This article assesses the impact of the Åkerberg and Melloni judgments on the interpretation of the horizontal provisions of the EU Charter of Fundamental Rights. Specifically, it evaluates whether the European Court of Justice (ECJ) has chosen an expansive approach or a minimalist one? Asking if the Court's approach in these cases has clarified or diluted the application of the EU Charter of Fundamental Rights. The article is limited to looking, in light of the judgments in Åkerberg and Melloni, firstly at Article 51 of the Charter; then at Article 52 and finally at Article 53. It will be shown that Article 51 of the Charter is the most important provision, whilst Article 52 the most complex and Article 53 the most underestimated. In the final sections it is highlighted that the judgments are illustrative that the ECJ strongly protects the level of protection of the Charter and the effectiveness and uniformity of EU law. However, it will also be shown that these two cases whilst clarifying the application of Article 51, and the meaning of implementing Union law, are the source of new questions rather than final answers.

Introduction

The judgments in Åkerberg and Melloni from the 26th of February 2013 were particularly awaited. This comes as no surprise since the questions asked by the Swedish Court of First Instance (the Haparanda Tingsrätt) and the Spanish Constitutional Court (the Tribunal Constitucional) concerned directly or indirectly the interpretation of three of the so-called horizontal provisions (les dispositions générales) of the EU Charter of Fundamental Rights (EUCFR or Charter), i.e. Articles 51, 52 and 53 EUCFR. These horizontal provisions of the EUCFR regulate the scope of application of this instrument and its relationship with other European norms as well as the national constitutions of the Member States. They are paradigmatic as to the interpretation of the Charter. Indeed, according to Article 6(1) third sentence of the Treaty on European Union (TEU), “the rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions”. 
Article 51 of the Charter – The Most Important Provision

Article 51 is the most important provision of the EUCFR or its ‘keystone’ as it determines the scope of application of the Charter’s rights in the EU federal order of competences.

Since the entry into force of the Lisbon Treaty and until Åkerberg only a few rulings have dealt with Article 51 of the Charter, e.g. McB, DEB, NS, Dereci and Yoshikazu Iida. None of them have clarified its scope of application. Judge Safjan in a working paper underlined that Article 51 can be subject to either a broad (application similar to general principles) or restrictive (application more limited than general principles) interpretation.

For him, two elements seem to tilt the balance in favour of a broad interpretation: First of all, “the prospect of ratification of the European Convention on Human Rights by the European Union, which may turn the ECJ's attention to the areas of national law functionally connected with EU law although falling within the sphere of national competences”. Secondly, “it is the prospect of deciding to what degree interpretation and application of the Charter may be modified to take into consideration constitutional traditions of individual Member States”. In other words, the main concern here is to ensure the unity or coherence of application of EU fundamental rights. In the same line of thought, according to Rosas and Kaila, the reinforcement of the Charter’s status does not imply a rupture between the past and the present. Yet, a more restrictive vision of the scope of Article 51 is also present at the Court and is exemplified by the Opinion of A.G. Cruz-Villalón in Case C-617/10 Åkerberg. Simply put, the Advocate General considers that the Charter is merely applicable in the situation of “implementation of EU law” in its strict sense, i.e. when the State acts as a decentralised administrator of the EU (the so-called ‘Agency situation’).

Comparatively, this “restrictive approach” is very different from that developed by the US Supreme Court. In the early years of constitutional jurisprudence in Barron v. Baltimore, the Supreme Court ruled that the Bill of Rights applied only to the federal government, and that, as a result, the federal courts could not prevent enforcement of state laws restricting the rights guaranteed in the Bill of Rights. But in Gitlow v. New York, the Supreme Court held that the Fourteenth Amendment to the US Constitution expanded the reach of certain provisions of the First Amendment to the governments of the individual states. This interpretation had the effect of extending the application of the fundamental rights recognised by the federal Constitution – and consequently, the federal’s courts’ supervision of those rights – to the legislative and administrative functions of the individual states. This fractional reversal started a trend toward nearly total reversal since the Supreme Court now holds that most of the provisions of the Bill of Rights applies to both the federal government and the states. Such a view is recently confirmed by in McDonald v. Chicago.

The reach of fundamental rights standards in the Union legal order is far more limited, though it goes beyond the framework of the regulatory and administrative activity of the Union’s own institutions and extends to the acts of Member States which fall within the scope of EU law. Yet one should wonder whether the Charter and, in particular, its Article 51 may have a kind of federalising effect much like the due process clause of the Fourteenth Amendment to the US Constitution. The purpose of Article 51 of the Charter is to determine the scope of the Charter. It seeks to establish clearly that the Charter applies primarily to the institutions and bodies of the Union, in compliance with the principle of subsidiarity but also in relation to the
acts of Member States. This provision was drafted in order to be in line with Article 6(1) TEU, which requires the Union to respect fundamental rights. Apparently, the drafting history of Article 51 is rather confusing. Indeed, Article 51 was one of the few Charter provisions modified during the drafting of the Constitutional Treaty in 2004. The ‘new’ Article 51(1) affirms respect for the limits on the powers of the Union conferred on it in the other parts of the Treaty. Article 51(2) emphasises that the Charter does not extend the field of application of Union law beyond the powers of the Union. These modifications to the wording of Article 51 of the Charter might be read as evidence of the willingness to curb the Court’s activist approach to EU fundamental human rights, when it comes to their application to Member States’ measures.

In the aftermath of this change of wording, the crucial question regarding the interpretation of Article 51 remains the following: What is the meaning of “only when they are implementing Union law”?\textsuperscript{15} Does this indicate that Member States attempting to derogate one of the freedoms would not fall under the scope of the Charter? An interpretation in the positive would be incorrect since that would directly conflict with the ERT line of cases which applied the EU fundamental rights as general principles in the context of derogations to EU law.\textsuperscript{16} Therefore, it can be argued that the ECJ should read the expression ‘implementing Union law’ as to include the derogation situation. However, it is evident that the wording of Article 51(1) of the Charter is less extensive than ECJ case-law. Its ‘original meaning’ is indeed very limited.\textsuperscript{17} Less surprising, but even more puzzling, are the explanations given by the praesidium regarding Article 51(1) Charter.\textsuperscript{18} Accordingly,

\textblock{[a]s regards the Member States, it follows unambiguously from the case law of the Court of Justice that the requirement to respect fundamental rights defined in a Union context is only binding on the Member States when they act in the scope of Union law (judgment of 13 July 1989, Case 5/88 \textit{Wachauf} [1989] ECR 2609; judgment of 18 June 1991, \textit{ERT} [1991] ECR I-2925; judgment of 18 December 1997 (C-309/96 \textit{Annibaldi} [1997] ECR I-7493). The Court of Justice confirmed this case law in the following terms: “In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules...” (judgment of 13 April 2000, Case C-292/97, \textit{[2000]} ECR 2737, paragraph 37 of the grounds). Of course this rule, as enshrined in this Charter, applies to the central authorities as well as to regional or local bodies, and to public organisations, when they are implementing Union law.

These legal explanations reflect, what has been called by Besselink, a “concoction of formulations”.\textsuperscript{19} The explanations make references not only to the ‘scope of Union law’, but also to the ‘context’ of EU law and ‘implementing Union law’.\textsuperscript{20} But what is really the legal force of these explanations? Are they legally binding or a mere source of inspiration? First of all, it appears important to notice that both the preamble of the Charter and Article 52(7) explicitly refer to these explanations. These explanations were originally prepared under the authority of the praesidium of the Convention which drafted the Charter of Fundamental Rights of the European Union. They have been updated under the responsibility of the praesidium of the European Convention, in light of the drafting adjustments made to the text of the Charter by that Convention (notably to Articles 51 and 52) and with regard to further developments in
Union law. Although they do not as such have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter. But is it in the power of the explanations to modify the unambiguous significance of words in the authentic text of the Charter? Can the ECJ rely on the original intent of the Charter in its interpretation? 

It is stated in the legal explanations that ‘implementation of Union law’ also includes the ERT-style of review or more generally any types of national measures falling within the scope of Community law. Thus one may consider the wording of the Charter of Fundamental Rights as an ‘inadvertent omission’ and it seems safe to say that Article 51 of the Charter should be interpreted broadly by the Court of Justice as including the derogations of Member States. This interpretation is also logical as its aim is the equal application of European law for all Union citizens. Since the wording of Article 51 has not been amended, it is obviously the task of the Court of Justice to interpret and elucidate any such an ‘ambiguous’ wording. As can be seen from the Court’s reference to Article 28 Charter in Laval and Viking, the Court does not seem to find itself barred from referring to the Charter in ERT-type situations.

In Yoshikazu Iida (2012), the ECJ had to assess whether the German authorities’ refusal to grant Mr. Iida a “residence card of a family member of a Union citizen” falls within the implementation of EU law within the meaning of Article 51 of the Charter. The Court emphasised that in order to check whether a national measure falls within the scope of the Charter under Article 51, it must be ascertained among other things: whether the national legislation at issue is intended to implement a provision of EU law, what the character of that legislation is, and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting that law, and also whether there are specific rules of EU law on the matter or capable of affecting it. The Court stated that:

While Paragraph 5 of the FreizügG/EU, which provides for the issue of a ‘residence card of a family member of a Union citizen’, is indeed intended to implement European Union law, it is none the less the case that the situation of the claimant in the main proceedings is not governed by European Union law, since he does not satisfy the conditions for the grant of that card in accordance with Article 10 of Directive 2004/38. Moreover, in the absence of an application by him for the status of long-term resident in accordance with Directive 2003/109, his situation shows no connection with European Union law.

