New Wine into Old Wineskins: The Scope of the Charter of Fundamental Rights of the EU after *Åklagaren v Hans Åkerberg Fransson*

Bas van Bockel[*]
Assistant Professor of EU law, Europa Institute, Utrecht University

Peter Wattel
Professor of EU tax law, ACTL, University of Amsterdam, and Advocate-General in the Netherlands Supreme Court

Keywords

Abstract

In the *Åkerberg Fransson* judgment, the Court of Justice held that the Charter applies to every instance in which Member States' obligations stemming from EU law can be identified. In accordance with the principle of effectiveness of EU law, this holds true regardless of how general or precise those obligations are and, therefore, regardless of the degree to which they *determine* Member States' actions. Although it is clear that the Court chose to cast the "net" of EU fundamental rights protection widely, the judgment raises a number of questions. In particular, it remains unclear how, and according to which legal criteria, the Court will arbitrate a conflict between a fundamental right protected by the Charter and the principle of effectiveness in EU law.

Introduction

On February 26, 2013, the Grand Chamber of the Court of Justice delivered two important rulings—*Åkerberg Fransson*[1] and *Melloni*[2]—on the scope of application of the Charter of Fundamental Rights of the EU (the Charter) and the level of fundamental rights protection to be applied when reviewing national measures against the requirments of EU law. A judgment shedding more light on the elusive question of the scope of the Charter was certainly welcome, as the issue has given rise to confusion in the case law of courts in some Member States as well as a longstanding debate in legal literature.[3] The *Åkerberg Fransson* judgment has not, however, met with much enthousiasm and has fuelled fears of EU "competence creep" in the field of fundamental rights for some. The judgment also raises questions as regards the

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[1] *Åklagaren v Hans Åkerberg Fransson* (C-617/10) [2013] 2 C.M.L.R. 46.

[2] *Melloni v Ministerio Fiscal* (C-399/11) [2013] 2 C.M.L.R. 43. The *Melloni* judgment is the subject of another contribution in this issue of the *European Law Review*.

[3] See, among others: B. de Witte, "The Role of the ECJ in Human Rights" in P. Alston, M. Bustelo and J. Heenan (eds), *The EU and Human Rights* (Oxford: Oxford University Press, 2001), pp.859–897; K. Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights" (2012) 8 *European Constitutional Law Review* 375; J. Weiler, "Fundamental Rights and Fundamental Boundaries" in *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999), p.102; and most recently D. Sarmiento, "Who's afraid of the Charter?" (2013) 50 C.M.L. Rev. (not yet published).

interaction between the *ne bis in idem* principle in EU law and in the case law of the European Court of Human Rights (ECtHR) on art.4 of Protocol No.7 to the ECHR; the interaction between Swedish and EU tax law; and the application of (Swedish) criminal law. After a summary of the background to the case, the judgment of the Grand Chamber of the Court of Justice, and an overview of the case law of the Court concerning the scope of EU fundamental rights before the judgment, this contribution explores the implications of *Åkerberg Fransson* for (1) the scope of application of EU fundamental rights to Member States' actions (or inaction); (2) the level of fundamental rights protection that national courts may or must offer in situations within the scope of EU law in situations where the Charter, the ECHR, and national (constitutional) law interact; and (3) the application of the *ne bis in idem* principle in situations within the scope of EU law.

The case

Facts

The case concerned a Swedish fisherman, Mr Åkerberg Fransson, who was accused of serious tax offences by providing false information in his tax returns for 2004 and 2005, underpaying income tax, value added tax (VAT) and employer's contributions. Of the underpayment for 2004 of 319,143 Swedish kronor (SEK), an amount of SEK 60,000 (around €7,000) concerned VAT; of the underpayment for 2005 (SEK 307,633), an amount of SEK 87,550 (around €11,200) concerned VAT. In 2007, Mr Åkerberg Fransson was ordered to pay additional assessments and also to pay punitive tax surcharges for 2004 and 2005: €11,250 for underpaying income tax, €1,800 for underpaying employers' contributions and €1,025 for underpaying VAT. Mr Åkerberg Fransson did not challenge these surcharges, which thus became final.[4] Meanwhile, criminal proceedings were brought against him, "based on the same acts of providing false information" as the tax surcharge before the Haparanda District Court.[5] That court stayed the proceedings and referred several questions to the Court of Justice asking, inter alia, (1) whether the bringing of criminal proceedings after a decision imposing a tax surcharge in respect of "the same act of providing false information" would come under the *ne bis in idem* principle laid down in art.4 of Protocol No.7 ECHR and art.50 of the Charter of Fundamental Rights; and (2) whether the Swedish rule that "there must be clear support in the ECHR or the case law of the European Court of Human Rights" in order for a national court to be able to set aside national provisions that could infringe the rights set out in the ECHR, and therefore also the Charter, would run counter to the primacy and direct effect of EU law.[6]

The case thus seemed to provide a questionable basis for a landmark ruling by the Grand Chamber of the Court of Justice on the scope of the Charter, as its scope was almost entirely domestic. Neither profit taxation nor employer's contributions have been regulated at EU level; the only connection with EU law is found in the Sixth VAT Directive (Directive 77/388), which harmonised the tax base of the VAT ("common system of value added tax").[7] This Directive does not, however, contain any provisions on enforcement of VAT offences, and both the tax surcharges imposed on Mr Åkerberg Fransson and the criminal proceedings brought against him concerned mainly the unharmonised income tax and employer's contributions. There is no link with trade between the Member States either, and the questions referred to the Court of Justice primarily concerned the case law of the ECtHR on art.4 of Protocol No.7 ECHR.

[4] On December 31, 2010, in respect of the 2004 tax year, and December 31, 2011, in respect of the 2005 tax year.
[5] *Åkerberg Fransson* (C-617/10) [2013] 2 C.M.L.R. 46 at [13].
[6] *Åkerberg Fransson* (C-617/10) [2013] 2 C.M.L.R. 46 at [15].
[7] Now replaced by the Recast VAT Directive 2006/112 on the common system of value added tax [2006] OJ L347/1.

The Opinion of A.G. Cruz-Villalón[8]

The Advocate General argued that the reference for a preliminary ruling should be considered inadmissible in view of the "unquestionably domestic nature of the case".[9] In his Opinion, the question of the admissibility of the reference coincides with the question as to whether the situation falls within the scope of EU law as defined in art.51 of the Charter, which states that the provisions of the Charter are "addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States *only* when they are implementing Union law".[10] This would lead to a situation in which,

> "the request for clear criteria to determine the scope of the expression 'implementation of Union law by the Member States' is matched only by the difficulty of responding to that request."

As regards the tension between the wording of art.51 of the Charter ("implementing" EU law) and the terminology used in the case law which that provision codifies according to the explanations attached to the Charter[11] ("field of application of" or "within the scope of" EU law), the Advocate General argued that these formulations are not necessarily "qualitatively different".[12] Neither art.51 of the Charter nor the case law of the Court sets forth a clear rule distinguishing between situations in which a "centralised review of the actions of Member States" is needed as far as compliance with fundamental rights is concerned, and situations where this is not the case.[13] He noted that what the various formulations have in common is that there must at least be "a presence (of EU law) at the origin of the exercise of public authority" by a Member State. Otherwise, the various phrases all share the "advantages and disadvantages of an essentially open formulation".[14]

A.G. Cruz Villalón argued that EU fundamental rights should apply only to Member State actions in cases "in which the lawfulness of public authority in the Union may be at stake and there must be an adequate response to that situation".[15] In such situations, the "transfer from the Member States to the Union of responsability for guaranteeing fundamental rights" is justified.[16] He opined, however, that the final determination of the scope of EU fundamental rights should be conducted on a case-by-case by taking into account the characteristics of the case, the fundamental right in question, and the specific regulation of the relationship between national and EU law.

