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The Application of the EU Charter of Fundamental Rights (CFR) and its *Ne bis in idem* Principle in the Member States of the EU

CJEU Judgment (Grand Chamber) C-617/10 of 26 February 2013

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Abstract

This article discusses the CJEU judgment in Case C-617/10, Åklagaren v Hans Åkerberg Fransson. The judgment is a landmark decision for several reasons. Does the CFR, and its ne bis in idem principle, apply to the legal order of the Member States when they are imposing administrative tax penalties and criminal penalties in relation to VAT irregularities and fraud? Does it make a difference if these penalties have been directly prescribed by EU law or not? The CJEU sticks firmly to its classic case law regarding the application of general principles of EU law in the domestic legal order. It is essential to the CJEU that applicability of Union law and applicability of fundamental rights go hand in hand. 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 by European Union law without those fundamental rights being applicable.

A second problem is the interaction between the CFR ne bis in idem principle and the ne bis in idem principle of article 4 ECHR-PR 7. Must the CFR ne bis idem principle be fully applied in line with the ne bis in idem principle of article 4 ECHR-PR 7, as elaborated in the case law of the ECtHR, or does it have an autonomous meaning? Could this autonomous meaning result in more restricted protection, given that not all Member States are bound or fully bound by article 4 ECHR- PR 7?

A third problem is related to the criteria to be applied in order to decide whether a sanction qualifies for a ne bis in idem application. When does a finally imposed administrative tax penalty bar a second prosecution under criminal law in the light of the ne bis in idem principle? What are the criteria for defining the criminal nature of the penalty and what are the consequences? The CJEU imposes the Engel-Bonda criteria in order to define the criminal nature of the penalty.

1 Introduction

With the growing impact of EU regulation and enforcement in the Member States, the increased mobility of persons, goods, services and capital and the related judicial cooperation in criminal matters in the EU, there is an increasing risk that a (legal) person might suffer double jeopardy or be

prosecuted and/or be punished twice. This can happen at the national level when enforcing EU policies, at the transnational level when several EU Member States use their jurisdiction or at the vertical level, when jurisdiction is triggered both by a Member State and the European Commission (such as punitive competition proceedings).

The *ne bis in idem* principle is a general principle of (criminal) law in many national legal orders, sometimes even codified as a constitutional right, such as in article 103 of the German Constitution. Historically the *ne bis in idem* principleonly applies nationally and is limited to criminal justice, this means precluding application to punitive administrative enforcement. There is also no general rule of international law that imposes an obligation to comply with *ne bis in idem*[1]. It has a conventional source, thus depends solely on the content of the international treaties. In recent decades the *ne bis in idem* principle has become an important principle of judicial protection for the citizen against the *ius puniendi* of the state and as such forms part of the principles of due process and a fair trial. The protective scope of the principle was widened from a principle to guarantee legal certainty into a fundamental right protecting against cumulative criminal punishment.[2]

We do find international public law treaty-based *ne bis in idem* provisions in three sources: (1) international human rights law (IHRL) and the EU CFR; (2) international criminal tribunal law and (3) multilateral treaties dealing with judicial cooperation in criminal matters, also called mutual legal assistance (MLA) and EU instruments of mutual recognition (MR) in criminal matters.[3]

The ECHR did not contain a *ne bis in idem* provision, but it has been elaborated in article 4 of the 7th Protocol to the ECHR:[4]

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1 Also underlined by German Federal Constitutional Court, 2 BVerfG 15 December 2011, 2 BvR148/11, par. no 31.

2 See the excellent Phd of J. Lelieur-Fischer, 'La règle ne bis in idem. Du principe de l'autorité de la chose jugée au principe d'unicité d'action répressive' [Paris 2005] Université Panthéon-Sorbonne (Paris I) (not published).

3 I will not deal with the MLA or MR ne bis in idem provisions, as they only apply to criminal matters and are only triggered when MLA requests or MR orders have been issued.

4 '1.No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State. 2.The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly *discovered facts, or if* there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case. 3. No derogation from this Article shall be made under Article 15 of the Convention'.

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The ECtrHR has widened the scope of the *ne bis in idem* principle to punitive proceedings and penalties, in fact by applying the Engel-criteria[5] for the qualification of (double) punitive proceedings. However, the protocol is not binding for all EU Member.States. Neither the Netherlands nor Germany has ratified this Protocol. The UK is the only member of the Council of Europe that did not even sign it. Moreover, countries like France and Luxembourg have formulated reservations when ratifying. Many EU countries have also deposited limiting declarations at the time of signature. It is clear that several EU countries[6], like Austria, France, Germany, Italy and the Netherlands have limited the scope of application of the principle by precluding its application to punitive penalties outside of the area of criminal law. Germany for instance has done this in line with article 103 of its Constitution. Moreover, the ECHR *ne bis in idem* provision does only apply in the jurisdiction of every single State, excluding transnational effect.

Might citizens and legal persons expect to be protected against *ne bis in idem* in a setting of an integrated internal market and a common area of freedom, security and justice and if so, does the standard of protection also apply in the legal order of one Member State, when EU regulation and enforcement is in play?

It comes as no surprise that the European Community stumbled over the issue of the (transnational) application of the *ne bis in idem* principle before the coming into force of the Treaty of Maastricht and the justice and home affairs policy when dealing with enforcement of community policies. In the field of competition policy we do have a system of direct enforcement by the European Commission, but one that can be combined with indirect enforcement by na-

5 *Engel v. the Netherlands*, Judgment ECtrHR, 8 June 1976 & *Öztürk v. Germany*, Judgment ECtrHR, 21 February 1984.

