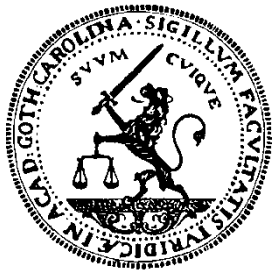

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The Charter of Fundamental Rights

- Altering the Relationship Between EU Law and National Law?

JURM02 Graduate Thesis

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Contents

Summary

In 2009, the Charter of Fundamental Rights of the European Union became legally binding almost a decade after the process to draft a Charter had begun. Naturally, the Charter's status as a legally binding document raises new questions about the future protection of human rights in Europe and the Charter's relation to the European Convention on Human Rights as well as the Member States' constitutional rights.

The horizontal provisions of the Charter, placed in the seventh chapter, govern its field of application and aim at managing conflicts between the Charter and other sources of protection of human rights. It has, however, not been clear how these provisions should be interpreted and what they thereby might entail. During the spring of 2013, the European Court of Justice (ECJ) finally settled two cases, *Åkerberg* and *Melloni*, concerning the interpretation of two of these horizontal provisions.

The purpose of this thesis is therefore to examine the relationship between the protection of human rights at supranational level and at national level in light of recent case law and to answer the question of what the implications of the Charter might be for the relationship between EU law and national law.

As is presented in this thesis, there are different ways of understanding the relationship between EU law and national law. One understanding is that the European legal order is superior to the national legal orders and that provisions of EU law therefore must prevail over provisions of national law in case of a conflict. In contrast, the concept constitutional pluralism seeks to understand the relationship in a non-hierarchical sense. According to the theories that are called discursive constitutional pluralism, EU law has developed through a dialogue between the ECJ and the national courts and an on-going dialogue between the courts is also a source of legitimacy for the ECJ.

In *Åkerberg* and *Melloni*, the ECJ finally clarified how two of the horizontal provisions of the Charter should be interpreted. It is evident from the Court's ruling in these two cases that the ECJ will still influence the protection of human rights at national level to a great extent. At the same time, my analysis is that it is possible to understand the ECJ's rulings as a reflection of discursive constitutional pluralism and that the Court's interpretations of the horizontal provisions have the potential to reconcile the European legal order with the national legal orders. Consequently, *Åkerberg* and *Melloni* further strengthens the notion that the relationship between EU law and national law is better understood in a non-hierarchical sense.

Sammanfattning

År 2009 blev Europeiska Unionens stadga om de grundläggande rättigheterna juridiskt bindande nästan ett decennium efter det att processen att utarbeta en stadga hade påbörjats. Stadgans status som ett juridiskt bindande dokument väcker naturligtvis nya frågor om det framtida skyddet av mänskliga rättigheterna i Europa samt stadgans förhållande till Europakonventionen såväl som medlemsstaternas konstitutionella rättigheter.

Stadgans allmänna bestämmelser, placerade i det sjunde kapitlet, reglerar dess tillämpningsområde och syftar till att hantera konflikter mellan stadgan och andra källor till skydd för de mänskliga rättigheterna. Det har däremot varit oklart hur dessa bestämmelser ska tolkas och vad de därigenom skulle kunna innebära. Under våren 2013 avgjorde EU-domstolen slutligen två fall, *Åkerberg* och *Melloni*, angående tolkningen av två av dessa allmänna bestämmelser.

Syftet med denna uppsats är därför att undersöka sambandet mellan skyddet av de mänskliga rättigheterna på överstatlig nivå och på nationell nivå mot bakgrund av ny rättspraxis och att svara på frågan om vad stadgan kan få för konsekvenser för förhållandet mellan EU-rätt och nationell rätt.

Som visas i denna uppsats finns det olika sätt att förstå förhållandet mellan EU-rätt och nationell rätt. En uppfattning är att den europeiska rättsordningen är överlägsen de nationella rättsordningarna och att EU-rättsliga bestämmelser därmed alltid måste ges företräde framför nationella bestämmelser om dessa kolliderar. I motsats så syftar begreppet konstitutionell pluralism till att förstå förhållandet i en icke-hierarkisk mening. Enligt de teorier som kallas diskursiv konstitutionell pluralism har EU-rätten utvecklas genom en dialog mellan EU-domstolen och de nationella domstolarna och en pågående dialog mellan domstolarna är också en källa till legitimitet för EU-domstolen.

I *Åkerberg* och *Melloni*, klargjorde EU-domstolen slutligen hur två av de allmänna bestämmelserna i stadgan ska tolkas. Det framgår av domstolens avgöranden i dessa två mål att EU-domstolen även fortsättningsvis kommer att påverka skyddet av de mänskliga rättigheterna på nationell nivå i stor utsträckning. Samtidigt är min analys att det är möjligt att förstå EU-domstolens avgöranden som en återspegling av diskursiv konstitutionell pluralism och att domstolens tolkningar av de allmänna bestämmelserna har potential att förena den europeiska rättsordningen med de nationella rättsordningarna. *Åkerberg* och *Melloni* stärker därför uppfattningen att förhållandet mellan EU-rätt och nationell rätt bättre kan förstås i en icke-hierarkisk mening.

Preface

First of all I would like to thank my supervisor, Xavier Groussot, for much needed guidance and our interesting discussions about the two cases that are the main focus of this thesis.

I would also like to thank my friends and family for their outstanding support all through the process of completing this thesis. I would especially like to thank my parents for their encouragement and constant belief in my abilities. Special thanks are also owed to Karin Westerberg for proofreading this text.

Malmö in May 2013,

Ingrid Olsson

Abbreviations

AFSJ	Area of Freedom, Security and Justice
EAW	European Arrest Warrant
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EEC	European Economic Community
EU	European Union
FCC	Federal Constitutional Court of Germany
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
VAT	Value Added Tax

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Directive 2004/38/EC of the European Parliament and the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77

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The Charter of Fundamental Rights:

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Charter of Fundamental Rights of the European Union [2010] OJ C83/389

1 Introduction

1.1 The Charter of Fundamental Rights

With the Lisbon Treaty entering into force on 1 December 2009, the Charter of Fundamental Rights of the European Union (the Charter) became a legally binding document. Even though the Charter is not incorporated into any of the Treaties, Article 6 TEU states that the Charter 'shall have the same legal value as the Treaties'.[1]

The drafting of the Charter started almost a decade earlier and it originates from the European Court of Justice's (ECJ) decision in Opinion 2/94.[2] By this decision, the ECJ held that the then current Treaty did not provide competence for the European Union (EU) to accede to the European Convention on Human Rights (ECHR).[3] Thus, an accession would only be possible if the Treaty was amended. Since there was no unanimity among the Member States to carry out such an amendment the German Presidency of the European Council instead proposed a Charter of Fundamental Rights in 1999.[4] In the German Presidency Conclusions it was emphasised that the main purpose with adopting a Charter was to make the already existing protection of fundamental rights in EU law, which had mainly developed through the ECJ's case law, more visible to EU's citizens.[5] Aside from making the fundamental rights more visible, the drafting of a Charter was also motivated by two other factors. Firstly, it was supposed to promote legal certainty and secondly to enhance EU legitimacy.[6]

Subsequently, the European Council instituted a body, which assumed the name 'Convention', to draft up the Charter. In the end, the Convention's result was a compromise between differing opinions within its leadership. On the one hand, the Member States were prone to see the Charter as a purely declaratory document, while on the other hand the European Council and the European Parliament were more interested of a document of greater significance. As a result the Charter was not given legally binding status by incorporation into the Nice Treaty. Instead, it was 'solemnly proclaimed' by the European Parliament, the Council of Ministers and the European Commission at Nice in the year of 2000.[7]

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[1] Article 6, Consolidated Version of the Treaty on European Union [2010] OJ C303/17; The Lisbon Treaty, [2010] OJ C82/2 and Charter of Fundamental Rights of the European Union [2010] OJ C83/389.
[2] Andersson QC, David & C Murphy, Cian, 'The Charter of Fundamental Rights', In: Biondi, Andrea; Eeckhout, Piet. & Ripley, Stefanie. (eds.), *EU law after Lisbon*, 2012, p. 155.
[3] Opinion 2/94 ECR I-1759.
[4] Andersson QC, David & C Murphy, Cian, op. cit., p. 155.
[5] Presidency Conclusions – Cologne 3 and 4 June 1999 (150/99 REV).
[6] Tridimas, Takis, *The General Principles of EU Law*, 2006, pp. 356-357.
[7] Ibid., pp. 156-159.

