Implementation of EU Law through Domestic Measures after *Fransson*: the Court of Justice Buys Time and "Non-preclusion" Troubles Loom Large

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Analysis and Reflections

Implementation of EU Law through Domestic Measures after *Fransson*: the Court of Justice Buys Time and "Non-preclusion" Troubles Loom Large

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Abstract

In 2014, the Court came to terms with the application of the Charter of Fundamental Rights to domestic measures in the wake of Fransson*. The five cases discussed here provide an overview of the Court's subsequent interpretation of the "implementation" link between EU law and national measures, required for the Charter to apply. Arguably, the Court is playing by ear and eludes the real legal riddle: how to determine with certainty the application of EU law at large in a specific case. Because the application of the Charter depends on the application of EU law, this issue deserves more attention. In particular, the precise notion of the application of EU law could help to identify non-preclusion cases, i.e. those in which EU law applies to, but does not prohibit, domestic measures. Only in these cases does the Charter have added value as an autonomous standard of review.*

Introduction

The European Union has no general competence on the protection of fundamental rights, but it has come to use them regularly in judicial review. The application of EU fundamental rights to domestic measures has been questioned for decades, as its contours were being laid down in the case law of the Court of Justice referring to general principles of EU law. Later, with the adoption of the Charter of Fundamental Rights, art.51(1) thereof specified that the Charter binds Member States only when they "implement" EU law. So far, the Court has been unable to indicate the exact meaning of this linchpin provision, thus failing to provide reliable instructions to determine which domestic acts are challengeable for a breach of the Charter. In *Fransson*, the Court attempted to devise a test for the interpretation of art.51(1), which ultimately proved unsatisfactory, despite its apparent elegance, and left several questions unanswered.

One year after *Fransson*, between March and July 2014, the Court delivered five judgments dealing with the relationship between national measures and the Charter. These rulings provide an illustration of the Court's current take on art.51(1) of the Charter and compound an assessment of *Fransson*'s legacy. In this article, it is argued that the Court is buying time, using overlapping tests at once without electing any of them as the standard. Presumably, this cautious approach means to avoid assertive precedents that might be generalised into defective or incoherent tests. However, this continued lack of clarity is preventing domestic courts from fulfilling their mandate as first-instance enforcers of the Charter, and hinders the

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Charter's uniform application at national level. It is argued that the problem lies deeper than the Court admits. Rather than fixing on a definition of the elusive "implementation" link, the Court should come to terms with its historical neglect of a basic element: the application of EU law (at large) to domestic measures.

The next part of this article describes the build-up to *Fransson* and explains why the implementation link matters mostly for measures that are not precluded by EU law. In these cases, the Charter can serve as a discrete standard of review even when the national act is compatible with the rest of EU law. The five rulings delivered in 2014 are then outlined, followed by a discussion that takes stock of the current status of the case law in light of these decisions. The purpose is to determine whether the reasoning of the Court in these cases can found a more predictable test in non-preclusion cases. Finally, some continuing problems with the Court's approach are suggested, noting that the quintet of 2014 judgments might serve in the future as a repository of exceptions from the application of the Charter.

The background—"implementation" and "scope of application"

Article 51 of the Charter

The Charter binds the institutions of the Union and is not addressed to the Member States as such. It codifies a condition of validity for EU action: compliance with fundamental rights. By definition, therefore, the Charter operates within the sphere of conferred competences. Article 51 states that "[t]he provisions of this Charter are addressed to the institutions … of the Union with due regard for the principle of subsidiarity", and confirms an obvious implication for the allocation of powers between the Union and its Member States: "The Charter does not extend the field of application of Union law beyond the powers of the Union."

The Charter also applies to domestic acts implementing EU law. For instance, a Member State transposing a directive acts as "agent" of the Union and must respect the Charter.[1] This is a plausible arrangement: otherwise, domestic implementation of EU law could defeat the Charter's purpose, which is to outlaw all breaches of human rights that are ultimately attributable to the Union. Article 51(1) of the Charter confirms the substantive scope of State obligations, stipulating that the Charter is addressed "to the Member States only when they are implementing Union law". The notion of "implementation" under art.51(1), a precondition for the Charter's application, lacks a clear-cut legal meaning and therefore requires hermeneutic parsing.

The Praesidium's explanations on this provision recall several pre-Charter precedents[2] on the analogous question of the application of fundamental rights (*quibus* general principles of the European Union) to State acts. In particular, the Court stated in *ERT* that general principles of EU law apply to domestic measures which "fall within the scope of [EU] law".[3] Hence, EU fundamental rights apply not only to national measures executing EU law obligations, but also to each measure governing matters that, *ratione materiae*, belong to the sphere of application of EU law. For instance, national measures derogating from

[1] See N. Nic Shuibhne, "Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law" (2009) 34 E.L. Rev. 230, 238; J. Weiler, "Fundamental Rights and Fundamental Boundaries" in *The Constitution of Europe: "Do the New Clothes have an Emperor" and Other Essays on European Integration* (Cambridge: Cambridge University Press, 1999), p.123.

[2] *Elliniki Radiophonia Tileorassi AE (ERT) v Dimotiki Etairia Pliroforissis* (C-260/89) [1991] E.C.R. I-2925; [1994] 4 C.M.L.R. 540; *Wachauf v Germany* (C-5/88) [1989] E.C.R. 2609; [1991] 1 C.M.L.R. 328; *Proceedings brought by Karlsson* (C-292/97) [2000] E.C.R. I-2737; *Annibaldi v Sindaco del Comune di Guidonia* (C-309/96) [1997] E.C.R. I-7493; [1998] 2 C.M.L.R. 187.

[3] *ERT* (C-260/89) [1991] E.C.R. I-2925 at [42].

EU law must respect its general principles,[4] and so must measures whereby States exercise discretionary powers conferred by EU law.[5] In *Annibaldi*, the Court devised a first limit to the *ERT* doctrine: a domestic measure is not bound by the general principles of EU law if it affects only indirectly matters governed by EU law and does not share its purposes.

Essentially, for general principles of EU law or the Charter to apply to a domestic measure, the latter must implement a norm of EU law other than the general principles or the Charter themselves. Whether the *ERT* doctrine could apply as such to the Charter was controversial. Based on the literal interpretation of art.51(1), referring only to "implementation", certain observers advocated a narrower application of the Charter, limited only to State acts that directly execute EU law.[6] Even if the Præsidium specified that its interpretation followed "unambiguously" from the case law on general principles, the semantic and substantive shift from "implementation" to "scope of application" was, without doubt, "quite a leap"[7] and, unsurprisingly, it was met with enough resistance to question its currency.[8]

The decision in Fransson

The judgment in *Åkerberg Fransson* ended this uncertainty.[9] The Court's Grand Chamber confirmed that the Charter and general principles apply to domestic measures in the same circumstances, whenever domestic acts fall within the purview of EU law. The ruling traced the Præsidium's indications, based on the judgment in *ERT*. It also rebuked the creeping backlash against the Charter, considered in some quarters a potential Trojan horse that allows the European Union to extend its powers over Member States' exclusive jurisdiction. The rabid reaction of the German Federal Constitutional Court to *Fransson*[10] and the suspicious stance of the UK House of Commons[11] are clear instances of this trend.

[4] *ERT* (C-260/89) [1991] E.C.R. I-2925 at [43].

[5] *Chakroun v Minister van Buitenlandse Zaken* (C-578/08) [2010] E.C.R. I-1839; [2010] 3 C.M.L.R. 5 at [64]; *R. (on the application of NS) v Secretary of State for the Home Department* (C-411/10 and C-493/10) [2011] E.C.R. I-13905; [2012] 2 C.M.L.R. 9 at [68]; *Germany v Puid* (C-4/11) [2014] Q.B. 346; *Sabou v Finanční ředitelství pro hlavní město Prahu* (C-276/12) [2013] B.T.C. 718 at [38].

[6] F. Jacobs, "Human Rights in the European Union: The Role of the Court of Justice" (2001) 26 E.L. Rev. 331, 337; see also the discussion of the restrictive school of thought in K. Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights" (2012) 8 E.C.L.R. 375, 383–384 and C. Ladenburger, "European Union Institutional Report" in *Reports of the XXV FIDE Congress* (2012), p.141. See also A.G. Bot's remark in *Scattolon v Ministero dell'Istruzione, dell'Universita e della Ricerca* (C-108/10) 1 C.M.L.R. 17 at [117] of the Opinion.