6 See the overview of declarations and reservations at www.conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=117&CM=8&DF=11/01/2013&CL=ENG&VL=1, status 11.01.2013.

tional competition authorities. Both can impose punitive administrative sanctions.[7] In some countries criminal courts have jurisdiction in competition cases as well. The risk of double punitive penalties is thus more than real for the legal persons concerned. Meanwhile, the CJEU's case law is clear in confirming the *ne bis in idem* principle as a general principle of Community law,[8] which means that it is not limited to criminal sanctions but also applies to punitive administrative proceedings, such as the ones in the competition policy. However, the CJEU has its own interpretation of the principle, as it does not exclude double prosecution, nor the imposition of double punishment. In cases of imposition of two consecutive sanctions, any previous punitive decision has to be taken into account in determining any sanction which it to be imposed (*Anrechnungsprinzip*).[9] Moreover the CJEU has avoided applying the Engel-criteria to competition sanctions. Furthermore, in *Cement,*[10] the CJEU made the application of the general principle of *ne bis in idem* to the area of EC competition law subject to a 'threefold condition' of 'identity of the facts, unity of offender and unity of the legal interest protected. This CJEU definition of the idem element is not in line either with the idem factum definition of the ECtrHR as established recently in the Zolutukhin case.[11] In other words, we cannot speak of a fully elaborated *ne bis in idem* principle in the area of competition that is in line with the ECtrHR case law. Apart from ompetition cases indirect enforcement by the Member States is the basic rule. In some of these areas, such as the common agricultural and fisheries policies, the EU has not only prescribed detailed regulation but also enforcement obligations, including detailed punitive penalties. There has been no EU legislative action to harmonise the application of *ne bis in idem* when it comes to national enforcement of these EU policies. In some exceptional cases the EU legislator has regulated the interaction between administrative and criminal prosecution.[12]

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7 W. Wils, 'The principle of "*ne bis in idem*" in EC Antitrust Enforcement: a Legal and Economic Analysis' [2003/2] *World Competition*.

8 See for instance Judgment of 14/12/1972, *Boehringer Mannheim/Commission* (Rec.1972, p. 1281) (DK1972/00323 GR1972-1973/00313 P 1972/00447 ES1972/00261 SVII/00061 FIII/00059) and Judgment of the Court of 15 October 2002. *Limburgse Vinyl Maatschappij NV (LVM)* (C-238/99 P), *DSM NV and DSM Kunststoffen BV* (C-244/99 P), *Montedison SpA* (C-245/99 P), *Elf Atochem SA* (C-247/99 P), *Degussa AG* (C-250/99 P), *Enichem SpA* (C-251/99 P), *Wacker-Chemie GmbH and Hoechst AG* (C-252/99 P) and *Imperial Chemical Industries plc (ICI)* (C-254/99 P) *v. Commission of the European Communities*.

9 *Wilhelm v. Bundeskartellamt*, Judgment of 13 February 1969 [1969] *ECR* 3.

10 Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v. Commission* [2004] ECR I-123 (*Cement*).

11 *Zolotukhin v. Russia*, Judgment ECtrHR, 10 February 2009.

12 Council Regulation 2988/95 of 18th December 1995 on the protection of the European Communities financial interest, article 6, *OJ* L 312, p. 1-4.

The *ne bis in idem* principle in the EU became clearly visible with the CJEU's new case law in relation to articles 54-58 of the1990 intergovernmental Convention implementing the Schengen Agreement of 1985 (CISA), as integrated by the Amsterdam Treaty in the third pillar. The relevance of the case law of the CJEU,[13] is limited to the area of freedom, security and justice and is dealing with the transnational *ne bis in idem* in criminal matters, as elaborated in article 54 of the CISA. It does thus not deal as such with the *ne bis in idem* application related to the enforcement of harmonised EU policies (the former first pillar) into one jurisdiction.

We had to wait for the Lisbon Treaty in order to have a binding *ne bis in idem* principle for all enforcement of EU law, be it direct or indirect, in a single jurisdiction or a transnational one. This principle has been provided for in article 50 CFR. Pursuant to article 6 TEU, the Charter is now binding as a primary source of EU law. Article 50 CFREU stipulates:

'No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law'.

This provision triggers two main questions. Who are the addressees of the provision and what is exactly the content. Concerning the addressees there is little doubt about the actors of direct enforcement at the EU level, as due to article 51(1) CFR the Charter applies to the institutions and bodies of the EU. The problem, however, arises when it comes to the application of the CFR and its *ne bis in idem* principle in a frame of indirect enforcement and thus to domestic enforcement actors, as article 51(1) CFR stipulates that the Charter only applies to Member States when they are implementing EU law. However, the exact meaning of 'when they are implementing EU law' and thus of the the scope of application of the Charter *ratione materiae* in the Member States is not further defined and leaves room for different interpretations.

Concerning the content of the principle, it seems from a first reading that the wording of the article is a traditional one, as it refers only to criminal offences. It is however, clear that the text must be interpreted in the light of the case law of the ECtrHR, as article 52 (3) CFR states clearly that the meaning and the scope of the Charter rights will be the same as corresponding rights in the Convention. This means that the content of article 50 CFR has to be interpreted in line with the scope and meaning of article 4 of the 7th Protocol to the ECHR, as elaborated under the ECtrHR case law. *In concreto,* does it mean that the

[13] J.A.E. Vervaele, 'The transnational ne bis in idem principle in the EU. Mutual recognition and equivalent protection of human rights' [2010] 5th European Jurist's Forum, Budapest, 117-139.

scope of article 50 CFREU includes, thanks to the article 6 ECHR 'criminal charge concept' and the related Engel-criteria, all punitive proceedings and sanctions and has thus to be applied to double punishment stemming from punitive administrative penalties and criminal penalties for instance?