After the Charter was solemnly proclaimed, the process to make it legally binding continued. The question of a legally binding Charter then became part of an attempt to reform EU in a more comprehensive way as the Charter as a whole, with some minor amendments, was incorporated into the Constitutional Treaty. In the end, the Constitutional Treaty was never ratified why the legal status of the Charter remained uncertain until the Lisbon Treaty.[8]

1.2 Purpose and Main Question

The Charter provides yet another system of protection of human rights within Europe along with the ECHR and constitutional rights under national law. Even though the Charter is primarily directed to the EU and its institutions, it is also binding on the Member States when they implement Union law. The protection of human rights in Europe can therefore be said to exist in three different spheres; at international level where the Member States are bound by international human rights treaties such as the ECHR, at supranational level where the Member States are bound by the Charter when they implement Union law, and finally at national level by constitutional rights.[9] They so called horizontal provisions placed in the Charter's seventh chapter govern the Charter's field of application and aims at avoiding and managing conflicts between these different levels of protection.

How the so-called horizontal provisions should be interpreted and what effect the Charter thereby might have on the relationship between EU law and national law have been subject to discussion in the academic literature.[10] During the spring of 2013, the ECJ finally settled two cases concerning the interpretation of two of the horizontal provisions, *Åkerberg* and *Melloni*. These two cases cast new light on the interpretation of the horizontal provisions and thus contribute with new perspectives.

The main purpose of this thesis is therefore to examine the relationship between the protection of human rights at supranational level and the protection of human rights at national level in light of recent case law. Consequently, the main question, which will be examined in this thesis, is:

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[8] Craig, Paul & De Búrca, Gráinne, *EU law: text, cases, and materials*, 2011, p. 394.
[9] See Torres Pérez. Aida, *Conflicts of Rights in the European Union – A Theory of Supranational Adjudication*, 2009, p. 27.
[10] See e.g. Besselink, Leonard F.M, *The Member States, the National Constitutions and the Scope of the Charter*, 2001; Biondi, Andrea; Eeckhout, Piet. & Ripley, Stefanie. (eds.), *EU law after Lisbon*, 2012 and Mock, William B.T. & Demuro, Gianmario. (eds.), *Human rights in Europe: commentary on the Charter of Fundamental Rights of the European Union*, 2010.

What are the implications of the Charter for the relationship between EU law and national law?

With respect to the purpose of my thesis, this question should not be understood as to only include the relationship between the European legal order and the national legal orders, but also to what extent EU law can influence and govern the protection of human rights at national level.

1.3 Delimitations

Since the research question of this thesis is not discrete it has been necessary to make some delimitations. Firstly, it should be highlighted that there are of course a lot of interesting discussions in the academic literature regarding the relationship between the Charter and the ECHR. One of the most interesting aspects is that the Lisbon Treaty did not only turn the Charter into a legally binding document, but Article 6 TEU now states that the EU shall accede to the ECHR. Thus, the Charter's relation to the ECHR is naturally of interest to anyone who seeks to accomplish a comprehensive study of human rights issues in Europe. However, the aim of this thesis is not to conduct a comprehensive study, but I will be focusing on the relationship between EU law and national law.

Secondly, another significant delimitation is that this thesis focuses on the horizontal provisions of the Charter why I will not describe or discuss the actual rights that are being protected by the Charter. Furthermore, the horizontal provisions are contained in Article 51-Article 54 of the Charter. Since the main purpose of this thesis is to examine what can be concluded about the relationship between EU law and national law in light of *Åkerberg* and *Melloni*, I have decided to focus on Article 51, Article 52(4) and Article 53 of the Charter. These provisions have been selected with respect to the questions that *Åkerberg* and *Melloni* brought before the ECJ.

Yet another delimitation is that even though the role of the national courts is discussed more generally in this thesis, the main focus will be on the Federal Constitutional Court of Germany (FCC). This choice is motivated by the fact that the FCC has voiced its positioned clearly in a number of cases and most recently it responded to the ECJ's ruling in *Åkerberg*.

Lastly, it should also be emphasised that not all Member States fully agreed to the idea of a legally binding Charter why a protocol, on the application of the Charter to Poland and the UK, was added to the Treaty.[11] The protocol might therefore entail that the Charter does not have the same implications in UK and Poland as in the other Member States. Even so, this issue will not be addressed in this thesis since I am interested of the potential effect of the Charter on a more general level.

[11] Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom [2007] OJ C306/156.

1.4 Method and Material

My research question will be answered by using a traditional legal method. Since the protection of fundamental rights in EU law has mainly developed through the ECJ's case law, these cases are of course one of my most important sources. In addition, cases from the FCC will bee examined in order to study the nature of the relationship between the ECJ and the national courts.

Another important source is of course the academic literature and the theories that have been developed by prominent scholars concerning the relationship between EU law and national law as well as regarding the possible implications of the Charter. This literature will be used to analyse the ECJ's previous case law and to discuss my research question. However, since the two cases I am focusing on, *Åkerberg* and *Melloni*, were delivered only a couple of months ago, there are yet no published articles discussing these two cases. The analyse of *Åkerberg* and *Melloni* will therefore be the result of my own interpretation, even though I try to connect it to the theories that have already been developed by scholars. This also entails that I am faced with a great challenge since the ECJ's rulings are not always easy to interpret and the implications of its statements are seldom self-evident. Even so, this thesis is an attempt to at an early stage analyse the consequences of *Åkerberg* and *Melloni.*

It should also be highlighted that I will not be entirely consistent in my references. What was previously called the Community and Community law are after the entrance of the Lisbon Treaty and the abolishment of the three-pillar structure instead called the EU and EU law. Therefore, when suitable with regard to the situation, I will use Community/Community law or EU/EU law.

1.5 Disposition

Since my research question aims to discuss the implications of the Charter for the relationship between EU law and national law, chapter 2 of this thesis is dedicated to discuss the relationship between the European legal order and the national legal orders. As a part of this discussion, I will also address the role of the ECJ and the role of the national courts. In chapter 3, the attention will then be turned to the horizontal provisions of the Charter, which I have decided to focus on. This part of the thesis aims at identifying the function of the horizontal provisions and to present some of the issues that have been raised in the academic literature. Finally, in chapter 4, I will analyse *Åkerberg* and *Melloni* and discuss what these two cases might entail for the relationship between EU law and national law.

2 The Relationship Between EU Law and National Law

2.1 Two Aspects of Internationale Handelsgesellschaft

To begin with, as a way of examining the relationship between EU law and national law, I will start by exploring two aspect of the *Internationale Handelsgesellschaft* case. As I will show in the following, this case is part of two separate, yet closely connected, developments in EU law: the supremacy of EU law and the protection of fundamental rights.

2.1.1 Supremacy of EU Law

In 1963 the ECJ first established the doctrine of direct effect in *Van Gend en Loos*.[12] This doctrine applies to all EU law even though its application is more limited with regard to directives. Exactly what direct effect entails is quite difficult to summarise since it is a contested concept that has been given different meanings. Put simply, at risk of oversimplifications, it means that provisions of EU law have the capacity to confer rights upon individuals and when these provisions are sufficiently clear, precise and unconditional, individuals can invoke them before national courts.[13] Hence, one consequence of direct effect is that in Member States with a dualistic legal tradition there might be situations where individuals can rely on both provisions of EU law and provisions of national law before the national court. In other words, there is a potential for a conflict of norms deriving from two different legal orders.

In legal systems, the conflict between two norms that are both applicable but entail different end results is commonly solved by a hierarchical model, which provides that the superior norm has precedence (*lex superior*).[14] Implementing this model with respect to the relationship between the European legal order and the national legal orders, the question would naturally be: which norm is highest in the hierarchy, national law or EU law?