[7] See Nic Shuibhne, "Margins of Appreciation" (2009) 34 E.L. Rev. 230, 242.

[8] A. Rosas, "When is the EU Charter of Fundamental Rights Applicable at National Level?" (2012) 19 *Jurisprudence* 1269, 1281: "In the interest of avoiding this risk, it is preferable … to use the terminology of Article 51(1) of the Charter rather than that of some of the earlier case law and Article 19(1) TEU (which refers to the 'fields covered by Union law', 'scope of application of Union law', or the like."

[9] *Åklagaren v Fransson* (C-617/10) [2013] 2 C.M.L.R. 46. The Court confirmed that Swedish criminal measures sanctioning tax evasion implement EU law, by virtue of their connection with the collection of VAT, and can therefore be reviewed under the Charter's guarantee of *ne bis in idem*. See B. van Bockel and P. Wattel, "New Wine into Old Wineskins: The Scope of the Charter of Fundamental Rights of the EU after Åkerberg Fransson" (2013) 38 E.L. Rev. 866; F. Fontanelli, "Hic Sunt Nationes: The Elusive Limits of the EU Charter and the German Constitutional Watchdog" (2013) 9 E.C.L.R. 315.

[10] BVerfG, April 24, 2013, docket number 1 BvR 1215/07 (Ger.). See D. Thym, "Separation Versus Fusion—or: How to Accommodate National Autonomy and the Charter? Diverging Visions of the German Constitutional Court and the European Court of Justice" (2013) 9 E.C.L.R. 391; Fontanelli, "Hic Sunt Nationes" (2013) 9 E.C.L.R. 315, 327–333.

[11] See *The Application of the EU Charter of Fundamental Rights in the UK*, HC Paper No.979 (Session 2013–14), *http://www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/979/979.pdf* [Accessed September 1, 2014].

Fransson, followed by the consonant ruling in *Texdata*,[12] was less successful in formulating a precise test to determine when domestic measures fall, indeed, within the scope of EU law. In a passage that could feature in dictionaries' entries on question-begging, the Court stated that the Charter applies whenever EU law applies[13]; this is referred to here as "*Fransson* equivalence". The equivalence is logically indisputable: when EU law does not apply, the Charter alone cannot create State obligations (principle of conferral); instead, when EU law applies, the Charter must necessarily apply too (principle of respect for fundamental rights). This truism hardly helps to elucidate the meaning of art.51(1) of the Charter, in spite of the enthusiastic words of President Skouris, who commented that:

> "The alignment between the application of the Charter and that of EU law, which is solidly based on an established case law, permitted to extract an appropriate criterion to delimit the scope of application of the Charter."[14]

However, the Court's approach unintentionally exposed another dormant issue: the Charter's unclear application to domestic measures is the direct consequence of the unclear relationship between EU law and domestic measures more generally. When does EU law apply to, or affect, State acts? In Judge Rosas' optimistic words, determining the application of EU law,

> "does not seem to be an insurmountable problem … In any case before the Union Courts or national courts, determining at least in a preliminary way the applicable law is a normal starting point".[15]

This is a fair comment: judges are normally expected to ascertain whether the law that determines their jurisdiction applies. In preliminary ruling proceedings, the application of EU law in the main proceedings determines, in principle, the Court's competence *ratione materiæ*. If this were true in all cases, the problem would indeed be "surmountable": to exercise its competence, the Court of Justice must somehow be able to know when EU law is involved. Accordingly, *Fransson* equivalence could be simplified further: whenever the Court has jurisdiction to deliver a preliminary ruling, because it considers EU law to be engaged, the Charter applies and therefore the Court must give "all the guidance"[16] to the referring judge as regards the human rights compatibility of the domestic measures at stake.

However, the simplification is too approximate to work. In fact, the application of EU law is not a requirement for the Court to uphold its jurisdiction, for at least three reasons. Logically, a referring court's doubt about the "interpretation of EU law"[17] could concern precisely whether EU law applies or not in the main proceedings.[18] To answer, the Court must exercise its competence even in cases in which EU law does not apply. Historically, the Court has adopted a very loose standard of admissibility, whereby all questions enjoy a presumption of admissibility as regards the relevance of EU law. Only in extreme cases, when "it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual

[12] *In re Texdata Software GmbH* (C-418/11) [2014] 1 C.M.L.R. 52.

[13] *Fransson* (C-617/10) [2013] 2 C.M.L.R. 46 at [21]. This is the message repeated ad nauseam in *Texdata* (C-418/11) [2014] 1 C.M.L.R. 52 at [72]–[73].

[14] V. Skouris, "Développements Récents de la Protection des Droits Fondamentaux dans l'Union Européenne: Les Arrêts Melloni et Åkerberg Fransson" (2013) 18 *Il Diritto dell'Unione Europea* 229 (own translation from French).

[15] Rosas, "When is the EU Charter Applicable at National Level?" (2012) 19 *Jurisprudence* 1269, 1284.

[16] *Fransson* (C-617/10) [2013] 2 C.M.L.R. 46 at [19]; see P. Cruz Villalón, "'All the Guidance': ERT and Wachauf" in M. Poiares Maduro and L. Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford: Hart Publishing, 2010), p.162.

[17] Article 267 TFEU.

[18] See, for instance, *Sky Italia srl v Autorità per le Garanzie nelle Comunicazioni* (C-234/12) [2014] 1 C.M.L.R. 22 at [20] of the Opinion: "If, as is the case here, a national court considers that it is faced with the question whether national law adheres to the limits of the margin of discretion accorded by Article 4(1) of Directive 2010/13 or exceeds those limits, a reference may be made to the Court on the interpretation of that provision of the directive."

facts of the main action or its purpose",[19] will the Court decline jurisdiction. This leaves a portion of non-obvious cases in which the Court upholds its jurisdiction, but then finds EU law not to apply in the end. Finally, there is a technical reason why the Court simply has no competence to determine the application of EU law to national measures: whether EU law applies depends on the interpretation of domestic law as applied to the facts of the main proceedings. The Court does not, however, have competence to interpret domestic law and/or to apply EU law to the facts of the case: its only mandate under art.267 TFEU is, formally, to interpret EU law. In other words,

> "it is for the national court to decide whether EU law applies in the case before it, and whether a given national law provision is in accordance with EU law … references to the Court of Justice … should be formulated so that [it] is not requested to make a specific application of the law to the case. Instead, the formulation of the question should ensure that the Court of Justice can make an, in principle, abstract interpretation of the relevant EU rule."[20]

Because there is no real alignment between the jurisdiction of the Court and the application of the Charter, whether a Member State is "implementing EU law" under art.51(1) of the Charter is irrelevant at the jurisdictional stage. As A.G. Sharpston puts it:

> "When asked to interpret provisions of EU law by a national court … such a request is, in principle, admissible. The alleged inapplicability of a provision of EU law … to the case before the referring court is not a matter of admissibility but rather one of substance. Moreover, whether or not [the domestic measure] was intended to implement [EU law] has no bearing on the issue of admissibility."[21]

Conversely, the mere admissibility of a preliminary question does not automatically entail the application of EU law, let alone the Charter. In *Ymeraga*,[22] for example, the Court exercised its jurisdiction, and yet found EU law not to be involved. The questions regarding the Charter were therefore ignored:

> "[43] … the Luxembourg authorities' refusal to grant Mr Kreshnik Ymeraga's family members a right of residence as family members of a Union citizen is not a situation involving the implementation of European Union law within the meaning of Article 51 … so that its conformity with fundamental rights cannot be examined in the light of the rights established by the Charter."
>
> [45] … the answer to the question referred is that Article 20 TFEU must be interpreted as not precluding [the State measure]."

The Court used the non-preclusion formula ambiguously to indicate, at once, that EU law does not apply ([43]) and/or that EU applies but it does not prohibit the national measure ([45]).[23]

[19] This approach dates back to *Salgoil SpA v Italian Ministry for Foreign Trade* (13/68) [1968] E.C.R. 453 at 459; see most recently, *YS v Minister voor Immigratie, Integratie en Asiel* (C-141/12 and C-372/12) July 17, 2014 at [63].