[8] Opinion of A.G. Cruz Villalon in *Åkerberg Fransson* (C-617/10) [2013] 2 C.M.L.R. 46.

[9] Opinion of A.G. Cruz Villalon in *Åkerberg Fransson* (C-617/10) [2013] 2 C.M.L.R. 46 at [2].

[10] Opinion of A.G. Cruz Villalon in *Åkerberg Fransson* (C-617/10) [2013] 2 C.M.L.R. 46 at [23] (emphasis added). Whether the scope of the Charter can thus be equated with the admissability of a reference for a preliminary ruling is not all that clear from the case law of the Court of Justice. In the so-called *Dzodzi* line of case law, the Court has found jurisdiction to give rulings on the interpretation of provisions of EU law in "situations where the facts of the cases being considered by the national courts were outside the scope of Community law but where those provisions had been rendered applicable either by domestic law or merely by virtue of terms in a contract" (*Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2* (C-28/95) [1997] E.C.R. I-4161; [1998] 1 C.M.L.R. 157; and *Giloy v Hauptzollamt Frankfurt am Main-Ost* (C-130/95) [1997] E.C.R. I-4291). See K. Lenaerts, "The Unity of European Law and the Overload of the ECJ: the System of Preliminary Rulings Revisited" in *The Global Community: Yearbook of International Law and Jurisprudence 2005* (New York: Oceana Publications, 2006), pp.173–201.

[11] Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/2. The Explanations are not binding on the Court of Justice and "do not as such have the status of law", but are intended as "a valuable tool of interpretation intended to clarify the provisions of the Charter".

[12] Opinion of A.G. Cruz Villalon in *Åkerberg Fransson* (C-617/10) [2013] 2 C.M.L.R. 46 at [27].

[13] Opinion of A.G. Cruz Villalon in *Åkerberg Fransson* (C-617/10) [2013] 2 C.M.L.R. 46 at [30].

[14] Opinion of A.G. Cruz Villalon in *Åkerberg Fransson* (C-617/10) [2013] 2 C.M.L.R. 46 at [34].

[15] Opinion of A.G. Cruz Villalon in *Åkerberg Fransson* (C-617/10) [2013] 2 C.M.L.R. 46 at [41].

[16] Opinion of A.G. Cruz Villalon in *Åkerberg Fransson* (C-617/10) [2013] 2 C.M.L.R. 46 at [46].

Although the power to impose penalties is "ultimately based on a provision of Union law", the Advocate General considered that this was,

> "not sufficient for the purposes of transferring the review of any constitutional guarantees applicable to the exercise of that power from the sphere of responsability of the Member States to that of the Union."[17]

The reasons for this were (1) that the link with the *ne bis in idem* principle in EU law was "rather weak",[18] and (2) that the only applicable instrument of EU law was Directive 2006/112, which lays down no specific requirements beyond those which apply generally in the context of the "effective exercise of the power of taxation" within national systems of law.[19]

As regards the *ne bis in idem* principle, A.G. Cruz Villalón observed that the situation was complicated by the partial ratification of Protocol No.7 to the ECHR, and by the fact that the imposition of both administrative and criminal penalties for the same offence is a "widespread practice" in the Member States.[20] As a result of the so-called *Engel* line of case law of the ECtHR, the protection afforded by the *ne bis in idem* principle extends beyond the realm of traditional criminal law to include tax penalties and other punitive administrative measures. He noted that "after some initial hesitation", the case law of the ECtHR is now conclusive in its statement that the *ne bis in idem* principle prohibits any new *proceedings* (and not just penalties) after the outcome of an earlier instance of prosecution has become final, regardless of whether it concerns criminal penalties or penalties of a different nature, and irrespective of whether the first penalty is deducted from the second sentence.[21] The case law of the ECtHR therefore provides "more than sufficient criteria" for the referring court to decide the issue at hand.

Finally, in order to tackle the interaction of the partial ratification of Protocol No.7 to the ECHR and art.52(3) of the Charter—requiring the Charter rights to be given the same scope and meaning as the corresponding ECHR rights—the Advocate General proposed a rather awkward distinction between the *ne bis in idem* principle codified in art.4 of Protocol No.7 and in art.50 of the Charter, arguing that the *ne bis in idem* principle would not belong to the "core" of the fundamental rights originally set out in the Charter owing to its placement in Protocol No.7 to the ECHR.[22] Such a distinction would, according to the Opinion, allow for a more autonomous reading of art.50 of the Charter, under which the "prior imposition of a final administrative penalty" would not necessarily violate the *ne bis in idem* principle protected by art.50 of the Charter.[23]

The judgment of the Grand Chamber

The Court did not follow the Opinion of A.G. Cruz Villalón. Reiterating the existing body of case law on the scope of application of EU fundamental rights "as general principles of EU law", it first observed that the,

> "definition of the field of application of the fundamental rights of the European Union is borne out by the explanations relating to art. 51 of the Charter which … have to be taken into consideration for the purpose of interpreting it".[24]

[17] Opinion of A.G. Cruz Villalon in *Åkerberg Fransson* (C-617/10) [2013] 2 C.M.L.R. 46 at [55].
[18] Opinion of A.G. Cruz Villalon in *Åkerberg Fransson* (C-617/10) [2013] 2 C.M.L.R. 46 at [57].
[19] Opinion of A.G. Cruz Villalon in *Åkerberg Fransson* (C-617/10) [2013] 2 C.M.L.R. 46 at [58].
[20] Opinion of A.G. Cruz Villalon in *Åkerberg Fransson* (C-617/10) [2013] 2 C.M.L.R. 46 at [72]–[76].
[21] Opinion of A.G. Cruz Villalon in *Hans Åkerberg Fransson* (C-617/10) [2013] 2 C.M.L.R. 46 at [78] and [79]. See ECtHR, judgment of June 8, 1976, *Engel v Netherlands* (A/22) (1979-80) 1 E.H.R.R. 647 ECtHR.
[22] Opinion of A.G. Cruz Villalon in *Åkerberg Fransson* (C-617/10) [2013] 2 C.M.L.R. 46 at [82]–[85].
[23] Opinion of A.G. Cruz Villalon in *Åkerberg Fransson* (C-617/10) at [97]–[100].
[24] *Åkerberg Fransson* (C-617/10) [2013] 2 C.M.L.R. 46 at [19] and [20].

. Where national legislation falls "within the scope" of Union law, this "entails applicability of the fundamental rights guaranteed by the Charter"; by contrast, the Court does not have jurisdiction to rule on "a legal situation" or on any of the provisions of the Charter where that situation does not come within the scope of EU law, because the provisions of the Charter cannot themselves "form the basis for such jurisdiction".[25]

Unlike the Advocate General, the Court considered the case of Mr Akerberg Fransson to fall within the scope of the Charter. It construed the necessary link with EU law from three sources: (1) the provisions of VAT Council Directives 77/388 and 2006/11; (2) art.4(3) TEU, obliging every Member State "to take all legislative and administrative measures appropriate" for ensuring the collection of VAT due on its territory; and (3) art.325 TFEU, requiring Member States to "counter illegal activities affecting the financial interests of the EU".[26] The Court emphasised that VAT forms part of the system of the European Union's own resources, which provided "a direct link between the collection of VAT revenue in compliance with the European Union law applicable and the availability to the European Union budget of the corresponding VAT resources".[27] For these reasons, both the tax surcharges imposed on Mr Åkerberg Fransson as well as the criminal proceedings brought against him "constitute implementation … of European Union law" for the purposes of art.51(1) of the Charter.

