National Measures and the Application of the EU Charter of Fundamental Rights – Does curia.eu Know iura.eu?

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ABSTRACT

Even after the entry into force of the European Union Charter of Fundamental Rights (‘the Charter’), some doubts regarding its legal effects are still looming large. Among them is whether, and to what extent, the Charter applies to national measures that are connected to European Union (EU) law but are not intended to implement it directly. This legal uncertainty affects the position of individuals seeking to assert their fundamental rights before a national judge. In particular, whereas the application of the Charter warrants disapplication of the conflicting national measures, the same remedy is often not available when plaintiffs rely only on other fundamental rights instruments (like the European Convention on Human Rights or national constitutions). This article offers a bottom-up account of how this hermeneutic cul de sac, often discussed at the theoretical level, influences adjudication in ordinary courts. It also appraises the outcome of two recent disputes that hinged precisely upon the application of the Charter and its relationship with other fundamental rights instruments (Kamberaj, Fransson). The aim is to ascertain whether national judges can derive some interpretive guidance from these precedents. It is submitted that the Kamberaj judgment fails to provide guidance on Article 51(1) of the Charter, and that the Advocate General’s laudable attempt at conceptualisation in Fransson is ultimately impracticable, at least in the short term. The decision in Fransson is maybe showing some goodwill on the part of the Court of Justice of the European Union (CJEU), but is insufficient. In the absence of a reliable test, it is argued that the CJEU should be pressed to clarify the scope of application of the Charter on a case-by-case basis through its preliminary reference jurisdiction. The recent case-law suggests instead that the CJEU prefers to maintain a hands-off approach. This is undermining the advent of the Charter as a discrete legal instrument (as opposed to an interpretative supplement) and is contrary to the CJEU’s mandate to help national judges in the interpretation of EU law. Besides, the
Bundesverfassungsgericht’s reaction to Fransson shows that the lack of a clear test can encourage member states to attempt a counter-colonisation of areas falling within the scope of EU law, as far as human rights protection is concerned.

**KEYWORDS**: Charter of Fundamental Rights, European Union law, Court of Justice of the European Union

1. PLAN OF THE ARTICLE AND RESEARCH QUESTION

It has become commonplace that the European Union Charter of Fundamental Rights (‘the Charter’) could not vest the European Union (EU) with new powers, whether by adding new competences or by expanding the exercise of existing ones at the expense of member states’ autonomy. This was made clear during the negotiation of the Charter, following its proclamation in 2000 and even after its upgrade to a treaty-like source in 2009. The Charter’s added value was concededly more modest: to exemplify 40 years of developments in the evolving relationship between EU law and the protection of human rights and to confirm that human rights, which had already surged to the status of general principles of the Union, define in fact the outer limits of the exercise of EU’s competences.

This article will not investigate whether the Charter’s entry into force has led to an expansion of the substantive reach of the human-rights tool-kit of the EU. In general, the post-Lisbon practice has been consistent with the pre-Lisbon case-law on fundamental rights (applied in their form of general principles).\(^1\) The Charter has proven to be an instrument condensing and rationalising a settled practice (costituzione-bilancio) rather than a blueprint for further development in the area of human rights (costituzione-programma).\(^2\) The reassuring safeguard on the non-revolutionary nature of the Charter was inserted in the Charter itself, and duplicated in the redundant UK and Poland’s protocols.\(^3\) It is true, however, that the Charter includes rights that are not found in the European Convention on Human Rights (ECHR)\(^4\) or in the case-law of the Court of Justice of the European Union (CJEU) on general principles;\(^5\) there is therefore a concrete potential that these new rights might expand the reach of the EU’s rule of law, as far as compliance with fundamental rights is concerned. A discussion of these aspects, however, lies outside the focus of this article.

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3 On the effect of UK’s opt-out, see Case C-411/10, NS v Secretary of State for the Home Department [2011] ECR 000, and the national proceedings NS (Sudan) v Secretary of State for the Home Department [2008] EWCA Civ 318.


Its purpose, instead, is to describe the state of uncertainty surrounding the applicability of the Charter to national measures (section 2) and the repercussions that this situation has on the activity of domestic courts. After the discussion of an exemplary domestic case-study (section 3), the analysis will turn to the CJEU’s judgments in the cases Kamberaj and Fransson (section 4) in an attempt to determine whether these rulings provided some guidance to domestic judges. The final section (section 5) discusses the stance of the CJEU and its reluctance to resolve the doctrinal impasse described, which frustrates the application of the Charter. This discussion is undertaken in order to answer the following questions: is a clearer test needed for the application of the Charter to domestic measures? (arguably, it is), and is the CJEU helping national courts apply the Charter with confidence? (arguably, it is not).

2. THE CHARTER AND NATIONAL MEASURES

Article 51(1) is the key provision of the Charter’s self-restraint vis-à-vis member states. This clause marks the difference between the Charter and other rights charters (such as the European Convention of Human Rights and national constitutions) with respect to its scope of application, and specifies that the Charter cannot force the boundaries of the principle of conferral. It provides, in relevant part:

The provisions of this Charter are addressed to…the Member States only when they are implementing Union law (emphasis added).

Thus, the Charter does not bind member states across the board. It lays down the principles of human right compliance for all acts attributable to the EU, that is, acts of all EU bodies. This includes the conduct of states implementing EU law. Therefore, member states are considered, for the purpose of applying the Charter, agents of the EU but only when, and insofar as, they implement EU law.

The application of human-rights provisions to state conduct is not a novelty in the EU. As soon as the case-law confirmed that fundamental rights are among the general principles of the Union, by virtue of a commonality of members’ constitutional traditions or of their equivalent international commitments, it followed necessarily that their application ratione materiae coincided with that of general principles at large. On this issue, the CJEU had already clarified (see Wachauf6 and ERT7) that general principles of EU are binding not only on EU bodies, but also on member states that (i) implement EU law, or (ii) adopt measures in derogation of EU commitments. Whether states derogate from EU law by virtue of an express specific exception (like those listed in Article 36 of the TFEU, or those envisaged in a Directive or a regulation8), a general

8 See, for example, the judgment of 21 December 2011 in NS, supra n 3 at para 68 (‘the freedom of the national lawmaker resulting from an express authorization laid down in Regulation is subject to restrictions resulting from the necessity to respect the fundamental rights’ guarantees’). For more dated instances, see Case 71/81, Zuckerfabrik Franken [1982] ECR I-681 at paras 22–28; and Joined Cases C-20/00 and C-64/00, Booker Aquaculture and Hydro Seafood [2003] ECR I-7411 at paras 88–93.
one or a mandatory requirement, one thing is clear: states must in all instances comply with fundamental rights qualifying as EU general principles.

Since member states can have a margin of manoeuvre when they implement EU law, the latter cannot foreclose the possibility that human rights are breached, down the line, by the national ‘agents’. Therefore, EU law must put in place safeguards to make sure that EU law is implemented correctly, with due attention to the rights-guarantees that permeate its adoption: the discretion that states enjoy to choose the preferred means of implementation cannot include the power to violate fundamental rights. This is particularly true when EU law limits itself to harmonise national regulations:

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

Article 51(1) of the Charter, in fact, simply condenses the two conclusions reached by the case-law over time: human rights operate in the same way as other general principles of the EU and apply to state action whenever member states act as agents of the EU retaining some discretion in the choice of implementation strategies. Although it is true, in this respect, that the Charter does not extend the scope of the powers of the EU, neither does it provide any clarification about how wide this scope is, in the first place.

Indeed, neither the relevant provisions nor the case-law have managed to devise a reliable judicial test that could be used to get a yes/no answer to the question.

10 Case 120/78, Rewe Zentral (Cassis) [1979] ECR 649.
12 Eeckhout, supra n 5 at 977.
13 C-101/01, Lindqvist [2003] ECR I-12971 at para 91; see also Cases C-465/00, C-138/01 and 139/01, Rundfunk [2003] ECR I-4989. See Besselink, ‘General Report for the FIDE 2012 (Topic 1)’, in Reports of the XXV FIDE Congress (Tartu: Tartu University Press, 2012) 107, specifying that in the case of national measures falling within the ‘harmonising’ effect of EU law, even situations without trans-border aspects are deemed to be within the scope of EU law.
14 In this respect, it may be mentioned that according to some authors, the Charter does not apply to the derogation scenario (Case C-260/89, ERT [1991]1-2925). This is a minority position, somewhat at variance with the Praesidium’s explanations on the Charter, and will not be discussed here. For an overview, see Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (2012) 8 European Constitutional Law Review 375 at 383–5.
whether the ‘implementation of Union law’ is performed by certain state measures. All that is clear, so far, is that states are not bound by the Charter when they do not act as agent of the EU, that is, when their actions concern purely domestic matters. This outer limit is aptly expressed in the second paragraph of Article 51, which excludes the possibility that the Charter expand the competences of the Union. If the Charter applied to state measures governing purely domestic matters, it follows, the reach of EU law would be enlarged at the expense of state’s exclusive competences: Article 51(2) informs the construction of Article 51(1) and confirms that the Charter is meant to ensure the compliance of Union’s actions with the rule of (human rights) law, and does not impose another list of rights upon the member states. 17 As it has been observed by a CJEU judge, the identification of the scope of application of the Charter has far-reaching implications that transcend the search for legal certainty and go to the core of national sovereignty and the mission of the Union. 18

Taking cues from the case-law on general principles, which is expressly referred to in the Praesidium’s Explanations of the Charter, 19 it is possible to attempt a construction of Article 51(1) of the Charter. The Court, in the ERT case, concluded that fundamental rights obligations are binding on member states not just when they implement EU law, but every time domestic norms ‘do fall within the scope of Community law’. 20 This wording foreshadows a shift from a subjective to an objective test: the benchmark of reference is not the aim of the national measure under review (that is, whether it is designed to implement EU law or not), but the area covered by the aggregate scope of EU legislation (that is, whether the measure falls therein). Advocate General Gulmann, in an attempt to paraphrase the ERT criterion, explained that the relevant question is ‘whether [the national measures] are so closely connected to Community law that they fall within [its] scope’, 21 but the requirement of a ‘close connection’ appears too vague to bring an added value and provide reliable guidance on the precise reach of EU general principles.

