CASE LAW

A. Court of Justice

The meaning of “implementing” EU law under Article 51(1) of the Charter: Åkerberg Fransson

Case C-617/10, Åklagaren v. Hans Åkerberg Fransson, Judgment of the Court (Grand Chamber) of 26 February 2013, nyr

1. Introduction

On 26 February 2013, the Grand Chamber of the ECJ handed down its judgment in Åkerberg Fransson. On the same day, a differently constituted Grand Chamber decided another case relating to fundamental rights, Melloni.1 Given the lengthy deliberations in both,2 the date cannot have been a coincidence. On its own, Åkerberg Fransson marks a turning point in our understanding of the scope of the EU Charter of Fundamental Rights (“the Charter” or “CFR”). Together, the two cases mark a significant progression in the ECJ’s interpretation of the general provisions of the Charter.

The substance of Åkerberg Fransson concerned the interpretation of the right not to be convicted (or tried) twice for the same action (ne bis in idem) as protected by Article 50 CFR. The significance of the judgment, however, lies in its resolution of the apparent inconsistency between the scope of the Charter with regard to Member States, as defined in Article 51(1), and the scope of general principles of EU law. Before drafting of the Charter commenced, the scope of EU fundamental rights could be summarized by reference to two key areas of Member State activity: “implementing”3 and acting “within the scope of [EU] law”.4 The Convention drafting the Charter chose not to adopt this terminology in relation to the Member States, as a result of which the Charter binds them “only when they are implementing EU law”.5

2. The applications were lodged on 27 Dec. 2010 and 28 July 2011, respectively.
5. Art. 51(1) of the Charter.
Complicating matters further are the Explanations to the Charter, which state that it binds “Member States when they act within the scope of Union law”. 6

In light of this disparity, two questions arose: does the Charter intend to restrict the scope of EU fundamental rights, or have a narrower scope than the general principles of EU law? 7 Two options lay open to the ECJ. Firstly, it could rely on the express wording of the Charter and the seemingly intentional decision to use restrictive language. 8 This would ensure consistency in the meaning of implementing and accord with the apparent views of the Convention. 9 Secondly, the ECJ might interpret “implementing” as embodying all of the earlier case law, an option supported by the Explanations.

The path the ECJ would take was far from clear; the 2012 judgment in Iida leaned towards the former. 10 It is only now in Åkerberg Fransson, more than three years after the ratification of the Lisbon Treaty, that the ECJ confirmed the continuity between scope of Charter and the scope of the general principles. This aspect of the decision is most welcome: it avoids the potential for two distinct regimes of differing scope, one for general principles and one for the Charter. 11 Whether the decision introduces any more clarity to what constitutes “implementing” EU law for the purposes of the Charter, is another matter.

2. Factual and legal background

2.1. Factual background

In 2004 and 2005, Mr Åkerberg Fransson, a self-employed fisherman, submitted a false tax assessment. This infringed Swedish tax law and resulted

6. Explanations relating to the Charter of Fundamental Rights, O.J. 2007, C 303/17. Art. 52(7) of the Charter states the Explanations must be given “due regard by the courts of the Union and of the Member States”.


10. Case C-40/11, Yoshikazu Iida, judgment of 8 Nov. 2012, nyr, para 79 expressed the need for an intention to implement. This suggests the national measure had to be specifically enacted to give effect to EU law.

in losses for the Swedish national exchequer, including some stemming from his avoidance of value added tax (VAT). On 24 May 2007, the Skatterverket imposed a fine, part of which related to the VAT losses, in accordance with the Taxeringslagen. Mr Åkerberg Fransson did not appeal the fine, and it is now finalized. Subsequently, based upon the same facts, the Haparanda tingsrätt initiated criminal proceedings for serious tax offences against Mr Åkerberg Fransson. This led to the question whether continuing with the prosecution would sanction Mr Åkerberg Fransson twice for the same act, contrary to the principle of *ne bis in idem*.

Since Article 50 CFR protects the right not to be tried twice, the Haparanda tingsrätt made a preliminary reference to the ECJ. It asked, in essence, whether the principle prevents the pursuance of a criminal prosecution for the same facts that have already led to the imposition of a financial penalty in administrative proceedings. Furthermore, in Swedish law, violations of EU fundamental rights must be clear before national law is disapplied, and the Haparanda tingsrätt questioned the compatibility of this requirement with EU law.

### 2.2. Legal background

The multi-level framework of fundamental rights protection in the EU complicates interpreting the principle of *ne bis in idem*. Domestic legal orders, international human rights treaties such as the ECHR, and the EU treaties all protect fundamental rights in Europe. In fact, the EU adds two sources of fundamental rights protection: the general principles of EU law and the Charter. Article 6 TEU affirms both EU sources as binding, leading to unresolved issues over how they relate to each other and to national and international sources. The principle of *ne bis in idem* is a paradigmatic example of this multi-level rights protection in Europe. It finds protection in national constitutions but also in Article 14(7) of the International Covenant on Civil and Political Rights, Protocol 7 of the ECHR and Article 50 of the Charter. Awareness of this framework is important.

Two provisions of the Charter govern the relationship between these different levels of protection: Article 53 CFR and Article 52(3) CFR. Article 53 CFR provides that the Charter shall not “be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the [ECHR], and by the Member States’ constitutions”. Article 52(3) governs solely the interaction between the Charter and ECHR. It provides that when Charter rights “correspond to rights guaranteed by the
[ECHR], the meaning and scope of those rights shall be the same as those laid down by the [ECHR]”. EU law remains free, however, to provide protection that is more extensive.