In 1964, the ECJ established the principle of supremacy in *Costa v Enel*, stating that Community law had to have primacy over national law.[15] Hence, the ECJ's solution to the conflict between the provisions of EU law and

[12] Case C-26/62 *NV Algmene Transporten Expedite Ondernemig van Gend en Loos v Nederlandse Adminstartie der Belastingen* [1963] ECR 1.
[13] Craig, & De Búrca, op. cit., p. 180.
[14] Torres Pérez, op. cit, p. 41.
[15] Case 6/64 *Flamino Costa v. E.N.E.L.*[1964] ECR 585.

provisions of national law was to give precedence to EU law. The Court's arguments were that the EEC Treaty had established an own legal order, which became an integral part of the Member States' legal systems on the day of the entry of the Treaty. Furthermore, the Court held that the Member States had limited their sovereign rights, although within limited fields, by creating the Community and thereby had created a body of law that must be binding on them. In addition, the Court emphasised that the objectives of the Treaty could not be accomplished if the Member States could chose not to apply Community law.[16]

In *Internationale Handelsgesellschaft*, the principle of supremacy was taken one step further as the ECJ held that Community law had to prevail even over the Member States own constitutions. The plaintiffs argued at national level that two Community regulations infringed on their rights under the German Constitution.[17] Put simply, the plaintiffs tried to use German constitutional rights as a ground for judicial review of Community measures. The German Administrative Court shared this view and held the legislation in question to be void since it ran counter to principles of German Basic Law. However, the matter was referred to the ECJ.[18]

The ECJ on the other hand was not willing to abandon the principle of supremacy so easily and stressed the importance of uniformity and efficacy of Community law. Furthermore, the Court underlined the status of Community law as an independent source of law why only Community law could be used to decide whether Community measures should be declared void or not. In sum, the ECJ found that Community law could not be challenged on the basis that it was in conflict with national constitutional rights or with national constitutional principles.[19]

Yet another dimension of the principle of supremacy is evident from the case *Simmenthal,* by which the ECJ established the principle of pre-emption. The Court declared that the principle of supremacy entails that the national courts must set aside provisions of national law if they are conflicting with Community rules, regardless of whether the national provisions were adopted prior to or after the Community rule in question.[20] As the Court continued, it also stated that this was not only an obligation for the constitutional courts, but all national courts.[21] However, as the case *IN.CO.GE'90*[22] illustrates, the fact that national courts must set aside national provisions contrary to EU law does not necessarily mean that the

[16] Case 6/64 *Flamino Costa v. E.N.E.L.*[1964] ECR 585, at pp. 594-595.
[17] Case 11/70 *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle Getreide* [1970] ECR 1125.
[18] Ibid., para 2.
[19] Ibid., para 3.
[20] Case 106/77 *Administrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR-629, paras. 17-21.
[21] Ibid., paras. 21-24.
[22] Case C-10-22/97 *Ministero dello Finanze v IN.CO.GE'90 and Others* [1998] ECR I-6307.

national provisions must be declared void. In contrast, they are just inapplicable.[23]

2.1.2 The Protection of Fundamental Rights

As already mentioned previously in this thesis, one of the purposes with adopting a Charter was to make the already existing protection of fundamental rights more visible to EU's citizens. In this section, I will briefly examine the ECJ's pre-Lisbon case law on the protection of fundamental rights. As will be shown in the following, the *Internationale Handelsgesellschaft* case played a significant part to this development.

The Treaty of Rome, founding the Community, contains no explicit reference to the protection of fundamental rights, which can be explained by the fact that the Community in the early days was intended to focus purely on economic integration. With only competence to act for economic integration such a reference did not appear to be necessary.[24] Even so, as Community law developed and the ECJ established the doctrine of direct effect and the principle of supremacy, the impact of Community law on Member States as well as individuals became evident.[25]

Initially, the ECJ rejected that the Community had to respect constitutional rights under national law.[26] However, the principle of supremacy led to growing concerns that Community law could impair the protection of human rights provided for by the Member States' constitutions.[27] Especially the German and Italian Constitutional Courts expressed their concerns for the lack of protection of human rights, which increased the pressure on the Community to act. As a result, the ECJ took a first step towards a new approach on human rights issues.[28]

In 1969, the ECJ overruled its previous case law and held in *Stauder* that a Community act could be interpreted in a certain way with the effect that it would not impair 'the protection of fundamental human rights enshrined in the general principles of Community law and protected by the Court'.[29] The mere reference to fundamental rights as general principles made headway for the leading case *Internationale Handelsgesellschaft*.[30]

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[23] Groussot, Xavier, *The Role of the National Courts in the European Union: A Future Perspective*, 2005, p. 16.
[24] Tridimas, op. cit., pp. 298-300.
[25] Zetterquist, Ola, 'The Charter of Fundamental Rights and the European *Res Publica*' In: Giacomo, Di Federico (ed.), *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument*, 2011, pp. 4-5.
[26] See e.g. Case 1/58 *Stork v High Authority* [1959] ECR 17.
[27] Craig & De Búrca, op. cit., pp. 364-365.
[28] Zetterquist, op. cit., pp. 5-6.
[29] Case 29/69 *Erich Stauder v. City of Ulm-Sozialamt* [1969] ECR 419, para. 7.
[30] Tridimas, op. cit., pp. 300-301.

As already evident from the previous section of this thesis, the ECJ restated in *Internationale Handelsgesellschaft* that Community law had to be given primacy. However, the Court also elaborated on fundamental rights:

> In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community…[31]

As highlighted by Takis Tridimas, the ECJ did not only take the principle of supremacy as far as possible, but also gave the Member States some reassurance that fundamental rights would be respected continually. By calling the constitutional traditions common to the Member States an inspiration to Community law, but nothing more, the Court also ensured the autonomy of Community law. Furthermore, since the protection of fundamental rights had to be ensured within the framework of Community law, the Court assigned to itself the task of safeguarding the protection of fundamental rights. Even though the ruling has been heavily criticized, Tridimas do not consider *Internationale Handelsgesellschaft* to be the result of judicial activism. Instead, he finds that it would be difficult to argue that the Court should have taken another direction. The Member States' constitutional traditions justified the notion that Community law and Community institutions had to respect fundamental rights. Being part of the Community legal order, the protection of fundamental rights had to be adjusted to the specific nature of that legal order and could not be a replica of protection of human rights at national level.[32] Notably, in *Internationale Handelsgesellschaft*, the Court did not consider the Community regulations in question to be contrary to fundamental rights of Community law.[33]

In following case law, the ECJ became more prone to perceive national constitutions as an inspiration when interpreting EU fundamental rights. In *Nold*, the ECJ reiterated that fundamental rights are general principles that must be ensured by the Court. However, this time around the Court continued and underlined the importance of the constitutional traditions common to the Member States as a source of inspiration and held that measures that could impair the protection of constitutional rights were incompatible with Community law. In this connection, the Court also emphasised that international human rights treaties should also be an inspiration and guideline within the framework of Community law.[34] This new approach was restated in *Hauer* where references were made both to some of the Member States' constitutions and to the ECHR.[35] However, as Tridimas has pointed out, both *Nold* and *Hauer* also shows that even though the ECJ accepted that it had to respect the Member States' constitutional

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[31] Case 11/70 *Internationale Handelsgesellschaft*, para 4.
[32] Tridimas, op. cit., pp. 302-304.
[33] Case 11/70 *Internationale Handelsgesellschaft*, para 20.
[34] Case 4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECR 491, para. 13.
[35] Case 44/79 *Liselotte Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727, paras. 15-20.

rights it continued to create its own interpretation of those rights. Thus, the ECJ did not only respond to the demands of ensuring the protection of constitutional rights, but also started to create a EU standard of protection somewhat other than the national standard of protection.[36]

In subsequent case law the ECJ extended the field of application of EU fundamental rights as it held that the Member States, when acting within the scope of EU law, had to comply with them.[37] In other words, that not only the validity of EU measures had to be reviewed in light of EU fundamental rights, but also measures by the Member States falling within the scope of EU law. It has, however, been questioned whether this development showed true concern from the ECJ regarding the protection of human rights or if the ECJ simply used fundamental rights as a way of extending the impact of EU law.[38] In contrast, other scholars have defended it and argued that it was an inevitable development.[39] Nevertheless, this development will be further examined under section 3.2 of this thesis.

2.2 Reactions from the National Courts

The question of the relationship between EU law and national law is not only a question of the relationship between the European legal order and the national legal orders, but also of the ECJ and the national courts. In the following, it will be discussed how the national courts have reacted to the principle of supremacy, in particular concerning the protection of fundamental rights. For reasons that have already been explained previously in this thesis, the main focus in this part will be on the FCC.