[20] M. Broberg and N. Fenger, *Preliminary References to the European Court of Justice* (Oxford: Oxford University Press, 2014), p.154 (footnotes omitted).

[21] *Carratù v Poste Italiane SpA* (C-361/12) [2014] 2 C.M.L.R. 27 at [33] of the Opinion.

[22] *Ymeraga and Ymeraga-Tafarshiku v Ministre du Travail, de l'Emploi et de l'Immigration* (C-87/12) [2013] 3 C.M.L.R. 33.

[23] A similar pattern is discernible in *Iida v Ulm* (C-40/11) [2013] 1 C.M.L.R. 47. Compare [80] (the claimant's situation shows no connection to EU law) and [82] (third-country nationals in the same situation of the claimant cannot claim a right to residence under EU law, that is, EU law does not preclude a national act rejecting their application for residence).

Fransson equivalence cannot, therefore, mean that the jurisdiction of the Court in preliminary ruling proceedings and the Charter's application go hand in hand.[24] *Fransson*'s relevance could be then narrowed down to a more modest guideline: when EU law is positively found to apply in the case, the Charter also applies. However, this is also a flimsy test. In fact, the Court is typically uninterested in determining conclusively whether EU law applies to a specific national act: if the question is admissible, the Court simply assesses whether EU law precludes the domestic measure at issue or not. In the majority of cases, there is simply no difference between a finding of non-application of EU law *ratione materiæ* and the conclusion that EU law does not prohibit certain domestic acts. This difference is perceived as irrelevant in pragmatic terms, as emerges from the *Ymeraga* extract above, but the underrating of this difference is the by-product of the *fictio* whereby the Court only *interprets* EU law. Consequently, "non-preclusion" and "non-application" findings are normally interchangeable.[25]

The Charter's application to non-precluded measures

This overlooked difference (between non-preclusion and non-application) is instead crucial when the Charter is invoked. Whereas the non-application of EU law prevents the Charter from applying altogether, when EU law (applies but) does not preclude the national measures, the Charter applies and might render them incompatible with EU law. In fact, this is the only hypothesis in which the Charter has an added value as a separate standard of review, among the three possible scenarios (EU law does not apply; EU law applies and prohibits; EU law applies and permits).

When there is prima facie no application of EU law, the Charter cannot apply on its own. Dozens of cases fit this boot-strapping scenario, in which referring courts and claimants flip art.51(1) on its head and invoke the Charter to prove the link with EU law.[26] When EU law applies and precludes the impugned domestic measures, conversely, there is no need also to invoke the Charter: a claim under the Charter is ultimately redundant, if the domestic measure is struck down under the applicable EU norms.[27]

The third category of disputes is the most delicate. In these cases, the application of EU law (other than the Charter) acts only as the *trigger* for using the Charter as a standard of review. The standard of review

[24] The Court's historical inability to define its preliminary jurisdiction is discussed in detail with reference to the implications for art.51(1) of the Charter in F. Fontanelli, "The Implementation of European Union Law by Member States under Article 51(1) of the Charter of Fundamental Rights" (2014) 20 C.J.E.L. 193; see in particular 234–247.

[25] For an example, compare the wording, with emphasis added, of different judgments that reach an identical conclusion (art.34 TFEU does not prohibit indistinctly applicable rules on the advertising of products). See *Konsumentombudsmannen v Gourmet Int'l Products AB* (C-405/98) [2001] E.C.R. I-1795; [2001] 2 C.M.L.R. 31 at [34]: "Articles [34 and 36 TFEU] *do not preclude* a prohibition on the advertising of alcoholic beverages"; *Konsumentenombudsmannen v De Agostini (Svenska) Förlag AB* (C-34–36/95) [1997] E.C.R. I-3843; [1998] 1 C.M.L.R. 32 at [47]: "a Member State *is not precluded* from taking … measures against an advertiser in relation to television advertising"; *Société d'Importation Edouard Leclerc-Siplec v TF1 Publicité SA* (C-412/93) [1995] E.C.R. I-179; [1995] 3 C.M.L.R. 422 at [48]: "[Article 34 TFEU *does*] *not preclude* Member States from prohibiting … the broadcasting of advertisements for the distribution sector"; *Hünermund v Landesapothekerkammer Baden-Württemberg* (C-292/92) [1993] E.C.R. I-6787 at [24]: "[Article 34 TFEU] is to be interpreted as *not applying to* a rule of professional conduct … which prohibits pharmacists from advertising quasi-pharmaceutical products outside the pharmacy."

[26] See *Omalet NV v Rijksdienst voor Sociale Zekerheid* (C-245/09) [2010] E.C.R. I-13771 at [18]; *Chartry v Etat belge* (C-457/09) [2011] E.C.R. I-819 at [25]–[26]; *Ministerul Administratiei si Internelor v Corpul Național al Polițiștilor* (C-134/12) May 10, 2012 at [15]; *Pedone v N* (C-498/12) February 7, 2013 at [15]; *Gentile v Ufficio Finanziario della Direzione Ufficio Territoriale di Tivoli* (C-499/12) February 7, 2013 at [15]; *Loreti v Comune di Zagarolo* (C-555/12) March 14, 2013 at [18]; *T* (C-73/13) May 8, 2013 at [14]; *Cholakova Osmo Rayonno Upravlienie pri Stolichna direktsia na vatreshnite raboti* (C-14/13) June 6, 2013.

[27] This is the case in *Pfleger*, discussed below. See also *Direxta Alta Formazione Srl v Regione Puglia* (C-523/12) December 12, 2013 (the claim under art.56 TFEU absorbs those under arts 11 to 14 of the Charter); *Proceedings initiated by Sokoll-Seebacher* (C-367/12) February 13, 2014 at [21]–[23] (the claim under art.16 of the Charter is absorbed into that based on art.49 TFEU).

is decoupled from the trigger norms that are used to pass the (unchallenging) admissibility test and substantiate the "implementation" link. Take *Fransson*: the norms of EU law on VAT[28] were only invoked to convince the Court that the domestic regime on tax evasion fell within the scope of EU law, but they did not preclude it. The challenge was instead based on art.50 of the Charter. In *Sky Italia*,[29] the applicable Directive[30] and art.56 TFEU did not preclude the impugned measures (which granted a shorter advertising airtime to pay-TV broadcasters)[31]; however, a parallel challenge was brought invoking media pluralism under art.11 of the Charter.[32]

Another instance of the non-preclusion routine is the case *IBV v Région wallonne*.[33] The Belgian Constitutional Court suspected the incompatibility with the Charter's non-discrimination guarantees of a regional scheme incentivising energy co-generation,[34] which was only available to certain plants.[35] For the Charter to apply, however, the internal measure had to fall within the scope of application of EU law. The referring court identified Directive 2004/8 and Directive 2001/77[36] as trigger norms. The decree containing the domestic provision at issue in the main proceedings partially transposes these Directives.[37] A.G. Bot acknowledged that the Directives laid down only minimum harmonisation provisions and left "a broad margin of discretion"[38] to States that devise support schemes. As a result:

> "[60] … Directive 2004/8 must … be interpreted as not, in principle, precluding a regional support scheme such as that at issue in the main proceedings.
>
> [61] Nevertheless, in implementing Directive 2004/8, the Member States are required, under Article 51(1) of the Charter, to observe the principle of equal treatment enshrined in Article 20 thereof."

This passage is instructive. EU law has nothing to say about the domestic decree's provisions, but it is implemented by them for the purposes of art.51(1). Granted, the fact that the decree transposed a Directive generated a serious presumption of "implementation", but nothing prevents a Member State from including in the transposition act extra provisions that are *not* implementing EU law. These provisions cannot be brought within the scope of application of EU law simply because they feature in a transposing act.[39] In

[28] Namely, art.325 TFEU and the Sixth Directive (Directive 77/388 on the harmonisation of national laws on turnover taxes [1977] OJ L145/1, replaced by Directive 2006/112 on the common system of VAT [2006] OJ L347/1).

[29] *Sky Italia* (C-234/12) [2014] 1 C.M.L.R. 22.

[30] Directive 2010/13 (Audiovisual Media Services Directive) [2010] OJ L95/1.

[31] *Sky Italia* [2014] 1 C.M.L.R. 22 at [26].

