

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

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German Federal Constitutional Court's dialogue with the European Court of Justice – Background, trigger, contents and context of the FCC's reaction to the Åkerberg Fransson judgment – The FCC's Counter-Terrorism Database judgment – Constitutional control standards – theoretical repercussions of the judicial dispute – Underlying conceptual differences – The 'fusion thesis' versus the 'separation thesis' – Pragmatic approximation of divergent positions

INTRODUCTION

Dozens of articles and monographs have been written about a potential conflict between the German Federal Constitutional Court (hereinafter FCC) and the Court of Justice of the European Union (CJEU), which has so far been limited to shadow-boxing. Karlsruhe relied upon dissuasive tactics and was quite successful. Its warnings encouraged the CJEU to develop reliable human rights standards, restrained an expansive reading of Union competences and fostered judicial respect for national constitutional singularities.¹ Recently, however, power games escalated when the FCC fired a forceful warning shot towards Luxembourg and pronounced that the latter's *Åkerberg Fransson* ruling might have been *ultra vires*. It will be argued that, this hand-wringing about the precise delimitation of the

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¹For a wider analysis see D. Thym, 'Attack or Retreat? Evolving Themes and Strategies of the Judicial Dialogue between the German Constitutional Court and the European Court of Justice', in C. van de Heyning and M. de Visser (eds.), *Constitutional Conversations in Europe – Actors, Topics and Procedures* (Intersentia 2012) p. 235-250.

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Charter of Fundamental Rights (hereinafter the Charter) reveals deeper conflicts about how to resolve jurisdictional overlap.

This contribution starts off with a presentation of the background, cause, contents and context of the German decision. It will proceed with an explanation why the dispute about the Charter will be difficult to resolve, since both courts pursue different visions of the relative autonomy of national decision-making in the field of human rights. While the FCC propagates a dualist 'separation thesis', the European Court of Justice (ECJ, the highest court in the CJEU) focuses on reflexivity and fusion. The third section will indicate conceptual and theoretical repercussions of divergent approaches which, arguably, reflect profound conflicts about the pluralist interaction of different legal orders. This contribution will conclude with a positive turn demonstrating the potential for pragmatic appeasement despite fundamental disagreement.

BACKGROUND, TRIGGER, CONTENTS AND CONTEXT OF THE FCC'S REACTION TO THE *ÅKERBERG FRANSSON* JUDGMENT

The experience of federal states demonstrates that human rights provide a crucial mechanism for regulating the vertical balance of power.² Indeed, the German example itself provides ample evidence that federal courts may activate human rights enshrined in the federal constitution, the *Grundgesetz*, to exercise scrutiny of autonomous regional powers. Human rights in the constitutions of Germany's regions, the *Länder*, never gained much prominence; nor did their constitutional courts.³ This background explains why German academics and politicians have always been anxious about the scope of the newly drafter of Charter of Fundamental Rights.⁴ For that reason, German participants, among others, advised careful drafting and, for the same reason, the FCC has now opted for a fierce and resolute response when the *Åkerberg Fransson* judgment signalled that the ECJ supported a generous approach.

Background: limiting the scope of the Charter

Before the Charter became legally binding, the ECJ had described the scope of EU human rights in open-ended formulations, as unwritten general principles.

² See C. Fercot, 'Perspectives on Federalism. A Comparative Analysis of German, American and Swiss Law', 4 *EuConst* (2008) p. 302-324.

³ For a reliable overview see K. Gärditz, 'Grundrechte im Rahmen der Kompetenzordnung', in J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatsrechts*, Vol. IX 3rd edn. (C.F. Müller 2011) § 189, paras. 38-49; as well as Fercot, *supra* n. 2, p. 319.

⁴ See P.M. Huber, 'Europäisches und nationales Verfassungsrecht', 60 *Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer* (2001) p. 194 at p. 239-240.

The precise delimitation varied, obliging member states either ‘within the scope’⁵ or, with a more restrictive nudge, ‘when they implement Community rules.’⁶ German academia soon started exploring implications of the case-law.⁷ Yet, the academic debate had little impact in practice. Most state authorities, courts and practicing lawyers, within Germany at least, did not pay much attention to the EU human rights in domestic disputes involving EU law and continued to apply well-established national constitutional guarantees instead. That was hardly surprising. To this date, the doctrinal finesse of the FCC’s interpretation of fundamental rights in the *Grundgesetz* is a crucial component of legal education and practice.⁸ By contrast, EU human rights never gained much importance. Unwritten general principles were difficult to put into operation and Luxembourg often limited itself to abstract declarations of intent. All this changed with the Treaty of Lisbon.⁹ The newly found prominence of the Charter explains why the debate about its scope of application gathered momentum in recent years.

When it comes to the Charter, it is well known that the wording of Article 51 opts for a somewhat narrow understanding, which obliges member states to apply the Charter ‘only when they are implementing Union law.’ Both Article 51(2) of the Charter and, with a slightly different formulation, Article 6(1)(2) TEU add that the Charter ‘shall not extend in any way the competences of the Union.’¹⁰ These provisions reflect a general desire to uphold breathing space for national autonomy and go back to lively debates in the Convention drafting the Charter, where delegates from different member states had criticised earlier drafts, to which the Convention Presidium responded with revised, and purportedly more restrictive, language.¹¹ Yet, the drafting history was not conclusive. The final compromise

⁵ ECJ, Case C-260/89, *ERT* [1991] *ECRI*-2925, para. 42 (French: ‘dans le cadre du droit communautaire’; German: ‘Anwendungsbereich’).

⁶ ECJ, Case 5/88, *Wachauf* [1989] *ECR* 2609, para. 19 (French: ‘lorsqu’ ils mettent en œuvre’; German: ‘Durchführung’).

⁷ See the early contribution by M. Ruffert, ‘Die Mitgliedstaaten der Europäischen Gemeinschaft als Verpflichtete der Gemeinschaftsgrundrechte’, 22 *Europäische Grundrechte-Zeitschrift* (1995) p. 518-530.

⁸ In line with uniform exam requirements, all German law students usually attend a 4 hour lecture on national human rights in their first year of studies which also features prominently in the centralised final state exams, while both the ECHR and the Charter play a marginal role at best and are often not taught at all.

⁹ See S. Iglesias Sánchez, ‘The Court and the Charter’, 49 *CML Rev.* (2012) p. 1565 at p. 1576-1582.

¹⁰ The FCC relies, among others, on these provisions to contest the ECJ’s findings; see text to n. 50 *infra*.

¹¹ For the debate see M. Borowski, ‘Art. 51’, in J. Meyer (ed.), *Die Charta der Grundrechte*, 3rd edn. (Nomos 2010) Art. 51 paras. 2-15a and F. Brosius-Gersdorf, *Bindung der Mitgliedstaaten an die Gemeinschaftsgrundrechte* (Duncker & Humblot 2005) p. 47-58.

text of Article 51 supports different interpretations,¹² also considering that the official Explanations indicate a continuation of earlier case-law,¹³ with which other language versions are more in line than the German translation.¹⁴ Despite these uncertainties, one lesson appeared evident: the EU was meant not to follow the example of the US and Germany, where federal courts activated federal human rights to extend their reach to the detriment of regional autonomy.

Trigger: the ECJ's Åkerberg Fransson judgment

When Luxembourg proclaimed the *Åkerberg Fransson* judgment, the title of the press release promised that the Court would 'explain' the field of application of the Charter.¹⁵ Indeed, the judgment has apparently been designed as a decision of principle (even if the FCC now claims the opposite).¹⁶ The ECJ describes the scope of the Charter in general terms and opts for continuity. In line with earlier case-law, the Charter is considered to apply 'within the scope of European Union law.'¹⁷ The Grand Chamber explains its position with a comparison *ex negativo*: the orientation at the scope of Union law implied that 'situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable.'¹⁸ This formula is as simple as it is generous. The applicability of Union law entails the application of the Charter.

The facts of the *Åkerberg Fransson* case illustrate the relevance of these findings. Both the Commission, the Advocate-General and various national governments had rejected the applicability of the Charter to the criminal proceedings against *Åkerberg Fransson*¹⁹ given the high level of abstraction of common rules for value added tax, which did not present, including in the eyes of the Court, the criminal

¹² See P. Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question', 39 *CML Rev.* (2002) p. 945 at p. 954-958.

¹³ Cf. the (revised) official Explanations relating to the Charter (*OJ* [2007] C 303/17).

¹⁴ See J. Kokott and C. Sobotta, 'Die Charta der Grundrechte nach dem Inkrafttreten des Vertrags von Lissabon', 37 *Europäische Grundrechte-Zeitschrift* (2010) p. 265 at p. 268.

¹⁵ See ECJ, Press Release No. 19/13 of 26 Feb. 2013.

¹⁶ *Åkerberg Fransson* was delivered by a Grand Chamber; paras. 16-31 analyse the Court's jurisdiction in general terms (without usual linguistic self-constraints such as 'in the present case' etc.); moreover, the *Melloni* judgment, delivered the same day, had been discussed as an important decision for months.

¹⁷ Cf. ECJ, Case C-617/10, *Åkerberg Fransson* [2013] ECR I-0000, paras. 19-20.

¹⁸ ECJ, *ibid.*, para. 21; for further comments see F. Fontanelli, 'Hic Sunt Nationes: The Elusive Limits of the EU Charter and the German Constitutional Watchdog', 9 *EuConst* (2013) p. 315 at p. 322-324.

¹⁹ Cf. AG *Cruz Villalón*, opinion of 12 June 2012, Case C-617/10, *Åkerberg Fransson*, paras. 22, 116.

proceedings as an implementation of the VAT Directive.²⁰ Instead, the facts came within the scope of Union law and, as a result, of the Charter, since member states are, generally, obliged to provide for effective, proportionate and dissuasive sanctions.²¹ The Court's additional reference to the protection of the Union's financial interests does not render the linkage with Union law much more specific.²² Both obligations are of a general nature, i.e. member states retain (very) wide discretion how to fight tax evasion within the framework of national procedural autonomy. Nevertheless, the ECJ assumes that the Charter applies. It would have been difficult to design a more perfect test case to demonstrate how wide the Court's new formula may stretch.

