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Purely internal situations in European Union law after *Åklagaren v Hans Åkerberg Fransson*

Introduction

This text aims to state and assess the law of the European Union, as it stands at the time of writing on the legal concept of purely internal situations. The issue at hand is an important one, as it concerns effectiveness and application of EU law, therefore being of value for the needs of legal practitioners and, more broadly, anyone who would like to acquaint themselves with the current state of the law of the European Union.

Central to this paper is the notion of a purely internal situation, that is, a situation where no link with EU law can be established within the facts of a given legal case. Were this to be so, then EU law would not apply to such situations, leaving individuals unable to assert their rights under that law.

The issue in question is also a field of law where the legal landscape changes very quickly, and where recent developments in case-law of the Court of Justice of the European Union ("CJEU" or "the Court") have occurred. This paper distinguishes one case — the titular *Åklagaren v Hans Åkerberg Fransson* — as a particularly important moment for the Court's jurisprudence,[1] given its impact on the Charter of Fundamental Rights of the European Union ("CFR"). Decided in disregard of the Advocate General's views, the Grand Chamber judgment of 26 February 2013 found that not only the concept of 'implementation,' found in

[1] Cited in Polish by A. Wróbel in *Zeszyty Naukowe Sądownictwa Administracyjnego* 3/2013, Warszawa 2013, p. 162.

the CFR, amounts to a situation of applicability of EU law — with the automatic and concurrent application of fundamental rights enshrined in the CFR, but also that a given case comes within the field of EU law where the primacy, unity and effectiveness of European Union law are being compromised — in a field that is *not* entirely determined by European Union law.

This paper addresses areas of EU law other than fundamental rights, noting several developments in the field of European citizenship,[2] horizontal application of EU law and fundamental freedoms of the internal market.

The guiding principle and the main thesis for this paper is the one that the area of purely internal situation is steadily shrinking due to the judgment in *Fransson*, true to the ever-closer Union. The question remains whether *Fransson* did alter the area in any way and if so, to what extent.

This paper takes account of the law as it stands on 30 May 2014.

Purely internal situations

Given that this is the concept around which this paper revolves, it is appropriate to briefly describe the notion of a purely internal situation and its origins.

A purely internal situation, or a wholly domestic situation, for the purposes of this article, can be defined as a case where no EU rules apply. It is a question of application (or rather, lack thereof) of a relevant EU norm; where there is a purely internal situation, national law applies.

This paper distinguishes a purely internal situation from a *lacuna*, where there is simply no law to apply, an area where a lack of competence for the EU exists (and so the Union cannot act *intra vires*), a situation where an applicable EU norm is not being enforced (for miscellaneous reasons, which may include a lack of jurisdiction of the Court, no standing for an individual or negligence of national authorities), and an exercise of the principle of a procedural autonomy by a Member State in regard to procedural law, where there is no common standard and principles of effectiveness and equivalence are met.

In purely internal situations EU rules that cover similar cases may exist, yet for reasons set out below — that may be summed up as a lack of a link to EU law — are left unused. This is, however, without contradiction that the above four concepts are related in their effects to a purely internal situation.

The legal concept that it entails is not new to the law of the European Union, as it has been present at least since the year 1979. It was for the judgment of the Court of 7 February 1979 — case 115/78 *J. Knoors v Secretary of State for Eco-*

[2] As per P. Craig, G. De Burca, *EU Law — Text, Cases and Materials 5e*, Oxford 2011, p. 833.

nomic Affairs[3] to first introduce it, within the realm of the fundamental freedoms of the internal market, and it remained jurisprudential since.

In that case, the Court heard an argument (para. 22) that "it is claimed that [the] provisions of the treaty [on the freedom of establishment and to provide services] show that the nationals of the host state are not regarded by the treaty as being beneficiaries of the liberalization measures for which provision is made and that they therefore remain entirely subject to the provisions of their national legislation" and accepted (para. 24) that "it is true that the provisions of the treaty relating to establishment and the provision of services cannot be applied to situations which are purely internal to a member state," before going on to interpret a relevant directive in an extensive fashion.

Another judgment that would follow this line of reasoning was one of 28 March 1979 — case 175/78 *The Queen v Vera Ann Saunders*,[4] wherein (para. 11) the Court handed down that "the provisions of the treaty on freedom of movement for workers cannot therefore be applied to situations which are wholly internal to a member state, in other words, where there is no factor connecting them to any of the situations envisaged by community law."

