make sense. As it was rightly noted in paragraph 62 of Kamberaj, the ECJ has no jurisdiction to pronounce on the compatibility of domestic

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219 See Case C-453/04, Innoventif, 2006 E.C.R. I-4929, ¶ 29, which was used by the CJEU in the Rossius order (C-267 and 268/10), ¶ 15, in support of the refusal to clarify whether the Belgian measures were covered by EU law.
221 Id. at ¶ 114.
norms and the Convention, because the latter is not a source of EU law. The ECtHR should have noted this and either declined to review the refusal as worded above (which would have been an unobjectionable choice, in respect to an ill-conceived question) or re-defined the preliminary question that the Conseil d’État did not raise, as one concerning the compatibility between the domestic measures implementing EU law and the Charter. In pretending not to see this formal error, the ECtHR is conveying a message that has wide-reaching implications: the Convention is a valid standard for the review of EU law and domestic implementing measures. That is, it is a source of EU law. It is no wonder that national courts now fall into Kamberaj-like confusion.

Paragraph 63 of Kamberaj says too much to national courts, but para. 114 of Michaud is equally misleading. The difficulties related to the interpretation of the Charter in domestic proceedings are serious enough to start a supra-national cold war on the Union-ization of the Convention.

V. APPLICATION OF EU LAW, ADMISSIBILITY, AND OTHER BLURRY CONCEPTS

A. The Fransson Equivalence

After Fransson, it appeared that the interpretive Gordian knot concerning the “implementation” trigger would be cut once and for all. Because the Charter was explicitly said to apply whenever EU law applies, it is tempting to believe that the search for the exact meaning of implementation would no longer be necessary: the trigger for the application of the Charter would not be the elusive idea of “implementation,” but the very fact that EU law applies at all. This cannot be true. In Fransson, the Court itself struggled to demonstrate that the implementation link was identifiable, by laying emphasis on member states’ obligations under EU law. This struggle was mainly due to the atypical format of the claim, in which the standard of review (the rule of the Charter) was not the same norm that would warrant the engagement of EU law. As a result, the Court needed to identify certain EU rules, whose application was not engaged at all by the facts of the main proceedings, to be able to discuss the ne bis in idem aspect of the case.

As was rightly observed, the impression is that for the Charter to apply, it is sufficient to identify certain EU obligations, “regardless of the degree to which they determine Member States’ actions.”222 The synthesis of Fransson is correct, and it reveals its deficiency: it does not provide an indication of the relevant link between these EU law obligations and state measures. Once the “implementation” relationship is diluted so much that the “degree” of legal determination between EU law and national measures does not matter, some other instruction should be in order to understand which kind of “link” is necessary in lieu. Here is where the Fransson equivalence, in the view of the Court, should work miracles, as it can apparently function without a link to hold it.

The allegedly portentous contribution of this alignment is not an unintended consequence, but a deliberately engineered result. The Court attempted to reboot the

222 Van Bockel & Wattel, supra note 62, at 879.
“implementation” riddle by relying on a somewhat simpler test, at once getting rid of all the doctrinal complications that the case law on general principles had brought about over time. In the words of Judge Skouris, the President of the ECJ at the time of the Fransson judgment: “[t]he alignment between the application of the Charter and that of EU law, which is solidly based on an established case law, permitted to extract an appropriate criterion to delimit the scope of application of the Charter.”

That EU law applies, in turn, is arguably something that the ECJ can assess with ease, since the application of EU law is arguably a primary condition to its jurisdiction. Anyone foreign to the case law of the ECJ would expect that, in more than 50 years, the Court would have developed a reliable routine to spot and reject, for inadmissibility or mere lack of jurisdiction, all claims hinging on domestic measures (i.e., preliminary questions) that fall outside the scope of EU law—purely domestic claims. This seems to be the suggestion of Skouris’s quote, above, that refers to an “established case law.”

B. The ECJ’s Inability to Pin Down the Limits of its Competence

However, this has not been the case, for several reasons. First, it is exclusively for the national judge to ascertain the relevance of EU law in the main proceedings; the ECJ must answer preliminary questions in the abstract, without taking into account—at least in principle—the facts of the dispute. Second, proceedings before EU jurisdictions are not split between a jurisdictional stage and a phase on the merits. Because jurisdictional objections are mostly joined with the merits, typically there is no incentive or reason for the Court to distinguish neatly between rejections based on inadmissibility/lack of jurisdiction (i.e., EU law has no bearing on the domestic measures impugned) or negative judgments on the merits (i.e., EU law does not preclude such domestic measures). Third, the jurisdictional policy of the ECJ was initially to encourage the submission of preliminary references, and the reception of ill-conceived questions (with respect to the relevance of EU law) was deemed preferable to developing strict admissibility criteria.

