

# Constitutional Activism of the European Court of Justice? On Rising Tensions Between Karlsruhe and Luxembourg After *Åkerberg Fransson*

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## *The supremacy of EU law over national constitutions*

The extent to which EU law can override national legislation has been among the most controversial issues ever since the creation of the European Economic Community in 1957. The ECJ set the course for the unprecedented impact of a supranational legal order on the laws of sovereign states in its seminal decision of “Costa v. ENEL” in 1964 by inventing the principle of primacy or supremacy of EU law.<sup>1)</sup> In later judgments, e.g. “Internationale Handelsgesellschaft”<sup>2)</sup>, “Simmenthal II”<sup>3)</sup> and “Kreil v. Germany”<sup>4)</sup>, the Court left no room for doubt that every provision of Union law, including secondary and tertiary law, potentially supersedes any norm of national law, including constitutional law.

## *Filling the gap: the invention of EU fundamental rights*

At the same time, there were considerable concerns about the level of fundamental rights protection on the EU stage. Above all, the German Federal Constitutional Court (FCC) demanded in its famous “Solange I” decision<sup>5)</sup> that fundamental rights be safeguarded by the ECJ in a manner comparable to that foreseen in the German Basic Law. Subsequently, the ECJ paid greater attention to human rights, anchored them as general principles of EU law deriving from the ECHR and constitutional traditions common to the Member States (cf. the codification of that case-law in Article 6(3) TEU) and developed four constellations in which

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1) Case 6/64, *Costa v ENEL*, ECR (English special edition) p. 585, at para. 3.

2) Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

3) Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629.

4) Case C-285/98, *Tanja Kreil v. Bundesrepublik Deutschland* [2000] ECR I-69.

5) Case 2 BvL 52/71, *Solange I*, 37 BVerfGE 271; English translation available from <[http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=588](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=588)> (last accessed on 31 January 2014).

the fundamental rights of the European Union apply to measures taken at the national level.<sup>6)</sup> (1) when the member states are *stricto sensu* implementing EU law,<sup>7)</sup> i.e. when the national legislature adopts provisions to make the law of the land compatible with EU requirements, when the Member State administration executes directly applicable EU law or national law based on EU prerequisites, or when the national judiciary applies such law – including situations in which the EU measure leaves the Member States considerable room for discretion and derogations;<sup>8)</sup> (2) when Member States contravene the requirements of an insufficiently transposed directive or violate the prohibition on frustrating the objectives of a directive during the transposition period;<sup>9)</sup> (3) when a Member State cites fundamental rights as mandatory requirements in order to restrict one of the fundamental freedoms;<sup>10)</sup> (4) when a Member State relies on a derogation from a fundamental freedom, so EU fundamental rights function as boundaries to the justification grounds cited by the Member States.<sup>11)</sup>

### *An attempted cutback of ECJ case-law*

Notable figures such as FCC judge Peter M. Huber have regarded that case-law as too far-reaching and aired misgivings that a wide scope of EU fundamental rights protection would lead to a “unitarisation by basic rights”, i.e. a harmonisation of wide areas of Member States law through the back door of requirements derived from the Charter.<sup>12)</sup> Consequently, attempts were made during the drafting process at the Convention on a Charter of Fundamental Rights – the body which elaborated the text of the original version proclaimed

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6) For greater detail cf. Rudolf Streinz and Walther Michl, “Art. 51 GRCh”, at marginal numbers 7 et sqq., in Rudolf Streinz (ed.), *EUV/AEUV*, 2<sup>nd</sup> ed. (Munich: C.H. Beck, 2012), at p. 2861 et sqq.

7) Cf. the ECJ’s classic decision in Case 5/88, Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft [1989] ECR 2609, at para. 19.

8) See the ECJ’s clear statement in Case C-540/03, European Parliament v. Council of the European Union [2006] ECR I-5769, at para. 22.