In relation to the principle of ne bis in idem, the ECJ and the ECHR interpretations are in fact mostly consistent, reducing the need for recourse to Articles 52(3) and 53. The interpretation of the principle at both levels demonstrates the potential complementariness of a multi-level system. Regarding the definition of what is criminal in nature, the ECJ in Bonda\textsuperscript{12} abandoned its earlier two-stage test\textsuperscript{13} and adopted the ECHR interpretation.\textsuperscript{14} As regards what is the same, idem, the ECJ has consistently held that it is the facts which are of most importance.\textsuperscript{15} Originally, the ECHR adopted a narrower interpretation,\textsuperscript{16} focusing on the essential characteristics of the offence. In Zolotukhin,\textsuperscript{17} however, the ECHR expressly referenced the ECJ case law and adopted a similar approach. Interpretations do diverge, however, between the ECJ and the ECHR and the Member States. Some Member States either did not ratify Protocol 7, or included a declaration limiting the meaning of criminal offences to that laid down in national law.\textsuperscript{18}

3. Opinion of Advocate General Cruz Villalón

The Advocate General reached a different conclusion to the ECJ on almost all points raised by the preliminary reference. Firstly, he recommended that the ECJ decline jurisdiction and find that the situation falls outside the scope of

\textsuperscript{12} Case C-489/10, \textit{Bonda}, judgment of 5 June 2012, nyr.
\textsuperscript{13} Case C-210/00, \textit{Käserei Champignon Hofmeister}, [2002] ECR I-6453. The test focused on the nature of the breach and the objective of the penalty imposed.
\textsuperscript{14} ECHR, \textit{Engel and Others v. the Netherlands}, Appl. No. 5100-5102/71; 5354/72; 5370/72, judgment of 8 June 1976. The criteria are the legal classification of the offence under national law; the very nature of the offence; and the degree of severity of the penalty that the person concerned risks incurring.
\textsuperscript{15} In relation to competition proceedings, see Case C-219/00, \textit{Aalborg Portland}, [2004] ECR I-123, stating that application of \textit{ne bis in idem} is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected. On the Convention Implementing the Schengen Agreement, see Case C-436/04, \textit{Van Esbroeck}, [2006] ECR I-2333, where the ECJ held that the principle applies to the “existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected”.
\textsuperscript{17} ECHR, Sergey Zolotukhin \textit{v. Russia}, Appl. No. 14939/03, judgment of 10 Feb. 2009.
\textsuperscript{18} At the time of the judgment (and at the time of writing) Germany, the Netherlands, and the United Kingdom had still not ratified it; at the time of signature, Germany, Austria, Italy and Portugal lodged such declarations.
the Charter. Secondly, if the ECJ considered the reference admissible, he proposed an autonomous conception of the principle of *ne bis in idem*.

On the jurisdictional point, the Advocate General began by commenting upon the various ways to define the scope of EU fundamental rights. He considered the formulations used, such as “implementing” and “within the scope of Union law,” and criticized them as being of an essentially open and protean nature without any clearly identifiable feature distinguishing them.19 In his view, the precise words used to define the scope of EU fundamental rights are both irrelevant and unable to limit the applicability of EU fundamental rights:20 to describe a situation as one of “implementing” EU law does little more than to assert the susceptibility to review of Member State action.21 This led him to propose guiding principles to develop a coherent jurisprudence that respects the appropriate limits of centralized EU review.

As a rule, in a *Verfassungsverbund*, or multi-level constitution, the Member States should bear the responsibility for reviewing the acts of their public authorities.22 The exception, as defined by the Charter, is when a Member State “implements” EU law. At this point, the Member State transfers responsibility to the EU.23 The Advocate General proposed that the EU ought to invoke the exception only when it has a specific interest in ensuring that its interpretation of a fundamental right takes precedence.24 Member State activity that merely originates from EU law is insufficient for this. What is necessary is that “the lawfulness of public authority in the Union may be at stake”.25 When this arises depends upon the degree of connection between the relevant EU law and the Member State activity.26 It is for ECJ, however, to determine when this arises on a case-by-case basis.27 The Advocate General admits, “in terms of its subject-matter, Union law changes over time and that change will inevitably and legitimately determine the scope of the exception”.28 Fixed rules would therefore not be appropriate.

Applying this principle to Mr Åkerberg Fransson’s situation, the Advocate General accepted that the imposition of penalties based on Union law might in principle legitimate a transfer of responsibility to the Member States. He concluded, however, that in this case the connection was extremely weak.

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19. Opinion, paras. 34, 43–44.
20. Ibid., para 34.
21. Ibid., para 43.
22. Ibid., para 35.
23. Ibid., para 36.
24. Ibid., paras. 40–41.
25. Ibid., para 41.
26. Ibid., para 57.
27. Ibid., para 45.
28. Ibid., para 38.
Although EU law demands the effective collection of VAT, the system securing this was the general Swedish tax system, which also ensured the collection of taxes not governed by EU law. The connection to EU law thus amounted to a mere *occasio* of the general structure of Swedish tax law rather than the *causa*.

The Advocate General then considered the principle of *ne bis in idem* and that not all Member States accept the ECtHR’s interpretation of the principle. This led him to conclude that there was a “common constitutional tradition” of lesser protection: Member States interpret *ne bis in idem* as allowing the imposition of both an administrative and a criminal penalty in relation to the same offence.29 In light of this, he considered the obligation to apply the Charter in light of the ECHR contained in Article 52(3) CFR problematic. He restricted the application of Article 52(3) CFR to the ECHR as it stands, without the Protocols.30 This conclusion allowed him to propose an autonomous definition of Article 50 that, so long as the decision is not arbitrary, the Charter does not prevent the commencement of criminal proceedings following a finalized administrative penalty. To avoid arbitrariness, national courts ought to take into account earlier sanctions.