The joint effect of these factors is aptly reflected in the following passage from Salgoil (1968):

[Article 267 TFEU] is based on a distinct separation of functions between national courts and tribunals on the one hand and the Court of Justice on the other, and it does not give the Court jurisdiction to take cognizance of the facts of the case, or to criticize the reasons for the reference. Therefore, when a national court or tribunal refers a provision of community law for interpretation, it is to be supposed that the said court or tribunal considers this interpretation necessary to enable it to give judgment in the action. Thus the Court cannot require the national court or tribunal to state expressly that the provision which appears to that court or tribunal to call for an interpretation is applicable. In so far as the

223 Skouris, supra note 98 (own translation from French).
224 In the optimistic words of Judge Rosas: “This does not seem to be an insurmountable problem, however. In any case before the Union Courts or national courts, determining at least in a preliminary way the applicable law is a normal starting point.” Rosas, supra note 27, at 1284. However, the circularity of this reasoning and the apparent nonchalance of that proviso (“at least in a preliminary way”) will be discussed more in detail infra, to demonstrate that the problem is indeed quite difficult to surmount.
quotation of the provision in question is not incorrect on the face of it, there is a valid reference to the court. The Court of Justice has no jurisdiction to decide whether one or other of the provisions referred for an interpretation is applicable to the case at issue; this is a matter for the court making the reference.225

At least in 1968, the ECJ candidly avowed that it had simply no jurisdiction to decide upon the application of EU law in the main proceedings, except for cases in which the reference to EU law is prima facie obviously mistaken:

a request from a national court may be rejected only if it is quite obvious that the interpretation of Community law or the examination of the validity of a rule of Community law sought by that court bears no relation to the actual nature of the case or to the subject-matter of the main action.226

Contrary to the assumption above, therefore, the preliminary jurisdiction of the ECJ does not depend on whether EU law applies to the national measure at stake in the main proceedings. Unless the question is merely hypothetical or arises from a phony dispute,227 “a central feature of the Article [267] procedure [is that] the ECJ will answer any question referred to it.”228 In a sense, the Fransson equation is strikingly unserviceable and brings about little clarification. Rather than simplifying the interpretation of art. 51(1) of the Charter, it exposes how difficult it is to appraise with precision the application of EU law as a whole.229

In light of the present discussion, a look at the recent Zakaria decision is instructive.230 The convoluted reasoning of the Court reveals the inherent paradox described hitherto: whether or not EU law applies in the main proceedings is for the national court to determine, but it is also something that the Court must assess to uphold its preliminary jurisdiction and, more importantly, to determine whether the Charter applies. In a perplexing reversal of the usual pattern, nobody seemingly wants to have the last word, and the Court’s reasoning is contradictory. The Court first arrogates the power to decide whether EU law applies and complains about the lack of necessary information to carry out its task:

39. [T]he decision to refer does not provide sufficient information regarding the main proceedings, in particular regarding the relevant facts, for the Court to determine the relevance of [EU law] for the purposes of examination of that action. Consequently, the Court is not in a position to

229 For a recent use of this permissive doctrine, see C-522/12, Isbir v. DB Services GmbH, 2013 WL 612CJ0522, ¶ 28 (Nov. 7, 2013).
230 Case C-23/12, In re Zakaria, 2 C.M.L.R. 22 (2013). Thank you to Katarzyna Granat for turning my attention to this judgment.
determine whether the situation of the claimant in the main proceedings is governed by European Union law [within the meaning of Article 51(1) of the Charter].

Immediately thereafter, however, the Court remembers that the application of EU law in the main proceedings is none of its business: the fictio must be respected:

40. It is for the referring court to ascertain, in the light of the facts in the main proceedings, whether the situation of the claimant in the main proceedings is governed by European Union law and, if that is the case, whether a refusal to grant him the right to bring his claims before a court infringes the rights recognised in Article 47 of the Charter.

This judgment is an instance of the do-it-yourself approach of the Court: the referring judge who wanted to know whether the Charter applies to a certain situation receives no guidance, and is invited to solve the question on her own. So much for jura novit curia.