9) See Case C-144/04, Werner Mangold v. Rüdiger Helm [2005] ECR I-9981, at paras. 67 et sqq., and Case C-555/07, Seda Küçükdeveci v. Swedex GmbH & Co. KG [2010] ECR I-365, at paras. 22 et sqq.

10) See Case C-112/00, Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich [2003] ECR I-5659, at paras. 77 et sqq, Case C-438/05, International Transport Workers’ Federation and Finnish Seamen’s Union v. Viking Line ABP and OÜ Viking Line Eesti [2007] ECR I-10779, at paras. 75 et sqq., and Case C-341/05, Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet [2007] ECR I-11767, at paras. 102 et sqq.

11) See the seminal Case C-260/89, Elliniki Radiophonia Tiléorassi AE (ERT) and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others [1991] ECR I-2925, at para. 43. Notable subsequent decisions include Case C-368/95, Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag [1997] ECR I-3689, Case C-60/00, Mary Carpenter v. Secretary of State for the Home Department [2002] ECR I-6279, and Case C-71/02, Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH [2004] ECR I-3025.

12) Peter M. Huber, “Unitarisation durch Gemeinschaftsgrundrechte – Zur Überprüfungsbedürftigkeit der ERT-Rechtsprechung”, *Europarecht (EuR)* 2008, pp. 190 et sqq.

on 7 December 2000 in Nice – to restrict the field of application to constellation (1) and, within that constellation, to cases in which national fundamental rights are barred from application due to the primacy of EU law (i.e. when the Member States act as mere “agents” of the Union<sup>13</sup>).<sup>14</sup> The idea was that there should be a clear-cut red line between the domains of EU and national fundamental rights providing that the former are only available when the latter are not.<sup>15</sup> Hence come the wording of Article 51 (“only when they are implementing Union law”)<sup>16</sup> and the wide-spread notion that the Charter is narrower in its application than the previously utilised general principles.<sup>17</sup> The underlying fear was that the ECJ could develop case-law that amounts to a general human rights jurisdiction, thus usurping competences that were never meant to be vested in the Court or the EU as a whole.<sup>18</sup> On the other hand, the explanations to the Charter which “shall be given due regard by the courts of the Union and of the Member States”<sup>19</sup> (Article 52(7) of the Charter) explicitly refer to the *ERT* judgment, which concerns the controversial constellation (4), as an example for the implementation of EU law by the Member States and states that the Charter “is only binding on the Member States when they act in the scope of Union law”.<sup>20</sup>

### *The perseverance of the ECJ in Åkerberg Fransson*

In a decision of 26 February 2013<sup>21</sup>, the ECJ for the first time explicitly ruled on the meaning of Article 51(1) of the Charter and gave guidance as to the implications of its decision for the future relationship between EU and national fundamental rights regimes.

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13) Cf. Joseph Weiler and Nicolas Lockhart, “‘Taking rights seriously’ seriously: The European Court and its fundamental rights jurisprudence – part I”, 32 C.M.L.Rev. (1995), pp. 51 et seq., at p. 73.

14) Cf. Gráinne de Búrca, “The Drafting of the European Charter of Fundamental Rights”, 26 E.L.Rev. (2001), pp. 126 et seq., at p. 137.

15) Cf. Daniel Thym, “Die Reichweite der EU-Grundrechte-Charta – Zu viel Grundrechtsschutz?”, *Neue Zeitschrift für Verwaltungsrecht (NVwZ)* 2013, pp. 889 et seq., at p. 892.

16) Compare the final version of Article 51(1), 2<sup>nd</sup> sentence with the originally proposed wording (Convention document CHARTE 4123/1/00 REV 1 CONVENT 5 of 15 February 2000): “They are binding on the Member States only where the latter transpose *or apply* the law of the Union.” (emphasis added) and the interim proposal by the Praesidium (Convention document CHARTE 4316/00 CONVENT 34 of 16 May 2000): “The provisions of this Charter are addressed to the institutions and bodies of the Union within the framework of the powers conferred on them by the Treaties, and to the Member States exclusively *within the scope* of Union law.” (emphasis added).