For our purposes, it should be noted that the Court opts for continuity and assumes that member states are bound by the Charter whenever they act within the 'scope of Union law' – irrespective of whether national action represents a direct implementation of Union law.²³ As a result, earlier proposals not to apply the Charter whenever member states rely on derogations from the fundamental freedoms²⁴ or whenever they have implementing discretion²⁵ are obsolete. Luxembourg will have to refine its generic formula in follow-up decisions.²⁶ As a matter of principle, however, the ECJ has taken a firm and confident position: the scope of EU law entails the application of the Charter.

Reaction: the FCC's counter-terrorism database Judgment

It took eight weeks for the German Constitutional Court to react to the *Åkerberg Fransson* ruling. The facts are not directly related to Union law and concern, in essence, a federal law which established a national Counter-Terrorism Database,

²⁰ ECJ, *Åkerberg Fransson*, *supra* n. 17, para. 28 recognises explicitly that the Charter applies even though the national Swedish rule 'has not been adopted to transpose' Directive 2006/112/EC (OJ [2006] L 347/1).

²¹ Cf. Art. 4 para. 3 TEU and ECJ, *Åkerberg Fransson*, *supra* n. 17, para. 36; the VAT Directive, *ibid.*, comprises only very general language.

²² There is no legislation specifying the reach of Art. 325 TFEU; Commission proposal COM(2012) 363 of 11 July 2012 has not been adopted so far.

²³ This conclusion corresponds to the Court's position on the field of application of other general principles of Union law, such as proportionality – an aspect which is rarely mentioned in the German debate; cf. Eeckhout, *supra* n. 12, p. 962-968 and F. Jacobs, 'Human Rights in the European Union', 26 *EL Rev.* (2001) p. 331 at p. 335-341.

²⁴ This situation was discussed prominently by many German authors, since the language of Art. 51 of the Charter seemed to indicate a reversal of earlier case-law; *see*, among others, the present FCC justice P. Huber, 'Auslegung und Anwendung der Charta der Grundrechte', 64 *Neue Juristische Wochenschrift* (2011) p. 2385 at p. 2386-2387.

²⁵ *See* D. Thym, 'Anmerkung (EuGH, Rs. C-400/10 PPU, *McB*, Urt. v. 5.10.2010)', 66 *Juristenzeitung* (2011) p. 148-152.

²⁶ *See* the last section of this contribution.

to which regional and federal police authorities as well as intelligence services would have access.²⁷ A citizen had challenged the compatibility of the law with national fundamental rights – a complaint which the FCC upheld in some respects, thereby specifying further its case-law on data protection in an age of enhanced data processing capabilities.²⁸ Yet these issues need not be discussed any further in this contribution, since EU law enters the picture as a preliminary observation only, when the FCC considers the hypothetical option whether it should have referred the matter to Luxembourg.²⁹

To be sure, there are no EU rules which oblige Germany to set up a central Counter-Terrorism Database, but there are, nonetheless, certain common standards, such as the Data Protection Directive or measures on police and judicial co-operation to enhance the transnational fight against terrorism, which might have indirect bearing on the law under dispute.³⁰ In the light of the open formula used by the ECJ in *Åkerberg Fransson*, these common rules might, possibly, bring the German law within the scope of Union law and, as a result, submit it to the Charter. Yet the FCC brushes aside the idea with a number of generic comments which are clearly meant to be perceived as a forceful warning shot: isolated rules on the fight against terrorism or data protection do not result in an application of the Charter, since national rules establishing the Counter-Terrorism Database ‘are not determined by Union law’ and do not, therefore, present an ‘implementation of European Union law, which alone is capable of obliging Member States to apply the Charter (Art. 51(1)).’³¹

For our purposes, we should distinguish the FCC’s conclusion on the Counter-Terrorism Database from more general comments on *Åkerberg Fransson*. While the former are largely uncontroversial, the latter require our attention. Why? It may well be correct that the Data Protection Directive and common rules on the fight against terrorism do not bring the German Counter-Terrorism Database within the scope of Union law; and it might even be acceptable that this conclusion is ‘so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved’³² that it releases the FCC from the

²⁷ Cf. FCC, judgment of 24 April 2013, 1 BvR 1215/07, *Counter-Terrorism Database*.

²⁸ For an annotation see K. Gärditz, ‘Anmerkung’, 68 *Juristenzeitung* (2013) p. 633-636.

²⁹ Both the first and the second Senate of the FCC have on earlier occasions recognised that there could, in principle, be situations when they might refer matters of EU law to the ECJ; see, prominently, FCC, judgment of 2 March 2010, 1 BvL 256/08 et al., *Data Retention*, BVerfGE 125, 260, para. 218.

³⁰ See Data Protection Directive 95/46/EC (OJ [1995] L 281/31), Art. 2 of Council Decision 2005/671/JHA (OJ [2005] L 253/22) and Regulation (EC) No. 2580/2001 (OJ [2001] L 344/70), which are mentioned by the FCC, *Counter-Terrorism Database* (n. 27), para. 89.

³¹ FCC, *Counter-Terrorism Database* (n. 27), para. 88 (own translation; reference to Art. 51(1) in the original).

³² ECJ, Case 283/81, *CILFIT* [1982] ECR 3415, para. 16.

obligation to refer the dispute to Luxembourg.³³ Yet, we should not be primarily concerned with the FCC's verdict about the Counter-Terrorism Database. Arguably, the case served as a launch pad for a clear and unmistakable message to Luxembourg.³⁴ These generic statements are relevant irrespective of whether we share the conclusion on the facts under discussion.

When it comes to its assessment of the *Åkerberg Fransson* judgment, the First Senate of the German Constitutional Court leaves no doubt that it was not amused. The FCC makes crystal clear that it objects to any interpretation or application of *Åkerberg Fransson* which 'would address the human rights laid down in the Charter to Member States in situations of an open-ended linkage between national rules and the scope of Union law with the latter being defined in an abstract manner.'³⁵ Remarkably, the conclusion that the Counter-Terrorism Database is not subject to EU human rights standards is explicitly based on a 'constructive' reading of the *Åkerberg Fransson* judgment, since the latter must be interpreted 'in a spirit of mutual coexistence between the FCC and the ECJ' and may, therefore, 'not be understood in a way which would have to be qualified as an obvious *ultra vires* act or which might impede the protection or accomplishment of national human rights with the result of calling into question the identity of the constitutional order established by the *Grundgesetz*.'³⁶

This is tough language and in the press release (not, however, in the judgment itself), the German judges effectively instruct the ECJ how to retreat in an orderly way: '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.'³⁷ This rigorous stance is even more notable, if we bear in mind that the FCC's first Senate, whose jurisdiction focuses on human rights, had recently demonstrated a more relaxed outlook on European affairs³⁸ than the

³³ Given that the impact of secondary and primary EU law on the criminal proceedings in Sweden in *Åkerberg Fransson* was not much more specific than the combined effects of the Data Protection Directive and rules on the fight against terrorism (see text n. 31 *supra*), it is questionable whether the FCC applied the *CILFIT* rule correctly; cf. Fontanelli, *supra* n. 18, p. 332-333 and T. von Danwitz, 'Verfassungsrechtliche Herausforderungen in der jüngeren Rechtsprechung des EuGH', 40 *Europäische Grundrechte-Zeitschrift* (2013) p. 253 at p. 261.

³⁴ For a similar interpretation, see Gärditz, *supra* n. 28, p. 636 and D. Grimm, 'Der Datenschutz vor einer Neuorientierung', 68 *Juristenzeitung* (2013) p. 585 at p. 591.

³⁵ FCC, *Counter-Terrorism Database*, *supra* n. 27, para. 91 (own translation).

³⁶ *Ibid.* (own translation).

³⁷ FCC, Press Release No. 31/2013 of 24 April 2013, para. 2; it has been demonstrated in n. 16 *supra* that the context of the *Åkerberg Fransson* ruling suggests otherwise.

³⁸ Pro-European rulings of the first Senate include FCC, decision of 19 July 2011, 1 BvR 1916/09, *Le Corbusier*, BVerfGE 129, 78, paras. 75-81, which extended protection under the German *Grundgesetz* to moral persons from EU member states despite clear constitutional language to the contrary in the light of the primacy of Union law, and FCC, decision of 7 Sept. 2009, 1 BvR 1164/07, *Same-Sex Partnership*, BVerfGE 124, 199, paras. 88, 92, where the first Senate invoked

hawkish second Senate, which delivered the well-known Maastricht, Lisbon and ESM/EFSF judgments.³⁹ The explicit notification, in the press release, that the first Senate's position on *Åkerberg Fransson* was unanimous is apparently meant to emphasise that the ECJ should take the warning seriously. Otherwise, Karlsruhe may, for the first time ever, declare a ECJ ruling *ultra vires* and/or in conflict with national constitutional identity.

Doctrinal context: constitutional control standards

This is not the first time that human rights trigger a conflict between the FCC and the CJEU. In the well-known *Solange* saga, judges in Luxembourg went some length to 'discover' human rights as unwritten general principles in order to fend off challenges to the primacy of Union law by the German *Bundesverfassungsgericht*.⁴⁰ It is worth remembering that the FCC had insisted, in *Solange I*, that the German Constitution would prevail 'as long as (*solange*) the process of European integration has not led to a legally binding catalogue of fundamental rights which [...] offers a level of protection resembling, though not necessarily duplicating, the fundamental rights in the *Grundgesetz*.'⁴¹ Although the FCC later accepted ECJ methodology and case-law as functionally satisfying this requirement,⁴² the Charter appears as the ultimate victory of the German court. Finally, the European Union obtains a catalogue of human rights upon which it had originally insisted – and the Charter was even drafted by a Convention that was presided over by a former German chief justice. Why should the FCC now object to a situation which it helped to bring about?

It is important to understand that the fight over the Charter is not a remake of the *Solange* argument about the (in-)adequacy of the degree of human rights protection. The FCC's threat, in the *Counter-Terrorism Database* judgment, is based upon alternative doctrinal benchmarks: *ultra vires* and constitutional identity. *Ultra vires* review was first developed in the *Maastricht* judgment and concerns the scope of EU powers; Karlsruhe famously maintains that it is the ultimate arbiter whether or not the European Union respects the principle of attributed powers.⁴³ In addition, the *Lisbon* judgment employed the constitutional identity

Art. 21 of the Charter and ECJ, Case C-267/06, *Maruko* [2008] ECR I-1757 in order to pave the way for the equal treatment of same-sex partnerships with married heterosexual couples.

³⁹ The jurisdiction of the second Senate focuses on general constitutional law.