It concluded that the German authorities’ refusal to grant Mr. Iida a “residence card of a family member of a Union citizen” does not fall within the implementation of EU law within the meaning of Article 51 of the Charter, with the result that its conformity with fundamental rights cannot be examined by reference to the rights established by the Charter. The ECJ here insists on the lack of connection with EU law; particularly, it is made clear that the EU secondary legislation is not applicable in the circumstance of the case. In others words, the very existence of the Directive cannot make it fall within the scope of EU law and, therefore, EU fundamental rights cannot be relied on by a third country national. The test applied by the ECJ to verify whether the national measure falls within the scope of EU law can be viewed as very stringent. Let’s see now whether the position of the ECJ, and particularly its Grand Chamber, is the same in the wake of Yoshikazu Iida.
Comments in light of Åkerberg and Melloni

The Åkerberg case provides us with detailed guidelines for interpreting the scope of Article 51 of the Charter. This case is of interest since it concerns the scope of application of EU fundamental rights in factual circumstances lying at the fringes of Article 51(1) of the Charter. According to the facts of the decision, Mr. Fransson a self-employed worker whose main activities are fishing and the sale of white fish. His fishing activity is carried out in Sweden, although his catches are sold on both Swedish and Finnish territory. The Swedish tax authorities accused Mr. Fransson of failing to comply with his obligations to provide tax information in the 2004 and 2005 fiscal years and decided to impose an administrative fine. In addition, the public prosecutor in 2009 considered that his actions resulted in an important loss of revenue to the tax authorities, which justified in bringing criminal proceedings. The facts on which the charges brought by the public prosecutor are based are the same as the ones which formed the basis for the administrative penalty imposed by the tax authority. One of central issues for the ECJ to decide is whether the EU principle of ne bis in idem under Article 50 Charter is applicable to the circumstances of the case. To be applicable, the matter needs to fall within the material scope of the Charter as prescribed by Article 51 Charter. In the submissions to the ECJ, almost all the government (the Swedish, Czech, Irish and Dutch governments) considered that the matter was falling outside the scope of EU law and was thus not justiciable. The European Commission surprisingly took the same position reflecting a cautious approach towards the application of the EU Charter of Fundamental Rights; an approach also mirrored in the so-called Ladenburger report. Similarly, A.G. Cruz-Villalón in Åkerberg adopted a narrow or minimalist interpretation of Article 51 based on the cause (in contrast to its effect) of the Member States action. According to him, having assessed all the circumstances of the case, the reference for a preliminary ruling from the Swedish court must not be regarded as a situation involving the implementation of Union law within the meaning of Article 51(1). For the A.G., “the competence of the Union to assume responsibility for guaranteeing the fundamental rights vis-à-vis the exercise of public authority by the Member States when they are implementing Union law must be explained by reference to a specific interest of the Union in ensuring that that exercise of public authority accords with the interpretation of the fundamental rights by the Union”. That specific interest of the Union is principally founded on the presence, or even the leading role, of Union law in national law in each particular case. As elaborated further, there must be a shift in the division of responsibility (for guaranteeing the fundamental rights between the Union and the Member States) based on the circumstances of the case. And this shift, accordingly, cannot be realised if the factual/legal situation reflects a ‘simple occasion’.

In the analysis of this difficult subject, according to A.G. Cruz-Villalón, “it must be possible to perceive the difference between the causa, whether or not immediate, and the simple occasio. The difficulty, in so far as it exists, with the conception of the scope of the ne bis in idem principle in Swedish law is a general difficulty regarding the structure of the Swedish law on penalties which is, as such, completely independent from the collection of VAT, where punishment of the conduct in the present case, involving the falsification of information, is treated as a mere occasion … That being so, the question is whether, as a result of this occasio, the Union judicature must interpret, with inevitably general consequences, the scope of the ne
bis in idem principle in Swedish law, an interpretation which must take priority over the one which is derived from Sweden’s constitutional structure and international obligations ... My view is that it would be disproportionate to infer from this occasio a shift in the division of responsibility for guaranteeing the fundamental rights between the Union and the Member States”.33 In our view, this test of the so-called “specific interests” creates in fact a “manifest test” regarding the scope of application of the Charter since it must be demonstrated that EU law has a leading role in the case at issue. In the end, it is amenable to a minimalist approach as to the application of EU fundamental rights. As put by Rosas, writing extrajudicially, a significant distinction must be made between cases where the EU norm is applicable in concreto and applicable in abstracto.34 An application of the Charter rights when another EU norm is only applicable in abstracto would entail that it was enough that EU law covered the issue before the Court, without having direct relevance (or connection) for the litigation at hand. This situation should be avoided because the Charter rights would otherwise be applicable in almost all situations since almost all areas are covered by EU law in one-way or the other. In fact, Rosas considers that this distinction may illustrate the difference between the more narrow formula ‘implementing Union law’ and the wider formula ‘the scope of EU law’, if there is any.35

The Court of Justice in Åkerberg had the possibility to clarify the meaning of ‘implementing Union law’ and subsequently its relationship with the ‘the scope of EU law’. For the ECJ, in the case in point the tax penalties and criminal proceedings to which Mr Åkerberg Fransson has been or is subject are connected in part to breaches of his obligations to declare VAT. In that respect, it made clear that in relation to VAT, it follows from Articles 2, 250(1) and 273 of Council Directive 2006/112/EC and from Article 4(3) TEU that every Member State is under an obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion. Furthermore, Article 325 TFEU obliges the Member States to counter illegal activities affecting the financial interests of the European Union through effective deterrent measures and, in particular, obliges them to take the same measures to counter fraud affecting the financial interests of the European Union as they take to counter fraud affecting their own interests.36 It follows that tax penalties and criminal proceedings for tax evasion, such as those to which the defendant in the main proceedings has been or is subject because the information concerning VAT that was provided was false, constitute implementation of Articles 2, 250(1) and 273 of Directive 2006/112 and of Article 325 TFEU and, therefore, of EU law, for the purposes of Article 51(1) of the Charter.37

The Court of Justice assimilates here ‘the scope of Union law’ with ‘implementing Union law’ as mentioned in Article 51(1) of the Charter. There is no normative difference between the formula ‘implementing Union law’ and the wider formula ‘the scope of EU law’. This view is also confirmed by the logic used by the Court of Justice in its general reasoning around Article 51 which precedes its conclusion in paragraph 27 related to the specific circumstances of the case. The ECJ in Åkerberg stated that Article 51 confirms the Court’s previous case-law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union. In essence, this case-law – making explicit reference to the ERT case - shows that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law, but not outside such situations. That definition of the field of application of the fundamental rights of the European Union is borne out by the explanations relating to Article
51, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the purpose of interpreting it. According to those explanations, ‘the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law’.  

For the ECJ, at paragraph 21, the position is that "[s]ince the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of EU law, situations cannot exist which are covered in that way by EU law without those fundamental rights being applicable. The applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter. This paragraph is paradigmatic as it assimilates the scope of EU law with the applicability of the fundamental rights guaranteed by the Charter”. The EU fundamental rights apply in parallel to EU law or to use the words of Lenaerts and Gutiérrez-Fons, ‘the EU fundamental rights have become the shadow of EU law’. Moreover, this authoritative passage, also confirms that the general principles of EU law and the Charter - the two main sources of EU fundamental rights - have a similar scope of application in EU law and thus overlap. Therefore it can be safely said that the Charter does not change the scope of application of fundamental rights protection, respecting the constitutional allocation of powers sought by the authors of the Treaties.  

Article 52 of the Charter: The Most Complex Provision

Article 52 is certainly the most complex provision of the Charter and can be seen as akin to a Pandora’s Box. Not surprisingly, with the drafting of the Constitutional Treaty of October 2004, the European Convention added four paragraphs to Article 52 of the Charter (paragraphs 4 to 7) in order to clarify the scope and interpretation of the Charter’s rights. This clarification is to be welcomed. Nevertheless, it may have created another layer of doctrinal complexity. In our view, Article 52 of the Charter is a clause that regulates the functioning of the rights within the Charter (internal regulation) and its relationship with other sources of law related to the protection of human rights in Europe (external regulation). Paragraphs 3 and 4 of Article 52 of the Charter are of special significance since they essentially seek to guarantee a harmonious relationship with the external sources of the Charter, i.e. the national constitutions (Article 52(4)) and the ECHR (Article 52(3)). These provisions acknowledge the intricate application of European rights in a pluralist context. However, they also have the ambition to prevent a conflict of interpretation between the various jurisdictions.

Article 52(3) of the Charter, which is the main focus of this section, is viewed here as the most intricate paragraph of Article 52 of the Charter. In fact, the relationship between the ECHR and the EU has always been a source of attention and the so-called ‘homogeneous clause’ and its correct interpretation has become a matter of constant discussions and disagreements since the entry into force of the Lisbon Treaty. As put by Presidents Skouris and Costa, “The Charter has become the reference text and the starting point for the ECJ’s assessment of the fundamental rights ... It is thus important to ensure that there is the greatest coherence between the Convention and the Charter in so far as the Charter contains rights which correspond to those guaranteed by the Convention”. During the drafting of the Charter, its relationship with the ECHR was a matter of constant consideration. It is apparent that one of the problems that a binding Charter could raise is that of diverging interpretations with the
Convention. It may be argued, in that sense, that the Charter could increase the risk of divergence since the text of the Charter does not correspond exactly to the text of the ECHR. Lenaerts and de Smijter contend, however, that “[w]here the text of the Charter departs from that of the ECHR, it can never be at the expense of the level of protection offered by the ECHR”.47 Furthermore, if the Convention is to be amended in the future, these amendments will automatically become the minimum standard for the protection of fundamental rights within the European Union.48 The risk of diverging interpretation is in reality rather weak due to the ‘subsidiary’ character of the ECtHR jurisdiction.49 It will become even weaker with the accession to the European Convention on Human Rights.50

Article 52(3) has the purpose to ensure the consistency between the Charter and the ECHR by establishing the rule that insofar as the rights in the present Charter also correspond to rights guaranteed by the ECHR the meaning and scope of those rights, including authorised limitations, are the same as those laid down by the ECHR. It goes on to add that this will not prevent Union law from providing more extensive protection.51 A.G. Kokott in Solvay rightly considers that the first sentence of Article 52(3) contains a “homogeneity clause”.52 As it stems from the legal explanations of the praesidium, the meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case law of the European Court of Human Rights and by the Court of Justice of the European Union. This paragraph is essential to make sure that the Charter’s rights incorporate as a minimum the standards of the Convention.