The concept of a "connecting factor" (or a lack thereof) has resurfaced in a number of cases.[5] It is also linked to the one of "reverse discrimination," that is, treatment of a Member State's nationals that is less favourable than that of individuals being able to rely on EU law.[6] If a reverse discrimination appears, however, and a referring national court wishes to obtain useful interpretation from the Court to address national law that requires it to remedy it, the Court has jurisdiction and would be able to formulate a response.[7]

That connection has gradually become interpreted extensively by the Court, which has allowed it to encompass measures that only potentially render the exercise of a freedom less attractive,[8] even in a wholly domestic context — that is, where all the facts in the main proceedings are confined within a single Member State.[9]

[3] ECR 1979, p. 00399, CELEX 61978J0115. This paper would provide, apart from the usual ECR citation, a relevant CELEX number for the sake of enhancing searches. Should no ECR citation be provided, it would mean that there is no analog Report with a page citation for that judgment.

[4] ECR 1979, p. 01129, CELEX 61978J0175.

[5] See to that end K.J.M. Mortelmans et al., *The Law of the European Union and the European Communities*, 4th ed., Alphen aan den Rijn 2008, p. 585.

[6] Which remains for national law, esp. national constitutional law to address accordingly; see Judgment of the Court of 16 June 1994 in a case C-132/93 *Volker Steen v Deutsche Bundespost*, ECR 1994 p. I-02715, CELEX 61993CJ0132, operative part.

[7] To that effect see judgment of the Court of 5 December 2000, case C-448/98 *Criminal proceedings against Jean-Pierre Guimont*, ECR 2000 p. I-10663, CELEX 61998CJ0448, para. 23.

[8] See eg. Case C-371/10 *National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam*, ECR 2011, p. I-12273, CELEX 62010CJ0371, para. 36.

[9] Conversely, even a passing 'extraneity' on part of an economic activity would bring a case within the scope of fundamental freedoms; to that end see judgment of the Court of 11 April 2000, Joined Cases *Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue*

The Court does accept that national legislation can fall within the scope of the provisions on the fundamental freedoms established by the Treaty only to the extent that it applies to situations connected with intra-EU trade, yet just the possibility of the freedom being hindered brings the case within the remit of the Court.[10]

Additionally, if a national provision itself makes a connection to EU law, the case falls within the scope of EU law by virtue of such a reference.[11] This may not be a direct or detailed reference — domestic legislation that adopts the same solutions as those adopted in EU law in order, particularly, to avoid discrimination against foreign nationals or any distortion of competition, suffices — because it is in the EU's interest that, in order to forestall future differences of interpretation, provisions or concepts taken from EU law should be interpreted uniformly, irrespective of the circumstances in which they are to apply.[12]

Moreover, the Court is in general unwilling to refuse its jurisdiction, as it is settled case-law that it is for the national court to consider whether the reference is required to reach a conclusion in a case, a conclusion the Court cannot — at least easily — negate or criticize.[13]

However, given the ever-wider expansion of EU law into various spheres of national law, the idea of a purely internal situation has transcended the field of fundamental freedoms, for it appeared in regard to fundamental rights enshrined in EU law.[14]

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belge de judo ASBL, Union européenne de judo (C-51/96) and François Pacquée (C-191/97), ECR 2000 p. I-02549, CELEX 61996CJ0051, para. 59, where a participation in an international amateur judo competition did suffice for that 'extraneity.'

[10] See to that end Case C-384/08 *Attanasio Group Srl v Comune di Carbognano*, ECR 2010, page I-02055, CELEX 62008CJ0384, paras 23 and 43.

[11] See judgment of the Court of 18 October 1990, Joined Cases C-297/88 and C-197/89 *Massam Dzodzi v Belgian State*, ECR 1990, p. I-03763, CELEX 61988J0297, paras 36 and 41 in particular.

[12] To that effect, judgment of the Court of 15 January 2002, case C-43/00 *Andersen og Jensen ApS v Skatteministeriet*, ECR 2002 p. I-00379, CELEX 62000CJ0043, para. 19, and judgment of the Court of 17 July 1997, case C-28/95 *A. Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2*, ECR 1997 p. I-04161, CELEX 61995CJ0028, para. 34. See also that judgment as to the line of case-law that allows contractual references to EU law and therefore private law negation of a purely internal situation.