Would the “established case law” mentioned by Judge Skouris be of any help? The President of the CJEU refers to a trio of well-known cases. In Terhoeve the Court noted that the rules on the freedom of movement of workers apply also against the state of nationality and of residence, if the worker has resided or worked elsewhere in the Union (working abroad being the transnational element that Union-izes an otherwise purely internal situation). In Guimont, the ECJ held that an indistinctly applicable regulation regarding the marketing of cheese could potentially hinder trade flows, and was, therefore, caught under the Treaty rules on freedom of movement of goods. To the objection of the intervening States that the situation at hand was purely internal, the Court simply responded that the challenged national measure could potentially affect imports, and in any case “it is for the national courts alone to determine [. . .] both the need for a preliminary ruling in order to enable them to give their judgment and the relevance of the questions which they refer to the Court.” The bottom-line of the three cases is that prima facie purely internal situations can engage EU law when domestic measures might frustrate the exercise of market freedoms. Not quite the silver bullet that one would expect with respect to the interpretation of art. 51(1) of the Charter. If anything, this case law has expansive potential, as it relies on the application of the effet utile principle: States cannot operate within their exclusive competence so as to frustrate compliance with EU law obligations.
C. The Fransson Mantra, or, the Worst of Two Worlds

This Fransson alignment demonstrated its simplifying force in the class of cases where EU law does not apply, because the dispute bears no link whatsoever with any rule of EU law. Naturally, EU fundamental rights do not apply either, whether considered general principles239 or norms of the Charter.240 The current standard employed by the Court nonchalantly merges the issue of jurisdiction and the application of EU law to exclude the application of the Charter:

As the Court of Justice has consistently held, it has no jurisdiction to answer a question referred for a preliminary ruling where the interpretation of rules of EU law which is sought by the national court has no relation to the actual facts of the main action or to its purpose, and those rules are incapable of applying in the main proceedings.241

The Court refers to a line of cases that flows from Reisdorf (1995),242 which in turn elaborated the “incapable of applying” standard drawing expressly from the earlier Salgoil and Salonia rulings, quoted above. This case law proves too little with regard to the interpretation of art. 51(1) of the Charter. That the Charter cannot apply to domestic measures to which EU law is prima facie incapable of applying is not surprising. It would have been more useful to know more about the situations to which EU law appears instead capable of applying.

The Reisdorf test is one that regards the jurisdiction of the Court, but it is evidently under-defined for the purpose of art. 51(1) of the Charter. On one hand, the “no relation to the actual facts” standard is too vague: if taken too literally it would imply that any relation could suffice, however remote or stretched. Nobody is suggesting that any relation whatsoever between a national measure and EU law can make the Charter applicable. On the other hand, the “EU rules are incapable of applying” standard is equally deceptive. It might work as a gateway filter for the preliminary jurisdiction of the Court, but it certainly cannot serve as a test for the application of EU law, which triggers the Charter. It does not take a master in formal logic to understand that the question “when does one national measure fall outside the scope of application of EU law?” cannot be answered with “when EU law is incapable of applying to it.” The answer begs the question or, more accurately, causes a petitio principi.

In the mouth of the Court of Justice, the expressions “EU law cannot apply ratione materiae” and “EU law does not apply ratione materiae” must mean precisely the same thing. There cannot be a situation where EU law is capable of applying but does not apply in fact.243 If this legal equivalence corroborates the Fransson alignment, it does however cast a retrospective shadow: the Court seems to have rejected as inadmissible questions that prima facie bore no connection with EU

241 Vinkov, 2012 WL 611CJ0027, ¶ 44.
243 Of course, this is different from the situation in which the EU has some legislative competence but has not exercised it. In a similar scenario, EU law does not apply because there is (still) none that could possibly apply.
law, which are not the same as the questions to which EU law was incapable of applying. The summariness of the analysis needed to discard the application of EU law is not a perfect indicator of whether EU law actually applies. There will be at least some cases in which a thorough analysis is needed, at the jurisdictional stage, to conclude that EU law does not apply after all. In these cases, the jurisdiction of the ECJ is granted and the application of the Charter is not. In other words, it is not “quite obvious” that there is no link to EU law, and yet the link is ultimately not there.