As A.G. Trstenjak noted in NS,53 under Article 52(3) of the Charter the ECJ must ensure that the protection provided by the Charter rights is no less than the protection granted by the corresponding ECHR rights.54 In other words, by Article 52(3) the EU has committed itself to “secure to everyone within their jurisdiction the rights and freedoms defined in ... the Convention”.55 That commitment only regards matters that fall within the competence of EU law, and those ECHR rights which find their correspondence in the Charter, but the key point to note is that the EU has committed itself to respect ECHR rights, that is to say, the rights defined in the ECHR. This commitment entails a legal duty, derived from EU primary law, on the part of all EU institutions (including the ECJ), as well as the Member States, when acting within the scope of EU law,56 to respect the relevant ECHR rights. This legal duty to respect the Convention derives from the Charter, and is not contingent on any accession by the EU to the ECHR or on any power of the Council of Europe or the ECtHR to sanction the EU for breach of the ECHR.

Even though, during the drafting of the Charter, there were many attempts to include an unequivocal reference to the ECtHR case-law, Article 52(3) does not provide any explicit reference to it. Is the ECJ, after the entry into force of Charter, bound by the jurisprudence of the Strasbourg Court? One could argue that the rights contained in the Convention and interpreted in the case-law of the Strasbourg Court form an integral part of the meaning, interpretation and scope of the fundamental rights guaranteed within the EU legal order.57 By contrast, Article 52(7) of the Charter merely states that its official explanations ‘shall be given due regard’. In the explanations, it is established that the reference to the ECHR in Article 52 (3) covers both the ECHR and the Protocols to it and that “the meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the
case law of the European Court of Human Rights and by the Court of Justice of the European Union”. But since the interpreter of the Charter only has to give due regard to the case-law of the ECtHR, there is nothing in these explanations that imposes an explicit obligation to respect the ECtHR jurisprudence. This is perhaps due to the fact that the Convention constitutes a minimum standard of protection as emphasised by Article 52(3). Also, in view of the recent case-law of the ECJ on fundamental rights – based on the doctrine of general principles – it is possible to consider that the material content of the Convention has been incorporated into EU law. If this is the scenario, one should not worry about the lack of unequivocal reference.

It may even be said that there has never been an instance in which the ECJ openly challenged the ECtHR’s interpretation of the Convention. This is not so unanticipated since the case-law of the Court takes into consideration the case-law of the ECtHR on the relevant provisions of the ECHR in interpreting the provisions of the Charter. And in that sense, one can state that “the ECJ has not only helped to maintain a high standard of human rights protection in Europe but also contributed to the development of these human rights. It is to be expected that [after accession] the two Courts will keep an eye on the development of the other’s case law”. It can even be argued that – in light of Article 52(3) and in so far the Convention is part of EU Treaty law – since the entry into force of the Treaty of Lisbon the EU has made itself unilaterally bound to the jurisdiction of the ECtHR. As stated by A.G. Trstenjak in N.S., “[b]ecause the protection granted by the ECHR is constantly developing in the light of its interpretation by the European Court of Human Rights, the reference to the ECHR contained in Article 52(3) of the Charter of Fundamental Rights is to be construed as an essentially dynamic reference which, in principle, covers the case-law of the European Court of Human Rights.” However, in the same case the Advocate General made a remark which is important to address:

It should be borne in mind in this connection that the judgments of the European Court of Human Rights essentially always constitute case-specific judicial decisions and not the rules of the ECHR themselves, and it would therefore be wrong to regard the case-law of the European Court of Human Rights as a source of interpretation with full validity in connection with the application of the Charter. This finding, admittedly, may not hide the fact that particular significance and high importance are to be attached to the case-law of the European Court of Human Rights, with the result that it must be taken into consideration in interpreting the Charter.

The passage quoted above may be interpreted as depicting the judgments of the ECtHR as merely case-specific judicial decisions which do not provide rules of general application, and as such they therefore cannot be determinative of the scope and application of the corresponding rights. We consider that if that was the meaning intended by the Advocate General, then it does not reflect the true nature of the judgments of the ECtHR. It is true that in its judgments the ECtHR usually focuses on the specific issues at hand, and avoids laying down general standards of interpretation. However, through the application of the Convention to the specific cases at hand the ECtHR does interpret the meaning and scope of the Convention.
rights, and the concepts contained within those rights, and this interpretation will be autonomous.\textsuperscript{67}

The NS case from the ECJ and the earlier case from the ECtHR of MSS v. Belgium and Greece showed the two Courts vigorously staking their respective grounds as protectors of fundamental rights in the European legal order. Given this, it is of crucial importance that a \textit{modus vivendi} is found between the two Courts that will ensure not coherence, as coherence between these two legal orders with fundamentally different ‘normative umbrellas’\textsuperscript{68} is not achievable, but the harmony which ECJ judge Alan Rosas described in the above quotation: a harmony which respects the different normative goals of each legal system and ensures that the fundamental rights set out in both instruments are respected.

As put by the former President of the ECtHR, Jean-Paul Costa, “it is of course true that formally speaking the Convention is not binding under Union law”.\textsuperscript{69} However, the relationship between the ECJ and the ECtHR has become so internalised into the EU legal system that it can no longer be considered an external policy matter.\textsuperscript{70} In that sense, Article 52(3) of the Charter appears to be the key provision when it comes to assess the interaction between the two Courts and could even be read as containing an obligation for the Court of Justice to respect the ECtHR case law. But after a quick look at the ECJ case-law, it seems difficult to maintain that the Court follows ‘scrupulously’ the Strasbourg jurisprudence.\textsuperscript{71} As demonstrated by de Witte, many examples can be found both in actions in annulment and preliminary rulings where the Court does not (but should have) analyse the ECtHR case-law.\textsuperscript{72} His conclusion is that the ECJ jurisprudence reflects an eclectic and unsystematic use of Strasbourg case-law.

**Comments in light of Åkerberg and Melloni**

In Åkerberg, a tax case concerning an ‘internal application’ of \textit{ne bis in idem}, the ECJ did not refer again to the ECHR or its case-law. It seems that the ECJ avoided tackling the relationship between Article 50 of the Charter and Article 4 of the Protocol 7.\textsuperscript{73} By contrast, the Opinion of A.G. Cruz Villalón is here very instructive and thus necessitates to be fully scrutinized. As to the scope of application of Article 50 EUCFR \textit{en préliminaire}, the A.G. was of the opinion that the ECJ did not have jurisdiction to give a ruling on the substance of the case since it should be considered to fall outside of the scope of EU law. However, he decided to propose an answer to the questions referred to the court, for the court to look to if it decided to rule on the issue. A.G. Cruz Villalón first turned to Article 4 of Protocol No 7 and the relevant case-law of the ECtHR and pointed out that there had been considerable lack of agreement between the Member States of the EU regarding the problems resulting from the imposition of both administrative and criminal penalties in respect of the same offence. This lack of agreement he finds to be clearly revealed in the fact that not all Member States have been willing to ratify Protocol No 7 to the ECHR and some that have, have done so with reservations to the application and interpretation of Article 4 of the Protocol.\textsuperscript{74} The A.G. traced the lack of agreement back to the importance of measures imposing administrative penalties in a large number of States, in addition to the special significance also afforded to criminal prosecution and penalties in those Member States. The twofold interest in maintaining a dual – administrative and criminal – power to punish he said explained why, many Member States, are
holding on to this dual system even though the case-law of the ECtHR has developed in a direction which practically excludes that duality.\textsuperscript{75}

When looking into the case-law of the ECtHR the A.G. finds that evolution of the case-law of the ECtHR to show that, at the moment, Article 4 of Protocol No 7 precludes measures for the imposition of both administrative and criminal penalties in respect of the same acts, thereby preventing the commencement of a second set of proceedings, whether administrative or criminal, when the first penalty has become final.\textsuperscript{76} When having established the meaning of the \textit{ne bis in idem} principle in the context of Article 4 of Protocol No 7, he proceeded to look at the \textit{ne bis in idem} principle in Union law that is Article 50 of the Charter and its interpretation in the light of Article 4 of Protocol No 7. The AG maintained that the ECHR, as referred to in primary Union law, was the convention as its stands, and that notice must be taken to the fact that the \textit{ne bis in idem} principle is not guaranteed in the same way as the core principles of the ECHR are guaranteed and all States are bound by.\textsuperscript{77} He then pointed out that in this case a lack of agreement concerning a right in the system of the ECHR clashes with the widespread existence and established nature in the Member States of systems in which both an administrative and a criminal penalty may be imposed in respect of the same offence. That widespread existence and well-established nature could even be described as a common constitutional tradition of the Member States. The view of the A.G. is thus that Article 50 of the Charter calls for a partially autonomous interpretation. That regard must be had to the current state of the case-law of the ECHR, but the ECJ must independently interpret Article 50 of the Charter, basing its interpretation exclusively on the wording and scope of the provision itself.\textsuperscript{78}

In Åkerberg, similarly to Toshiba, the ECJ dropped again the reference to the ECHR case-law. It is argued that this reflects a conscious choice of the Luxembourg judges. According to Devroe, “[s]ome may have believed that the deletion of a reference to the ECHR was a one time ‘accident de parcours’. However, the recent Fransson [Åkerberg] judgment of the ECJ proves otherwise. It confirms - unfortunately again only implicitly - that the deletion of a reference to the ECHR very much translates as a deliberate choice of the ECJ. The Court is no longer willing to interpret the EU \textit{ne bis in idem} requirement in Article 50 in conformity with the ECHR’s \textit{ne bis in idem} requirement as interpreted in Zolotukhin. From now on, it seems, the EU and ECHR \textit{ne bis in idem} principles will diverge in large areas of the law.’\textsuperscript{79} If this is true, it means that there is no obligation to interpret Article 50 in conformity with Article 4 Protocol No. 7 and its related case-law. In the end, it appears that, after the entry into force of the EU Charter and its incorporation in its Article 50, the principle of \textit{ne bis in idem} can be viewed as a general principle of the EU legal order. However, this incorporation does not lead to a uniform interpretation in the laws of Europe but instead reinforces the autonomous character of EU law towards the ECHR legal order.\textsuperscript{80} This autonomous interpretation of \textit{ne bis in idem} clashes in our view with the so-called ‘homogeneity clause’ enshrined in Article 52(3) EUCFR which imposes an obligation to respect the ECtHR case-law when the rights are corresponding between the Charter and the ECHR.