[13] To that end see judgment of the Court of 16 June 1981, case 126/80 *Maria Salonia v Giorgio Poidomani and Franca Baglieri, née Giglio*, ECR 1981 p. 01563, CELEX 61980CJ0126, para. 6, with a long and ongoing string of cases that came after it, and a in case 13–68 that preceded it, judgment of the Court of 19 December 1968 — *SpA Salgoil v Italian Ministry of Foreign Trade, Rome*, ECR 1968, English edition, p. 00453, CELEX 61968CJ0013, in a section titled "Jurisdiction of the Court." In all, the inadmissibility must be "quite obvious."

[14] In particular, the Court has been known to refuse to provide an answer to a preliminary reference where a given case is purely internal and therefore inadmissible as above; see judgment of the Court of 7 June 2012 in a case C-27/11 *Anton Vinkov v Nachalnik Administrativno-nakazatelna deynost*, CELEX 62011CJ0027, para. 54 and operative part.

The Court has held in a judgment of 11 July 1985 — joined cases 60 and 61/84 *Cinéthèque SA and others v Fédération nationale des cinémas français*[15] that (para. 26) "although it is true that it is the duty of this Court to ensure observance of fundamental rights in the field of community law, it has no power to examine the compatibility with the European Convention of national legislation which concerns, as in this case, an area which falls within the jurisdiction of the national legislator."

Moreover, that case was further referenced in the judgment of the Court of 30 September 1987 — case 12/86 *Meryem Demirel v Stadt Schwäbisch Gmünd*,[16] clarifyning that (para. 28) "[the Court] has no power of [to examine] national legislation lying outside the scope of community law," which was indeed the case, as it concerned the ECHR and no secondary EU law.

The next step in defining purely internal situations came in the judgment of the Court of 18 June 1991 — case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* (*ERT*),[17] where the Court qualified the above judgments by adding "on the other hand, where such rules do fall within the scope of Community law, and reference is made to the Court for a preliminary ruling, it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the European Convention on Human Rights.

In particular, where a Member State relies on the combined provisions of Articles 56 and 66 in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights. Thus the national rules in question can fall under the exceptions provided for by the combined provisions of Articles 56 and 66 only if they are compatible with the fundamental rights the observance of which is ensured by the Court."

There has been also a development in case-law to state the notion of a connecting factor — a link to EU law — directly. In case C-427/06 *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH*,[18] the Court — while contradicting the Commission — openly stated in the operative part of the judgment that if an allegedly discriminatory treatment contains no link with EU law, the EU courts have no duty to apply Treaty provisions on the prohibition of discrimination. That development has been confirmed in cases C-555/07 *Seda*

[15] ECR 1985, p. 02605, CELEX 61984J0060.
[16] ECR 1987, p. 03719, CELEX 61986J0012.
[17] ECR 1991, p. I-02925, CELEX 61989J0260.
[18] ECR 2008, p. I-07245, CELEX 62006CJ0427.

Kücükdeveci v Swedex GmbH & Co. KG[19] and C-147/08 *Jürgen Römer v Freie und Hansestadt Hamburg*.[20]

As to the *Kücükdeveci* case, preceded by case C-144/04 *Werner Mangold v Rüdiger Helm*,[21] it represents a venture of EU law into what is generally called a horizontal situation, or a dispute between individuals, as to the general principle of law of non-discrimination on grounds of age and the prohibition of discrimination on such grounds.

The Court accepts that, if a period of transposition of a directive has expired, and a general principle of law applies, EU law can be used horizontally (para. 53 of the judgment in *Kücükdeveci*).

Lastly, the scope of a purely internal situation is being lessened by virtue of a European Union citizenship. Since the decisions in *Chen*[22] and *Ruiz Zambrano*,[23] it became — albeit grudgingly and not without struggle[24] — accepted[25] that, in certain circumstances,[26] the EU citizenship — alone and with no help from secondary EU law or other primary EU law — confers certain[27] rights on EU citizens[28] that can be invoked (in other words, has direct effect).[29]

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[19] ECR 2010, p. I-00365, CELEX 62007CJ0555.

[20] ECR 2011, p. I-03591, CELEX 62008CJ0147.

[21] ECR 2005, p. I-09981, CELEX 62004CJ0144. The CJEU in *Mangold* decided that a directive can be horizontally applied if a general principle so requires, before the expiry of a period of transposition.