17 More precisely, as rightly explained by Ladenburger, supra n 15 at 21, this proviso aims to defuse the circular reasoning whereby each national measure concerning fundamental rights would fall under the review of EU law by virtue of the mere existence of the Charter. In other words, Article 51(2) of the Charter confirms its character as a secondary guarantee on the correct application of primary competences, which cannot serve as legal basis for new EU competences on human rights. For instance, the inclusion of the right to strike cannot entitle the EU to adopt acts on the matter, nor must State authorities care to comply with the Charter as a whole when regulating internally the conditions applicable to the exercise of the right. See C-217/08, Mariano [2009] ECR I-35 at para 29; C-535/08, Pignataro [2009] ECR I-50; C-287/08, Crocifissa Savia [2008] ECR I-136; and C-427/06, Bartsch [2008] ECR I-7245.
19 This was the explanation of Article 51 provided by the Praesidium: ‘As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the EU is only binding on the Member States when they act within the scope of EU law (Case 5/88, Wachauf [1989] ECR 2609; ERT, supra n 14; Case C-309/96 Amihaldi [1997] ECR I-7493). See Explanations relating to the Charter of Fundamental Rights, OJ [2007] C 303/17, and the similar approach in the case C-292/97, Karlsson [2000] ECR I-2737 at para 37.
20 ERT, supra n 14, see in particular para 42; see also C-442/00, Caballero v Fondo de Garantia Salarial (Fogasa) [2002] ECR I-11915 at paras 30–31.
In the wake of ERT, it seemed that member states must respect the general principles of Union law, including the norms on the protection of fundamental rights, whenever their acts concern or affect, even potentially, a matter touched upon by EU law.\textsuperscript{22} In this vein, the UK Supreme Court has recently declared that

\[\text{[the Charter] only binds member states when they are implementing EU law - article 51(1). But the rubric, ‘implementing EU law’ is to be interpreted broadly and, in effect, means whenever a member state is acting ‘within the material scope of EU law’.}\textsuperscript{23}\\

This is of course a very generic test, based on a minimal requirement (that state action touches upon matters regulated, at least partially, by EU law) that, on its face, would probably determine the application of the Charter to a disproportionate majority of state measures. Assuming that the scope of the Charter is not so far-reaching, it is for the interpreter and the judiciary to formulate a workable test to locate its boundaries; a similar test has so far failed to emerge.\textsuperscript{24} A minimal safeguard against the inadvertent encroachment of Union law on state measures was set in Annibaldi, where the Court found that

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

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.\textsuperscript{25}

\textsuperscript{22} Case C-578/08, Chakroun v Minister van Buitenlandse Zaken [2010] ECR I-01839. The British courts have taken a similar view, see R (on the application of Zagorski and Baze) v Secretary of State for Business, Innovation and Skills [2010] EWHC 3110 (Admin), per Lloyd Jones J.

\textsuperscript{23} The Rugby Football Union v Consolidated Information Services Ltd [2012] UKSC 55 at para 28. Quotations are from Zagorski & Baze; R(on the application of) v Secretary of State for Business, Innovation and Skills & Anor [2010] EWHC 3110 (Admin).

\textsuperscript{24} See the AG’s perplexity on this point in Case C-108/10, Ivana Scattolon (AG Bot, Opinion of 5 April 2011 at paras 116–20); and Joined Cases C-483/09 and C-1/10, Magatte Gueye and Valentin Sánchez Salmerón (AG Kokott, Opinion of 12 May 2011 at para 77), mentioned also in Anderson and Murphy, ‘The Charter of Fundamental Rights: History and Prospects in Post-Lisbon Europe’ (2011) EUI Working Paper 2011/08. Advocate General Cruz Villalón, in a doctrinal work, observed that the ERT standard is still the most reliable one, and that national measures fall under the scope of EU law ‘wherever the latter has any say on the matter regulated by national law’. See Villalón, ‘“All the Guidance”, ERT and Wachauf’, in Maduro and Azoulai, The Past and Future of EU Law: The Classics of EU Law Revisited (Oxford: Hart Publishing, 2010) 162 at 166.

\textsuperscript{25} Annibaldi, supra n 19 at [22]–[24]. In the seminal study by García, ‘The General Provisions of the Charter of Fundamental Rights of the European Union’ (2001) Jean Monnet Working Paper 4/02 at 5, available at: centers.law.nyu.edu/jeanmonnet/archive/papers/02/020401.pdf [last accessed 24 February 2014], it is noted that an a contrario interpretation of Annibaldi ‘would imply including inside the aforementioned scope of action all activities that are linked, and not necessarily in the strict terms of execution, to Community Law’.
In the Chartry order, the CJEU rejected a preliminary question from a Belgian ordinary court, hinging on the possible conflict between a domestic statute and the EU principle of effective judicial protection, also codified in the Charter. The Court could not find a connection (un rattachement) between the situation at hand and EU law and therefore concluded that there could not be a question on the interpretation of EU law that could be answered through a preliminary ruling. The Court concluded that the main proceedings related neither to the EU discipline on the market freedoms, nor to the application of national measures implementing (mettre en œuvre) EU law.

The same reason that prevents the Court from retaining preliminary jurisdiction – the lack of a link with EU law – confirms a fortiori that the Charter cannot apply, under the proviso of Article 51(1). The CJEU’s interpretative competence and the application of the Charter being coextensive, whenever a national measure is at stake, the connection with EU law (vel non) would warrant (or prevent) both at the same time.

To complicate things further, the doctrine of incorporation (whereby EU general principles apply to those national measures that, despite falling under the exclusive jurisdiction of the State, represent a precondition for the enjoyment of EU rights) seems to point to an ever-expanding reach of the sphere of EU law through a gradual but irreversible process of competence creep.

Already in Zambrano, AG Sharpston lamented this state of ingrained uncertainty and advocated a fundamental change in the discipline. Instead of trying to pin down the elusive ‘implementation’ concept, she proposed a federalist approach to cut the
unserviceable Gordian knot resulting from the intertwinelement of the ‘implentation of EU law’ and ‘scope of EU law’ boundaries. Regardless of whether an EU competence is exclusive or shared with the members, and whether the EU has already exercised it through secondary legislation, any state action touching upon that competence-matter should comply with the Charter. We will refer to this suggestion as the ‘federalist proposal’, seeking to transform ‘EU fundamental rights into free-standing rights that can be invoked in any situation to challenge national measures depending on the mere existence of exclusive or shared EU competence’.

Whereas AG Sharpston’s proposal invokes a decisive shift of focus from the elusive reach of EU law to the reach of EU competences, less revolutionary commentators are divided on the correct way to make use of the reach of EU law as a yardstick. The two schools of thought (the restrictive one and the extensive one) are vividly described by the Advocate General in Scattolon:

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

The CJEU, in late 2012, still maintained an ambiguous position, perhaps closer to the restrictive option:

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.

The ambiguity stems particular from that last remark, which seemingly hints to the possibility that the Charter not apply to an act that affects (indirectly) EU law, if ‘it pursues objectives other than those covered by the European Union’. 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).

32 Groussot, Pech and Petursson, ‘The Scope of Application of EU Fundamental Rights on Member States’ Action: In Search of Certainty in EU Adjudication’ (2011) Eric Stein Working Paper No 1/2011, at 22, available at: http://www.ericsteinpapers.eu/papers/2011-1 [last accessed 24 February 2014]. Although the term ‘federalist’ terms intends to portray the inevitable harmonisation that this proposal would entail, it is not used to indicate a full-fledged process of ‘federal’ harmonisation, that is, outside the scope of EU law, as it is used, for example, in ibid. at 18, to describe the US experience.
33 Scattolon, supra n 24 at Opinion of AG Bot, para 117.
34 C-40/11, Yoshikazu Iida v Stadt Ulm [2012] ECR 000 at para 79.
By the same token, one could read the order in Asparuhov\(^\text{35}\) to signify that there actually exists a kind of ‘connection’ between the domestic act and EU law, other than a relationship of implementation, which could grant the application of the Charter.\(^\text{36}\)

The use of \textit{a contrario} inference, however, besides being a diabolically hard exercise,\(^\text{37}\) provides little reassurance to those looking for the safe harbour of a new judicial doctrine: only future cases will confirm whether these passages contained a mere rephrasing of Annibaldi, the kernel of a new test or, to the contrary, an inconsequential \textit{obiter dictum}.

3. THE TRIPLE-C TRIANGLE: CHARTER, CONVENTION AND CONSTITUTIONS

The reason for determining the precise scope of application of the Charter is crucial and obvious. A national measure inconsistent with the Charter might be alternatively perfectly lawful or not, depending on whether it is possible to identify the decisive ‘presence’ of EU law, in the sense above (or, as Ladenburger puts it, the existence of ‘some sort of link’ between the national act and EU law)\(^\text{38}\). Ordinary courts, which are unable to extract from Article 51 of the Charter a workable test, might end up applying or disapplying national measures with the best intentions, but for the wrong reasons.

This inconvenience is, in part, mitigated by the fact that in all member states there are other instruments that roughly correspond, \textit{ratione materiae}, to the content of the Charter\(^\text{39}\): national constitutions typically include fundamental rights charters, and the ECHR requires public authorities to respect a list of human rights provisions that is to some extent indistinguishable from the Charter’s one.

Since most fundamental rights appear in all three sources, when a domestic measure appears to unduly frustrate a right, it will arguably conflict with all of them equally.\(^\text{40}\) In an ideal scenario, the remedy in the event of collision between a national measure and any one of the three C-sources\(^\text{41}\) (Charter, Convention,
constitution) would be one and the same (the possibility for the national judge to set aside the domestic measure). Consequentially, the national court could outflank the hermeneutic ambiguity of Article 51(1) of the Charter, and turn its attention to the other sources of similar import.

In reality, the situation is quite different: ordinary courts of EU member states are usually deprived of the power to review autonomously the constitutionality of statutory legislation, and even in case of a conflict with the ECHR, only a few courts are entitled to disapply the domestic measure.\(^4\)\(^2\) Whereas the procedures available to remedy statutory violations of the constitution and the ECHR are ultimately depending on the constitutional layout of each state, the disapplication of EU-illegal measures derives from an unconditional doctrine, mandated centrally by the Union, and inspired by the principles of primacy and loyalty. At least since the *Simmenthal* case member states (should) have learned that there is simply no way around it.\(^4\)\(^3\) The application of EU law, carrying within the tool of disapplication, ensures an efficient protection of fundamental rights or, better, a swift implementation of the EU standards of fundamental rights protection:

> If [interpretation of domestic law consistent with EU law] is not possible, the national court is bound to apply Community law in full and protect the rights it confers on individuals, and to disapply, if necessary, any provision in so far as application thereof, in the circumstances of the case, would lead to a result which is contrary to Community law.

Granted, the purpose of the Charter is not to merge with the other national constitutions and the ECHR, nor is it to provide a minimum uniform standard of rights protection like the ECHR.\(^4\)\(^5\) As it was noted, the Charter’s central purpose is to provide a uniform standard of fundamental rights compliance to be used as a benchmark for the validity of EU acts. This objective must be the pole star also in the application of the Charter to EU competences implemented by way of state measures, precisely to ensure the uniformity of EU law application across the Union, since ‘[t]o do otherwise would create the risk of having twenty-seven different

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\(^4\)\(^5\) On the interpretation of Article 53 of the Charter, which many read as evidence that the Charter sets a minimum standard of protection, see Case C-399/11, *Melloni* [2013] ECR 000 at Opinion of AG Bot.
standards of protection of fundamental rights within the European Union, and therefore a heterogeneous application of the EU law.\textsuperscript{46} Whereas the role of the Charter in this respect is uncontroversial, its scope of application is less so, insofar as it is still difficult to discern which national measures qualify as (delegated) EU legislation, and therefore must be subject to this uniformity straightjacket, and which do not.

