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WHO'S AFRAID OF THE CHARTER? THE COURT OF JUSTICE, NATIONAL COURTS AND THE NEW FRAMEWORK OF FUNDAMENTAL RIGHTS PROTECTION IN EUROPE

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In Edward Albee's famous play *Who's Afraid of Virginia Woolf?*, two middle-aged and sophisticated academics, George and Martha, struggle to keep their marriage alive by creating the illusion of a son they never had. As the play goes on and George and Martha unashamedly confront each other in front of two young guests during a late-evening gathering, they sing to themselves every now and then "who's afraid of Virginia Woolf?" The audience eventually realizes that Virginia Woolf represents a life made of false illusions. The imaginary son George and Martha never had, the illusion they both artificially created, was the only reason to keep their marriage together. Albee's disturbing play is thus a reminder of the importance of facing reality, but also of the force of illusions (and their risks) in keeping relationships together.

For many years, the Court of Justice of the European Union and the constitutional courts of the Member States have lived under the illusion of unilateral supremacy. According to the Court of Justice, EU law has primacy over national Constitutions, whilst national supreme jurisdictions have repeatedly stated that EU law's ultimate source of legitimacy lies in the Constitution of the Member State, thus subjecting EU law to constitutional review. The illusion played the trick and it has bound this odd couple happily together for more than forty years.

However, the entry into force of the Charter of Fundamental Rights of the European Union (hereafter "the Charter") has proved how fragile the illusion and the marriage can be. In a series of ground-breaking decisions (*Åkerberg*

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Fransson, *Melloni*, *N.S.,* etc.), the Court of Justice has put the Charter at the forefront of European integration, an event that can hardly be a surprise in light of the prominent status that the Charter was given by the Member States once the Lisbon Treaty entered into force. The role of the Charter as a paramount reference of EU law grants new interpretative powers to the Court of Justice, but it does so in an area much cherished by national constitutional courts.

Fundamental rights protection is one of the few areas in which constitutional courts are willing to scrutinize EU law. Therefore, any conflict between the Charter and a fundamental right as protected by a Member State's constitution could tragically put at risk the illusion that European courts have comfortably lived under. In light of some reactions of constitutional courts to the ECJ's early case law on the Charter, it could all be taken as the very first symptom of a marriage coming inevitably to a sad end.[1] However, the opposite could also be argued: through a process of trial and error, the ECJ and constitutional courts might be struggling to accommodate their respective claims of supremacy in a novel and more sophisticated framework in which all legal orders pursue a new role in a composite legal space. Such a process could result in a different arrangement for EU and national fundamental rights protection, but also in a *common* understanding of constitutional supremacy in the European Union. In other words, the highest courts in Europe could be struggling to find a way to live in harmony without the assistance of false illusions, but with the benefits and the daunting challenges of having to face reality. This article will show that such process is currently in the making, and it will be argued that the chances of living a life comfortably together, but without false illusions, might be too good to be spoiled.

First, I deal with the impact of the Charter in EU Law and will explain how it has conditioned the way in which EU lawyers currently approach fundamental rights in Europe. As a result of this impact, section 2 will address one of the most contested issues since the enactment of the Charter: its scope of application when applied by Member States. Some criteria will be proposed in an attempt (fallible, but an attempt nevertheless) to determine the exact scope of Article 51(1) of the Charter after the ECJ's seminal decision in *Åkerberg Fransson*. Section 3 will then address, once the scope of application of the Charter has been determined, how the Charter interacts with national

1. See the judgment of 1 Jan. 2012 of the Czech Constitutional Court (Pl. ÚS 5/12), declaring that the ECJ breached the right to a fair trial; the judgment of the Polish Constitutional Court of 16 Nov. 2011 (SK 45/09) on the constitutionality of Regulation 44/2001; and more recently the judgment of the German Federal Constitutional Court of 24 April 2013 (1 BvR 1215/07), pointing in a precautionary *dictum* at the limits of the scope of application of EU fundamental rights. On this last judgment, see the editorial comment "*Ultra vires* – has the *Bundesverfassungsgericht* shown its teeth?" 50 CML Rev, 925–929.

fundamental rights when national courts find themselves under the obligation to serve two masters. *Åkerberg Fransson* and *Melloni* have set the basic rules for a new framework of fundamental rights in Europe. Whether this new framework is bound to work will depend on future developments. This article proposes a few ways forward, while raising some queries that the framework will eventually drive the ECJ to address.

1. What's in a Charter?

When the Charter entered into force on 1 December 2009, the prospects of a revolutionary impact in EU law were far from clear.[2] The ECJ had been proclaiming for decades that fundamental rights were part of EU law as general principles, thus possessing the status of primary law.[3] This case law was the result of the pressure exerted by national Constitutional courts in the early 1970s, in particular by the German Federal Constitutional Court, concerned as it then was with the lack of scrutiny of EU acts in light of fundamental rights and freedoms.[4] In a well-known story often told, the ECJ rose to the challenge and declared that EU law was bound to observe fundamental rights as general principles of law, as derived from the common constitutional traditions of the Member States and from the standards of protection guaranteed by international instruments for the protection of fundamental rights, not least the European Convention on Human Rights.[5] In the late 1980s it became obvious that the ECJ's scrutiny would not only concern EU acts, but also Member State action when implementing EU law.[6] The scope of fundamental rights over time even went as far as recognizing their potential impact *inter privatos,* as in the case of non-discrimination on the grounds of sex or age,[7] or the right of collective action.[8] Prior to the change

2. See Weiler, "Does the European Union Treaty Need a Charter of Rights?" 6 ELJ (2000), 95–97; De Witte, "The legal status of the Charter: Vital question or non-issue?" 8 MJ (2001), 81 et seq., and Iglesias Sánchez, "The Court and the Charter: The impact of the entry into force of the Lisbon Treaty on the ECJ's approach to fundamental rights", 49 CMLR (2012), 1565–1568.

3. See the seminal judgments in Case 29/69, *Stauder,* [1969] ECR 419 and Case 11/70, *Internationale Handelsgesellschaft,* [1970] ECR 1125, followed, *inter alia,* by Case 4/73, *Nold* v. *Commission,* [1974] ECR 491 and Case 44/79, *Hauer,* [1979] ECR 3727.

4. On the tensions between the ECJ and the *Bundesverfassungsgericht* in the late 1960s and early 1970s, see Alter, *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe* (OUP, 2001).

5. See Weiler, *The Constitution of Europe. "Do the New Clothes have an Emperor?" and other Essays on European Integration* (Cambridge University Press, 1999), pp. 103 et seq.

6. Case 5/88, *Wachauf,* [1989] ECR 2609; Case C-260/89, *ERT,* [1991] ECR I-2925.

7. Case 43/75, *Defrenne,* [1976] ECR 455 (equality on the grounds of sex) and Case C-144/04, *Mangold,* [2005] ECR I-9981 (equality on the grounds of age).

in the Charter's legal value in 2009, it appeared that the EU had a very dignified fundamental rights record in spite of the absence of a written text showing those rights. There were thus well-founded reasons to believe that the Charter would be a mere confirmation of past practice, a rubberstamp of the *status quo* as it then stood in late 2009.

With the benefit of hindsight, it can now be said that the Charter has been the source of very significant changes in EU law. Far from being a decorative declaration validating past practices, the Charter has forced the Union to take fundamental rights even more seriously, a move that has consequently pushed the ECJ in the same direction. The reasons underlying this change appear as an illustrative background when explaining the ECJ's recent case law.

Making fundamental rights visible has the virtue of bringing to the forefront of the debate many issues that might have given the wrongful impression of being peacefully resolved. By rendering those rights more visible, Member States may now be exposed to specific obligations limiting their margin of action. Individuals become familiarized with the standards to which Member States are bound when implementing EU law, in the same way those same individuals can also demand the EU to act in accordance with, and promoting, the rights proclaimed in the Charter. EU and national judges are no longer the enforcers of a casuistic array of rights whose content only appears spread over numerous judgments of the ECJ, but the guardians of a fully-fledged declaration of rights. The visibility of rights transforms them into perceivable matter, a tangible good added to the patrimony of the individual. Above all, the visibility of the Charter puts in the limelight two issues that have been discretely managed in the past by the ECJ, but that now demand a clear and direct answer: the division of competences between the Union and its Member States, and the status of the individual as a Union citizen.

Once EU fundamental rights become a tangible reality, authorities are entitled to know what portion of the obligation they must comply with. When fundamental rights benefited from a certain obscurity, acting solely as general principles, the precise share of the burden was an issue that often remained on the sideline. However, at the present time Member States are perfectly right to demand a clearer division of tasks, knowing as they do what the Charter carries within. Since the ECJ's seminal decision in *Wachauf,*[9] in which the ECJ recognized that Member States were also bound by EU fundamental rights when implementing EU law, the degree of exposure of Member States to EU fundamental rights has been on a gradual yet constant rise. The wording

8. Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union* (*Viking Line),* [2007] ECR I-10779, para 54; Case C-341/05, *Laval un Partneri,* [2007] ECR I-11767, para 98.

9. Cited *supra* note 6.

of the Charter itself is ambiguous on this point, its Article 51(1) does not confirm whether that trend is to be stopped, whether it may continue, or if the *Wachauf* doctrine should be reconsidered altogether. Until the ECJ's recent decisions, Member States were well aware that the scope of application of the Charter required an overt, clear and convincing decision from the ECJ that would eventually have major consequences for the distribution of powers between the Union and its Member States. All in all, the Charter was raising "the federal question".[10]

Though EU Institutions and Member States remain the formal addressees of the Charter, it is the individual who benefits from the rights. However, the status of the individual has been far from settled in the evolving history of European integration and of EU law in particular. Restrictive standing requirements of individuals for EU courts have contrasted with the generous array of EU remedies those same individuals benefit from *vis-à-vis* national courts.[11] The "economic individual" benefits from free movement rules, whilst the "non-economic individual" remained for a long time the pariah of integration. These paradoxes came partially to an end with Maastricht's proclamation of Union citizenship, a status that is destined to be, according to the ECJ, "the fundamental status of nationals of the Member States".[12] Since 1992, the status of Union citizens (and as a result, also of many third country nationals) has reinforced the role of the individual as a relevant protagonist of European integration.[13] The Union citizen is not a passive subject whose sole destiny is to receive the goods that the internal market provides. Citizens are called to play an active role in the process, a significant voice with the power to condition EU and national policies.[14] The paradigm of EU citizenship was evident in 2010, when the ECJ proclaimed the ability of Article 20 TFEU to protect "the genuine enjoyment of the substance of the rights attached to the status of citizenship". In *Rottmann* and *Ruiz Zambrano,*[15] EU citizenship

10. Shortly after the Charter was solemnly proclaimed (but not enacted as binding law), Piet Eeckhout, in one of the first doctrinal comments of Art. 51(1) of the Charter, used an illustrative title: "The EU Charter of Fundamental Rights and the Federal Question", 39 CML Rev (2002).

11. The paradigm of this case law is Case C-50/00 P, *Unión de Pequeños Agricultores* v. *Council,* [2002] ECR I-6677.

12. Case C-184/99, *Grzelczyk,* [2001] ECR I-6193, para 31, confirmed later in, *inter alia,* Case C-224/98, *D'Hoop,* [2002] ECR I-6191, para 28, and Case C-209/03, *Bidar,* [2005] ECR I-2119, para 31.

13. See O'Leary, *The Evolving Concept of Community Citizenship* (Kluwer Law International, 1996) and Closa, "The Concept of Citizenship in the Treaty on European Union", 29 CML Rev. (1992), 1137.