⁴⁰ Cf. G. de Búrca, 'The Evolution of EU Human Rights Law', in P. Craig et al. (eds.), *The Evolution of EU Law*, 2nd edn. (OUP 2011) p. 465 at p. 477-479; and Thym, *supra* n. 1, p. 236-237.

⁴¹ FCC, decision of 29 May 1974, *Solange I*, BVerfGE 37, 271, p. 285 (own translation).

⁴² See FCC, decision of 22 Oct. 1986, 2 BvR 197/83, *Solange II*, BVerfGE 73, 339.

⁴³ See FCC, decision of 6 July 2010, Case 2 BvR 2661/06, *Honeywell*, BVerfGE 126, 286, paras. 53-66; for an English translation see, <www.bverfg.de/entscheidungen/rs20100706_2bvr266106en.html>.

yardstick which, in essence, defends a functioning democracy within a sovereign German state and may be directed against the transfer or exercise of European powers in sensitive policy fields; since its reach is defined by the 'eternity clause' of the German Constitution, it may also be activated in situations when the principle of conferral is respected and, as a result, *ultra vires* review is bound to fail.⁴⁴ In its response to *Åkerberg Fransson*, the FCC refers to both control standards,⁴⁵ thereby indicating that it reserves some flexibility on how to evaluate the dispute at closer inspection.

It seems to me that an *ultra vires* review would hardly succeed. The reason is simple. In the *Honeywell* decision, the FCC had sent the judicial equivalent of a peace offer to Luxembourg by laying down a number of specifications which render *ultra vires* complaints strenuous in practice.⁴⁶ More specifically, the FCC recognised the primary responsibility of the CJEU for European Union law on the basis of interpretative standards such as *effet utile*; the FCC would not simply substitute the CJEU's conclusion with its own evaluation, but refer potential disputes to Luxembourg and require *ultra vires* acts to be 'manifestly in violation of competences and that the impugned act is highly significant in the structure of competences between the Member States and the Union.'⁴⁷ These criteria will rarely be met and signalled that the FCC was eager to foster reliable and constructive working relations with the CJEU.⁴⁸ Arguably, the strong and almost aggressive language of the *Counter-Terrorism Database* judgment may be rationalised as an act of frustration. Karlsruhe may have had the impression that the olive branch, which it had held out in *Honeywell*, was turned down by the ECJ in *Åkerberg Fransson*.⁴⁹

In the light of the standards above, it will be difficult to argue that *Åkerberg Fransson* constitutes an *ultra vires* act. To be sure, the judgment is highly significant for the vertical balance of power. But the ECJ's standpoint can hardly be qualified as a 'manifest' misconception of the EU Treaties. One may object the outcome, but has to recognise, nonetheless, that the wording, drafting history and the official explanations of the Charter comprise various arguments which support the

⁴⁴ See FCC, judgment of 30 June 2009, 2 BvE 2/08 et al., *Treaty of Lisbon*, BVerfGE 123, 267, paras. 240-241, 251-260; for an English translation, see, <www.bverfg.de/en/decisions/es20090630_2bve000208en.html>.

⁴⁵ See FCC, *Counter-Terrorism Database*, *supra* n. 27, para. 91 and text n. 36 *supra*.

⁴⁶ For more detail see C. Möllers, 'Constitutional *Ultra Vires* Review of European Acts only under Exceptional Circumstances', 7 *EuConst* (2011) p. 161-167; and M. Payandeh, 'Constitutional Review of EU Law after *Honeywell*', 48 *CML Rev.* (2011) p. 9 at p. 19-26.

⁴⁷ FCC, *Honeywell*, *supra* n. 43, para. 61; see also Thym, *supra* n. 1, p. 239-240.

⁴⁸ In line with the position of chief justice A. Voßkuhle, 'Multilevel Cooperation of the European Constitutional Courts', 6 *EuConst* (2010) p. 175 at p. 193-196.

⁴⁹ As argued by Grimm, *supra* n. 34, p. 591.

conclusion that the ECJ's position presents an 'outcome in the usual legal science discussion framework'.⁵⁰ Moreover, protection clauses against an extensive interpretation of EU competences in the light of the Charter, which the FCC highlighted both in the *Honeywell* decision and the *Counter-Terrorism Database* judgment,⁵¹ do not generally support a different outcome, since they are primarily aimed at the interpretation of legislative competences.⁵² The European Union, however, may not adopt more directives or regulations as a result of *Åkerberg Fransson*.⁵³ For all these reasons, it will be difficult for the FCC to find an *ultra vires* act in line with the *Honeywell* decision.

If *ultra vires* review is elusive, the novel constitutional identity standard represents an attractive alternative, since the contents is ultimately defined by the German Constitution.⁵⁴ Nonetheless, the first Senate will find it difficult to support a violation, since constitutional identity protects 'the ability of a constitutional state to democratically shape itself',⁵⁵ and has been activated, hitherto, primarily to enhance scrutiny of EU affairs by the German parliament.⁵⁶ Any argument that non-majoritarian constitutional review by courts constitutes an integral part of democratic self-government may rest on sound theoretical footing,⁵⁷ but would transcend the pro-parliamentarian thrust of earlier case-law.⁵⁸ Judges might instead consider a novel combination of *ultra vires* and constitutional identity.⁵⁹ In any

⁵⁰ FCC, *Honeywell*, *supra* n. 43, para. 66; for a similar assessment, see Gärditz, *supra* n. 28, p. 636 in his footnote 31.

⁵¹ FCC, *Honeywell*, *supra* n. 43, para. 78 and FCC, *Counter-Terrorism Database*, *supra* n. 27, para. 90 refer to Art. 51(2) of the Charter and/or Art. 6(1) TEU.

⁵² Arguably, the reference to the EU's 'powers' and 'competences' in Art. 51(2) of the Charter and Art. 6(1)(2) TEU refers to the interpretation of the new categories of 'competences' in accordance with Art. 2-6 TFEU (although an overtly generous interpretation of Art. 51(1) may, of course, fall foul of Art. 5 TEU and be *ultra vires* as a result).

⁵³ In *Åkerberg Fransson*, the ECJ does not extend the scope of Union law under recourse to the Charter, but argues, rather, that the Charter applies in situations which are already within the scope of Union law anyway.

⁵⁴ See M. Wendel, 'Lisbon Before the Courts', 7 *EuConst* (2011) p. 96 at p. 131-136; and D. Thym, 'In the Name of Sovereign Statehood', 46 *CML Rev.* (2009) p. 1795 at p. 1800-1802.

⁵⁵ FCC, *Treaty of Lisbon*, *supra* n. 44, para. 252.

⁵⁶ In the various decisions on financial support for eurozone members in financial distress; see Editorial: 'Watching Karlsruhe/Karlsruhe Watchers', 8 *EuConst* (2012) p. 367-374.

⁵⁷ Even if constitutional theory and history provide ample examples that the horizontal balance of powers is indeed often country-specific and subject to domestic bargaining; cf. M. Rosenfeld, *The Identity of the Constitutional Subject* (Routledge 2010).

⁵⁸ Although the FCC's first Senate already indicated that it might apply constitutional identity to its own review process in FCC, *Data Retention*, *supra* n. 29, para. 218: 'It forms part of Germany's constitutional identity [...] that the exercise of individual freedom by citizens may not be registered in its entirety.'

⁵⁹ The FCC could, for instance, argue that stringent criteria for *ultra vires* review in *Honeywell* do not apply in situations which are closely related to Germany's constitutional identity and that, therefore, *Åkerberg Fransson* required stricter scrutiny.

case, there remain plenty of questions for the FCC to answer. For the time being, the first Senate got its message across, also because it abstained from lengthy scholarly deliberations mirroring the *Lisbon* judgment. The core point cannot be missed: Luxembourg shall retreat, otherwise Karlsruhe will take up the gauntlet.

UNDERLYING CONCEPTUAL DIFFERENCES

It would be one-sided to assume that the ECJ delivered the *Åkerberg Fransson* judgment without due regard to national sensitivities. Judges in the Grand Chamber knew that their verdict on Article 51 of the Charter had been expected nervously in Germany⁶⁰ and beyond.⁶¹ Indeed, the Court did not ignore corresponding concerns and presented its vision of peaceful coexistence through a compromise which, in future, may provide room for country-specific solutions within the overall context of the Charter. This settlement will be called the ‘fusion thesis’ in this article and it will be argued later that it will satisfy expectations of many national (constitutional) courts – with the notable exception of Karlsruhe. The underlying reason is simple. Over recent years, the FCC has propagated a different solution, which I shall call the ‘separation thesis’ and which aims at safeguarding national autonomy by means of strict demarcation of national human rights and the Charter. Arguably, the FCC’s harsh response to *Åkerberg Fransson* may be explained, at least in part, by the underlying difference of both approaches. Karlsruhe understands that its strategy may come to nothing, since the CJEU pursues an alternative settlement.

Compromise of the CJEU: the ‘fusion thesis’

In contrast to the German FCC, the Spanish *Tribunal Constitucional* is willing to communicate directly with the CJEU by means of preliminary reference (and not only via press release). In the well-known *Melloni* case, the Spanish court asked Luxembourg whether the Spanish constitutional prohibition of trials *in absentia* could be directed against a transfer from Spain to Italy on the basis of an European Arrest Warrant in the light of Article 53 of the Charter, which safeguards, in general terms, the level of protection of human rights in national constitutions.⁶² In its judgment, delivered on the same day as *Åkerberg Fransson*, the ECJ accepts

⁶⁰ See C. Calliess, ‘Europäische Gesetzgebung und nationale Grundrechte’, 64 *Juristenzeitung* (2009) p. 113 at p. 115-118 and W. Cremer, ‘Der programmierte Verfassungskonflikt’, 22 *Neue Zeitschrift für Verwaltungsrecht* (2003) p. 1452-1457.

⁶¹ For a position from within the ECJ, see Vice-President K. Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’, 8 *EuConst* (2012) p. 375 at p. 376-387.