It is therefore clear why there is a distinct added value in trying to resolve the ‘implementation’ conundrum in Article 51(1) of the Charter: national courts faced with the perspective of activating the supra-legislative effect of one of the C-sources, must be able to know when the Charter offers to them the silver bullet of disapplication. In the alternative, recourse to the constitution or the Convention might require ordinary courts to embark upon alternative procedures (resulting, often, in a pronouncement by the constitutional tribunal) that are more burdensome and increase—by definition—the length of the main proceedings. This is an undesirable course of action, especially when individuals are affected by national measures passed in disregard of human rights guarantees. Also, this contravenes the principles of efficiency and effective protection, whereby national procedural rules cannot frustrate the application of rights granted by EU law, or make it more burdensome than that of similar rights conferred by domestic law.\textsuperscript{47}

It is appropriate to describe a real case that exemplifies this state of uncertainty from the vantage point of the national court, and underscores how constitutional courts might be tempted to take advantage of it, for the self-serving purpose of maintaining some control over the human-rights review of primary legislation.\textsuperscript{48}

A. The (Pisan) Case

In 2011, an Italian first-instance civil tribunal (\textit{Tribunale di Pisa}) found itself in the very middle of the triple-C triangle.\textsuperscript{49} The claimant, a non-EU citizen, had challenged the administrative decision whereby the State pension authority refused to grant him attendance allowance. The refusal was based on the Italian statutory provision which limited such allowance to non-EU citizens with a residence card. Nevertheless, the claimant maintained that this provision should not apply, because it unreasonably discriminated against foreigners legally residing in Italy by virtue of a (temporary) residence permit. As such, the Italian norm violated Article 14 of the ECHR (on the prohibition of discrimination) and the principle of equality included in the Constitution (Article 3).

\textsuperscript{46} See von Danwitz and Paraschas, supra n \textit{15} at \textit{1401}.
\textsuperscript{47} For a classic definition of these principles, see Case C-78/98, \textit{Preston} [2000] ECR I-3201 at para 25. More generally, on the principle of effective judicial protection, see Joined Cases C-317-20/08, \textit{Alassini v Telecom Italia SpA} [2010] ECR I-2213 at para 61, mentioned in von Danwitz and Paraschas, supra n \textit{15} at \textit{1409}.
\textsuperscript{48} For an insightful (and contrapuntal) description of this CCC triangle, from the point of view of the Constitutional Court, see Cassese, ‘La giustizia costituzionale in Italia: lo stato presente’ (2012) \textit{Rivista Trimestrale di Diritto Pubblico} 603.
\textsuperscript{49} The full text of the judgment is available at: www.stranieriitalia.it/briguglio/immigrazione-e-asilo/2011/febbraio/trib-pi-indenn-accomp.html [last accessed 24 February 2014].
The judge knew that the statute would not stand constitutional scrutiny: in keeping with the case-law of the Constitutional Court on the same provision (but in regard to a different kind of allowance), she concluded with confidence that the provision of attendance allowance has an essential nature, as it aims at satisfying the essential needs of a person. In this respect, it is analogous to disability living allowance, whose essential nature was acknowledged by the Constitutional Court…. This conclusion is inescapable, at least when attendance is provided to people without an income.

Borrowing the words of the Constitutional Court, the judge found that the norm regulating the grant of attendance allowance would have to conform to an ‘unconditional parameter of equal treatment between nationals and foreigners legally residing on the territory of the State’. Thus, the judge could comfortably underscore the conflict between the challenged statute and both the Constitution and Article 14 of the ECHR. However, Italian judges are not allowed to set aside domestic acts colliding with the Constitution or the ECHR. Hence, disapplication of the domestic provision was not warranted unless the statute could be found at variance also with the third C-source, the EU Charter.

The judge noted the correspondence between Article 14 of the ECHR and Article 21 of the Charter, and recalled the horizontal instruction of Article 52(3) of the Charter. Under this provision, the interpretation of the Charter must be inspired by case-law of the ECtHR on the equivalent rights of the Convention. However, the substantive equivalence could not suffice to determine the application of the Charter; the judge also had to find, at least, that the Italian norm fell under the scope of application of EU law.

She started by noting that the field of social security is regulated by EU law, in particular by Regulation (EEC) No 1408/71. This Regulation (like its subsequent updates) was adopted on the legal basis of Article 51 of the 1957 EEC Treaty, which empowered the Council to act in the field of social security in order to facilitate the freedom of movement of Community workers. Although the scope of application ratione personae of Article 51 of the Treaty and of the Regulation was limited...
to EU worker citizens and their families, the Italian judge noted that the Union’s legislator had provided a list of social benefits covered by the Regulation, including invalidity and sickness benefits, which de facto delimited the reach of the social security law of the Union.

Consequently, the judge ruled that member states operate within the scope of EU law when they regulate those social benefits which are granted automatically in the presence of one of the risk-factors covered by the Regulation:

[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 Article 4 of Regulation EEC No 1408/1971. 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.

As a result, the Italian provision was set aside for conflict with Article 21 of the EU Charter (on non-discrimination), and the claimant’s application was granted.

The ordinary judge, confronted with the arduous task of finding the slightest trace of EU law, its ‘presence’, was well aware of the difficulty of such an operation, and that a mistake could cause unpleasant consequences: if she had declined to take the EU element into account, she would have condemned the claimant to wait for the conclusion of a full cycle of constitutional review before she could obtain the sought-after benefit, unjustly withheld pursuant to a statutory provision that was clearly unconstitutional and disrespectful of the ECHR.

Conversely, by betting on the relevance of the link with EU law, the judge would have faced the risk that her judgment be reversed in appeal. It is easy to imagine that a Court of Appeal, unimpressed by the sophisticated work of legal research necessary to trace the EU-gene in the measure at stake, could consider the link too weak to matter. This would mean that the constitutionality review would be finally activated, with the additional two to three years of waiting for the proceedings to arrive to a judgment of appeal.

Neither way was free of risk but the judge was given no third option. She had no reliable test to determine with certainty whether the Charter applied. Nevertheless, because the alternative ways to challenge the domestic provision fared significantly lower in terms of rapidity and actual protection of the claimant’s rights, the judge could not ignore the possibility to use the Charter. After all, iura novit curia, if judges cannot interpret Article 51(1) of the Charter, who can?

56 Note also that, since June 2003, the coordination scheme of Regulation 1408/71 was extended to third country nationals legally residing in one Member State, see Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and 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.
57 As a matter of fact, the judgment was not appealed. Thanks go to Dr Tarquini – the judge of the first-instance proceedings – for kindly sharing this information with me.
Shortly after this judgment, the Italian Constitutional Court entertained another question of constitutionality relating to the very same provision set aside in the Pisan proceedings. The Constitutional Court declared it unconstitutional, in the part subjecting the award of child disability allowance to the possession of a residence card. Formally speaking, this can demonstrate, a contrario, that the Pisa Tribunal erred on the scope of application of EU law, and on the application of the Charter. This is because the Constitutional Court, simply by admitting the question of constitutionality, implicitly discarded the possibility of a conflict between the challenged provision and EU law. When such conflicts arise, the Constitutional Court has since long learned the Simmenthal lesson: the ordinary judge must disapply the domestic norm, rather than making a referral to the Constitutional Court. If such referral is made nevertheless, it is inadmissible for lack of relevance: the provision being inapplicable in the main proceedings, neither party can claim to have an actual interest in a review of its constitutionality. Quite apart from this a contrario inference, did the Constitutional Court actually control whether EU law had some bearing on the challenged measure, and implicitly concluded that it did not? In other words, has the Constitutional Court really considered whether the list of Article 4 of Regulation 1408/71 provides reliable evidence of the application of EU law to the Italian scheme of social security?

Although this hypothesis is theoretically tenable, some indicators point to another plausible explanation. Firstly, the possible effect of EU law is never mentioned in the judgment, not even in the introduction summarising the position of the parties to the main proceedings. It could well be that neither the parties, the referring judge, nor the Constitutional Court took care to question the compatibility of the provision with the EU Charter. In the alternative, this very question was perhaps deliberately left out of the judgment. In either case, this indicates that the Constitutional Court did not (want to) rule, even implicitly, on the existence of a link with EU law. There could be a precise reason for it to avoid such a ruling.

As mentioned above, the Constitutional Court has by now come to terms with its lack of jurisdiction on the conflict between national provisions and directly applicable EU acts. Even when these provisions have a quasi-constitutional content (general

60 See, for instance, the ordinance of a contrario legal argumentation, see again Canale and Tuzet, supra n 37.
61 See, for instance, the ordinance of a contrario legal argumentation, see again Canale and Tuzet, supra n 37.
62 The only exception to this doctrine occurs when a conflict arises between domestic norms and non-self-executing acts of the EU. In similar cases, the Constitutional Court retains the jurisdiction to review and declare this divergence, see Judgments No 28/2010 and 227/2010. For a comment on these decisions, see Fontanelli, ‘Commento alla sentenza della Corte Costituzionale n. 227 del 2010 in tema di mandato di arresto europeo’ (2011) Giornale di Diritto Amministrativo 47; and Miccu, ‘Toward a (Real) Cooperative Constitutionalism? New Perspectives on the Italian Constitutional Court’, in Beneyto and Pernice (eds), Europe’s Constitutional Challenges in the Light of the Recent Case Law of National Constitutional Courts (Baden Baden: Nomos, 2011) 109 at 121–8.
principles of the EU, fundamental rights), it is for the ordinary judge to evaluate the potential conflict, the only remedy being the mechanism of disapplication.\footnote{See cases C-144/04, Mangold [2005] ECR I-9981; and Kıcıkdeveci, supra n 43.}

To the contrary, the Constitutional Court has strenuously negated the possibility that disapplication apply in cases of conflict between national measures and norms of international law. In 2007,\footnote{See Fontanelli and Biondi Dal Monte, ‘The Decisions No. 348 and 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention in the Italian Legal System’ (2008) 9 German Law Journal 889.} the Constitutional Court has reproached some ordinary judges who had started to set aside national provisions to implement ECHR, as interpreted by the European Court of Human Rights (ECtHR). ECHR provisions (but the same applies to other international legal instruments) have in the Italian system a particular status, half way between statutory acts and the Constitution. Accordingly, ECHR norms cannot prevail on constitutional norms, but can in turn be used as a standard of constitutional review for ordinary legislation, by virtue of their privileged status and the letter of Article 117(1) of the Constitution.\footnote{Reading: ‘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)}

In so doing, the Constitutional Court has underscored Italy’s commitment to remove from the system the effects of all legislative acts conflicting with Italy’s international obligations. However, it has fenced its turf from the creeping jurisdiction of ordinary courts, and retained the exclusive competence to operate this removal. Rather than conferring on ordinary judges the right to use disapplication as they routinely do when a clash with EU law arises, it has absorbed the review of conventionality within the scope of its centralised constitutional review.\footnote{Granted, the ECHR does not require contracting parties to provide it with direct effect, and neither do the relevant provisions of the Italian Constitution, see Cannizzaro, ‘Diritti “diretti” e diritti “indiretti”: i diritti fondamentali tra Unione, CEDU e Costituzione italiana’ (2012) 2 Il Diritto dell’Unione Europea 23 at 37. Nevertheless, it is fair to note that on the one hand, the ECHR does not prevent States from choosing to grant direct effect to its provisions and, on the other hand, that the Italian constitutional provisions relating to the effects of international commitments are couched in general terms and arguably would not represent an insurmountable obstacle should the Constitutional Court decide to open the Italian system of sources so as to grant direct effect to the provisions of the ECHR.}

As it has been noted,\footnote{A recent attestation of the prohibition to set aside national norms to grant priority to ECHR provisions is found in the Constitutional Court’s Judgment No 264 of 2012 of 28 November 2012.} at a critical juncture in which the drift of competences to the supra-national level has grandly reduced the scope of Member States’ exclusive jurisdiction, one could see in this move of the Constitutional Court an attempt to counter its own marginalisation and to retain the last word on certain matters of constitutional substance. The mechanisms of preliminary ruling and disapplication have virtually sanctioned the exclusion of the Constitutional Court from most matters concerning the relationship between domestic and EU law. In the field of...
international law, instead, the Constitutional Court took pain to defuse the risk that the same pattern apply, and vigorously reassessed its central role as the final arbiter of human rights protection.  