4. Judgment of the ECJ

The ECJ began by considering the jurisdictional question. It disposed of the debate surrounding Article 51(1) of the Charter by holding that, despite its wording, the scope of the Charter is the same as the scope of the general principles of EU law. Justification for this interpretation is located in the Explanations to the Charter.31 While the Charter refers only to “implementing” EU law, and the Explanations refer to the “scope of Union law,” the ECJ does not restrict itself to these terms when discussing the limits and applicability of the Charter. The ECJ summarized the pre-Charter case law as standing for the proposition that fundamental rights apply in “all situations governed by European Union law”.32 It then referred to matters within the “field of application” of EU fundamental rights,33 before finally stating that the “applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter”.34

29. Ibid., para 86.
30. Ibid., para 84.
32. Ibid., para 19.
33. Ibid., paras. 20, 23.
34. Ibid., para 21.
Applying this to Mr Åkerberg Fransson’s situation, the ECJ identified a number of connections between VAT-related infringements and EU law. Firstly, Articles 2, 250(1) and 273 of Directive 2006/112/EC combined with Article 4(3) TEU impose an obligation on Member States to take all legislative and administrative measures appropriate for ensuring collection of all the VAT and preventing evasion. Secondly, Article 325 TFEU obliges Member States to counter illegal, especially fraudulent, activities that may affect the financial interests of the EU in the same way as they protect their own interests. Finally, VAT collection goes towards the EU’s own resources and so a direct link exists between provisions for collecting VAT and the EU’s financial interests. These factors meant the ECJ considered the national measures to “constitute implementation” of EU law. The fact that the legislation did not specifically transpose Directive 2006/12 did not alter this determination.

The ECJ concluded its discussion of the applicability of the Charter by referring to Melloni (decided the same day). When a situation is “not entirely determined” by European Union law, yet the Member State is still implementing EU law for the purposes of Article 51(1) of the Charter, it remains open to the national authorities and courts to apply their own national standards of fundamental rights. A caveat exists that this is only as long as the protection provided by the Charter and the primacy, unity and effectiveness of European Union law are not compromised.

In relation to the principle of ne bis in idem, the ECJ held that Article 50 does not prohibit a Member State from imposing a combination of administrative tax penalties and criminal penalties for tax evasion. Further criminal proceedings would be contrary to Article 50 only if the first measure is criminal in nature and has been finalized. Whether a measure is criminal in nature depends on three factors: legal classification of the offence under national law, the nature of the offence, and the nature and degree of severity of the penalty to be incurred. The ECJ then leaves it to the Swedish court to determine the status under national administrative law.

Finally, the ECJ held that it is incompatible with EU law for Swedish judges only to disapply national law if an infringement of the Charter or the ECHR is clear. National courts must not be impaired from disapplying a provision of national law potentially impairing the effectiveness of EU law. The ECJ did

35. Ibid., para 25.
36. Ibid., para 26.
37. Ibid., para 26.
38. Ibid., para 27.
39. Ibid., para 28.
40. Ibid., para 29.
41. Ibid., para 34.
42. Ibid., para 35.
not comment on the obligations of Member States under the ECHR. It noted that before the EU accedes to the ECHR, EU law does not govern relations between the ECHR and the Member States’ legal systems, or the consequences of national infringements of the ECHR.

5. Comment

Åkerberg Fransson raises several issues regarding the interpretation of a number of general provisions of the Charter, namely, Article 51(1), Article 52(3) and Article 53.

5.1. What constitutes “implementing” EU law for the purposes of Article 51(1) CFR?

Over time, a consensus has emerged regarding several situations that trigger the application of the general principles. One may categorize these according to three kinds of relationship between the Member State and the EU: when the Member State acts as an agent of the EU, when a Member State derogates from EU law, and when an EU right is dependent for its realization upon Member State measures. Åkerberg Fransson confirms that this established case law is not lost and remains of utility.

The first situation clearly falling within “implementing” EU law is when Member States act as agents of the EU. Member States, acting as part of the decentralized EU administration, provide the necessary “hands and feet” for EU law to have effects within national territories. Member States enact measures in accordance with EU law, and national administrative authorities apply these. National action is conceived as originating from the EU; this in turn justifies bringing the situation “within the scope of Union law”. In reality, Member States rarely “replicate” EU law and considerable discretion

43. This categorization was not made by the ECJ, but is suggested by the author.
exists in many situations. Furthermore, Member States can use pre-existing provisions of national law to give effect to EU law.\textsuperscript{48}

Åkerberg Fransson arguably falls within this category as the Swedish measures give effect to at least two provisions: Directive 2006/112 and Article 325 TFEU.\textsuperscript{49} The ECJ affirmed the existing position that it does not matter for this purpose whether the Member State introduced the measure specifically to give effect to these provisions, i.e. whether it possessed an “intention to implement”. “Implementing” would therefore appear to cover any national measure taken to secure VAT collection and deter evasion. The ECJ does not state whether the cumulative effect of these provisions is important, however, there seems no reason why the national measures would not still implement either Article 325 TFEU, or the Directive, in the absence of the other. Despite this, and despite stressing the consistency of Article 51(1) with its settled case law, the ECJ does not cite the analogous general principles cases such as Wachauf\textsuperscript{50} or Booker Aquaculture.\textsuperscript{51} This demonstrates a desire to move beyond the language of “implementing” in the provision, looking beyond this to the description of scope in the Explanations and in the pre-Charter case law. Notably, the ECJ introduces different terminology, for example, when a situation is “governed” by EU law, or where EU law is “applicable”.