⁶² For background information, see A. Torres Perrez, ‘Constitutional Dialogue on the European Arrest Warrant’, 8 *EuConst* (2012) p. 105-127.

that the provision supports country-specific solutions as a matter of principle, thereby allowing some degree of value pluralism. Yet it draws a red line: Article 53 of the Charter does not authorise national courts to set aside the primacy of EU law; when it comes to Union law, only the Charter may serve as a yardstick of validity – not national constitutions.⁶³

The firm position of the Court on primacy is hardly surprising and it implied, with regard to the *Melloni* case, that there was no room for national singularities for the simple reason that EU legislation had established common rules for the recognition or execution of judicial decisions following trials *in absentia* in 2009.⁶⁴ Leaving aside problems related to legal effects of former third pillar measures,⁶⁵ such full harmonisation leaves no room for national deviations.⁶⁶ Whenever member states do not have implementing discretion, human rights protection is fully supranationalised⁶⁷ – a result which the German FCC would not contest, since it has accepted, ever since *Solange II*, that national human rights do not apply to mandatory rules of Union law.⁶⁸ In my view, the ECJ is correct to extend these principles to Article 53 of the Charter, which shields national human rights ‘in their respective fields of application’, and which from the perspective of the EU legal order, had never included secondary Union law.⁶⁹

Having acknowledged the limits of national deviations, we may identify the positive twist of the ECJ’s approach to Article 53. It opts against full harmonisation of human rights standards in areas covered by the (broad) reach of Article 51. Within the wide scope of Union law, the Charter is not the only, quasi-totalitarian human rights benchmark, but may be complemented by national guarantees:

⁶³ See ECJ, Case C-399/11, *Melloni* [2013] ECR I-0000, paras. 58-60; it was delivered by a Grand Chamber with a different composition than in *Åkerberg Fransson* in line with Art. 27 of the Rules of Procedure (OJ [2012] L 265/1).

⁶⁴ See Framework Decision 2009/299/EU (OJ [2009] L 81/24).

⁶⁵ In accordance with Arts. 9 and 10 Protocol (No. 36) on Transitional Provisions (OJ [2008] C 115/322) the above-mentioned framework decision retains some characteristics of former third pillar law until 2014, while the *Melloni* judgment assumes, without further discussion, that regular rules on supranational primacy apply.

⁶⁶ As confirmed by ECJ, *Melloni*, *supra* n. 63, paras. 35-46 in response to the first question.

⁶⁷ See the response to the second question by ECJ, *Melloni*, *supra* n. 63, paras. 47-54.

⁶⁸ This principle was extended to compulsory elements in EU Directives by FCC, decision of 13 March 2008, 1 BvF 1/05, *Emission Certificates*, BVerfGE 118, 79, paras. 69-70 and reaffirmed in FCC, *Counter-Terrorism Database*, *supra* n. 27, para. 88.

⁶⁹ Cf. ECJ, Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125, paras. 3 and 4; this outcome is shared by most German commentators, such as H. Jarass, ‘Zum Verhältnis von Grundrechtecharta und sonstigem Recht’, *Europarecht* (2013) p. 29 at p. 38; Calliess, *supra* n. 60, p. 119-120; and T. von Danwitz, ‘Art. 53’, in P. Tettinger and K. Stern (eds.), *Europäische Grundrechte-Charta* (C.H. Beck 2006) paras. 8 et seq.; the autonomy and primacy of EU law distinguish Art. 53 of the Charter from Art. 53 ECHR.

[W]here 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.⁷⁰

To be sure, primary and secondary Union law command primacy over national human rights in cases of conflict. But in areas, where member states have discretion, they may opt for differentiated solutions. In such scenarios, the Charter does not give rise to uniformity.

It seems to me that the recognition of national specificities in the application of the Charter is not just gesture politics, even if the immediate outcome of the *Melloni* judgment emphasises its centripetal thrust. Structural considerations show that the pluralist underpinning of the ‘fusion thesis’ will be realised. Judicial capacity does not allow Luxembourg to engage in micromanagement of human rights adjudication at the fringes of European law. The ECJ should ensure that it retains full control of validity disputes⁷¹ and for the consistent interpretation of EU legislation in the light of Charter.⁷² By contrast, it should refrain from in-depth interventions where Union law is loosely knit. The Charter will apply in such situations, but the Court should limit itself to basic principles, which will often reiterate ECtHR case-law (not much different from *Åkerberg Fransson*, where the *ne bis in idem* principle will have to be put into effect by the Swedish court⁷³). Procedurally, this outcome is supported by the dominance of preliminary references and the absence of human rights complaints by individuals in Luxembourg. Hence, the structure of the European court system will sustain an active role for national (constitutional) courts.

Another recent decision on the European Arrest Warrant demonstrates that EU minimum rules or broad discretion for national authorities leave room for national (constitutional) courts to creatively unfold country-specific solutions under the umbrella of the Charter. In response to the French *Conseil constitutionnel*, the ECJ confirmed that Union law tolerates enhanced human rights at national level, since rights of appeal have not been fully harmonised (in contrast to trials *in absentia*): ‘provided that the application of the Framework Decision is not frustrated, [...] it does not prevent a Member State from applying its constitu-

⁷⁰ ECJ, *Åkerberg Fransson*, *supra* n. 17, para. 29; similarly, ECJ, *Melloni*, *supra* n. 63, para. 60.

⁷¹ Cf. ECJ, Case 314/85, *Foto Frost* [1987] ECR 4199, para. 17.

⁷² Cf. ECJ, Case C-403/09, *Deiček* [2009] ECR I-12193, para. 55.

⁷³ See ECJ, *Åkerberg Fransson*, *supra* n. 17, paras. 38–42, where the Court reminds the Swedish court of its own case-law, while avoiding the tricky question, whether it can rely on ECtHR case-law in line with Art. 52.3 of the Charter given that some member states have not ratified Additional Protocol No. VII to the ECHR.

tional rules relating *inter alia* to respect for the right to a fair trial.⁷⁴ This is the 'fusion thesis' in action and Luxembourg should build upon this example. Doing so will protect the relative autonomy of the member states and will guarantee that the wide reach of the Charter does not result in uniformity.⁷⁵

For the purposes of our analysis, it should be emphasised that Luxembourg accepts that member states and national (constitutional) courts should have breathing space for autonomous and country-specific solutions which allow for a certain degree of value pluralism within the scope of Union law. Yet, this solution is not brought about by means of strict demarcation between spheres of influence, but realised within the broader framework of the EU Charter (and the ECHR). National deviations are blended into the application of the Charter and are combined with a broad definition of its field of application. That is the essence of the ECJ's 'fusion thesis': national singularities and the Charter are synthesised.

Vision of the FCC: the 'separation thesis'

Karlsruhe has not been sitting idle during the past decade pending the entry into force of the Charter. Rather, the FCC's first senate, whose jurisdiction focuses on human rights, developed its vision on how to preserve the relative autonomy of national legal orders. This scheme had been developed for EU human rights as unwritten general principles of Community law originally and was extended to the Charter later. I shall call the FCC's standpoint 'separation thesis', since it focuses on a strict demarcation of respective sphere of influence. One may trace this approach back to the original *Solange* decisions, which rested on the assumption that the application of European law by national courts either is subject to EU standards (whose suitability the FCC recognised in *Solange II*) or falls within the ambit of the *Grundgesetz*.⁷⁶ In recent years, this approach has been fine-tuned and extended to areas, such as the transposition of directives, where national and European law are often intrinsically linked.

The operation of the 'separation thesis' is illustrated best in relation to implementing discretion. In such situations, the FCC distinguishes accurately between matters which are determined by EU law and issues which are left to member states. Such discretion may concern legislative transposition by national parliaments or administrative application through state authorities. In both cases, the FCC

⁷⁴ See ECJ, Case C-168/13 PPU, *F* [2013] ECR I-0000, para. 53 without reference, however, to either Article 53 of the Charter or the *Melloni* and *Åkerberg Fransson* decisions.

⁷⁵ It should be noted that member states retain freedom to increase the level of protection only, while less human rights protection would not be covered by Art. 53 of the Charter (even if pluralist constitutional theory might suggest otherwise).

⁷⁶ See FCC, *Solange II*, *supra* n. 42, p. 387; and FCC, decision of 7 June 2000, 2 BvL 1/97, *Bananenmarktordnung*, BVerfGE 102, 147.

maintains that national constitutions apply to domestic rules within the range of member state discretion, while the Charter serves as the benchmark for those aspects which are determined by Union law.⁷⁷ Sophisticated guidelines for domestic courts are meant to put the 'separation thesis' into practice. They are obliged to assess in detail, if necessary by means of preliminary references to Luxembourg, whether and, if so, to what extent directives or regulations leave member states room for discretionary implementation.⁷⁸ Once regular courts have assessed the room for manoeuvre left to member states, Karlsruhe may decide about its own involvement: in situations of implementing discretion, individuals and lower courts may seize the FCC. By contrast, Karlsruhe is replaced by Luxembourg insofar as EU law dictates the outcome, complaints by individuals and references by lower courts are inadmissible.⁷⁹

Against the background of our previous analysis, one might object that the FCC's approach can be accommodated with the CJEU's position. Luxembourg would respect the relative autonomy of national legal orders under the umbrella of the Charter in line with the 'fusion thesis' described above. This would grant Karlsruhe some leeway, which, in practice, would function pretty much like the margin of appreciation doctrine employed by the ECtHR. Why should the FCC oppose this solution? It seems to me that structural obstacles explain its rigorous stance on the scope of the Charter in the *Counter-Terrorism Database* judgment. Together with theoretical cleavages to be discussed later, these structural considerations may have motivated the FCC to insist upon a narrow reading of Article 51 of the Charter. More specifically, they concern ultimate control, domestic clout and division of labour with regular courts.

Firstly, the *Åkerberg Fransson* and *Melloni* judgments made crystal clear that the ECJ retains full control over the relative autonomy of domestic human rights standards. National courts may continue to apply domestic guarantees 'provided that the level of protection provided for by the Charter, as interpreted by the Court, [is] not thereby compromised.'⁸⁰ Put differently, Luxembourg determines the freedom of action for national courts and has the upper hand in cases of conflict.

⁷⁷ See, for directives, FCC, *Emission Certificates*, *supra* n. 68, paras. 68-72; and FCC, Decision of 11 March 2008, 1 BvR 256/08, *Data Retention (Provisional Measure)*, BVerfGE 121, 1, paras. 135-137; similarly, for regulations, FCC, decision of 14 Oct. 2008, 1 BvF 4/05, *Agricultural Premiums*, paras. 83-85.

⁷⁸ See, in the context of constitutional complaints by individuals, FCC, *Le Corbusier*, *supra* n. 38, paras. 88-92; and, for references by lower courts, FCC, decision of 4 Oct. 2011, 1 BvL 3/08, *Investitionszulagengesetz*, paras. 48-56; for further comments see M. Wendel, 'Neue Akzente im europäischen Grundrechtsverbund', *Europäische Zeitschrift für Wirtschaftsrecht* (2012) p. 213 et seq.