An apposite example could be drawn from the reading of the Ymeraga judgment. In this case, the ECJ concluded that the situation at stake in the main proceedings “is not a situation involving the implementation of European Union law within the meaning of Article 51 of the Charter, so that its conformity with fundamental rights cannot be examined in the light of the rights established by the Charter.”[244] If the Fransson two-way equivalence is of any normative value, one should expect the ECJ to have rejected the preliminary question as inadmissible: if EU law is not involved—and therefore the Charter cannot apply—there is no valid question about EU law to begin with. This is not what happened. The ECJ admitted and examined at length the questions posed by the national judge, only to find ultimately that EU law (namely, art. 20 TFEU) “must be interpreted as not precluding” the national measures brought before the Court.[245]

It is all the more remarkable that this judgment comes after Fransson (May 2013), disproving implicitly, but openly, the simplistic equation that preliminary jurisdiction equals application of EU law, which equals application of the Charter. Because the ECJ is not in the business of applying EU law, but, mainly, interpreting it, it can very well happen that a question deals precisely with a doubt regarding the scope of EU law. Such question is of course within the Court’s jurisdiction, but it might result in a finding of non-application. Only if the response clarifies that EU law does not apply to certain national measures can one be certain that the Charter does not apply either. A case like Ymeraga exposes the ultimate disutility of the Fransson Columbus’s egg, and it is only fair to note that AG Cosmas, in his Opinion to Annibaldi, had already shied away from building unnecessary parallels between the application of fundamental rights and the preliminary jurisdiction of the Court:

> The extent to which the Member States are bound by fundamental rights under Community law matches the extent of the jurisdiction of the Court to give a ruling on questions of interpretation of those rights.[246]

What Cosmas said, in this quote, is something narrower than what the Court did in Fransson. The application of fundamental rights corresponds with the Court’s competence to issue a preliminary reference that concerns the interpretation of those rights, not of any norm of EU law.[247] In other words, the ECJ’s competence to

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[245] Id. at ¶ 45.
[247] A similar reasonable equivalence was used by the Swedish Supreme Court in the case NJA, [Supreme Court] 2011–6–29, B5302–10 (Swed.), ¶ 11, to refuse to raise a preliminary question regarding
pronounce on the interpretation of the triggering EU norm does warrant per se the application of the Charter, as the Ymeraga judgment shows with clarity. When EU fundamental rights are applicable, of course, the ECJ must answer to all questions regarding their interpretation. This truism, however, has nothing to do with the question of whether or not there is “implementation of EU law” of the kind warranting the application of the Charter: assuming that EU fundamental rights are applicable necessarily means that the “implementation” switch had been turned on, i.e., that there was a valid triggering EU norm.

The countercheck of the real decoupling between the jurisdiction of the Court and the application of the Charter comes from laconic rejection orders like that of the Asparuhov case,248 in which the Court noted that the preliminary question was inadmissible because there was no evidence that the national measure at bar “would constitute a measure implementing European Union law or would be connected in any other way with that law.”249 Note that the Court was not confident enough to rely on a single criterion and provided, “somewhat incongruously,”250 two separate ones to decline jurisdiction. There is no implementation of EU law, and, therefore, the Charter cannot apply, but also there is no connection whatsoever with EU law (a harder requirement to meet) and therefore the Court has no jurisdiction. There could have well been some sort of connection with EU law that entitled to Court to exercise its jurisdiction, and yet no implementation under art. 51(1) of the Charter—precisely what happened in Ymeraga. The jurisdictional threshold and the “implementation” trigger are not coextensive. When there is no jurisdiction, the application of the Charter is certainly out of the question, but the reverse scenario (jurisdiction entails application) is not always true.

In September 2013, the ECJ handed down the Texdata ruling, in which it confirmed the currency of the Fransson equivalence.251 The case was arguably less controversial than Fransson, as the Austrian sanctions challenged in the main proceedings were clearly adopted in compliance with the requirements of art. 12 of the Eleventh Directive.252 The ECJ, however, seemed impatient to leave behind all pre-Fransson doctrines, which, in truth, would have just done the trick, and re-proposed the Fransson equivalence as a sort of one-size-fits-all solution (no other ruling is mentioned in the section discussing art. 51(1) of the Charter). Paragraphs 72 and 73 hypnotically repeat how EU law and the EU Charter go hand in hand, in five similar but slightly reworded consecutive sentences. The impression is that the

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249 Id. (emphasis added). To be sure, this was not the case with the measure at stake in the main proceedings in the Asparuhov case, which showed neither connection, of implementation or otherwise, with EU law.
250 Rosas, supra note 27, at 1281.
ECJ is attempting to wash the reader’s brain from the sorrowful memories of too many fallible constructions of art. 51(1) of the Charter.