14. See, in particular, Art. 10 TEU and Arts. 39 to 46 of the Charter, under Title V (Citizens' rights).

15. Case C-135/08, *Rottmann,* [2010] ECR I-1449 and Case C-34/09, *Ruiz Zambrano,* [2011] ECR I-1177.

finally became a self-standing status in the sole possession of the individual, irrespective of a transfrontier link and fully cognizable by all courts. Against this background, the Charter should eventually become a significant part of the said "substance of the rights attached to the status of citizenship".[16]

This article deals primarily with the first of these two issues. The ECJ's early decisions on the Charter show that the federal question has been the main source of its concerns, particularly when dealing with the scope of application of the Charter and its level of protection *vis-à-vis* national fundamental rights. Of course Union citizenship and the content of each individual right have also been at the heart of much controversy in the past years, but it seems obvious that the federal question has attracted most attention because it acts as a premise, a *question préalable,* to all the remaining issues. Thus, the following section addresses the scope of application of the Charter as stated in Article 51(1), a matter dealt with by the ECJ in *Åkerberg Fransson.*[17] It then deals with the level of protection clause, Article 53 of the Charter, as interpreted in *Melloni*[18] and, indirectly, in *Åkerberg Fransson* and *N.S.*[19] It will be argued that the ECJ has created a new framework of "situations" with the purpose of allocating the respective scopes of application and protection of the Charter and of national fundamental rights. Despite some internal incoherence and a fragmented structure that obscures its reading, criticisms addressed later on, the arrangement designed by the ECJ attempts to recognize the strategic role of supreme and constitutional courts, but also assures the autonomy of Member States as well as the Charter's prominent role in fundamental rights protection.

2. Scope of application

Article 51(1) of the Charter refers to the personal and material scope of application of the freedoms, rights and principles therein proclaimed, and it does so in a very conventional way. As to the personal scope, the provision states that the Charter is only addressed to Member States and to EU institutions, bodies, offices and agencies. On the issue of the material scope, the wording of the rule only restricts the applicability of the Charter when referring to Member States, bound by its provisions "only when they are

16. *Ruiz Zambrano,* cited previous note, at para 42. On the link between fundamental rights and the "substance of the rights" test, see Sarmiento, "The Constitutional Core of the European Union", in Saiz Arnaiz and Alcoberro (Eds.), *National Constitutional Identity and European Integration* (Intersentia, 2013).

17. Case C-617/10, *Åkerberg Fransson,* judgment of 26 Feb. 2013, nyr.

18. Case C-399/11, *Melloni,* judgment of 26 Feb. 2013, nyr.

19. Joined Cases C-411 & 493/10, *N.S. and Others,* judgment of 21 Dec. 2011, nyr.

implementing EU Law". Therefore, the rules on the scope of application diverge depending on whether the Charter addresses EU Institutions or Member States.[20]

Since the main focus of this article is on the role of Member States, the EU Institutions are not dealt with in detail. Suffice it here to say that the status of EU Institutions under the Charter is far from settled, as the current euro crisis and the growing tendency towards fragmentation and intergovernmentalism is proving. In *Pringle,* the ECJ confirmed that Member State action under the umbrella of the Treaty establishing the European Stability Mechanism was not an implementation of EU law.[21] As a result, one may wonder what is the role of EU Institutions in the establishment and daily governance of the ESM or, for that matter, in the implementation of the Fiscal Compact, agreements in which EU Institutions play an important yet peculiarly outsourced role.[22] Similar queries concern the applicability of the Charter to certain agreements into which the Union's Institutions can enter, as in the case of Memoranda of Understanding on Specific Economic Policy Conditionality, instruments signed by the European Commission and a Member State subject to a financial assistance programme, pursuant to Article 13(4) of the Treaty Establishing the European Stability Mechanism.[23] Considering the nature of

20. I will not deal here with the issue of horizontal effect of the Charter. For some authors, the enumerated addressees of Art. 51(1) confirms the exclusion of any effects in relationships *inter privatos*. On this issue, see the Opinions of A.G. Cruz Villalón in Case C-176/12, *Association de Médiation Sociale* (nyr) and of A.G. Trstenjak in Case C-282/10, *Dominguez,* judgment of 24 Jan. 2012, nyr.

21. Case C-370/12, *Pringle,* judgment of 27 Nov. 2012, nyr, paras. 179 to 182.

22. The Commission has assumed powers within the Board of Governors and the Board of Directors of the European Stability Mechanism pursuant to Art. 4.4, 5.3, 5.6.g, 6.2, 13, 14.5, 16.5, 17.5 of the Treaty Establishing the European Stability Mechanism; the ECJ has also assumed powers, under Art. 37.3 of the ESM Treaty. As to the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (the Fiscal Compact), the Commission has also received new powers according to Arts. 3, 5, 6 to 8 and 12. Article 8 of the Fiscal Compact grants jurisdiction to the ECJ, while Arts. 4 to 6 give powers to the Council. This attribution of extra-EU powers to EU Institutions has been approved by the ECJ in *Pringle*, cited *supra* note 21, at paras. 155 to 177. The issue of EU institutions' participation in non-EU bodies and its impact in the application of the Charter was already discussed in 2002 by Jacqué, "La Charte des droits fondamentaux de l'Union Européenne. Aspects juridiques généraux", 14 *Revue Européenne de Droit Public* (2002), 110. More recently, see Peers, "Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework", 9 EuConst (2013).

23. So far, the ECJ has declared its lack of jurisdiction to interpret the Memorandum of Understanding signed between the European Commission and Portugal in Case C-128/12, *Sindicato dos Bancários do Norte and Others,* Order of 7 March 2013, nyr. However, the preliminary reference concerned implementing measures prior to Decision 2011/344, on granting Union financial assistance to Portugal. According to Art. 13(3) of the ESM Treaty, "The MoU shall be fully consistent with the measures of economic policy coordination provided for in the TFEU, in particular with any act of European Union law, including any opinion, warning, recommendation or decision addressed to the ESM Member concerned". At

the measures contained in these agreements, but also their impact on ordinary citizens' lives, it is surprising that the issue has remained unchallenged for so long.

However, the main difficulties relate to determining the criteria of application of the Charter to the Member States. The fact that Member States are bound to the Charter "only" when they "implement" EU law puts them under particular pressure, as they are obliged to comply with the rights provided in the Charter, but also with the rights of their internal legal order. This situation raises an issue of distribution of powers between the Union and its Member States, but also of jurisdiction between the ECJ and its national counterparts, guardians of their respective legal orders and, above all, fundamental rights. To this end, the ECJ has built a case law that aims at balancing the need to guarantee Charter rights in Member States, but also safeguarding the autonomy of Member States and their internal instruments of fundamental rights protection.

2.1. *Member States and the implementation of EU law*

2.1.1. *The terms of the debate*

According to Article 51(1), the provisions of the Charter bind Member States "only when they are implementing Union law". The term "implementation" is not an innocent one, as it refers to situations where Member States act as *agents* of the Union, enforcing EU rules. This commonly called "agency situation"[24] appears in contexts of strict implementation of EU law, wherein the Member State acts as a decentralized administration of the EU, for example in the customs union, the common organization of the sugar market, or monetary policy in Eurozone members.[25] However, the ECJ has also stated in a well-established and hardly contested case law that Member States are also bound by EU fundamental rights when acting "within the scope of application" of EU law.[26] This criterion is obviously much wider, exposing Member States more broadly to EU fundamental rights, including when they apply EU rules that grant a wide margin of discretion to Member States. Thus, the fact that Article 51(1) refers, as the "only" relevant criteria, to situations in

the time of writing, another reference was pending before the ECJ, openly stating the link between national austerity measures and Decision 2011/344 (Case C-264/12, *Sindicato Nacional dos Profissionais de Seguros e Afins*).

24. The term comes from Weiler, op. cit. *supra* note 5, pp. 120 et seq.

25. Examples of "agency situations" pre-dating the Charter can be found, *inter alia,* in *Wachauf*, cited *supra*; Case C-2/92, *Bostock,* [1994] ECR I-955, and Joined Cases C-20 & 64/00, *Booker Aquaculture and Hydro Seafood,* [2003] ECR I-7411.

26. See, *inter alia*, *ERT*, cited *supra* note 6; Case C-368/95, *Familiapress,* [1997] ECR I-3689, and Case C-112/00, *Schmidberger,* [2003] ECR I-5659.

which Member States "implement" EU law, led some authors to interpret this provision as a clear signal from the masters of the treaties, by virtue of which the Charter would only apply to Member States when acting in an agency situation, i.e. as a result of strict implementation of EU rules.[27]

However, the issue was not as simple as first appeared. Besides the literal terms of Article 51(1) and the concerns of some members of the two Conventions during the drafting of the Charter,[28] there were many other arguments supporting the preservation of the ECJ's traditional case law which would have led to the applicability of the Charter in *both* "implementation" and "scope of application" situations.[29] First, the explanations to the Charter, whose interpretative authority is proclaimed in Article 6 TEU, state that "it follows unambiguously from the case law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States *when they act in the scope of Union law*".[30] Immediately after, the explanations refer to *Wachauf* and *ERT*, the judgments that best portray the two well-established situations mentioned above. Furthermore, there were some linguistic versions of Article 51(1) that did not refer to "implementation" but to a more vague "application", which

27. In this sense, see Huber, "The Unitary Effect of the Community's Fundamental Rights: the ERT-Doctrine Needs to be Reviewed", 14 EPL (2008). Taking an intermediate stance, but inviting the ECJ to undertake a self-restrained approach to Art. 51(1) contrasting with previous case law, Ladenburger, "Protection of Fundamental Rights post-Lisbon – The interaction between the Charter of Fundamental Rights, the European Convention of Human Rights and National Constitutions" – Institutional Report, FIDE 2012, at p. 14 et seq.; von Danwitz and Paraschas, "A fresh start for the Charter: Fundamental questions on the application of the European Charter of Fundamental Rights", 35 *Fordham International Law Journal* (2012), pgs. 1399 et seq., and Nusser, *Die Bindung der Mitgliedstaaten an die Unionsgrundrechte*, Mohr Siebeck, 2011. Taking a broader view, see Craig, *EU Administrative Law*, 2nd ed. (OUP, 2012), pp. 446 et seq.; Kokott and Sobotta, "The Charter of Fundamental Rights of the European Union after Lisbon", EUI Working Papers, Academy of European Law, No. 2010/06, p. 6 et seq., and Groussot, Pech and Petursson, "The Scope of Application of EU Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication", Eric Stein Working Paper 1/2011. For an overall vision of the debate, see the ECJ's Special Edition of its *Bulletin Reflet* 2013/1, devoted to the Charter, and in particular pp. 43 et seq.

28. Although some members of the first Convention were determined to restrict the scope of application of the Charter (see the authoritative account of Braibant, *La Charte des Droits Fondamentaux de l'Union Europénne*, Seuil, 2001 pp. 251–252), such determination was not so clear on the part of other members, as is the case of Mr Vitorino, representative of the Commission, who qualified the language of Art. 51(1) as a "stylistic precaution". See Vitorino, "The Charter of Fundamental Rights as a foundation for the Area of Freedom, Security and Justice", Exeter Paper in European Law No. 4, Exeter, 2001, p. 17.

29. In this line of reasoning, see the Opinion of A.G. Bot in Case C-108/10 *Scattolon* (not yet reported), paras. 180–120.