A second situation falling within “implementing” is when a Member State derogates from EU law. This could be either on the basis of an express Treaty provision,\textsuperscript{52} or on the basis of mandatory requirements.\textsuperscript{53} Prior to the Charter, derogations from EU law were most frequently associated with the notion of falling “within the scope of Union law” and were considered outside “implementing” \textit{strictu sensu}. Considerable discussion surrounded whether derogations from EU law would, or should, fall within Article 51(1) of the Charter.\textsuperscript{54} Åkerberg Fransson definitively laid this debate to rest, but Tsakouridis had already confirmed the inclusion of this situation within “implementing” for the purposes of the Charter.\textsuperscript{55} In Tsakouridis, Germany sought to expel an EU citizen exercising his rights of free movement on imperative grounds of public security. The ECJ, in interpreting the meaning of public security, held that fundamental rights must be taken into account “in so far as reason of public interest may be relied on to justify a national measure

\textsuperscript{48} Case C-81/05, Alonso, [2006] ECR I-7569, para 29.
\textsuperscript{49} See section 4 supra.
\textsuperscript{50} Wachauf, cited supra note 3.
\textsuperscript{51} Booker Aquaculture, cited supra note 46.
\textsuperscript{52} ERT, cited supra note 4.
\textsuperscript{53} Case C-368/95, Familiapress, [1997] ECR I-3689.
\textsuperscript{54} See literature cited supra note 9.
\textsuperscript{55} Case C-145/09, Tsakouridis, [2010] ECR I-11979.
which is liable to obstruct the exercise of freedom of movement”\textsuperscript{56}. This is unsurprising if one considers that derogations, in reality, operate similarly to agency situations. As Craig notes, the Member States when derogating “act on a power given by EU law to provide a defence to that violation”\textsuperscript{57}.

A final situation falling within “implementing,” is when a national measure preconditions the exercise of a right granted by EU law. This is so despite the Member State apparently acting within its own field of jurisdiction. The ECJ in Åkerberg Fransson cites Sopropé\textsuperscript{58} a case arguably fitting this category, thereby hinting at its support for the continued inclusion of this within the scope of EU law. Sopropé concerned the Community Customs Code, which stated “provisions for the implementation of the appeals procedure shall be determined by the Member States”\textsuperscript{59}. The EU thereby leaves the appeals procedure to the Member State. Notwithstanding this, following a challenge to the Portuguese appeals procedure, the ECJ held that Member States are bound to respect the rights of the defence “when they take decisions which come within the scope of [EU] law, even though the [EU] legislation applicable does not expressly provide for such a procedural requirement”\textsuperscript{60}.

Several post-Charter cases confirm that this situation still falls within Article 51(1) of the Charter. For example, in Kamberaj,\textsuperscript{61} the EU asserted a power of review, similar to that in Sopropé, over national legislation defining social security, social assistance and social protection. The directive concerned left this to the Member State, yet the ECJ still found it necessary to review the Member State definitions to ensure the effectiveness of the EU right. Similarly, the Zambrano,\textsuperscript{62} McCarthy,\textsuperscript{63} Dereci\textsuperscript{64} case law further demonstrates that fundamental rights are applicable when the consequence of a national measure is “depriving citizens of the Union of the genuine enjoyment of the substance of the rights” of EU citizenship.\textsuperscript{65} In these cases, the ECJ recognizes that although the national measures fall “a priori within

\textsuperscript{56} Ibid., para 52.


\textsuperscript{58} Case C-349/07, Sopropé, [2008] ECR I-10369.


\textsuperscript{60} Sopropé, cited supra note 58, para 38.

\textsuperscript{61} Case C-571/10, Kamberaj, judgment of 24 Apr. 2012, nyr. See also C-400/10 PPU, McB, [2010] ECR I-8965.


\textsuperscript{63} Case C-434/09, Shirley McCarthy, [2011] ECR I-3375.

\textsuperscript{64} Case C-256/11, Dereci, judgment of 15 Nov. 2011 nyr.

\textsuperscript{65} Zambrano, cited supra note 62, para 42.
the competence of the Member States... they none the less have an intrinsic connection with the freedom of movement of a Union citizen".66

5.2. The boundaries of “implementing” EU law for the purposes of the Charter

Prior to the Charter’s entry into force, commentators had already begun to question the exhaustiveness of the above categorization. Authority hints at a further category (or categories) of situation falling within the scope of the Charter,67 variously described as when “some other connecting factor exists between the national measures at stake and EU law”,68 or when “some specific substantive rule of EC law is applicable to the situation”.69 So far, though, no universal accord exists and the case law remains far from definitive. The complexity does not stop here: assuming a further category does exist, problems of definition then arise. For instance, is a mere “coincidence of subject matter between Union law and national law” sufficient to trigger the application of EU fundamental rights?70 The ECJ in Åkerberg Fransson explains that the “applicability of EU law entails the applicability of the fundamental rights guaranteed by the Charter”71 and that national measures only need to be “connected in part” to obligations regarding the collection of VAT.72 The following considers whether this improves comprehension of what national activity brings a situation within the scope of EU law.