[22] Judgment of the Court (Full Court) of 19 October 2004, case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, ECR 2004 p. I-09925, CELEX 62002CJ0200.

[23] Judgment of the Court (Grand Chamber) of 8 March 2011, case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*, ECR 2011 p. I-01177, CELEX 62009CJ0034.

[24] As per judgment of the Court of 5 May 2011, case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department*, CELEX 62009CJ0434, the latter section of the operative part.

[25] To that effect see judgment of the Court of 15 November 2011, case C-256/11 *Murat Dereci and Others v Bundesministerium für Inneres*, CELEX 62011CJ0256, paras. 64–69.

[26] Judgment of the Court of 8 November 2012, case C-40/11 *Yoshikazu Iida v Stadt Ulm*, CELEX 62011CJ0040, para. 71.

[27] See eg. judgment of the Court of 12 May 2011, case C-391/09 *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Other*s, CELEX 62009CJ0391, para. 91.

[28] Who need not be related by blood for EU citizenship to apply, as per judgment of the Court of 6 December 2012 *O. and S. v Maahanmuuttovirasto (C-356/11) and Maahanmuuttovirasto v L* (C-357/11) CELEX 62011CA0356; it is the dependency that appartently suffices, as per para. 55 of that judgment.

[29] Therefore, the author submits that the judgment of the Court of 1 April 2008 in case C-212/06 *Government of Communauté française and Gouvernement wallon v Gouvernement flamand*, ECR 2008 p. I-01683,CELEX 62006CJ0212, is no longer good law, and the flat-out statement that "citizenship of the Union is not intended to extend the material scope of the Treaty to internal situations which have no link with Community law" has been superseded in that "the scope of the Treaty" now includes the operation of EU citizenship by itself.

Åklagaren v Hans Åkerberg Fransson

The law of the European Union presented above up to this point accepted that there would be at least some situations that escape the fundamental rights and freedoms due to their "internal" nature, the number of which would be implicitly substantial, yet slowly but surely shrinking.

In light of the above, the CJEU has, on 26 February 2013, made a decision in case C−617/10 *Åklagaren v Hans Åkerberg Fransson* (CELEX 62010CJ0617). The case, which concerned the interpretation of the CFR by way of a preliminary ruling, has primarily clarified the scope of the "implementation" for the purposes of Article 51(1) of the CFR.

The facts of the case concerned a legislative action by a Member State (Kingdom of Sweden) in the field of tax offences (incl. VAT). National law therein itself provided for appropriate criminal penalties and additional tax surcharges. The only link to EU law in that case was the fact that some (but not all) offences infringed VAT, and therefore concerned Directive 2006/112 and Article 325 TFEU.

It is worth noting that the Swedish, Czech and Danish Governments, Ireland, the Netherlands Government and the European Commission all disputed the jurisdiction of the Court, while AG Cruz Villalón invited the Court to declare the questions referred inadmissible.

The CJEU responded by stating (para. 21) that "since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable.

The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter."

However, this was not the only development brought by the titular case.

In paragraph 29 of that judgment and, consequently, in regard to a principal point of interest for this paper, the Court went on to add that "where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, 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 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 (see, in relation to the latter aspect, Case C-399/11 Melloni [2013] ECR I-0000, paragraph 60)."

The cross-reference to another Grand Chamber judgment that has been decided at the same day in a case *Stefano Melloni v Ministerio Fiscal* (CELEX

62011CJ0399) echoed the Court's remark therein that "where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised."

However, it is obvious that *Melloni* does not contain any further interpretative hints, as it simply states — without any further delving into the subject — what *Fransson* echoes.

It also does not refer to the situation "not entirely determined by European Union law," but is merely addressing the levels of protection flowing, on one part, from the CFR, and national, especially national constitutional law on the other.

It can be therefore assumed that the CJEU's remarks on that subject in *Fransson* are largely original[30] in regard to *Melloni*.

The decision in *Fransson* has been cited by the CJEU seventeen times up to the time of writing[31] and has generated a significant academic debate.[32]

It has also provoked the Bundesverfassungsgericht (the Federal Constitutional Court of Germany or BVerfG) to reiterate its *Honeywell* doctrine of *ultra vires* review of Union action in a judgment of 24 April 2013 (1 BvR 1215/07).