17) See e.g. Leonard F. M. Besselink, “The Member States, the National Constitutions and the Scope of the Charter”, 8 *Maastricht Journal of European and Comparative Law* (2001), pp. 68 et seq., at p. 79; Alan Dashwood, Derrick Wyatt et al., *European Union Law*, 6<sup>th</sup> ed. (Oxford and Portland, Oregon: Hart Publishing, 2011), at p. 382; Allard Knook, “The Court, the Charter, and the vertical division of powers in the European Union”, 42 CMLRev. (2005), pp. 367 et seq., at pp. 372 et seq.

18) Alan Dashwood, Derrick Wyatt et al., loc. cit.

19) Article 52(7) of the Charter; cf. also Article 6(1) 3<sup>rd</sup> subparagraph TEU.

20) OJ 2007 C 303 of 14 December 2007, at p. 32.

21) Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, nyr.

Mr Åkerberg Fransson was charged with serious tax offences, among others failure to declare VAT, and failure to declare employers' contributions to social insurances. By decision of 24 May 2007, the Swedish tax authority had already ordered him to pay a tax surcharge plus interest as a penalty based on the same acts of providing false information as those relied upon by the Public Prosecutor's Office in the criminal proceedings. The competent criminal court was confronted with the question as to whether a criminal sanction would contradict the prohibition on being punished twice ("ne bis in idem") enshrined in Article 4 of Protocol No. 7 to the ECHR and Article 50 of the Charter. It referred that question to the ECJ adding that Swedish law demands clear support in the ECHR or the case-law of the European Court of Human Rights for a national court to be able to disapply national provisions allegedly infringing the *ne bis in idem* principle. Therefore, it furthermore asked whether such a condition under national law is compatible with European Union law and in particular its primacy and direct effect.

Although both the European Commission and the Advocate General had stated that the reference concerned a purely internal situation and lacked a sufficient link to EU law, the Court did not quash the request for a preliminary ruling. Instead, it took the opportunity to issue a leading decision on the framework of its fundamental rights jurisdiction.

It started its findings by citing the wording of Article 51(1) of the Charter and immediately drew the conclusion that that provision "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"<sup>22)</sup>. The Court went on to reiterate its "settled case-law" and boiled it down to the question whether a national measure lies within or outside the scope of European Union law.<sup>23)</sup> It underlined that that "definition of the field of application of the fundamental rights of the European Union is borne out by the explanations relating to Article 51 of the Charter" and stipulated the following framework for the delineation of its competences in the area of fundamental rights: "The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter. Where, on the other hand, a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction"<sup>24)</sup>. At a later point of the judgment the Court added: "That said, where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of

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22) *Ibid.*, at para. 18.

23) *Ibid.*, at para. 19.

24) *Ibid.*, at paras. 21 and 22.

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. For this purpose, where national courts find it necessary to interpret the Charter they may, and in some cases must, make a reference to the Court of Justice for a preliminary ruling under Article 267 TFEU.<sup>25)</sup>

As to the concrete case at hand, the Court derived from Articles 2, 250(1) and 273 of Directive 2006/112/EC on the common system of value added tax, read in conjunction with Article 4(3) TEU “that every Member State is under an obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion”.<sup>26)</sup> Additionally, the Court drew on the Member States’ obligation to counter illegal activities affecting the financial interests of the European Union through effective deterrent measures under Article 325 TFEU given that the European Union’s own resources include revenue from application of a uniform rate to the harmonized VAT assessment bases under Article 2(1) of Decision 2007/436/EC. Although only parts of the criminal charges were based on the failure to declare VAT, the Court accepted jurisdiction without any restrictions and undertook “to provide all the guidance as to the interpretation needed in order for the referring court to determine whether the national legislation is compatible with the *ne bis in idem* principle laid down in Article 50 of the Charter”.<sup>27)</sup> That is the case if the initially imposed tax penalty is not criminal in nature which is for the national court to determine.<sup>28)</sup> On the other hand, the Court refused to give guidance on Article 4 of Protocol No 7 to the ECHR since the Convention provision “does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law. Consequently, European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by the convention and a rule of national law”.<sup>29)</sup> If, however, the referring court concludes that there is a conflict between a provision of Swedish law and the right under Article 50 of the Charter the standing case-law on the primacy and direct effect of EU law applies so that “it is not necessary for the court to request or await the prior setting aside of such a provision by legislative or other constitutional means”.<sup>30)</sup>