The emergence of the EU Charter as a treaty-like source, in 2009, undermined this strategy. With the increased use of this instrument in litigation, the risk that human rights protection would be removed from the Constitutional Court’s jurisdiction became reality. A narrow interpretation of the scope of application of the Charter would mitigate this risk, or at least decelerate this competence drainage.

B. EU Fundamental Rights and ECHR Rights: They Are One But They Are Not the Same (Kamberaj)

Only bearing in mind the specificity of the Italian system (the three C-sources read similarly, but operate differently as standards of review for domestic legislation) is it possible to understand the perplexity of the Italian court that referred the preliminary question in Kamberaj. Specifically, the Court of Bolzano asked the CJEU whether the ECHR, by virtue of Article 6(3) of the TEU, could be considered part of EU law and, accordingly, entitle national judges to disapply domestic inconsistent provisions.

The question is apparently nonsensical: why should the Convention be formally considered a EU source, and is it really a reasonable hypothesis to stretch the interpretation of Article 6(3) of the TEU that far? It seems not. However, it is possible to appreciate the judge’s concern, in light of the example described above: the difficulty inherent in the identification of the applicability ratione materiae of the Charter is such that the temptation to use the Convention instead is strong. Article 6(3) of

69 See a similar reflection in Cannizzaro, supra n 66 at 35–6.
73 See, for instance, the ‘classic’ reading (ERT+Wachauf) of Article 51(1) of the Charter Judgment No 80 of 2011 of the Italian Constitutional Court at para 5.5.
74 Case C-571/10, Kamberaj [2012] ECR 000.
75 Reading: ‘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.’
76 See, among the many authors who discarded such hypothesis, Cannizzaro, supra n 66 at 28, who also refers to a remark of Judge Tizzano to stress the possibility that even the substantive interpretation of equivalent rights of the two sources might diverge, in spite of the clause of Article 52(3) of the Charter, when the interpretation offered by the ECtHR could threaten the fundamental principles of the EU: see Tizzano, ‘Les cours européennes et l’adhésion de l’Union à la CEDH’ (2011) Il Diritto dell’Unione Europea 29 at 48.
the TEU (not unlike Article 52(3) of the Charter) lays down a correspondence between the substantive content of similar provisions of the Convention and the corresponding norms of EU law (yet filtered by, or at least complemented with, the consideration of common constitutional traditions). The Italian Court tried to derive from this correspondence another one, between the scopes of application of the two sources. Since the judge knew that disapplication is not available when the Convention applies per se, she tried to use Article 6(3) of the TEU as a Trojan horse to insinuate the EU law’s direct effect into the ECHR. Conversely, she attempted to infuse into the EU general principles (and, by the same token, the EU Charter) not just the material rules of the ECHR, but also its universal material reach.

As desperate as this move might seem, it reflected an honest concern. As seen above, this attempted hijack is not necessarily motivated by the awareness that the general principles and Charter do not apply in a given case, but often arises from the endemic state of uncertainty regarding their application. This attempt, although excusable, was destined to fail: the Convention is not a source of EU law, even if fundamental rights are general principles of the EU.77 In its ruling, the CJEU made this point clear:

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.

However, in the following paragraph the Court added a remark whose apparent simplicity hides in fact a dangerous message:

63. …the 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.

Taking cues from the question presented by the Italian judge, the CJEU specified that, since the Convention is not part of EU law, judges are not required to disapply domestic rules incompatible with the ECHR.

It is easy to read too much into this plain statement. It is correct to say that, as a matter of EU law, judges do not have to disapply legislation incompatible with the ECHR. However, this is not because EU law bars this possibility, but only because, to put it simply, EU law cannot affect the internal implementation of the

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77 This remark could be reversed and still hold true: even if the Convention is not a source of EU law, yet fundamental rights are general principles of the EU. For instance, see De Witte, ‘The Use of the ECHR and Convention Case Law by the European Court of Justice’, in Popelier, Van de Heyning and Van Nuffel (eds), Human Rights Protection in the European Legal Order: The Interaction between the European and the National Courts (Antwerp: Intersentia, 2011) 17 at para 33 (‘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’).
ECHR: ‘[o]bviously, this also means that [Article 6(3)] does not prohibit such dis-application’. 78 It might well be, as it is sometimes the case, that the domestic constitutional structure of one member state, in fact, allows or even requires judges to disapply ECHR-illegal norms, 79 and EU law has no bearing on this internal arrangement. The fact that EU and ECHR laws are not the same does not necessarily mean that they cannot be treated in the same way.

It is now clear where the danger in the CJEU’s dictum lies. Instead of limiting itself to state that the preliminary question was poorly formulated, and that Article 6(3) of the TEU had nothing to do with the domestic application of the ECHR (paragraph 62), the CJEU went out of its way and answered in the negative. It concluded that, under Article 6(3) of the TEU, the ECHR cannot warrant disapplication, omitting to say that it cannot prevent it either. 80 In so doing, the CJEU unnecessarily supported the differential treatment of EU and ECHR law by domestic courts. The Italian Constitutional Court, for instance, will find in this dictum a confirmation of its dubious affirmation of exclusive jurisdiction over the conventionality review of domestic norms. 81 Whereas the CJEU was right in rebuking the Italian judge’s attempt to conflate the scope of application of the EU human rights protection regime and the ECHR, it was perhaps wrong in pronouncing on the matter of disapplication. 82 It had no obligation to do so, it was arguably not entitled to tackle that matter, and it indirectly endorsed an anachronistic doctrine such as the one devised by the Italian Constitutional Court.

While the CJEU, maybe unintentionally, helped the Italian Constitutional Court, Italian domestic courts – and those of all member states – received no guidance in their Sisyphean attempt to bridle the EU general principles and Charter. Quite to the contrary, the Court remanded the question back to the ordinary judge. At issue was the grant of housing benefits to third-country nationals enjoying the status of long-term residents under Directive 2003/109. 83 The claimant had challenged the Provincial Law of the Autonomous Province of Trento and Bolzano, which allocated housing benefits privileging the three linguistic groups existing in the area, and determined de facto a less-favourable treatment for third-country nationals, in spite of their status of long-term residents. 84

The Court observed that the obligation of non-discrimination was already implemented in the Directive itself, which provided for equal treatment between nationals

79 See the previous paragraph, and in particular n 42 and accompanying text.
80 Supra n 74 at para 63.
82 See AG Bot’s opinion, delivered on 13 December 2011, at para 38.
84 The details of this dispute are discussed with clarity Bianco and Martinico, supra n 78.
and long-term resident aliens with regard to, *inter alia*, ‘social security, social assistance and social protection as defined by national law’. As for the application of EU law to the impugned Provincial Law, as anticipated above, the Court returned the hot potato into the reluctant lap of the national court:

Since both Article 11(1)(d) of Directive 2003/109 and Article 34(3) of the Charter refer to national law, it is for the referring court, taking into account the integration objective pursued by that directive, to assess whether housing benefit such as that provided for under the provincial law falls within one of the categories referred to in Article 11(1)(d).

This hands-off approach is particularly interesting in light of the *Pisan* case discussed above, and the subsequent judgments of the Constitutional Court: the national judge has to identify on her own the coverage of the EU law in the matters of ‘social security, social assistance and social protection’, because the Court is not keen to draw boundaries. This Pilate’s solution is increasingly employed by the CJEU, and AG Kokott’s remark, which defines it as ‘surprising’, is to be shared.

It is simply that the CJEU, formally, does not decline to determine the interpretation of EU law, but barricades itself behind the well-rehearsed truism that it is for national judges ‘to assess the scope of national provisions and the manner in which they must be applied’. However, this seems to generate a circular reasoning, insofar as the question is often precisely whether the scope of EU law is touched by the national measures, not the opposite. National judges know too well the reach of the domestic acts, what they ignore is the reach of EU legislation. Moreover, it is well known that the CJEU is usually keen to indicate a conflict between EU law and precise national measures, in spite of the essential *fictio* whereby it has no jurisdiction to rule on the validity of national law. The factual irrelevance of this *fictio* is generally tolerated for the good reason that ruling on the validity of a specific national measure is not different from declaring, with a pretence of abstractness, which hypothetical national measures – identical to those at stake in the main proceedings – are allowed *vel non* under EU law. Invoking this *fictio* is therefore an exercise of dubious utility, especially when it results in returning to the sender a genuine question on the exact delimitation of EU law.

86 *Kamberaj*, supra n 74 at para 81.
87 Cases C-434/10, *Aladzhov* and C-430/10, *Gaydarov* [2011] ECR 000 at para 48; Case *Gueye*, supra n 24 at para 69; and Case C-256/11, *Dereci and Others* [2011] ECR 000 at para 72. These are distinguishable from a case like Case C-303/08, *Bezkurt* [2010] ECR I-13445, where the CJEU (at para 60) only attributes to the national court the task of ensuring the observance of the principle of proportionality and respect for fundamental rights.
88 See Kokott’s Opinion in C-489/10, *Kukasz Marcin Bonda* [2012] ECR 000 at n 18, referring to the conclusion on this point of *Dereci*, supra n 85 at para 72.
4. THE PATH TO FRANSSON AND THE ELUSIVE MEANING OF
ARTICLE 51(1) OF THE CHARTER

A. An Attempt to Conceptualise the ‘Implementation of EU Law’
In Case C-617/10, the matter of the application of the Charter to national measures arose again. The Swedish referring court asked the CJEU whether the principle of *ne bis in idem* (a general principle of EU law, but in any case one codified in the Charter) could apply and be used to set aside certain domestic provisions. Under Swedish law, indeed, when a taxpayer provides false information to the authorities for the purpose of tax assessment, not only might she incur a tax surcharge, but she could also face criminal prosecution for the same misconduct. The claimant in the main proceedings argued that the imposition of both administrative and criminal sanctions for the same facts amounted to a violation of the principle of *ne bis in idem*, as contained in the EU Charter and the ECHR.

Unlike in Italy, Swedish judges can in principle set aside provisions incompatible with the ECHR, but only if ‘there [is] clear support’, in the ECHR or the case-law of the ECtHR, for a construction of the right at stake that contradicts national norms. Since it could be difficult to assess whether such requirement is met, the potential application of the Charter could serve as a fast-track to disapplication, in case of an actual collision between national measures and human rights guarantees.