30. Italics added.

could be interpreted as a *via media* between the *Wachauf* and *ERT* lines of case law.[31]

Prior to the principled decision in *Åkerberg Fransson*, the ECJ sent a few somewhat contradictory messages when dealing with this issue.[32] In *Iida,*[33] for example, a case on free movement of persons, paraphrasing a scarcely quoted case law from the 1990s (part of which was, however, referred to in the explanations to Art. 51(1)),[34] a five judge chamber stated that in order to ascertain whether a Member State "implements" Union law in the sense of Article 51(1), the following criteria should be considered: "whether the national legislation at issue is intended to implement a provision of European Union law, what the character of that legislation is, and whether it pursues objectives other than those covered by European Union law, even if it is capable of indirectly affecting that law, and also whether there are specific rules of European Union law on the matter or capable of affecting it".[35] However, in *Dereci*,[36] also a free movement of persons case, the Grand Chamber declared that the applicability of the Charter depended on whether "in the light of the circumstances of the disputes in the main proceedings, … the situation of the applicants in the main proceedings is covered by European Union law",[37] thus disregarding the very specific requirements concerning nature, content and purpose of EU and domestic rules enumerated in *Iida*.

The debate was resolved by the Grand Chamber in *Åkerberg Fransson*, a case concerning the applicability of Article 50 of the Charter to the national enforcement mechanisms of the VAT Directive. Article 22 of the Directive allows Member States to "impose other obligations which they deem necessary for the correct collection of the tax and for the prevention of evasion". In Sweden, a system of double administrative and criminal penalties allowed judges to impose criminal sanctions on persons who had already been sanctioned definitively by the tax authorities. Although the judge in the criminal proceedings was empowered to deduct the administrative penalty from the criminal sanction, the system was questioned in light of the *ne bis in idem* principle, as enshrined in Article 50 of the Charter.

31. That is the case of the Spanish version ("aplicar"), as well as the Finnish ("soveltavat") and the Swedish version ("tillämpar"), as highlighted by Rosas and Kaila, "L'application de la Charte des droits fondamentaux de l'Union Européenne par la Cour de Justice: un premier bilan", 16 *Il Diritto dell'Unione Europea* (2011), 19.

32. See Rosas and Armati, *EU Constitutional Law. An Introduction,* 2nd ed. (Hart Publishers, 2012), pp. 166–167.

33. Case C-40/11, *Iida,* judgment of 8 Nov. 2012, nyr.

34. Case C-309/96, *Annibaldi,* [2007] ECR I-7493.

35. *Iida*, at para 79.

36. Case C-256/11, *Dereci and Others,* judgment of 15 Nov. 2011, nyr.

37. *Dereci*, at para 72.

The circumstances of *Åkerberg Fransson* were at the fringes of Article 51(1) of the Charter. The national judge would be imposing a sanction on a person infringing the rules of an EU harmonized tax, VAT, probably the paradigm of an exhaustively EU regulated tax and the revenues from which, furthermore, make up a significant share of the Union's own resources. On the point of enforcement, however, it was also self-evident that Member States enjoy a wide margin of discretion, not only in light of their procedural autonomy, but also as a result of the ambiguous terms of Article 22 of the then applicable Sixth VAT Directive. Member States are allowed to impose punitive measures on individuals in order to prevent tax evasion, but do those measures also have to be in conformity with the Charter? In its reply to this query, the ECJ gave a coherent answer by means of four criteria that can be catalogued as follows.

2.1.2. *No relevant distinction between "implementation" and "scope of application"*

The ECJ came to the conclusion that Article 50 of the Charter was applicable to a situation like that in *Åkerberg Fransson.* In a principled and detailed judgment, the ECJ solved the apparent tension between the "implementation" and "scope of application" situations by confirming its previous case law and thus asserting that the Charter had not in any way changed the criteria of applicability of EU fundamental rights from prior to 1 December 2009. In the words of the ECJ, Article 51(1) "thus confirms the Court's case law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union".[38]

This decision makes sense. It is obvious that if the Charter's aim was to overrule the ECJ's pre–2009 case law on the scope of application of fundamental rights, it would have done so in unambiguous terms. If the Charter was enacted to make visible and to reinforce the protection of the fundamental rights of individuals, a regressive decision concerning its scope of application would have been of such relevance that it would have required a clear statement on the part of its drafters. No such statement is to be found throughout its provisions; quite the opposite. The ambiguity that flows from the sum of Article 51(1) and the explanations, the lack of clear and consensual indications during the debates in both Conventions, and the diversity of linguistic versions of Article 51(1), were sufficient proof that the Charter was not in the business of changing the ECJ's case law on this point.[39] As the Advocate General held in his Opinion in *Åkerberg Fransson*, if the ECJ was to

38. *Åkerberg Fransson,* at para 18.
39. See references in footnotes 28 and 31 *supra*.

declare the inapplicability of the Charter in the case at hand, a revision of its previous and consolidated case law would have been needed, since the Charter did not provide conclusive arguments in favour of an overruling. The ECJ agreed on this point with its Advocate General, although it disagreed when declining his invitation to perform such an overruling in the circumstances of *Åkerberg Fransson.*[40]

2.1.3. *No areas of EU law foreign to the Charter*

By refusing to embrace a regressive interpretation of Article 51(1) of the Charter, the ECJ also rejects the possibility that Member States might act within the scope of application of EU law but with no duty to respect the Charter. A strict interpretation of Article 51(1) would have confirmed the existence of areas in which EU law would be applicable, but not the Charter. The ECJ has clearly rejected this scenario in *Åkerberg Fransson*, and for this purpose it stated that "situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable".[41] In one of the most powerful passages of the judgment, the ECJ bluntly concluded: "the applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter".[42] In the expressive terms used by Lenaerts and Gutiérrez-Fons commenting this passage, the Charter thus becomes the "shadow" of substantive EU rules.[43]

2.1.4. *No Member State acts foreign to the Charter*

The same rationale applies also to Member States when they apply EU law. In *Åkerberg Fransson*, one of the arguments of the Member States in support of the purely internal character of the case was that Swedish criminal law was not a transposition measure of the Sixth VAT Directive. In their opinion, Member State action that is not intended to be an "implementation" of EU law (although it might indirectly serve such purpose) should not be considered "implementation" in the sense of Article 51(1) of the Charter. We can find some support for this argument in the aforementioned case of *Iida*, a five-judge chamber judgment rendered shortly before *Åkerberg Fransson*, where the ECJ pointed, among other criteria, at the importance of "whether the national legislation at issue is intended to implement a provision of European Union law".

40. Opinion of A.G. Cruz Villalón in *Åkerberg Fransson,* at para 5.
41. *Åkerberg Fransson,* at para 21.
42. *Ibidem*.
43. Lenaerts and Gutiérrez-Fons, "The Place of the Charter in the EU Constitutional Edifice", in Peers, Hervey, Kenner and Ward (Eds.), *The EU Charter of Fundamental Rights. A Commentary* (Hart Publishers, 2013). On this passage of the judgment, see also Hancox, annotation of *Åkerberg Fransson*, 50 CML Rev.; (2013), 1411–1432.

In *Åkerberg Fransson,* the ECJ's Grand Chamber departed from *Iida* and rejected the Member State's position, concluding that "the fact that the national legislation upon which those tax penalties and criminal proceedings are founded has not been adopted to transpose Directive 2006/112 cannot call that conclusion into question, since its application is designed to penalize an infringement of that directive and is therefore intended to implement the obligation imposed on the Member States by the Treaty to impose effective penalties for conduct prejudicial to the financial interests of the European Union". Therefore it is not the *intention* of the State, but the *function* of the State act regarding the implementation of EU law which matters.[44] The ECJ thus relies on the effect and not the cause of Member State action, a criterion that is perfectly coherent with the need effectively to guarantee Charter rights. Otherwise, the protection of those rights would be avoided by a simple statement of the concerned Member State denying that its original purpose was to implement EU law.

2.2. *"Triggering rules"*

The judgment in *Åkerberg Fransson* provides relevant criteria concerning the interpretation of Article 51(1) of the Charter. However, the judgment does not codify the different links that the ECJ has developed throughout the years in determining when Member States "implement" EU law. After *Åkerberg Fransson*, we know that "implementation" in the sense of Article 51(1) also refers to situations within "the scope of application" of EU law. However, we are still missing the overall picture.

Although such picture might not be found in one single judgment, the ECJ's recent case law is providing some resources that help to construct a list of criteria to trigger the application of the Charter. If Member States only need to apply the Charter when they "implement" EU law, in the sense settled by the ECJ in *Åkerberg Fransson*, such an implementation will imply that there is a substantive rule of EU law governing the facts of the case. This means that all cases concerning the Charter will need as an essential precondition to its application the existence of a substantive rule of EU law, what Ladenburger has defined as "*a concrete norm of EU law applied*".[45] I will call such EU

44. It must be added that this outcome is coherent with the ECJ's case law concerning the obligation of consistent interpretation of national law in light of Directives. Since the judgment in the seminal case of *Marleasing* (Case C-106/89 [1990] ECR I-4135), it is clear that national courts must interpret not only the domestic rules transposing the Directive (i.e., those notified by the Member State to the Commission), but *the entire domestic legal order* in search of a consistent interpretation. This was openly stated in the Grand Chamber judgment in Joined Cases C-397-403/01, *Pfeiffer and Others,* [2004] ECR I-8835), at para 115.

45. Ladenburger, op. cit. *supra*, p. 16 (italics added).

norm the "triggering rule", for it acts as a catalyst for the application of the Charter by Member States. In light of the ECJ's case law, such triggering rules can be catalogued into three groups, which I will call mandating rules, optioning rules and remedial rules.[46] Also, as the reverse side of the same coin, there are exclusionary rules acting as *negative* triggers, for they point at areas where EU rules do not apply at all.

2.2.1. *Mandating rules*

A Member State will be "implementing" EU law in the sense of Article 51(1) of the Charter when it acts under an express mandate contained in a rule of EU law. The "mandating rule" orders the Member State or States to undertake a specific activity. It is thus a mandate to attain goals *through specific means*. When acting pursuant to the said mandate, a Member State will be "implementing" EU law and thus will be subject to the provisions of the Charter.

Åkerberg Fransson is an example of such a mandate, whereby Member States act under the obligation, pursuant to Article 22 of the Sixth VAT Directive (now Art. 273 of Directive 2006/112), to ensure that every taxable person submits a VAT return by a deadline to be determined by Member States. Since the Member States are also, according to Article 325 TFEU, under the obligation to take effective and deterring measures to counter fraud affecting the financial interests of the EU, it is therefore clear that a national punitive criminal reaction to a breach of these provisions constitutes an "implementation" of EU law.

The mandate might grant a broad margin of Member State discretion or no discretion at all, depending on the terms of the EU rule. This will have consequences when it comes to determining the level of protection, an issue examined below (section 3). But in order to determine the application of the Charter, what the mandating rules require for the purposes of Article 51(1) is that they contain a clear obligation, as to the goals and/or the means addressed to the Member State. The use in the norm of imperative verbs like "shall", "will" or "must" are obvious indicators of an obligation acting as a mandating rule. The same will result when the mandating rule grants an individual right *vis-à-vis* the Member State; the mandate will be equally present, but as a result of the exercise of the right by the individual.

46. A proposal inspired by Safjan, "Areas of application of the Charter of Fundamental Rights of the European Union: Fields of conflict?" EUI WP Law 2012/22, pp. 7–12, who distinguishes, under the category of "gear mechanisms", between a "mechanism of complementarity", a mechanism of effectivity and a mechanism based on a "close functional relationship".