⁷⁹ This is the procedural consequence of the decisions *ibid.* in line with *Solange II*.

⁸⁰ ECJ, *Melloni*, *supra* n. 63, para. 60; and ECJ, *Åkerberg Fransson*, *supra* n. 17, para. 29 (additional references to the primacy of Union law have been omitted).

In the case of the ECtHR, the situation is quite different, since most national constitutional courts preserve some leeway as to whether to align themselves with Strasbourg.⁸¹ For the reasons outlined above I am optimistic that Luxembourg will grant member states considerable leeway, especially in areas where Union law is loosely knit. As a matter of principles, however, national autonomy remains flexible by the grace of judges in Luxembourg.

Secondly, the FCC is much more than an ordinary court. Its influence over European affairs is legendary and yet judgments on European integration are only an offspring of domestic significance. The interpretation of fundamental rights in the *Grundgesetz* constitutes the bedrock of the FCC's domestic influence. Arguably, Karlsruhe has managed successfully to portray the *Grundgesetz* as a microcosm of social and political conflicts within Germany which are, then, resolved through the interpretation of human rights.⁸² To accept that European law and the Court of Justice may have an important word to say on these matters would lay the axe to the root of Karlsruhe's domestic clout.⁸³ Imagine a situation where the *Grundgesetz* overlaps with the Charter – with primacy of the latter in cases of conflict. Karlsruhe would regularly have to refer questions to Luxembourg in order to manage interaction.⁸⁴ Everyone would understand that the FCC is being dethroned.⁸⁵ That is why the difference between 'fusion' and 'separation' matters. Karlsruhe defends its crown jewels.

Thirdly, there are other courts within Germany – and a wide reading of the scope of the Charter may have significant repercussions on the domestic division of labour between the FCC and ordinary courts. Why? In fields not covered by EU law, the FCC is the ultimate judicial authority and it has developed multiple doctrines and mechanisms to control legal developments at infra-constitutional level. Within the scope of Union law, however, this influence is undermined, since regular courts may bypass the FCC by referring questions to Luxembourg, whose

⁸¹ For the FCC, see Voßkuhle, *supra* n. 48, p. 184-188; generally, N. Krisch, 'The Open Architecture of European Human Rights Law', 71 *M.L. Rev.* (2008) p. 183 at p. 186-196.

⁸² See C. Schönberger, 'Anmerkungen zu Karlsruhe', in C. Möllers et al., *Das entgrenzte Gericht* (Suhrkamp 2011) p. 9 at p. 59-65.

⁸³ For a similar argument with regard to recent FCC decisions on the euro crises, in which judges have refused to consider EU law and refer questions to Luxembourg, resolving all disputes on the basis of the *Grundgesetz* instead, see D. Thym, 'The Emperor's New Clothes?', *EJILT* talk of 20 Sept. 2012, <www.ejiltalk.org/?s=Thym>.

⁸⁴ See, among others, T. von Danwitz, 'Grundrechtsschutz im Anwendungsbereich des Gemeinschaftsrechts nach der Charta der Grundrechte', in M. Herdegen et al. (eds.), *Staatsrecht und Politik. Festschrift für Roman Herzog* (C.H. Beck 2009) p. 19 at p. 27 et seq. and N. Matz-Lück, 'Die Umsetzung von Richtlinien und nationaler Grundrechtsschutz', 37 *Europäische Grundrechte Zeitschrift* (2011) p. 207 at p. 210.

⁸⁵ As predicted by B. Schlink, 'Abschied von der Dogmatik', 62 *Juristenzeitung* (2007) p. 157 at p. 157-159.

interpretation prevails in cases of conflict.⁸⁶ Such empowerment of regular courts *vis-à-vis* the FCC would be particularly pronounced whenever the Charter requires balancing of different human rights.⁸⁷ As a result, leeway which the CJEU will provide for country-specific solutions in the de-centralised application of the Charter, may be seized by regular courts in Germany (not the FCC).⁸⁸ The ‘separation thesis’ propagated by the FCC evades these pitfalls and tries to uphold, for the time being, the status quo ante.

THEORETICAL REPERCUSSIONS OF THE JUDICIAL DISPUTE

Half a century ago, the ECJ faced a foundational choice. It had to decide whether human rights in national constitutions can be directed against EU law. The answer from Luxembourg was firm and is well-known: national human rights cannot be relied upon to challenge the validity of EU law;⁸⁹ domestic courts must give primacy to Union law in cases of conflict;⁹⁰ autonomous human rights standards, developed by the ECJ, serve as yardsticks for secondary Union law instead.⁹¹ This story has often been told and deserves, nonetheless, a fresh look. For the purposes of our analysis, it demonstrates that the judicial assertion of distinct and separate standards at national and European level was, at the time, no German hobby horse. Quite to the contrary, Luxembourg was eager to draw a clear line between the EU legal order and national constitutions – a position of principle which *Åkerberg Fransson* complements with a more nuanced outlook on the relative autonomy of EU human rights.

To be sure, the Court of Justice developed EU human rights, as general principles of law, under due regard to constitutional traditions common to member states.⁹² In practice, however, Luxembourg eagerly protected the autonomy and

⁸⁶ For the division of labour, see the text between n. 77 and n. 79 *supra*.

⁸⁷ See ECJ, Case C-275/06, *Promusicae* [2011] ECR I-271, paras. 65-70; for corresponding difficulties between the ECtHR and the FCC see G. Lübke-Wolff, ‘Der Grundrechtsschutz nach der EMRK bei konfigrierenden Individualrechten’, in M. Hochhuth (ed.), *Nachdenken über Staat und Recht* (Duncker & Humblot 2010) p. 193 at p. 199 et seq.

⁸⁸ This is demonstrated by the example of human rights standards for expulsion of third-country nationals described by D. Thym, *Migrationsverwaltungsrecht* (Mohr Siebeck 2010) p. 246-250; and anti-discrimination law analysed by A. Stone Sweet and K. Stranz, ‘Rights Adjudication and Constitutional Pluralism in Germany and Europe’, 19 *Journal of European Public Policy* (2012) p. 92 at p. 97-104.

⁸⁹ Cf. ECJ, Case 1/58, *Storck v. High Authority* [1959] ECR 19, p. 26-27.

⁹⁰ See ECJ, Case 6/64, *Costa/E.N.E.L.* [1964] ECR 1251, p. 1269.

⁹¹ See, again, ECJ, *Internationale Handelsgesellschaft*, *supra* n. 69, paras. 3 and 4.

⁹² See Art. 6(3) TEU; and P. Pescatore, ‘Les droits de l’homme et l’intégration européenne’, 4 *Cahiers de droit européen* (1968) p. 629 at p. 652-655.

primacy of Union law,⁹³ and, by doing so, pursued its own variant of the ‘separation thesis’ quite similar to the FCC’s present position.⁹⁴ Against this background, the shift of emphasis from separation to fusion shows why recent developments may epitomise much more than judicial handwringing. Arguably, they reflect a fundamental disagreement about how to accommodate value pluralism and European law. While the FCC tries to keep legal orders apart, the CJEU seems willing to consider a greater degree of mutual reflexivity. After having acknowledged systematic differences between the courts, this section presents some preliminary conclusions about theoretical repercussions for general models of the interaction of national and European law.

It is important to understand that the day-to-day management of the fusion thesis will necessitate permanent conversations across jurisdictional boundaries – both procedurally through preliminary references and substantively about the contents of human rights law. National courts cannot apply the limits for national deviations maintained by the CJEU without intimate knowledge of the Charter, since the latter prevails in cases of conflict.⁹⁵ This constant exchange of ideas will be reinforced by active engagement of both national courts and the CJEU with ECtHR case-law, which guides the interpretation of the Charter.⁹⁶ Doing so will result in occasional conflicts, but may nonetheless foster the gradual alignment of human rights standards.⁹⁷ If that happens, the ‘fusion thesis’ would reinforce a trend towards reflexivity and permeability with national and European courts engaging in constant dialogue about the substantive meaning of human rights and other constitutional principles across jurisdictional boundaries. Such dialogue is supported by integration clauses in national constitutions and corresponding provisions in the EU treaties,⁹⁸ which establish substantive *passerelles* linking national constitutional traditions with corresponding principles of Euro-

⁹³ See the classic criticism by J. Weiler and N. Lockhart, ‘“Taking Rights Seriously” Seriously’, 32 *CML Rev.* (1995) p. 51 at p. 67-92.

⁹⁴ For a similar argument, see P. Allott, ‘Preliminary Rulings – Another Infant Disease?’, 25 *EL Rev.* (2000) p. 538 at p. 541-543.

⁹⁵ See text between n. 64 and n. 69 *supra*.

⁹⁶ Cf. Art. 52(3) of the Charter, which will be buttressed by the forthcoming EU accession to the ECHR; on the future interaction see P. Eeckhout, ‘Human Rights and the Autonomy of EU Law’, 66 *Current Legal Problems* (2013) forthcoming in section 5; and W. Weiß, ‘Human Rights in the EU’, 7 *EuConst* (2011) p. 64 at p. 81-84.

⁹⁷ Remember that the FCC, for example, has long recognised that the *Grundgesetz* ‘may’ be interpreted in the light of the ECHR; see Voßkuhle, *supra* n. 48, p. 185-187 (even if Karlsruhe controls the degree of convergence and has rarely given way in practice, while never recognising that the Charter may have the same relevance).

⁹⁸ Such as Art. 4(2) TEU or Art. 52(3)(4) of the Charter.

pean public law.⁹⁹ In the long run, we may even observe the gradual emergence of a *ius commune* on human rights.

Different types of pluralism

Experts on EU law and state theory have been fascinated by the confrontation between Karlsruhe and Luxembourg for decades. It remains, to this date, a pillar of many proposals on how to rationalise the fragmented character of legal orders in Europe and countervailing claims to ultimate authority among highest courts.¹⁰⁰ In the field of human rights, the dispute between Germany's and the EU's top courts is complemented by judicial disagreements over the status of the European Convention in different High Contracting Parties as well as the *Kadi* saga about the autonomy of EU law.¹⁰¹ Taken together, these skirmishes play a prominent role in pluralist accounts of law, which have emerged as a lead narrative to account for the loss of legal unity in today's world.¹⁰² While the recent dispute confirms the appeal of pluralist thinking in general, it invites us to consider discrepancies among distinctive strands of pluralism.