As for the cumulation of criminal and administrative proceedings and the scope of the *ne bis in idem* principle of art.50 of the Charter, the Court found that the latter "does not preclude a Member State from imposing, for the same acts of non-compliance with declaration obligations in the field of VAT, a combination of tax penalties and criminal penalties".[28] The Court considered that in order to ensure that all VAT revenue is collected and the financial interests of the European Union are protected, "the Member States have freedom to choose the applicable penalties", which may be administrative or criminal in nature, "or a combination of the two".[29] The Court added that only if the tax penalty is criminal in nature for the purposes of art.50 of the Charter would this "[preclude] criminal proceedings in respect of the same act from being brought against the same person", and went on to examine whether that was the case. To that end, it reiterated the *Engel* criteria, which it had already adopted in the *Bonda* judgment: (1) the national legal characterisation of the offence; (2) the very nature of the offence; (3) the degree of severity of the penalty liable to be incurred.[30] Remarkably, the Court refrained from reaching any conclusions on the application of these criteria in the present case, and instead held that it "is for the national court to determine" whether there was indeed a breach of the *ne bis in idem* principle.[31]

Finally, as regards the requirement under Swedish law that there must be "clear evidence" in the case law of the ECtHR or the Court of Justice in order for a Swedish judge to be able to set aside any provision in national law that runs counter to a fundamental right as guaranteed by the ECHR or the Charter, the judgment is conclusive. The Court first pointed out that it could not rule on the compatibility of the national provision with ECHR rights,

> "whilst fundamental rights recognised by the ECHR constitute general principles of the European Union's law and whilst Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid

[25] *Åkerberg Fransson* (C-617/10) [2013] 2 C.M.L.R. 46 at [21] and [22].
[26] *Åkerberg Fransson* (C-617/10) [2013] 2 C.M.L.R. 46 at [25].
[27] *Åkerberg Fransson* (C-617/10) [2013] 2 C.M.L.R. 46 at [26].
[28] *Åkerberg Fransson* (C-617/10) [2013] 2 C.M.L.R. 46 at [34].
[29] *Åkerberg Fransson* (C-617/10) [2013] 2 C.M.L.R. 46 at [34].
[30] *Criminal Proceedings against Bonda* (C-489/10) June 5, 2012.
[31] *Åkerberg Fransson* (C-617/10) [2013] 2 C.M.L.R. 46 at [37].

> down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law."[32]

As far as Charter rights are concerned, however, the Court emphasised its case law requiring the judiciary in the Member States to give full effect to provisions of EU law, and to disapply provisions of national law where necessary to this end. The conclusion followed that:

> "European Union law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the text of the Charter or the case-law relating to it, since it withholds from the national court the power to assess fully, with, as the case may be, the cooperation of the Court of Justice, whether that provision is compatible with the Charter."[33]

The importance of the judgment

The judgment in *Åkerberg Fransson* is important for three main reasons. The first is that it captures the scope of application of EU fundamental rights to Member States' actions in a single sentence, "[t]he applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter". *Akerberg Fransson* thus confirms that the Court will not interpret the phrase "implementing Union Law" in art.51 of the Charter narrowly ("only when Member States are acting as agents of EU Law"), but more broadly, as "in all situations governed by EU law".[34] The judgment also suggests that the Court will make no distinction between the scope of the Charter rights and that of the rights developed in the case law on general principles of EU law. It is, however, questionable whether the judgment merely aligns the scope of the Charter as defined in art.51 with the existing case law on the scope of general principles of EU law, as the Court suggests. As will be discussed below, the Court's finding that Mr Åkerberg Fransson's case falls within the scope of the Charter does not follow unambiguously from its earlier case law on the scope of application of general principles of EU law, and appears to give the Charter a wider scope of application.[35]

The second reason is that *Åkerberg Fransson*, when read together with the *Melloni* judgment[36] of the same day, offers some further clarification on the level of fundamental rights protection that national courts may or must offer in situations within the scope of EU law where the Charter, the ECHR and national (constitutional) law interact. National courts may offer a higher level of protection than the Charter and the ECHR provide for if EU law leaves national authorities room for discretion, and provided that the primacy, unity and effectiveness of EU law are not jeopardised. On the other hand, national courts must always guarantee the minimum level of protection guaranteed by the Charter.

Thirdly, and finally, the case adds to the body of case law on the *ne bis in idem* principle in EU law. The referring Swedish court must now apply the Charter to the double jeopardy situation arising in respect of Mr Åkerberg Fransson's VAT offences. However, since there is no link with EU law in respect of his income tax and employer's contributions offences, the latter do not enter the scope of application of EU law and of the Charter.[37] If it were not for the fact that Sweden has ratified Protocol No.7 to the ECHR,

[32] *Åkerberg Fransson* (C-617/10) [2013] 2 C.M.L.R. 46 at [43].
[33] *Åkerberg Fransson* (C-617/10) [2013] 2 C.M.L.R. 46 at [48].
[34] When they act "within the scope of Union law": *Åkerberg Fransson* (C-617/10) [2013] 2 C.M.L.R. 46 at [19] and [20].
[35] The Explanations claim that the scope of application of EU fundamental rights the Member States' actions would follow "unambiguously from the case-law of the Court of Justice".
[36] *Melloni* (C-399/11) [2013] 2 C.M.L.R. 43.
[37] See C. Brokelind, "Case Note on Akerberg Fransson (Case C-617/10)" (2013) 53 *European Taxation* 281, 284–285.

Mr Åkerberg Fransson would have been left in a rather awkward legal position, only protected from double jeopardy for the VAT part of his tax offences.

Although the Court of Justice does not *explicitly* depart from the case law of the ECtHR on the *ne bis in idem* principle—it refrains from answering the relevant questions referred by the Swedish court on that point—the judgment seems to suggest that the Court did not consider that the *ne bis in idem* principle as protected by art.50 of the Charter was violated in Mr Åkerberg Fransson's case. This is surprising, as there is hardly any doubt that tax penalties such as those imposed on Mr Åkerberg Fransson are "criminal" within the meaning given to that term in the case law of the ECtHR. The 1984 *Öztürk*[38] and *Lutz*[39] cases, the subsequent fiscal *Bendenoun*[40] and *Société Sténuit*[41] cases, and, above all, the 2006 Grand Chamber *Jussila* case,[42] which concerned a €309 tax penalty for inadequate tax-bookkeeping, are all conclusive in this regard. Furthermore, in the *Janosevic* case,[43] which involved the same tax penalties for income tax, employer's contributions and VAT offences under Swedish tax law and a comparable sum of tax surcharges (€20,150 in total), the ECtHR explicitly characterised these tax surcharges as "criminal" in nature under art.6 ECHR.[44] These cases raise the question as to why the Grand Chamber of the Court of Justice stopped short of finding an infringement of the *ne bis in idem* principle in *Åkerberg Fransson*.[45] This may have something to do with art.52(3) of the Charter, which requires the Court to interpret Charter rights corresponding to ECHR rights in conformity with the ECtHR's interpretation of those rights. One possibility is that the Court of Justice's deferential stance was prompted by the (real or perceived) potential for constitutional conflict on the point of *ne bis in idem*. The locus of such conflict is immediately not obvious here, as Sweden did ratify Protocol No.7 to the ECHR. There are indications, however, that the application of the *ne bis in idem* principle is the subject of some controversy between different Swedish courts, and there is at present a Swedish case pending before the ECtHR on this very issue.

The development of EU fundamental rights

After a brief sketch of some important developments in the case law of the Court of Justice on fundamental rights, this contribution will address the question whether the *Åkerberg Fransson* judgment departs from the "old" case law on the scope of application of those rights. Some attention will then be given to the level of fundamental rights protection national courts may apply, and to the tension between the *ne bis in idem principle* and the principle of effectiveness in EU law.