The Åkerberg case has also raised interesting and complex issues as to the interpretation of Article 52(3). Indeed, the principle of \textit{ne bis in idem} (Article 50 Charter) at issue in Åkerberg also constitutes a corresponding right in the ECHR, i.e Article 4 of Protocol No. 7 ECHR. However,
many states of the Council of Europe have not ratified the Protocol or have put specific reservations on the application of Article 4 of Protocol No. 7 in order to preclude its application to administrative penalties. This situation leads to the legitimate question whether there is an obligation for the ECJ under Article 52(3) to strictly follow the Strasbourg case-law when it has to interpret such a type of “corresponding rights”. AG Cruz-Villalón in Åkerberg provides us with a negative answer. His reasoning is founded on the divergences resorting from the ratification of the Protocol No. 7. He draws a distinction between core principles (mandatory since all the states that are parties to the ECHR are bound) of the ECHR and the others (non-core principle) such like the ne bis in idem principle. The Advocate General believes, referring to Article 6(3) TEU, that “the ECHR, as referred to in primary Union law, is the convention as it stands; in other words, the convention, with its combination of provisions which are mandatory and provisions which are, to a certain extent, conditional. The interpretation of the references to the ECHR contained in primary Union law cannot disregard that point”. Going further, he concluded in order to make his point that the Article must be interpreted independently from the ECHR case-law that:

“the present case draws attention to a situation where a lack of agreement concerning a right in the system of the ECHR clashes with the widespread existence and established nature in the Member States of systems in which both an administrative and a criminal penalty may be imposed in respect of the same offence. That widespread existence and well-established nature could even be described as a common constitutional tradition of the Member States”.

Following this strong logic, it appears difficult to argue that there is always an obligation to respect the ECHR case-law when a Charter right corresponds with an ECHR right. Then a distinction should be drawn between core corresponding rights (mandatory interpretation in light of the ECHR case-law) and peripheral corresponding rights (independent interpretation from the ECHR case-law). In the Åkerberg case, the ECJ wholly applied, and this for the very first time, the Engel criteria to determine the criminal nature of the administrative penalty within the frame of a Charter right, an innovation in ECJ case-law. In its paragraph 35, the ECJ stated that three criteria are relevant for the purpose of assessing whether tax penalties are criminal in nature: “The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur (Case C-489/10 Bonda [2012])”. Interestingly here, the Grand Chamber makes a single reference to its case law on criminal charge with neither a reference to the ECHR case-law (the Engel line of case-law) nor a reference to Article 52(3) of the Charter on corresponding right – the so-called ‘homogeneity clause’. This is all the more surprising since the Bonda case makes an explicit reference to the ECHR case-law. By doing so, the Court gives us the impression to build on an autonomous standard of protection whereas – arguably – it should have relied on Article 52(3) and the relevant corresponding ECHR case-law. Already in the Melloni case, delivered the same day as Åkerberg, the ECJ made a cryptic reference to Article 6 ECHR case-law with no explicit mention to Article 52(3) EUCFR. In Åkerberg, it took a step further by making no reference at all to the ECHR case-law. The overall sensation is that the Court wishes to give a limited meaning to the ‘homogeneity clause’ by relying instead on an autonomous interpretation of Article 50 of the Charter. This reasoning contrasts also with the position of the A.G. who
assessed in great detail, as discussed, the relationship with the ECHR and the complex issue of corresponding rights. In his opinion, in order to correctly interpret Article 50 of the Charter, it is important to take into consideration the possible lack of agreement concerning a right in the ECHR system. As discussed before, not all the Member States have ratified or signed Article 4 of Protocol 7 and many States have put reservations as to the application of Article 4 of Protocol 7. Nevertheless, it seems that the ECJ decided to elude this problem by simply not referring to the Protocol 7 and to Article 52(3) of the Charter on corresponding rights. Therefore, it may be said that Article 52(3) is given a limited meaning by the ECJ. The minimalist interpretation of the Article in this judgment has the effect of reinforcing the autonomous character of the Charter and its ‘double jeopardy’ clause. It is made clear that the starting point of the interpretation in EU law of *ne bis in idem* is Article 50 EUCFR and the criteria given by the ECJ to the national courts for its interpretation are based on the EU case-law.  

This autonomous interpretation has the effect to ‘nullify’ the non-ratification of the Protocol 7 by many Member States (e.g. the United Kingdom) and the declarations of reservations of Article 4 of Protocol 7 by many others States (e.g. France). In that sense, it could be argued that the ECJ has extended the competence of the Union and has thus acted in breach of Article 51(2) of the Charter. This is all the more true if we take into consideration the fact that the Union will not ratify Protocol 7 when it accedes to the ECHR. This effect has no direct consequence in Åkerberg since Sweden has ratified the Protocol 7. But it is not sure what will be the reactions in countries such as UK or France which do not apply Article 4 of the Protocol 7. In the worst case scenario, Åkerberg might even legitimate the reactivation of Protocol 30 by the United Kingdom. That would be a serious drawback. Another consequence of this interpretation of Article 50 of the Charter in Åkerberg is to lead to the uniform application of the tripartite criteria in all the Member States of the EU in areas outside the field of criminal law and having a cross-border dimension. As rightly put by Vervaele, “[t]he consequences for the Member States are substantial when implementing and enforcing EU law. They can no longer limit the *ne bis in idem* principle to criminal law sensu strictu and will have to widen their scope of protection in order to include punitive administrative sanctioning. Moreover, the reach of article 50 CFR is not limited to the jurisdiction of every single Member States, as it is the case with article 4 ECHR Protocol 7. This means that Article 50 CFR has also transnational effect in the integrated legal order of the EU. This means that Member States will have to face the transnational application of *ne bis in idem* for all punitive sanctioning in the EU when implementing and enforcing EU law. The consequence will be that there will be an increasing need to decide about case allocation in the EU when it comes to investigations and punishment under administrative and criminal law”. In the end and on a more negative note, the problem remains that the interpretation of Article 50 of the Charter is not uniform whether the case concerns the area of Freedom Security and Justice or EU competition law. In a way, the Åkerberg decision which uniformly applies the Engel criteria to the Member States of the EU militates in favour of applying them within the context of EU competition law. However, it is doubtful that the ECJ will uniformly apply the Engel criteria in all the fields of EU law. As discussed earlier, the full application of the Engel criteria might endanger the effectiveness of EU competition law. The autonomous interpretation of Article 50 in Åkerberg legitimizes, in this sense, the dearth of uniform interpretation of *ne bis in idem* in EU law and also leads to a
minimalist interpretation of Article 52(3) of the Charter. The ECJ has instead chosen to give a significant, normative and pluralist meaning to Article 53 of the Charter.

**Article 53 of the Charter – The Most Underestimated Provision**

According to Article 53, “[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions”. This provision constitutes a non-regression clause or, in the words of Lenaerts, a ‘standstill clause’ and is intended to maintain the level of protection currently afforded within Union law, national constitutions and international law (particularly the ECHR). Its ultimate purpose is to ensure the constitutional autonomy of the Charter in preserving a high standard of protection of human rights in the European legal orders. Regarding its relationship with the ECHR, one of the major problems that a binding Charter could raise is that of diverging interpretations with the ECHR. It may be argued that the Charter could increase the risk of divergence, since the text of the Charter does not correspond exactly to the ECHR. Lenaerts and de Smijter contended that “[w]here the text of the Charter departs from that of the ECHR, it can never be at the expense of the level of protection offered by the ECHR”. The risk of diverging interpretation is in reality rather weak due to the ‘subsidiary’ character of the ECtHR jurisdiction. It will become even weaker with the entry into force of the Lisbon Treaty since the new Article 6(2) TEU imposes an obligation on the Union institutions to accede to the European Convention on Human Rights. Finally, it is worth noting that the “non-regression” clause of Article 53 of the Charter might be difficult to put into practice in the situation of clash between fundamental rights like in the Promusicae case.

Regarding its relationship with the Member States’ constitutions, Article 53 of the Charter may also have repercussions on the principle of supremacy. In that sense, the Charter could pose a threat to the supremacy of EU law. More precisely, there might be a risk of multiplication of conflicts between domestic constitutional norms and Union law that would, consequently, increase the proclivity of the national courts to review the acts of the Union. This “terror thesis” was rightly set aside by Liisberg who has undertaken a wide analysis of the drafting history of Article 53 as well as a detailed comparison of similar provisions in international and US federal instruments (Article 53 Charter entitled “safeguard for existing human rights”, Article 27 of the Declaration of Fundamental Rights and Freedoms entitled “degree of protection”, and the Ninth Amendment of the US Constitution). The conclusion pointed towards a limited legal significance for Article 53. First, the author stressed that a “fumbling approach” marked the drafting of Article 53 and thus reflected a political compromise. Second, his approach seems justified in light of the case law of the ECtHR concerning Article 53 ECHR. For instance, the Irish government in the Open Door Counselling case resorted to Article 53 ECHR so as to contend that Article 10 ECHR (freedom of expression) should not be construed to circumscribe the right to life of the unborn as enshrined in the national Constitution. The ECtHR jettisoned the argument, applied the doctrine of margin of appreciation and found an infringement of Article 10 ECHR by a vote of
fifteen to eight. By not using Article 53 ECHR in this conflict of rights case, the ECtHR arguably refuse to use this provision as a “best protection” clause. It is in fact very tricky for a judge to establish a normative hierarchy between fundamental rights. Third, the US case-law does not indicate that the Ninth Amendment has been used to challenge the supremacy of the federal law with the provisions of the domestic constitutions. Finally, the author submitted that the legal significance of Article 53 of the Charter is identical to that of Article 53 ECHR. At the end of the day, it must be made clear that Article 53 of the Charter does not pose a threat to the principle of supremacy, does not jeopardise the existence of higher standards of protection at the domestic level and should not be used as a tool to solve conflicts of fundamental rights.