Case C-617/10, *Åklagaren v.Hans Åkerberg Fransson*, deals exactly with these two main questions, and is the reason why the importance of the case goes far beyond the technicalities of the area and can thus be qualified as a landmark CJEU case and reason why the Advocate General states that 'behind the apparent simplicity of the case – punishment of a fisherman operating in the Gulf of Bothnia for failure to comply with tax obligations – the present reference for a preliminary ruling raises two particularly tricky issues for the Court and a rather perplexing situation'.[14]

2 The Facts of the Case and Proceedings before the National Courts

Mr Fransson is a self-employed worker whose main activities are fishing and the sale of white fish. The Swedish tax authorities (Skatteverket) accused Mr Fransson of failing to comply with the obligation to provide tax information in the fiscal years 2004 and 2005, inter alia concerning VAT taxes. As regards the VAT assessment, the Swedish tax authorities calculated that the information provided by Mr Fransson entailed a loss of revenue to the tax authorities totaling SEK 60,000 in the fiscal year 2004 and SEK 87,550 in the fiscal year 2005. In 2007 the Swedish tax authorities imposed a fine on Mr Fransson for tax offences committed in the fiscal year 2004, of which SEK 4,872 relates to the VAT offence. As concerns the fiscal year 2005, they determined a different fine, of which SEK 3,255 relates to the VAT offence. No appeal was lodged against either the penalty for 2004 or the penalty for 2005 and those penalties became final in 2010 and 2011, respectively. In 2009 Mr. Fransson was summoned to appear before the Haparanda District Court (Haparanda tingsrätt) on charges of serious tax offences, including the VAT tax offences for 2004 and 2005, for which he had been fined by the Swedish Tax authorities. In accordance with the law on tax offences (Skattebrottslagen), the offence with which Mr Fransson is charged is punishable by up to six years imprisonment. Before the criminal court the question arises as to whether the charges brought against Mr Fransson must be dismissed on the ground that he has already been punished for the same acts in other proceedings, as the prohibition on being punished twice laid down by Article 4 of Protocol No 7 to

14 Opinion of AG Cruz Villalón, delivered on 12 June 2012, point 1.

the ECHR and article 50 of the Charter would be infringed. The Haparanda District Court stayed the criminal proceedings brought against Mr Fransson, finding that there was a link with Union law, specifically article 50 of the Charter which enshrines the fundamental right of *ne bis in idem*. The preliminary questions referred by the Haparanda District Court are worded as follows:

'(1) Under Swedish law there must be clear support in the European Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms (ECHR) or the case law of the European Court of Human Rights for a national court to be able to disapply national provisions which may be suspected of infringing the *ne bis in idem* principle under Article 4 of Protocol No 7 to the ECHR and may also therefore be suspected of infringing Article 50 of the Charter of Fundamental Rights of the European Union of 7 December 2000 ('the Charter'). Is such a condition under national law for disapplying national provisions compatible with European Union law and in particular its general principles, including the primacy and direct effect of European Union law?

(2) Does the admissibility of a charge of tax offences come under the *ne bis in idem* principle under Article 4 of Protocol No 7 to the ECHR and Article 50 of the Charter where a certain financial penalty (tax surcharge) was previously imposed on the defendant in administrative proceedings by reason of the same act of providing false information?

(3) Is the answer to Question 2 affected by the fact that there must be coordination of these sanctions in such a way that ordinary courts are able to reduce the penalty in the criminal proceedings because a tax surcharge has also been imposed on the defendant by reason of the same act of providing false information?

(4) Under certain circumstances it may be permitted, within the scope of the *ne bis in idem* principle mentioned in Question 2, to order further sanctions in fresh proceedings in respect of the same conduct which was examined and led to a decision to impose sanctions on the individual. If Question 2 is answered in the affirmative, are the conditions under the *ne bis in idem* principle for the imposition of several sanctions in separate proceedings satisfied where in the later proceedings there is an examination of the circumstances of the case which is fresh and independent of the earlier proceedings?

(5) The Swedish system of imposing tax surcharges and examining liability for tax offences in separate proceedings is motivated by a number of reasons of general interest, which are described in greater detail below. If Question 2 is answered in the affirmative, is a system like the Swedish one compatible with the *ne bis in idem* principle when it would be possible to establish a system which would not come under the *ne bis in idem* principle without it being necessary to refrain from either imposing tax surcharges or ruling on liability for tax offences by, if liability for tax offences is relevant, transferring the decision on the imposition of tax surcharges from the Skatteverket and, where appropri-

ate, administrative courts to ordinary courts in connection with their examination of the charge of tax offences?'

Given the importance of the case, written observations were submitted by Sweden, the Netherlands, Denmark, the Czech Republic, the Republic of Austria, Ireland and the European Commission and at the hearing before the Court the agents of the Czech Republic, Denmark, Germany, Ireland, Greece, France, the Netherlands and the Commission intervened.

3 The Advocate General's Opinion

3.1. Jurisdiction and Applicability of the CFR

Advocate General (AG) Cruz Villalón first deals with the question of the jurisdiction of the Court, linked to the question of applicability of the CFR in this case. The AG is aware of the fact that the Court is again faced with the request for clear criteria to determine the scope of CFR in the Member States, related to the expression 'implementation of Union law by the Member States' and that several other AG's have expressed diverging views on the matter[15]. He also takes into account that several Member States and the European Commission defended in their interventions the non-applicability of the Charter in this domestic case. Problems arise further concerning the fact that the wording of the Charter ('implementation') is different from the wording of the CJEU case law ('field of application' or 'scope') and that all of these wordings have an open meaning. The AG points rather to continuity with the existing case law on the application of general principles of Community/Union law, which means 'in the field of application of Union law'. This brought him to the following triad: scope-field of application-implementation. In his view, the competence of the Union to assume responsibility for guaranteeing the fundamental rights vis-à-vis the exercise of a public authority by the Member States, when they are implementing Union law, must be explained by reference to a specific interest of the Union in ensuring that the exercise of public authority conforms to the interpretation of fundamental rights by the Union.[16] The AG elaborates reasoning *in abstracto* and reasoning *in concreto*. Under the former he concludes that there is a fundamental right of the Charter at stake. He also

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15 See, for example, the Opinion of AG Bot in Case C-108/10 *Scattolon* [2011] ECR I-0000; the Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000; the Opinion of AG Poiares Maduro in Case C-380/05 *Centro Europa 7* [2008] ECR I-349; and the Opinion of AG Jacobs in Case C-112/00 *Schmidberger* [2003] ECR I-5659.