The BVerfG, while considering constitutionality of a German terrorist database (therefore adjudicating in an area where there is a presence of EU law, esp. in the field of data protection), refused to refer questions to the CJEU and took effort to address *Fransson*.

The BVerfG remarked that "[…] 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 case *Åkerberg Fransson* (judgment of 26 February 2013, C-617/10) does not change this conclusion. As part of

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[30] The Court did also add in a section of the operative part of *Fransson* that an infringement need not be "clear" from the text of the CFR or the case-law relating to it, and a judicial practice that requires it is contrary to EU law.

[31] Most recently in case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT and Others*, CELEX 62012CJ0176, GC judgment of 15 January 2014. The part of *Fransson* that is being repeated by the Court is principally the clarification of the "implementation" requirement, a conclusion that is being accorded the status of "settled case-law."

[32] See the list of notes relating to the decision at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0617:EN:NOT (access: 18.05.2014).

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"[33].

In light of above considerations — both the evolution of the purely internal situation and the content of *Fransson* and *Melloni* — a question should be asked: did *Fransson* alter the scope of a purely internal situation in any way?

Additionally, if only a modicum of presence of EU law in a given area is sufficient for a given measure *in its entirety*, the undetermined part included, to fall within the scope of EU law and therefore be subject to review, would this mean that the CJEU has, through *Fransson*, "exported" EU fundamental rights into areas of national law that bore no link to EU law in themselves?

The law as it stands post-*Fransson*

The Court's reasoning both in *Fransson* and *Melloni* did not entail any reference to past judgments as to the above questions.

The Court has already expressly mentioned the principle of effectiveness in a purely internal context, where there were no procedural EU rules, but only a presence of EU law in a given field.[34]

Nor has it stopped the Court — as in *Andersen og Jensen* above — from assuming jurisdiction that a measure does not directly refer to EU law.

However, the phrase, and, consequently, the requirement that primacy, unity and effectiveness of European Union law are not to be compromised by a measure unless it comes within the scope of EU law, does not appear verbatim, at the time of writing, anywhere in EU law but in *Fransson* and *Melloni*,[35] save for a very recent development in the case of *Cruciano Siragusa v Regione Sicilia-Soprintendenza Beni Culturali e Ambientali di Palermo,* decided on 6 March 2014 and further discussed below.

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[33] From BVerfG's press release, available at http://www.bundesverfassungsgericht.de/en/press/bvg13-031en.html. See also original judgment, available at http://www.bundesverfassungsgericht.de/entscheidungen/rs20130424_1bvr121507.html, para. 91 (access: 18.05.2014).

[34] Case C-34/02 *Sante Pasquini v Istituto nazionale della previdenza sociale (INPS)*, judgment of the Court of 19 June 2003, ECR 2003 p. I-06515, CELEX 62002CJ0034.

[35] New Eur-Lex service link: http://new.eur-lex.europa.eu/search.html?instInvStatus=ALL&qid=1393366219470&DTS_DOM=ALL&textScope=tite&type=advanced&lang=en&SUBDOM_INIT=ALL_ALL&exactWord=primacy,%20unity%20and%20effectiveness&DTS_SUBDOM=ALL_ALL (access: 18.05.2014).

That requirement is therefore novel and constitutes an original development in the field of purely internal situations. Novel is also the concept of a situation "not entirely determined by European Union law"[36] found verbatim only in *Fransson*.

Standards of protection, flowing from the CFR, primacy and effectiveness of European Union law are not unheard of to require specific actions on part of Member States, not least of which are the requirement to disapply provisions of national law and the provision of remedies to enforce rights under EU law in a practical manner.

Additionally, the requirement stated in *Fransson* and *Melloni* must mean that each of the trio must be respected. Any other conclusion would be irrational, as primacy and effectiveness produce legal effects of themselves.

Unity of EU law, on the other hand, is a legal concept found in Article 62a of the Statute of the Court of Justice of the European Union.

It does not readily follow why exactly there would be an express requirement for national law in the field of that concept to conform to it, and if it did not there would be a link to EU law to appear and a ground for review.

The concept did, however, feature in the Court's jurisprudence, and the latter can be used to interpret it. The Court in case C−579/12 RX-II *European Commission v Guido Strack* (CELEX 62012CJ0579, para. 58) addressed "unity of EU law," describing a situation involving unity of European Union law.