[38] *Öztürk v Germany* (A/73) (1984) 6 E.H.R.R. 409.
[39] *Lutz v Germany* (A/123) (1988) 10 E.H.R.R. 182.
[40] *Bendenoun v France* (1994) 18 E.H.R.R. 54.
[41] *Société Sténuit v France* [1992] E.C.C. 401.
[42] *Jussila v Finland* (2007) 45 E.H.R.R. 39.
[43] *Janosevic v Sweden* (2004) 38 E.H.R.R. 22.
[44] The ECtHR came to the same conclusion in another comparable Swedish case, No.36985/97 of July 23, 2002, *Västberga Taxi Aktiebolag and Vulic v Sweden*.
[45] Surprisingly however, the Swedish Supreme Administrative Court also ignored the case law of the ECtHR on this point and only considered relevant whether the total of administrative and criminal penalties was "not unreasonable". Lower Swedish courts, on the other hand, had already conformed to the clear ECtHR case law, which not only prohibits a second "criminal" charge, but also confirms that *ne bis in idem* in art.4 of Protocol No.7 ECHR means *ne bis vexari*, not just the duty to credit the prior penalty against the subsequent penalty to reach a proportionate total (see *Zolotukhin v Russia* (2012) 54 E.H.R.R. 16). A new case on the Swedish law criterion of "not-unreasonable-in-total" is pending before the ECtHR. See Brokelind, "Case Note on Akerberg Fransson (Case C-617/10)" (2013) 53 *European Taxation* 281, 282.

Background

Much ink has flowed from the developments that took place in the case law of the Court of Justice on the primacy, effectiveness and general principles of EU law, and from the dialectics between these principles over the years. There is no need to revisit the debates at length here, but it is useful briefly to highlight some important aspects of the "genesis" of fundamental rights in the case law of the Court and their subsequent extension to Member States' actions in order to consider the relevance of the *Åkerberg Fransson* judgment in that wider context.

The original ECSC and EEC Treaties did not contain any fundamental rights provisions.[46] The absence of fundamental rights on the Community level proved problematic, in view of the growing capacity of Community law "to affect fundamental rights to an extent unforeseen at the time the European Communities were created", among other reasons.[47] In response, the Court of Justice introduced a body of fundamental rights, rooted in the constitutional traditions common to Member States as well as the relevant international instruments to which they were signatories, and capable of restraining the exercise of public authority at the Community level as general principles of Community law.[48] Henceforth, the protection of fundamental rights would form "an integral part of the general principles of law, whose observance the Court ensures".[49] The extension of EU fundamental rights protection to situations in which Member States act "within the scope" of EU law follows from the primacy of EU law. Owing to the overriding nature of the primacy of EU law, an important category of situations would escape all scrutiny for compliance with fundamental rights if such primacy were not accompanied by fundamental rights protection at EU level, and formed an open invitation to the national judiciary to reject the primacy of EU law by applying domestic human rights standards.

A problem encountered in extending EU fundamental rights protection to Member States' actions (and inactions) is that EU law interacts with the legal orders of the Member States in such a wide variety of different ways that it becomes difficult to capture every aspect of that interaction in a single legal formula. Both the wording of the Charter and the case law of the Court raise questions in this regard. Article 51 of the Charter stipulates that its provisions are exclusively "addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they *are implementing* Union law" (emphasis added). According to the Convention Praesidium explanations relating to art.51 (on which the Court relied in *Åkerberg Fransson*), the provision "merely codifies" the body of case law of the Court on the extent to which the Member States are bound by human rights obligations as general principles of EU law.[50]

Developments in the case law on the scope of general principles of EU law

Within the Court's case law on general principles of EU law, a distinction can be made between two categories of situations, both of which are referred to in the explanations to the Charter: those in which Member States act as *agents* of EU law, commonly referred to as the *Wachauf* line of case law; and those

[46] Some commentators have speculated that this reflected a deliberate choice to leave the Member States in charge of the protection of their citizens. See B. de Witte, "The Role of the ECJ in Human Rights" in P. Alston (ed.), *The EU and Human Rights* (Oxford: Oxford University Press, 2001), p.863.

[47] De Witte, "The Role of the ECJ in Human Rights" in *The EU and Human Rights* (2001), p.866.

[48] *Stauder v City of Ulm* (29/69) [1969] E.C.R. 419; [1970] C.M.L.R. 112; *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* (11/70) [1970] E.C.R. 1125; [1972] C.M.L.R. 255; *Foto-Frost v Hauptzollamt Luebeck- Ost* (314/85) [1987] E.C.R. 4199; [1988] 3 C.M.L.R. 57 at [11]–[16].

[49] *Internationale Handelsgesellschaft* (11/70) [1970] E.C.R. 1125 at [3].

[50] Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/02 at para.2. The Explanations claim that the scope of application of EU fundamental rights with respect to art.51 of the Charter "follows unambiguously from the case-law of the Court of Justice".

in which Member States *derogate* from EU law in free movement cases, the so-named *ERT* line of cases.[51] The case law on the extent to which Member States are bound by EU fundamental rights when acting "as agents of" or "implementing" EU law may be further divided into case law on directives that require implementing legislation, and case law on regulations that are directly applicable. In *Wachauf*, the Court held that the Member States are bound by fundamental rights as general principles of EU law when applying the (then) Community rules on the common organisation of the milk market in Regulation 1371/84.[52] In the later *Karlsson* judgment, the Court examined whether Swedish legislation implementing Regulation 3950/92, also concerning the common organisation of the milk market, complied with the principle of equality.[53] The Court found that there was a difference in treatment, but that it was justified by the legitimate aim of the common organisation of the milk market, being the reduction of structural milk surpluses and the "improvement of the milk market".[54] Lenaerts submits that what the *Wachauf* and *Karlsson* judgments demonstrate is that,

> "when adopting national measures which aim to apply a normative scheme put in place by the EU legislator, member states are implementing EU law, and are thus bound by the fundamental rights contained in the Charter."[55]

For directives, the Court confirmed in *Rundfunk* and *Lindqvist* that national authorities are bound by EU human rights standards when applying national law, implementing (then) Community law.[56] Both cases concerned Directive 95/46 on the protection of individuals with regard to the processing of personal data. In *Rundfunk*, the question was whether Austrian national legislation implementing the Directive, and enabling an audit body to collect and publish data on the income of persons employed by the bodies subject to that control, complied with the Directive and with the right to privacy under EU law. Although there was no cross-border element present, the Court nevertheless decided that case on grounds of EU fundamental rights.[57]

As for the derogation (or non-"agent") category of cases,[58] the Court (citing, among others, *Wachauf*) held in *ERT* that when a Member State,

> "relies on the combined provisions of Articles 56 and 66 [now 52 and 62 TFEU] in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification,

[51] See X. Groussot, L. Pech, and G. Thor Petursson, "The Scope of Application of EU Fundamental Rights on Member States' Action", Erik Stein Working Paper 1/2011, *http://www.ericsteinpapers.eu/images/doc/eswp-2011-01-groussot.pdf*.

[52] *Wachauf v Germany* (C-5/88) [1989] E.C.R. 2609; [1991] 1 C.M.L.R. 328; Commission Regulation 1371/84 laying down detailed rules for the application of the additional levy referred to in art.5c of Regulation 804/68 [1984] OJ L132/11.

[53] *Proceedings brought by Karlsson* (C-292/97) [2000] E.C.R. I-2737.

[54] *Karlsson* (C-292/97) [2000] E.C.R. I-2737 at [20].