As already stated above, the principle of supremacy entails that EU law has primacy over national law, even over the Member States' constitutions. Furthermore, it entails two kinds of obligations for the national courts. Firstly, the national courts have a positive obligation to set aside national provisions if they are conflicting with EU law. Secondly, the national courts have a negative obligation to not review EU legislative acts in light of their own constitutions. The negative obligation of the national courts is thereby closely connected to the question of judicial *kompetenz-kompetenz*. In other words, which court, the ECJ or the national courts, is to decide over the limits of the Union's competence and which court has the capacity to review the validity of EU law and to declare acts of the Union *ultra vires*? The answer given to these questions from the ECJ has been that the ECJ is the

[36] Tridimas, op. cit., pp. 303-304.
[37] See e.g. Case 36/75 *Roland Rutili v The Minister for the Interior* [1975] ECR 1219; Case 5/88 *Wachauf v. Germany* [1989] ECR 2609 and Case C-260/89 *Elliniki Radiophonia Tileorassi Anonimi Etairia v Dimotiki Etairia Pliroforissis* [1991] ECR I-2951.
[38] Coppel, Jason & O'Neill, Aidan, *The European Court of Justice: Taking Rights Seriously?*, 1992.
[39] Weiler, Joseph H.H & Lockhart, Nicolas J.S, *Taking Rights Seriously: The European Court of Justice and its Fundamental Right Jurisprudence* Part I-II, 1995.

competent court. However, some of the Member States constitutional courts have challenged its position as the final arbitrator.[40]

The general approach among the national courts has been acceptance to the principle of supremacy, although, this acceptance has been subject to qualifications. One qualification is that some national courts have based the acceptance of the supremacy of EU law on provisions of their own constitution and thereby not fully agreed to the ECJ's reasoning in *Costa v Enel*. Another qualification is that some courts have limited the principle of supremacy so that EU law cannot have precedence over the most important provisions of the constitution, for example the constitutional rights.[41]

This is also the case with the German courts. The *Honeywell*[42] case from 2010 envisages a general acceptance to the principle of supremacy. However, this acceptance has some significant limitations.[43]

To begin with, the German Administrative Court was not entirely satisfied with the ECJ's ruling in *Internationale Handelsgesellschaft* and therefore referred the matter to the FCC. In 1974, the FCC held in *Solange I* (so long as) that the German Constitution did not allow a transfer of sovereign rights to an inter-state institution if it included a transfer of powers to alter absolute and essential features of the German constitutional structure such as the protection of German basic rights. Furthermore, it considered that the Community, at the then current level of integration and in lack of a written Bill of Rights, did not provide an adequate protection for fundamental rights.[44] In conclusion, the FCC held that it would not surrender its jurisdiction to rule on conflicts between Community law and German basic rights, and in case of such a conflict the German Constitution had to prevail.[45] Notably, the ECJ had decided on the previously mentioned *Nold* case two weeks before the *Solange I* ruling. However, the FCC did not make any reference to it.[46]

In 1986, the FCC altered its earlier position in the case that came to be known as *Solange II*. The FCC held that because of the development of the protection of fundamental rights in Community law, the court would no longer practice its jurisdiction to review Community measures *so long as* the protection of fundamental rights would continually be ensured at the then present level. As a sign of development, *Nold* and subsequent case law were mentioned.[47] Thus, in *Solange II*, the FCC still challenged the ECJ's position as the final arbitrator and reserved the right to safeguard the protection of German basic rights. Though, it also softened its previous

[40] Groussot, op. cit., p. 14.
[41] Craig & De Búrca, op. cit., pp. 268-269.
[42] BVerfG, 2 BvR 2661/06, 6 july 2012.
[43] Craig & De Búrca, op. cit., p. 272.
[44] BVerfGE 37, 271 [1974] 2 CMLR 540, at pp. 549-550.
[45] Craig & De Búrca, op. cit., p. 274.
[46] Kokott, Juliane, *German Constitutional Jurisprudence and European Integration: Part I*, 1996, p. 247.
[47] BVerfGE 73, 399 [1987] 3 CMLR 225, at p. 265.

position by stating that it would not practice its jurisdiction so long as the Community could adequately protect German basic rights instead.

Up until the *Maastricht*[48] decision in 1993, the FCC had mainly been concerned with the protection of fundamental rights. The novelty with the *Maastricht* decision was that the FCC took on to review the Maastricht Treaty's compliance with the German Constitution before ratification and addressed the limits to transfer of powers to the EC. One of the most significant aspects of this ruling is that the FCC held that the Member States are 'the master of the Treaties'. Thus, the FCC established, in contrast to what had been held by the ECJ, that it had the competence to define the limits to the Community's jurisdiction and to declare acts of the Community *ultra vires*.[49] This conclusion, which has also been called the *ultra vires*-lock, was restated in the *Lisbon*[50] decision. However, the FCC eventually softened its position in the previously mentioned case *Honeywell*. Even so, it should also be noted that in the *Lisbon* decision, aside from reaffirming the *ultra vires* lock, the FCC also held that the German Constitutional identity had to be respected and the FCC thereby established what has been called the identity-lock.[51]

In addition to the question of the limits to transfer of powers to the EC, the FCC once again addressed the protection of fundamental rights in the *Maastricht* decision and held that:

> However, the Court exercises its jurisdiction on the applicability of secondary Community legislation in Germany in a relationship of cooperation with the European Court, under which that Court guarantees protection of basic rights in any particular case for the whole area of the European Communities, and the Constitutional Court can therefore restrict itself to a general guarantee of the constitutional standard that cannot be dispensed with.[52]

This statement has been subject to different interpretations; one of them being that it was simply a restatement of *Solange II*.[53] In the *banana*[54] case, the FCC's competence to review Community law in light of the German Constitution and the protection of fundamental rights was again raised. With references to *Solange II* and the *Maastricht* decision, the FCC ruled that the case was inadmissible and held that it could only review Community measures if it could be proven that the Community provided a lower level of protection than the German Constitution.[55]

Thus, it can be concluded that the FCC has in a number of cases challenged the ECJ's position as the final arbitrator. Even though clear statements were

[48] BVerfGE 89, 155 [1994] 1 CMLR 57.
[49] Kolkott, op. cit., see especially p. 238 and pp. 260-261.
[50] BVerfG, 2 BvE 2/08, 30 june 2009.
[51] Craig & De Búrca, op. cit., pp. 277-280.
[52] BVerfGE 89, 155 [1994]1 CMLR 57, at p. 79.
[53] Groussot, op. cit., p. 25.
[54] BVerfGE 102, 147.
[55] BVerfGE 102, 147 and Groussot, op. cit., p. 28.

being made in *Solange I* and the *Maastricht* decision, the FCC softened its previous position in both *Solange II* and *Honeywell*.[56]

2.3 Constitutional Pluralism

2.3.1 A Non-Hierarchical Relationship

As evident from the section above, there can be said to be a difference between how the ECJ and how the national courts have viewed the principle of supremacy. The ECJ have held that EU law must have supremacy over national law, even over the Member States' constitutions, and positioned itself as the final arbitrator. However, this view has been contested and it has been argued that the national constitutions must have supremacy. The rationale for this view is that all state actions must be in compliance with the constitution since it is the highest norm in the national legal order. Additionally, a transfer of powers from the constitution to the EU would not be in accordance with constitutional provisions if it allowed violations of constitutional rights. In fact, this is how the FCC reasoned in *Solange I*. A second line of argumentation for the constitutions' precedence over EU law is based on the constitutional theory claiming that the people are the ultimate source of legitimacy for any legal order. National constitutions therefore should prevail over EU law since national constitutions are the result of the will of the people.[57]

Evidently, these two perspectives are contrary to each other as they present conflicting solutions to the question of which legal order is supreme, they cannot both be correct. However, it has been contested whether the hierarchical model, entailing that one legal system is always superior to the other, can rightfully explain the European integration and the relationship between the European legal order and the national legal orders.