16 Case C-617/10 *Aklagaren v. Hans Akerberg Fransson*, Opinion of AG Cruz Villalón, 12 June 2012, point 40.

agrees that the power to impose penalties, as the exercise of public authority, must be exercised with respect for the general principles of Union law, including the CFR. However, he is of the opinion that the mere fact that such an exercise of public authority, expressly the power of the State to impose penalties in this particular case, if ultimately based on a provision of Union law, is not, in itself, sufficient for finding that there is a situation involving the implementation of Union law. The result of his reasoning is that the link is not sufficient to transfer the review of any constitutional guarantees applicable to the exercise of that power from the sphere of the responsibility of the Member States to that of the Union.[17] the fundamental question, in his view, is to analyse in the present proceedings the connection between Union law and the national law. Directive 2006/112 on the common system of VAT does not prescribe concrete administrative sanctions. There is only a requirement for effectiveness in the collection of VAT. On the other hand, the provision of false information to the tax authorities by taxable persons is punished in a general way, as an essential prerequisite of that system of penalties. It is that part of the Swedish tax system which is used for the purposes of collecting VAT. In his view there is no relationship of immediate or mediate *causa* between the directive and the Swedish tax penalties. He believes that a distinction must be made between the *causa*, whether immediate or not, and the simple *occasio* andthe question is whether, as a result of this *occasio*, the Union judicature must interpret the scope of the *ne bis in idem* principle in Swedish law, an interpretation which must take priority over the one which is derived from Sweden's constitutional structure and international obligations. His view is clearly that it would be disproportionate to infer from this *occasio* a shift in the division of responsibility for guaranteeing the fundamental rights between the Union and the Member States and that the reference for a preliminary ruling from the referring court must not be regarded as a situation involving the implementation of Union law within the meaning of Article 51(1) of the Charter. The result of his reasoning is that the link is not sufficient to transfer the review of any constitutional guarantees applicable to the exercise of that power from the sphere of the responsibility of the Member States to that of the Union.[18] The premise for finding that the Union has an interest in assuming responsibility for guaranteeing the fundamental right concerned in this case is the degree of connection between Union law, which is in principle being implemented, and the exercise of the public authority of the State. He considered the VAT directive to be an extremely weak link and not, in any event, a sufficient basis for a clearly identifiable interest on the part

17 Case C-617/10 *Aklagaren v. Hans Akerberg Fransson*, Opinion of AG Cruz Villalón, 12 June 2012, point 40 and point 54. . *Inconcreto*{noot: Case C-617/10 *Aklagaren v. Hans Akerberg Fransson*, Opinion of AG Cruz Villalón, 12 June 2012, points 56 -64.

18 Case C-617/10 *Aklagaren v. Hans Akerberg Fransson*, Opinion of AG Cruz Villalón, 12 June 2012, point 40 and point 54.

of the Union in assuming responsibility for guaranteeing that specific fundamental right vis-à-vis the Union.[19]

Accordingly, he proposes that the Court should declare that it lacks jurisdiction to give a ruling in these proceedings.

3.2 Scope of *Ne bis in idem* Protection

The AG sets aside the fifth question as a hypothetical one and regroups the remaining questions. Questions 2,3 and 4 all concern the content of the *ne bis in idem* principle. He first analyses the imposition of both administrative and criminal penalties in respect of the same facts in the light of Article 4 ECHR-PR 7. The AG refers to the Engel-criteria and comes to the conclusion that they have been applied to tax surcharges, including the surcharge provided for in Swedish law at issue in these proceedings[20] and that the ECtrHR has confirmed that this type of measure comes under the heading of a criminal penalty within the meaning of Articles 6 and 7 of the ECHR and, by extension, of Article 4 ECHR-PR 7. He also stresses that under the ECtrHR case law, once it has been established that a penalty has been imposed in respect of the same acts, all new proceedings are prohibited provided that the first penalty has become final. It is irrelevant if the first penalty has been discounted from the second in order to mitigate the double punishment.[21] In summary, he comes to the conclusion that article 4 ECHR-PR 7 precludes measures for the imposition of both administrative and criminal penalties in respect of the same acts, thereby preventing the commencement of a second set of proceedings, whether administrative or criminal, when the first penalty has become final. He then analyses article 50 CFR in the light of article 4 ECHR-PR 7. Article 52(3) of the Charter provides that where the rights laid down in the Charter correspond to rights guaranteed by the ECHR 'the meaning and scope of those rights shall be the same as those laid down by the said Convention'. Given the fact that article 4 is not or not fully applicable in all EU Member States and that many Member States do accept the double imposition of punitive administrative and criminal penalties in their legal order, it is his view that the proclamation in Article 52(3) of the Charter acquires its own definition when it is applied to the *ne bis in idem* principle and thus an autonomous interpretation. He concludes[22]

19 Case C-617/10 *Aklagaren v. Hans Akerberg Fransson*, Opinion of AG Cruz Villalón, 12 June 2012, point 57.

20 See *Västberga Taxi Aktiebolag and Vulic v. Sweden*, Judgment of 23 July 2002, no. 36985/97, and *Janosevic v. Sweden*, Judgment of 23 July 2002, ECHR 2002-VII.

21 *Tomasovic v.Croatia*, Judgment of 18 October 2011, no. 53785/09.

22 Case C-617/10 *Aklagaren v. Hans Akerberg Fransson*, Opinion of AG Cruz Villalón, 12 June 2012, point 96.

that Article 50 of the Charter must be interpreted as meaning that it does not preclude the Member States from bringing criminal proceedings relating to facts in respect of which a final penalty has already been imposed in administrative proceedings relating to the same conduct, provided that the criminal court is in a position to take into account the prior existence of an administrative penalty for the purposes of mitigating the punishment to be imposed by it.