[32] The claim was rejected as inadmissible because the Court found that it had insufficient information about the distortive effects of the domestic measure on competition to be able to assess its prejudice to media pluralism. *Sky Italia* [2014] 1 C.M.L.R. 22 at [23]–[24].

[33] *IBV & Cie v Région wallonne* (C-195/12) [2014] 1 C.M.L.R. 43.

[34] Cogeneration being defined as "the simultaneous generation in one process of thermal energy and electrical and/or mechanical energy"; see art.3(a) of Directive 2004/8 on the promotion of cogeneration based on a useful heat demand in the internal energy market and amending Directive 92/42 [2004] OJ L52/50.

[35] Those using biomass, with the exclusion of those using wood.

[36] Directive 2001/77 on the promotion of electricity produced from renewable energy sources in the internal electricity market [2001] OJ L283/33.

[37] Décret de la Région wallonne relatif à l'organisation du marché régional de l'électricité, *Moniteur belge*, May 1, 2001, p.14118, *http://www.code-project.eu/wp-content/uploads/2010/12/Wallonia-Electricity-Act.pdf* [Accessed September 1, 2014].

[38] *IBV* (C-195/12) [2014] 1 C.M.L.R. 43 at [55].

[39] Ladenburger, "European Union Institutional Report" in *Reports of the XXV FIDE Congress* (2012), p.141, 165: "Article 51 should apply not only where the transposing legislator has no margin, but also where it uses options or derogations foreseen in the directive, but not where, merely at the occasion of transposing, it adds national provisions not induced by the directive."

other words, it would not have been superfluous to explain why the specific provisions at issue in the main proceedings fell within the scope of EU law.

In truth, the referring court had tried to break down the "implementation" link into intelligible legal notions. It asked whether the Directives should be interpreted, in the light of the Charter, "as requiring, permitting or prohibiting" the domestic measure. This request for clarification was swept under the non-preclusion carpet. The ambiguity of "non-preclusion" is fully exposed: even if EU law leaves a margin of discretionary action to States, this does not mean that EU law is not applicable to their acts, but that it simply does not preclude them. This has a formidable implication: in the former case, the Charter applies; but not in the latter.

In the final analysis, one must come to terms with the Court's implicit notion that the "scope of application" of EU law is not as narrow as the actual application of EU law: it encompasses cases in which EU law has no reason to apply and yet is "applicable" in principle, just enough to trigger the Charter and general principles. The invocation of the Charter in the five 2014 decisions that will now be discussed gave the Court an opportunity to clarify the "scope of application" requirement.

The five decisions—facts and outcome

All five preliminary rulings gathered in this section stem from a similar claim raised in the main proceedings and espoused by the referring judges, at least tentatively: the applicable national measures were incompatible with the Charter. In each dispute, the Court first had to determine whether the domestic measures implemented EU law, in order then to review them for breach of the Charter.

The present discussion focuses mostly on the "implementation" link, as foreshadowed by the referring judge and assessed by the Court. The cases are grouped in non-chronological order, ranging from those disposed of for no connection at all with EU law (*Turnhout*, *Torralbo*), through those decided upon a non-implementation determination (*Siragusa*, *Hernández*), to the case where the Court found the implementation link at work (*Pfleger*).

Lack of jurisdiction prima facie—Torralbo *and* Turnhout

In *Torralbo*,[40] the claimant in the main proceedings—an employee who sought a judicial declaration of the insolvency of his employer—challenged the obligatory payment of judicial fees to bring the proceedings. In his view, this fee law unduly restricts the right to an effective judicial remedy (art.47 of the Charter) in proceedings aimed at securing the remedies provided by Directive 2008/94,[41] which protects employees in the event of employers' insolvency.

The Court found that the Spanish statute regulating the payment of judicial fees did not implement EU law and was not influenced by it. The Directive's scope of application was not engaged, because its safeguards are conditional upon a (previous) declaration of insolvency and cannot operate in proceedings that seek to obtain it.[42] The Court found that it had no jurisdiction to answer the preliminary questions.[43]

In *Turnhout*,[44] the Belgian Constitutional Court raised a preliminary question regarding the compatibility with EU law of the obligation for businesses to have a weekly closing day. This obligation and the

[40] *Torralbo Marcos v Korota SA* (C-265/13) March 27, 2014.

[41] Directive 2008/94 on the protection of employees in the event of the insolvency of their employer [2009] OJ L283/36.

[42] This is also the argument used by the Court in *Torralbo Marcos* (C-265/13) March 27, 2014 at [3]–[36] to distinguish *Torralbo* from *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Germany* (C-279/09) [2010] E.C.R. I-13849; [2011] 2 C.M.L.R. 21. In *DEB*, the simple fact that the claimant invoked State responsibility for breach of EU law in the main proceedings was considered sufficient to trigger art.47 of the Charter.

[43] *Torralbo* (C-265/13) March 27, 2014 at [43].

[44] *Pelckmans Turnhout NV v Walter Van Gastel Balen NV* (C-483/12) May 8, 2014.

exceptions thereto were challenged under arts 20 and 21 of the Charter on non-discrimination. The referring judge suggested that the Belgian measure could fall under the scope of EU law because it affects the implementation of EU obligations on the free circulation of goods and services.

The Court of Justice recalled the doctrine regarding selling arrangements, in particular those relating to the closure of shops.[45] It therefore discarded the application of art.34 TFEU to the measure at issue, which was indistinctly applicable and governed the conditions of selling in the marketplace, rather than the characteristics of the products sold. Then, the Court observed that the domestic measure's effects on the free provision of services "are too uncertain and indirect" to consider it an obstacle to trade.[46] Since neither art.34 nor arts 56–57 applied, the Court disposed of the preliminary reference claiming lack of jurisdiction.

Siragusa *and* Hernánde*—checklists and revival of the 1990s*

In *Siragusa*,[47] the claimant in the main proceedings challenged an Italian administrative law, which requires the demolition of building works conducted in areas covered by landscape conservation safeguards without the authorisation of the competent authorities. The rule is without exception and does not allow public authorities to grant planning permission retrospectively even when works are ultimately found to be compliant with the applicable landscape requirements. The referring judge asked the Court whether the absolute impossibility of sparing the works from destruction contradicts the principle of proportionality and art.17 of the Charter protecting private property. To substantiate the connection between the proceedings and EU law, the Italian judge pointed to EU law instruments relating to the Aarhus Convention and the Environmental Impact Assessment Directive,[48] noting that the safeguarding of landscape is a component of the European Union's environmental policy.[49]

Ultimately, the Court found that it had no jurisdiction, since there was no link of implementation between the impugned measure and EU law. Tellingly, to assess whether the Italian measure implemented EU law, the Court did not use the *Fransson* test, besides mentioning it in passing.[50] At [24]–[26] and [32], the Court mentioned no fewer than four rationales whereby this conclusion could be reached: each sufficient to found an autonomous test, none implicit in *Fransson* equivalence.

First, the Court held that the mere commonality of subject-matter between domestic and EU law is irrelevant for the purpose of applying the Charter. It explained that,

[45] The seminal case on selling arrangements is *Criminal Proceedings against Keck and Mithouard* (C-267–268/91) [1993] E.C.R. I-6097; [1995] 1 C.M.L.R. 101; on the closure of shops, see *Semeraro Casa Uno Srl v Sindaco del Comune di Erbusco* (C-418-421/93, C-460-462/93, C-464/93, C-9-11/94, C-14-15/94, C-23-24/94, C-24/94 and C-332/94) [1996] E.C.R. I-2975; [1996] 3 C.M.L.R. 648.

[46] *Turnhout* (C-483/12) May 8, 2014 at [25].

[47] *Siragusa v Regione Sicilia* (C-206/13) [2014] 3 C.M.L.R. 13.

[48] *Siragusa* (C-206/13) [2014] 3 C.M.L.R. 13 at [10], mentioning the Aarhus Convention, approved by Decision 2005/370 [2005] OJ L124/1 and Directive 2011/92 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L26/1.

[49] This reference to the EU regime of environmental law marks the difference between *Siragusa* and a previous case, *Fierro and Marmorale v Edoardo Ronchi and Cosimo Scocozza* (C-106/13) May 30, 2013. Also, in *Fierro and Marmorale*, the referring judge had raised doubts on the compatibility between domestic town planning laws and the right to property. However, the judge had not indicated any norm of EU law that could be relevant for the main proceedings; hence the Court swiftly declined its competence to answer the preliminary question. Likewise, see *Loreti* (C-555/12) March 14, 2014 and *Gentile* (C-499/12) February 7, 2013.