The aim of Article 53 is to clarify that the EU Charter of Fundamental Rights does not replace national constitutions and does not jeopardise the existence of higher standards of protection at the domestic level. This provision, just like Article 53 ECHR (ex Article 60 ECHR), should be viewed as a ‘maximisation clause’ reflecting the essence of the Charter, i.e. a document ensuring a minimum standard. Besides, Article 53 may arguably be used by the ECJ in order to elaborate fundamental rights (as general principles) not enshrined in the Charter. However, in light of the Lisbon Treaty, this function would probably be assumed by the new Article 6(3) TEU. In an interesting article, Van de Heyning questioned whether Article 53 provides an effective tool to avoid conflicts and safeguard a domestic “better protection” of fundamental rights (better protection clause or maximisation clause). Like Liisberg, she draws a comparison with Article 53 ECHR and considers that this provision is rarely used by the Strasbourg Court. After a thorough analysis of the ECHR case-law (notably in relation to Articles 6 and 8 ECHR), the author considers that Article 53 Charter should not be used to solve conflict of rights and should only be read as a minimum standard clause. It is deemed than the margin of appreciation is a better tool to solve conflicts of rights. As emphasised by Van de Heyning, the ECtHR elaborated an alternative method to offer manoeuvring space for the Member States, i.e. the margin of appreciation. The maximisation clause does not offer a ‘viable solution’. The Strasbourg case-law on Article 53 ECHR implies a modest future for its EU Charter equivalent. Article 53 Charter constitutes a non-regression clause reflecting the ‘minimum standard’ established by the Charter vis-à-vis other external human rights instruments, i.e. the national constitutions and the ECHR.

This interpretation of Article 53 ECHR as a non-regression clause or standstill clause is also shared by Judge Lenaerts: “A combined reading of Article 52(3) and Article 53 of the Charter demonstrates that if the ECtHR raises the level of protection of a fundamental right (or decides to expand its scope of application) so as to overtake the level of protection guaranteed by EU law, then the autonomy of EU law may no longer exist”. With a view to attaining the level of protection guaranteed by the ECHR, the ECJ will be obliged to reinterpret the Charter. Conversely, if the ECtHR ever decides to lower the level of protection below that guaranteed by EU law, by virtue of Article 53 of the Charter, the Court of Justice will be precluded from interpreting the provisions of the Charter in a regressive fashion. Stated differently, interpreted as a ‘stand-still clause’, Article 53 of the Charter preserves the constitutional autonomy of EU law”. So Lenaerts views the Charter as a living instrument ensuring a minimum standard of protection vis-à-vis the ECHR. In practical terms, however, the need to follow the developments of the ECHR case-law might end up in a constitutional jigsaw. For instance, it is well-known that the Court of Justice has developed two separate lines of interpretation (in competition law and
Article 54 CISA) of the principle of *ne bis in idem* (Article 50 Charter).\textsuperscript{111} The ECtHR now follows the same interpretation that the ECJ gives to the *ne bis idem* principle in relation to Article 54 CISA. Does it mean that under Article 53 ECHR there should be a change of its line of case-law in the context of competition law? Furthermore, one may also consider that Article 53 of the Charter could be used to engage in a dialogue with the national constitutional courts of the Member States.\textsuperscript{112} This interpretation is not recommended, since the 2007 version of the Charter has added complementary paragraphs to the horizontal clauses, i.e. paragraphs 4 to 7 of Article 52. To interpret Article 53 of the Charter in such a way would endanger the *effet utile* of Article 52(4) of the Charter.

A.G. Bot discussed at length Article 53 in the Melloni case. In this case, the ECJ had to answer a question put by the Spanish Tribunal Constitucional concerning Article 53 of the Charter, the national standard of protection on judgment *in absentia* and its relationship with a European framework decision. According to the A.G., Article 53 is to be interpreted as meaning that it does not allow the executing judicial authority, pursuant to its national constitutional law, to make the execution of a European arrest warrant subject to the condition that the person who is the subject of the warrant be entitled to a retrial in the issuing member state, where the application of that condition is not authorised by Article 4a(1) of the Framework Decision. Before coming to this conclusion, he discussed the role of Article 53 within the Charter. For the AG, this provision should be read in close combination with Articles 51 and 52 of the Charter, which it complements. In his words, Article 53 of the Charter supplements the principles stated in Articles 51 and 52 thereof [particularly 52(3) and 52(4) which also demonstrate the link with other sources], by pointing out that, in a system in which the pluralism of sources of protection of fundamental rights prevails, the Charter is not intended to become the exclusive instrument for protecting those rights and, also, that it cannot have the effect, on its own, of adversely affecting or reducing the level of protection resulting from those different sources in their respective fields of application.\textsuperscript{113} This provision makes clear that the Charter imposes a level of protection for fundamental rights only within the field of application of EU law. Therefore, as emphasised by A.G. Bot, the Charter cannot lead to a situation where Member States are obliged to diminish the level of protection of fundamental rights guaranteed by their own domestic constitutions in litigation which falls outside the ambit of EU law. And, in a similar vein, Article 53 of the Charter should not be used as an excuse for the Member States to reduce the level of protection in purely internal matters.\textsuperscript{114} Finally, Advocate General Bot considered that Article 53 cannot undermine the primacy of EU law since the assessment of the level of protection for fundamental rights to be achieved is carried out within the framework of the implementation of EU law.\textsuperscript{115} One may agree with the last point of the Advocate General. Indeed, it is contended that Article 53 is not to be used as a framework for claims leading to the ‘conditional primacy’, but also should not be used for installing a constitutional dialogue between the ECJ and the constitutional courts of the Member States. In that regard, Article 4(2) TEU and Article 52(4) Charter constitute more appropriate grounds in our view.

One thing remains clear with regard to the relationship between the Charter and the Member States’ constitutions; the ‘correct’ interpretation of Article 53 of the Charter is far from self-evident. To begin with, it has been raised that the phrase ‘in their respective field of applications’ contributes with some ambiguity. This phrase indicates that the Charter rights, the rights in international agreements, and the constitutional rights actually have separate fields of
applications and that the Charter will not interfere within the other fields. However, it could well be argued that Article 53 itself shows that there is actually an overlap and potential for conflict between EU fundamental rights and constitutional rights, why else would there be a need to insert this Article? Secondly, Article 53 could be understood as restricting the Charter rights from undermining the level of protection offered by the Member States constitutions. Thus, it could open up for the argument that within the field of application of EU law, the Charter rights is not allowed to adversely affect the protection of constitutional rights. This broad interpretation of Article 53 of the Charter could obviously have the effect of undermining the principle of supremacy if it would justify that national courts apply their own constitutional rights instead of the Charter rights simply because the national rights provide a higher level of protection. Hence, this interpretation would alter the relationship between EU law and national law significantly.

According to Torres Pérez, there is an alternative way of interpreting Article 53, which goes well in line with her theory of adjudication of EU fundamental rights. In a nutshell, she argues that Article 53 could instead be used by the Court to defer to the interpretation of a fundamental right under national law. However, this would only be possible in those situations when the level of protection is higher under national law and the application of a higher level of protection does not harm other rights or interests. This interpretation would therefore entail that Article 53 constraint the application of the Charter rights without threatening the principle of supremacy. With respect to the protection of fundamental rights, Torres Pérez has discussed the possibility of a shared discourse between the ECJ and the national courts and offers a normative theory for ECJ adjudication, which favours a certain degree of diversity. As a point of departure she emphasizes that when the Member States are acting within the scope of EU law there is a potential risk for conflicts between EU fundamental rights and constitutional rights. Also, there is a risk that the EU level of protection falls below the level of protection provided for by the national constitution. She does not consider it suitable to solve this potential conflict by using a hierarchical model, trying to establish which norm is highest in the hierarchy, since the hierarchical model fails to recognise the reality of European integration. Instead, she focuses on the ‘legitimacy of the European Court of Justice’s claim of authority in adjudicating EU fundamental rights’. In other words, why should it be accepted that the ECJ, a supranational court, has the authority to interpret supranational rights, which national courts have to apply, even if they conflict with constitutional rights?

For her, the ECJ’s legitimacy could be based on the ideal of a dialogue. To begin with, she finds it necessary to first answer whether EU fundamental rights must be interpreted uniformly or if some diversity between the Member States should be allowed. She finds that both solutions have different benefits. If interpreted uniformly, for example, the unity and efficacy of EU law would be secured and it would also guarantee equality. However, allowing state diversity would, for example, secure democratic self-government. Altogether, she finds that state autonomy justifies the allowance of a certain degree of diversity. However, this should not be viewed as in stark contrast to a uniform interpretation. The point she makes is just that the development of a common supranational standard should not be ‘through a hierarchical imposition of ECJ standards’ since it has no legitimacy. Instead, the legitimacy of the ECJ should be sought by interpreting EU fundamental rights through an on-going dialogue between the ECJ and the national courts. Put simply, Torres Pérez considers that the purpose of the dialogue
would be to seek an interpretation that is rationally agreeable to all national courts since it would show equal respect to the constitutional identity of all Member States and further better-reasoned decisions. For this dialogue the system of preliminary rulings is the vehicle and provides an opportunity to establish a dialogue that is non-hierarchical. When interpreting EU fundamental rights, the ECJ should therefore consider the Member States’ constitutional rights and use comparative reasoning. The legitimacy of its interpretation would also be further enhanced if the use of comparative reasoning were emphasised in the Court’s rulings. Furthermore, Torres Pérez believes that this sort of dialogue could arguably also lead to an exercise of deference to the interpretation of a right at national level, even though it is not necessarily a consequence of a dialogue between the courts. The situation which is found most likely to happen is when the ECJ review a Member State’s measure that is only remotely related to EU law and the national standard offers a higher level of protection.  

Comments in light of Åkerberg and Melloni.

As stated by Sarmiento, in Åkerberg and Melloni, “the ECJ has created a framework of ‘situations’ with the purpose of allocating the respective scopes of application and protection of the Charter and of national fundamental rights. The new arrangement recognizes the strategic role of supreme constitutional courts, but it also assures the autonomy of Member States as well as the Charter’s prominent role in fundamental rights protection”. In these two cases, Article 53 has been construed as something more than a non-regression clause, coming closer to a conflict of laws rule in the field of fundamental rights. Article 53 of the Charter mandates the ECJ to engage in a dialogue with the supreme constitutional courts. Paragraph 36 in Åkerberg is of utmost importance and – to be fully understood – must be read together with the paragraph 29 of the same case and paragraph 60 in Melloni. According to the Court,

36 It is for the referring court to determine, in the light of those criteria, whether the combining of tax penalties and criminal penalties that is provided for by national law should be examined in relation to the national standards as referred to in paragraph 29 of the present judgment, which could lead it, as the case may be, to regard their combination as contrary to those standards, as long as the remaining penalties are effective, proportionate and dissuasive (see, to this effect, inter alia Commission v Greece, paragraph 24; Case C-326/88 Hansen [1990] ECR I-2911, paragraph 17; Case C-167/01 Inspire Art [2003] ECR I-10155, paragraph 62; Case C-230/01 Penycoed [2004] ECR I-937, paragraph 36; and Joined Cases C-387/02, C-391/02 and C-403/02 Berlusconi and Others [2005] ECR I-3565 paragraph 65).