The first question of the District Court concerns the compatibility with Union law of a criterion laid down in Swedish law, specifically in the case law of the Swedish Supreme Court, pursuant to which a Swedish provision which is contrary to the rights laid down in the Charter and the ECHR can only be set aside if there is a clear support in the provisions of the Charter and the ECHR and in the related case law. The AG makes a clear distinction between compatibility with the ECHR and with the Charter. The first is the compatibility with Union law of a criterion for the application of the ECHR in so far as it is an international agreement containing rights, which constitute general principles of the European Union legal system (Article 6(3) TEU). Secondly, the referring court asks about the compatibility of that criterion when it is extended to the application of the Charter and, therefore, to Union law. The referring District Court seems to be inspired by the different wording of article 6(3) TEU and old article 6(2) EU. Article 6(2) EU stated that the Union 'shall respect fundamental rights, as guaranteed by the ECHR, whereas the current wording provides that fundamental rights, as guaranteed by the ECHR 'shall constitute general principles of the Union's law'. Concerning the compatibility with the ECHR, the AG refers to the judgment of the CJEU in Kambera,[23] where the CJEU underlines the fact that article 6(3) TEU simply reflects the Court's settled case law and that the new wording of the provision does not alter the status of the ECHR in Union law and, therefore, nor does it do so in the legal systems of the Member States. For that reason the CJEU cannot carry out an assessment of the 'clear support' criterion, as applied by the Swedish Supreme Court to situations relating exclusively to the interpretation and application of the ECHR. Concerning the Charter, the AG believes that EU law must be interpreted as meaning that it does not preclude a national court from assessing, prior to setting aside a national provision, whether a provision of the Charter is 'clear', provided that that requirement does not hinder the national courts in exercising the powers of interpretation and disapplication assigned to them under Union law.

23 Case C-571/10 [2012] ECR I-0000.

4 The Court of Justice's Ruling

4.1 Jurisdiction and Applicability of the CFR

The CJEU makes it clear from the very beginning that it is not willing to make a difference between 'implementing EU law' under article 51(1) CFR and the Court's case law[24] concerning the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights, including general EU principles, guaranteed in the legal order of the European Union.[25] The requirement to respect fundamental rights defined in the context of the Union is therefore only binding on the Member States when they act in the scope of the Union. It is essential to the CJEU that applicability of Union law and applicability of fundamental rights go hand in hand: 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 EU law entails the applicability of the fundamental rights guaranteed by the Charter.[26]

The CJEU has no doubt about the applicability of EU law in the concrete case. The tax penalties and criminal proceedings to which Mr Fransson has been or is subject to are connected in part to breaches of his obligations to declare VAT and this VAT declarations are not only linked to the VAT directive 2006/112, but also to specific Treaty obligations. The CJEU refers to the Union loyalty under article 4(3) TEU, by which every Member State is under an obligation to take all legislative and administrative measures appropriate for ensuring the collection of all the VAT due on its territory and for preventing evasion.[27] The CJEU refers to article 325 TFEU that obliges the Member States to counter illegal activities affecting the financial interests of the European Union through effective deterrent measures and, in particular, obliges them to take the same measures to counter fraud affecting the financial interests of the European Union as they take to counter fraud affecting their own interests. The CJEU leaves no doubt as to the application of article 325 to the VAT-area. According to the CJEU, VAT revenue is part of the European Union's own resources[28] and there is a direct link between the collection of VAT revenue in compliance

24 Case 5/88 (*Wachauf*), *Jur.* 1989, p. 2609 and Case C-260/89 (*ERT*). *Jur.* 1991, p. I-2925.
25 Point 18.
26 Point 21.
27 Case C-132/06 *Commission v. Italy* [2008] ECR I-5457, paras 37 and 46.
28 Article 2(1-b) of Council Decision 2007/436/EC, Euratom of 7 June 2007 on the system of the European Communities' own resources (*OJ* 2007 L 163).

with the European Union law applicable and the availability to the European Union budget of the corresponding VAT resources, since any lacuna in the collection of the first potentially causes a reduction in the second.[29] For all these reasons the CJEU considers tax penalties and criminal proceedings for tax evasion, such as those which the defendant in the main proceedings has been or is subject to because the information concerning VAT that was provided was false, constitute implementation of the VAT directive and of article 325 TFEU and, therefore, of European Union law, for the purposes of article 51(1) of the Charter. The fact that the national legislation upon which those tax penalties and criminal proceedings are based has not been explicitly adopted to transpose the VAT Directive cannot, in the CJEU 's opinion, lead to another conclusion, since its application aims to implement and enforce the VAT Directive and the obligations imposed on the Member States by the Treaty to impose effective penalties for conduct prejudicial to the financial interests of the European Union.

The CJEU concludes its analysis by stating that Member States remain free to apply national standards of protection of fundamental rights in cases where action of a Member State is not entirely determined by European Union law. However, the CJEU clearly states that in any event the national standards of protection of fundamental rights must not only be in line with the level of protection provided for by the Charter, as interpreted by the CJEU, but also comply with the primacy, unity and effectiveness of the EU (par. 60 Case C-399/11-Melloni).

Accordingly, the CJEU comes to the conclusion that it has jurisdiction to give a ruling in these proceedings.

4.2 Scope of the *Ne bis in idem* Protection

The CJEU follows the AG in relation to the fifth question and declares it inadmissible thanks to its hypothetical character. It also follows the regrouping of the other questions as proposed by the AG. The essence of question 2, 3 and 4 are, according to the CJEU, whether or not the *ne bis in idem* principle laid down in Article 50 CFR should be interpreted as precluding criminal proceedings for tax evasion from being brought against a defendant where a tax penalty has already been imposed upon him for the same acts of providing false information. The CJEU starts by emphasising that article 50 CFR 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

29 Case C-539/09 *Commission v. Germany* [2011] ECR I-0000, par. 72.

of tax and criminal penalties. It is only if the tax penalty is criminal in nature for the purposes of Article 50 CFR and has become final that that provision precludes criminal proceedings in respect of the same acts from being brought against the same person. Next, the CJEU applies without further delay the Engel-criteria of the ECtrHR, criteria that is has recently made its own in the *Bonda-case*:[30] the legal classification of the offence under national law, the very nature of the offence and the nature and degree of severity of the penalty that the person concerned is liable to incur. The assessment of the first tax penalty is criminal in nature in relation with the *Bonda-criteria* is left by the CJEU to the referring court, be it however with guidance. The CJEU states[31] that the referring court has to apply the *Bonda-criteria* to the national penalties and the relevant national standards and may come to the conclusion that double prosecution and punishment would violate the *ne bis in idem* principle, provided that the remaining penalties are effective, proportionate and dissuasive.[32]