[50] *Siragusa* (C-206/13) [2014] 3 C.M.L.R. 13 at [22].

> "the concept of 'implementing Union law', as referred to in Article 51 of the Charter, requires *a certain degree of connection* above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other."[51]

In support, the Court cited *Kremzow*,[52] in which it held that long-term imprisonment could not be challenged for breach of the fundamental rights protected by EU law.[53] In particular, the "purely hypothetical prospect" of the inmate exercising free movement rights, which would have been hindered on account of his imprisonment, was deemed not to "establish a sufficient connection with Community law".[54]

Secondly, the Court listed some "points to be determined" to assess the applicability of EU law to national measures: whether the domestic act is intended to implement EU law; what its nature is[55]; whether it has other purposes than those envisioned by EU law "even if it is capable of indirectly affecting" the latter; and whether EU law contains norms that govern or can affect the specific matter regulated by the domestic rule.[56] This enumeration—with no indication of the relative importance of the aspects listed—is accompanied by reference to the 1997 precedent of *Annibaldi*[57] and to two recent judgments on citizenship (*Iida* and *Ymeraga*), which contained checklists identical to the one provided in *Siragusa*.

Thirdly, the Court noted that EU law did not create any obligation applicable to the facts of the main proceedings; hence the Charter could not apply either. In support of this conclusion, the Court cited *Maurin*, a 1996 case hinging on the possible application of fair trial guarantees in the context of criminal proceedings relating to the sale of expired foodstuff.[58]

Fourthly, the Court recalled the purpose of EU fundamental rights protection: to prevent regulatory diversity in this area from threatening the "unity, primacy and effectiveness" of EU law. This formula is borrowed from *Melloni*[59] (and *Fransson*) and is strengthened through a reference to *Internationale Handelsgeselschaft*,[60] which contained a similar passage regarding the superior interest of the "uniformity and efficacy" of Community law vis-à-vis national law of whatever rank.

Under each of the four criteria, the Italian administrative rule fell outside the scope of application EU law and, accordingly, failed to trigger the Charter's application.

The preliminary ruling in the *Hernández* case[61] consolidated the eclectic approach taken in *Siragusa*. The claimants had successfully challenged their dismissal in labour proceedings against their employers. However, the latter had ceased their activity and were found to be provisionally insolvent by the end of the labour proceedings. Consequently, the employees who had been unjustly terminated were awarded compensation for the dismissal and for the remuneration owned since termination, including for the time that had elapsed during the labour proceedings. Because of the employers' insolvency, the employees sought to recoup part of the compensation from the state, under a statutory provision[62] that makes the state

[51] *Siragusa* (C-206/13) [2014] 3 C.M.L.R. 13 at [24] (emphasis added).

[52] *Kremzow v Austria* (C-299/95) [1997] E.C.R. I-2629; [1997] 3 C.M.L.R. 1289.

[53] Namely, for breach of the right to fair trial and for unlawful deprivation of liberty.

[54] *Kremzow* (C-299/95) [1997] E.C.R. I-2629 at [16].

[55] This being a strikingly vague element, it is worth mentioning that on previous occasions (see *Iida* and *Ymeraga*), the checklist read "character" instead of "nature". From a reading of *Annibaldi* (C-309/96) [1997] E.C.R. I-7493 at [20], it appears that this notion refers to the reach of the domestic measure. That is, "national rules which are general in character" are less likely to implement EU law if they pursue other objectives.

[56] *Siragusa* (C-206/13) [2014] 3 C.M.L.R. 13 at [25].

[57] *Annibaldi* (C-309/96) [1997] E.C.R. I-7493 at [21]–[23].

[58] *Criminal Proceedings against Maurin* (C-144/95) [1996] E.C.R. I-2909 at [11]–[12].

[59] *Melloni v Ministerio Fiscal* (C-399/11) [2013] 2 C.M.L.R. 43 at [60]. See L. Besselink, "The Parameters of Constitutional Conflict after Melloni" (2014) 39 E.L. Rev. 531.

[60] *Internationale Handelsgesellschaft mbH v Einfuhr und Vorratsstelle für Getreide und Futtermittel* (11/70) [1970] E.C.R. 1125; [1972] C.M.L.R. 255 at [3].

[61] *Hernández v Puntal Arquitectura SL* (C-198/13) July 10, 2014.

[62] See art.57(1) of the Workers' Statute.

liable for remuneration owed after the 60th day of dismissal proceedings. This rule's aim is to protect the employer from the portion of liability caused by the length of the proceedings: the employer is primarily entitled to request the corresponding amount, but the employee can claim it directly by way of subrogation if the employer is insolvent. In this case, the employees' request for compensation from the state was rejected, because the statutory provision granted it only in cases of "unfair" dismissals (*improcedentes*), not "invalid" ones (*nulos*).

The referring judge asked the Court whether this difference in treatment was compatible with art.20 of the Charter on non-discrimination. As for the link with EU law, the preliminary question tentatively indicated that the national measures might fall within the scope of Directive 2008/94,[63] requiring Member States to establish guarantee institutions that pay employees their outstanding claims when employers are insolvent.

The Court noted that the rules on State liability for sums owed after 60 days of proceedings protected the employer from delays in the dismissal proceedings, and that only through subrogation in specific cases could employees lay claim to these sums. In other words, the purpose of the national measures was to compensate employers from potential damage incurred because of the poor administration of justice, whereas the Directive's objective was to protect workers from the economic repercussions of the employer's insolvency. The Court used this teleological gap to hold that the Spanish measures did not fall under the scope of EU law, let alone the Charter's.

The Court's finding with respect to the implementation link was supported through general remarks that are virtually indistinguishable from *Siragusa*'s composite test, as described above. They featured, in the same order, the "degree of connection" element,[64] the lack of "any specific [EU] obligation" as an impediment,[65] the checklist distilled from the *Annibaldi-Iida-Ymeraga* trio,[66] and the final safeguard against the risk to the "unity, primacy effectiveness of EU law".[67]

For greater certainty, the Court recalled that the mere existence of EU legislative powers is insufficient to bring domestic acts under the scope of EU law in the absence of actual EU norms.[68] Hence, the fact that the European Union can adopt measures for the protection of terminated workers under art.153(2) TFEU cannot change the final conclusion: the Spanish measure does not implement EU law for the purposes of art.51(1) of the Charter.

One remark of the Spanish court needed special care. Article 11 of Directive 2008/94 recognises that it shall not affect the "option" of the Member States to enact provisions that are more favourable to employees than required therein. It was therefore asked whether Spain had availed itself of this option, by granting to the employees the right directly to claim the sums owed by the state to the employer in certain cases. If that were the case, Spain arguably acted "within the scope of EU law", that is, within the limit of legislative discretion granted by art.11 of the Directive. The Court debunked this reasoning by noting that art.11 does not authorise the exercise of competence of the Member States, but simply acknowledges that the Directive does not detract from their original legislative power. When Member States provide for higher protection for employees, they do not act within the limits of the permission of some EU law, but precisely within the field that EU law has left untouched.[69]

This was a delicate passage of the reasoning: the Court simply noted that the Directive expressly excludes its *application* ("shall not affect") to certain national measures. Because EU law does not apply, neither

[63] Directive 2008/94 on the protection of employees in the event of the insolvency of their employer [2008] OJ L83/36.
[64] *Hernández* (C-198/13) July 10, 2014 at [34].
[65] *Hernández* (C-198/13) at [35].
[66] *Hernández* (C-198/13) at [37].
[67] *Hernández* (C-198/13) at [47].
[68] *Hernández* (C-198/13) at [36].
[69] *Hernández* (C-198/13) at [44].

does the Charter. However, the very fact that EU law certifies this margin of state action could be interpreted as a permission, that is, a discretionary power granted by EU law (as in *Chakroun* and *NS*). In other words, this could be a *non-preclusion* case, which triggers the application of the Charter. The line is blurred and the determination hinges on tentative analysis of the wording of the EU act, on the hopeful assumption that the law-makers held this distinction clear: in this case, "shall not affect" seemingly indicates non-application rather than non-preclusion. A comparison with the opposite scenario, in *IBV*, is provided below.