The judge, however, could not declare with certainty whether the Charter applied in the case at stake, as it was controversial whether the challenged Swedish regime (i.e., the dual system of sanctions) had an impact on the ‘implementation’ of Union law, or in any case belonged, *ratione materiae*, to the scope of application of EU law. Some ‘presence’ of EU law could be found, in the form of Directive 2006/112. Article 273 of the Directive entitles States to ‘impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion’. Would that be enough to consider the Swedish bifurcated system of imposing tax surcharges and prosecuting tax offences as falling within the purview of EU law (for the purpose of the application of the Charter)?

The Advocate General candidly acknowledged that no hermeneutic parsing of Article 51 of the Charter, its official explanations and the CJEU’s case-law could possibly lead to a clear answer. The available keywords (implementation, scope, field of

90 See the reference for a preliminary ruling from the Haparanda Tingsrätten (Sweden) lodged on 27 December 2010, Case C-617/10, *Åklagaren v Hans Åkerberg Fransson* [2013] ECR 000. For a comment, from which some of the present analysis is borrowed, see Fontanelli, ‘*Hic Sunt Nationes*: The Elusive Limits of the EU Charter and the German Constitutional Watchdog’ (2013) 9 European Constitutional Law Review 315.

91 See Article 50 Charter.

92 Moreover, the judge had the doubt that the ‘clear support’ criterion, by analogy with the Convention, would be a prerequisite for the direct application of the EU Charter.

application) are too open-textured (‘protean’) and need inevitably an interpretive integration.⁹⁴ The CJEU is the obvious choice to complete the contract,⁹⁵ but so far it has engaged in a case-by-case treatment of this issue, and this piece-meal approach allows for no abstraction of a recurrent principle. In sum, a general theory of whether EU law binds States which operate ‘in the presence of EU law’, yet with some margin of discretion, is still outstanding.

B. Alternative Proposals

In the literature, this is a well-known deficiency, and many authors have suggested tests that should be employed to reach consistent determinations. The present section offers a representative sample of these proposals originated in the academic milieu. Where relevant, the institutional affiliation of the authors is specified, simply to give a sense of the state of uncertainty that might characterise the work of EU bodies, in particular the Court of Justice (note the high incidence of Judges, Advocate Generals and référendaires who have come to grips – at least in their extra-judicial capacity – with the interpretation of Article 51(1) of the Charter).

Peers rejected the idea that the mere existence of a EU competence – even when the EU has not acted in that area – implies necessarily that the State is implementing EU law when it adopts all sorts of measures,⁹⁶ as suggested by Sharpston in Zambrano. He also discarded the opposite hypothesis (only State acts intended to implement directly EU law are subject to the Charter and EU general principles). A nuanced approach should be preferred: where a matter falls within the competence of the EU and is governed by national law, the latter must comply with the Charter. However, unless the EU can promote harmonisation in that field, the scrutiny can only take place (i) to ensure the uniform application of EU law; or (ii) the protection of basic individual rights: or (iii) in those cases where national competences must be exercised in compliance with EU law (for example, see Viking and Laval, or the management of citizenship rights).⁹⁷

Special Rapporteur Ladenburger,⁹⁸ praising the cautious approach of the Commission, posited that the relevant question should be ‘whether there is a sufficiently specific link between the national act at issue and a concrete norm of EU law applied’⁹⁹ He provided a list of instances where the link is not specific

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⁹⁴ Fransson, supra n 90 at AG Opinion, paras 33–34; see also paras 42–43, where the AG underscores the ‘need of case-law which supplements and, in short, gives order to protean wording of the kind under consideration.’


⁹⁶ Peers, supra n 71 at 298: ‘Put simply, Member States cannot be ‘implementing Union law’ that has not yet been adopted.’

⁹⁷ Ibid. at 297.

⁹⁸ See the Institutional Report, supra n 15.

⁹⁹ Ibid. at 16 (emphasis in the original).
enough: 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 of course applicable, but other equality
rights and the Charter at large might not be); when a national law mentions a funda-
mental right that has a correspondent one in the Charter, but without a specific refer-
ence to the latter.\textsuperscript{100}

Ladenburger conceded that this exemplary list is short of compounding a veritable
test, and that therefore the ERT + \textit{Wachauf} test is still good law, and the only one
available at that. He did not discard the possibility that other categories of acts (other
than implementation and derogation ones) might over time be gathered under the
EU law umbrella, but such hypothesis could ‘only be contemplated if really there was
a convincing justification for adding fundamental rights protection at EU level and if
a concrete, manageable definition of the acts covered could be found’.\textsuperscript{101}

According to the so-called Heidelberg proposal,\textsuperscript{102} which takes cues from
\textit{Zambrano} but distances itself from Sharpston’s suggestion, ‘beyond the scope of
Article 51\textup{(1)} \textup{[of the Charter]} Member States remain autonomous in fundamental
rights protection as long as it can be presumed that they ensure the essence of funda-
mental rights enshrined in’. The promoters of this doctrine call it reverse-\textit{Solange},\textsuperscript{103}
with clear reference to the tolerance technique of the German Bundesverfassungsger-
icht, then borrowed by the ECTHR in \textit{Bosphorus}.\textsuperscript{104} Even in purely domestic mat-
ters, the authors maintain, a violation of fundamental right so serious that it would
undermine the integration project (as well as the minimum enjoyment of those
rights granted to EU citizens) could for this reason fall within the scope of the
Court’s human rights judicial review.\textsuperscript{105}

Groussot, Pech and Petursson have analysed the line of cases dealing with Directive
2000/78 (\textit{Mangold}, \textit{Bartsch}, \textit{Küçükdeveci}, \textit{Römer}\textsuperscript{106}), and have observed the emersion
of a third class of situations (or, which is the same, an expansion of the \textit{Wachauf}-type
category). They took note of the passage of \textit{Küçükdeveci} in which the CJEU stated that
the mere expiry of the Directive’s transposition deadline ‘had the effect of bringing
within the scope of European Union law the national legislation at issue’.\textsuperscript{107} This

\textsuperscript{100} Ladenburger recalls the case C-482/10, \textit{Teresa Cicala v Regione Siciliana} \textsuperscript{[2011]} \textit{ECR} 000 at paras 21–30. However, it would perhaps be easier to say that in that case the referring court was trying to use a Münchhausen strategy when it argued that the national measure implemented the same Charter provision
against which it had to be reviewed. Similarly, the Court dismissed (at para 16), for lack of jurisdiction, the preliminary question in the case of \textit{Rossius}, supra n 89, noting that the Charter provision 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.’)

\textsuperscript{101} Ladenburger, supra n 15 at 20.

\textsuperscript{102} Von Bogdandy et al., ‘Reverse Solange – Protecting the Essence of Fundamental Rights Against EU Member States’ \textsuperscript{(2012)} \textit{49 Common Market Law Review} 489.

\textsuperscript{103} A term already used in Villalón, ‘All the Guidance’, supra n 24 at 168–9.

\textsuperscript{104} \textit{Bosphorus Hava Yollari Turizm v Ireland} 2005-VI; \textit{42 EHRR} 1 at para 155.

\textsuperscript{105} Something similar was proposed by AG Maduro in Case C-380/05, \textit{Centro Europa7} \textsuperscript{[2008]} \textit{ECR} I-349 at paras 17ff.

\textsuperscript{106} Case C-147/08, \textit{Römer} \textsuperscript{[2011]} \textit{ECR} 000 at para 63.

\textsuperscript{107} \textit{Küçükdeveci}, supra n 43 at para 25.
unconditional inclusion (irrespective of an implementing aim, or a close connection) highlighted the importance of another connective element, that is, the entry into force of an EU act of secondary legislation. If EU law, through a secondary act, governs some matter, all national measures in that area are ‘brought within the scope’ of EU law, and must therefore conform to its general principles and the Charter.

These authors maintained that ‘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’. Likewise, all national measures limiting one of the market freedoms are within the scope of EU law. They also devised two parallel corresponding categories, where implementation and derogation models, respectively, warrant horizontal application of the fundamental rights, but ended up acknowledging that, in the end, ‘it seems that we are stuck with the Wachauf and ERT lines of cases – and its related inconsistencies’.

Judge von Danwitz opined that the application of the Charter should be limited to the implementation/derogation cases, and that ‘les autres situations ne relèvent pas du champ d’application de la Charte, même lorsque les mesures prises par les États membres se situent dans un domaine régé par les traités de l’Union’. Together with Paraschas, he nevertheless observed that this would not prevent the Charter from applying to a large number of cases, in particular all those cases ‘that involve national measures determined by obligations under Union law will fall within the Charter’s scope’. In this sense, they seem to unearth and elaborate on the line of Molenheide in which the CJEU had stated that general principles of EU law (in that case, proportionality) apply to domestic measures that ‘are liable to have an impact on the national authorities’ obligation... under [a provision of EU law]’.

Taking a similar approach that uses the concept of EU obligations as the pole star, Judge Lenaerts elected the reasoning of Annibaldi as the relevant touchstone for the delimitation of the Charter’s scope of application: EU fundamental rights obligations are not binding on ‘national measures which are not a means for a member state to fulfil its obligations under EU law’. To demonstrate that this criterion had been clear and consistently applied for 15 years at least, he pointed at the recent Dereci case, where the lack of a link with EU law and of a threat to the genuine enjoyment of EU

108 Ibid. at para 32.
109 Ibid. at para 36.
110 See ‘General Report’ at 9, available at: www.juradmin.eu/seminars/DenHaag2011/Gen_Report_fr.pdf [last accessed 24 February 2014], where the opinions of Judge Prechal and Mr Romero (Commission) are also noted, in the sense that there is no need to hypothesize a third category of cases beyond the ERT and Wachauf ones.
112 Joined Cases C-286/94, C-340/95, C-401/95 and C-47/96, Molenheide and Others [1997] ECR I-7281 at para 45 (emphasis added). This passage, quoted by AG Sharpston in C-427/06, Bartsch, supra n 38 at para 69, is used by Kaila to support the third category of acts subject to the Charter, in addition to the ERT and Wachauf scenarios, see below.
113 Note that the restrictive take of the reasoning of Annibaldi adopted by Lenaerts goes in the opposite direction of the reading offered by García, supra n 25, which speculates on the potentially expansive effect of the reference to the objectives of EU law referred to in para 22 of the judgment.
114 Lenaerts, supra n 14 at 386.
rights were used by the CJEU, respectively, to refrain from a review of national measures based on the Charter and to operate a Zambrano-like coup de théâtre.\textsuperscript{115}

To the contrary, Judge Safjan took cognisance of a triplet of cases\textsuperscript{116} in which the CJEU considered the application of the Charter to national measures that did not meet squarely the Wachauf ‘implementation’ requirement: the exercise of a discretionary choice expressly permitted by a EU regulation (which by definition needs no implementation, but sees nevertheless member states acting as ‘trustees’ of the Union,\textsuperscript{117} a somewhat wider role than that of ‘agents’); the national statute regulating the grant of legal aid (linked to EU law through the use of the principle of effectiveness, in the framework of a claim seeking to recover damages for state liability for breach of EU law); and the national norm regulating the attribution of a precondition for the enjoyment of protection granted by a EU regulation (namely, the right to parental custody, a precondition to be protected against illegal removals of children). He identified a series of ‘gears’ that linked national measures to EU law in these cases (the \textit{effet utile}, the reference to national action in the EU act, creating a close functional relationship or a link of complementarity)\textsuperscript{118} and ultimately suggested 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’.\textsuperscript{119} He posited that the Charter applies even outside the reach of legislative acts of the Union, provided that some connection is traceable, and EU law provides member states with guidance as to their exercise of delegated powers,\textsuperscript{120} as the Court is ready to confirm with regard to the application of general principles.\textsuperscript{121}

\textsuperscript{115} Although the reference to an obligation deriving from EU law is a useful element to assess certain borderline cases where the ‘presence’ of EU law does not to fulfil the ‘implementation’ criterion, it fails to provide a clear explanation for certain situations in which the Charter applies even when no direct obligation seems to arise under EU law, and nevertheless the influence of the latter is sufficient to require compliance with EU fundamental rights standards. For instance, see the cases mentioned by Judge Safjan, below, or those cited above, in nn 29 and 30 and accompanying text, relating to the so-called incorporation doctrine. Moreover, the Dereci case does not come across as a revealing demonstration of the CJEU’s approach in borderline cases: in Dereci the non-application of the Charter was justified on the uncontroversial ground of a lack of connection with EU law, and the doubts were perhaps rather due to the potential application of the newly minted Zambrano doctrine of the genuine enjoyment of EU citizenship rights.