Cases concerning national criminal or administrative sanctions are good examples of such mandating rules, inasmuch EU law frequently contains provisions requiring Member States to ensure an effective enforcement of a regulated area of EU policy.[47] The same applies to equality law, an area in which EU Directives mandate a goal through specific means, thus allowing the Charter's rules on equality to play a role when Member States implement these directives.[48] Other examples can also be found in the ECJ's post-Charter case law. For example, *S.C.*[49] concerned the interpretation of Article 28(1) of Regulation 2201/2003,[50] according to which "a judgment on the exercise of parental responsibility in respect of a child given in a Member State which is enforceable in that Member State and has been served shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there". The mandate addressed to the Member State ordering enforcement of the judgment must be complied with in conformity with the Charter, as in *S.C.,* where the ECJ scrutinized Member State action in light of Articles 6 and 24 of the Charter.[51] In *Dülger,*[52] the ECJ was called to interpret Article 7 of Decision No 1/80 on the development of the Ankara Agreement. This provision establishes the principle that members of the family of a Turkish worker who are not nationals of a Member State have the right to accompany or join him or her in the host Member State. When the worker exercises this right, Member States act within the mandate of Article 7 and, as in *Dülger,* they must comply *inter alia* with Article 7 of the Charter.[53]

2.2.2. *Optioning rules*

Member States may find themselves implementing an exhaustively regulated area by EU law, but explicitly receiving by virtue of those rules the possibility of making a choice. If the Member State decides voluntarily to follow such

47. The case law of the ECJ previous to the entry into force of the Charter is abundant. See, *inter alia,* the judgments in Case 8/77, *Sagulo and Others,* [1977] ECR 1495; Case C-326/88, *Hansen,* [1990] ECR I-2911; Case 68/88, *Commission* v. *Greece,* [1989] ECR 2965; Case C-7/90, *Vandevenne and Others,* [1991] ECR I-4371, and Case C-262/99, *Louloudakis,* [2001] ECR I-5547. After the entry into force of the Charter, the same rationale has been applied, as seen in Case C-546/09, *Aurubis Balgaria,* [2011] ECR I-2531 and Case C-210/10, *Urbán,* judgment of 9 Feb. 2012.

48. See, *inter alia*, Cases C-555/07, *Kücükdeveci,* [2010] ECR I-365; Case C-447/09, *Prigge,* [2011] ECR I-8003 and Case C-141/11, *Hörnfeldt,* judgment of 5 July 2012, nyr.

49. Case C-92/12 PPU, *Health Service Executive* v. *S.C.,* judgment of 26 April 2012, nyr.

50. Council Regulation (EC) No 2201/2003 of 27 Nov. 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (O.J. 2003, L 338/1).

51. *S.C.,* cited *supra*, at paras. 111 and 127.

52. Case C-451/11, *Dülger,* judgment of 19 July 2012, nyr.

53. In *Dülger*, at paras. 52 and 53.

course, the decisions it will eventually make will be considered "implementation" in the sense of Article 51(1) of the Charter.

An example of an optioning rule can be found in *N.S.,*[54] in which the ECJ was called to interpret Article 3(2) of Regulation 343/2003, on the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in a Member State.[55] Article 3(2) introduces an exception to the general rule by stating that a Member State "may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation". The Member State is not under an obligation to examine the application; it acts pursuant to a discretionary power granted by the Regulation. According to the ECJ, this power "forms part of the mechanisms for determining the Member State responsible for an asylum application provided for under that regulation and, therefore, merely an element of the Common European Asylum System".[56] Inasmuch as the power forms part of a broader general regulatory framework of EU law, the ECJ came to the conclusion that "a Member State which exercises that discretionary power must be considered as implementing European Union law within the meaning of Article 51(1) of the Charter".[57]

Another example can be found in *Pupino*.[58] Under the Italian legislation at issue in the main proceedings, testimony given during the preliminary enquiries in a criminal procedure must generally be repeated at the trial in order to acquire full evidential value. However, Italian law allowed in certain cases to give that testimony only once, during the preliminary enquiries, with the same probative value. Member States were not under an obligation to enforce such exceptions as a result of Framework Decision 2001/220 on the standing of victims in criminal proceedings. But once a Member States decides freely to make use of this exception, it is subject to EU fundamental rights.[59]

2.2.3. *Remedial rules*

One of the most prominent features of EU law applied by the Member States is its ability to empower national judges for the purpose of guaranteeing the effectiveness of the rights and obligations derived from EU law. In a

54. *N.S. and Others,* cited *supra* note 19.

55. Council Regulation (EC) No 343/2003 of 18 Feb. 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (O.J. 2003, L 50/1).

56. *N.S.*, cited *supra*, para 68.

57. Ibid.

58. Case C-105/03, *Pupino,* [2005] I-05285.

59. *Pupino*, cited *supra*, paras. 55 and 56.

well-established case law,[60] the ECJ has developed a wide array of EU-made remedies in the hands of national judges, including damages actions,[61] interim measures,[62] access to justice,[63] or procedural guarantees.[64] This case law is based on the principle of loyal cooperation (Art. 4 TEU), but also on the new provision contained in Article 19 TEU, according to which "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law". Furthermore, the ECJ has developed the principles of effectiveness and equivalence, through which it scrutinizes national procedural rules that hinder the exercise of EU rights before domestic courts.[65] The overall framework that emerges from this case law is one of strict submission of Member States to EU remedies. This submission is mostly restricted to the domain of national procedural law, but it nevertheless constitutes an area of major relevance for the Charter, since it is mainly before national courts that fundamental rights are to be guaranteed.

After the entry into force of the Charter, the ECJ kept its case law on remedies unchanged in substance. However, as a result of some of the Charter's provisions, particularly Article 47, there has been a considerable increase of judgments in which the ECJ addresses an issue concerning a previously confirmed remedy, or the principle of effectiveness or equivalence, having regard also or exclusively to the Charter. This trend is not only putting considerable pressure on the autonomy of the principle of effectiveness (one could wonder if this principle is being cannibalized by Art. 47 of the Charter),[66] but it has also reinforced the already existing remedies. Overall, when individuals exercise EU rights before national courts, the judicial

60. For a general prospect, see Dougan, *National remedies before the Court of Justice: issues of harmonisation and differentiation* (Hart Publishing, 2004), and Slaughter, Stone Sweet and Weiler (Eds.), *The European Courts and National Courts: Doctrine and Jurisprudence* (Hart Publishing, 1998).

61. See, *inter alia,* Joined Cases C-6 & 9/90, *Francovich and Others,* [1991] ECR I-5357, para 35, and Joined Cases C-46 & 48/93, *Brasserie du Pêcheur and Factortame,* [1996] ECR I-1029, para 31.

62. See, *inter alia*, Case C-213/89, *Factortame and Others,* [1990] ECR I-2433, para 21, and Case C-432/05, *Unibet,* [2007] ECR I-2271, para 67.

63. See, *inter alia*, Case 222/84, *Johnston,* [1986] ECR 1651, paras. 18 and 19; Case 222/86, *Heylens and Others,* [1987] ECR 4097, para 14; Case C-50/00 P, *Unión de Pequeños Agricultores* v. *Council,* [2002] ECR I-6677, para 39; and *Unibet*, cited previous note, para 37.

64. See, *inter alia*, Case 322/81, *Nederlandsche Banden-Industrie-Michelin* v. *Commission,* [1983] ECR 3461 para 7, and Case C-69/10, *Samba Diouf,* [2011] ECR I-7151, para 35; and Case C-277/11, *M.,* judgment of 22 Nov. 2012, nyr.

65. See, *inter alia,* Case 33/76, *Rewe-Zentralfinanz and Rewe-Zentral,* [1976] ECR 1989, and Joined cases C-430 & 431/93, *Van Schijndel and Van Veen,* [1995] ECR I-4705, para 17.

66. On the distinction between the principles of effectiveness and Art. 47 of the Charter, see Prechal and Widdershoven*, "*Effectiveness or Effective Judicial Protection: A Poorly Articulated Relationship", in *Today's Multilayered Legal Order: Current Issues and Perspectives. Liber Amicorum in Honour of Arjen W.H. Meij* (Paris Legal Publishers, 2011).

itinerary leading to the court's final judgment is to be considered "implementation" in the sense of Article 51(1) of the Charter.

In *DEB,*[67] the ECJ was questioned by the *Kammergericht* about the conformity with the principle of effectiveness of a national rule that subjected the exercise of a damages action for breach of EU law to the making of an advance payment in respect of costs. Furthermore, the claimant in the case was a legal person, and under the national rules legal persons did not qualify for legal aid. As can be seen, *DEB* did not concern the rules governing the substantive right of the claimant, but the national procedural rules allowing the exercise of such right before national courts. In these circumstances, the ECJ reformulated the question of the German referring court and analysed the case in light of Article 47 of the Charter.[68] Although the ECJ came to the conclusion that German law was in conformity with Article 47, it also resulted that the *Kammergericht*, when deciding on the issue of costs and legal aid, was "implementing" EU law pursuant to Article 51(1) of the Charter.[69]

Shortly after *DEB,* the ECJ faced a similar setting in *Otis,*[70] a case decided by the Grand Chamber in which a delicate issue on the independence of national courts was raised. In a rather kafkaesque turn of events, a Belgian court made a reference to the ECJ asking whether it was compatible with the Charter that the Commission brings a damages action against a private party for breach of EU competition law. In the case at hand, the breach of EU competition rules had been previously declared by the Commission by way of a Decision stating the incompatibility of an agreement with Article 101 TFEU. One of the parties to the agreement was the defendant in the main proceedings, which had sold its products to various EU Institutions, including the Commission. Following the ECJ's judgment in *Masterfoods,*[71] Commission decisions in the area of competition bind the national judge hearing a damages action for breach of EU competition law. However, the referring judge doubted if it was compatible with the Charter that the claimant in the proceedings had the power to issue decisions binding the judge on a crucial point of law. As in *DEB*, the ECJ decided that the circumstances raised in *Otis* did not constitute a breach of Article 47 of the Charter.[72] However, by admitting the conformity of national procedural law with the Charter, the ECJ was also confirming that the Belgian court was "implementing" EU law when determining the scope of its own jurisdiction in light of its internal procedural

67. Case C-279/09 *DEB* [2010] ECR I-13849.

68. *DEB*, cited *supra*, paras. 28 to 33.

69. The ECJ reached the same result, but answered by way of a reasoned order, in Case C-156/12, *GREP,* Order of 13 June 2012, nyr.

70. Case C-199/11, *Otis and others,* judgment of 6 Nov. 2012, nyr.

71. Case C-344/98, *Masterfoods,* [2000] ECR I-11369.

72. *Otis*, cited *supra*, para 56 et seq.

rules. In the ECJ's own words: "When [the] right [to claim compensation for the damages suffered] is exercised, however, the fundamental rights of the defendants, as safeguarded, *inter alia*, by the Charter, must be observed".[73]

2.2.4. *Exclusionary rules*

It is also important to highlight that EU rules may contain provisions that exclude certain areas of Member State action from their scope of application. Since these provisions act as exceptions, they must be construed restrictively. The EU rule must be clear and unconditional as to its exclusionary purpose. But once the exclusion is construed, it is obvious that the Member States are not "implementing" EU law when acting within the said exclusion. Therefore, exclusionary rules appear as a useful accessory that complements the triggering rules, delimiting in the negative the areas of influence of EU law and, consequently, of the Charter.