29 That said, where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of 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).
Paragraph 36 in Åkerberg gives the possibility for the referring court to examine the combining of tax penalties and criminal penalties in relation to the national standards referred in paragraph 29, according to which in a situation where action of the Member States is not entirely determined by EU law, 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. This reasoning is new and its legal basis is surprisingly founded on Article 53. It is worth underlining that many in the doctrine have viewed Article 53 as a mere ‘non-regression clause’, thus establishing the Charter as a minimum standard of protection (and establishing a conceptual link with Article 53 ECHR). Others have interpreted this provision more broadly as a ‘fountain of law’ or a ‘co-existence’ clause or even as a ‘best protection clause’. One thing is sure after Åkerberg and Melloni is that the ECJ has decided to give a meaning to Article 53 different from a mere ‘regression clause’. Article 53 is used to allow the national courts to rely on their own national standards of protection of fundamental rights in a situation where action of the Member States is not entirely determined by EU law (the so-called Åkerberg situation). By contrast, they cannot rely on national standards in a situation where action of the States is entirely determined by EU law, e.g. in the context of the European Arrest Warrant (the so-called Melloni situation). In this last situation, Article 53 EUCFR cannot be used by the national court referring to a higher national standard of protection of fundamental rights, e.g. the Spanish constitutional tribunal in Melloni relied on the right not be tried in absentia, a higher national standard.

Importantly, to rely on the national standards in an Åkerberg situation two cumulative conditions must be respected. First, the level of protection provided by the Charter must not be compromised (the ‘level of protection’ condition). Second, the primacy, unity and effectiveness of EU law must not be compromised (the ‘uniformity’ condition). The meaning of the first condition is not entirely clear to us but we assume that it signifies that a national court may rely only on national standards that afford higher protection to the individual than the level of protection of the Charter. However, a national court cannot rely on a lower national standard of protection of fundamental rights that can compromise the level of protection of the Charter. The level of protection condition as defined in Åkerberg is not easy to grasp and problems related to its interpretation are to be expected in our view from the national courts. Moreover, in practice, it creates a complex system of protection of fundamental rights. The complexity will also indubitably increase in situations involving conflict of fundamental rights. As rightly put by Clemens Ladenburger in his EU institutional report during the XXV FIDE congress, “a priori a cumulative application of several layers of fundamental rights binding Member States acts should be admitted...[however]...the principle of co-existence of several layers of fundamental rights as arguably enshrined in Article 53 has a price: complexity”.

The interpretation of Article 53 EUCFR in Åkerberg and Melloni provides a new test as to the application of fundamental rights in Member States actions falling within the scope of EU law. Also, this interpretation establishes a solid bridge between national standards of protection of fundamental rights and Charter’s standards. The ECJ has thus decided to give a meaning to Article 53 of the Charter which goes further than a simple ‘non-regression’ clause. This provision can now be viewed as a ‘pluralist’ clause, ‘discursive’ or a ‘co-existence’ clause or,
more precisely, as a limited or conditioned ‘best protection’ clause meaning that a local maximum standard may apply depending on a set a very specific circumstances based on the regulatory context of the case and having always the Charter and the uniformity of EU law as an interpretative backdrop. The interpretation of Article 53 of the Charter by the Court appears to us Janusian. On the one hand, it reflects the pluralist nature of EU law by recognising the cumulative application of several layers of fundamental rights binding Member States. On the other hand, it strongly protects the level of protection of the Charter and the effectiveness and uniformity of EU law.

But uniformity of EU law has a price. In Melloni, the ECJ applied the lower EU standard of fundamental rights and not the higher national standard as asked by the Spanish Constitutional Court. Indeed, Article 53 is not to be used in the context of the European Arrest Warrant as it is a fully regulated area of EU law. The pluralist clause is, therefore, not a general ‘best protection’ clause and is limited by the need to respect the uniformity and autonomy of EU law. The analysis of the ECJ case-law on Article 50 of the Charter also points towards the same conclusion. The Charter is used as the starting point of interpretation in fundamental rights case and sits at the top of the normative pyramid as any Bill of Rights. The Charter, in principle, appears to be used by the EU judges to provide for the unremitting protection of individual rights and liberties. It is in this sense that the Charter can be viewed as a purposive document, i.e. its purpose being to guarantee and to protect within the limits of reason the enjoyment of the rights and freedoms it enshrines. Arguably, the use of purposive constitutional interpretation may thus justify a ruling like Åkerberg which applied an autonomous standard of protection without taking into consideration the lack of consensus between the States of the Council of Europe in relation to Article 4 of Protocol 7. To put it differently, Article 50 EUCFR sets its own and uniform standard of protection of fundamental rights between the 28 Member States of the EU and the reliance on the ECHR standards is, therefore, not compulsory.

Conclusion

So clarifying or diluting the application of the Charter? It appears from our study that the ECJ has clarified the meaning of ‘implementing Union law’ and has thus eventually elucidated the relationship of the Charter with ‘the scope of EU law’. In fact, Article 51 of the Charter is interpreted in Åkerberg as confirming the Court’s case-law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union. In essence, this case shows that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law (including situations of derogation to EU law), but not outside such situations. This interpretation reflects an expansive approach taken by the ECJ as to Article 51 of the Charter. But the same cannot be said about the interpretation of Article 52 of the Charter. In Åkerberg, the ECJ did not refer to the ECHR and its case-law. And it seems that the ECJ avoid tackling the relationship between Article 50 of the Charter and Article 4 of the Protocol 7. This autonomous interpretation of Article 50 of the Charter in Åkerberg legitimizes the lack of uniform interpretation of the ne bis in idem principle in EU law and also leads to a minimalist interpretation of Article 52(3) of the Charter. It is like Article 52 get to play the second fiddle and Article 53 steals the show.
Indeed, the ECJ has chosen to give a significant meaning to Article 53, a meaning different from a mere non-regression clause. This clause is now used to allow the national courts to rely on their own national standards of protection of fundamental rights in a situation where action of the Member States is not entirely determined by EU law (the so-called Åkerberg situation). By contrast, they cannot rely on national standards in a situation where action of the States is entirely determined by EU law, e.g. in the context of the European Arrest Warrant (the so-called Melloni situation). In this last situation, Article 53 EUCFR cannot be used by the national court referring to a higher national standard of protection of fundamental rights, e.g. the Spanish Constitutional Court in Melloni relied on the right not be tried in absentia, a higher national standard. In that sense, the interpretation of Article 53 by the ECJ appears to us Janusian. On the one hand, it reflects the pluralist nature of EU law by recognising the cumulative application of several layers of fundamental rights binding Member States and mandates the ECJ to engage in a dialogue with the national constitutional courts. On the other hand, it strongly protects the level of protection of the Charter and the effectiveness and uniformity of EU law. Ultimately, the general feeling left by the analysis of these two cases is that aside from clarifying the application of Article 51, and the meaning of implementing Union law, Åkerberg and Melloni are the source of new questions rather than final answers.
Notes

1 Case C-399/11 Melloni [2013] nyr; and Case C-617/10 Åkerberg [2013] nyr.
2 K. Lenaerts and J.A. Gutiérrez-Fons, ‘The Place of the Charter in the EU Constitutional Edifice’, in S Peers et al. (eds.), The EU Charter of Fundamental Rights: A Commentary (Oxford, Hart Publishing, Forthcoming, autumn 2013). According to these authors, Article 51(1) is the keystone which guaranteed that the vertical allocation of powers sought by the authors of the Treaties is not disturbed. The scope of application of the Charter is therefore the keystone which guarantees that the principle of conferral is complied with.

3 See generally on this matter, L. Azoulai (ed.), The EU as a Federal Order of Competences (OUP, forthcoming 2013).

6 Ibid., p. 15.
7 Could the scope of the Charter’s application be differentiated due to a different character of constitutional protective standards adopted in different Member States? A positive answer to this question could hypothetically lead to a narrowing of the sphere of unified application of guarantees of fundamental rights included in the Charter.
8 See A. Rosas and H. Kaila, L’application de la Charte des droits fondamentaux de l’Union européenne par la Cour de justice: un premier bilan, premier bilan” Dir. Un. Eur. 2011, 01, 1. 15.
9 See Opinion of A.G. Cruz-Villalón in Case C-617/10 Åkerberg [2013] nyr, paras. 35-36.
10 Ibid., for the Advocate General, “a proper interpretation of the basic constitutional structure of the compound comprising the Union and the Member States, which has been described as the ‘European Verfassungsverbund’, it is, as a rule, for the Member States themselves, in the context of their own constitutional order and the international obligations which they have entered into, to review acts of their public authorities. However, that rule is accompanied by an exception which has acquired undeniable scope and applies to cases where national public authorities are implementing Union law, to use the wording of the Charter”.
13 McDonald v. Chicago, 561 U.S. (2010). The Supreme Court held that the right of an individual to “keep and bear arms”, which is protected by the Second Amendment and applies to the states.
16 See B. de Witte, ibid, at p. 85
37 Cf. A. Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 1997). The “original meaning theory”, is the belief that interpretation of a constitution should be based on what reasonable persons living at the time of its enactment would have declared the ordinary meaning of the text to be. This theory of interpretation is intricately connected with textualism. If one follows this theory, the legal explanations of the Charter on Article 51(1) Charter are thus useless since, arguably, they reflect the “original intent” (or secret meaning in mind in adopting the text) of the framers.

38 In this document, it is declared that, “[a]s regards Member States, it follows unambiguously from the case law of the Court of Justice that the requirement to respect fundamental rights defined in a Union context is only binding on the Member States when they act in the context of Community law”. Council of the EU, ‘Charter of Fundamental Rights of the European Union: Explanations Relating to the Complete Text of the Charter’, December 2000, at p. 73. Interestingly, the Wachauf and ERT cases are expressly cited.