D. The Siragusa Flashback – or the Way Forward?

On March 6, 2014, the Court delivered the order in the Siragusa case.253 This decision further challenges the efficiency of the Fransson/Texdata equivalence and draws on the almost 20-year old precedents in Annibaldi, Maurin and Kremzow to provide a more articulated test. The claimant in the main proceedings challenged an Italian measure252 which required, without exception, the demolition of certain structures built without previous authorization from the competent authorities in areas covered by landscape conservation safeguards. The Italian administrative tribunal raised a question of compatibility with EU law regarding the unconditional obligation to dismantle the structures, which does not afford the authorities the power to issue a retrospective clearance if the works are ultimately found to be compatible with the landscape conservation criteria. In the view of the Italian court, this national measure could be in breach of the general principle of proportionality and of the right to property as protected by art. 17 of the Charter.

Naturally, these EU standards of legality allow for the setting-aside of the domestic provision only if it “implements EU law” under art. 51(1) of the Charter. The referring court listed a range of EU law instruments in the field of environment protection255 that could serve as triggers, noting that the protection of landscape is a component of EU environmental policies.

The Court declined jurisdiction, finding that the challenged measures fell outside the scope of EU law. It acknowledged the connection between landscape policies and the EU competence on environmental protection but noted “[…] the concept of ‘implementing Union law’, as referred to in Article 51 of the Charter, requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other” (emphasis added).256

The Court pretended to borrow the standard of a “certain degree of connection” from Kremzow, but the parallel is not convincing. In that case, the Court noted that the facts in the main proceedings were “not connected in any way with any of the situations contemplated by the Treaty provisions” and that the “purely hypothetical prospect” of exercising an EU right that could be affected by the national measures

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254 D.Lgs. 22 gennaio 2004, n. 42/04, art. 167(4)(a) (It.).
was incapable of establishing a “sufficient connection with Community law.” In the present case, the Court had instead recognized that the situation was connected in some way to EU law: the final decision of the Court was based on an assessment of degree, not one of existence. After all, the matrix of the two cases was very different. At issue in Kremzow was the \textit{effet utile} of the Treaty provisions on the freedom of movement, which was allegedly threatened by domestic measures that clearly fell outside the scope of EU law. In Siragusa, however, it was precisely the issue of the respective reach of EU and domestic law, and their possible overlap \textit{ratione materiae}, at stake.

More revealing is the reference to \textit{Annibaldi}. The Court explained that a national measure “indirectly affecting EU law” might nevertheless fall outside its scope, especially if they have a different purpose. This specification is instructive, as it shows that the \textit{Iida} and \textit{Ymeraga} checklists were not abandoned with \textit{Fransson} and, more importantly, that the message from the German Constitutional Court was heard loud and clear in Luxembourg.

The Court provided yet another rationale for the non-application of EU law, drawn from \textit{Maurin}: EU law did not impose any obligations on the Member States in the specific situation.

The \textit{Siragusa} judgment is encouraging, although the inclusion of no less than three alternative explanations for the non-application of the Charter and the general principles appears an over-compensation for the minimalism of \textit{Fransson} and \textit{Texdata}. The Court implicitly abjured the \textit{Fransson} equivalence as a self-sufficient test, sent a message of reassurance to the \textit{Bundesverfassungsgericht} (dusting for the occasion the \textit{Annibaldi} test which had been forcefully invoked in Karlsruhe), and timidly attempted to propose the presence of a specific EU obligation as the relevant yardstick. A fourth discrete remark, which might be interpreted as \textit{obiter dicta}, is that the application of EU fundamental rights to national measures pursues the objective of ensuring the “unity, primacy and effectiveness” of EU law (the \textit{Melloni} formula). Therefore, when the national measures pose no risk to said objective, there is no need for the Charter to apply.

The multiple rationales used by the Court make it impossible to discern a clear test, or even to determine which among them would be sufficient, taken separately, to prevent the application of the Charter (for instance, is the absence of a threat to the unity of EU law enough? Is the \textit{Kremzow} test really applicable beyond the safeguard of the \textit{effet utile} of the four freedoms?). However, \textit{Siragusa} could be interpreted as a sign of goodwill, a cautious attempt to engage with the riddle of art. 51(1) of the Charter through plausible argumentation rather than oracular decisions.

\begin{itemize}
\item \textit{Kremzow}, 1997 E.C.R. I-2637, ¶ 16.
\item See \textit{Siragusa}, 2014 WL 613CJ0206, ¶ 25.
\item \textit{Id.} at ¶ 26.
\item In line with the \textit{Maurin} precedent, but also with some scholars’ proposal, see e.g., Lenaerts, \textit{supra} note 36.
\item \textit{Siragusa}, 2014 WL 613CJ0206, ¶ 31–32.
\end{itemize}
E. Decoupling Trigger Norm and Standard of Review