According to that judgment, unity was at stake where "a provision such as [Article 31(2)] of the Charter, has the same legal value, pursuant to the first subparagraph of Article 6(1) TEU, as the provisions of the treaties and the Union legislature is required to observe it both when it adopts a measure such as the Staff Regulations on the basis of Article 336 TFEU and when it adopts other measures of European Union law under the legislative power invested in it under other provisions of the treaties and, moreover, in the Member States when they implement such measures."

Therefore, it would be reasonable to assume that the contravention in regard to "unity" of EU law refers to a situation where a particularly important norm of EU law is being subjected to an omission or a blatant disregard, especially so if the said norm is of primary character.

It would be so if the CFR were to be treated less favourably than Treaties (which have the same legal value). Member States are also required to observe the primary character of the CFR, as the Court duly noted.

The Court did add an important implication of *Fransson* in a subsequent judgment, decided on 15 January 2014 in case C−176/12 *Association de médiation sociale v Union locale des syndicats CGT, Hichem Laboubi, Union départementale*

[36] New Eur-Lex service link: http://new.eur-lex.europa.eu/search.html?instInvStatus=ALL&qid=1393450840080&DTC=false&DTS_DOM=ALL&textScope=tite&type=advanced&lang=en&SUBDOM_INIT=ALL_ALL&exactWord=not%20entirely%20determined%20by%20European%20Union%20law&DTS_SUBDOM=ALL_ALL (access: 18.05.2014).

CGT des Bouches-du-Rhône, Confédération générale du travail, while citing the judgment in *Kücükdeveci* above.

As is apparent from paras 41 to 51 of that judgment, and what logically follows from likening the CFR to the scope of application of all EU law in *Fransson* (much like the general principles of law of the EU), the CFR has — in principle — acquired[37] a "horizontal" dimension not unlike what has been seen in *Kücükdeveci*.

However, the CJEU ruled against horizontal effect in *CGT*, as it found, in para. 48 of that judgment, that Article 27 of the CFR is not sufficiently precise and unconditional and therefore cannot be applied horizontally (which did not prejudice, and — if found in breach — enabled, a "vertical" *Francovich*- type claim for damages against an infringing Member State).

Moreover, the cases of *Fransson* and *Melloni* have received a recent development in a hereinabove mentioned case of *Cruciano Siragusa v Regione Sicilia — Soprintendenza Beni Culturali e Ambientali di Palermo*,[38] with the judgment of the Court of 6 March 2014 in question.

Therein, the Court referenced *Fransson* (para. 21) as to the scope of application of the CFR and *Melloni* (para. 33), as to the requirement of unity, primacy and effectiveness and in regard to differing levels of protection of fundamental rights found in national and EU law. However, the CJEU referenced one other case, where there supposedly was such a criterion present.

This case was none other that the judgment of the Court of 17 December 1970 had pertained to — 11–70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*,[39] paragraph 3 of that judgment. Therein, the Court underscored its then-beginning jurisprudence on fundamental rights by stating that "uniformity and efficacy" of what is now EU law require that it cannot be overridden, because of its very nature, by national rules, however framed and of whatever rank.

Such a reference bridges the original justification for creation of protection of EU fundamental rights, found in *Internationale Handelsgesellschaft*, with that, which has transpired in *Fransson* and *Melloni*. Notwithstanding that the wording in three judgments is not exact, and the requirement of primacy is not present in *Internationale Handelsgesellschaft*, The Court has, by equating those three cases, closed a 43-year gap in judicial practice, during which that original justification appeared but four times.[40]

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[37] The "horizontality" of the CFR has been already foreshadowed in the judgment of the Court of 22 January 2013 in case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk*, CELEX 62011CJ0283, para. 35, that involved a right to property enshrined in the CFR in a horizontal context.

[38] Case C-206/13, CELEX 62013CJ0206.

[39] ECR 1970, page 01125, CELEX 61970J0011.

[40] eur-lex.europa.eu/search.html?instInvStatus=ALL&qid=1401497407004&DTS_DOM=EU_LAW&textScope=ti-te&type=advanced&lang=en&SUBDOM_INIT=EU_CASE_

Therefore, the notion that "the need to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved in such a way as to undermine the unity, primacy and effectiveness of EU law" may bring the case into EU law's scope has been further substantiated (albeit the CJEU ruled that "there is nothing in the order for reference [in *Siragusa*] to suggest that any such risk is involved in the case before the referring court").