Problems defining this originate from the ECJ’s failure at times to fully explain its conclusions. In Karner,73 for instance, the ECJ applied EU fundamental rights to an Austrian measure that not only gave effect to an EU prohibition on misleading advertising but also employed a stricter definition than that given in EU law. Even though the measure did not violate Article 34 TFEU, the ECJ still reviewed it for compatibility with EU fundamental rights, never making the connecting factor explicit. This led to several differing interpretations of the situation. On the one hand, some consider the case as a derogation situation since, if it did not fall within the Keck exception,74 the

66. C-87/12, Ymeraga and Ymeraga-Tafarshiku, judgment of 8 May 2013, nyr.
67. See e.g. Case C-555/07, Seda Küçükdeveci, [2010] ECR I-365 as discussed below.
70. Editorial comments, “The scope of application of the general principles of Union law: An ever expanding Union?”, 47 CML Rev. (2010), 1596.
72. Ibid., para 24.
measure would have infringed Article 34 TFEU.\textsuperscript{75} On the other hand, several commentators consider the decision to be simply \textit{per incuriam}.\textsuperscript{76} Perhaps the best interpretation is that the Austrian measure fell “within the scope” of EU law as it constituted a more stringent measure above a minimum EU standard.\textsuperscript{77} Karner stresses that the Directive intended to set out minimum criteria and this is consistent with general principles review of Member State action in the field above minimum harmonization.\textsuperscript{78}

The failure to fully explain the grounds of a decision can lead to perplexing inconsistencies in the case law, casting doubt upon the existence of a further category of situation. This is particularly evident in the controversial \textit{Küçükdeveci} line of case law.\textsuperscript{79} In \textit{Küçükdeveci}, national legislation on dismissal periods fell within the scope of EU law since the Equal Treatment Directive\textsuperscript{80} covers “dismissals and pay” and thereby “governed” the matter.\textsuperscript{81} Consequently, one may conclude EU fundamental rights bind Member States “whenever the exercise of their own regulatory competences happens to touch upon a matter also subject to some form of legislative intervention by the Union itself.”\textsuperscript{82} Yet, in the post-Charter cases of \textit{Römer}\textsuperscript{83} and \textit{Dominguez}\textsuperscript{84} the ECJ avoids extending this approach to all provisions in the Charter. In \textit{Römer}, the ECJ applies only the general principle of non-discrimination on the grounds of sexual orientation to the national measures, rather than Article 21(1) CFR. In \textit{Dominguez}, on the other hand, the ECJ does not explicitly state whether the right to annual paid leave is a general principle, and does not rely upon Article 31(2) CRF. Instead, it focuses its analysis on Article 7 of Directive 2003/88.\textsuperscript{85} Explanation may lie with the distinction contained in

\begin{itemize}
\item \textsuperscript{76} Dougan, “In defence of Mangold?”, in Arnell et al. (Eds.) \textit{Constitutional Order of States: Essays in EU Law in Honour of Alan Dashwood} (Hart, 2011), p. 238; and Editorial comments, op. cit. supra note 70, 1591.
\item \textsuperscript{77} See Azoulai, “The case of fundamental rights: A state of ambivalence” in Micklitz and De Witte (Eds.), \textit{The European Court of Justice and the Autonomy of the Member States} (Intersentia, 2011), pp. 210–211; and Karner, cited supra note 73, paras. 32–33.
\item \textsuperscript{78} See Case C-496/04, J. Slob, [2006] ECR I-8257.
\item \textsuperscript{79} \textit{Küçükdeveci}, cited supra note 67.
\item \textsuperscript{81} \textit{Küçükdeveci}, cited supra note 67, para 21.
\item \textsuperscript{82} Dougan, op. cit. supra note 76, p. 239.
\item \textsuperscript{83} Case C-147/08, \textit{Römer}, [2011] ECR I-3591.
\item \textsuperscript{84} Case C-282/10, \textit{Maribel Dominguez}, judgment of 24 Jan. 2012, nyr.
\end{itemize}
Article 52(5) CFR between rights and principles, and with the fact that the right to annual paid leave is not recognized yet as a general principle of EU law. Regrettably, though, the ECJ does not explain why the Charter does not apply.

What is more, the jurisprudence of the ECJ makes it difficult to determine what connecting factor between EU and national measures is necessary to bring a situation within this further category. Several Orders where the ECJ declines jurisdiction on the basis of Article 51(1), for instance, lead one to question what link to a Treaty provision is sufficient to bring the situation within the scope of EU law. In Åkerberg Fransson, a connection to Article 325 TFEU constituted “implementing”, yet it is clear that not all Member State activity connected in part to a Treaty provision suffices. Inconsistent reasoning in these Orders means they throw little light on the issue. In some Orders, the ECJ justified declining jurisdiction on the basis that the measure lacked a connection to EU law. In others, the ECJ declined jurisdiction because the national measure did not implement EU law. Following these Orders, it is safe to say a connection to EU law stemming from the obligation in Articles 2 and 6 TEU to respect fundamental rights is not enough. Hardly a surprising conclusion, given that this would grant fundamental rights freestanding application – a result Article 51(1) of the Charter clearly aims to prevent. Beyond this, the varying terminology impedes any further the conclusion regarding what will fall within the scope of the Charter.