Concerning the first question, the CJEU follows the AG on the conflict between provisions of domestic law with the ECHR but is much more straightforward than the AG when it comes to a conflict between provisions of domestic law and rights guaranteed by the Charter. According to the CJEU, it is settled case law that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of European Union law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such a provision by legislative or other constitutional means.[33] The CJEU states furthermore that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of European Union law, by withholding from the national court having jurisdiction to apply such law, the power to do everything necessary at the time of its application to set aside national legislative provisions which might prevent European Union rules from having full force and effect are incompatible with those requirements, which are the very essence of European Union law.[34] The CJEU

30 Case C-489/10 *Bonda* [2012] ECR I-0000, par. 37.
31 Point 36.
32 And the CJEU refers here to the classic effect utile notion in relation to enforcement: (see, to this effect, inter alia *Commissionv. Greece*, par. 24; Case C-326/88 *Hansen* [1990] ECR I-2911, par. 17; Case C-167/01 *Inspire Art* [2003] ECR I-10155, par. 62; Case C-230/01 *Penycoed* [2004] ECR I-937, par. 36; and Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565 par. 65).
33 Point 45 (Case 106/77 *Simmenthal* [1978] ECR 629, paras 21 and 24; Case C-314/08 *Filipiak* [2009] ECR I-11049, par. 81; and Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, par. 43.
34 Point 46.

concludes that EU law precludes judicial practice which makes the obligation for a national court to set asideany 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.[35]

5 Case Commentary

5.1 Applicability of the CFR

It is obvious from the judgment that the CJEU insists on a line of continuity between its case law on application of general principles of EU law in the domestic legal order and the Charter. Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union and it does not matter if these rights are enshrined in the Charter or in general principles of EU law. Indeed, the CJEU wants further to exclude the possibility of EU law applying without the applicability of the fundamental rights guaranteed by the Charter. In its judgment the CJEU has fully set aside the reasoning of the AG Cruz Villón. It is interesting to compare the reasoning of AG Cruz Villón with the one of AG Kokott in the similar *Bonda-case*.[36] In this Polish *Bonda-case*, accused of an incorrect declaration under the EU agricultural subsidy scheme, was excluded by the administrative Agricultural Restructuring and Modernisation Agency from receiving a EU subsidy for several years and was subsequently convicted and given a suspended custodial sentence by the criminal district court. The appeal court decided, however, that the criminal proceedings against Bonda were inadmissible because of the *ne bis in idem* principle. After an appeal to the Supreme Court in the interest of the law, the Supreme Court referred to the CJEU for a preliminary ruling. In my view the *ne bis in idem* problem is quite similar in the *Bonda-case* and *Fransson-case*, as in both cases there is a risk of double punitive penalties (administrative and criminal) in one jurisdiction. Is there a different degree of connection with the implementation of EU law? In the case of *Bonda*, there is a Commission regulation that explicitly states the exclusion of subsidies as an administrative sanction. However, criminal enforcement is not specifically prescribed by Union law and is thus only imposed under the general enforcement obligations of the CJEU (*effet utile* and effective, proportionate and

35 Point 48.
36 Case C-489/10, Opinion of AG Kokott, 15 December 2011, point 16.

deterrent sanctions).[37] In the case of Fransson there is no explicit provision in the VAT directive, but only a reference thereto in article 273:

'Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion (...)'.

In the case of VAT there is a duty for the member states to comply with the same enforcement obligations imposed by the CJEU, which means that this "may" becomes a must and can include administrative and criminal penalties. In the *Bonda-case* AG Kokott clearly stated that the *ne bis in idem* principle enjoys the status of a fundamental right of the EU under article 50 CFR and that this-case is within the scope of the Charter,[38] whatever interpretation – restrictive or not – may be given to the material scope of the Charter. AG Kokott comes thus to the opposite conclusion to that of Cruz Villón. However, despite several references by AG Kokott to article 50 CFR as an applicable human right, in the *Bonda-case* the CJEU completely neglected article 50 CFR in its analysis and reasoning. This is more than striking, as in both cases there is a substantial connection to Union law. The scope and the interest are similar: an effective application and enforcement of the common agricultural policy and the common VAT regime. In case of the ineffective application of both, they potentially affect the budget of the Union. In other words, there is a direct link to the protection of the financial interest of the Union, which is one of the core interests of the Union, as laid down in article 235 TFEU. The only reason that I can imagine for the exclusion of article 50 CFR is that the referring Supreme Court did not ask it at all,[39] but that is of course a formal and unconvincing argument. With the ruling in the *Fransson-case* the CJEU has set aside any doubts that might exist: no application of EU law in the member states without the application of the Charter. This means that when enforcement of EU law is at stake the rights and guarantees of the Charter come into play. The applicability of Union law does not depend on the way by which Member States comply with their EU obligations. If they have to comply with EU enforcement obligations, be it even based on Union loyalty under article 4(3) TEU and the related case law[40] of the CJEU, they act within the scope of Union law, even if they apply enforcement

37 Case 68/88, *Commission v. Greece*, Judgment of 21 September 1989.

38 Case C-489/10, Opinion of AG Kokott, 15 December 2011, points 13 & 16.

39 The only question was: 'What is the legal nature of the penalty provided for in Article 138 of Commission Regulation (EC) No 1973/2004 of 29 October 2004 laying down detailed rules for the application of Council Regulation (EC) No 1782/2003 as regards the support schemes provided for in Titles IV and IVa of that Regulation and the use of land set aside for the production of raw materials (*OJ* 2004 L 345, p. 1) which consists in refusing a farmer direct payments in the years following the year in which he submitted an incorrect statement as to the size of the area forming the basis for direct payments?'.

40 Case C-68/88 *Greek maize, Jur.* 1989, p. 2965.

mechanism that have not been specifically prescribed by Union law or have not been specifically designed by the Member State to enforce Union law. In my view this is a very wise choice, as otherwise the applicability of Union law and the CFR would depend on national legislative and practical choices and undermine the equivalent protection of the Charter in the EU.