Cases in which there is some link between the national measure and EU law are very hard to decode. The ECJ is historically ill-equipped to perform the task of second guessing national judges’ invocation of EU norms, as seen above. The correct execution of this task, however, is crucial in cases relating to fundamental rights. Accepting the national judge’s interpretation regarding the applicability of EU law almost at face value is tantamount to triggering the application of the Charter without checking. The standard of scrutiny cannot be the same standard developed above, that is, the rejection only of cases obviously unrelated to EU law. Accepting that EU law applies, unless it is manifestly irrelevant, entails the risk of applying the Charter to measures to which EU law, in fact, does not apply at all. The ultimate implication is unsettling: if the ECJ followed upon the Fransson judgment by recycling its loose admissibility standard into art. 51(1) of the Charter, some purely internal matters would inevitably slip through and end up being reviewed under the Charter just because EU law was not “obviously” unrelated. This extreme scenario would run counter the oft-repeated assurance that the Charter cannot expand the competences of the Union.

To be sure, the Court has not done so, nor is it likely to consider this course of action. Without saying it expressly, the Court and the commentators are aware that when the compatibility between national measures and EU fundamental rights is challenged, a peculiar legal scenario arises: the normative decoupling of the jurisdictional basis and the standard of review. In basic cases, national judges will request a preliminary ruling from the ECJ when they suspect that a national measure is incompatible with one or more EU norms. This EU norm serves at the same time as a jurisdictional basis and standard of review for the preliminary proceedings. In Van Gend en Loos, for instance, art. 12 of the Treaty on the European Community was the norm that (1) certified the application of EC law to the contested Dutch custom duties, but also (2) specified the primary obligation, which the contested Dutch measures allegedly breached. It is no surprise that in similar cases, “jurisdiction” and “substance” (the merits) are connected in the Court’s analysis, as both depend on the interpretation of the same EU norm(s).

When a national measure is challenged for an alleged breach of the Charter, on the other hand, jurisdictional basis and standard of review are found in different EU norms. In Fransson, the Court’s jurisdiction on the Swedish system of double sanctions was based on the norms of the TFEU and of the VAT Directive 2006/112 relating to the member states’ obligations to collect the value added tax, but the standard of review was the Charter’s provision on ne bis in idem. In N.S., the jurisdiction of the Court on the English decision to transfer the asylum-seekers to Greece was based on art. 3(2) of the Dublin II Regulation, whereas the standard of review applied was art. 4 of the Charter, which outlaws inhumane treatment. At first sight, the “gateway” norms of EU law, which fulfill the condition of art. 51(1) of the Charter, present no issue of compatibility with the domestic measures challenged. EU provisions on VAT are silent on the criminal liability of tax evaders in Sweden, and art. 3(2) of the Dublin II Regulation is, on its face, even openly supportive of transfer decisions such as that taken by the English authorities. The applicable trigger EU norms, in other words, have no reason to apply to the national measure to
determine the outcome of the main dispute. They only serve as the gateway for the judicial review based on other norms of EU law, the relevant Charter’s standards.

This decoupling, in reality, can be reduced to unity through a theoretical process. In fact, the jurisdictional basis and the standard of review continue to be one norm only, that is, the trigger EU norm interpreted as containing, implicitly, the relevant guarantee flowing from the Charter. This is but the obvious consequence of a truism: because respect for fundamental rights is a condition of validity for EU law, each and every norm of the EU must be interpreted as carrying within it all EU fundamental rights guarantees, lest it should be held invalid. Since art. 47 of the Charter must be read into art. 325 TFEU, the latter can found the Court’s jurisdiction and, in its enhanced normative rendition, serve also as a benchmark for the compatibility of Swedish norms with the principle of _ne bis in idem_. Likewise, art. 3(2) of the Dublin II Regulation, read in light of art. 4 of the Charter, both _applies ratione materiae_ to transfer decisions and _forecloses_ those that expose individuals to the risk of inhuman treatment.

This reduction to unity, however, is just a rationalization. It justifies the apparent nonsense of having norms that are outside the primary competence of Court but that apply nevertheless, thanks to other norms that, in turn, do not apply, but are essential to establishing the jurisdiction of the Court.\(^{262}\) Besides this theoretical unity, however, looms the normative decoupling that national and Union courts must manage, with no other tool than the “implementation” _trait d’union_.