From the perspective of state law, conceptual differences in pluralist thought seemed negligible. The novelty factor of the key message, the loss of legal unity, concealed differences among authors. These divergences stand out, however, once you accept the basic assumption that the unity of legal orders has been lost.¹⁰³ Generally speaking, two versions may be distinguished: first, those who assume that there is a deep conflict between structurally antagonistic legal orders, which should be contained by non-legal cooperation and mediation with no or little room for substantive harmonisation instead of ongoing jurisdictional conflicts.¹⁰⁴

⁹⁹ See A. von Bogdandy, 'Grundprinzipien von Staat, supranationalen und internationalen Organisationen', in J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatsrecht, Vol. XI*, 3rd edn. (C.F. Müller 2013), § 232; M. Wendel, *Permeabilität im europäischen Verfassungsrecht* (Mohr Siebeck 2012); and, with an anti-pluralist impulse, Eeckhout, *supra* n. 96.

¹⁰⁰ See J. Baquero Cruz, 'The Legacy of the *Maastricht-Urteil* and the Pluralist Movement', 14 *ELJ* (2008) p. 389-422.

¹⁰¹ See N. Krisch, *Beyond Constitutionalism. The Pluralist Structure of Postnational Law* (OUP, 2010), chs. 4 and 5.

¹⁰² See the contributions to M. Avbelj and J. Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012); inter-court disputes are complemented by increasing (domestic) societal pluralism and the spread of private described by N. Walker, 'The Idea of Constitutional Pluralism', 65 *M.L.R.* (2002) p. 317 at p. 323-330.

¹⁰³ See N. Walker, 'Beyond Boundary Disputes and Basic Grids', 6 *ICON* (2008) p. 373-396; and G. Itzcovich, 'Legal Order, Legal Pluralism, Fundamental Principles', 18 *ELJ* (2012) p. 358 at p. 361-375.

¹⁰⁴ See, notwithstanding differences among them, Krisch, *supra* n. 101, ch. 3; G. Teubner, *Constitutional Fragments* (OUP 2012); and R. Barents, 'The Precedence of EU Law from the Perspective of Constitutional Pluralism', 5 *EuConst* (2009) p. 421 at p. 429-438.

Second, there are the legal accounts which recognise the primary separation of legal orders but emphasise mutual interconnections as the basis for intra-legal solutions to conflicts through procedural and substantive reflexivity. While some proponents of this group focus on positive legal rules which may serve as *passerelles* between legal orders,¹⁰⁵ another subcategory discusses the identification of background norms regulating the interaction of legal orders, thereby constructing a meta-level,¹⁰⁶ which, in the field of human rights, resonates with non-positivist positions.¹⁰⁷

For our purposes, the first model bears a resemblance to the ‘separation thesis’ of the FCC, whereas the second model corresponds to the ‘fusion thesis’ of the CJEU described earlier. Karlsruhe makes an effort to preserve the self-sufficiency of the German Constitution and the domestic court system by insisting upon a strict demarcation of respective fields of application.¹⁰⁸ By contrast, the CJEU seems willing to blend national singularities into the application of the Charter,¹⁰⁹ thereby paving the way for a constant exchange of ideas about the contents of pan-European human rights standards across jurisdictional boundaries.¹¹⁰ If that is correct, the recent dispute is about much more than scope of the Charter. It reflects basic disagreement over how to accommodate national constitutions and EU law. Do they belong to two different worlds, amongst which interchange is controlled by judicial disputes pursued by courts as interest-driven rational actors trying to extend their leverage? Or are national constitutions and EU law separate but not separable with courts engaging in a communicative dialogue about how to conceive of the foundations of legitimate public authority in an age of jurisdictional overlap which is defined by substantive reflexivity of constitutional rules and principles at national and European level? Arguably, this theoretical cleavage underlies divergent judicial positions on the scope of the Charter.

Ideal types and judicial reality

We can expect neither the (rotating) Grand Chamber of the ECJ nor the two senates of the FCC to have a uniform conceptual vision of how national autonomy should be accommodated with the Charter, let alone describe it in their judgments. We can expect judges, at best, to deliver decisions which resolve the

¹⁰⁵ See von Bogdandy, *supra* n. 99; Wendel, *supra* n. 99; and Eeckhout, *supra* n. 96.

¹⁰⁶ See, in particular, M. Kumm, ‘The Cosmopolitan Turn in Constitutionalism’, in J. Dunoff and J. Trachtman (eds.), *Ruling the World* (CUP 2009), p. 258-324.

¹⁰⁷ Cf. A. Somek, ‘Monism’, in Avbelj and Komárek, *supra* n. 102, p. 343 at p. 364-372; and L. Zucca, ‘Monism and Fundamental Rights’, in J. Dickson and P. Eleftheriadis (eds.), *Philosophical Foundations of European Union Law* (OUP 2012) p. 331-353.

¹⁰⁸ See text between n. 76 and 88 *supra*.

¹⁰⁹ See text between n. 62 and 75 *supra*.

¹¹⁰ See text between n. 95 and 99 *supra*.

questions at hand and establish coherent standards for the future. This does not stop academia, though, from a reconstruction of the case-law and the exploration of theoretical implications. In doing so, commentators regularly transcend original materials; academic reconstruction need not coincide with the actual motivation of judges nor does it necessarily reflect all facets of a particular case. They are ideal types in a Weberian sense which are formed upon judgments as legal phenomena and accentuate certain features for analytical purposes. This contribution is no exception. The separation and fusion theses, developed above, are idealised accentuations of the *Åkerberg Fransson* and the *Counter-Terrorism Database* rulings. Since they are analytical tools, judicial reality can be more nuanced. Luxembourg may be less integrative than the fusion thesis suggests, while Karlsruhe could be less separatist.

The position of the ECJ is particularly ambiguous, since the emphasis on national singularities in the domestic application of the Charter comes with a resolute insistence upon the primacy of Union law over national human rights in cases of conflict.¹¹¹ Moreover, the wide interpretation of Article 51 of the Charter reaffirms the ECJ's authority over disputes with a loose connection to EU law; this self-conscious claim of jurisdiction guarantees, as a side-effect, that judges in Luxembourg retain a firm grip over national disputes with an EU dimension after the forthcoming accession of the EU to the ECHR; it allows the ECJ to insist upon a similar generous handling of the prior involvement procedure which will grant Luxembourg a first say before a decision in Strasbourg.¹¹² Moreover, it should be emphasised that the ECJ does not extend the 'fusion thesis' to international law. Luxembourg has famously rejected any modification of EU human rights standards in the Charter in relation to UN law in both *Kadi* judgments.¹¹³ To this date, reflexive fusion remains a continental phenomenon embracing national constitutions, EU law and the European Convention.

To recognise that the 'fusion thesis' coincides with interest-driven utility maximisation on the side of the CJEU does not imply that the concept will not work. I have mentioned above structural reasons which will support a generous approach of the CJEU towards national deviations.¹¹⁴ Moreover, the CJEU is moving in this direction already. In a number of prominent cases, judges emphasised that member states retain room for country-specific solutions when applying EU stan-

¹¹¹ See text n. 69 *supra*.

¹¹² On corresponding rules in the Draft Agreement on EU Accession to the ECHR my blog post D. Thym, 'A Trojan Horse', <Verfassungsblog.de> of 11 Sept. 2013.

¹¹³ See Zucca, *supra* n. 107, p. 348-351 and the reinforced position in ECJ, Joined Cases C-584/10 P et al., *Commission/Kadi* [2013] ECR I-0000, para. 66.

¹¹⁴ See text between n. 71 and n. 73 *supra*; it is beyond the confines of this article to analyse whether and to what extent German constitutional law may support substantive reflexivity towards EU human rights – in contrast to FCC case-law.

dards: they ‘retain the freedom to determine the requirements of public policy and public security in accordance with their national needs, which can vary from one Member State to another and from one era to another.’¹¹⁵ Such flexibility may be enhanced whenever certain values relate to the constitutional identity of a member state.¹¹⁶ If Luxembourg builds upon these examples when it interprets the Charter, national courts may learn to appreciate the ‘fusion thesis.’ Overarching principles stretching across legal orders may guide the gradual alignment of national laws and Union law¹¹⁷ and pave the way for Union law and national laws to ‘go hand in hand in the European legal area.’¹¹⁸ That may be the ultimate prize of the fusion thesis. Jurisdictional overlap gives way to substantive reflexivity with an emphasis on unity-enhancing elements of Europe’s pluralist legal reality.

PRAGMATIC APPROXIMATION OF DIVERGENT POSITIONS

In *Åkerberg Fransson*, the ECJ opts for a clear-cut position which equates the scope of Union law with the field of application of the Charter. But what precisely defines the ‘scope of Union law’? Luxembourg will have to specify this abstract formula in follow-up cases, thereby possibly limiting implications for the domestic application of the Charter. On the other hand, the FCC will have to recognise that even a narrow reading of Article 51 implies that the Charter overlaps with national constitutions to a certain extent and that, therefore, its ‘separation thesis’ cannot always be applied. For the purposes of our analysis, this would mean that both the ECJ and the FCC may find common ground for conciliatory gestures and peaceful coexistence, even if underlying structural and theoretical cleavages are not being resolved. I would not be surprised if such pragmatic approximation was discussed when a delegation from Luxembourg visited Karlsruhe a few weeks after *Åkerberg Fransson*.¹¹⁹

FCC: gradual adaptation to jurisdictional overlap

Prior to *Åkerberg Fransson*, the FCC had emphasised that it would continue to apply fundamental rights enshrined in the *Grundgesetz* to national measures which

¹¹⁵ ECJ, Case C-348/09, *I*, [2012] ECR I-0000, para. 23; similarly, ECJ, Case C-110/05, *Commission v. Italy* [2009] ECR I-519, para. 61.

¹¹⁶ See ECJ, Case C-208/09, *Sayn-Wittgenstein* [2010] ECR I-13693, paras. 91-93; and ECJ, Case C-36/02, *Omega* [2004] ECR I-2569, paras. 37-38.

¹¹⁷ See Wendel, *supra* n. 99, chs. 12 and 13; and Eeckhout, *supra* n. 99, section 4.

¹¹⁸ FCC, *Treaty of Lisbon*, *supra* n. 44, para. 240; for comments on the reflexivity of control standards for *ultra vires* and identity review in FCC case-law see Thym, *supra* n. 1, p. 239-240, 247; and Voßkuhle, *supra* n. 48, p. 193-196.