For example, Directive 95/46/EC on the protection of individuals with regard to the processing of personal data,[74] states in Article 3 that its provisions "shall not apply" to the processing operations concerning "security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law". This is a clear and unconditional provision excluding the applicability of EU law on personal data protection, including the Charter, from the said areas of Member State action. The same can be found in the area of public procurement, where Directive 2004/18[75] excludes in Articles 15 to 18 a number of contracts from its scope of application. In other cases the exclusion might concern a specific fundamental right, as in the case of Directive 2010/64 on the right to interpretation and translation in criminal proceedings.[76] According to Article 1(4) of the Directive, none of its provisions "affect national law concerning the presence of legal counsel during any stage of the criminal proceedings, nor [do they] affect national law concerning the right of access of a suspected or accused person to documents in criminal proceedings", thus excluding scrutiny in light of Article 47 of the Charter when Member States "implement" Directive 2010/64.

73. *Ibid*., para 45. See also Case C-93/12, *Agrokonsulting,* judgment of 27 June 2013, nyr, paras. 59–61.

74. Directive 95/46/EC of the European Parliament and of the Council of 24 Oct. 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (O.J. 1995, L 281/31).

75. Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (O.J. 2004, L 134/114).

76. Directive 2010/64/EU of the European Parliament and of the Council of 20 Oct. 2010 on the right to interpretation and translation in criminal proceedings (O.J. 2010, L 280/1).

2.3. *Somewhere beyond the Charter*

The judgments mentioned so far show how the triggering rules act as a necessary premise when invoking Charter rights in Member States. However, another valuable source can be found in the ECJ's orders refusing jurisdiction. The ECJ tends to avoid developing substantive points of law in orders, a task it will reserve for judgments. But despite the absence of any principled statements, the cases solved by way of an order interpreting Article 51(1) of the Charter confirm how the triggering rules work, particularly when none are to be found in a specific case. This is a common scenario when the claimant unsuccessfully invokes the existence of a mandating rule, or when he or she raises a procedural point in absence of a right based on EU law. If the ECJ comes to the conclusion that the claimant's situation is not within the scope of the mandating rule, or that there is no right whatsoever involved in the case, the Member State will not be considered to be "implementing" EU law in the sense of Article 51(1) of the Charter.

The ECJ considered there was no mandating rule in *Vino,*[77] a case in which an Italian court questioned the legality of the terms of fixed-time working contracts in the postal sector, deemed to be discriminatory in contrast with the conditions in other sectors. According to the Italian court, the mandating rule that triggered the Charter was clause 4 of the Framework Agreement in Directive 1999/70, concerning fixed-term work.[78] The ECJ disagreed, as the Directive only concerns situations of discrimination between fixed-term workers and "comparable permanent workers". Because the referring court was comparing the conditions of fixed-term working contracts with other companies and not with permanent workers, the potential discrimination was not within the scope of EU law. In *Sindicato Bancarios do Norte,*[79] the triggering rule invoked was a Memorandum of Understanding between the Commission and Portugal. The ECJ seemed to admit that the Memorandum was not an act of EU law, at least not at the specific time in which the national contested measures were enacted; thus Portugal could not be subject to the Charter.[80] The reduction of police officers' salaries in Romania was also deemed to lack a triggering rule justifying the applicability of the Charter.[81] As for Luxembourg nationals invoking EU immigration rules before Luxembourg authorities in order to benefit from family reunification measures, in

77. Case C-161/11, *Vino,* [2011] ECR I-91.

78. Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (O.J. 1999, L 175/43).

79. *Sindicato Bancarios do Norte,* cited *supra* note 23.

80. See Ibid, para 12.

81. Orders of the Court in Case C-134/12, *Corpul,* 10 May 2012, nyr, Case C-462/11, *Cozman*, 14 Dec. 2011, nyr, and Case C-434/11, 14 Dec. 2011, *Corpul,* nyr.

Ymeraga,[82] the ECJ reached the conclusion that Luxembourg was not "implementing" EU law: the family reunification and residence directives did not apply to the case, and nor did the free movement rule of Article 21 TFEU, nor the "substance of the rights test" of Article 20 TFEU.[83]

As was stated above, the remedial rule cannot trigger Charter rights if there is no right granted by EU law to be invoked before a national court. This was the case in the *Chartry* saga,[84] several references questioning the obligation of Belgian courts to refer to the Constitutional court before making a preliminary reference to the ECJ. Because the rights involved in each case had no link at all with EU law, the ECJ was unable to rule on the conformity of the Belgian procedural rules with Article 47 of the Charter. In contrast to the circumstances in *DEB*, the claimants in the cases of *T*, *Loreti*, *Gentile* and *Pedone*[85] challenged the Italian rules of legal aid, but they did so in the absence of a link with EU law. The ECJ stated that the Italian referring court was not "implementing" EU law and denied the application of the Charter. The ECJ arrived at the same result in *Currà,*[86] where the claimants questioned the immunity of the German State before Italian courts in claims about war crimes committed during the Second World War. The substantive right invoked before the national courts was not based on EU law, so any procedural limitation was exempt from scrutiny under Article 47 of the Charter.[87]

3. Level of protection

Whilst Article 51(1) of the Charter traces the border for determining its applicability, Article 53 introduces the terms through which the Charter interacts with national fundamental rights in areas of concurrent application of both legal orders. At first sight the provision appears to be a traditional

82. Judgment in Case C-87/12 *Ymeraga,* judgment of 8 May 2013, nyr.

83. In the same line, see the judgment in Case C-27/11 *Vinkov,* judgment of 7 June 2012, nyr, and the Order in Case C-14/13, *Cholakova*, Order of 6 June 2013, nyr.

84. Orders of the Court in Case C-312/12, *Ajdini,* Order of 21 Feb. 2013, nyr; Case C-538/10, *Lebrun,* [2011] ECR I-137*, Summ.pub; Case C-314/10, *Pagnoul,* [2011] ECR I-136*, Summ.pub; Case C-457/09, *Chartry* [2011] ECR I-819), and Case C-267/10, *Rossius* [2011] ECR I-81*, Summ.pub.).

85. Orders of the Court in Case C-73/13 *T,* Order of 8 May 2013, nyr; Case C-555/12, *Loreti,* Order of 14 March 2013, nyr; Case C-499/12 *Gentile,* Order of 7 Feb. 2013, nyr; and Case C-498/12, *Pedone,* Order of 7 Feb. 2013, nyr.

86. Order of the Court in Case C-466/11, *Currà,* Order of 12 July 2012, nyr.

87. Order of the Court in Joined Cases 483 & 484/11, *Boncea and others*, Order of 14 Dec. 2011, nyr, and Case C-339/10, *Estov,* [2010] ECR I-11465.

minimum standard clause, well known in international human rights law.[88] However, because of the peculiar traits of EU law, Article 53 has been interpreted by the ECJ as something more than a minimum standard clause, coming closer to a conflict of laws rule in the area of fundamental rights.[89] The way in which this rule works has been recently portrayed in *Melloni* and *Åkerberg Fransson*, where the ECJ introduced an important distinction that conditions how the two systems of fundamental rights, of the EU and of the Member States, interact when solving a case which comes within the scope of EU law. In order to describe this doctrine I will use a term that EU lawyers are familiarized with: "situations".[90] By distinguishing three different "situations", I address the diverging scenarios expressly mentioned in the judgments of *Melloni* and *Åkerberg Fransson*, followed by the legal consequences that each "situation" entails.

According to the ECJ's case law, once the Charter is confirmed as "applicable" to a Member State under Article 51(1), the following step is to determine if the Charter right at hand is able to effectively "protect" the individual. This second enquiry is based on Article 53 of the Charter, according to which none of its provisions "shall 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". The provision adds, regarding international agreements and domestic law, that the said human rights instruments include the ECHR, and "the Member States' constitutions".

88. Art. 53 finds its direct source of inspiration in Art. 53 ECHR. There are, however, other relevant references, mostly Art. 5.2 of the International Covenant on Civil and Political Rights, Art. 5.2 of the International Covenant on Economic, Social and Cultural Rights, or Art. 29 of the American Convention on Human Rights. On the influence of these provisions on Art. 53 of the Charter, see Alonso García "The Horizontal Provisions of the Charter of Fundamental Rights of the European Union" 8 ELJ (2002), 507 et seq., and Bering Liisberg, "Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?" 38 CML Rev. (2001), 1183 to 1188.

89. Before the ECJ's decisions in *Melloni* and *Åkerberg Fransson,* the literature was divided on the scope and meaning of Art. 53. See, *inter alia,* the diverging positions of Alonso García, op. cit. previous note, 507 et seq., and Bering Liisberg, op. cit. previous note, 1189 et seq.; Azoulai, "Article II-113" in Burgorgue, Levade and Picod, *Traité établissant une Constitution pour l'Europe* (Bruylant, 2005), p. 689. Prior to the enactment of Art. 53, but addressing the issue as well, see Besselink, "Entrapped by the maximum standard: on fundamental rights, pluralism and subsidiarity in the European Union", 35 CML Rev. (1998), 629.

90. Besides the fact that the ECJ uses the term "situation" when referring to cases in the scope of application of EU fundamental rights, see, *inter alia*, Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights", 8 EuConst (2012), 376–387 and Iglesias Sánchez, op. cit. *supra* note 2, 1583 et seq.

In *Melloni* and *Åkerberg Fransson*, the ECJ interpreted Article 53 such that Charter rights and domestic fundamental rights interact in different ways depending on whether EU law has completely or only partially "determined" the Member State's action. The notion of "determination" is to be understood as a concept equivalent to that of *discretion*. Thus, when EU law completely determines the Member State's action, there is no discretion granted to Member States in fulfilling EU obligations. On the contrary, when EU law only partially determines Member State action, the Member State may implement EU law making use of a discretionary margin of manoeuvre. In the first "situation", the Charter displaces national fundamental rights, with the exceptions that will be examined later. In the second "situation", national fundamental rights can be the relevant reference, unless the Charter's rights provide a higher standard of protection. There is also a third "situation" still to be resolved in the ECJ's case law: Member State action derogating from fundamental freedoms, an area subject to the authority of the *ERT* judgment, where a principled decision is still awaited. Further "situations" could be addressed, but for the time being the case law appears to be dealing with these three. Overall, the current portrait provides further clarity in the allocation of tasks between the EU and national legal orders, drawing a separation of normative and jurisdictional powers inspired, as will be argued below, by those of federal systems.

3.1. *Situation 1: Complete determination*

In regulatory scenarios where EU law, as interpreted by the Court, has completely determined the way in which Member States must act, it follows that the Charter displaces national fundamental rights. In these circumstances, the Charter is the sole relevant fundamental rights instrument applicable, with the exception of the ECHR and of the exceptions that will be developed further. This is the conclusion that results from *Melloni*, a preliminary reference, whereby the Spanish Constitutional Court questioned, in light of Article 53 of the Charter, whether its own case law precluding the surrender of persons convicted *in absentia* in another Member State superseded Framework Decision 2002/584 on the European arrest warrant and the surrender procedures between Member States. The Spanish Constitutional Court's case law was considerably more protective of the individual, but clearly clashed with Article 4a(1) of the Framework Decision, which imposed an unqualified surrender once a series of procedural conditions had been guaranteed. In the case of *Melloni*, such guarantees had been fulfilled, but

under the Spanish Constitutional Court's case law Mr Melloni could still not be surrendered to the Italian authorities.[91]

The ECJ's judgment in *Melloni* starts with an analysis of the validity of Article 4a(1) of Framework Decision 2002/584 in the light of Article 47 of the Charter, following closely the ECHR's case law on the matter. Once the ECJ confirmed the provision's compatibility with Article 47, it turned to Article 53 of the Charter, in line with the Spanish Constitutional Court's query, and stated that "where an EU legal act calls for national implementing measures, *national authorities and courts remain free to apply national standards of protection of fundamental rights* … ".[92] However, the ECJ immediately highlighted the fact that Article 4a(1) of Framework Decision 2002/584 "does not allow Member States to refuse to execute a European arrest warrant when the person concerned is in one of the situations provided for therein".[93] Because the Member State is deprived of discretionary choices by this rule, a conclusion that results not only from the literal text of Article 4a(1) but also from the goals of Framework Decision 2002/584, the ECJ came to the conclusion that Spain could not rely on Article 53 of the Charter in order to justify a derogation.