To begin with, it should be noted that the principle of supremacy is much more ambiguous than previously revealed in this thesis. It has been highlighted that the ECJ has only used the phrase 'supremacy' in two cases and that it instead has used the phrase 'primacy' much more often to describe the notion that EU law must prevail over national law. In the academic literature, both supremacy and primacy have been used frequently. It has been questioned whether there might be a conceptual difference embedded in the different terminologies that goes beyond semantics. According to Avbelj, three different models of describing the relationship between EU law and national law can be discerned in the academic literature as well as in the ECJ's case law and the national courts' case law. Firstly, the *hierarchical model* only uses the phrase supremacy and sees the European legal order as supreme to the national legal orders, why all national legislation in conflict with EU law must be invalid. Secondly, the

[56] Craig & De Búrca, op. cit., p. 279.
[57] Torres Pérez, op. cit. pp. 42-44 and 50-53.

conditionally hierarchical model makes no difference between supremacy and primacy and accepts that there are limits to the supremacy of the European legal order. Lastly, the *heterarchical model* never uses the phrase supremacy since it denies that the relationship between EU law and national law is hierarchical. Instead, the principle of primacy should be used and only be understood as entailing an obligation for the national courts to disapply national law in conflict with EU law; in contrast to entailing that the conflicting national law is invalid.[58]

Aside from the fact that the principle of supremacy in itself is ambiguous, it has been held that one of the flaws with the hierarchical model is that it fails to recognize that both EU law and national law have had an influential effect on each other. According to the hierarchical model there can only be a one-way effect where the highest norm influences the lower norm. The opposite would be against the very nature of a relationship were one norm is always the 'master' and the other the 'serf'. But in reality it is not only the national legal orders that have been influenced by EU law. Indeed, the development of the protection of fundamental rights in EU law is one example of when the European legal order has adapted itself to principles of the national constitutions.[59] More generally, its been argued that one of the functions of general principles are that they have an influential effect and 'travel back and forth from the national legal systems to the EU'.[60]

In the academic literature there is one concept, which will be further examined in the next section of this thesis, that clearly seeks an alternative way of describing the relationship between EU law and national law: constitutional pluralism. Put simply, this concept is based on the notion that both the European legal order and the national legal orders have to bee seen as autonomous legal orders with their own constitutions. Thus, both legal orders have its independent sources of law and are functioning according to its own rules. Furthermore, within the territory of a Member State, the legal orders are co-existing and since they are autonomous they are in fact denying the existence of each other. Hence, constitutional pluralism recognises that the relationship between national law and state territory is not an exclusive one.[61]

2.3.2 Defining the Concept

As evident from the section above, one aspect of the concept constitutional pluralism is that it seeks to understand the relationship between EU law and national law in a non-hierarchical sense. However, constitutional pluralism

[58] Avbelj, Matej, *Supremacy or Primacy of EU Law-(Why) Does it Matter?*, 2011.
[59] Barents, René, *The Precedence of EU Law from the Perspective of Constitutional Pluralism*, 2009, pp. 440-441.
[60] Lenaerts, Koen & Guitiérrez-Fons, José A., *The Constitutional Allocation of Powers and General Principles of EU law*, 2010, p. 1653.
[61] Barents, op. cit., pp. 438-439.

is not one thing, containing only one meaning. Instead, it has been discussed in many different ways.[62]

It first surfaced in an article by Neil MacCormick[63], even though he did not call it constitutional pluralism at the time. Up until then, the common view had been that the European legal order had to have supremacy over the national legal orders and that all national courts should accept this principle. Even so, the FCC's ruling in the *Maastricht* decision envisaged that the national courts still did not accept the supremacy of EU law unconditionally.[64] In his article, MacCormick analysed the FCC's ruling in the *Maastricht* decision and argued that it could be understood as in accordance with pluralistic legal theory. According to this theory, the relationship between different legal orders is in fact pluralistic and not monistic just as it is interactive and not hierarchical.[65] From then on, the idea developed and started to be called by its name. As already stated, different scholars have developed and understood this concept in quite different ways. Among these theories there are six different concepts that have been more developed and therefore more influential.[66]

Thus, when discussing constitutional pluralism it is necessary to define which understanding of constitutional pluralism that is being presented and relied on. Based on the history of the protection of fundamental rights in EU law, which is to some extent the result of the pressure put on the ECJ by the national courts, I consider it to actually be the result of interplay between the courts. Therefore, I find the theories that have focused on a shared discourse between the courts to be particularly interesting and to contribute with useful perspectives. Two of them will be further examined under the next section of this thesis.

2.3.3 Discursive Constitutional Pluralism

Miguel Poiares Maduro has developed one of the more influential concepts; *harmonious discursive constitutional pluralism*.[67] According to Maduro, constitutional pluralism in practice consists of the fact that the relationship between the national courts and the ECJ is based on a dialogue. This dialogue and the co-operation between the courts have mainly developed through the system of preliminary rulings.[68]

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[62] See e.g. Avbelj, Matej & Komárek, Jan (eds.), *Four visions of constitutional pluralism*, 2008; Pernice, Ingolf, *Multilevel Constitutionalism in the European Union*, 2002, and Avbelj, Matej & Komárek, Jan (eds.), *Constitutional Pluralism in the European Union and Beyond*, 2012.
[63] MacCormick, Neil, *The Maastricht Urteil: Soveriegnity Now*, 1995
[64] Avbelj, & Komárek (eds.), op. cit., p. 2.
[65] MacCormick, op. cit., p. 259.
[66] Avbelj, & Komárek (eds.), 2012, op. cit., pp. 2-4.
[67] Ibid., p. 6.
[68] Maduro Poiares, Miguel, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, In: Walker, Neil (ed.), *Sovereignty in Transition,* 2003, pp. 511-513

Maduro claims that the European legal order developed through, and based its legitimacy on, a discourse with the national courts. Since the ECJ held that individuals could under certain circumstances invoke their EU rights before a national court, EU law became a new source of law for litigants to base their claims on. Individuals therefore became important actors with respect to the development of EU law aside from the ECJ and the national courts. Furthermore, the national courts were thereby given a significant task since the effective incorporation of EU law into the national legal orders became their responsibility. In this respect, the system of preliminary rulings played a significant part where the ECJ assumed the role of interpreting EU law while the national courts, by asking for preliminary rulings and enforcing these rulings, granted the ECJ's decision the same legal value as national judicial decisions. Hence, the European legal order could be said to have developed through, and been legitimised by, a legal discourse between the ECJ on the one hand and the national courts and individuals on the other. According to Maduro, this discourse is also continuing and the best understanding of the European legal order is achieved by understanding that these actors are all part of one legal community. Therefore, the interpretations of EU law and the legal outcomes of it are the result of the legal community as a whole, and 'a discourse among equals', instead of only the ECJ.[69]

Maduro does not only consider the European legal order to have developed through a discourse in practice, but he also sees this discourse as a strong argument for claiming that the European legal order should not be subject to a hierarchical model and that a hierarchical model would in fact harm its legitimacy. Put differently, there is no need to answer the question of which legal order is superior and which court is the final arbitrator as long as the different views of the ECJ and the national courts do not harm the European integration. Instead, legal pluralism should be welcomed.[70] However, there must still be some principles that all participants agree to in order to ensure harmony, otherwise the competing visions of the ECJ and the national courts could render to disintegration.[71] As I see it, Maduro basically claims that the shared discourse must be subjected to some common rules. Regarding the question of how to prevent constitutional conflicts, Maduro argues that it is essential that both the European legal order and the national legal orders can adept themselves to the other legal order's claim of authority. As an example, he raises that the national courts should be granted an increased margin of discretion, and in return the national courts should not review the validity of specific EU legal acts.[72]

This approach is also to some extent detectible in one of Maduro's opinions from his time as an Advocate General. It should be noted that the Charter had not become legally binding yet when this case was brought before the Court why Maduro is referring to fundamental rights as general principles.

[69] Ibid., pp. 513-517.
[70] Ibid., pp. 520-523.
[71] Ibid., pp. 523-524.
[72] Ibid., pp. 533-534.