[55] K. Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights" (2012) 8 *European Constitutional Law Review* 379. This however implicates a distinction between "normative" and "non-normative" schemes, which would appear unrealistic.

[56] *Rechnungshof v Osterreichischer Rundfunk* (C-465/00, C-138/01 and 139/01) [2003] E.C.R. I-4989; [2003] 3 C.M.L.R. 10; *Criminal Proceedings against Lindqvist* (C-101/01) [2003] E.C.R. I-12971; [2004] 1 C.M.L.R. 20.

[57] *Rundfunk* (C-465/00, C-138/01 and 139/01) [2003] E.C.R. I-4989 at [64]–[69]. After a thorough discussion of the relevant case law of the European Court of Human Rights, the CJEU concluded that the interference with private life resulting from the application of the Austrian legislation could be justified under certain circumstances.

[58] i.e. the situation in which the validity of national measures derogating from EU requirements is examined, e.g. measures restricting free movement rights. See Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights" (2012) 8 *European Constitutional Law Review* 379, 383.

> provided for by Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights."[59]

Consequently, the Greek Government was required to bring evidence that the national legislation at issue did not contravene the general principle of freedom of expression in order to be able to invoke the Treaty provisions allowing for derogations from the right of establishment and freedom to provide services. In the subsequent *Familiapress* case, the Court corfirmed that where mandatory requirements are invoked,

> "to justify rules which are likely to obstruct the exercise of free movement of goods, such justification must also be interpreted in the light of the general principles of law and in particular of fundamental rights."[60]

Some scholars have argued that the *ERT* line of case law raises questions, and casts the net of EU fundamental rights protection rather wide without any clear justification provided by the Court.[61] Excluding *ERT*-type cases from the scope of EU fundamental rights review could, however, yield unacceptable results. There are often fundamental rights issues to consider where Treaty derogations and mandatory requirements are relied on by the Member States to justify restrictions of free movement. As Eeckhout points out, using the example of the *Grogan* case on abortion services, it would have been rather difficult for the Court to "legitimately review the conflict between the right to life, as protected under the Irish Constitution, and the freedom of expression" without recourse to EU fundamental rights.[62] It would, for instance, also be difficult to explain why, in a dispute before a national court on harmonised indirect taxation, the right of property in art.17 of the Charter would have to be respected if, in a dispute before the same national court on unharmonised direct taxation violating the Treaty freedoms, the rights protected by the Charter could be ignored. [63]

Much has been written on the subject of the interaction between the scope of EU fundamental rights and the concept of EU citizenship in the wake of the *Ruiz Zambrano*, *McCarthy* and *Dereci* judgments.[64] Some authors have argued that art.20(2) TFEU offers the possibility to "federalise" the Charter rights and that all Charter rights should also be EU-citizenship rights.[65] This would enable courts to protect Charter rights also in purely internal situations, putting an end to reverse discrimination.[66] There is, however, no legal basis in the relevant Treaty provisions for federalisation of the Charter rights by extending the appliciation of Union citizenship—and with that, of the Charter—to situations without any "link" to EU law (other than that of EU citizenship per se).[67] The Charter rights are not, in and of themselves, part of

[59] *Elliniki Radiophonia Tileorassi AE (ERT) v Dimotiki Etairia Pliroforissis (DEP)* (C-260/89) [1991] E.C.R. I-2925; [1994] 4 C.M.L.R. 540 at [43].

[60] *Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH v Bauer Verlag* (C-368/95) [1997] E.C.R. I-3709; [1997] 3 C.M.L.R. 1329 at [22] et seq.

[61] See Weiler, "Fundamental Rights and Fundamental Boundaries" in *The Constitution of Europe* (1999), p.102.

[62] P. Eeckhout, "The EU Charter of Fundamental Rights and the Federal Question" (2002) 39 C.M.L. Rev. 978. The Court did not find a restriction of the freedom to provide services in *Society for the Protection of Unborn Children (Ireland) Ltd (SPUC) v Grogan* (C-159/90) [1991] E.C.R. I-4685; [1991] 3 C.M.L.R. 849.

[63] Conversely, it would seem contradictory to apply the EU prohibition of abuse of rights only as regards harmonised taxes, such as VAT, and not to allow that general principle as a justification for fiscal restrictions of the Treaty freedoms.

[64] *Ruiz Zambrano v Office National de l'Emploi (ONEm)* (C-34/09) [2011] E.C.R. I-1177; [2011] 2 C.M.L.R. 46; *Dereci v Bundesministerium fur Inneres* (C-256/11) [2012] 1 C.M.L.R. 45; *McCarthy v Secretary of State for the Home Department* (C-434/09) [2011] E.C.R. I-3375; [2011] 3 C.M.L.R. 10.

[65] M. van den Brink, "EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously?" (2012) 39 *Legal Issues of Economic Integration* 273, 280–281.

[66] See the Opinion of A.G. Sharpston in *Ruiz Zambrano* (C-34/09) [2011] E.C.R. I-1177 at [84].

[67] Although it must be admitted that the distinction between citizens who have and citizens who have not used their free movement rights that this leads to seems arbitrary: S. Adam and P. van Elsuwege, "Citizenship Rights and the

"the substance of the rights attaching to the status of European Union citizen", and the fact that the right to family life of an EU citizen is violated by a national measure is, in itself, not enough to engage EU law; a link with secondary EU law or the Treaty's free movement rights must be present. It is only under the very exceptional circumstances that an EU citizen is deprived of the substance of his citizenship rights by being, in fact, forced to leave the EU territory altogether (*Ruiz Zambrano*) that no prior connection to EU law is required.[68]

A question that has surfaced in the literature is whether the Court did not in fact take a narrower view of the scope of EU fundamental rights in citizenship cases as compared with the *ERT* case law. Lenaerts admits that the Court's approach in citizenship cases is "restrictive", but argues that this is not inconsistent with *ERT*:

> "The restrictive approach followed by the ECJ [in *Ruiz Zambrano*, *McCarthy* and *Dereçi*] aims to respect the vertical allocation of powers set out in the Treaties. Had the ECJ followed a broad interpretation of the type of measures producing a 'deprivation effect', then the scope of the Treaty provisions on EU citizenship, notably the right to move enshrined in Article 21 TFEU, would have been excessively broadened so as to cover almost all types of situations. However, this is not the aim of EU citizenship as defined by the authors of the Treaties. Although EU citizenship is intended to be 'the fundamental status of nationals of the Member States', it 'is [, however,] not intended to extend the scope *ratione materiae* of the Treaty also to internal situations which have no link with [EU] law.'[69]
>
> ... It is in the context of examining the validity of the justification put forward by the defaulting Member State that the referring court in co-operation with the ECJ must determine whether the contested national measure complies with fundamental rights. This two-step analysis followed in *Dereci* is, in my view, consistent with previous case law, notably *ERT*, where the ECJ held that, 'where a Member State relies on [a legitimate aim recognised by EU law] in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by [EU] law, must be interpreted in the light of the general principles of law and in particular of fundamental rights.'"[70]

In the recent *Ymeraga* judgment, the Court confirmed that the refusal by a national authority to grant third-country nationals a right of residence as family members of a Union citizen does not form "a situation involving the implementation of European Union law within the meaning of Article 51 of the Charter" in the absence of any prior link with EU law.[71] The case concerned 15-year-old Kreshnik Ymeraga from Kosovo, who came to live with his uncle in Luxembourg and became a citizen there. When his parents and brothers from Kosovo applied for residence permits with a view to family reunification, the applications were denied by the Luxembourg authorities. The Court considered, inter alia:

> "As to the fundamental rights mentioned by the referring court, it must be borne in mind that, in accordance with Article 51(1) of the Charter, its provisions are addressed to the Member States only when they are implementing European Union law. Under Article 51(2) thereof, the Charter does not extend the field of application of European Union law beyond the powers of the Union, and it does

Federal Balance between the European Union and its Member States: Comment on Dereci" (2012) 37 E.L. Rev. 176, 185–186.