### *The angry reaction of the German Constitutional Court*

In a judgment of 24 April 2013, the FCC had to rule on the constitutionality of the German Counter-Terrorism Database Act, a legislative act touching on EU data protection

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25) Ibid., at paras. 29 and 30 (internal quotations omitted).

26) Ibid., at para. 25.

27) Ibid., at para. 31.

28) Ibid., at para. 37.

29) Ibid., at para. 44.

30) Ibid., at para. 45.

rules such as Article 16 TFEU and Directive 95/46/EC but having no apparent basis in them. It could not resist the temptation to utter a furious rebuke to the ECJ: “The constitutional complaint provides no reasons for a preliminary ruling before the European Court of Justice. Clearly, the Counter-Terrorism Database Act and actions that are based on it do not constitute an implementation of Union law according to Art. 51 sec. 1 sentence 1 of the Charter of Fundamental Rights of the European Union. The Counter-Terrorism Database Act pursues nationally determined objectives which can affect the functioning of the legal relationships under EU law merely indirectly. Thus, the European fundamental rights are from the outset not applicable, and the European Court of Justice is not the lawful judge according to Art. 101 sec. 1 sentence 2 of the Basic Law (Grundgesetz – GG). The European Court of Justice’s decision in the case Åkerberg Fransson (judgment of 26 February 2013, C-617/10) does not change this conclusion. As part of a cooperative relationship, this decision must not be read in a way that would view it as an apparent *ultra vires* act or as if it endangered the protection and enforcement of the fundamental rights in the member states in a way that questioned the identity of the Basic Law’s constitutional order. The Senate acts on the assumption that the statements in the ECJ’s decision are based on the distinctive features of the law on value-added tax, and express no general view. The Senate’s decision on this issue was unanimous.”<sup>31)</sup>

To put it in a nutshell: the FCC regards the ECJ’s aforementioned judgment as an assault on its own jurisdiction and urges the Luxembourg court to retroactively read it down as a minor decision in the rather obscure field of VAT law. In case of disobedience, the FCC seems determined to regard all future judgments by which the ECJ grants German courts the power to disapply German legislation without a prior reference to Karlsruhe as *ultra vires* acts, i.e. unlawful measures for which the EU has no competence, unless the material provisions of national law are directly determined by EU law. The practical consequence in such a case would be an FCC order to the competent courts not to follow the ECJ’s judgment and to apply German law disregarding the allegedly illegitimate input from EU law.

The FCC’s tough reaction can best be explained by taking a look at the prerequisites for declaring an EU measure *ultra vires*. In its so-called Honeywell decision of 6 July 2010 the FCC stipulated: “Ultra vires review by the Federal Constitutional Court can only be considered if a breach of competences on the part of the European bodies is sufficiently qualified. This is contingent on the act of the authority of the European Union being manifestly in breach of competences and the impugned act leading to a structurally significant shift to the detriment of the Member States in the structure of competences.”<sup>32)</sup> Although the Counterterrorism Database judgment was handed down by the FCC’s first Senate, i.e. not

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31) See for greater detail FCC, Case 1 BvR 1215/07, Counter Terrorism Database Act, nyr, at paras. 88 et seq.; the quoted text is taken from the FCC’s English language press release of 24 April 2013, <<http://www.bverfg.de/pressemitteilungen/bvg13-031en.html>> (last accessed on 31 January 2014).