¹¹⁹ According to FCC, Press Release No. 45/2013 of 1 July 2013 the debate focused, among others, on ‘the relationship between European and national human rights.’

are subject to discretionary implementation.¹²⁰ By contrast, these judgments never took a firm position on whether the Charter can be applied alongside the *Grundgesetz* in situations of implementing discretion, although academic commentators¹²¹ and some judges¹²² had argued that such overlap might present an acceptable middle ground. The ECJ might even have assumed that the ‘fusion thesis’ would not encounter much resistance. Be it as it is, the conflict is real now. But what precisely is the FCC’s position beyond principled objections to *Åkerberg Fransson*? On closer inspection, the *Counter-Terrorism Database* judgment leaves room for later refinement. Karlsruhe rejects the generous formula employed by the ECJ, but does not present a clear-cut alternative.

In one passage, the FCC insists that the Charter does not apply, since national rules in question ‘are *not determined* by Union law’ and that, therefore, the case at hand ‘does not represent an implementation of Union law which alone would entail the application of the Charter.’¹²³ This could be read that ‘implementation’ is confined to ‘determination’, thereby leaving no room for overlap in situations of state discretion in line with a strict version of the ‘separation thesis’ discussed above.¹²⁴ In another passage, however, the FCC rejects a threshold test for the application of the Charter which would be based upon ‘abstract connections with’ or ‘mere factual effects upon’ European Union law.¹²⁵ This formulation would leave room for overlap, in particular in situations of implementing discretion, where the FCC might accept a double human rights standard.¹²⁶ This outcome is even more likely given that the first Senate will have trouble justifying a negative *ultra vires* and/or identity verdict in such scenarios.¹²⁷ Thus, the FCC might have

¹²⁰ See text between n. 77 and n. 79 *supra*.

¹²¹ See, among many, D. Ehlers, ‘Allgemeine Lehren der Unionsgrundrechte’, in Ehlers (ed.), *Europäische Grundrechte und Grundfreiheiten*, 3rd edn. (de Gruyter 2009) § 14 para. 51; for critical comments see Calliess, *supra* n. 60, p. 118-119.

¹²² See Huber, *supra* n. 24, p. 2386-2387, H.-J. Papier, ‘Das Verhältnis des BVerfG zu den Fachgerichtsbarkeiten’, *DVBl.* (2009) p. 473 at p. 480 and F. Kirchhof, ‘Grundrechtsschutz durch europäische und nationale Gerichte’, 64 *Neue Juristische Wochenschrift* (2011) p. 3681 at p. 3684-3685; given that the FCC has so far declined to make a preliminary reference, such indirect channels are critical for judicial ‘dialogue’.

¹²³ FCC, *Counter-Terrorism Database*, *supra* n. 27, para. 88 (emphasis added).

¹²⁴ The German (and French) meaning of ‘determined’ (*determiniert*) is slightly stronger than the English equivalent and implies no (or very little) discretion.

¹²⁵ FCC, *Counter-Terrorism Database*, *supra* n. 27, para. 91.

¹²⁶ It is almost impossible to neatly disentangle issues determined by EU law and those which are subject to national discretion in situations of minimum rules or whenever EU law establishes individual rights whose contours and limits are defined by the member states, cf. F. de Cecco, ‘Room to Move?’, 43 *CML Rev.* (2006) p. 9-30 and C. Ladenburger, ‘Art. 51’, in Tettinger and Stern, *supra* n. 69, paras. 33-48.

¹²⁷ See text between n. 50 and n. 59 *supra*.

to concede some degree of overlap, thereby becoming accustomed to the ECJ's 'fusion thesis' over time.

Moreover, there are little indications that Karlsruhe will be supported by courts from other member states¹²⁸ – partly because the 'fusion thesis' is an attractive middle ground for courts in other member states.¹²⁹ In Sweden, the Netherlands and the United Kingdom, the broad reading of Article 51 enhances the power of national courts to set aside national legislation on human rights grounds¹³⁰ (indeed, the UK Supreme Court has already supported, in abstract terms, a broad reading of Article 51¹³¹). In other member states, the 'fusion thesis' will operate smoothly, since domestic courts orientate themselves at the ECHR anyway.¹³² Elsewhere, regular courts are more self-confident than in Germany and join forces with the ECJ to rein in constitutional courts.¹³³ Indeed, the Austrian *Verfassungsgerichtshof* pursues just the opposite strategy to the FCC, when it embraces the Charter and tries, without much chance of success, to monopolise its domestic application.¹³⁴ Why should Luxembourg give in to resistance from Karlsruhe, if the opposition is, in part at least, motivated by particularities of the German court system?

The Luxembourg Court: defining the 'scope of European Union Law'

Luxembourg emphasised, in *Åkerberg Fransson*, that the Charter has the same field of application as general principles of European Union law. But what precisely is the 'scope of Union law', which the French and most other language versions of the judgment designate as 'le champ d'application' (field of application)?¹³⁵ A wide understanding would replicate the wide reach *ratione materiae* of Article 18 TFEU

¹²⁸ On the role of national courts see K. Alter, 'The European Court's Political Power' (1996), in *ibid.*, *Selected Essays* (OUP 2010) p. 92 at p. 99-105.

¹²⁹ In all probability, national courts will be the only real opposition, since *ex post* court-curbing by political institutions, including a hypothetical amendment/clarification of the Charter by means of Treaty change, is highly likely.

¹³⁰ See M. Tabarelli, 'The Influence of the EU and the ECHR on "Parliamentary Sovereignty Regimes"', 19 *ELJ* (2013) p. 340-363.

¹³¹ See UK Supreme Court, Judgment of 21 Nov. 2012, *Rugby Football Union v. Consolidated Information Services Limited* [2012] UKSC 55, para. 28 Lord Kerr (others agreeing).

¹³² Art. 52(3) of the Charter supports convergence in these countries.

¹³³ Cf. the reference of the French *Conseil d'Etat* in ECJ, Joined Cases C-188/10 and C-189/10, *Melki & Abdeli* [2010] *ECRI*-5667, paras. 52-56 and, for the Czech Republic, J. Komárek, 'Playing with Matches', 8 *EuConst* (2012) p. 323 at p. 327-334.

¹³⁴ See Austrian Constitutional Court, Decision of 4 May 2012, U 466/11 and U 1836/11, paras. 29 et seq. and the counter-attack of the Supreme Court (*Oberster Gerichtshof*) by means of reference to the CJEU, Case C-112/13, *Aliyev* (pending).

¹³⁵ Similarly Italian (ambito di applicazione) and Spanish (ámbito de aplicación), while the German version fluctuates between 'Anwendungs-' and 'Geltungsbereich' (with the former being preferable, since EU law is valid even in situations where it does not apply); inconsistently, also the Dutch 'kader/toepassingsgebied'.

which prescribes non-discrimination on grounds of nationality '[w]ithin the scope of application of the Treaties.'¹³⁶ If this was correct, the Charter would embrace diverse areas of law, which are outside the scope of the Union's legislative ambit and are, as national competences, nonetheless subject to non-discrimination rules in Article 18 TFEU and, as *leges speciales*, economic free movement provisions.¹³⁷ National rules on study grants, family names or social assistance, for instance, would all be subject to the Charter¹³⁸ – even in purely internal situations. That is what the FCC might have had in mind when it directed the *ultra vires* threat against the (putative) idea that 'abstract connections with' or 'mere factual effects upon' Union law might pass the threshold of Article 51.¹³⁹

It seems to me that this criticism is valid and that we should distinguish Article 18 TFEU from the field of application of the Charter. The wide reach of non-discrimination principles is based upon the assumption that the exercise of national competences may have negative repercussions on the internal market and the free movement of persons.¹⁴⁰ For this reason, Article 18 TFEU and the economic freedoms prohibit any restriction of transnational activities, while the same national rules are exempt from Article 18 TFEU in purely internal situations.¹⁴¹ This functional rationale underlying the prohibition of transnational restrictions cannot be extended to Article 51 of the Charter.¹⁴² Certain national laws, such as university tuition fees or access to study grants, are 'within the scope of application of the Treaties' for the purposes of Article 18 TFEU, if they discriminate against migrant EU citizens, but are not 'within the scope of Union law' in the meaning of Article 51 of the Charter when British students protest against domestic fee levels.¹⁴³ Doctrinally, such distinction would emphasise discrepancies between the

¹³⁶ French: 'le domaine d'application des traités'; German: 'in ihrem Anwendungsbereich'.

¹³⁷ It is established case-law that their reach extends beyond the EU's legislative powers; cf. CJEU, Case C-73/08, *Bressol & Chaverot* [2010] ECR I-2735, paras. 28-29.

¹³⁸ Cf. A. Epiney, 'The Scope of Article 12 EC', 13 *ELJ* (2007) p. 611 at p. 612-620.

¹³⁹ See FCC, *Counter-Terrorism Database*, *supra* n. 27, para. 91.

¹⁴⁰ See M. Poirares Maduro, *We, the Court* (Hart 1998) chs. 4 and 5 and T. Kingreen, 'Fundamental Freedoms', in A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law*, 2nd edn. (Hart 2009) p. 515 at p. 532-542.

¹⁴¹ Notwithstanding uncertainties about the precise delimitation, purely internal situations are not covered by Art. 18 TFEU; cf. CJEU, Case C-212/06, *Gouvernement de la Communauté française et Gouvernement wallon* [2008] ECR I-1683, paras. 38-39.

¹⁴² Of course, the Charter would continue to apply, whenever member states justify a restriction to the fundamental freedoms in line with CJEU, Case C-260/89, *ERT* [1991] ECR I-2925, para. 42, which is referred to in both CJEU, *Åkerberg Fransson*, *supra* n. 17, para. 19 and the official explanations to Art. 51 of the Charter, *supra* n. 13.