However, the situation "not entirely determined by EU law," found in *Fransson*, did not feature in *Siragusa*.

Conclusions

In light of the above, the answer to the first question must be that the developments in *Fransson* have altered the scope of a purely internal situation. *Fransson*, while clarifying what "implementation" for the purposes of the CFR means and tackling a particular judicial practice, added a new test for bringing a case within the scope of EU law, by introducing a requirement of primacy, unity and effectiveness.

The answer to the second and specific question, namely whether the CJEU has sent fundamental rights into areas not governed directly by EU law is that the author believes it to be so, for there would be no need to stress that EU fundamental rights apply if a given situation was determined by EU law. The vehement reaction of the BVerfG supports the interpretation that the judgment in *Fransson* does just that.

In that regard, the author takes the view that the principles of conferral and subsidiarity would bar the EU from simply forcing Member States to abide by EU fundamental rights where there is an adjacent EU law "presence." The BVerfG would be right to classify such projection as *ultra vires*. Therefore, a "simple" projection of EU fundamental rights into all areas with adjacent EU law cannot be accepted.

However, *Fransson* qualifies the test in that there needs to be a link connecting the areas governed and not governed by EU law in a given case, a link which appears where the area not governed by EU law somehow influences the part with EU presence, even if EU law does not apply by itself. If this happens — and primacy, unity and effectiveness of EU law are compromised thereby — EU fundamental rights apply, with the CFR, interpreted by the Court, being used as a matrix for protection.

It would seem that such a test is meant to be operated differently than a simple link to EU law, eg. the expiry for transposition. Were this not the case, such a link

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LAW&exactWord=UNIFORMITY%20AND%20EFFICACY&DTS_SUBDOM=EU_CASE_LAW (access: 18.05.2014).

would suffice to bring a case within the scope of EU law and there would be no need to additionally consider primacy, unity and effectiveness. It can be posited that the nature of the link in *Fransson* is supposed to be different than the one eg. in *Kücükdeveci* or *Bartsch*. It can also be theorized that such a link would not have to be factual (that would mean the usual connection), but rather that it would plausibly appear if an area that would not be governed by EU law was to indirectly impede EU law that would be present in an area adjacent to it.

It can also be assumed that such a connection could be more easily established where national law in question was designed and intended (para. 28 of the judgment in *Fransson*) to fulfil EU law's aims and objectives. Such a connection would also be at least in part analogous to what can be seen in *Dzodzi*- and *Andersen og Jensen*-like cases.

Therefore, the "link" needed for the operation of the *Fransson* criteria would have to be clarified by the Court in subsequent jurisprudence, in order to avoid the *ultra vires* scenario.

By virtue of the judgment in *Siragusa*, the *Fransson/Melloni* criteria have been accorded the lineage of *Internationale Handelsgesellschaft*. However, "the situation not entirely determined by EU law" has not yet been addressed.

When this happens, *Fransson* may have to be referred to for more than implementation of the CFR.

For now, however, Member States and individuals apparently tread in a field not entirely determined by EU law.

Sytuacje czysto wewnętrzne w prawie Unii Europejskiej po wyroku w sprawie *Åklagaren v Hans Åkerberg Fransson*

Streszczenie

Niniejszy artykuł ma za zadanie przedstawić rozwój pojęcia sytuacji czysto wewnętrznej, obecnego w prawie Unii Europejskiej, i wpływ wyroku Trybunału Sprawiedliwości Unii Europejskiej w sprawie *Åklagaren v Hans Åkerberg Fransson* na treść i zakres tegoż pojęcia. Artykuł ma w szczególności rozpoznać nową podstawę do rozciągania prawa UE na sytuacje czysto wewnętrzne, wtedy gdy poziom ochrony z Karty i wymogi pierwszeństwa, jednolitości i skuteczności tego wymagają, a także przybliżyć pojęcie działania nie w pełni określonego przepisami prawa UE. W celu prześledzenia rozwoju pojęcia sytuacji czysto wewnętrznej wykorzystane zostało orzecznictwo TSUE.

Słowa kluczowe: sytuacja czysto wewnętrzna, *Åkerberg Fransson*, łącznik z prawem UE, stosowanie prawa UE w sądach krajowych, działanie nie w pełni określone przepisami prawa Unii