The case concerned the validity of a Community directive that conflicted with provisions in the French Constitution. In this connection, Maduro raised the question of how to protect national constitutions without undermining the principle of primacy. Maduro held that Article 6 TEU has a dual function. First of all it should be viewed as an assurance to the Member States that Community law will not threaten the fundamental values of their constitutions since said article expresses respect for the constitutional traditions common to the Member States. At the same time, he held that Article 6 TEU entails that the Member States have left it to the ECJ to safeguard those values within the scope of Community law. Furthermore, he argued that constitutional values should not be used as a review of Community legal acts since that could imply different end-results in different Member States. If the European legal order allowed such varieties in the application of Community law it would not be based on the rule of law why Community law must prevail over national law. Even though Maduro held that national courts must accept the principle of primacy, he also highlighted that the national courts have an important role in interpreting general principles and fundamental rights of Community law and that the system of preliminary rulings opens up for such a dialogue.[73] Thus, even though slightly more pragmatic in his role as an Advocate General, Maduro emphasised the possibility of a shared discourse through the system of preliminary rulings. However, it has been pointed out that the uniformity in application of EU law, which Maduro found necessary, would probably entail a greater sacrifice of national identity than is evident in his reasoning.[74]

With respect to the protection of fundamental rights, Aida 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 emphasises 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 bellow the level of protection provided for by the national constitution. Torres 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 (ECJ) 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,

[73] Opinion of Advocate General Poires Maduro in Case C-127/07 *Société Arcelor Atlantique et Lorraine and Others v Premier ministre, Ministre de l'Écologie et du Développement durable and Ministre de l'Économie, des Finances et de l'Industrie* [2008] ECR I-9895, para. 15-17.
[74] Craig & De Búrca, op. cit., pp. 299-300.

which national courts have to apply even if they conflict with constitutional rights?[75]

According to Torres, the ECJ's legitimacy could be based on the ideal of a dialogue. To begin with, Torres 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, Torres finds that state autonomy justifies the allowance of a certain degree of diversity. However, this should not be viewed as in starch 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.[76]

Put simply, Torres 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 states 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 situations she finds this most likely to happen in is when the ECJ reviews a Member State's measure that is only remotely related to EU law and when the national standard offers a higher level of protection.[77]

To sum up, both Maduro and Torres have focused on a shared discourse between the ECJ and the national courts and consider an on-going dialogue to be a source of legitimacy for the ECJ. It is also evident that there is a tension between uniformity and diversity. Maduro has addressed the tension that exists on a more general level between a uniform application of EU law and the Member States national identity. In this respect, he has highlighted that EU law has to prevail over national constitutions in order to secure a uniform application of EU law and that this is a consequence of the rule of law. However, he has also argued that the national courts have an important

[75] Torres Pérez, op. cit. see especially p. 25, p. 66-67 and p. 97.
[76] Ibid., see especially pp. 70-93.
[77] Ibid., see especially pp. 138-140 and pp. 176-177.

function to contribute to the ECJ's interpretations through the system of preliminary rulings.

Torres on the other hand has focused entirely on the protection of fundamental rights and the ECJ's review of measures by Member States. Here the tension between uniformity and diversity lays in whether EU fundamental rights should be interpreted uniformly or if it should be accepted that they are interpreted slightly differently in different Member States. According to Torres, a common EU standard of protection should be developed through a dialogue between the national courts. However, this dialogue could also lead to an exercise of deference in some cases.

3 The Horizontal Provisions

3.1 A Legally Binding Charter

As the Lisbon Treaty entered into force the Charter became legally binding and was given the same legal value as the Treaties. Naturally, the question arises what this will entail for the future and the protection of fundamental rights in the post-Lisbon context. Alan Rosas has highlighted that a legally binding Charter does not alter the Union's previous status, it does not turn into a human rights organisation just as the ECJ will not all of the sudden be a human rights court. The consequences are much less dramatic.[78] Even so, the implications of a legally binding Charter have been discussed at length in the academic literature ever since the EU first started to draft a Charter, it is therefore not a completely new issue, and it seems like all possible scenarios have been dealt with.[79]

In chapter 2 of this thesis, I examined different ways of describing the relationship between EU law and national law. In the following I will examine the horizontal provisions that I have decided to focus on and try to identify their function as well as what they might entail for the relationship between EU law and national law.

3.2 The Field of Application

Article 51 of the Charter governs the Charter's field of application and the article states that:

> 1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.'
>
> 2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties. [80]

[78] Rosas, Alan, *When is the EU Charter of Fundamental Rights Applicable at National Level?* 2012, p. 1276.
[79] See e.g. A De Vires, Sybe, Bernitz Ulf & Weatherill, Stephen (eds.) *The Protection of Fundamental Rights in the EU After Lisbon*, 2013;, Peers, Steve and Wards, Angela (eds.), *The EU Charter of fundamental rights*, 2004 and Mock, William B.T. & Demuro, Gianmario. (eds.), *Human rights in Europe: commentary on the Charter of Fundamental Rights of the European Union*, 2010.
[80] Article 51, Charter of Fundamental Rights of the European Union, [2010] OJ C83/389.

Article 51(1) clarifies that the Charter is primarily addressed to the institutions, bodies, offices and agencies of the Union. It has been pointed out that this conclusion is almost redundant considering the history of fundamental rights and the fact that one of the most important objectives with drafting a Charter was to secure the protection of human rights in EU law.[81] Secondly, the Charter is addressed to the Member States, but only 'when they are implementing Union law'.

During the drafting of the Charter, the wordings of Article 51(1) were one of the most debated questions and the wordings of the article were changed several times during the process.[82] The vagueness of this formulation, compared with previous case law, will be discussed under section 3.2.1. Firstly, it should be clarified why the Charter's field of application matters for the relationship between EU law and national law.

As Torres highlighted, and used as a point of departure for her theory, the incorporation of EU fundamental rights to the states has resulted in that there are areas were EU fundamental rights and constitutional rights might overlap and conflict. When Member States act within the scope of EU law they are not only bound by constitutional rights under national law but also by EU fundamental rights. As a result, a national court, faced with the task of reviewing state acts, has to decide which norm to apply. From the perspective of constitutional law, the national court must apply the constitutional rights. From the perspective of EU, the Member States must apply EU fundamental rights if the legislation falls within the scope of EU law. If the national court has any doubts about the interpretation of the EU standard of protection it must make a reference for a preliminary ruling to the ECJ. Even though the ECJ cannot decide on the validity of the national legislation, the Court's interpretation will determine the outcome of the national court's ruling. Hence, the field of application of EU fundamental rights matter since it decides the ECJ's power to review state acts. Put differently, 'by deciding on the scope of EU fundamental rights, the ECJ is deciding on the scope of its own powers, and its capacity to influence upon state policies'.[83]

In this connection, it should be emphasised that Article 6(1) TEU states that 'The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties'.[84] In the same vein Article 51(2) of the Charter declares that it does not establish any new powers for the Union or modify already established powers as defined in the Treaties. This over explicit emphasis on the limits to the EU's powers is the result of some of

[81] Cartabia, Marta, 'General Provisions' In: Mock, William B.T. & Demuro, Gianmario. (eds.), *Human rights in Europe: commentary on the Charter of Fundamental Rights of the European Union*, 2010, pp. 315-316.
[82] Torres Pérez, op. cit. p. 23.
[83] Ibid., pp. 23-24.
[84] Article 6(1), Consolidated Version of the Treaty on European Union [2010] OJ C303/17.

the Member States' fear that the Charter could otherwise be used to extend the Union's competence.[85]

3.2.1 A Restriction of Previous Case Law?

According to Article 51(1) of the Charter, the Member States must comply with the Charter rights 'only when they are implementing Union law'. This formulation has caused a lot of debate among scholars since the literal meaning appears to entail a restriction of the pre-Lisbon case law, which used the 'scope of EU law' as the decisive formula.[86]

However, the pre-Lisbon case law is not completely straightforward and the Court never spelled out the exact meaning of 'the scope of EU law'. In practice, it seems to have entailed that the Court focused on finding any cross-border elements to establish a connection between the national measures in question and EU law.[87] As a result, the situations that were considered to be 'a wholly internal situation' were viewed as falling outside the scope of EU law and thereby excluded the ECJ from having jurisdiction.[88]

Different classifications of the situations where the Member States had to comply with EU fundamental rights pre-Lisbon appear in the academic literature. Even though the classifications vary to some extent, there seems to be consensus regarding the two main categories: when Member States acted as agents of EU law and when Member States derogated from EU law.[89]

The first category has commonly been referred to as Wachauf-type cases and essentially concerned the situations when Member States were implementing EU law. The leading case, *Wachauf,* raised the question of the validity of the German authorities' implementation of various Regulations on the system of milk quotas. The plaintiff argued at national level that the implementation infringed on his constitutional rights under national law.[90] With reference to *Hauer*, the ECJ restated that fundamental rights forms an integral part of the general principles of Community law and therefore must be ensured by the Court. Furthermore, the importance of constitutional