Several Member States have intervened in order to avoid this result. Their aim was to limit the Charter's impact at the domestic level as much as possible as well as avoiding the impact of EU law in tax matters, which is one of the remaining jealously guarded competences. Meanwhile, concerning the latter there is clear-cut case law[41] of the CJEU that VAT is fully part of the EU's resources[42] and Member States should let go of this tired idea. Concerning the impact of the Charter, it seems that these Member States are not particularly in favour of an evolution by which deepening integration goes hand in hand with equivalent protection of fundamental rights, be it in the domestic legal order or in a transnational setting in the EU. Moreover, several Member States are not willing to comply with the ECHR case law on *ne bis in idem* when it comes to multiple punishment by combining punitive administrative sanctions and criminal sanctions. This is why they maintain their reservations or are not willing to sign or ratify the ECHR-PR 7. This was also reflected in the 2003 Greek proposal for a framework decision on *ne bis in idem*[43] with the the aim of replacing articles 54-58 of the CISA with new EU legal rules in order to ensure uniformity in both the interpretation of those rules and their practical implementation. The proposal was not in line with the case law of the ECtrHR on the applicability of the Engel-criteria to the *ne bis in idem* principle. One of the reasons the proposal failed to be adopted was that the Member States disagreed on the applicability of the criminal charge Engel-criteria to the *ne bis in idem* principle Seen this context it is quite clear that there is a great need for equivalent application of the *ne bis in idem* principle when implementing and enforcing EU law. This equivalent application will not come from the legislator as it stands, but as a result of the praetorian role of the CJEU. At the same time the CJEU has to guarantee that its standards comply with the minimum standards of the ECtrHR.

More astonishing is the position of the European Commission and its legal service on the point of the application of the Charter to the Member States. In the *Franssen-case* they defended the same position taken by the minimalist Member States. As the opinion of the legal service of the European Commission

41 Case C-539/09 *Commission v. Germany* [2011] ECR I-0000, par. 72.

42 Article 2(1-b) of Council Decision 2007/436/EC, Euratom of 7 June 2007 on the system of the European Communities' own resources (*OJ* 2007 L 163).

43 Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the 'ne bis in idem' principle (*OJ* C 2003 100/4).

is not public, it is difficult to point out what the exact reasons were. It is however clear that the Commission and its legal service have recently taken an increasingly cautious approach when it comes to the procedural autonomy of the Member States. The fact that the VAT Directive does not prescribe *expressis verbis* the sanctions to be imposed might explain this attitude. Fortunately, the CJEU has not followed this approach, as this would undermine the applicability of Charter rights when enforcing EU law in case of non-explicit enforcement obligations in EU directives or regulations.

From the point of view of the party accused, in both cases his fundamental right to *ne bis in idem* protection is at stake not only as part of a sovereign state's enforcement policy, but also as the consequence of the policy and enforcement choices of a Member State in applying and enforcing EU obligations. In other words, we are not speaking here of a purely internal case falling outside the scope of the application of EU law. When we aim for the effective and equivalent protection of the financial interests of the Union, it is logical that we aim for equivalent human rights protection at the same time, as provided under the Charter. This is sufficient reason to trigger the material application of the Charter and to trigger the jurisdiction of the Court to ensure uniform application through preliminary rulings.

The principal decision in the *Fransson case* will have substantial consequences for the enforcement regimes in the Member States that go far beyond the *ne bis in idem* principle of the CFR. The right to an effective remedy and fair trial (article 47 CFR), presumption of innocence and defence rights (article 48 CFR), the principle of legality and the proportionality of criminal offences and penalties (article 49 CFR) are all CFR rights that apply to national provisions when used to enforce EU law.

5.2 The Autonomous Character of the Charter and National Standards of Fundamental Rights

The AG made a plea for an autonomous interpretation of the Charter and of its *ne bis in idem* principle. However, he used this reasoning to argue for a lower standard than that of the ECHR, given the fact that not all Member States are bound or fully bound by the ECHR's *ne bis in idem* standard and given their practice of combining punitive administrative and criminal law enforcement regimes. He did plea for a *ne bis in idem* principle, as applied by the CJEU in competition cases. In the case of the imposition of two consecutive punitive sanctions, any previous punitive decision has to be taken into account in determining the level of the second sanction which is to be imposed (*Anrechnungsprinzip)* in order to be in line with the Charter. The opinion of the AG is clearly incompatible with the case law of the ECtrHR. It is important to emphasise that the CJEU has avoided any reference to the limiting binding force of the

ECHR *ne bis in idem* principle for some Member States. This is wise, as these problems do not concern the EU legal order as such. Making the application of EU Charter rights dependent upon reservation clauses under public international law leads to the danger of 'Charter à la carte'. The CJEU has clearly stated that Member States may apply their proper assessment of fundamental rights under national standards, but that the outcome must comply with the standard imposed by the Charter. The Charter is thus a minimum threshold that cannot be put aside, neither by arguments under national law, nor arguments derived from reservations or declarations to public international law, including the ECHR.

The autonomous character of the Charter also gives the CJEU leeway for developing fundamental rights of the EU beyond the minimum requirements of the ECHR case law, as foreseen under article 52(3) CFR. In my view, this is also the real added value of the Charter. In an integration model the need to protect fundamental rights might need specific answers for creation of a level of equivalent protection and/or when dealing with issues of transnational justice in the single legal area. The fact that the ECHR *ne bis in idem* has a domestic application only and article 50 CFREU an application within the scope of EU law (which can be domestic, transnational and/or at the European level) does not mean that we do not have a similar right with a similar function. Moreover, under article 52(3) the EU can provide more extensive protection. That means that the CJEU case law providing a wider protection than the ECtrHR is perfectly compatible with article 50 CFREU. This means that CJEU case law giving broader protection is fully in line with the Charter.

Last but not least, remains the question of to what extent Member States may suggest national human rights standards when dealing within the scope of Union law. The CJEU deals with this point very briefly in paragraph 29:

'(...) where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised (see, in relation to the latter aspect, Case C-399/11 *Melloni* [2013] ECR I-0000, paragraph 60)'

The CJEU seems to leave some room for application of national human right standards in situations such as the one in the *Fransson-case,* but only as long as the level of protection offered by the Charter, as interpreted by the Court, is

guaranteed and as long as the primacy, unity and effectiveness of European Union law are thereby not compromised. Member States must in any case apply the Charter, which is a mandatory minimum standard. They can go beyond it as this does not prejudice primacy, unity and effectiveness. In other words these concepts constitute a maximum ceiling. The Member States have a playing field between this minimum threshold and maximum ceiling. Primacy certainly plays an important role in fields of exclusive competence and/or in fields of fully harmonised or unified EU law such as in the case of the European arrest warrant[44] or in the *Bonda-case*. Unity and effectiveness can play a role in the other cases in order to guarantee that Union-loyalty is complied with when enforcing EU law (effective, proportionate and dissuasive enforcement regimes). To summarise, the CJEU leaves room for application of national human rights standards but within the boundaries imposed by classic general principles of EU law. This means that for the alleged party a higher national human right standard can only apply in cases within the scope of EU law, when in conformity with the Charter and not infringing upon primacy, unity and effectiveness of EU law.