The purpose of this section has been to show that the elegant solution chosen by the Court in _Fransson_ with respect to the “implementation” dilemma, which comes across as a masterwork of minimalism compared to the AG’s Opinion, is mostly useless. It discards conclusively certain indefensible readings of art. 51(1) of the Charter—for instance, that it cannot apply to the ERT derogation scenario, or that it only covers measures adopted with the specific intention of executing EU obligations—but adds nothing to the _status quo_ inherited from the case law on general principles. The _Texdata_ ruling perpetuates the _status quo_, and national courts are left without much guidance on how to treat challenges to domestic measures based on odd normative couplets (think of the bottom line of the Scottish case: EU norms on electoral rights should be the reason why Scottish rules on legal aid are subject to EU-human rights review.\(^{263}\)

To conclude, it is appropriate to add a more general remark, which cannot point to an exit out of the current _cul de sac_ but might help to better understand how the ECJ ended up in it. It is well known that the EU courts have no jurisdiction over national measures. According to an inveterate _fictio_, issues of compatibility between

\(^{262}\) For two perceptive studies on the management of primary and secondary jurisdictions of international tribunals, see Lorand Bartels, _Applicable Law and Jurisdiction Clauses: Where Does a Tribunal Find the Principal Norms Applicable to the Case Before It?_, in _MULTISOURCED EQUIVALENT NORMS IN INTERNATIONAL LAW_ 115 (Tomer Broude & Yuval Shany eds., 2011), and Joost Pauwelyn & Luiz Eduardo Salles, _Forum Shopping Before International Tribunals: (Real) Concerns, (Im)possible Solutions_, 44 _CORNELL INT’L L.J._ 77, 77–118 (2009).

\(^{263}\) Another extreme case is _Kremzow_, in which the claimant tried to bring the matter of his imprisonment under the umbrella of EU law, by stressing that it prevented him from exercising the freedom of movement across member states. See _Kremzow_, 1997 E.C.R. I-2637.
EU law and national measures are subsumed under the analysis of the interpretation of EU law. In other words, what is in reality a question regarding the EU-illegality of internal norms is answered by clarifying whether or not EU law, interpreted in a certain way, precludes, in the abstract, all hypothetical domestic measures identical to those applicable in the main proceedings. It is an innocent fiction, devised to preserve the division of competences between Member States and the EU, and defuse the impression of top-down supremacy of EU law over national law. It is for the national judge to apply EU law as interpreted and set aside conflicting domestic provisions, if the preliminary reference points in that direction: EU Courts cannot pronounce on the fate of the challenged national measures. After all, art. 267 TFEU is clear in this respect: preliminary questions can concern only the interpretation of all EU law and the validity of EU secondary law. Although anyone reading a preliminary decision learns how EU law would apply in the main proceedings, the ECJ has no jurisdiction to apply it directly. For purposes of this article, this oft-forgotten truism is revealing, along with the reflections above. The ECJ does not apply EU law to national measures (by definition), and is ill-equipped to indicate when it applies thereto, because its primary mandate is only to interpret it, in the abstract.

It should not be surprising, therefore, to see the ECJ struggle so much with the “implementation” riddle. The formula of art. 51(1) of the Charter has involuntarily exposed some of the institutional and jurisdictional compromises that were necessary to jumpstart the integration process and the mandate of the ECJ: the fiction regarding the ECJ’s disinterest in national measures; the unnaturally loose admissibility criteria; the singularity of a tribunal whose main competence is merely advisory but, at the same time, firmly rooted in specific proceedings run by other courts; and the fact that Foto-Frost\textsuperscript{266} does not extend to acts implementing EU law only because the agent is a member state.\textsuperscript{267}

VI. CONCLUSION

Despite the palpable enthusiasm of the Court in Texdata, the test for the application of art. 51(1) of the Charter is still not clear. The Fransson/Texdata equivalence is misleading, as it conveys the mistaken idea that a balanced test has finally been struck. The plethora of national cases in which parties and judges struggle equally with the application of the Charter is testimony instead to a

\textsuperscript{264} On the distinction between interpretation and application of the law, one that is too often overlooked and might prove illuminating, see Anastasios Gourgourinis, The Distinction between Interpretation and Application of Norms in International Adjudication, 2 J. Int’l L. Disp. SETTLEMENT 31, 31-57 (2011).

\textsuperscript{265} Or to assess its validity against other EU law standards, an aspect of the Court’s jurisdiction which is not relevant for this discussion.