32) FCC, Case 2 BvR 2661/06, Honeywell, 126 BVerfGE 286, headnote 1a); English translation taken from the FCC’s website: <[http://www.bverfg.de/entscheidungen/rs20100706\\_2bvr266106en.html](http://www.bverfg.de/entscheidungen/rs20100706_2bvr266106en.html)> (last accessed on 31 January 2014).

Peter M. Huber's second Senate, the underlying leitmotif seems to be the aforementioned fear of a "unitarisation by basic rights" or in other words: a general fundamental rights jurisdiction on the EU level. Such a development would indeed be both a clear breach of the treaties and a massive structural gain of power for the Union.

### *What lies ahead?*

Once the initial anger has subsided, however, the FCC should realize that Åkerberg Fransson may be a disturbing indication of the ECJ's determination to defend its current power but it does not mean the end of days for national fundamental rights jurisdiction and does not provide suitable material for the ultimate confrontation with Luxembourg. Quite the opposite: the term 'implementing' used in Article 51(1) is ambivalent enough to allow for a broad reading; the more so as even Peter M. Huber admits that the various language versions are to a certain extent ambiguous.<sup>33)</sup> Therefore, the Court's approach to consult the explanations to the Charter is methodologically correct and should be welcomed as a gain in legal certainty.<sup>34)</sup> As the Court rightly concluded, nothing in the explanations points towards a deliberate cutback of the existing case-law. To the contrary, the explanations support equating the scope of the Charter with the general scope of EU law. Moreover, if the Court had come to a different conclusion it could still have construed the scope of the fundamental rights stemming from general principles of EU law as mentioned in Article 6(3) TEU in a broad sense, thus splitting the applicable law and counteracting the Charter's aim to visualize the EU's fundamental rights.<sup>35)</sup> The same is true for general principles of EU law other than fundamental rights whose field of application undoubtedly remains unchanged by Article 51 of the Charter.<sup>36)</sup> As an aside, the development that is now so heavily criticized by the FCC

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33) Peter M. Huber, "Auslegung und Anwendung der Charta der Grundrechte", *Neue Juristische Wochenschrift (NJW)* 2011, pp. 2385 et sqq., at p. 2386.

34) Cf. Opinion of Advocate General Bot in Case C-108/10, *Ivana Scattolon v. Ministero dell'Istruzione, dell'Università e della Ricerca* [2011] ECR I-7491, at paras. 118 et seq.; Koen Lenaerts, "Exploring the limits of the EU Charter of Fundamental Rights", 8 *E.C.L.Rev.* (2012), pp. 375 et sqq., at p. 378; Verica Trstenjak and Erwin Beysen, "The growing overlap between fundamental freedoms and fundamental rights in the case-law of the CJEU", 38 *E.L.Rev.* (2013), pp. 293 et sqq., at p. 306 et seq.; Wolfgang Weiss, "Human rights in the EU: rethinking the role of the European Convention on Human Rights after Lisbon", 7 *E.C.L.Rev.* (2011), pp. 64 et sqq., at p. 90.

35) Opinion of Advocate General Bot in Case C-108/10, *Ivana Scattolon v. Ministero dell'Istruzione, dell'Università e della Ricerca*, [2011] ECR I-7491, at para. 120; Michael Dougan, "The Treaty of Lisbon 2007: Winning minds, not hearts", 45 *C.M.L.Rev.* (2008), pp. 617 et sqq., at pp. 664 et seq.; Koen Lenaerts, op. cit. *supra* note 34, at p. 384 et seq.; Rudolf Streinz and Walther Michl, op. cit. *supra* note 6, at marginal number 14, p. 2863; Verica Trstenjak and Erwin Beysen, op. cit. *supra* note 34, at p. 307.