[68] See K. Lenaerts, "The Concept of EU Citizenship in the Case Law of the European Court of Justice" (2013) 13 *ERA Forum* 569, to whose analysis we adhere. See also *Dereci* (C-256/11) [2012] 1 C.M.L.R. 45 at [66]–[68].

[69] Footnote in original: "Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171, para. 23

[70] K. Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights" (2012) 8 *European Constitutional Law Review* 379, 394.

[71] *Kreshnik Ymeraga* (C-87/12) May 8, 2013 at [43].

> not establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.
>
> …
>
> While the [Luxembourg] Law on freedom of movement is indeed intended to implement European Union law, it is none the less the case that the situation of the applicants in the main proceedings is not governed by European Union law, since Mr Kreshnik Ymeraga cannot be regarded as a beneficiary of either Directive 2004/38 or, as regards the applications at issue in the main proceedings, Directive 2003/86, and the refusal to confer a right of residence on Mr Kreshnik Ymeraga's family members does not have the effect of denying him the genuine enjoyment of the substance of the rights conferred by virtue of his status as citizen of the Union."[72]

It was consequently held that the refusal to grant family members a right of residence as family members of a Union citizen did not fall within the scope of the Charter.

Does *Åkerberg Fransson* depart from the existing case law on the scope of application of general principles of EU law?

The foregoing is merely a succinct taxonomy of the case law of the Court of Justice on the scope of EU fundamental rights from which many important decisions have been omitted. The aim was to demonstrate that the Court's application of the Charter in *Åkerberg Fransson* is not as evident from the existing case law as the judgment itself suggests. Indeed, the case fits neither in the wider *ERT* line of case law (because there was no link with the Treaty provisions on free movement or on EU citizenship), nor in the *Wachauf* category. By fining and subsequently prosecuting Mr Åkerberg Fransson, Sweden was hardly "applying" or "implementing" the Sixth VAT Directive in any immediate sense, as that Directive, which harmonises the tax base of VAT, contains no provisions on enforcement of VAT offences. Furthermore, there was no cross-border element or citizenship issue involved in the case, and neither profit taxation nor employer's contributions are regulated at EU level. In the end, it was only the fact that a modest amount of EU-harmonised (*and* EU-financing) VAT had been underpaid that brought the case within the scope of EU law, and triggered the applicability of the Charter.

What conclusions, then, can be drawn from *Åkerberg Fransson*? One conclusion could be that the judgment establishes a third category of situations in which the Charter applies, comprising, inter alia, situations in which the Member States act (or refrain from acting) in a manner that affects the financial means of the European Union. It is, however, sufficiently clear from the language of the judgment that it transcends cases concerning the financial means of the Union. The ambitions of the Court are revealed at [21] of the judgment, in particular:

> "Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter."

The fundamental rights guaranteed by the Charter thus become, as it were, the lining of the fabric of EU law We infer, therefore, that *Åkerberg Fransson* merges the various lines of case law previously discussed into a single overarching doctrine. Under this doctrine, the scope of application of the Charter now coincides with that of EU law itself, irrespective of which *kind* of applicability of EU law is involved. Henceforth

[72] *Kreshnik Ymeraga* (C-87/12) May 8, 2013 at [40] and [41]. The Court of Justice refers to Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77; and Directive 2003/86 on the right to family reunification [2003] OJ 251/12.

the Charter applies to every situation covered by EU law: but, crucially, goes no further than that, in accordance with art.51(2) of the Charter. Both the agent situation and the derogation situation are covered, as well as an emerging third category of situations in which the Court discerns serious threats to concepts essential to the Union, such as its own resources However, while the net of the Charter is thus clearly cast wider than before, it must be said that the "rule" from *Åkerberg Fransson* is itself no more clear than the various rules found in the "old" case law, and this is regrettable. The key question is, therefore, what *Åkerberg Fransson* means in practical terms; and the judgment provides several indications.

The EU law obligations placed on Sweden at issue in *Åkerberg Fransson* are very general in nature, and derive from the requirement of effectiveness of EU law and the duty of loyal co-operation laid down in art.4(3) TEU[73]: the Member States are required by EU VAT law to take measures to ensure collection of all VAT due on their territories and to prevent tax evasion, and art.325 TFEU requires Member States to protect EU resources as diligently as they protect their own financial interests. What is striking in *Åkerberg Fransson* is the direct link between the principle of effectiveness of EU law and the scope of application of the Charter, which does not feature so clearly in the cases previously discussed. If the Court indeed set out to establish a direct link between the scope of the Charter and the principle of effectiveness in EU law in *Åkerberg Fransson*, the applicability of the Charter in a given situation will follow from the presence of any positive or negative EU law *obligation* for the Member States involved in that situation, regardless of the specificity of that obligation and, therefore, regardless of the degree to which Member States' actions in a particular field are actually determined by EU law. Although the wording of the judgment is subtle, this can be seen as an important change in the Court's approach to the question of the scope of EU fundamental rights. It follows that any national measure that jeopardises the effectiveness of EU law, in whatever manner, falls within the scope of EU law and is therefore susceptible to scrutiny under the Charter.

And yet, it must be said that the link between the principle of effectiveness and the scope of the Charter in *Åkerberg Fransson* still does not provide a sufficiently clear criterion to determine the scope of the Charter. As the recent case of *Sindicato dos Bancários do Norte v Banco Português de Negócios SA* shows, not just any link with EU law is sufficient to engage the Charter, even if EU rules are being implemented.[74] The case concerned bank personnel in Portugal litigating against their employer, a nationalised bank, which had significantly reduced their wages as from January 2011 to comply with the national budget law providing for wage reduction in respect of all civil servants with a view to meeting the requirements of the EU Stability and Growth Pact (SGP) for the period until 2013. The referring Portuguese court doubted whether this legislation was compatible with the prohibition of discrimination and the right to working conditions respecting the workers' dignity (arts 20, 21 and 31 of the Charter). Even though the wage measures taken ultimately flowed from Portugal's EU obligations under the SGP, the Court of Justice considered itself not competent to answer the questions referred, as it did not see any "implementation" of EU law within the meaning of art.51 of the Charter. In the light of *Åkerberg Fransson*, it is not all that clear why the implementation of the SGP should fall outside of the scope of the Charter. On the other hand, if the Court had ruled differently, this could have brought every national cutback law, and maybe every national tax law, within the scope of the Charter, and therefore within the scrutiny of the Court of Justice. Such an outcome would not have seemed acceptable in the light of the subsidiarity principle laid down in arts 6(1) TEU and 51(2) of the Charter.

[73] The Lisbon Treaty has reshaped the former loyalty clause, introducing some important changes. Among other things, the duty was incorporated into the common provisions of the TEU, and its mutual character was underlined.

[74] *Sindicato dos Bancários do Norte v Banco Português de Negócios SA* (C-128/12) March 7, 2013.

The level of fundamental rights protection to be applied by national courts

In accordance with the principle of effectiveness in EU law, the Court's statement that "applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter" must be taken to mean that the Charter applies to every instance in which Member States' obligations stemming from EU law can be identified, regardless of how general or precise those obligations are (and therefore regardless of the degree to which they *determine* Member States' actions). A combined reading of the *Melloni* and *Åkerberg Fransson* judgments also shows, however, that the degree to which Member States' actions are determined by EU law is not irrelevant, as far as the *level* of EU fundamental rights standards are concerned.