This outcome is confirmed in *Åkerberg Fransson*, issued (not coincidentally) on the very same day as *Melloni*. In paragraph 29 of the judgment in *Åkerberg Fransson*, making an explicit reference to this passage of *Melloni*, the ECJ stated that "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* … national authorities and courts remain free to apply national standards of protection of fundamental rights … "[94] *Åkerberg Fransson* depicts the opposite scenario, one in which Member States do enjoy sufficient discretion, but it indirectly confirms the solution in *Melloni*. In *Åkerberg Fransson*, the Member State benefited from a margin of manoeuvre granted by EU law, thus becoming free to apply national standards of fundamental rights. On the contrary, in *Melloni*, the Member State was deprived of such margin, making the Charter the sole relevant fundamental rights reference.

The outcome offered by the ECJ introduces a variable to the federal doctrine of pre-emption. Federal systems rely on this doctrine in areas of shared competence, assuring the normative and executive powers of the States as long

91. The Spanish context of the case has been described in detail by Torres Perez, "Constitutional Dialogue on the European Arrest Warrant: The Spanish Constitutional Court knocking on Luxembourg's Door", 8 EuConst (2012), 82.

92. *Melloni*, cited *supra*, para 60 (emphasis added).

93. Ibid, para 61.

94. Emphasis added.

as federal authorities do not exercise their own, but pre-empting the powers of the States once the federal authorities make use of them.[95] In *Melloni* and *Åkerberg Fransson* the ECJ has confirmed the shared nature of fundamental rights protection, guaranteeing Member State action in areas not previously pre-empted by EU law. Recognizing the relevance of national fundamental rights when EU rules grant discretionary choice to Member States, but imposing strict primacy once a domain is completely determined by EU rules, the ECJ emphasizes the importance of a coordinated separation of tasks between the Union and the Member States in the area of fundamental rights protection.[96] This development is coherent with the Charter's reference to the Union's and Member State's competences in Article 51(2), but also with Article 53's reference to the "respective fields of application" of fundamental rights between the Union and its Member States. Furthermore, it shows how the Charter has forced the ECJ to address the federal question, and how the ECJ has consciously moved towards a sophisticated approach that blends its concerns about competence and allocation of tasks with ensuring an adequate level of protection of fundamental rights.

The first commentaries of *Melloni* have criticized the severity of the solution, taking into account that the ECJ forced a Member State to accept a less protective standard of protection of a fundamental right than that in its constitutional law.[97] However, this critique loses much of its force when analysed from a broader perspective. That an EU act completely determines the actions of Member States, thus leaving no space for national fundamental rights, in no way implies that such an act is immune to an exhaustive fundamental rights scrutiny. EU acts will always be subject to a control of validity in light of the Charter, a scrutiny that complies, as a result of Article 52(3) of the Charter, with the standards set by the ECHR. Therefore, in a regulatory framework completely determined by EU law, there is no fundamental rights gap, quite the contrary. The Treaties and the ECJ's case law guarantee the power of national courts to scrutinize the validity of EU acts in light of the Charter if they consider that the said acts do not violate Charter

95. The doctrine of pre-emption is found chiefly in the case law of the US Supreme Court. For a summary of this Court's position in the context of US federalism, see *Pacific Gas & electric Co* v. *State Energy Resources Conservation & Development Commission*, 461 US 190 (1983). On the doctrine of pre-emption in EU law, see Lenaerts, "Constitutionalism and the Many Faces of Federalism" 38 AJCL (1990) and Schütze, "Supremacy without pre-emption? The very slowly emergent doctrine of Community preemption" 43 CML Rev. (2006), 1023.

96. Prior to *Melloni*, a similar approach was put forward by Torres Perez, *Conflicts of Rights in the European Union. A Theory of Supranational Adjudication* (OUP, 2009), pp. 13 et seq.

97. See De Boer, annotation of *Melloni*, 50 CML Rev. (2013) and Díez-Hochleitner "El derecho a la última palabra: ¿Tribunales constitucionales o Tribunal de Justicia de la Unión?" Working Paper IDEIR nº 17 (2013), pp. 22 et seq. and Martín Rodríguez, "Crónica de una muerte anunciada" 30 *Revista General de Derecho Europeo* (2013).

rights.[98] In case of doubt, Article 267 TFEU and the *Foto-Frost* case law ensure that national courts make a preliminary reference to the ECJ in order to confirm any possible violation of the Charter.[99] In the course of national proceedings, Member State courts can grant interim measures for the purposes of protecting the individual's rights conferred by the Charter.[100] Furthermore, the interpretation that the ECJ will derive from the Charter will be bound to the standards previously settled by the ECHR, and it will take into account the constitutional traditions common to the Member States.[101] According to Article 52(1) of the Charter, any restriction of a fundamental right must be examined through the lens of a proportionality test, an assessment that so far has proved its ability to effectively monitor EU legislative and administrative action.[102] Overall, Member State action might be completely determined by a EU act, but such act by no means deprives the individual of a genuine protection of his fundamental rights.

Also, the interpretation that *Melloni* gives of Article 53 of the Charter is tacitly pointing its finger at the EU legislature. Member States bound by an EU act are not defenceless if they consider that it trumps domestic fundamental rights. Negotiators in the Council will frequently find themselves facing constitutional objections from some Member States that can condition the discussions and eventually the final outcome.[103] If a Member State unsuccessfully pleads an exception to protect a domestic constitutional rule of particular importance, it will always have the chance to bring a direct action before the ECJ.[104] Furthermore, since the entry into force of the Treaty of Lisbon, direct actions can be construed not just on the grounds of a breach of the Charter, but also by reference to the national identity clause, as stated in the terms of Article 4(2) TEU, considerably more detailed and judicially cognizable than the previous Article 6(3) TEU. The purpose of this

98. Case 314/85, *Foto-Frost,* [1987] ECR 4199, at para 14.

99. *Foto-Frost*, ibid., paras. 15–20.

100. See, *inter alia,* Joined Cases C-143/88 & C-92/89, *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest,* [1991] ECR I-415, para 17, and Case C-366/10, *Air Transport Association of America and Others,* judgment of 21 Dec. 2011, nyr, para 47.

101. See Art. 6 TEU, as well as para 5 of the Preamble and Art. 52(3) and (4) of the Charter. On the influence of the ECHR in the interpretation of the Charter and its limits, see Case C-571/10, *Kamberaj*, judgment of 24 April 2012, nyr, para 62 and *Akerberg Fransson*, cited *supra*, para 44.

102. The ECJ has scrutinized the validity of EU legislation in light of the Charter in Joined Cases C-92 & 93/09, *Volker und Markus Schecke and Eifert,* [2010] ECR I-11063; Case C-236/09, *Association Belge des Consommateurs Test-Achats and Others,* [2011] ECR I-773; Case C-221/09, *AJD Tuna,* [2011] ECR I-1655; Case C-283/11, *Sky Östereich,* judgment of 22 Jan. 2013, nyr, and Case C-234/12, *Sky Italia*, judgment of 18 July 2013, nyr.

103. See Hilson, "The Unpatriotism of the Economic Constitution? Rights to Free Movement and their Impact on National and European Identity" 14 ELJ (2008).

104. Art. 263(2) TFEU.

clause is precisely to stop the EU from enacting measures that might collide with a constitutional rule of essential importance for a Member State.[105] In his Opinion in *Melloni*, Advocate General Bot scrutinized the Spanish Constitutional Court's case law in light of Article 4(2) TEU, and came to the conclusion that the case law did not represent an essential constitutional rule for Spain.[106] The Spanish Government had pleaded during the oral hearing that the refusal to surrender persons convicted in absentia was not part of Spain's national identity.[107]

Furthermore, the ECJ has confirmed an important exception to the aforementioned rule in cases of complete determination by an EU act. In *N.S.*, and shortly after the ECHR had delivered its landmark decision in *M.S.S. versus Belgium and Greece*,[108] the ECJ followed suit and admitted that asylum procedural rules must be reinterpreted in order to overcome systemic deficiencies leading to serious fundamental rights breaches.[109] Facing the strict jurisdictional rules of Regulation 343/2003, the ECJ confirmed an exception to these rules "if there are substantial grounds for believing that there are *systemic flaws* in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State".[110] The same line of argument was followed by Advocate General Sharpston in *Radu*, a European Arrest Warrant case concerning the protection of fundamental rights in the Member State of origin and the powers of the executing Member State to refuse surrender on such grounds.[111] Because of the lack of detailed evidence in the file, the ECJ did not address the possibility of accepting such a fundamental rights exception, but it is obvious from its previous judgment in *N.S.* that when systemic flaws appear in an EU-based arrangement based on mutual recognition, Member States are under the obligation to derogate from

105. On the scope of the national identity clase, see von Bogdandy and Schill, "Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty', 48 CML Rev. (2011) and Millet, *L'Union Européenne et l'identité constitutionnelle des États membres* (LGDJ, Paris), pp. 257 et seq.

106. Opinion of A.G. Bot in *Melloni*, paras. 140–142.

107. Ibid., para 141.

108. Judgment of 21 Jan. 2011, Application No 30696/09.

109. See Costello "Dublin-case NS/ME: Finally, an end to blind trust across the EU?", (2012) *Migrantenrecht*,; Heijer, annotation of *N.S.*, 49 CML Rev. (2012) and Mellon, "The Charter of Fundamental Rights and the Dublin Convention: An Analysis of N.S. v. Secretary of State for the Home Department", 18 EPL (2012).

110. *N.S.,* cited *supra*, para 86 (emphasis added).

111. Opinion of A.G. Sharpston in Case C-396/11, *Radu,* judgment of 29 Jan. 2013, nyr, para 97.

the rules if such systemic flaws result in a serious breach of a fundamental right.

3.2. *Situation 2: Partial determination*

If EU law has only partially determined the regulatory framework of the case, Member States retain a margin of action in which their internal legal system plays the leading role. In contrast with *Melloni*, the ECJ considered that the EU rules governing the case in *Åkerberg Fransson* left Member States considerable discretion. In these circumstances, and although Member States are "implementing" EU law as a result of a triggering rule, they are free to choose the regulatory means by which to attain the goals set by the European rule. When it comes to fundamental rights protection this will entail, in line with the principle of subsidiarity, that the facts will be better governed by national fundamental rights, in accordance with the standards set by the higher jurisdictions of the Member State. As the ECJ affirmed in *Åkerberg Fransson*, in contexts of partial determination by EU law

> "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".[112]

As can be seen, in situations of partial determination the ECJ confirms that EU and national fundamental rights *coexist* for the purposes of the resolution of the case. Both systems of fundamental rights are in principle applicable, since EU law grants Member States (and in particular national courts) the power to protect fundamental rights with one or the other instrument. It is likely that domestic courts will tend to make use of the source they are more familiar with, i.e. national fundamental rights, but nothing precludes them from solving the case solely by reference to the Charter's standards of protection. Consequently, in situations partially determined by EU law, the Charter is applicable, but it will not necessarily be the relevant protective rule, a choice that falls upon the national court.[113]

However, the ECJ has introduced a twofold exception to the general criterion. First, the Charter will become the sole applicable rule if its level of protection is superior to that provided by the national fundamental rights

112. *Akerberg Fransson*, cited *supra*, note 17, para 29.
113. In this vein, see Lenaerts and Gutiérrez-Fons, op. cit. *supra* note 43.

system. In other words, in situations partially determined by EU law, the Charter plays a subsidiary rule, waiting to enter the scene in case national standards are inferior to those of the Charter. This is perfectly in line with the general objectives of the Charter and the underlying reasons for its enactment: if the rights therein are more protective and the Member State is implementing EU law, the Charter demands all Member States to comply with its standards when acting within the competences vested in the Union. This interpretation accords with Article 53 of the Charter, in particular with the passage highlighting that nothing within its provisions "shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized … by the Member States' constitutions". Indeed, the Charter respects the protection granted by national fundamental rights and EU law cannot restrict it. However, if the Charter goes beyond the standards set by the internal legal order in an area governed by EU law, the former will display its protective force.