Pfleger—*implementation at work*

The preliminary question in *Pfleger*[70] was raised by an Austrian administrative tribunal. In the main proceedings, several claimants had challenged the administrative and criminal sanctions issued for operating gaming machines without the authorisation of the competent public authorities. In their view, the Austrian licensing system contradicts the TFEU's norms on the free circulation of services and the guarantees on the right to property and to conduct a business in arts 15–17 of the Charter.

A.G. Sharpston considered the question to be admissible despite Austria's objection that there was no cross-border element in the dispute. In fact, the same licensing measures apply to Austrian and non-Austrian operators; hence they fall within the scope of EU law on market freedoms if they hinder inter-State trade.[71] In addition, the notion of implementation of EU law also encompasses State acts that derogate from fundamental freedoms, hence the requirement of art.51(1) of the Charter was met.[72] She founded her reasoning on a joint reading of the explanations of the Præsidium and the post-Lisbon cases of *Fransson* and *Texdata*: the Charter and fundamental rights—as general principles—apply to Member States acting "in the scope of Union law". As the *ERT* precedent shows, exceptions to the freedom to provide services are only permitted if they are compatible with fundamental rights.[73]

The Court upheld its own competence and agreed with A.G. Sharpston that the situation was not purely internal. It recalled that Member States must respect fundamental rights when they seek to justify impediments to free movement grounded on "overriding requirements in the public interest".[74] In the specific case, the TFEU regime on free movement constituted the normative sphere within which the Austrian system operated, if only to derogate from it.

The Court, while acknowledging States' margin of appreciation in choosing appropriate policies on gambling, concluded that the impugned measures were disproportionate. This finding was based on the referring court's remarks that the pre-eminent purpose of the licensing system was to increase public revenues rather than to fight crime. As a result, the Court found a violation of art.56 and, ipso facto, arts 15–17 of the Charter.

A comment on the five cases

These rulings send mixed signals about the "implementation" notion of art.51(1) of the Charter, and raise a reasonable suspicion that there still is no reliable test to identify the "scope of application of EU law".

[70] Proceedings brought by *Pfleger* (C-390/12) April 30, 2014.
[71] Opinion in *Pfleger* (C-390/12) November 14, 2013 at [32].
[72] Opinion in *Pfleger* (C-390/12) at [36].
[73] Opinion in *Pfleger* (C-390/12) at [44].
[74] *Pfleger* (C-390/12) April 30, 2014 at [35].

Multiple tests do not make a definition

From the previous paragraphs, it should be clear that the Charter is only relevant to the Court's judicial review of domestic acts in "non-preclusion" cases. The discussion of art.51(1) in all other circumstances is virtually an exercise of style, an obiter: if national measures do not fall within the scope of EU law, there is *no right* to resort to the Charter; if EU law prohibits the national measures, there is *no need* to resort to the Charter. In four cases, the Charter (like EU law at large) did not apply at all, whereas in *Pfleger* the Charter's application proved irrelevant because it did not provide substantive protection beyond that granted in the TFEU.

In other words, none of these cases can be used as a precedent to interpret art.51(1) of the Charter in non-preclusion cases, not even *a contrario* (see below): the Court seems to be buying time and generally narrowing down *Fransson*'s liberal approach. However, the Court is acutely aware that a better test for art.51(1) is necessary, so it is plausible to expect that no obiter is spent in vain or written distractedly. In fact, the use of formulaic reasoning suggests that the Court is treading lightly, testing the relevance and accuracy of its own case law and playing by ear, rather than experimenting with new tests.

This impression is reinforced by a coincidence. When domestic measures were found clearly to implement EU law (*Pfleger*) or not at all (*Torralbo*, *Turnhout*), *Fransson* equivalence sufficed and no other test or precedent was deployed. This is understandable, and so is the use of further tests in less obvious cases if one agrees that *Fransson* is useless to determine the "connection" between domestic and EU law. One would expect that the detailed reasoning of cases like *Siragusa* and *Hernández* served precisely to describe the elusive "*élément de rattachement*" that could allow the Court to use the Charter in non-preclusion cases.[75]

In fact, the multiple rationales for non-application offered in these cases provided no additional clarity, because they all applied at once. That is, the domestic measures at issue did not satisfy any of the indicators proposed to ascertain the "implementation" link, despite the alleged use of four separate benchmarks or even more (the *Iida* checklist being composed of four sub-elements). It is impossible to tell yet whether a domestic measure can meet only *some* of the conditions listed in *Siragusa* and still implement EU law. If a domestic act has the same general purpose as some EU measure and yet there is no EU law obligation in the specific area governed by the domestic act, will there be "implementation"? What about a national measure which is not intended to implement EU law and does not share its objectives, but nevertheless affects its operation directly? The spate of tests offered in *Siragusa* did not answer these and other comparable questions.

At this stage, the impression is that the tests in *Siragusa* are neither cumulative nor alternative: they are roughly repetitive. The Court seems to have a hard time devising a precise test and therefore proceeds by inference rather than analysis. In an inductive endeavour, the Court piled up quasi-synonymous tests whose aggregate purpose is to "give the idea". This is not necessarily a bad strategy, and is possibly the only one available if it is accepted that "implementation" in the sense of art. 51(1) of the Charter "is one of those Potter Stewart-type words that's ultimately definable only ostensively—i.e., we know it when we see it".[76]

[75] *Polier v Najar EURL* (C-361/07) [2008] E.C.R. I-6 at [11].

[76] D. Foster Wallace, "David Lynch Keeps His Head", *Premiere* (September 1996), referring to Justice Potter's famous refusal to define "pornography" analytically. See *Jacobellis v Ohio* 378 U.S. 184 (1964): "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." The quote from Foster Wallace's essay, in the paragraph titled "What Lynchian means and why it's important", introduces a gallery of hypothetical scenarios each of which is considered "Lynchian" or not, in an intuitive but reliable way.

It is impossible to draw general rules a contrario

This impressionistic approach is traceable also in *IBV*, where the subsumption of the main proceedings under the application of EU law was remarkably cavalier. Specifically, the claimant met one of the definitions of Directive 2004/8 (that of co-generation units) and so did its activity under a definition of Directive 2001/77 (the production of electricity).[77] This sufficed for the Court to say that certain rules of these Directives "must be taken into consideration",[78] even if they do not regulate the situations at stake in the main proceedings. However, the State was squarely considered to implement EU law because, in adopting the support scheme, it acted "within a framework such as that laid down" by the two Directives.[79] Two provisions in particular were singled out simply because they mention national support schemes and require their energy-effectiveness and non-trade-restrictiveness (two aspects that were not at issue in the main proceedings).[80]

It would be tempting to reverse-engineer a test of implementation from this finding, claiming for instance that all State action taken "within a framework" set by EU law is subject to the Charter, or that one decisive element is whether EU law mentions, for any reason, the specific matter regulated by the domestic measures. One could agree with the Court's conclusion in *IBV*, noting that the adoption of supporting schemes does indeed implement the EU obligation to "take appropriate steps to encourage" the consumption of renewable energies.[81] On the contrary, one could note that each Member State has the capacity to choose the support scheme that "corresponds best to its particular situation"[82] and claim that EU law does not apply to (as opposed to simply not precluding) national support schemes, unless they breach certain requirements, but, ultimately, the impression is that the Court was not interested in setting a test in the specific case: it knew implementation when it saw it.

The margin of freedom left to Member States by Directive 2004/8 to adopt co-generation support schemes was immaterial in a *positive* finding of implementation: States could freely determine the format of their policies, but they still acted within the scope of the Directive. Contrast this conclusion with the opposite one reached in *Hernández*. In that case, the margin of freedom left to Member States by Directive 2008/94 to enact measures more favourable to employees was immaterial in a *negative* finding of implementation: States could freely determine higher standards of protection under the permissive terms of the Directive and yet act outside its scope. There is no contradiction only if one refrains from *a contrario* generalisations and zooms out enough. The different conclusions stem primarily from a teleological analysis: whereas the Belgian decree and Directive 2004/38 had roughly the same overall objective (promoting the production of renewable energy), the Spanish measure and Directive 2008/94 simply had different overall rationales (respectively, protecting employers and protecting employees), irrespective of whatever *rattachement* or connection could be hypothesised to exist between the two.