\textsuperscript{116} In Safjan, supra n 18; Case NS supra n 3; Case C-279/09, DEB [2010] ECR I-13849; and Case C-400/10 PPU, McB [2010] ECR I-08965. For a discussion of the facts of each of these cases, see Fontanelli, supra n 4 at 29–39.

\textsuperscript{117} See Case 804/79, Commission v United Kingdom [1981] ECR 1045 at paras 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 n 11 at 733, n 126, to show that national measures fall within the scope of EU law when there is a specific obligation deriving from EU law.

\textsuperscript{118} Safjan, supra n 18 at 11–12.

\textsuperscript{119} Ibid. at 11.

\textsuperscript{120} Ibid. at 13 (‘[t]his 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 NS, supra n 3, from Gueye, supra n 24, where the discretionary action taken domestically within the subject-matter of a Framework decision was considered to be \textit{outside} the reach of the Charter, because the EU act was silent on the members’ autonomy with respect to the measure impugned.

\textsuperscript{121} He mentions joined Cases C-611/10 and C-612/10, Hudzyński [2012] ECR 000; and C-329/11, Achughbabian [2011] ECR 000 at paras 48–9, to support this opening occurring in the case-law.
Kaila’s view, which elaborates on her previous study on the issue co-authored with Judge Rosas,\textsuperscript{122} can be aptly summarised as follows: the application of the Charter is co-extensive to the application of EU law. Hence, member states shall respect it when acting within the scope of EU law, that is, ‘when a specific substantive rule of EU law is applicable to the situation’.\textsuperscript{123} She advances various supporting arguments, all related to some extent to the need for consistency in the interpretation and application of EU law across the member states. Opting for an application of the Charter narrower than that of EU law would result in a series of unreasonable consequences: (i) EU institutions and national bodies would be under a different obligation (to respect the Charter \textit{vel non}) when interpreting the same EU acts; (ii) the application of Charter’s rights would not coincide with that of general principles, the rights associated with EU citizenship, or the principle of non-discrimination; and (iii) rights conferred by EU law would be subject to different (and possibly unfavourable) procedural rules only because the member state has not implemented them through a domestic measure, which would contravene the principles of effective protection.

C. The Advocate General’s Attempted \textit{Repulisti} in Fransson

In Fransson, AG Cruz Villalón suggested a more principled approach, starting from the very rationale behind the possibility that State action be reviewed for conformity with EU principles. He saw in this possibility an exception to the rule that it is for member states to review acts of their public authorities. This rule-exception dynamics is the starting point to determine the application of the Charter: the judge should in every case inquire whether the situation at hand requires the exception to materialise, that is, whether ‘the original responsibility of the Member States is passed to the Union’,\textsuperscript{124} as far as the guarantee of a fundamental right is concerned.

The controlling criterion, the AG said, is the existence of a ‘specific interest’ of the Union to centralise the human rights review of measures governing certain matters. Not every exercise of power whose ultimate origin is located in EU law needs to be informed by the EU conception of a fundamental right: it must be possible to isolate those situations in which ‘the Union’s interest in leaving its mark...should take priority over that of each of the Member States’.\textsuperscript{125} Only in such cases, where the EU has an interest to review the lawfulness of the exercise of State public authority, is it possible to subject state measures to the provisions of the Charter (and to EU general principles).

The identification of a principle is necessary, but insufficient to formulate a real test. The ‘EU’s interest’ is a generic idea, and calls for a ‘basic determination’ of the typical situations in which the transfer of human rights responsibility to the EU is

\textsuperscript{122} Kaila, supra n 11; see also Rosas and Kaila, ‘L’application de la Charte des droits fondamentaux de l’Union européenne par la Cour de justice: un premier bilan’ (2011) Il Diritto dell’Unione Europea 1.

\textsuperscript{123} Kaila, supra n 11 at 733, borrowing the words of AG Sharpston in the opinion of Case C-427/06, Bartsch, supra n 17 at para 69. Note that this formula is examined by Groussot, Pech and Petursson, supra n 32 at 15, who ultimately reject its added value, noting that ‘the third category identified by Advocate General Sharpston would not appear warranted on the basis of the cases mentioned in her opinion.’

\textsuperscript{124} Fransson, supra n 90 at AG’s Opinion, para 37.

\textsuperscript{125} Ibid. at para 41.
‘likely to be justified’, as well as a case-by-case assessment of the specificities of each case. The AG, in a generous attempt to provide an example of how this test works in practice, tackled the Swedish dilemma, and exposed the cogs of its multi-step process.

In AG Cruz Villalón’s view, the state’s power to impose sanctions based on EU law can indeed justify the transfer of responsibility to the Union that is the premise for the Charter to apply. Although sanctions are generally regulated and reviewed domestically, it cannot be excluded that the EU has an interest to monitor whether the ‘power to impose penalties is exercised with respect for the basic principles which govern a community established under the rule of law, like the Union’. However, the link between the EU legislation and the national measures appeared to be too tenuous to substantiate this interest, in the specific circumstances of the main proceedings. The Swedish dual system of sanctions for the provision of false tax information to the authorities was not directly based on Union law, and the only traceable link thereto was that the sanctions contributed to the effectiveness in the collection of VAT, a matter regulated by Directive 2006/112. The AG distinguished between the case in which national legislation is ‘based directly on Union law’ and the hypothesis that it is ‘used to secure objectives laid down in Union law’, referring to the difference between causa and occasio. In the main proceedings, the commencement of criminal prosecution – the only element that could fall within the reach of the ne bis in idem rule – was simply an inessential circumstance, a Member-specific normative incident incapable of affecting the EU competence on VAT collection. This led the AG to conclude that the EU had no specific interest to impose its own conception of the principle on the Swedish system and, accordingly, the review of the member states’ power to impose penalties remained squarely within the jurisdiction of domestic authorities (and subject only to the national constitutional constraints).

The CJEU had already managed to avoid answering a similar question in Scattolon. After finding that the challenged Italian measure fell within the scope of a Directive, it gave instructions to the Italian judge on how to ensure compliance with it, and considered it unnecessary to review the compatibility between the Italian norm and the Charter (or the general principles of the EU). This was arguably due to the vertical application of the Directive, which authorised the potential dis-application of conflicting rules, and made it redundant to identify further standards of review. Advocate General Bot, instead, had embarked upon the analysis of the Charter’s impact on the Italian legislation at issue. Bot started his analysis with a truism, based on the same assumption used in Chartry: since the Court has jurisdiction

126 Ibid. at para 53.
127 Ibid. at para 60.
128 For a similar finding, see the AG’s remark in Gueye, supra n 24 at para 78 (‘Since the Framework Decision is only concerned with the criminal proceedings aspects of victim protection and not the penalties to be imposed on the offender, the facts of the present case do not come within the scope of the Framework Decision and therefore EU law.’) The Court confirmed this view in the judgment.
129 As correctly noted by Iglesias-Sanchez, supra n 1 at 1591, this rationalization of the requirement under Article 51(1) of the Charter reveals a ‘self-reflective’ approach, which is more concerned with the primacy and consistency of EU law than with individuals’ attempts to have their human rights vindicated.
130 Fransson, supra n 90 at AG’s Opinion, para 63.
131 Scattolon, supra n 24 at para 84.
on the preliminary question, the Charter must apply to the national measures at stake in the main proceedings. 132

Ultimately, is the test formulated by AG Cruz Villalón a viable one, let alone the right one? Or could it rather be argued that the AG, trying to weave a net capable of catching measures outside the scope of the ERT+Wachauf combined test, did in fact identify

[a new] residual category, comprising any act for which a link to EU law can somehow be intellectually construed, [which] would not bring further dogmatic clarity and not help the task of the EU institutions, [and that] would only create legal uncertainty. 133

D. The Court’s Judgment in Fransson

In late February 2013, the CJEU handed down the Fransson preliminary ruling, 134 a ten page decision that apparently declined Cruz Villalón’s invitation to set the record straight and provide a fresh interpretation of Article 51(1) of the Charter based on the analysis of the EU’s ‘specific interest’. The CJEU considered its jurisdiction and the application of the Charter jointly, confirming that they both depend on the same element, i.e., the application of EU law. It therefore recalled that, whenever a situation is ‘governed by European Law’, the Court must issue a preliminary ruling and provide ‘all the guidance’ that national courts could need to determine the compatibility of national legislation with EU fundamental rights, 135 since ‘[t]he applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter’. 136 The CJEU recalled the explanations relating to Article 51 of the Charter, the limits to EU’s competences derived from Article 51(2) of the Charter and Article 6(1) of the TEU, and the established case-law ruling out the Charter’s application to situations that do not come within the scope of EU law. Nothing new under the sun of Luxembourg, pace the Advocate General, besides the definitive confirmation that the conditions for the application of general principles and Charter provisions are just the same.

The analysis of the merits of the case, instead, is more interesting, because the decision is based on some implicit reasoning that might prove far from obvious, and possibly sheds new light on Article 51(1) of the Charter, besides rejecting the causa v. occasio dichotomy advocated for in the Opinion. In short, the CJEU recalls all provisions of EU law that require member states to ensure the collection of VAT and to prevent VAT evasion, including the principle of sincere cooperation, 137 and notes that any shortcoming in the domestic collection of VAT affects the EU budget, in so

132 Scattolon, supra n 24 at AG Bot’s Opinion, para 121. He also attempted (at para 119) to sketch a definition of the relevant link, when he holds that the Charter applies ‘to all situations in which national legislation `concerns’ or `affects’ a matter governed by a directive’.

133 Ladenburger, supra n 15 at 20.

134 Fransson, supra n 90.

135 Ibid. at para 19.

136 Ibid. at para 21.

137 Article 4(3) TEU.
far as the latter depends directly on the former. Moreover, since member states are obliged to counter all wrongdoing affecting the EU’s financial interests, under Article 325 of the TFEU, the Court concludes resolutely that tax penalties and criminal proceedings for tax evasion, such as those to which the defendant in the main proceedings has been or is subject because the information concerning VAT that was provided was false, constitute implementation of Articles 2, 250(1) and 273 of Directive 2006/112 (previously Articles 2 and 22 of the Sixth Directive) and of Article 325 TFEU and, therefore, of European Union law, for the purposes of Article 51(1) of the Charter.