According to art.53 of the Charter, nothing in it,

> "shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."

A combined reading of the simultaneous judgments in *Åkerberg Fransson* and *Melloni* provides an indication of how this provision must likely be understood.[75] From the *Melloni* judgment, it transpires that Member States are not to maintain any other level of protection of fundamental rights than that provided for in the Charter in matters where a common EU policy has been agreed upon, such as in matters concerning a European Arrest Warrant (EAW) for the enforcement of a criminal sentence *in absentia*.[76] In such matters, it was held in *Melloni* that the *minimum* level of protection under the Charter is, at the same time, the *maximum* protection level that the Member State concerned may apply.[77] In this instance, Spain was not allowed to apply its stricter national requirements for enforcement of *in absentia* convictions in order to block the execution of an EAW. In *Åkerberg Fransson*, the Court hastened to add (referring to *Melloni*) that if the action of the Member State concerned is "not entirely determined by EU law" (unlike EAW cases), national courts remain free to apply a *higher* level of protection of fundamental rights, provided that "the primacy, unity, and effectiveness of EU law are not thereby compromised".[78] The level of protection of fundamental from the Charter and from national systems of law may vary, therefore, depending on the degree to which EU law determines the actions of the Member State.

Where EU law completely determines Member States' actions, the Charter trumps fundamental rights standards in national law and becomes "the sole relevant human rights instrument applicable to the case".[79] For cases such as *Åkerberg Fransson*, this implies that a Member State may entertain stricter *ne bis in idem* rules than those required by art.50 of the Charter, which could preclude criminal prosecution of a tax offence once an administrative fine has been imposed for it, perhaps even if such a penalty is not final yet. This is, however, subject to the condition that the enforcement of tax law remains sufficiently "effective, proportionate, and dissuasive" to protect the European Union's financial interests. The interests of the enforcement of the law and the protection of fundamental rights pull, by their nature, in opposite directions in such circumstances, and the question is therefore whether punitive measures will still be considered to be "effective, proportionate, and dissuasive" where they are mitigated to respond to national legal rules

[75] *Melloni* (C-399/11) [2013] 2 C.M.L.R. 43. See Sarmiento, "Who's afraid of the Charter?" (2013) 50 C.M.L. Rev. (not yet published).

[76] Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States [2002] OJ 190/1.

[77] *Melloni* [2013] 2 C.M.L.R. 43 at [60].

[78] *Åkerberg Fransson* (C-617/10) [2013] 2 C.M.L.R. 46 at [29].

[79] *Åkerberg Fransson* (C-617/10) [2013] 2 C.M.L.R. 46 at [29].

requiring a higher level of fundamental rights protection than the Charter does. As discussed below, for the *ne bis in idem* principle at least, the Court of Justice has not shown much willingness to allow enforcement considerations to be set aside by considerations relating to fundamental rights protection.

Tension between the *ne bis in idem* principle and the principle of effectiveness of EU law

As observed above, the decision of the Court as regards art.50 of the Charter (the *ne bis in idem* principle) appears to suggest that the Member States may still impose a tax penalty and a criminal penalty succesively in respect of the same VAT offences, whereas, according to the case law of the ECtHR, they may not. In the present case, the Court leaves it to the national court to assess whether Mr Åkerberg Fransson's tax surcharges were "criminal" in nature within the meaning of the *Engel* criteria of the ECtHR. This is also remarkable because the Court of Justice had no difficulty in settling the matter itself in the recent *Bonda* judgment, in which it characterised the administrative sanctions imposed on Mr Bonda for overstating his agricultural area to obtain EU subsidies as not being "criminal" in nature.

As a fundamental right, the *ne bis in idem* principle is not uncontroversial. Several Member States (the United Kingdom, the Netherlands, Belgium and Germany) did not ratify Protocol No.7 to the ECHR, and several others (France, Austria, Portugal and Italy) made rather noisy reservations. In *Åkerberg Fransson*, A.G. Cruz Villalón therefore proposed a distinction between a "core" body of human rights, laid down in the Convention, and a periphery, which found its way into succesive protocols.[80] A problem with this approach is that there is little evidence to suggest that the placement of certain fundamental human rights in the Convention or in its protocols is intended as an expression of their respective importance, or of a particular hierarchy among them. The fact that some fundamental rights—like the *ne bis in idem* principle—which cannot be derogated from in times of war or public emergency (art.15 ECHR) found their way into protocols instead of into the ECHR may itself provide some indication to the contrary.[81] In the end, the partial non-ratification of Protocol No.7 did not play any discernable role in the *Åkerberg Fransson* judgment. This may, however, equally reflect a deliberate choice on the part of the Court not to make its general ruling on the scope of the Charter in *Åkerberg Fransson* dependent on the fortuitous ratification of a Protocol to the ECHR.

The question thus arises as to whether the Court of Justice will accept the consequences of the prohibition of double jeopardy in a situation in which the first national penalty imposed may not be considered to be sufficiently "effective, proportionate and dissuasive" to protect the European Union's own resources or to prevent other contraventions of EU law. Although national courts may apply higher *national* standards of fundamental rights protection, provided that this does not undermine the effective, proportionate and dissuasive enforcement of EU law, the Court does not provide any indication of how, and according to which legal criteria, it will arbitrate a conflict between a fundamental right and the principle of effectiveness in such cases. What if, for instance, the Swedish tax surcharges imposed in this case could not be regarded as sufficiently effective and dissuasive to deter Mr Åkerberg Fransson and other entrepreneurs from VAT fraud—and by whom would this have to be established?

In *Zolotukhin*, the ECtHR unambiguously held that any second prosecution will violate the *ne bis in idem* principle of art.4 of Protocol No.7 to the ECHR after the outcome of the first prosecution has become final.[82] There is scope for conflict, therefore, between the effectiveness principle of substantive EU law, which may require a Member State to bring a second prosecution if the first prosecution is found to be

[80] Opinion of A.G. Cruz Villalon in *Åkerberg Fransson* (C-617/10) [2013] 2 C.M.L.R. 46.

[81] Furthermore, Sweden did ratify Protocol No.7 to the ECHR without any reservations, so the argument bears no relation to the case at hand.

[82] *Zolotukhin* (2012) 54 E.H.R.R. 16.

insufficiently effective, and the obligations of the Member States under the Convention, which categorically obliges those Member States that have ratified Protocol No.7 to refrain from doing so. In accordance with its nature as a fundamental right, we submit that surely in such instances the effectiveness principle ought to be trumped by the Charter and, despite the possible ineffectiveness of the first and final penalty, no second charge ought to be possible. This is so, irrespective of the possibly unobjectionable proportionality of a supplementary sanction.

This conclusion appears to find support in the *Belvedere Costruzioni* judgment,[83] concerning the Italian rule that after 10 years of litigation, tax claims are waived if the litigating taxpayer was successful at first and second judicial instance. Such a rule clearly runs counter to the effectiveness of EU VAT rules, EU customs duties law and EU excise duties law. Nevertheless, the Court held that,

> "it follows from Articles 2 and 22 of the Sixth Directive and Article 4(3) TEU that every Member State is under an obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory. In that regard, Member States are required to check taxable persons' returns, accounts and other relevant documents, and to calculate and collect the tax due. Under the common system of VAT, the Member States are required to ensure compliance with the obligations to which taxable persons are subject, and they enjoy in that respect a certain measure of latitude, inter alia, as to how they use the means at their disposal. That latitude is nevertheless limited by the obligation to ensure effective collection of the European Union's own resources and not to create significant differences in the manner in which taxable persons are treated, either within a Member State or throughout the Member States … However in the first place, the obligation to ensure effective collection of European Union resources cannot run counter to compliance with the principle that judgment should be given within a reasonable time, which, under the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, must be observed by the Member States when they implement European Union law, and must also be observed under Article 6(1) of the ECHR."[84]

As Rui Camacho Palma observes, *Belvedere Costruzioni* can be seen as a prediction of the *Åkerberg Fransson* judgment: like the Swedish laws on tax penalties and criminal prosecution of tax offences in *Åkerberg Fransson*, the Italian rules at issue in *Belvedere Costruzioni* were neither entirely determined by EU law nor caused or required by it.[85] Nevertheless, the Court applied art.47 of the Charter. It should, however, be pointed out that the case concerned facts that went back over 30 years, and such a severe delay not only affects fundamental rights but also "the effective collection of the European Union's own resources". It therefore remains to be seen how the Court will look upon less flagrant fundamental rights violations, in instances where there is more at stake in terms of the enforcement of EU law.