Secondly, and only if national fundamental rights happen to be more protective, the Charter can exceptionally displace them if the said national fundamental rights prove to "compromise" the "primacy, unity and effectiveness of European Union law". This is a safeguard clause, an exceptional remedy for situations where the ordinary application of Article 53, as interpreted in *Åkerberg Fransson*, might lead to severe breach of constitutionally protected principles inherent in the EU's legal order. In principle, these circumstances should be exceptional, and the safeguard clause should thus act as the equivalent to the *Solange* clauses developed by national constitutional courts: last-resort safety measures to be used only in extraordinary situations that, as the Spanish Constitutional Court stated in Opinion 1/2004, are "hardly conceivable".[114] It is also difficult to envisage such a scenario before the ECJ, but, in line with its national counterparts, Luxembourg has powerful reasons to impose its own counter-limits, whose purpose is, in last instance and in line with previous case law, to guarantee the autonomy of EU law.[115]

The logic of the entire construction is, in principle, simple to grasp, but it is nevertheless subject to conceptual and practical difficulties that the ECJ will have to address in the years to come. Comparing standards of fundamental rights protection is no simple task, particularly in a system in which twenty-eight national legal orders interact with EU law *and* with the ECHR.

114. Opinion of the Spanish Constitutional Court 1/2004 of 13 Dec. 2004, FJ 4º.

115. The ECJ is gradually developing its own "constitutional core" doctrine in parallel to national constitutional courts. This development can be seen in landmark decisions like Joined Cases C-402 & 415/05 P, *Kadi and Al Barakaat International Foundation* v. *Council and Commission* [2008] ECR I-6351 and *Ruiz Zambrano*. On the existence of a "constitutional core", see Rosas and Amati, op. cit. *supra* note 32, p. 43 and Sarmiento, op. cit. *supra* note 16.

The difficulties are practical (how to compare? Is a preliminary reference needed? What are the relevant parameters of comparison?), but there are also conceptual hurdles of a considerable complexity.

For example, the underlying values of a fundamental right might not always be the same in different legal orders. The right to marry is enshrined in Article 9 of the Charter, but in some Member States it protects values inherent to a specific conception of family life, whilst in others it is closer to an individualistic vision of the value of privacy, thus protecting the right to form a family in the way one considers most appropriate. Another conceptual difficulty occurs in those Member States that recognize a special protection to the "essential content" of fundamental rights. What if a Member State considers that a specific aspect of a right comes within its "essential content", but the Charter appears to be less* protective? Can the Charter trump the "essential content" of a national fundamental right? And if so, how essential is it, if it can be set aside as a result of EU law?

Similar doubts can be found when facing horizontal conflicts between fundamental rights. The ECJ's interpretation of Article 53 of the Charter concerns conflicts between the individual and the State over equivalent rights. However, if the case concerns a conflict between the holder of a right to intellectual property and the holder of a right to freedom of information, the comparison between standards becomes more complex. In these circumstances, the solution should not be too different to that in *Åkerberg Fransson:* the standard will not concern the degree of protection of one right, but the overall weight given to the combination of both rights.[116] If EU law grants more weight to the right to intellectual property than to freedom of information in the concrete circumstances of the case at hand, that weight is the reference against which the national standard should be compared. This process can become too circumstantial and subject to the peculiarities of each legal order but, overall, the comparative analysis is possible.

3.3. *Situation 3: Derogations from fundamental freedoms*

The third and last situation concerns Member State action pursuant to the derogation from a fundamental freedom. In a well-established case law

* The original text of this sentence, as published, erroneously said "more protective" rather than "less protective". Text updated March 2014.

116. This is confirmed by the ECJ's approach to conflicts between fundamental rights, as in Case C-275/06, *Promusicae,* [2008] ECR I-271, para 70: "when transposing those directives, the Member States take care to rely on an interpretation of them which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights."

starting with *ERT*, the ECJ has declared that Member States, when justifying derogations to a fundamental freedom, are obliged to comply with EU fundamental rights. *ERT* concerned the compatibility with the Treaty freedom to provide services of the grant of a television franchise to a single broadcaster. After endorsing Greece's right to invoke the justifications of the then equivalent to today's Article 62 TFEU, the ECJ added that the relevant Greek rules "can fall under the exceptions provided for by the combination of [Articles 52 and 62 TFEU] only if they are compatible with the fundamental rights the observance of which is ensured by the Court".[117] *ERT* thus opened the door to an application of EU fundamental rights in particularly sensitive areas of Member State action such as public policy, public security or public health, and its authority has been reiterated throughout the years in the ECJ's subsequent case law.[118]

At first sight, it could be argued that this situation is no different from a situation partially determined by EU law, as depicted above. It is true that in *ERT* the ECJ was dealing with a framework in which Member States still hold a wide scope of action. However, as shown by *Schmidberger*, *Omega* or *Viking Line*,[119] the margin involved when justifying derogations to a fundamental freedom is very different from that found pursuant to a regulation or a directive. Free movement rules occupy a privileged constitutional position in EU law, but, above all, justifications to these rules deal with concepts such as "public policy" or "public security" which are autonomous and thus subject to the ECJ's interpretative jurisdiction.[120] It would be contradictory if the ECJ became empowered to define the scope of "public policy", but not to impose limits to such justification on the grounds of, for example, the right to liberty and security or the prohibition of degrading treatment or punishment.[121] Therefore, the underlying rationale of *ERT* is that of coherence in the interpretation and application of EU law, but in an area of constitutional relevance for the internal market in its entirety.

The ECJ has not yet decided whether the consequences previously portrayed for situations of complete and partial determination by EU law also

117. *ERT*, cited *supra*, para 42.

118. See, *inter alia*, *Familiapress*, cited *supra*, note 26; Case C-60/00, *Carpenter,* [2002] ECR I-6279; *Schmidberger*, cited *supra* note 26; Case C-71/02, *Karner,* [2004] ECR I-3025; and Case C-441/02, *Commission* v. *Germany,* [2006] ECR I-3449.

119. *Schmidberger*, cited *supra* note 26, paras. 79–82; Case C-36/02, *Omega,* [2004] ECR I-9609, paras. 32–39; *Viking Line*, cited *supra* note 8, paras. 86–89; and *Laval*, cited *supra* note 8, paras. 107–111.

120. Although the ECJ grants a considerable margin of appreciation to Member States in particularly sensitive areas (see, *inter alia,* Case 34/79, *Henn and Darby,* [1979] ECR 3795, para 15, and Case C-268/99, *Jany and Others,* [2001] ECR I-8615, paras. 56 and 60), the truth is that the scrutiny operates in light of the Treaties and not national law.

121. Arts. 6 and 7 of the Charter.

extend to the free movement derogations. In principle, it would be reasonable that the *Åkerberg Fransson* case law on partial determination should also apply to an *ERT* scenario. Member States are entitled to justify derogations to free movement rules, but when doing so they must comply with their internal fundamental rights, unless the Charter, as interpreted by the ECJ, provides a higher protection of the right or rights concerned. This outcome would not endanger the *ERT* rationale and would grant Member States' fundamental rights a high degree of autonomy that the *ERT* judgment could appear to disregard. The question is currently open, but it has recently been brought to the ECJ's attention in *Pfleger,*[122] a preliminary reference from the *Unabhängiger Verwaltungssenat* of the *Land* of Upper Austria, questioning the legality of domestic measures derogating from the freedom to provide services in light of Articles 15 to 17, 47 and 50 of the Charter. The ECJ will have the opportunity to determine how the *ERT* case law stands today.

4. National constitutional accommodation

The framework of fundamental rights created by the Charter and the ECJ's recent case law does not exist in a vacuum. Now it is time that Member States, and particularly their supreme and constitutional courts, actively participate in this system and contribute to make it work properly. Acceptance will not always be simple. Fundamental rights are one of the sovereign domains of supreme and constitutional courts, and the risk that the EU might force a Member State to lower its standards of fundamental rights protection is not an appealing prospect for such courts. However, it is argued that the ECJ's case law provides a balanced solution that reconciles the Charter's role with the autonomy of national constitutional arrangements. Furthermore, it is submitted that this framework can help supreme and constitutional courts to reinforce their position within the State, a result of their privileged position as guarantors of both EU *and* national fundamental rights.

The case law portrayed above provides a framework guaranteeing all institutional actors the ability to condition the outcome of a case in which both EU and national fundamental rights are applicable. As argued above, in cases of complete determination by EU law, Member States retain powerful *ex ante* and *ex post* mechanisms safeguarding the integrity of their essential constitutional traits. In the case of partially determined areas of EU law, the role of Member States is crucial, and Charter protection will only be called for in cases of lower national standards. Supreme and constitutional courts can hardly find this outcome surprising or unfamiliar: this is exactly the role

122. Case C-390/12, pending before the Court.

assigned to the ECHR in domestic law, whereby the Strasbourg court sets minimum standards that all signatory States must comply with. The role that *Melloni* and *Åkerberg Fransson* attribute to the Charter in situations of partial determination is purely to the benefit of the individual, a solution that justifies setting aside a less protective national fundamental right. Supreme and constitutional courts with high standards of fundamental rights protection will see no need to make use of the Charter in situations partially determined by EU law. Overall, the result of the ECJ's case law is to push domestic fundamental rights in the same direction, a direction that drives both legal orders towards higher standards of protection.

It could be argued that under these arrangements, supreme and constitutional courts will inevitably lose autonomy *vis-à-vis* the ECJ. If the standards of protection of the Charter can only be authoritatively determined by the Luxembourg court, national courts will need to submit a preliminary reference in every case before deciding which is the superior standard. However, this concern is unfounded. It is reasonable to expect that during the first years, the ECJ will be increasingly addressed by its national counterparts on points of interpretation concerning each specific right. But this is a transitory situation which will stabilize in the course of time, as the ECJ continues to define the scope and content of each provision of the Charter. In a few years' time the national supreme and constitutional courts will be perfectly aware of the standards set by the Charter without the need to make a preliminary reference, and will thus not consider themselves to be under a wrongly perceived "supervision" from the ECJ. All in all, the Charter is not destined to be a menace to supreme and constitutional courts, but quite the opposite: it is a unique opportunity, particularly for constitutional courts, to assume an even more relevant role in the institutional dynamics of the State and of the Union as a whole.

Constitutional courts are peculiar jurisdictions frequently linked to the traumatic past of a political community. The emergence of constitutional courts in Europe is mostly the result of previous historical calamities, whether dictatorship, occupation, civil war or calculated genocide, to name but a few.[123] Constitutional courts thus appear as counter-majoritarian institutions, acting as watchdogs not of another institution, but of democracy itself.[124] As a result of European integration, the prospects of further calamities on the

123. On the origins of European continental constitutional courts, see Ferreres Comella, *Constitutional Courts & Democratic Values* (Yale University Press, 2009), pp. 3–27 and, in the case of Eastern European countries, Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (University of Chicago Press, 2000).