\textsuperscript{267} As it was seen repeatedly in this article, the Simmenthal doctrine applies even to national measures fulfilling the criterion of art. 51(1) of the Charter, meaning that they can be set aside in case of a conflict with EU law. As reasonable as this arrangement is, it creates a minor paradox: national measures implementing EU law are treated like all other domestic measures on one hand (they are subject to Simmenthal, not to Foto-Frost), but on the other hand they are treated like EU law, and therefore brought under the scope of the Charter.
continuing uncertainty, as is the disinterment of Annibaldi, Maurin and Kremzow, carried out in Siragusa.

For once, it seems that the pragmatism of the ECJ is also at the basis of its failure to come up with a better test. It is evident that, until Fransson, the ECJ had tackled the interpretation of art. 51(1) of the Charter using a piece-meal approach, which often required adjustments or gave rise to contradictions. The attempt of the Advocate General in Fransson, at least went in the opposite direction, aimed toward abstraction and envisioning a gradual process of learning through progressive polishing of the applicable test. It is desirable that the ECJ come to terms with a major defect of the implementation doctrine: the lack of a theoretical framework of the cases in which EU law affects domestic law. Just like Lord Laws suggested, it should be possible to start with a general classification of what EU law can do through the agency of national measures (it can create obligations, grant permissions or privileges, define duties, determine rights, impose prohibitions, assume liabilities, etc.) and let the case law sort out atypical cases. It is somewhat unacceptable that, decades after ERT, the Court has not clarified what instantiates the "application of EU law." This concern is echoed by Sarmiento, supra note 10, at 1279, which takes no particular issue with Fransson, but notes that the Fransson-equivalence is insufficient ("[T]he judgment does not codify the different links that the ECJ has developed throughout the years in determining when Member States ‘implement’ EU law. After Åkerberg Fransson, we know that ‘implementation’ in the sense of Article 51(1) also refers to situations within ‘the scope of application’ of EU law. However, we are still missing the overall picture.").

This situation brings to mind the admonishment of James Bradley Thayer, Preliminary Treatise on Evidence at the Common Law 190 (1898) ("If terms in common legal use are used exactly, it is well to know it; if they are used inexacty, it is well to know that, and to remark just how they are used.").

The impressive number of Court insiders who have engaged with the implementation riddle can only be evidence that the issue is far from resolved, though the Fransson/Texdata mantras and President Skouris’s comments would trick some into believing otherwise. Suffice it to remember Judge Rosas’s heartfelt recommendation that Fransson go exactly in the opposite direction from where it went in fact to appreciate the gravity of the situation. It might well be that some time will pass before the ECJ is confronted with the unavoidable task of rectifying the current interpretation of art. 51(1) of the Charter, but what is certain is that, in the meanwhile, hundreds of domestic proceedings will be affected by this state of chaos.

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268 See supra, Section II.C.
270 This concern is echoed by Sarmiento, supra note 101, at 1279, which takes no particular issue with Fransson, but notes that the Fransson-equivalence is insufficient ("[T]he judgment does not codify the different links that the ECJ has developed throughout the years in determining when Member States ‘implement’ EU law. After Åkerberg Fransson, we know that ‘implementation’ in the sense of Article 51(1) also refers to situations within ‘the scope of application’ of EU law. However, we are still missing the overall picture.”).
271 This situation brings to mind the admonishment of James Bradley Thayer, Preliminary Treatise on Evidence at the Common Law 190 (1898) ("If terms in common legal use are used exactly, it is well to know it; if they are used inexacty, it is well to know that, and to remark just how they are used.").
272 See Thym, supra note 176, at 405.
Ironically, ECJ’s shyness in resolving the issue of art. 51(1) of the Charter is contributing to the Court’s worst-feared disgrace: the uneven application of EU law across the Union. Incidentally, the Charter itself will suffer from this precariousness. The proportion of cases in which it is mistakenly invoked or wrongly ignored is too high to favor its growth into a reliable and predictable instrument. At the moment, Charter-based cases are the territory of the few who dare to use (or abuse) the case law to thicken the human-rights firepower of their claims. The Charter, instead, should be the ordinary touchstone of EU legality, both for the national authorities that act to give effect to EU law, and for individuals affected by such action.

During the build-up to Fransson, Judge von Danwitz and Paraschas called for a “fresh start” for the Charter. For the reasons discussed in this article, Fransson is at most a false start. Siragusa, at least, is somewhat of a start, even if it is neither new nor clear. More is needed, and quickly at that.