Even if the Swedish legislation at bar was not designed to transpose Directive 2006/112, its application ‘is designed to penalise the infringement of that directive’ and, therefore, ‘intend[s]’ to implement the Treaty-derived obligation to safeguard the financial interests of the EU through the imposition of effective penalties. As a result, the Charter applied, and the CJEU just made a point to quote the Melloni decision, published on the very same day, to remind Sweden that it was still possible to apply national standards, provided that the level of protection required by the Charter was complied with, lest the ‘primacy, unity and effectiveness’ of EU law be compromised.

First, the CJEU should be excused for the generous use of words like ‘designed’ and ‘intended’ to describe the link between the application of national measures and the implementation of EU obligations. Not only are the relevant provisions of Swedish laws on tax offences and tax assessments referred to taxes in general, and do not contain an express reference to VAT, but a factual remark might suffice to appreciate how the ideas of design and intention are ill-suited. The relevant Swedish provisions, quoted in the judgment, were adopted in 1971 and 1990. Since Sweden joined the EU only in 1995, it is hard to believe that the Swedish legislator designed them with the intention to implement obligations that did not bind Sweden at the time. A semantic shift from the area of intentions and aims to that of effects and results would certainly be appropriate. Moreover, it would certify that the focus idea of implementation of Article 51(1) of the Charter is not the subjective element of state measures but their objective contribution to the implementation of EU law. This shift, described above in section 2, would better explain situations like the Swedish

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139 See also Article 325(2) TFEU, that requires member states to protect the financial interests of the EU through the same measures adopted to preserve their own.
140 Supra n 134 at para 27.
141 Ibid. at para 28.
142 Ibid. at para 29, quoting Case C-399/11, Melloni [2013] ECR 000 at para 60.
143 As noted by Torres Perez, the use of the word ‘unity’ instead of ‘uniformity’ might be a lapse betraying the federalist mindset of the CJEU.
144 See supra n 134 at paras 7–11.
145 On the classic debate on the relevance of aims and effects of national measures in international trade law, see Hudec, ‘GATT Constraints on National Regulation: Requiem for an “Aim and Effects” Test’ (1998) 32 The International Lawyer 623.
ones, in which national measures happen, more or less unintentionally, to govern matters covered by EU law, and are therefore capable of hindering or promoting the attainment of the objectives set therein.

Second, a look at the EU provisions ‘implemented’ might provide further insight on the CJEU’s take on Article 51(1) of the Charter. Of the provisions of Directive 2006/112 that were mentioned, one simply lists the transactions subject to VAT (Article 2), one simply requires that all taxable persons submit their VAT return (Article 250(1)), and one empowers member states to impose additional obligations to ensure the correct collection of VAT and prevent evasion (Article 273). Of the three, only Article 273 seems to bear a link with the Swedish system of sanctions for tax evaders, whereas the other two are only useful to identify who is under the obligation to pay VAT, for which transactions, and through which assessment procedure. The CJEU, it is argued, should have kept Article 2 and Article 250(1) of the Directive out of the discussion on the relationship between the Swedish scheme of sanctions and EU law. To be sure, these provisions clarify the reach of the obligation to whose enforcement Article 273 refers. However, unlike the latter provision, Articles 2 and Article 250(1) of the Directive are hardly implemented by the Swedish measures. As to Article 325 of the TFEU, instead, it is arguably uncontroversial that the national provisions sanctioning tax evasion, in so far as they also apply to VAT evasion, act as a deterrent implementing EU-imposed obligation to ‘counter fraud and any other illegal activities affecting the financial interests of the Union’.

In this judgment, the CJEU engaged in a close scrutiny of the boundaries of EU law, which was necessary to determine whether the national measures fell within it. It was also careful to specify that, whatever the national judge would decide about the compliance of the national scheme with the principle of ne bis in idem, its decision would matter (only) ‘in the field of VAT’. This simple specification is of great importance, particularly when national measures are ‘caught’ under the scope of EU law inadvertently, or in any case govern also matters that fall outside the purview of EU law: the potential incompatibility with the Charter is only relevant for the part that encroaches upon EU law. In the instant case, should the Swedish judge decide that the double-sanction system is contrary to Article 50 of the Charter, the challenged measures would be nevertheless perfectly lawful, as far as EU law is concerned, in the part governing the regime of sanctions applicable to the evasion of taxes other than the VAT.

The CJEU’s willingness to help the national judge identifying the reach of EU law is certainly laudable, especially in light of the Pilate approach described above. The Advocate General’s proposal to assess in every case the intensity of the EU’s interest – which had led him to come to an opposite solution in the case at hand – has been

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146 Supra n 134 at para 37.

147 A determination based on the ascertainment of whether the first penalty is criminal in nature or not, which is left to the national judge to make, see ibid.

148 Supra n 134 at paras 38–42 the Court, indeed, dismissed the question asking which hypothetical alternative system of tax penalties would not contradict the principle of ne bis in idem, and still retain the double-track (tax surcharges and criminal liability). The question was misplaced, as it did not mention the link with EU law, and only considered the current and the hypothetical systems of tax enforcement in the abstract.
put aside. Quite the opposite, the CJEU seemingly gathered a diverse set of EU provisions under the umbrella of the ‘implementation’ concept. Arguably, some of these would not have sufficed, considered individually, to trigger the application of the Charter. If this intuition is correct, the Court mentioned Article 2 and 250(1) of Directive 2006/112 only ad abundantiam, to provide the context of the real ‘implemented’ norms, that is, Article 273 of the Directive and Article 325 of the TFEU. However, if this is not the case, it would follow that the ‘implementation’ link can be met by national measures whose effects are far removed from the substance of a EU law provision: think of the distance between a national scheme setting the penalties for tax evasion and the EU provision listing the transactions subject to VAT. Sanctioning this ‘implementation link’ would be tantamount to accept that to every EU norm corresponds a much wider sphere of competences related to its operation (think of implicit powers à la Article 308 of the TEC) and that all national measures falling within that sphere are ‘implementing EU law’.

From this remark, and from the discussion above on the fictive reference to the ‘implementing intention’ of the national measures, one last comment can be made. Although the wording of Article 51(1) of the Charter clearly indicates that the vector of implementation runs from the national measures to EU law, in reality the fact that there are measures that also implement EU law and/or implement EU law by chance makes it reasonable to devise a test that, for the sake of convenience, goes backwards. In other words, to see whether the condition of Article 51(1) of the Charter is met, one might find it easier to wonder whether there are EU legal provisions setting objectives that are implemented by the national measures, instead of starting by looking closely at the latter in an attempt to glimpse the imprint of EU implementation.

Incidentally, the CJEU also pronounced on the preliminary question on the compatibility with EU law of the Swedish rule whereby disapplication of domestic law at variance with the provisions of the ECHR is possible only when the existence of such conflict is ‘clearly supported’ in the Convention or the case-law of the ECtHR. The only tenuous link with EU law, which prevented the CJEU to dismiss the question as a Kamberaj-replica, lay in the hypothetical case that the ECHR right at risk might have a Charter alias, as in the case of the principle of ne bis in idem.

The CJEU recalled the ruling in Kamberaj, noting that EU law does not govern the relationship between the Convention and domestic law (paragraph 62) and mercifully did not indulge in obiter dicta of dubious use, let alone quoting paragraph 63 (see section 3 above). As for the Charter-related half of the question, the Court simply recalled that, under the Simmenthal mandate, nothing should prevent national courts from giving full effect to EU norms (including Charter rights), if necessary setting aside domestic norms contrary to EU law. Hence, the Swedish requirement of a ‘clear support’ was not compatible with EU law, as it had the potential to impair the effectiveness of EU law at the moment of its application in domestic courts.

149 Ibid. at para 44.
151 Supra n 134 at para 46.
152 Ibid. at para 48.
E. The Reaction of the Bundesverfassungsgericht to the Fransson Decision

Even if the Fransson does not extend the application of the Charter beyond the familiar area derived from the doctrines of ERT and Wachauf and expressly defines the scope of the Charter and EU law as coterminous, some commentators interpreted this judgment as a troublesome example of competence-creep sanctioned by the CJEU. Among them, in an unfortunate restaging of the post-Mangold drama, \(^{153}\) figure the judges of the German Constitutional Court. Their reaction did not take long to materialise: less than two months after Fransson they delivered the decision in the ‘Anti-terror Database’ case (ATD). \(^{154}\) This judgment is a vocal signal to the CJEU, whereby the Karlsruhe tribunal made clear that it will not ratify any trend of uncontrolled expansion of the EU’s competence in human rights protection, obtained through the application of the Charter to areas remotely touched upon by EU law.

The complainant challenged the constitutionality of the German Act on Setting up a Standardised Central Counter-Terrorism Database of Police Authorities and Intelligence Services of the Federal Government and the Länder. This law regulates the exchange of information between the police and intelligence agencies and poses a threat to the right to privacy of those people whose personal information are collected and exchanged. \(^{155}\)

The BvG affirmed that the challenged provisions pursue nationally determined objectives which ‘are not determined by EU law’, \(^{156}\) and can touch upon it ‘only in part’. \(^{157}\) Accordingly, the Charter cannot apply and the CJEU cannot be the juge naturel for the human-right review of this measure. \(^{158}\) However, the BvG candidly exposed all the possible links between the German measure and EU law; they are not few. \(^{159}\) The EU has legislated in the field of data protection and in particular on the limitations on the use of personal data by commercial actors; it developed a series of anti-terrorism policies that include the treatment and exchange of data relating to terrorism investigations. The ‘Anti-terror Database’ case therefore, has direct implications that spread across the scope of application of EU law.

153 This decision was famously criticized by former German President Roman Herzog and Luder Gerken, see ‘Stop the European Court of Justice: Competences of Member States Are Being Undermined. The Increasingly questionable Judgments from Luxemburg Suggest a Need for a Judicial Watchdog’, Frankfurter Allgemeine Zeitung, 8 September 2008, available at: www.cep.eu/fileadmin/user_upload/Pressemappe/CEP_in_den_Medien/Herzog-EuGH-Webseite_eng.pdf [last accessed 24 February 2014].

154 Judgment 1 BvR 1215/07 of 24 April 2013, an English translation of the press release is available at: www.jusline.de/index.php?cpid=8d9dec3e36c05c3417a89eeec877615&feed=153512 [last accessed 24 February 2014].

155 Incidentally, the BvG held that the structure of the measure is compatible with the Constitution, but some provisions thereof needed to be adjusted, to pass the strict proportionality test.