40 In the English version of the case ERT, the Court uses the expression “scope of Community law”, whereas in the French version it uses both the expression “champ d’application” and “une réglementation nationale qui ne se situe pas dans le cadre du droit communautaire”. See F. Mayer, ‘Competences – reloaded? The vertical division of powers in the EU and the new European constitution’, (2005) 3 I-CON 493.

41 *Original intent maintains that in interpreting a text a court should determine what the authors of the text were trying to achieve, and to give effect to what they intended the statute to accomplish, the actual text of the legislation notwithstanding.* That could hinder a more progressive reading of the Charter.


44 See contra B. de Witte, ‘The Legal Status of the Charter: Vital Question or Non-Issue?’, supra note 15, p. 86, fn 15. Yet, in light of the travaux préparatoires, it has also been stressed that the wording was not accidental. It was, indeed, a matter of constant attention during the drafting process.


46 Case C-40/11 Yoshikazu Iida [2012] nyr.

47 Ibid., para. 79.

48 Ibid. p. 80.

49 D. Sarmiento, ‘Who’s Afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe, supra note 15, “The circumstances […] were at the fringes of article 51(1) of the Charter”.


51 See Åkerberg, supra note 1, para. 40.

52 Ibid., para 60.

53 Ibid., paras 61–63.


55 Ibid., pp. 1280-1281. If the scope of application refers to the applicability of Union law in concreto, in the litigation at hand, the difference more or less disappears, but concreto if it refers to the situation which is in one way or another covered by a norm of Union, without any need to apply it, then, scope of application is a much more wider notion than implementing. For avoiding this risk of confusion, it is argued for using the terminology of Article 51(1), i.e., implementing Union law.

56 There is thus a direct link between the collection of VAT revenue in compliance with the European Union law applicable and the availability to the European Union budget of the corresponding VAT resources, since any lacuna in the collection of the potentially causes a reduction in the second (see, to this effect, Case C-539/09 Commission v Germany [2011] ECR I-0000, paragraph 72).

57 Åkerberg, supra note 1, paras 25-27.
Concerning internal regulation, the first two paragraphs of Article 52 together with the ‘new’ paragraphs added by the Convention during the drafting of the Constitutional Treaty are of crucial importance. Article 52(1) constitutes a general limitation or derogation clause. The second paragraph puts ‘limitation to the limitations’ by excluding the use of the Charter’s limitation clause when Treaty’s derogations, e.g. provisions concerning derogations to free movement or citizenship provisions, are applicable. Its aim is thus to avoid that the Charter substitutes the EU acquis. The new paragraphs are necessary to interpret the scope of the notions of “rights” and “principles” as enshrined in Article 52(5) Charter and to understand the role of the legal explanations for interpreting the Charter’s rights.

Article 52 of the Charter is particularly interesting when it comes to offering a framework for preventing conflicts between the Court of Justice, the national courts and the European Court of Human Rights. In that sense, paragraphs 2 to 4 of Article 54 Charter are of special significance since they essentially seek to guarantee a harmonious relationship with the sources of Charter, i.e. the EU treaties (Article 52(2)), national constitutions (Article 52(4) and the Strasbourg regime (Article 52(3))). These provisions acknowledge the intricate application of European rights in a pluralist context. However, they also have the ambition to prevent a conflict of interpretation between the various jurisdictions from arising exclusively the use of the Charter’s limitation clause when Treaty’s derogations, e.g. provisions concerning derogations to free movement or citizenship provisions, are applicable. Its aim is thus to avoid that the Charter substitutes the EU acquis. The new paragraphs are necessary to interpret the scope of the notions of “rights” and “principles” as enshrined in Article 52(5) Charter and to understand the role of the legal explanations for interpreting the Charter’s rights.

Article 52(4) of the Charter can be considered as the “little brother” of Article 4(2) of the TEU as amended by the Treaty of Lisbon. This provision provides that “[i]nsofar as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions”. This provision recognises with strength the principle of national constitutional autonomy and reflects European constitutional pluralism. If this interpretation is chosen by the Court of Justice, Article 52(4) Charter could be used to reconcile national constitutional law with a conflicting Charter’s right. That could probably be the case in an Omega-like situation, where a strong domestic constitutional principle, e.g. the principle of secularism (laïcité) in France, clashes with a Charter right. In that sense, Article 52(4) Charter might be perceived as an instrument to defuse constitutional conflicts between the national supreme courts and the ECJ.

In that regard, the horizontal provisions of the Charter are particularly interesting when it comes to regulating the relationship between the Charter and Convention’s rights and offering a framework for preventing conflicts between the EC and the ECtHR. In that sense, Articles 52(3) and 53 are of special significance since they essentially seek to guarantee a harmonious relationship between the Charter and the Strasbourg regime. These provisions have the ambition to prevent a conflict of interpretation between the various jurisdictions from arising as a result of the plurality of the legal sources. Article 52 of the Charter aims at ensuring equivalent protection of rights between the Strasbourg and Luxembourg regimes (Article 52(3)). Article 53 of the Charter establishes the so-called non-regression clause of the rights enshrined in the Charter, ECtHR and the national constitutions.

A. Rosas, ‘Fundamental Rights in the Luxembourg and Strasbourg Courts’, in C. Baudenbacher et al. (eds.), The EFTA Court: Ten Years On (Hart Publishing, Oxford, 2005), at p. 163. As put by Rosas, “[t]he thesis, often put forward in the literature, that there is a tension or even conflict between Luxembourg and Strasbourg case law is somewhat exaggerated. Harmony rather than conflicts is a much more likely scenario”.

See, in particular, Joint Communication of Presidents Costa and Skouris, 24 January 2011, para. 1, available online.


By ‘subsidiary’ character we mean that the preliminary ruling procedure is integrated within the “exhaustion of remedies” under Article 35 ECHR. Therefore, in this context, the ECtHR may have the last word on the
interpretation of the ECHR rights. See also A. Rosas, ‘Fundamental Rights in the Luxembourg and Strasbourg Courts’ in C. Baudenbacher et al. (eds.), supra note 44.

50 The argument often used as a rationale to the accession to the ECHR is that this accession will bring coherence to the system of human rights protection in Europe. However, a risk of divergence will always exist even after accession since the Convention is a minimal standard under Article 53 ECHR.

51 According to Article 52(3) Charter, “[i]nsofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection”.


54 Ibid., para. 145

55 Which is the duty set out in Article I ECHR.


58 Explanations relating to the Charter of Fundamental Rights (2007/C 303/33).


60 T. Lock, ‘The ECJ and the ECtHR: The Future Relationship between the Two European Courts’, supra note 48, p. 387. The author argues against the binding effect of the ECtHR case-law. According to him, during the drafting of the Charter, there were many attempts to include an explicit reference to the ECtHR case-law in the Charter’s text. Nevertheless it was impossible to agree on such reference. Neither the wording of the provision nor the history of the drafting support the fact that the ECJ is to be bound by the case-law of the Strasbourg Court.

61 Ibid.

62 See A.G. Trstenjak in Joined Cases C-411/10 and C-493/10 NS [2011] nyr. See, most recently, Joined Cases C-92/09 and C-93/09 Volker and Markus Schecke [2010] ECR I-11063, paras. 43 et seq. See also Case C-465/07 Elgafaji [2009] ECR I-921 para. 44, in which the Court stressed as an obiter dictum that the interpretation given in that judgment of the relevant provisions of Directive 2004/83 was fully compatible with the ECHR, including the case law of the European Court of Human Rights relating to Article 3 of the ECHR. In Case C-400/10 PPU McB, supra note 88, para. 53, the Court expressly found, with regard to Article 7 of the Charter of Fundamental Rights, that that provision must be given the same meaning and the same scope as Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights.

63 T. Lock, ‘EU Accession to the ECHR: Consequences for the European Court of Justice’, EUSA Conference, Boston, USA, paper for EUSA conference, 3 March 2011. The case of Kokkelvisscher can thus be read as evidence of the two Courts’ endeavour not to contradict each other.

64 The Convention is thus part of EU primary law and therefore has a higher status than is normally acquired by Treaties concluded by the Union, i.e. in between secondary and primary law.


67 Cameron argues that this choice of approach is a deliberate move on the part of the ECtHR, which is aware of the fact that it would be open to attack if its judgments were overly “legislative” in character. I. Cameron, National Security and the ECHR (Uppsala, 2000) at p. 22.

68 See for instance Chassagnou and others v. France (1999) 29 ECHR 615, at para. 100, where the ECtHR held that the term “association” in Article 11 had an autonomous meaning which was not dependent on domestic classification.

69 The term ‘normative umbrella’ refers to the general purposes which are common to all texts within a particular legal system, and which reflect that legal system’s accepted principles, fundamental objectives and basic standards. A. Barack, Purposive Interpretation in Law (Princeton, 2005) at p. 149.

70 J. P. Costa, “The Relationship between the European Convention on Human Rights and European Union Law – A Jurisprudential Dialogue between the European Court of Human Rights and the European Court of Justice” It is
of course true that formally speaking the Convention is not binding under Union law. Lecture on 7 October 2008, King’s college (available online) at p. 21.


71 F. Jacobs, The Sovereignty of Law (CUP, 2007), at p. 54.


73 J.A.E. Vervaele, “The Application of the EU Charter of Fundamental Rights (CFR) and its Ne bis in idem Principle in the Member States of the EU”, 6 (2013) REALaw 113, 134. According to the author, “In the Fransson-case the ECJ has avoided tackling the relationship between article 4 ECHR-PR 7 and article 50 CFR. Although the former has no transnational application, as is the case with article 50 CFREU, it can lead to conflicting situations for Member States, as article 50 CFREU can also apply in domestic situations. What happens if Member States have not ratified ECHR-PR 7 or have formulated a reservation to its application and are not willing to accept the application of the ne bis in idem principle to the bis combination of punitive administrative and criminal penalties? In my opinion, article 50 CFR de facto sets aside the non-ratification of declarations or reservations, as long as the Charter applies in a domestic situation of the ne bis in idem right”.

74 Ibid., para. 68.

75 Ibid., para. 74.

76 Ibid., para. 79.

77 Ibid., para. 84.

78 Ibid., paras. 86-87. The A.G. then goes on to discuss Article 50 of the Charter and the imposition of both an administrative and a criminal penalty for the same offence. With support of the established case-law of the Court of Justice on the ne bis in idem principle, the A.G. finds that the tax surcharge of the case indeed represents a substantive criminal penalty and that the acts being penalized in the case were indeed ‘same acts’ within the meaning of ne bis in idem.