Zakaria further evidences the difficulty in defining the necessary connecting factor to EU secondary law. The case concerned an allegation that treatment by border guards in Latvia violated human dignity. Article 6 of Regulation 562/2006 places a clear obligation on border guards “in the performance of their duties, [to] fully respect human dignity,” as protected by Article 1 of the Charter. The ECJ however cited insufficient information, leaving the national court to determine whether the situation fell within the

86. The latter are only judicially cognizable in the interpretation of such legislative and executive acts of the EU implementing them.
89. Case C-434/11, Corpul National al Politistilor, Order of 10 May 2012, nyr, para 16; Case C-128/12, Sindicato dos Bancários do Norte and Others, Order of 7 March 2013, nyr, para 12.
90. Case C-23/12, Zakaria, judgment of 17 Jan. 2013, nyr.
scope of Article 51(1) of the Charter. A strong case for the border guards’ actions falling within the scope of the Charter exists: the ECJ recognized that an individual may derive rights from Article 6 of Regulation 562/2006, and earlier case law establishes that the obligation to protect fundamental rights extends to those national actors giving effect to EU law. For whichever reason, the ECJ is particularly unwilling to follow this path. Citing Iida, the ECJ reflects particularly a restrictive view of the scope of the Charter. Evidently, not all provisions of EU secondary law provide a necessary connection to EU law to fall within the scope of the Charter, but again it remains unclear what connection is sufficient.

A potential explanation for Zakaria may be that Article 6 of Regulation 562/2006, like Articles 2 and 6 TEU, places an obligation upon the Member State to protect fundamental rights. Furthermore, unlike Article 325 TFEU in Åkerberg Fransson, there is no broadly framed obligation directed at Member States regarding the control of external borders. To consider Member State activity such as in Zakaria within the scope of Article 51(1) may again come too close to allowing the freestanding application of EU fundamental rights. While the EU has the competence to gather its own resources, it only has a limited fundamental rights competence. This leaves two alternatives; to fall within the scope of the Charter, the provision either cannot relate to fundamental rights protection, or needs to relate to a specific EU competence. The latter would follow the Opinion of Advocate General Sharpston in Zambrano who argued that one should look to the existence and scope of a material EU competence and not to the applicability of EU law.

Åkerberg Fransson qualifies the necessary connection between EU law and national law to some extent: EU law needs to be applicable to or govern the situation. The ECJ does not indicate whether it is introducing a new test for what falls within the scope of EU fundamental rights, or whether these terms merely describe the pre-Charter case law and are synonymous with Member State action falling within the scope of EU law. Specifically, the ECJ does not confirm the debated category of situations outside those set out in section 5.1.

93. Ibid., para 40.
94. See Lindqvist, cited supra note 48, para 82; and Case C-28/05, Dokter, [2006] ECR I-5431, para 71.
96. Art. 77 TFEU grants the EU a competence to enact measures relating to external borders, but this does not address the Member States.
97. The EU does not have a general human rights competence, but instead possesses several piecemeal competences related to fundamental rights. See e.g. Art. 19 TFEU regarding anti-discrimination; and Arts. 2, 7 and 49 TEU on the fundamental values of the EU as conditions for EU membership and the power to ensure compliance with these.
above, although the language seems broad enough to cover a mere coincidence of regulatory subject matter as in Kıcıkdeveci. Little can be gleaned, though, if such a situation is confirmed, to further define the necessary connection between national law and EU law. In Zakaria, EU law ought to have been applicable given the obligation on border guards in Regulation 562/2006; this indicates that unstated premises lie behind the decision. It remains to be seen how the notions of applicability and situations governed by EU law will be applied in later case law, but the indications are that new terminology alters little.

One development following from the language of applicability is that it potentially expands the scope of EU fundamental rights into other areas of EU law. For instance, it is questionable how this relates to Article 18 TFEU prohibiting discrimination on grounds of nationality. To trigger Article 18 TFEU, national conduct must fall “within the scope of the Treaties”, yet this covers situations other than those falling within scope of EU fundamental rights. Migrant citizens lawfully residing in another Member State99 and citizens who, despite always residing in one Member State, hold dual nationality come within the personal scope of Article 18 TFEU.100 In comparison, more is necessary for the application of EU fundamental rights. The ECJ previously bypassed Advocate General Jacobs’ suggestion in Konstantinidis that an EU citizen pursuing an economic activity in another Member State ought to be able to say “civis europeus sum” and invoke a basic level of EU fundamental rights protection.101 Now, given that some EU law is applicable if Article 18 TFEU applies, the ECJ opens the door to a revival of Advocate General Jacobs’ proposal.

5.3. Constructing a limit to Article 51(1) CFR.

Without clear criteria to identify what constitutes implementation under Article 51(1) CFR, the vertical division of powers within the EU is at risk, and, consequently, so is the protection of national constitutional identities.102 The scope of EU fundamental rights has no intrinsic limit due to their cross-sectoral nature.103 Furthermore, the distinction drawn between the

existence and exercise of Member State retained powers leaves few areas of Member State activity free from EU law. Drawing a limit is not easy due to a persistent tension between two opposing forces. On the one hand, centralizing forces push the EU towards becoming a more mature and comprehensive constitutional system; on the other, there is a desire to maintain a diversified and multifaceted constitutional system. It is no exaggeration therefore to say the scope of EU fundamental rights goes to the very nature of the EU legal order. The ECJ in Åkerberg Fransson does not refer to the balance between these two opposing forces. By explicitly moving beyond the wording of the Charter and removing any restriction potentially introduced in this legislative act, the ECJ now bears the responsibility of constructing a limit.