Conclusions

Did the Court in *Åkerberg Fransson* indeed merely pour the "new wine" of the Charter into the "old wineskins" of the case law on the scope of application of the general principles of EU law? It is sufficiently clear that the Court went further than that, and this has not gone unnoticed in some Member States. For example, the German Federal Constitutional Court (FCC) has warned that the *Åkerberg Fransson* judgment,

[83] *Uffucio IVA di Piacenza v Belvedere Costruzioni Srl* (C-500/10)[2012] E.C.R. I-202.
[84] *Belvedere Costruzioni* (C-500/10) [2012] E.C.R. I-202 at [21]–[23] of the judgment.
[85] See R. Camacho Palma, "Åklagaran v Hans Åkerberg Fransson: Charter(ing) New Territory" (2013) 2 B.T.R. 137,142.

> "must not be read in a way that would view it as an apparent ultra vires act or as if it endangered the protection and enforcement of the fundamental rights in the member states in a way that questioned the identity of the Basic Law's constitutional order."[86]

In a press release accompanying the judgment, that Court added that it will act on the "assumption" that the *Åkerberg Fransson* judgment is "based on the distinctive features of the law on value-added tax", and expresses "no general view".[87] As shown above, the FCC's "assumption" appears to be unfounded; the Court of Justice had more in mind than situations involving VAT when it held, in at [21] of the judgment in *Åkerberg Fransson*, that "the applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter". The Court chose to cast the net of the Charter widely, and we believe that the Court chose wisely. The restrictive position taken by the Commission, the Advocate General and five Member States in the proceedings before the Court could have yielded strange results, such as, for example, the applicability of the Charter to harmonised indirect taxation and, at the same time, the non-applicability of the Charter to unharmonised direct taxes violating free movement rights.[88] Furthermore, a narrower scope of application of the Charter could have led to discrepancies between the scope of general principles of EU law and the rights protected by the Charter. After *Åkerberg Fransson*, the judiciary of the Member States is confronted with only two possibilities: situations falling within and situations outside of the scope of application of EU law and of the Charter, and these are already difficult enough to distinguish.

To illustrate the relevance of the Court's decision to interpret the term "implementing Union law" from art.51 of the Charter widely, as "within the scope of application of EU law", we observe that the ECtHR has consistently held that proceedings concerning, inter alia, taxation[89] and aliens[90] are not covered by art.6 ECHR (the right to a fair hearing without undue delay), as they do not concern a criminal charge or a civil right or obligation. In contract, its sister provision in the Charter, art.47, does *not* limit the reach of its fair hearing requirements only to litigation concerning criminal charges, and civil rights and obligations; it also covers all tax litigation and all immigration litigation, provided that there is a link with EU law (e.g. with free movement rights). It would have been difficult to explain why a dispute before a national court on indirect taxation violating the Recast VAT Directive or the Union Customs Code[91] would merit a fair hearing without undue delay, and disputes before the same national court on direct taxation violating, for example, freedom of establishment would not.

Some feel that the Court of Justice's citizenship case law, such as the decisions in *Ruiz Zambrano*, *McCarthy* and *Dereçi*, would seem to take a narrower view of the scope of the Charter than *Åkerberg Fransson*. In those cases, the Court held that if no secondary EU law applies (such as Directive 2004/38 on the right of citizens of the Union and their family members and Directive 2003/86 on the right to family reunification), and neither has any free movement right been exercised, EU law, and therefore the Charter, does not apply. A third-country national cannot derive any right of residence, nor can he rely on art.7 of the Charter (the right to family life), on the basis of the fact that an EU citizen is dependent on him. Only

[86] BVerfG, 1 BvR 1215/07, April 24, 2013 at [91]. See also "Ultra vires—has the Bundesverfassungsgericht shown its Teeth?" (Editorial Comments) (2013) 50 C.M.L. Rev. 925.

[87] BVerfG, Press Release No.31/2013 of April 24, 2013. It is interesting to note that the judgment itself does not refer to the "distinctive features of the law on value added tax". BVerfG, 1 BvR 1215/07, April 24, 2013 at [91].

[88] Camacho Palma, "Åklagaran v Hans Åkerberg Fransson" (2013) 2 B.T.R. 137 seems to suggest, however, that the Member State involved should have an intention to "give effect to EU law" (at 141) or that the national measure in question should at least have some EU law implementing effect (at 142). But where a Member State restricts EU free movement rights by way of a tax measure, there is no such intention, nor such implementing effect. Nevertheless, we submit that the Charter is applicable, as the national measure frustrating EU free movement rights clearly enters the scope of application of EU law.

[89] *Ferrazzini v Italy* (2002) 34 E.H.R.R. 45.

[90] *Maaouia v France* (2001) 33 E.H.R.R. 42.

[91] Regulation 450/2008 laying down the Community Customs Code (Modernised Customs Code) [2008] OJ L145/1.

where his deportation by the national authorities would deprive the EU citizen involved (the child) of "the genuine enjoyment of the substance of the rights attaching to their status of European Union citizen" would EU law be engaged. This would be the case where the child (the EU citizen) would in fact have no choice but to leave the EU territory with the third-country national. We see no major inconsistencies between the citizenship cases and *Åkerberg Fransson*. In fact, if there is any inconsistency, then it would only be that in *Ruiz Zambrano*, the Court held that even absent any connection with EU law the Charter may nonetheless be invoked if the national measure would undermine the very substance of the Union citizenship rights of the child.

A combined reading of the *Åkerberg Fransson* and the *Melloni* judgments of the same day shows that national courts may offer a higher level of protection than the Charter and the ECHR provide for if EU law leaves national authorities room for discretion, provided that the primacy, unity and effectiveness of EU law are not jeopardised. On the other hand, national courts must always guarantee the minimum level of protection guaranteed by the Charter. Unresolved questions arise where national law provides for a higher level of protection than the Charter. In the *Bonda* and *Åkerberg Fransson* judgments, the Court of Justice appears to endorse a level of protection against *ne bis in idem* which is lower than that afforded by art.4 of Protocol No.7 to the ECHR and the *Zolotukhin* case law of the ECtHR. The question that arises is, therefore: according to which criteria will the Court determine whether the enforcement of EU law is sufficiently "effective, proportionate, and dissuasive"?

Finally, it comes as no surprise that the Court did not accept the Swedish judicial rule that a national court should establish "clear support" in the ECHR, the Charter, or the case law of the ECtHR or the Court of Justice, before it may disapply national law as incompatible with the ECHR or the Charter. Indeed, such a rule limits a national court's power to assess the compatibility of national law with the Charter in situations that fall within the scope of application of EU law. It would thus run counter to the effectiveness and uniform application of EU (Charter) law. However, this does raise the question as to whether the wide margin of appreciation which the ECtHR leaves to the Member States in such circumstances will become less wide if the case enters the scope of application of EU law.