Common Market Law Review **50**: 925–930, 2013.

EDITORIAL COMMENTS

Ultra vires – has the Bundesverfassungsgericht shown its teeth?

Some eight weeks after the Court of Justice handed down its *Akerberg Fransson* judgment,[1] the First Senate of the German Constitutional Court (GCC), on 24 April 2013, issued its decision on the establishment of the anti-terrorism database,[2] with a remarkable reference to the *Akerberg Fransson* judgment. The GCC held that – in order to enhance a harmonious cooperation between the two courts[3] – the *Akerberg Fransson* judgment should not be understood and applied in such a way that the provisions of the EU Charter of Fundamental Rights have a binding effect on the Member States whenever a measure of a Member State may have some material connection with the abstract scope of Union law or may have some effect on it.[4] The GCC made the point that the *Akerberg Fransson* judgment should not be given a reading that would amount to an evident *ultra vires* act by the ECJ or to an infringement of national fundamental rights in such a way that the identity of the national constitutional order would be put into question.

The very first reactions to the *Akerberg Fransson* judgment with its interpretation of Article 51(1) of the EU Charter already discussed a potential conflict with the GCC.[5] And, indeed, the reaction of the GCC, referring to a potential *ultra vires* jurisprudence of the ECJ,[6] may be considered as a signal to Luxembourg to clarify the scope and the implications of its *Akerberg Fransson* judgment in the light of what the GCC circumscribes with the

1. Case C-617/10, *Åklagaren* v. *Hans Åkerberg Fransson*, judgment of 26 Feb. 2013, nyr. A case comment by Hancox will be published in a subsequent issue (No. 5) of this *Review*.

2. *Bundesverfassungsgericht*, 24 April 2013, 1 BvR 1215/07, (2013) NJW, 1948.

3. "Im Sinne eines kooperativen Miteinanders zwischen dem Bundesverfassungsgericht und dem Europäischen Gerichtshof …"; para 91.

4. Para 91: "Insofern darf die Entscheidung nicht in einer Weise verstanden und angewendet werden, nach der für eine Bindung der Mitgliedstaaten durch die in der Grundrechtecharta niedergelegten Grundrechte der Europäischen Union jeder sachliche Bezug einer Regelung zum bloß abstrakten Anwendungsbereich des Unionsrechts oder rein tatsächliche Auswirkungen auf dieses ausreiche."

5. E.g. Rabe, *Grundrechtsbindung der Mitgliedstaten*, (2013) NJW, 1407, at 1408; see also the editorial comment by former A.G. Lenz, *EuGH-Urteil Fransson – Kein Anlass zum "Richterkrieg"*, (2013/3) *Europäisches Wirtschafts- und Steuerrecht* – "Die erste Seite".

6. For a detailed account of the preconditions of an *ultra vires* review, the decisive criteria, and its limitations, as discussed by the Second Senate of the *Bundesverfassungsgericht*, see BVerfG 6 July 2010, 2 BvR 2661/06, BVerfGE 126, 286 para 56–68 ("Honeywell").

notion of "harmonious cooperation" (*kooperatives Miteinander*) between the national court and the Court of Justice.

Let us restate the problem in a nutshell.[7] While the Charter is addressed to the EU institutions, Article 51(1) extends the Charter's scope of application to measures of the Member States, but "only when they are implementing Union law." The use of the word "implementation"[8] may reflect a somewhat restrictive connotation, as compared to the notion of the "scope" of Union law[9] as referred to in Article 18 TFEU or in the case law of the ECJ dealing with the general principles of Union law. However, in *Akerberg Fransson* the ECJ chose to interpret Article 51(1) of the Charter in the light of its established case law according to which the fundamental rights of EU law are applicable in all situations "governed" by European Union law (para 19). Such an interpretation is, indeed, confirmed by the Explanations relating to the Charter of Fundamental Rights,[10] which refer to the "unambiguous" case law of the ECJ, stating that the fundamental rights shall be (only) binding on the Member States when they act "in the scope" of Union law (para 20). The decisive question for the application of the Charter rights then turns on the criteria that are to be applied for the determination whether a Member State acts within the "scope" of Union law.