5.3 The CFR *Ne bis in idem* Principle: Content and Consequences under EU Law

When does an imposed administrative tax penalty bar a second prosecution under criminal law in the light of the *ne bis in idem* principle? What are the criteria and consequences?

In the *Fransson-case* both the AG and the CJEU fully applied, for the first time, the *Engel-Bonda* criteria to assess the criminal nature of the administrative penalty within the frame of a Charter right, a novelty in CJEU case law. Applied to the case, the CJEU emphasised that the Charter 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 and criminal penalties. To assess whether tax penalties are criminal in nature the Engel criteria of the ECHR, also clearly used in the *Bonda-case*, are applicable. In this case, contrary to the case of *Bonda,*[45] the CJEU considered that it is for the referring court to determine, in the light of those criteria, whether the combining of tax penalties are punitive in character. When it is considered punitive, however, double punishment is barred by article 50 CFREU. It is surprising that the CJEU leaves the final answer to the referring court instead of ruling on this matter, as it did

44 Case C-399/11 *Melloni* [2013] ECR I-0000, par. 60.

45 In the *Bonda*-case the administrative sanction was prescribed by the EU regulation and the referring court did ask for a ruling on the legal character of the sanction.

in the *Bonda-case*. Although it is true that the VAT Directive does not contain the type and level of sanctions to enforce the EU law, it is quite clear from ECHR case law that this type of administrative fiscal penalties are punitive in Sweden and do have a criminal nature under the Engel-criteria and are thus a criminal charge under article 6 ECHR.[46] In other words, there can only be one answer and there seems to be no room for other interpretations or for other national human rights standards, as suggested by the CJEU in paragraph 36 of the ruling. In the light of this legal findings it is clear that the *ne bis in idem* principle of the Charter will bar double punishment. It would have been better if the CJEU would have concluded it instead of suggesting room for other interpretation at national level.

The consequences for the Member States are substantial when implementing and enforcing EU law. They can no longer limit the *ne bis in idem* principle to criminal law *sensu strictu* and will have to widen their scope of protection in order to include punitive administrative sanctioning. Moreover, the reach of article 50 CFR is not limited to the jurisdiction of every single Member States, as it is the case with article 4 ECHR-PR 7. This means that article 50 CFR has also transnational effect in the integrated legal order of the EU. This means that Member States will have to face the transnational application of *ne bis in idem* for all punitive sanctioning in the EU when implementing and enforcing EU law. The consequence will be that there will be an increasing need to decide about case allocation in the EU when it comes to investigations and punishment under administrative and criminal law. In other words, the *ne bis in idem* principle cannot function properly in a common area without the coordination of jurisdiction and binding criteria on choice of jurisdiction and a proper allocation of cases in the common justice area.

5.4 Upcoming Legal Points

With this landmark decision the CJEU has not solved all the problems, nor could it have done. Although article 50 CFR is a primary source of Union law, it does co-exist alongside article 54 CISA, *ne bis in idem* clauses in the MLA and MR regimes, and article 4 ECHR-PR 7. Although the multiplicity of *ne bis in idem* clauses have different functions, they do not contribute to a comprehensive constitutional legal principle in the Union. Moreover, many of the *ne bis in idem* clauses outside of article 50 CFREU have a restricted application because of certain exceptions, derogations or reservations. In the MLA and MR regimes the *ne bis in idem* clause cannot just be an option but is also limited by exceptions if necessary. The same exceptions are also derogations or reser-

46 *Application no.* 34619/97 (*Janosevic*), ECtrHR 2002/88.

vations to ECHR-PR 7 or article 54 CISA. In practice, some Member States have formulated restricted or no application at all of *ne bis in idem* in the following situations: offences that have been committed on national territory (territoriality clause); the preclusion of punitive administrative sanctions from the scope of application; the interests of national security or other related interests and/or offences committed by national civil servants. Several national criminal courts have been obliged to deal with this legal patchwork, including the relationship between article 50 CFR and article 54 CISA.[47] Until now, none of them have, unfortunately, referred to the CJEU for a preliminary ruling.

In the *Fransson-case* the CJEU has avoided tackling the relationship between article 4 ECHR-PR 7 and article 50 CFR. Although the former has no transnational application, as is the case with article 50 CFREU, it can lead to conflicting situations for Member States, as article 50 CFREU can also apply in domestic situations. What happens if Member States have not ratified ECHR-PR 7 or have formulated a reservation to its application and are not willing to accept the application of the *ne bis in idem* principle to the *bis* combination of punitive administrative and criminal penalties? In my opinion, article 50 CFR de facto sets aside the non-ratification of declarations or reservations, as long as the Charter applies in a domestic situation of the *ne bis in idem* right. In such a case all Member States should apply the substance of article 50 CFR, in line with article 4 ECHR-PR 7. It would be a strange situation that in a common area of freedom, security and justice national reservations could still prevail as a claw-back clause concerning a fundamental right of primary law.

Finally, the CJEU's elaboration of a common *ne bis in idem* principle for all policy areas is long overdue, as there are still substantial differences between the *ne bis in idem* of the area of freedom, security and justice and the internal market/competition policy area. If member states have to comply with the *Engel-Bonda* criteria, I do not see any reason why these criteria should not be applicable to the enforcement of the competition rules.

47 See J.A.E. Vervaele, '*Ne bis in idem*: towards a transnational constitutional principle in the EU?' [2013] *Utrecht Law Review*, Autumn Special on Transnational Criminal Justice (to be published).