There are two potential methods to limit the scope of EU fundamental rights. Firstly, the ECJ may decide to protect a normative value such as the “sufficient interest” of the EU, or the uniformity of EU law. Otherwise, the ECJ may construct a limit based upon a connection to EU law, such as whether the domestic legislation under review is “so closely connected with Community law” as to fall within its scope. The ECJ’s reference to national law being “connected” to EU law suggests it chose the latter in Åkerberg Fransson. The difficulty with this is that whenever some connection exists between the EU and national law, the temptation is to justify the application of EU law on this basis, even if it overrides important constitutional provisions or does not further the EU’s interests. What is more, the above sections demonstrate the impossibility of articulating what connection to EU law is needed based upon the current case law.

A limit to EU action eventually requires a further rationale to prevent an arbitrary or overly broad determination of the necessary closeness of the connection. The Advocate General proposes a limit relating to the “sufficient interest” of the EU, but detailed consideration suggests this ought not to be adopted either. In the end, it appears to boil down to “the presence, or even the
leading role, of Union law in national law in each particular case. There is thus little difference between this and the need for some connection to EU law. Distinguishing it is that not just any connection to EU law is sufficient, yet it is difficult to identify when EU law plays a leading role. The Advocate General draws a distinction between *causa* and * occasio* to determine this, but this is unpersuasive. It suggests that if it had not been the general Swedish tax system in question, but a particular system for the collection of VAT owed to the EU, then the matter would have fallen “within the scope of Union law”. This brings to mind the requirement in *Iida* of an intention to implement EU law in order to fall within the scope of the Charter. This cannot provide a limit since the ECJ in *Åkerberg Fransson* clarifies it does not matter that the national measures were enacted without EU law in mind.

The ECJ therefore needs to find guiding principles that account for the more abstract relationship between the EU and the Member States, ignoring any specific intention to implement. This does not mean abandoning the categorization of situations falling within the scope of EU fundamental rights, but that the development of EU fundamental rights ought to be on a principled basis. One potentially effective limit stems from the principles of efficacy and uniformity. These facilitate the proper functioning of the EU, but do not go beyond this. For instance, there is a need to collect and guarantee EU funds in a similar manner across the EU, as *Åkerberg Fransson* ensures; otherwise, the rate of tax evasion may differ between Member States, leading to differing contributions to the EU budget.

5.4. **Article 53 and the primacy, unity and effectiveness of EU law**

Article 53 CFR reflects a method utilized in other treaties to address potential divergences in interpretation of any given right. Within, for instance, the ECHR system, such a provision implies that the ECHR forms only a minimum standard with Member States free to go above this. The conceptual nature of the EU, however, makes the importation of an analogous provision between Member States and the EU problematic. The principle of supremacy, in particular, is potentially under threat from such a provision.

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111. Opinion, para 41.
112. See e.g. Art. 53 ECHR; Art. 32 European Social Charter; Art. 5(2) International Covenant on Economic, Social and Cultural Rights; and Art. 5(2) International Covenant on Civil and Political Rights.
Article 53 CFR is at the heart of Melloni.\textsuperscript{115} The case concerned the interpretation of the right to a fair trial at national, EU, and ECHR level. According to the Spanish Constitutional Court, participation in one’s trial forms an inviolable part of the right to a fair trial when the offence is of a serious nature. Under Article 47 of the Charter and Article 6 ECHR, however, a person may waive their right to participation.\textsuperscript{116} The situation was thus the converse of that in Åkerberg Fransson, where the national interpretation of \textit{ne bis in idem} accorded less protection to the individual than the EU and ECHR.

In considering which interpretation of the right to a fair trial ought to apply, the ECJ chose in favour of uniformity despite thereby lowering protection for citizens against the exercise of public power. Not to do so would be to “undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State’s constitution”.\textsuperscript{117} This pulls the EU further towards centralization, although the ECJ did accept that a national court might apply national fundamental rights standards, if the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not thereby compromised.

In comparison, the interpretation of Article 53 CFR in Åkerberg Fransson seems to temper the unifying tendencies of Melloni. The ECJ states that, “where action of the Member States is not entirely determined by European Union law, [and the Member State] 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”.\textsuperscript{118} This statement is reminiscent of the Advocate General’s recognition that the existence of discretion is inherent in implementation and so the Member State nearly always has some freedom over how it gives effect to EU law.

In practice, this interpretation of Article 53 CFR in Åkerberg Fransson means Sweden is left to apply its own conception of \textit{ne bis in idem}, so long as this does not compromise the primacy, unity and effectiveness of European Union law, or the standard of protection in the Charter. The Charter standard provides only a “floor” of protection, rather than a ceiling, whenever Member States retain discretion. Whilst appearing to respect national constitutional identity, the realities are clear if one contrasts the result in Melloni. The EU

ECR I-8015. See also Liisberg, “Does the EU Charter of fundamental rights threaten the supremacy of community law? Article 53 of the Charter: A fountain of law or just an inkblot?”, Harvard Jean Monnet Working Paper No. 4-01, <centers.law.nyu.edu/jeanmonnet/archive/papers/01/010401.html>.

\textsuperscript{115} See on this the case note by de Boer, op. cit. \textit{supra} note 1.

\textsuperscript{116} Melloni, cited \textit{supra} note 1, paras. 49–50.

\textsuperscript{117} Ibid., para 58.

\textsuperscript{118} Judgment, para 29.
interpretation of *ne bis in idem* generally provides greater protection for the individual than the Member State standard.\(^{119}\) Åkerberg Fransson therefore does little to soften the potentially unifying effect of Melloni. Most Member States will therefore be required to adjust their national standard upwards when acting within the scope of Union law, just as the Spanish interpretation of the right to a fair trial needed adjusting downwards in the specific context of the European Arrest Warrant.