In the *Akerberg Fransson* proceedings, Advocate General Cruz Villalón, in his Opinion of 12 June 2012, had made the proposal that the Union would have the competence to apply the Charter provisions to measures of the Member States only where a *specific interest* of the Union that the respective measure is in conformity with the fundamental rights of the Union is at stake (para 40). In contrast, the third Chamber of the ECJ, in its *Iida* judgment of 8 November 2012, stated that it must be ascertained, "among other things", whether the national measure is *intended* to implement a provision of European Union law, what the character of that legislation is, whether it pursues other objectives than those covered by Union law, and whether there are specific provisions of Union law that may be affected.[11] The ECJ, sitting as Grand Chamber in *Akerberg Fransson*, neither mentions the approach taken by Advocate General Cruz Villalón, nor makes a reference to the *Iida* judgment. Instead, the Court develops its interpretation of Article 51(1) of the Charter with regard to the *obligations* that Union law imposes on the Member States: where Member States are obliged to enforce Union law, where they

7. For an in-depth discussion, see the comment by Hancox (op. cit. *supra* note 1), forthcoming.

8. The term used in German is "Durchführung des Rechts der Union".

9. See Editorial Comment, The scope of application of the general principles of Union law: An ever expanding Union? 47 CML Rev. (2010), 1589.

10. O.J. 2007, C 303/17, 32.

11. Case C-40/11, *Iida*, judgment of 8 Nov. 2012, nyr, para 79.

have to take measures to achieve the objectives of Union law, they will be considered to act within the scope of Union law. Accordingly, tax penalties and criminal proceedings which serve the duty to collect all the VAT (an obligation set by the VAT Directive and by Art. 4(3) TEU), and the duty to counter illegal activities affecting the financial interests of the Union (Art. 325 TFEU), have to be considered as an "implementation" of Union law within the meaning of Article 51(1) of the Charter (paras. 25–27).[12]

Certainly, defining the reach of the Charter rights as encompassing all measures of the Member States that have to be considered *within* the scope of Union law does not mean that national fundamental rights cannot be applied to national measures within the scope of Union law any longer. The Court makes it clear that it is only where an action of a Member State is entirely determined by Union law that solely the Charter rights (and the general principles) will be applicable. In contrast, where Union law leaves leeway to the Member States as to how they may fulfil their obligations, national courts remain free to apply national standards of protection of fundamental rights, as long as the primacy, unity and effectiveness of EU law are thereby not compromised (para 29). This is, of course, also the message of the *Melloni* judgment[13] (handed down by the Grand Chamber on the same day as *Akerberg Fransson*) dealing with the implications of Article 53 of the Charter.[14]

The German Constitutional Court, in its *Honeywell* decision concerning the *Mangold* judgment of the ECJ,[15] had restated its *ultra vires* jurisprudence in a restrictive, "Union-friendly" fashion (para 58). The ECJ as an institution of the EU would be considered to act beyond the limits of its competence only if its case law amounted to a modification of the Treaties or a substantive transfer of competences from the Member States to the Union.[16] In its judgment of 24 April 2013, the GCC discusses the issue whether it was obliged to make a preliminary reference to the ECJ as to the question whether and how far the

12. It is not a precondition for the measure of the Member State to be caught by Art. 51(1) of the Charter that the Member State (intentionally) transposes a Union directive; rather, it seems to be enough that the Member State measure objectively serves the enforcement of an obligation set up by Union law (para 28).

13. Case C-399/11, *Melloni*, judgment of 26 Feb. 2013, nyr, para 60. See annotation by de Boer in this *Review.*

14. Art. 53 of the Charter provides that "(n)othing in the Charter shall be interpreted as restricting or adversely affecting human rights …. as recognised . . . by . . . the Member States' constitutions." The interpretation of Art. 53 in its effect on the fundamental rights of the Member States as set forth in the *Melloni* judgment (cited previous note) may, in the end, prove far more influential (and controversial) than the *Akerberg Fransson* judgment. This is, however, beyond the scope of this Editorial.

15. BVerfG 6 July 2010, 2 BvR 2661/06, BVerGE 126, 286.

16. See paras. 57, 64–68.

fundamental rights of the Charter have to be applied to German legislation on the anti-terrorism database and the exchange of data between the competent institutions of the Member States. The GCC denies the obligation to make a preliminary reference, based on Article 267 TFEU, arguing that the national measures are not "determined" by Union law (para 88). The GCC concedes that the Union has exercised its competence in the field of data protection, that the Union has created obligations of the Member States to transfer and exchange relevant information to Union institutions and the other Member States, and that the establishment of an anti-terrorism database may have some (indirect) influence on legal matters in the field of judicial cooperation regulated by Union law. However, as a matter of *acte clair*, the GCC states that the German anti-terrorism database law is not implementing Union law in the sense of Article 51(1) of the Charter (para 90). As far as data protection is concerned, the anti-terrorism database is meant to serve public security and the protection of the State – matters that are expressly exempted from the relevant Union directive. Moreover, Union law does not oblige the Member States to set up such a database, nor does it regulate its functioning. The legislation on the anti-terrorism database merely serves national, and not Union policies. That the establishment of the database may have some effect on the transfer of information is considered irrelevant for the application of the Charter (para 90).