156 ATD, supra n 154 at para 88.

157 Ibid. at para 89.

158 Ibid. at para 91, referring to Article 101 of the German Constitution.

The BvG refused to raise a preliminary question to the CJEU, invoking the *acte claire* doctrine of *CILFIT*\textsuperscript{160} Moreover, it refused to consider the application of the Charter to the Anti-terror Database, because it does not implement EU law under Article 51(1) of the Charter.\textsuperscript{161} The strength of the link with EU law is insufficient to grant application of the Charter and the BvG invoked paragraph 22 of *Annibaldi* to validate this view. In that passage, commented upon above, the CJEU excluded the application of fundamental principles to national legislation which, despite ‘be[ing] capable of affecting indirectly the operation of an [EU norms]’, ‘pursues objectives other than those covered by [the latter]’. The choice to invoke this exemption is understandable: it is the only one available in the case-law on general principles, once the application of EU law is confirmed (which is also the reason why the BvG had to resort to the *acte claire* justification to escape the obligation of Article 267 of the TFEU).

What is more debatable is whether this exemption applies in fact: even if the origin of the German measure is fully domestic its objectives seemingly correspond to those pursued by EU law. There is no other primary purpose of the Anti-terror Database which makes the EU ones ancillary: the measure partly operates ‘within the scope of EU law’ and shares its aims. In this sense, the subsequent distinguishing of *Fransson* is a red-herring: the Anti-terror Database is subjected to the Charter simply because the *Annibaldi* exemption does not apply, hence there is no need to flag the destabilising potential of *Fransson*. In this sense, the BvG tried to dress its reluctance to submit the Database to the CJEU’s scrutiny as a wise act of conflict-prevention (taken ‘in the spirit of cooperative coexistence’).\textsuperscript{162}

In particular, it noted that an expansive reading of *Fransson* would render it akin to an ‘obvious’ *ultra vires* act endangering the protection of fundamental rights in the member States, of the kind foreshadowed in the *Lissabon Urteil*\textsuperscript{163} and *Honeywell*\textsuperscript{164} judgments, and therefore would force the BvG to act in civil disobedience and denounce the decision of the CJEU (as the Czech constitutional court did in 2012). Therefore the BvG specified which interpretation of *Fransson* might avert this risk, in an unprecedented exercise of *reverse consistent interpretation* (that is, how to interpret Article 51(1) of the Charter in conformity with the core values of the *Grundgesetz*).

Article 51(1) of the Charter, the BvG specified, cannot operate when the domestic measure relates to the ‘purely abstract scope of EU law’ nor when it has a ‘merely *de facto*’ impact on it.\textsuperscript{165}

Seemingly, the BvG decided to act as the champion of constitutional gatekeepers in the Union, in the immediate wake of a couple of decisions (*Melloni* and *Fransson*) whose combined effect is perceived to sanction the inexorable marginalisation of constitutional tribunals in an area where they have long lost the home-field

\textsuperscript{160} Case 283/81, *SrCILFIT* and *Lanificio di Gavardo* SpA v Ministry of Health [1982] ECR 3415.

\textsuperscript{161} ATD, supra n 154 at para 90.

\textsuperscript{162} Ibid. at para 91, literally: ‘Im Sinne eines kooperativen Miteinanders’. Compare this expression to the one used in *Honeywell*, BvG, Judgment of 6 July 2012, 2 BvR 2661/06, at para 57 (‘wechselseitige *Rücksichtnahme* which corresponds roughly to ‘mutual consideration’).

\textsuperscript{163} BvG, Judgment of 30 June 2009, 2 BvE 2/08.

\textsuperscript{164} Supra n 162.

\textsuperscript{165} ATD, supra n 154 at para 91.
advantage: review of human rights compliance of domestic norms. National constitutions are sidelined when EU law applies even remotely or when domestic measures happen to fall within its scope (Fransson). In addition, state-specific constitutional guarantees stand no chance of survival when they collide with the standards set by the Charter (Melloni). It is fair to say that, even if neither decision seems to constitute the kind of ultra vires act feared by the BvG in the Honeywell judgment, certainly the slow but irreversible application of the Charter is eroding the jurisdiction of constitutional tribunals (see above) and the scope of application of national guarantees that do not mirror EU standards. This decision served Luxembourg with a warning: the terms of the peaceful entente cannot act always in favour of the EU regime, lest the BvG be ready to denounce the contract (the constitutional synallagma, as it were) and renegotiate the well-documented status of constitutional tolerance.

5. MEANWHILE, IN ORDINARY COURTS... In the meanwhile, national courts are left wondering what is to be done with Article 51(1) of the Charter. It is reasonable to expect that some ordinary judges will deliberately fail to take the Charter into account in certain borderline cases, even giving up the possibility of referring a preliminary question to the CJEU. The chances that a court of appeal or last instance would reverse their decision on the point of law of the application of the Charter are too high to be worth trying. Likewise, it is probably unwise to raise a question under Article 267 of the TFUE, when chances are that the CJEU, rather than cooperate as in Fransson, will again deny the application of the Charter according to an unpredictable test, elude the question as it did in Scattolon, or even ignore the existence of the Charter as in Maribel Dominguez and Brüstle, where the CJEU limited its review to the proverbial ‘four corners’ of the Directives at issue. The initial enthusiasm, maybe enhanced by a bit of naiveté, whereby the national courts inundated the Court with preliminary questions regarding the interpretation of the Charter, is fated to fade out.

There will always be a judge, whether in Berlin or Pisa, brave enough to invoke the Charter or to use Article 267 of the TFUE in case of doubt, but there will not be a massive application of the Charter as a matter of judicial routine, until a new test is laid down. Ordinary courts can be brave, but their well-studied status of double

166 Honeywell, supra n 162 at para 66, where the BvG declared that a declaration of ultra vires would only occur when the CJEU exceeds a certain margin of error.
169 See Fontanelli, supra n 4 at 37, referring to Case C-34/10, Oliver Brüstle v Greenpeace eV [2011] ECR 000.
170 See Iglesias-Sanchez, supra n 1 at 1578–9, on the Court’s rejection of most references for a lack of connection with EU law. Danwitz and Paraschas, supra n 15 at 1420, note that ‘national courts do not show any reluctance to apply the Charter rights and are willing to explore the scope and meaning of its provisions by making use of the preliminary proceeding’. See at n 110 a list of preliminary rulings triggered by questions regarding the Charter.
allegiance (to the CJEU and their respective highest courts) makes them likely to follow course only when their highest courts have already given the go ahead.

In sum, the incentives to explore the limits of application of the Charter are currently very low for the national judge, and this is by all means a very unintended consequence of the Lisbon reform: bringing the Charter into the realm of Treaty law, rather than making its application more predictable and typical, increased the technical difficulties connected to its legal force. This paradox provoked many to believe that (or wonder whether) referring to equivalent fundamental rights as general principles of the EU could be an easier strategy than trying to apply the Charter: arguably Charter rights are also general principles, and if a restrictive interpretation of the scope of application of the EU Charter were to prevail, the application of general principles of the Union might assist. This is already the case, at least apparently, with the issue of horizontal application, where at least one general principle has been conclusively endowed with it, whereas the jury is still out on Charter provisions. As Lenaerts noted, a narrow reading of Article 51(1) of the Charter would favour a scenario in which general principles would take over where the scope of application of the Charter ends.

It is also lamentable that the CJEU has not yet responded to the various cries of help from the Advocates General. It is disheartening for the ordinary judge to realise that the difficulties she is facing are acknowledged and shared by the AGs (and often by the judges of the CJEU themselves, in their extra-judicial capacity), and that nevertheless the CJEU is deaf to each call for clarification. The CJEU has so far kept its impenetrable garb, dispensing from time to time answers based on elliptic reasoning, which are generally incapable of providing a maxim conducive to a general judicial test. In this sense, Fransson does not lend itself to generalisation and, together with the subsequent Texdata ruling, constitutes a missed opportunity. It may well be, as foreshadowed by Advocate General Cruz Villalón, that there is no golden test to measure how ‘decisive’ the link with EU law is. Going back to the basic rationale of ‘delegation’ is a desirable starting point, but only through intense work on clarification by the CJEU will the ‘implementation of EU law’ formula turn into a reliable benchmark. Even if this means that the national courts will have to cope with some lingering doubts, intensive input from Luxemburg could gradually dispel them: judgments like Fransson could be extended by analogy, and the CJEU itself could monitor the wrong attempts to ‘replicate’ its own instructions.

171 Baquero Cruz, ‘What’s left of the Charter? Reflections on Law and Political Mythology’ (2008) 15 Maastricht Journal of European and Comparative Law 65 at 72. On the distinction/discussion, see also Lenaerts and Gutiérrez-Fons, supra n 38 at 1659; and Iglesias-Sánchez, supra n 1 at 1597ff.

172 The Mangold-Kucukdeveci crescendo, however, seems to have been stopped in Maribel Dominguez, see de Mol’s comment, ‘A Deafening Silence’ (2012) 8 European Constitutional Law Review 280.

173 Lenaerts, supra n 14 at 384.

174 Case C-418/11, Texdata Software GmbH [2013] ECR 000.

175 On the disappointing reasoning of the Court in Fransson and Texdata, which might be revealing of its inherent incapacity to deal with the preliminary question of the scope of application of EU law: see Fontanelli, ‘The Implementation of European Law under Art. 51 of the Charter of Fundamental Rights’ (2014) 20 Columbia Journal of European Law (forthcoming).

176 As recognized also in Kaila, supra n 11 at 745.
A gradual building of a casuistry doctrine is the best thing one can think of, in light of the inherent vagueness of the principle informing Article 51(1) of the Charter, and a decreasing rate of wrong decisions at the national level is a tolerable side-effect to bear, on the road to legal certainty. After all, if the rule will not emerge through a deductive process, it is desirable that the inductive analysis be based on as large a database as it is possible.

However, the CJEU’s hand-off approach is puzzling precisely because it does not allow for this case-to-case corpus to emerge. Whenever the Court refuses to pronounce on the application of the Charter and returns the issue to the sender, it is a missed opportunity to shed light on a necessary rule of EU law, and a betrayal of its very mandate. When the Court concludes that it is for the national judge to assess whether the national measure is adopted in the implementation of EU law, it is simply pretending not to see that the ordinary judge had raised precisely that question. It is like receiving a MAILER-DAEMON Failed Delivery notification in the e-mail inbox: one gets to read his own message again, and gets the frustrating feeling that it is as if he had never sent it in the first place.

Earlier in this article, it was noted that an individual might invoke the Charter, and it is only fair to expect that the judge will be in a position to know whether it applies or not. Iura novit curia, after all. If national judges are not able to interpret Article 51(1) of the Charter, who is? The Court of Justice is, and it is obliged to make its interpretation clear and widely available. In not doing so, it is not fulfilling its mandate as curia, in spite of the domain of its internet homepage.

A ‘fresh start for the Charter’ is indeed desirable, but has not materialised quite yet. Arguably, it is not completely true that ‘[s]o far, the Court has not shown any reluctance to address major questions’. In part, this is false: the interpretation of Article 51(1) of the Charter is still far from clear and the Court, as it was shown in this article, is responsible for the continuing inconveniences that this state of uncertainty provokes in national courts. If no general test is possible, at least the Court should do more often what was done in Fransson, and explain in each case why the threshold of Article 51(1) of the Charter is met, or do as in Siragusa, explaining why the Charter does not apply. If only the two explanations were also consistent with each other—something which is not happening yet—we could really confirm that the Court is providing ‘all the guidance’ necessary for national courts.

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