36) Cf. Piet Eeckhout, "The EU Charter of Fundamental Rights and the Federal Question", 39 *C.M.L.Rev.* (2002), pp. 945 et sqq., at pp. 958 et sqq.; Francis Jacobs, "Human Rights in the European Union: The Role of the Court of Justice", 26 *E.L.Rev.* (2001), pp. 331 et sqq., at pp. 335 et sqq.; Daniel Thym, op. cit. *supra* note 15, at p. 890.

was not least triggered by that court's own demands for a comprehensive and effective EU fundamental rights standard comparable to that afforded by the German Basic Law.<sup>37)</sup> Now that the ECJ follows suit the FCC might feel reminded of Goethe's poem *The Sorcerer's Apprentice*. However, the spirits that were cited will ignore their pretended masters' commands once more.

One of the ECJ's motives might be to enable courts in Member States such as Sweden, where fundamental rights protection against acts of the national legislation is rather weak, to exercise an effective control.<sup>38)</sup> The reference for a preliminary ruling partially reads like a begging letter for the ECJ to grant the national judges such power. On the other hand, the Court explicitly states that national courts in jurisdictions where there is a very high level of judicial review, such as above all Germany, can continue to apply their own standards as long as they do not demand a violation of EU law and live up to the level of protection offered by the Charter. And even in cases where EU law leaves no room for the application of national fundamental rights, such as e.g. in the Melloni case<sup>39)</sup> which the Court cited as an example in the Åkerberg Fransson judgment,<sup>40)</sup> there could be a loophole for appealing the FCC. Advocate General Bot wrote in his Opinion on Melloni that particular regard must be had to the national identity of the Member States as is evident from Article 4(2) TEU and the preamble to the Charter.<sup>41)</sup> As is already apparent from cases like *Omega Spielhallen*<sup>42)</sup> and *Sayn-Wittgenstein*<sup>43)</sup> it is not futile for national courts to invoke constitutional particularities in order to avert the strict application of EU law.<sup>44)</sup> It needs to be stressed, however, that the Member States cannot use that argument to exempt themselves entirely from the application of EU law in certain areas. Accordingly, the FCC should be reluctant to cite "the identity of the Basic Law's constitutional order"<sup>45)</sup> and rather spare the argument for important cases. It will grudgingly have to accept that its subordinate courts will occasionally turn to the ECJ for advice in fundamental rights matters even when the connection to EU law is only tenuous. There will be no clear-cut red line between the Charter and national fundamental rights but a substantial field of concomitant applicability.<sup>46)</sup>

The ECJ, in turn, ought to smooth the waters, particularly by handling the notion of

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37) Cf. the *Solange I* judgment *supra* note 5.

38) Cf. Daniel Thym, op. cit. *supra* note 15, at p. 896.

39) Case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, nyr.

40) Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, nyr, at para. 29.

41) Opinion of Advocate General Bot in Case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, nyr, at para. 138.

42) Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

43) Case C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien* [2010] ECR I-13693.

44) Weiss, op. cit. *supra* note 34, at p. 93 et seq.

45) See *supra* note 31.

46) Rudolf Streinz and Walther Michl, op. cit. *supra* note 6, at marginal number 8, p. 2861; Daniel Thym, op. cit. *supra* note 15, at p. 895.

“implementing EU law” cautiously and demanding a more palpable link to EU law than in the Åkerberg Fransson case or in the even more problematic previous constellations of e.g. the Carpenter and Karner judgments<sup>47)</sup>,<sup>48)</sup>. In any case, the FCC is well advised to appreciate that the ECJ devoted great argumentative effort to establishing that the material Swedish provision implemented EU requirements and had already denied the applicability of the Charter in the comparable German case of Iida<sup>49)</sup>, decided three months before Åkerberg Fransson. It should keep to its successful role as barking watchdog but abstain from biting. Even though both courts are being eager to stake their claims in the tough and fast-changing world of legal pluralism, they will in the long run have to tolerate each other’s position in a spirit of mutual comity and deference.

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47) See *supra* note 11.

48) Rudolf Streinz and Walther Michl, *op. cit. supra* note 6, at marginal number 18, p. 2865; Daniel Thym, *op. cit. supra* note 15, at p. 896.

49) Case C-40/11, Yoshikazu Iida v. Stadt Ulm, *nyr*, at paras. 78 et sqq.