[85]Pernice, Ingolf, 'The Treaty of Lisbon and Fundamental Rights' In: Griller, Stefan & Ziller, Jacques (eds.), *The Lisbon Treaty: EU constitutionalism without a constitutional treaty?*, 2008, pp. 242-244.
[86] See e.g. Craig, Paul, *The Lisbon Treaty: law, politics, and treaty reform*, 2010, p. 211.
[87] Groussot, Xavier; Pech, Laurent. & Petursson, Gunnar Thor., *"The Scope of Application of EU Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication"*, 2011.
[88] See e.g. Case 12/86 *Meryem Demirel v Stadt Schwäbisch Gmünd* [1987] ECR 03719 and Case C-299/95 *Friedrich Kremzow v Republik Österreich* [1997] ERT-I-2637.
[89] See e.g. Craig & De Búrca, op. cit., pp. 382-389, Tridimas, op. cit., pp 320-326 and Groussot; Laurent & Petursson, op. cit.
[90] Case 5/88 *Wachauf v. Germany* [1989] ECR 2609, paras. 17-19.

traditions common to the Member States was again emphasised.[91] Regarding the Member States' obligations the Court concluded 'since those requirements are also binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with those requirements'.[92]

The Court's position in *Wachauf* was restated in *Bostock*; again the issue concerned the implementation of Community Regulations.[93] In subsequent case law it was also established that the Member States had to comply with EU fundamental rights when implementing directives.[94]

Both *Wachauf* and *Bostock* dealt with the scenario of Member States implementing EU law but the further development of the pre-Lisbon case law suggests that yet another type of situations can be discerned within the Wachauf line of cases; when Member States apply or interpret any provisions of national law that falls within the scope of EU law. The cases *Rundfunk*[95] and *Lindqvist*[96], which both concerned Directive 95/46[97], illustrate this. Even though there were no apparent cross-boarder elements in these two cases the ECJ found that the national measures fell within the scope of EU law, in contrast to the Advocate General who in both cases argued that the Court did not have jurisdiction to answer the questions from the national courts.[98] Thus, *Rundfunk* and *Lindqvist* can both be said to illustrate a more extensive interpretation of the scope of EU law within the Wachauf-line of cases.

However, an even more extensive interpretation of the scope of EU law is noticeable in the second category of cases: the ERT-type cases. In 1991, the Court clarified in *ERT* that the Member States also had to comply with EU fundamental rights when derogating from EU law.[99] In contrast to the previous case *Clinéthèque*, which had indicated the opposite. [100] In *ERT* the issue in question was if the Greek state's limitation of the freedom to provide services, based on clauses in the EC Treaty allowing derogation,

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[91] Ibid., para. 17.
[92] Ibid., para. 19.
[93] Case C-2/92 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Dennis Clifford Bostock* [1994] ECR I-955.
[94] See e.g. Case C-442/00 *Ángel Rodríguez Caballero v. Fondo de Garantía Salarial* [2002] ECR I-11915.
[95] Cases C-465/00, C-138-139/01 *Rechnungshof v Osterreichischer Rundfunk* [2003] ECR I-4989.
[96] Case C-101/01 *Lindqvist* [2003] ECR I-12971.
[97] Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.
[98] Groussot; Laurent & Petursson, op. cit., pp. 6-7; Case C-101/01 *Lindqvist*; Cases C-465/00, C-138-139/01 *Rundfunk*; Opinion of Advocate General Tizzano in Case C-101/01 *Lindqvist* and Opinion of Advocate General Tizzano in Cases C-465/00, C-138-139/01 *Rundfunk*.
[99] Case C-260/89 *Elliniki Radiophonia Tileorassi Anonimi Etairia v Dimotiki Etairia Pliroforissis* [1991] ECR I-2951.
[100] Joined Cases 60 and 61/84 *Clinéthèque v Fédération Nationle des Cinémas Francais* [1985] ECR 2605.

had to be compatible with fundamental rights. The ECJ again repeated that fundamental rights forms an integral part of Community law and expressed that the Community cannot accept measures by Member States that are not compatible with fundamental rights. As the Court continued it clarified that it would have jurisdiction to review national rules when they fall within the scope of Community law.[101]

In subsequent case law, it was also clarified that the obligation to comply with EU fundamental rights did not only exist when Member States relied on derogation clauses in the Treaty but also when they relied on a public interest as recognized by the Court's jurisprudence.[102] In addition, it was established in *Schmidberger* that the protection of fundamental rights itself could be a legitimate reason for derogations from EU law. In this case, the right to free movement of goods had been limited with respect to the right to freedom of expression and assembly.[103]

The *ERT* case was undoubtedly an extension of the Courts jurisdiction to review measures by the Member States compared with the *Wachauf* case.[104] This line of cases has also been contested because of the extension of the Court's jurisdiction. Some of the most controversial cases have involved EU citizens' free movement rights, where the Court's pre-Lisbon case law envisages a very extensive interpretation of the scope of EU law. It appears as if only the risk of obstructing or harming these rights have been enough for the Court to establish that the matter fell within the scope of EU law.[105] In this connection, *Carpenter* can be used as an illustrative example.

Mrs Carpenter, a third country national was facing deportation from the United Kingdom after overstaying her leave and failing to apply for extension of her stay. She was married to a British national and argued that a deportation of her would infringe her husband's freedom as a EU citizen to provide and receive services.[106] The couple resided in the United Kingdom why it at first is difficult to imagine how there could be a connection between her deportation and her husbands right to EU free movements, but she claimed that he was only able to conduct his businesses because she was minding his children from a previous marriage.[107] The Commission held that a EU citizen's freedom to provide services was not concerned in this particular situation since it does not apply to 'a national of a Member State that has never sought to establish himself with his spouse in another Member State but merely provides services from his State of

[101] Case C-260/89 *ERT*, para. 42-43.
[102] Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689.
[103] Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-5659.
[104] Craig & De Búrca, op. cit., p 385.
[105] Groussot; Laurent & Petursson, op. cit., p. 11.
[106] Case C-60/00 *Carpenter v Home Secretary* [2002] ECR I-6279.
[107] Ibid., para 21.

origin.'[108] In other words, the Commission rejected the existence of any cross-boarder elements and considered it to be a wholly internal situation.

In contrast, the Court accepted that there was a connection to Community law since a significant part of Mr Carpenter's businesses, consisting of selling advertising space, were conducted with business partners in other Member States. Quite surprisingly, the Court also accepted that Mr Carpenter's freedom to provide services could be adversely affected if he was to be separated from his spouse and she no longer could attend to his children.[109] The Court then continued and recognized the Member State's right to invoke public interest and restrict the fundamental freedoms established by the Treaty with the proviso that the measures must comply with fundamental rights. Finally, the Court considered that the measures taken by the United Kingdom was a disproportionate infringement on Mr Carpenters right to family life.[110]

To sum up, the Wachauf-type cases essentially concerned the implementation of EU law while the ERT-type cases concerned derogations from EU law. It has therefore been argued that Article 51(1) of the Charter, stating that the Charter is binding on the Member States 'only when they are implementing Union law', could be interpreted as only addressing the Wachauf-type situations. However, this interpretation of Article 51(1) would exclude the ERT-type situations from its scope of application and entail a significant restriction of the Court's previous case law.[111] This would of course also mean that the ECJ's power to review state measures, and influence upon state policies, would decrease significantly.