5.5. *Article 52(3) CFR and the relationship between the Charter and the ECHR*

Despite divergences from the Member States, mutual cross-fertilization between the ECJ and the ECtHR meant their respective interpretations of *ne bis in idem* were in accord when the ECJ decided Åkerberg Fransson. Article 52(3) CFR therefore did not play a major role, but contrasting the Advocate General and the ECJ discussion throws light on its potential implications.

The Advocate General gave weight to the facts, first, that the principle of *ne bis in idem* is in a Protocol to the ECHR and, second, that Member State practice often falls below that standard. For this reason, the obligation in Article 52(3) CFR is “asymmetrical, leading to significant problems when it is applied”\(^{120}\). Article 52(3) CFR therefore ought only to apply to the Convention “as it stands… with its combination of provisions which are mandatory and provisions which are, to a certain extent, conditional”.\(^{121}\) Accordingly, he argued for an autonomous definition of *ne bis in idem*, allowing a second sanction, so long as the national court takes into account any earlier sanction. With respect, however, such a definition seemed unnecessary given the ratification by a majority of Member States of Protocol 7. Furthermore, it appears regressive given that it reduced the standard of protection of EU law as it stood.

The ECJ does not discuss Article 52(3) CFR in relation to its interpretation of the principle of *ne bis in idem*, but in relation to whether an infringement of EU fundamental rights or the ECHR needs to be clear before national law may be disapplied. In this regard, the ECJ notes that, until accession, the ECHR is not “a legal instrument which has been formally incorporated into [EU] law”.\(^{122}\) The principle of *ne bis in idem* as interpreted by the ECtHR is furthermore unlikely to become formally binding: according to the Draft

\(^{119}\) See section 2 on this point.

\(^{120}\) Opinion, para 70.

\(^{121}\) Ibid., para 84.

\(^{122}\) Judgment, para 44.
Revised Agreement on Accession, the EU will not accede to Protocol 7. What the ECJ did not say is more significant, however.

Åkerberg Fransson is striking for the total absence of any reference to ECtHR jurisprudence in relation to the principle of ne bis in idem. The ECJ clearly does not interpret Article 52(3) CFR as requiring it to cross-refer the ECtHR. When divergences in interpretations exist, it may be more likely to do so. Yet in Melloni the ECJ and ECtHR interpretations of the right to a fair trial did not diverge but the ECJ still cross-referred the ECtHR in order to bolster its decision. Deciding not to do so perhaps demonstrates the ECJ’s desire to assert its significance in the European human rights landscape as EU accession to the ECHR nears. For the ECJ, the ECHR is “a useful tool and persuasive authority in the expanding human rights arena”123 when the controversial European Arrest Warrant is in question as in Melloni.124 Yet, in an area where the ECtHR adopted the jurisprudence of the ECJ,125 the ECJ remains predictably reluctant to give the ECtHR “too much accreditation for fear of appearing too deferential and subservient to a rival transnational ‘constitutional’ court”.126

6. Conclusion

Evaluating Åkerberg Fransson is complex. It is now clear that the ECJ does not interpret the Charter as restricting the scope of EU fundamental rights. How the scope of EU fundamental rights will develop in the future, however, remains uncertain. The ECJ declares that EU fundamental rights apply to Member State action whenever EU law is applicable,127 whenever EU law governs the situation,128 or when national law is partially connected to EU law.129 However, this neither confirms a further category of situation triggering the application of EU fundamental rights nor clarifies what connection to EU law might be sufficient to fall within this. As was noted several years ago, there is a need for a focused and critical debate about what it means to be “implementing” EU law for the purposes of Article 51(1) CFR.130 Åkerberg Fransson is a step forward, but it remains unclear what

125. See section 2.2. supra.
126. Douglas-Scott, op. cit. supra note 123, 663.
128. Ibid., para 19.
129. Ibid., para 24.
130. Editorial comments, op. cit. supra note 70, 1596.
national activity will fall within the scope of the Charter, what basis in constitutional principle there is for this, and where the limits lie. Given the effect the scope of fundamental rights has on the vertical division of power in the EU, a pressing need exists for the ECJ to clarify these matters.

Furthermore, when considering the impact Åkerberg Fransson might have, and whether it may expand the scope of EU fundamental rights, one needs to remember its context. Contributing financially to the EU is a “task so fundamental to EU membership, and so clearly defined in both primary and secondary Union law, that it goes without saying that it very clearly falls within the obligations of Member States”.131 Along these lines, the German Constitutional Court (FCC) in their decision on the anti-terrorism database attributed the decision to the distinctive features of VAT rather than consider it ultra vires.132 By contrast, the ECJ’s language is markedly different in Ymeraga, a case concerning the Zambrano jurisprudence that erodes the concept of a purely internal situation and permits further encroachments of EU law into national affairs. The ECJ stresses the need to ascertain “whether the national legislation at issue is intended to implement a provision of [EU] law, what the character of that legislation is, and whether it pursues objectives other than those covered by [EU] law, even if it is capable of indirectly affecting that law, and also whether there are specific rules of [EU] law on the matter or capable of affecting it”.133 No mention is made of Åkerberg Fransson and the ECJ instead cites both Annibaldi134 and Iida.135 The interpretation of Åkerberg Fransson in future case law thus remains an unknown quantity.

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131. Morijn, “Akerberg and Melloni: What the ECJ said, did and may have left open”, EUTopia law, 14 March 2013, available at: <eutopianlaw.com/2013/03/14/akerberg-and-melloni-what-the-ecj-said-did-and-may-have-left/#more-1826>.
133. Ymeraga, cited supra note 66, para 41.
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