¹⁴³ Cf. CJEU, Case C-457/09, *Chartry* [2011] ECR I-819, para. 25.

scope of corresponding rules *ratione personae*.¹⁴⁴ Even the Grand Chamber may have been trying to explain this difference, albeit indirectly, in *Åkerberg Fransson*.¹⁴⁵

If the wide conceptualisation of the 'scope of Union law' for the purposes of Article 18 TFEU cannot be extended to Article 51 of the Charter, it seems plausible that EU coordination of national policies and other support measures short of legislative harmonisation do not bring about an application of the Charter.¹⁴⁶ Legally non-binding recommendations, for instance, would not result in the domestic application of the Charter, even if member states followed the advice of EU institutions.¹⁴⁷ An important indication that Luxembourg may be of the same view is a recent decision rejecting a preliminary reference from a Portuguese court about the national adjustment programme within the wider framework of reinforced macroeconomic coordination in the euro-zone¹⁴⁸ (although the Court was wrong to present an unreasoned decision only¹⁴⁹). In a different context, the ECJ had already refused to submit the European Stability Mechanism to the Charter.¹⁵⁰ If the Court departed from that line and subordinated to the Charter all national measures which are subject to non-binding EU coordination and support, national human rights would be squeezed out.

¹⁴⁴ Purely internal situations are not covered by Article 18 TFEU *ratione personae*, even if corresponding rules are within the scope of Union law *ratione materiae*; it may be argued that the application of the Charter similarly requires national laws to be covered by Union law both *ratione personae* and *materiae*.

¹⁴⁵ See the reference by CJEU *Åkerberg Fransson*, *supra* n. 17, para. 19 to CJEU, Case C-27/11, *Vinkov* [2012] ECR I-0000, para. 58, which uses the formula 'scope of EU law' and finds, nonetheless, in para. 54 that purely internal situations are not covered, although there is EU legislation harmonising national rules on inter-state cooperation (and although transnational restrictions might fall foul of Art. 18 TFEU).

¹⁴⁶ Although competences under Arts. 5 and 6 TFEU are covered by Art. 18 TFEU *ratione materiae*; cf. CJEU, Case C-209/03, *Bidar* [2005] ECR I-2119, paras. 39-42.

¹⁴⁷ Doctrinally, one may point out that 'implementation' within the meaning of Art. 51 of the Charter does not embrace non-binding measures, while EU institutions would still be bound in their action; admittedly, this proposal relies overtly on formal legal effects and does not deny that non-binding recommendations may be powerful political governance instruments in practice; yet, legal certainty (here with regard to the scope of the Charter) sometimes requires clear-cut solutions irrespective of social reality.

¹⁴⁸ Cf. CJEU, Case C-128/12, *Sindicato dos Bancários do Norte u.a.* [2013] ECR I-0000 which concerned wage cuts in the public sector in line with, rather general, guidelines in Art. 3.6 Council Implementing Decision 2011/344/EU (OJ [2011] L 159/88).

¹⁴⁹ After *Åkerberg Fransson*, the lack of jurisdiction was far from 'clear' as the Court claimed in line with Arts. 53, 99 Rules of Procedure, *supra* n. 63.

¹⁵⁰ See CJEU, Case C-370/12, *Pringle* [2012] ECR I-0000, paras. 179-180 pointing out, correctly in my view, that the ESM is international law outside the EU framework; for that reason, FCC, *Counter-Terrorism Database*, *supra* n. 27, para. 90 wrongly cites the *Pringle* judgment to support a narrow reading of Art. 51 with regard to EU law.

Positively described, both limitations described above would concentrate the application of the Charter on the fulfilment, on the side of member states, of legal obligations under EU law.¹⁵¹ If that is correct, potential EU legislative competences which have not been exercised yet are not covered by Article 51 of the Charter either.¹⁵² Consequently, the focal point for the domestic application of the Charter would be national rules covered by secondary EU legislation, in particular the discretionary transposition of directives¹⁵³ and the flexible application of regulations.¹⁵⁴ With regard to these two categories, however, Karlsruhe will find it extremely difficult to maintain the *ultra vires* threat given that the wording of Article 51 of the Charter makes use of language which closely resembles established terminology for these scenarios.¹⁵⁵ Within the reach of secondary law, both binding obligations and optional rules authorising national action without mandating it¹⁵⁶ would bring about the application of the Charter.¹⁵⁷ This would certainly be a generous formula embracing situations of broad national discretion;¹⁵⁸ but it would not be without limits.

For our purposes, the solution above respects the abstract formula put forward by the ECJ in *Åkerberg Fransson* and distinguishes, on its basis, situations which do (not) fall 'within the scope of Union law.' This would not reverse structural incompatibilities underlying the divergent approaches of the ECJ and the FCC, but it might provide a pragmatic basis for peaceful co-existence. It should be noted that Luxembourg behaved similarly in a similarly contentious dispute in recent years: after having extended Union citizenship to situations without cross-border effects in the controversial *Ruiz Zambrano* judgment, judges held back

¹⁵¹ For a similar position, see Lenaerts, *supra* n. 61, p. 378-382.

¹⁵² One example: national tax rules would only be covered by the Charter, once legislation has been adopted in accordance with Art. 115 TFEU; cf. AG E. Sharpston, Opinion of 30 Sept. 2010, Case C-34/09, *Ruiz Zambrano*, paras. 171-173.

¹⁵³ See, prior to the Charter, with regard to directives CJEU, Case C-540/03, *Parliament v. Council* [2006] ECR I-5769, paras. 21-22, 104-105 and CJEU, Joined Cases C-20/00 & C-64/00, *Booker Aquaculture* [2003] ECR I-7411, paras. 88-90.

¹⁵⁴ See, for regulations, CJEU, Case C-2/92, *Bostock* [1994] I-955 and, more recently, CJEU, Joined Cases C-411/10 and C-493/10, *N.S. et al.* [2011] ECR I-0000, paras. 65-68.

¹⁵⁵ 'Implementation' (German: *Durchführung*) and 'transposition' (*Umsetzung*) were treated as synonyms in different (German) versions of Art. 51 of the Charter; cf. Borowski, *supra* n. 11, paras. 7-8; moreover, the term 'implementation' in Art. 51 of the Charter signals a certain leeway on the side of the member states; cf. AG Cruz Villalón, *supra* n. 19, para. 28.

¹⁵⁶ An application of EU human rights to provisions *authorising* (not: mandating) member state action has been proposed by AG J. Kokott, opinion of 6 June 2013, Case C-276/12, *Sabou*, paras. 40-42; and CJEU, *Parliament v. Council*, *supra* n. 153, paras. 21-22.

¹⁵⁷ Occasionally, it might be difficult to decide whether national rules are covered by EU legislation; for a proposal how to delineate see Fontanelli, *supra* n. 18, p. 326-327.

¹⁵⁸ As *Åkerberg Fransson* demonstrates; cf. text between n. 20 and n. 22 *supra*.

later by handling the newly established criteria restrictively in follow-up cases.¹⁵⁹ Luxembourg should do this again. Its abstract formula would stay in place and continue to cover situations of discretionary implementation, while avoiding jurisdictional over-reach of the Charter.

CONCLUSION

There was a time when the FCC was instrumental in shaping the role of human rights in the EU legal order, not least because Germany's constitutional judges were essentially perceived to be altruistic actors. These times of judicial hegemony are gone; Karlsruhe will in all likelihood not convince Luxembourg to reverse its position in *Åkerberg Fransson*. One reason for this is constitutional design. Both the drafting history and the wording of Article 51 of the Charter may demonstrate the intention to limit the domestic application of EU human rights in the member states. Yet, corresponding arguments are not waterproof and open to contestation. As a result, the FCC will find it difficult to sustain principled opposition to the ECJ's reading of the Charter on the basis of *ultra vires* and/or constitutional identity review, which it threatened, without thorough explanation, in the *Counter-Terrorism Database* judgment. Instead, both courts may support peaceful co-existence by means of pragmatic approximation. This strategy may work, since there is room for later refinement on both sides.

The abstract formula 'scope of Union law', which the ECJ defended in *Åkerberg Fransson*, requires clarification in follow-up cases. Judges in Luxembourg should emphasise, in my view, that the application of EU human rights within national legal systems concentrates on legally binding rules at European level by distinguishing the scope of the Charter from the reach of Article 18 TFEU with its focus on transnational free movement. Along similar lines, EU coordination of national policies would not bring corresponding national measures within the scope of the Charter. Such an outcome would limit repercussions of the *Åkerberg Fransson* ruling, while respecting the core conclusion of the ECJ that discretionary implementation on the side of the member states is within the 'scope of Union law' and subject, therefore, to the Charter. Conversely, the FCC will have to recognise that national fundamental rights in the *Grundgesetz* overlap with the Charter to a certain extent, in particular when it comes to the transposition of directives or discretionary rules in EU regulations.

Such pragmatic approximation would ease tensions and pave the way for mutual accommodation, even if it does not reverse structural incompatibilities and

¹⁵⁹ Cf. CJEU, Case C-256/11, *Dereci et al.* ECR [2011] I-0000, which handles the *Ruiz Zambrano* yardstick restrictively *in casu*; the decision is referred to as a model in FCC, *Counter-Terrorism Database*, *supra* n. 27, para. 90.

theoretical cleavages underlying the judicial dispute over the Charter. Indeed, both courts are in fundamental disagreement. This contribution has argued that the ECJ will pay due regard to national sensitivities, which it will blend into the application of the Charter by granting member states leeway to apply national human rights on the condition that they respect the primacy of Union law. This ‘fusion thesis’ is not gesture politics, since Luxembourg will give national (constitutional) courts room for country-specific solutions, in particular in areas where Union law is loosely knit, while retaining full control of disputes concerning the validity of EU law. By contrast, the FCC pursues a settlement which is based upon the strict demarcation of respective spheres of influence. This ‘separation thesis’ reflects, in part at least, specificities of the German court structure and defends, among others, the special status of the FCC *vis-à-vis* regular courts and the general public. But court interests are not the only force driving the dispute. Arguably, there is more profound disagreement.

In recent years, pluralist accounts have emerged as a lead narrative to account for the loss of unitary legal orders. The dispute analysed in this paper confirms the appeal of pluralist thinking in general, but emphasises different theoretical strands. The FCC’s separation thesis corresponds to a group of authors who suggest a deep conflict between legal orders, amongst which interchange is regulated by courts striving for interest-driven utility maximisation as rational actors. By contrast, the ECJ’s fusion thesis mirrors accounts which emphasise interconnections between legal orders as the basis for intra-legal solutions to conflicts through procedural and substantive reflexivity; courts are engaged in a communicative dialogue about how to conceive of the foundations of legitimate public authority in an age of jurisdictional overlap. If that is correct, the recent spat is about much more than the reach of the Charter and epitomises divergent visions of how to accommodate national autonomy and European law. Pragmatic approximation may provide the groundwork for conciliation among courts – and yet the fundamental choice between different legal paths to a continent united in diversity remains.