It is suggested that the analysis of the GCC is in accord with the approach taken by the ECJ in *Akerberg Fransson*. The fundamental rights contained in the EU Charter become applicable when a Member State measure is connected to an *obligation* to be fulfilled which is set up by primary or secondary Union law. The relevant German legislation on the establishment of the database is to be considered outside the scope of the Directive on data protection[17] and it is not meant to serve the fulfilment of an obligation set up by Union law. However, the GCC comes to its conclusion that the Charter is not applicable (and that, therefore, there is no obligation to make a request for a preliminary opinion on the interpretation of Charter rights) without any reference to *Akerberg Fransson* in the relevant section of the argument (para 90), though, in part, applying its approach. Instead, *Akerberg Fransson* is referred to by the GCC to restate the *ultra vires* doctrine, this time with regard to the scope of application of the EU Charter.

Why is that? Is there a message that the GCC (probably) intends to convey? In the relevant part of the judgment (para 91), the GCC refers to the need for a "harmonious cooperation" between the ECJ and the GCC, already set forth in the *Honeywell* judgment of 2010. Moreover, the GCC makes the aforementioned references to *ultra vires* and to the constitutional identity

17. O.J. 1995, L 281/35.

established by the German Basic Law in order to determine how *Akerberg Fransson* should *not* be interpreted. The GCC neither explicitly nor implicitly disputes the conclusion of the ECJ that the Swedish measure at issue in *Akerberg Fransson* could be regarded as an implementation of an EU act. In contrast, the GCC refers to two criteria that should *not* be regarded as sufficient to justify the application of the Charter rights to measures of the Member States. First: a mere material connection (*sachlicher Bezug*) of the said measure with the scope of Union law, determined just in an *abstract* fashion, should not suffice. Second: mere effects of the national measure on Union law should not suffice either. These two criteria do not seem to convey really clear standards. But what is more important: the *Akerberg Fransson* judgment of the ECJ itself does not seem to provide a basis for the proposition that one of these criteria has or might become the basis for the application of the Charter to national measures.[18] Why then this rather "unfriendly" ruling from the GCC?

It is certainly true that it is in the final competence of the ECJ to give an authoritative interpretation of the meaning and the application of its judgments. The GCC, by assuming the competence to determine how *Akerberg Fransson* shall *not* be interpreted, may have overstepped its own competence.[19] Be that as it may, the "message" sent from Karlsruhe to Luxembourg is a different one and might be regarded as a call for a "harmonious cooperation" between the courts. The ECJ, in developing the multi-level system of the protection of human rights in the EU, is asked to leave enough leeway for the national constitutional courts to breathe.[20] The message might be that the ECJ should see its task in defining situations and formulating criteria which delimit the scope of application of the Charter rights in a way that the fundamental rights contained in national constitutions – and the respective national constitutional courts as their interpreters[21] – still have a major role to play. It is suggested that the ECJ, in clarifying the scope of the Charter in its application to national measures in its future case law, might take this call into consideration.

18. The ECJ, in *Akerberg Fransson*, holds as the decisive criterion whether the Member State "acts in the scope" of the Union law (para 20) or whether the legal situation comes within the scope of Union law (para 22). For a most recent judgment, denying that a Member State has acted within the scope of Union law, see Case C-14/13, *Cholakova*, judgment of 6 June 2013, nyr, paras. 28–31.

19. See Latzel, Eine misslungene Karlsruher Trotzreaktion, *Frankfurter Allgemeine Zeitung*, 3 May 2013, No. 102, p. 7.

20. To be sure: National constitutions and national constitutional courts have a say with regard to measures of the Member States *within* the scope of Union law as far those measures are not entirely determined by Union law (para 29); see *supra* at notes 13 and 14.

21. From an institutional standpoint, the GCC might be viewed as defending its role as an important "player" in the multi-level discourse on fundamental rights.