Another comparison comes to mind. In *Torralbo*, the Court discounted the relevance of Directive 2008/94 in the main proceedings, even if the claimant clearly envisaged seeking protection under it. The lesson drawn *a contrario* from this case would be that EU law is not involved when the domestic measures at stake in the main proceedings merely regulate the preliminary conditions of access to the enjoyment of subjective rights conferred by EU law. This test would presumably be at odds with the *effet utile* principle of EU law and with the so-called "incorporation doctrine"[83] idea, according to which the conditions of

[77] *IBV* (C-195/12) [2014] 1 C.M.L.R. 43 at [45].
[78] *IBV* (C-195/12) at [46].
[79] *IBV* (C-195/12) at [49].
[80] Directive 2004/8 art.7; Directive 2001/77 art.4.
[81] Directive 2001/77 art.3(1).
[82] Directive 2004/8, Recital 32 of the Preamble.
[83] See M. Cartabia, "Europe and Rights: Taking Dialogue Seriously" (2009) 5 E.C.L.R. 15, referring to *KB v Nat'l Health Serv. Pensions Agency* (C-117/01) [2004] E.C.R. I-541; [2004] 1 C.M.L.R. 28; *Richards v Sec'y of State for*

access (and obstacles) to the enjoyment of EU rights are brought within the scope of EU law even when they belong to states' competences. See a classic enunciation of this doctrine in *Gravier*[84]:

> "[19] … although educational organization and policy are not as such included in the spheres which the treaty has entrusted to the community institutions, access to and participation in courses of instruction and apprenticeship, in particular vocational training, are not unconnected with Community Law …
> [24] Access to vocational training is in particular likely to promote free movement of persons throughout the Community …
> [25] It follows from all the foregoing that the conditions of access to vocational training fall within the scope of the Treaty."

If the restrictions on access to vocational training are instrumental to the free movement of workers, perhaps the restriction of claimants' access to labour proceedings could be equally instrumental to the objective of Directive 2008/94.

Consider instead the ruling in *Soukupová*.[85] At stake was the Czech law setting different minimum retirement ages for men and women. A domestic statute, regulating access to the incentives for early retirement from farming granted under an EU Regulation,[86] incorporated this differential regime by reference. As a result, it was challenged for breach of the rights of equal treatment and non-discrimination protected by the Charter. The Court took no issue with the "implementation" link,

> "while the definition of 'normal retirement age' within the meaning of the second indent of Article 11(1) of Regulation No 1257/1999, in the absence of harmonisation at European Union level, *falls within the competence of the Member States*, the fact nevertheless remains that, for the purposes of the application of that regulation, Member States may not [discriminate]."[87]

The lack of EU harmonisation did not situate the discriminatory element of the Czech measure outside the reach of EU law: if that were the case, the Regulation could possibly be executed at the State level in disregard of the Charter. This being precisely what art.51(1) of the Charter is designed to prevent, the national measure was brought within the scope of EU law—even if its defective provision fell in fact "within the competence of the Member States". As the Court noted,

> "the European Union legislature cannot be regarded, on the basis of that reference to a concept which has not been harmonised, as having empowered Member States, in the implementation of that regulation, to adopt measures which would infringe the general principles of European Union law and fundamental rights."[88]

Again, whereas the reasoning of *Torralbo* and *Soukupová* sounds jarring, their different outcomes are quite plausible if one does not strive to extract a test. In *Torralbo*, the domestic measure is concerned with the payment of judicial fees in civil proceedings, whereas the putative EU trigger norm (Directive 2008/94) pursued the completely unrelated purpose of protecting employees in the case of employers' insolvency.

Work & Pensions (C-423/04) [2006] E.C.R. I-3585; [2006] 2 C.M.L.R. 49; *Maruko v Versorgungsanstalt der deutschen Bühnen* (C-267/06) [2008] E.C.R. I-1757; [2008] 2 C.M.L.R. 32. For further examples regarding freedom of movement, see P. Eeckhout, "The EU Charter of Fundamental Rights and the Federal Question" (2002) 39 C.M.L. Rev. 945, 960.

[84] *Gravier v City of Liège* (293/83) [1985] E.C.R. 593; [1985] 3 C.M.L.R. 1.

[85] *Soukupová* (C-401/11) [2013] 3 C.M.L.R. 19.

[86] Regulation 1257/1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund [1999] OJ L160/80.

[87] *Soukupová* (C-401/11) at [26] (emphasis added).

[88] *Soukupová* (C-401/11) at [26].

In *Soukupová*, instead, the national measure was adopted to promote the development of rural areas just like the EU Regulation (commonality of purpose), and its discriminatory application resulted only from a careless reference to a general (and questionable) aspect of the Czech pensions regime.

In essence, then, the Court's determinations with regard to art.51(1) of the Charter are purpose-driven; they are not concerned with the application or creation of a coherent judicial test. Unfortunately, however, an abstract test is sorely needed to guide ordinary courts.[89] Whether the Charter applies to national measures or not is something that national judges are expected to know because they must disapply national measures that breach EU law, including the Charter. Granted, they are also supposed to know when EU law at large applies in the main proceedings, but their margin of error is wider in that respect. Whether they deem that EU law does not apply or, alternatively, that it applies but does not prohibit the applicable State norms, the result is the same: the domestic measure will apply in the proceedings. The non-preclusion grey area renders inoffensive at least some false positives (EU law is mistakenly deemed to apply, but is deemed not to affect the domestic measure) and false negatives (EU law is mistakenly ruled out, but it would have not affected the measure), because there is no relevant difference in their consequences on the proceedings. The operation of the Charter eliminates the buffer. Disapplication of domestic measures for breach of the Charter depends precisely on the distinction between non-application of EU law and application of EU law that does not preclude domestic acts. Without better instructions, ordinary courts are bound to develop do-it-yourself judicial tests,[90] which threaten the uniform application of EU law in general and of the Charter in particular.

The blurry confines of purely internal situations and the abusive use of the Charter

In less than 18 months, *Fransson* equivalence has revealed itself for what it is: a tautological red herring. If anything, *Fransson* confirmed that a specific legislative intention is not necessary for a national measure to implement EU law de facto: any contribution to the objectives of EU law can induce the Court to "see" implementation at work.

The revival of vintage tests (*Maurin*, *Annibaldi*, *Kremzow*) proved that the turn to minimalism has quickly, and luckily, lost its lustre.[91] However, the Court's renewed effort in trying to square the "implementation" circle for the purposes of art.51(1) is equally misplaced. The real conundrum is upstream: *Fransson*'s unintended merit has been to shift attention to the wider problem of the application of EU law at large.

President Skouris, praising *Fransson* equivalence as the Columbus egg of the interpretation of art.51(1) of the Charter, in fact confirmed its troublesome implications. In the attempt to demonstrate how easy it is to determine when EU law applies, he cited an "established case law" comprising *Terhoeve*,[92] *Carpenter*[93] and *Guimont*.[94] It is not clear how these rulings should be of any guidance, let alone reassurance. In these cases, the Court held that the Treaty obligations on the market freedoms can apply even to the State of nationality of the EU citizen (*Terhoeve* and *Carpenter*) or to non-discriminatory trade rules (*Guimont*).

[89] For a fully developed argument, see F. Fontanelli, "National Measures and the Application of the EU Charter of Fundamental Rights of the EU—Does curia.eu Know iura.eu?" (2014) 14 H.R.L.R. 231.

[90] A series of domestic case studies is provided in Fontanelli, "The Implementation of European Union Law by Member States under Article 51(1) of the Charter of Fundamental Rights" (2014) 20 C.J.E.L. 193, 194–196 and 227–230.

[91] In the wake of *Fransson*, it was noted that checklists were a thing of the past; see D. Sarmiento, "Who's Afraid of the Charter? The Court of Justice, National Courts and the new Framework of Fundamental Rights Protection in Europe" (2013) 50 C.M.L. Rev. 1267, 1279.

[92] *Terhoeve v Inspecteur van de Belastingdienst Particulieren* (C-18/95) [1999] E.C.R. I-345; [2001] 1 C.M.L.R. 12 at [27].

[93] *Carpenter v Sec'y of State for the Home Dep't* (C-60/00) [2002] E.C.R. I-6279; [2002] 2 C.M.L.R. 64.