124. See Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press, YEAR), pp. 263 et seq.; Ferreres Comella, op. cit. previous note, pp. 86 et seq., and Waldron, *Law and Disagreement* (OUP, 2001), pp. 266 et seq.

continent have diminished considerably, at least for the time being. The consolidation of democratic institutions in Europe's Member States has gradually deprived constitutional courts of many of the conflicts they were originally empowered to resolve. Therefore, today's principal *raison d'être* of constitutional courts has become, in a rather unexpected way, the protection of the fundamental rights and freedoms of the individual,[125] but an individual whose identity is tied to several political communities, both national and European. Constitutional courts can hardly continue to maintain their fundamental rights jurisdiction under the illusion of an individual exclusively tied to a bond with the nation State.[126] Therefore, as a cosmopolitan approach to fundamental rights becomes inevitable, the need for constitutional courts to adapt their framework to such context becomes not only convenient, but also an existential concern.

In its recent case law, the ECJ gives constitutional courts a role to play in a cosmopolitan scenario for the protection of fundamental rights in Europe. *Melloni* and *Åkerberg Fransson* highlight the importance of national standards of protection in deciding the role to be played by the Charter in solving a concrete case. Such a role will be determined by supreme and constitutional courts as a consequence of their own interpretation of the fundamental rights at stake. National standards of fundamental rights condition the application of the Charter in a Member State, at the same time that the Charter exerts its influence when it becomes a more protective source. The interaction of both systems of fundamental rights does not result in the exclusive pre-eminence of EU law, but in a balanced compromise in which both systems are taken into account.

Furthermore, constitutional courts can put their privileged jurisdiction at the service of the Charter in order to reinforce the rights it enshrines in the

125. That Constitutional courts are now heavily reliant on their role as guarantors of "rights", and not so much as courts entrusted with institutional litigation, can be witnessed in some recent, yet very relevant, developments. The French *Conseil constitutionnel* assumed new powers in 2009 as a result of the *question prioritaire de constitutionnalité*, for the scrutiny only of laws in light of fundamental rights, on request of a private litigant before an ordinary court. The Spanish *Tribunal Constitucional* has recently reformed its Statute in order to reduce the growing number of direct actions of individuals for the protection of fundamental rights, which represented approximately 90% of its docket. The idea of abandoning institutional litigation in order to become a genuine "court" is well portrayed in the case of the Belgian *Cour d'arbitrage*, renamed in 2007 *Conseil constitutionnel*, which has expanded its traditionally limited scope of interpretation to the entire constitutional text, thus allowing direct actions against laws in light of all fundamental rights as enshrined in the Belgian Constitution. According to the German *Bundesverfassungsgericht*'s 2012 report, to date the *Verfassungsbeschwerden* (individual direct action for the protection of fundamental rights) has taken 96.53% of the cases since the court's creation in 1951.

126. Weiler, "To be a European citizen – Eros or Civilization", (1997) *Journal of European Public Policy*, 495.

domestic scene. In fact, there are plenty of examples of constitutional courts channelling the potential of the Charter through internal constitutional remedies.[127] The German Constitutional Court has confirmed the constitutional duty of lower courts to make a preliminary reference pursuant to Article 267 TFEU, when a decision from the ECJ is necessary to determine the exact scope of discretion of a Member State that implements EU law.[128] In light of the importance of margins of appreciation after the ECJ's judgments in *Melloni* and *Åkerberg Fransson*, the decision of the German Constitutional Court is a remarkable move, which puts the Constitution at the service of the preliminary reference procedure, at the same time allowing the ECJ to determine the precise framework in which German courts will eventually apply the Charter or the *Grundgesetz*. In the same vein, the Austrian Constitutional Court incorporated the Charter as part of its parameter of constitutional review, a decision that now allows that court to scrutinize statutes in light of the Charter.[129] The Spanish Constitutional Court has recognized the constitutional protection of primacy of EU law when the ECJ has previously declared the authoritative interpretation of a EU provision, including, of course, a provision of the Charter.[130] The fact that the French Constitutional Council has made its first preliminary reference in the course of a *question prioritaire de constitutionnalité*, a special procedure exclusively concerned with fundamental rights cases, proves that the engagement of constitutional courts with EU fundamental rights protection is currently standard practice and not an exception.[131]

This is the domestic context in which the new framework for fundamental rights protection is now emerging. Seen in this light, the chances that the ECJ and its national counterparts decide to cooperate through the means portrayed here are very promising. And if the framework proves to work, unilateral supremacy will no longer be an issue. At least not in the area of fundamental rights protection, but that is, as is well known, the very core of conflicts between courts in the EU.

127. See Mayer, "Multilevel Constitutional Jurisdiction", in von Bogdandy and Bast, (Eds.), *Principles of European Constitutional Law,* 2nd ed. (Hart Publishers, 2010).

128. Order of 4 Oct. 2011 (1 BvL 3/08), paras. 52 et seq.

129. Judgment of 14 March 2012 (U 466/11 and 1836/11). Klaushofer and Palmstorfer, "Austrian Constitutional Court uses Charter of Fundamental Rights of the European Union as standard of review: Effects on Union Law" 19 EPL (2013), 1.

130. Judgment of 2 July 2012 (STC 145/2012). Sarmiento, "Reinforcing the (domestic) constitutional protection of primacy of EU law", annotation of STC 145/2012 (Tribunal Constitutional), 50 CML Rev. (2013), 000.

131. Decision of 4 April 2013 (Décision n° 2013-314P QPC).

5. Conclusion

This article has shown how the Charter has inevitably forced the EU and its Member States to address major constitutional issues, some of them going well beyond fundamental rights protection. So far, the ECJ has managed to balance the needs of a normatively strong Charter with respect for the competences and the autonomy of Member States. The recent case law makes specific contributions in this area, but has also provided some hints as to the challenges that lie ahead.

First, by clearing the issue of applicability of the Charter in Member States, the ECJ has shifted the attention from Article 51(1) to Article 53. Seen together with the remaining decisions of the ECJ on Article 51(1) of the Charter, the seminal judgment in *Åkerberg Fransson* confirms that the term "implementation" includes all the traditional criteria in the ECJ's pre-Charter case law, based, as has been seen, on the presence of what are here called "triggering rules". This principled decision thus puts the emphasis not on Article 51(1) of the Charter, but on Article 53, a conflict rule for those cases in which both EU and national fundamental rights are applicable. This transfer of the centre of gravitation from issues of applicability towards issues of interaction between autonomous legal orders proves that the case law seems willing to assume a pluralist approach to constitutional issues.[132] A strict conception of the applicability of the Charter would presuppose a stark separation between EU and national legal orders. However, a wide scope of application of the Charter entails an exponential increase of cases in which *both* legal orders are potentially applicable when solving the case at hand. Article 53 of the Charter assumes that such interaction exists and it provides, as interpreted by the ECJ, a conflict rule to make both legal orders interact in a coordinated fashion. If pluralism is understood as a variety of autonomous legal orders coexisting in a common space and with common objectives, the interpretation of Article 53 given by the ECJ in *Melloni* and *Åkerberg Fransson*, and specifically in situations of partial determination, is the confirmation that EU and national legal orders have embraced pluralism, and precisely in a domain that represents the paradigm of constitutional identity.

132. The idea of constitutional pluralism in EU law has been developed in detail by, *inter alia*, Kumm, "The Jurisprudence of Constitutional Conflict. Constitutional Supremacy in Europe before and after the Constitutional Treaty", 11 ELJ (2005), Poiares Maduro, "Contrapunctual Law: Europe's Constitutional Pluralism in Action", in "Walker (Ed.), *Sovereignty in Transition* (Hart Publishers, 2003), and Walker, "The idea of constitutional pluralism" 65 MLR (2002), 317. An overall portrait of the movement can be seen in the collective work of Komárek and Avbelj, *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing, 2012).

Second, the ECJ has highlighted the importance of comparative standards of fundamental rights protection between the Charter and the internal legal orders. In this respect, public lawyers will need to broaden their minds towards a more cosmopolitan vision of their domestic constitutional arrangements,[133] in line with what the German Constitutional Court calls an interpretation of the Constitution "open towards European law".[134] The same applies to EU lawyers, whose approach to EU law must take the mandate of Article 4(2) TEU seriously, contributing to an inclusive interpretation of the Treaties and the Charter that genuinely protects national identities.[135] All in all, legal science in Europe has powerful reasons to undertake a serious reconsideration of its purposes and methods.[136] Some Member States have taken the first steps in this direction.[137]

But above all, and despite the weaknesses of the case law and the problems that still lay ahead, the ECJ's first attempts in addressing the Charter's constitutional challenges show that the Luxembourg court and its national supreme and constitutional counterparts have much to lose through conflict, and a lot more to gain by way of loyal cooperation.[138] The national courts that best manage to adapt to this new framework will become major institutional voices in a pan-European legal space. One of the benefits of loyal cooperation is supranational relevance, a role that supreme and constitutional courts would have hardly ever conceived in the traditional landscape of the nation State. The Charter has given both the ECJ and national high courts the unique chance to

133. See, *inter alia*, von Bogdandy, "National legal scholarship in the European legal area – A manifesto" 10 I.CON (2012), 618 et seq., Torres López, op. cit. *supra* note 96, pp. 141 et seq., and Jacobs, "The Uses of Comparative Law in the Law of the European Communties", in Plender (Ed.), *Legal History and Comparative Law Essays in Honour of Albert Kiralfy* (Frank Cass & Co., 1990).

134. On the category of *Europarechtsfreundlichkeit*, see Vosskuhle, "The cooperation between European courts: the *Verbund* of European courts and its legal toolbox, in Court of Justice, *The Court of Justice and the construction of Europe: Analyses and perspectives on sixty years of case law* (Asser Press, 2013), pp. 94 et seq.

135. In this sense, see also Alonso García, op. cit. *supra* note 88, p. 513, demanding a *pro communitate* interpretation of national constitutional law and a *pro constitutione* interpretation of EU law.

136. On the role of EU fundamental rights as a source of transformation of legal science, see von Bogdandy, "The European Union as a human rights organization? Human rights and the core of the European Union" 37 CML Rev. (2000), 1336.

137. See e.g. the German Wissenschaftsrat's 2012 report on the state of legal science, *Perspektiven der Rechtswissenschaft in Deutschland. Situation, Analysen, Empfehlungen,* available at www.wissenschaftsrat.de/download/archiv/2558-12.pdf.

138. On loyalty and institutional cooperation between courts, see Sarmiento, "National voice and European loyalty. Member State autonomy, European remedies and constitutional pluralism in EU law" in Micklitz and de Witte (Eds.), *The European Court of Justice and the autonomy of Member States* (Intersentia, 2012) and Cartabia, "Europe and rights: taking dialogue seriously", 5 EuConst (2009), 27 et seq.

construe, as a common enterprise, the framework of fundamental rights protection in Europe. The temptation for a court to entrench itself in the discourse of unilateral primacy might be seductive, as is the lure of living a life under false illusions, with all its dubious benefits, but with all the risks as well.

At the end of Albee's play, George walks next to Martha as he quietly sings to himself "who's afraid of Virginia Woolf?", to which Martha replies, "I am, George… I am". With the entry into force of the Charter, the ECJ and its national counterparts can sing this song over and over. And if they all take the Charter seriously, as the ECJ has succeeded in doing in its first judgments to date, they could all reply, without a hint of doubt, "Not me, George… not me".