80 See contra as an example of convergence, K. Lenaerts and J.A. Gutiérrez-Fons, ‘The Place of the Charter in the EU Constitutional Edifice’, supra note 2. For these authors, unlike the Opinion of A.G. Cruz Villalón, the ECJ relied, albeit implicitly, on the interpretation of the ne bis in idem principle embraced by the ECtHR. Thus, Åkerberg Fransson confirms the converging trend between the case-law of the two Courts.

81 See A.G. Cruz-Villalón in Åkerberg, supra note 1, para. 83. Accordingly “the Member States of the Union all, to varying degrees, grant administrative authorities the power to impose penalties. In a large number of Member States, that power is compatible with the right to punish and can lead to the imposition of both administrative and criminal penalties for the same offence. However, that does not mean, under any circumstances, that Member States which allow double punishment do so with absolute discretion. On the contrary, in most cases, States which have measures for double punishment have provided for a formula which precludes an excessive punitive outcome. Thus, in France, the Constitutional Council has stipulated that the total amount of two penalties may not exceed the highest penalty laid down for each offence. The German courts apply a criterion of proportionality on a case-by-case basis, which is aimed at ensuring that the total amount of the penalties does not become excessive. Other States have established a rule of prior decisions in criminal cases pursuant to which administrative courts must stay the proceedings pending the final outcome of a criminal trial. Union law also provides for an approach of that kind, for example in Article 6 of the regulation on the protection of the Union’s financial interests. In other legal systems, as appears to be the case of Sweden, a criminal court which is seised of the second set of proceedings is entitled to deduct the administrative penalty from the amount of the criminal penalty”.

82 Ibid., para. 84.

83 Ibid.

84 Ibid., para.86.


86 See Case C-489/10 Bonda [2012] nyr, para 37.
written document freezes the hypothetical application of the principles. One might foresee such a type of charter goes stalwartly against the creat certain that the Court evolution and reflect the need and the characteristics of a particular society. Consequently, in the future, it is impossible to codify all the fundamental rights in a single document. The fundamental rights are subject to 113 CT might be used by the Court of Justice in order to elaborate the fundamental rig 104 103 102 101 100 99 98 97 96 95 94 93 92 91 90 89 88 87 See B. De Witte, ‘The Use of the ECHR and Convention Case Law by the European Court of Justice,’ in P. Popelier (eds.), supra note 72, p 17, at p. 25. 88 See Melloni. supra note 1, para 50. 89 J.A.E. Vervaele, “The Application of the EU Charter of Fundamental Rights (CFR) and its Ne bis in idem Principle in the Member States of the EU”, supra note 73, at 133. According to Vervaele, “it is quite clear from ECHR case law that this type of administrative fiscal penalties are punitive in Sweden and do have a criminal nature under the Engel-criteria and are thus a criminal charge under article 6 ECHR. In other words, there can only be one answer and there seems to be no room for other interpretations or for other national human rights standards, as suggested by the ECJ in paragraph 36 of the ruling”. 90 Ibid. 91 Ibid. According to Vervaele, “the ECJ’s elaboration of a common ne bis in idem principle for all policy areas is long overdue, as there are still substantial differences between the ne bis in idem of the area of freedom, security and justice and the internal market/competition policy area. If Member States have to comply with the Engel-Banda criteria, I do not see any reason why these criteria should not be applicable to the enforcement of the competition rules”. 92 The terms ‘in their respective fields of application’ are crucial here in order to interpret Article 53 Charter. Those words were chosen by the first Convention precisely to leave primacy of Union law unaffected. See, in that respect, C. Ladenburger, ‘EU Institutional Report’ of the XXV FIDE Congress in J. Laffranque (ed.), The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, The European Convention on Human Rights and National Constitutions (Tartu, 2012), 141, at p.175. 93 This clause is closely connected to Article 52 Charter. This is not surprising since, overall, the rhetoric of the high standard of human rights protection in the Union transpires from Articles 52 and 53 of the Charter. Article 52 Charter aims at ensuring equivalent protection of rights between the Strasbourg and Luxembourg regimes (Article 52(3)). 94 K. Lenaerts and E. de Smijter, ‘A Bill of Rights for the European Union’, (2001) 38 CMLRev. 273, p. 297. 95 A.G. Jacobs in Case Case C-168/91 Konstantinidis [1993] ECR I-1191, para. 50. 96 Case C-275/06 Promusicae [2008] ECR I-271. 97 J. B. Liisberg, ‘Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?’, (2001) 38 CMLRev. 1171, at p. 1193. The mere reference to the constitutions and not to the common constitutional traditions is explained as being a compromise between Member States who wanted a reference to the national law and the others who desired a reference to the common constitutional traditions. The explanations make reference to “national law”. 98 Ibid., at p. 1198. 99 In the first draft (entitled Article Z, level of protection) the only concern was on the ECHR. 100 Open Door v. Ireland (1992), A-246, paras. 78–79. 101 J. B. Liisberg, ‘Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?’, supra note 98, p. 1198, “politically useful inkblot meant to serve as an assurance to Member States, and eventually the electorate, that the Charter does not replace national constitutions and that it does not, by itself, threaten higher level of protection. The legal significance of Article 53 of the Charter is identical to that of Article 53 ECHR. And by its political nature and purpose, it is similar to e.g. Article 17(1) EC which provides that Citizenship of the Union does not replace national citizenship”. 102 See Case C-399/11 Melloni [2013], supra note 1. 103 This formulation is also used by J. B. Liisberg, supra note 98. Going beyond the scope of this report, it may be contended that Article II-113 could be used, in the future, as a “fountain of law” by the Court of Justice. Article II-113 CT might be used by the Court of Justice in order to elaborate the fundamental rights (as general principles of Union law) not enshrined in the Charter. In the words of Black, writing on the Ninth Amendment, it could be used as a “fountain of law. Indeed, as any written text, the Charter constitutes an imperfect document in the sense that it is impossible to codify all the fundamental rights in a single document. The fundamental rights are subject to evolution and reflect the need and the characteristics of a particular society. Consequently, in the future, it is certain that the Court of Justice would have to recourse to the general principles in order to fill the potential gaps of the judicial system established by a binding Charter. However, it could be highlighted that the very existence of a Charter goes stalwartly against the creative role of the Court of Justice. In other words, the existence of a written document freezes the hypothetical application of the principles. One might foresee such a type of
reasoning as partially wrong. On the one hand, it seems clear that the reality of a Charter (particularly if the Charter does not constitute a simple crystallization of the case law) limits instantly the role of the Court in the elaboration of principles. On the other hand, in the light of a binding charter, it is alleged that the Court of Justice could refer to Article II-113 CT (Article 53 Charter) in order to elaborate principles not included in it. A parallel can be drawn with Lenaerts’s comments on Article 27 of the Declaration of Fundamental Rights. According to him, such an article could have permitted the ECJ to construe further rights. As stressed previously, Article 53 Charter corresponds to an equivalent to Article 27 DFR. Subsequently, it might be asserted that such reasoning is applicable to Article II-113 CT (Article 53 Charter). In conclusion, Article II-113 CT might support the protection of unenumerated rights. Such a stance works perfectly in the sense of the Charter’s words, which hails the development of common constitutional values.


K. Lenaerts, “Exploring the Limits of the EU Charter of Fundamental Rights”, (2012) 8 EuConst, 375, at p. 394. See the explanations relating to the Charter, supra note 175, which provide that “[t]his provision is intended to maintain the level of protection currently afforded within their respective scope by Union law, national law and international law”. The adverb “currently” refers to the moment when the Charter, as primary EU law, entered into force, i.e. 1 December 2009.


K. Lenaerts, “Exploring the Limits of the EU Charter of Fundamental Rights”, supra note 110, at p. 398. See also L. Azoulai “L’article II-113 », in Burgogne- Larsen et al (eds.), Le Traite etablissant une Constitution pour l’Europe, L’architecture constitutionnelle, Partie II – La Charte des droits fondamentaux de l’Union, Commentaire article par article (Buyylan 2005) at p. 658 (Bruxelles, Buyylan, 2005). For Judge Lenaerts, this interpretation is the most convincing. However, it is worth noting that Azoulai’s article appears to be written before the incorporation of the four new paragraphs to Article 52, notably its paragraph 4 on the interpretation in harmony between the Charter and the national constitutions.


Ibid., paras. 133–134.

Ibid., para. 135.


Ibid.


Ibid., pp. 175-176.

Ibid., pp. 70-93.

Ibid., see especially pp. 138-140 and pp. 176-177.


Ibid.

Case C-399/11 Melloni [2013] nyr; and Case C-617/10 Åkerberg [2013] nyr, supra note 1.

Ibid., Melloni, para 60. According to the ECJ, “[t]his is true that Article 53 of the Charter confirms 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”.

See C. Ladenburger, ‘EU Institutional Report’ of the XXV FIDE Congress, supra note 30, at p. 173 and p. 175. Going further, Ladenburger provides us with the clairvoyant example of colliding rights or clash of fundamental
rights. For him “it can become a daunting task for a national administrator or judge to assess which margin if any, a norm of Union law may leave for applying rights other than those of the Charter, and then to identify the various applicable fundamental rights and their meaning pursuant to the case law of the Strasbourg, Luxembourg and the national constitutional courts” (at p. 176).

127 A. Barak, *Purposive Interpretation in Law* (Princeton University Press, 2005) at 370. For Barak, “[a] constitution is a legal text that grounds a legal norm. As such it should be interpreted like any legal text. However a constitution sits at the top of the normative pyramid. It shapes the character of society and its aspirations throughout history. It establishes a […] basic political points of view, It lays the foundation for social values, setting goals, obligations and trends”.

128 See Chief Justice Dickson of the Canadian Supreme Court in one of the first decisions interpreting the Canadian Charter of Rights and Freedoms. *Hunter v. Southam inc* [1984] 2 S.C.R. 145, 156. “The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill or a Charter of Rights*, for the unremitting protection of individual rights and liberties”.

129 To be closer from the reality, it may be said that the ECJ uses in fact a dual purposive interpretation. The first purpose is to ensure the protection of the individual rights of the Charter. The second purpose is to ensure the effectiveness of EU law.