[94] *Criminal Proceedings against Guimont* (C-448/98) [2000] E.C.R. I-10663; [2003] 1 C.M.L.R. 3.

These cases show conspicuously the expansive force of EU law, which can infiltrate what appear to be purely internal situations. In other words, these are not good cases to prove that the limits of the application of EU law can be known with confidence; if anything, they reinforce the opposite argument: that one never knows with certainty the situations to which EU law is (in)capable of applying. Moreover, these cases feature in all critiques questioning the vagaries of the "purely internal situations" doctrine and the nonsense of reverse discrimination caused by the idiosyncratic conditions of the application of EU law.[95] Solving the "implementation" puzzle through the equally confusing test on "purely internal situations" brings to mind the proverbial mistrust of the blind leading the blind. However, it helps at least to determine who among the blind is to blame for the meandering of the group: the leading one. Leaving metaphors aside, it follows from the above that to know when the Charter applies is at least as difficult as to know when EU law applies to national situations—if not more so.[96]

Two categories of cases will possibly cause the most serious embarrassment for the Court. The first category includes the situations in which the Court has interchangeably used "non-application" and "non-preclusion" so far, on account of their practical equivalence. The case law on selling arrangements under art.34 TFEU is one example. Take *Turnhout*: the Court confidently noted that, as observed "on a number of occasions", arts 34 to 36 TFEU "*do not apply* to national rules concerning the closure of shops" which are indistinctly applicable.[97] *Semeraro* is one of the numerous cases mentioned in support of this conclusion. In *Semeraro*, the Court argued that art.34 TFEU "*does not apply*" to the national measures at issue.[98] This conclusion cited as authority the precedents *Punto Casa*[99] and *B & Q*.[100] In the latter case, the Court was very clearly convinced that there is no distinction between non-preclusion and non-application. It started off with an impeccable finding of non-preclusion:

> "[11] … the legislation at issue pursued an aim which was *justified* under Community law. National rules restricting the opening of shops on Sundays reflected certain choices relating to particular national or regional socio-cultural characteristics. It was for the Member States to make those choices *in compliance with the requirements of Community law, in particular the principle of proportionality*."[101]

In other words, the national measures at issue fell within the scope of EU law (they must comply with its requirements, particularly with the proportionality principle) but were not precluded by it (they are "justified"). However, the Court's wrap-up said otherwise:

[95] N. Nic Shuibhne, "Free Movement of Persons and the Wholly Internal Rule: Time to Move On?" (2002) 39 C.M.L. Rev. 731; C. Ritter, "Purely Internal Situations, Reverse Discrimination, Guimont, Dzodzi and Article 234" (2006) 5 E.L. Rev. 690; A. Tryfonidou, "Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe" (2008) 35 *Legal Issues of Economic Integration* 43; M. Mataija, "Internal Situations in Community Law: An Uncertain Safeguard of Competences within the Internal Market" (2009) 5 *Croatian Yearbook of European Law and Policy* 31; D. Hanf, "Reverse Discrimination in EU Law: Constitutional Aberration, Constitutional Necessity, or Judicial Choice" (2011) 18 Maastricht J. Eur. & Comp. L. 29; P. van Elsuwege "The Phenomenon of Reverse Discrimination: An Anomaly in the European Constitutional Order?" in L. Rossi and F. Casolari (eds), *The EU after Lisbon* (New York: Springer, 2014), p.161.

[96] See *Hermes Hitel és Faktor Zrt v Nemzeti Földalapkezelo Szervezet* (C-16/12) July 6, 2012 at [20], for an example of the Court's refusal to review purely internal situations on account of a "purely hypothetical" effect of the domestic measure on inter-State trade.

[97] *Turnhout* (C-483/12) May 8, 2014 at [24] (emphasis added).

[98] *Semeraro* (C-418/93) [1996] E.C.R. I-2975 at [26] (emphasis added).

[99] *Punto Casa and PPV v Sindaco Del Commune di Capena* (C-69/93 and C-258/93) [1994] E.C.R. I-2355.

[100] *City of Stoke-on-Trent and Norwich City Council v B & Q Plc* (C-169/91) [1992] E.C.R. I-6635; [1993] 1 C.M.L.R. 426.

[101] *B & Q Plc* (C-169/91) [1992] E.C.R. I-6635 at [11] (emphasis added).

> "[17] … Article [34 TFEU] is to be interpreted as meaning that the prohibition which it lays down *does not apply* to national legislation prohibiting retailers from opening their premises on Sundays." (Emphasis added.)

This is the formula that was lifted word for word in *Semeraro*, and passed down until *Turnhout*. In spite of its apparent clarity (non-application of art.34 TFEU), it is only the summary of a more articulate reasoning that used non-preclusion and non-application as synonymous.

When the Charter's standard does not overlap with the rights protected by the TFEU—as in *Pfleger*—an inattentive finding of non-preclusion can lead to review under the Charter (e.g. under freedom of expression) of domestic measures that have no detrimental effect on inter-State trade but are nevertheless brought within the scope of EU law through the free movement provisions of the TFEU. The *Turnhout* case seems to discount this possibility, but the inconsistency of the case law from which it derives could be used strategically to invoke the Charter in a future case.

The second category comprises derogation cases (such as *ERT* or *Pfleger*), in which the departure from EU law obligations is minimal and easily justifiable; hence the proceedings result in a finding of justification (non-preclusion). It can be tempting to free-ride the principle of *effet utile* to bring a Charter-based challenge to domestic measures that have little to do with EU law. In fact, it would be sufficient to point to some minimum impact on trade or sub-optimal compliance with another EU law obligation to require justification and trigger the proportionality test. Even if the domestic measures are fully exonerated from any violation of non-Charter EU law in light of their purpose, they qualify also for review under the Charter by virtue of the *ERT*-doctrine. Without a clear de minimis test (only sketched in *Kremzow*, *Siragusa* and *Turnhout*), national and EU courts must either accept to carry out the Charter-based review or dismiss the claim turning their backs on evidence of some actual derogation from EU law, albeit minimum and justifiable, by calling it remote and hypothetical, or resorting to other qualifiers that imply some degree of value judgement.[102]

Conclusions

After *Fransson*, the Court elaborated on the concept of "implementation" of EU law in connection with art.51(1) of the Charter, trying to devise new tests. In the five cases discussed here, by chance or by design, the Court was spared from the crucial task of sanctioning the application of the Charter in non-preclusion situations. As a result, the lack of clarity continues, and the reasoning in these rulings is opaque: several tests are proposed at once, roughly synonymous, to determine when EU law *does not* apply. Because of their vagueness and their aggregate operation, it is impossible to use these tests *a contrario* in order to formulate a test to *know* when EU law applies, even when it does not prohibit national measures.

Because the problem with the application of EU law in national proceedings runs deeper than it appears at first glance, i.e. simply looking for the meaning of "implementation" in art.51(1) of the Charter, it is reasonable to expect future cases in which the claimants scheme a non-preclusion scenario to invoke the Charter in unexpected circumstances. These cases will induce a clarification that is long overdue. The risk is that, by then, it might be too late for the Court to tidy up its own case law and formulate a principled test. In particular, its absent-minded use of non-application and non-preclusion as substitutes might backfire and compel the Court to apply the Charter on account of a tenuous link between the domestic measure and EU law.

[102] See, for instance, the reasoning of Lord Glennie in *Re Moohan* [2013] CSOH 199; 2014 S.L.T. 213 at [90] (the domestic regime on prisoners' voting "is a matter one or more steps removed from" the issue of the enjoyment of EU citizenship rights). The claimants, in the attempt of invoking the Charter, had argued that the system affected the EU-derived rights of prisoners because it prevented them from voting in the September 2014 independence referendum, which could have resulted in Scotland leaving the United Kingdom.

In similar situations, however, the Court should not worry after all. In *Siragusa* and *Hernández*, it stored a panoply of excuses which it did not really need in these specific disputes and possibly went largely unnoticed for this very reason. However, each of them, suitably applied, could come in handy in the future in a non-preclusion case where *Fransson*-equivalence alone would leave no real escape from the Charter. With a bit of effort, the Court can slip away from borderline, specious and overly delicate cases using its own precedents. It could defuse the Charter bomb by administering one of *Siragusa*'s dormant exceptions, much in the same way one pulls out the hitherto useless Get Out of Jail Free card in Monopoly©, when things get tough.