3.2.2 The Meaning of 'Implementing Union Law'

According to Paul Craig, there are four arguments to support the conclusion that the drafters of the Charter did not intend to diverge from the pre-Lisbon case law. First of all there is what Craig calls the 'textual argument'. In the ECJ's previous case law, the Court has used the wordings 'implementing Community rules' when referring to the scope of Community law. Furthermore, the ERT type cases are in a way also about the implementation of EU law since the possibility to derogate from EU law is provided for by EU law itself. [112]

Craig's second argument is that the explanations relating to the Charter supports a broad interpretation.[113] Notably, the explanations, which must be

[108] Ibid., para. 27.
[109] Ibid., para. 37.
[110] Ibid., paras. 40-46.
[111] See e.g. Groussot; Laurent & Petursson, op. cit., pp. 18-19, Biond; Eeckhout & Ripley (eds.), op. cit., pp. 10-11 and Craig, Paul, *The Lisbon Treaty: law, politics, and treaty reform*, 2010, pp. 211-213.
[112] Craig, op. cit., p. 211.
[113] Ibid., pp. 212-213.

given due consideration when interpreting the Charter according to Article 6(1) TEU and Article 52(7) of the Charter, uses both the wordings 'scope of Union law' and 'implementing Union law' when addressing the Member States' obligations. In this connection, there is also a reference to the *ERT* case.[114]

The third argument Craig presents is a normative argument. According to Craig there are no principle reasons for making a distinction between the Wachauf-type cases and the ERT-type cases, the protection of fundamental rights is equally important in both scenarios. Finally, the fourth argument is that a narrow interpretation would create an unsatisfactory situation since the ECJ's pre-Lisbon case law would still be valid. This would entail that even though the ERT-type cases would not fall within the Charter's scope of application it would still be possible to rely on fundamental rights as general principles when Member Sates' derogate from EU law. Hence, there would be two parallel systems of review, which would only complicate matters.[115]

Then again, what should the meaning of 'implementing Union law' be? According to Rosas, the meaning of 'implementing Union law' and the question of the Charter's field of application should be focused on whether another EU norm is applicable or not. He highlights that the word 'implementing' has not been used in all translated versions of the Charter. In fact, the Swedish translation, as an example, uses the verb 'apply' (tillämpa). He also highlights that the pre-Lisbon case law indicate that the ECJ has actually used this method. For example in *Carpenter*, the ECJ started out by considering whether the case before it involved the application of another EU norm before addressing the question of the Member States' compliance with EU fundamental rights.[116]

However, Rosas considers that a significant distinction must be made between cases where another EU norm is applicable *in concreto* and applicable *in abstracto*. 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 for the litigation at hand. According to Rosas, this should be avoided because the Charter rights would otherwise be applicable in almost all situations since almost all areas are covered by EU law one-way or the other. In fact, Rosas considers that this distinction illustrates the difference between the more narrow formula 'implementing Union law' and the wider formula 'the scope of EU law'.[117]

Under section 4 of this thesis, I will return to the meaning of 'implementing Union law' as I examine the Court's reasoning in *Åkerberg*.

[114] Explanations Relating to the Charter of Fundamental Rights, [2007] OJ C303/17.
[115] Craig, op. cit., pp. 211-213.
[116] Rosas, op. cit., pp. 1277-1278.
[117] Ibid., pp. 1280-1281.

3.3 National Constitutional Traditions

Under section 2.1.2 of this thesis it was indicated that the ECJ in the cases *Nold* and *Hauer* became more prone towards using the constitutional traditions common to the Member States as an inspiration when interpreting EU fundamental rights. At the same time, the ECJ started to create a EU standard of protection somewhat other than the national standard of protection.

Article 52(4) of the Charter states that:

> In so far as this Charter recognises fundamental rights as they result from constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.[118]

This entails that the ECJ has an interpretive obligation with respect to those rights that are originating from the Member States' constitutions. This obligation does not require that there has to be 'identity of result', instead Article 52(4) imposes an obligation of harmonious interpretation. However, this is still a difficult task since the particular meaning of a right can vary considerably among the Member States.[119]

In fact, it has been pointed out that the ECJ in its pre-Lisbon case law has more often made references to international human rights treaties than to national constitutional traditions. The reason for this is probably that the protection of human rights varies from Member State to Member State and that it is therefore difficult to establish what really is 'common'. In contrast, international human rights treaties that have been ratified by all Member Sates can easier be said to envisage a commonality.[120]

Weiler has also discussed the fact that human rights are not identical in all the European countries. Instead, they differ from society to society and reflect the values and choices of every single polity. Thus, they are part of the social identity and are therefore treasured by the people. Furthermore, the protection of human rights always entails striking a balance between competing interests. Just like human rights themselves are an expression of a society's values, this balance, and how competing interests are balanced against each other, is an expression of societal choices. As a consequence, the question of which standards of protection are considered to be fundamental rights in the European legal order, and the balance between them, matters a great deal.[121]

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[118] Article 52(4), Charter of Fundamental Rights of the European Union, [2010] OJ C83/389.
[119] Craig, op. cit., p. 234.
[120] Craig & De Búrca op. cit., p. 369.
[121] Weiler, Joseph H. H., 'Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights', In: Neuwahl, Nanette & Rosas, Alan (eds). *The European Union and Human Rights*, 1995, pp. 51-55.

As I see it, the ECJ is therefore always left with a difficult task since whatever standard the ECJ adopt, and however the balance is struck, the Court risks harming one of the Member State's constitutional rights. Then, from a normative point of view, which standard should the ECJ adopt?

The maximalist approach advocates that the ECJ should adopt the highest standard. Using *Hauer* as an example, this would have entailed that the Court had adopted the German standard, as it was higher than the Community standard which the Court did not. In fact, the ECJ has never accepted the maximalist approach. According to Weiler, there are good reasons for the Court's reluctance as the maximalist approach would not be preferable; it would always favour one Member State at the expense of others. He illustrates this by using a hypothetical example; what if one Member State amended their constitution and introduced 'fresh air' as a constitutional right? If this right, being the highest standard, was adopted at EU level it would have to be respected by all Member States due to the principles of primacy and direct effect. Would this not be a great injustice for a country like Ireland, which is economically dependent on heavy industries? Instead, Weiler argues that the protection of fundamental rights at EU level should reflect all the Member States and their core values. [122]

Would it be better then to try to establish the lowest common denominator among the Member States? According to Tridimas, neither the maximalist approach nor the minimalistic approach, are appropriate solutions. Instead, the ECJ must establish a standard that is suitable with respect to the specific nature of the European legal order.[123]

This is clearly also the view of Weiler, who uses *Hauer* as an example of how the Court has, in its pre-Lisbon case law, established that the European legal order cannot adept itself to all of the requirements at national level. In this connection, Weiler points to the Court's statement:[124]

> The introduction of special criteria for assessment stemming from the legislation or constitutional law of a particular Member State would, by damaging the substantive unity and efficacy of Community law, lead inevitably to the destruction of the unity of the Common Market and the jeopardizing of the Cohesion of the Community.[125]

Weiler also highlights that even if the ECJ had adopted the higher German standard in *Hauer*, it would still have been a matter of applying this standard to the facts of the case and finding the "right" balance between different interests, the competing interest being the right to property and the public interest. Then again, if the balance between two competing interests itself differs among the Member States and represents different societal choices, which balance should be struck? In this respect, Weiler finds it naturally that the European legal order must find its own balance and that is

[122] Weiler, op. cit., pp. 58-61.
[123] Tridimas, op. cit., p. 312.
[124] Weiler, op. cit., pp. 58-60.
[125] Case 44/79 *Hauer*, para. 14.

must be secured by the ECJ. In other words, it should be accepted that the ECJ is for the European legal order what the constitutional courts are for the national legal orders.[126]

Even though Weiler apparently supports the autonomy of EU fundamental rights, he makes one significant distinction between the varying situations where Member States' measures had to comply with fundamental rights. According to Weiler, it is natural that the Member States have to adjust themselves to a EU standard when acting as agents of EU law, even if that would entail that constitutional rights might be harmed. Regarding the ERT-type situations, when Member States derogate from EU law, he instead considers that the national standard should be applied and that the ECJ should only interfere if the national standard is not in conformity with the ECHR. The reason for this distinction would be that when acting as agents, the Member States are implementing EU law, whereas when derogating from EU law they are implementing their own policies.[127] Notably, as illustrated by *Carpenter*, this has not been the view of the Court.[128]

With respect to Article 52(4) of the Charter, it is evident from the explanations relating to the Charter that the article is not intended to secure the lowest common denominator, but rather to offer a 'high standard' of protection.[129] A fair conclusion also seems to be that this should not be interpreted as to mean that the ECJ should seek to secure the 'highest standard' of protection. But what then is a 'high standard' of protection and how can the ECJ interpret the Charter rights in harmony with national constitutional traditions when they in fact differ?

In my view, the fact that constitutional rights are not identical in all Member States raises a question related to the tension between uniformity and diversity that was previously addressed under section 2.3.3; does the Charter rights have to be interpreted uniformly or should the ECJ defer to the interpretation of a fundamental right under national law in some cases?

With regard to this question, one of the pre-Lisbon cases is particularly interesting, namely *Omega Spielhallen*.[130] In this case, the German authorities had prohibited a German company, which had concluded a franchise agreement with a British company, to organize laserdrome games. The game was prohibited since it was considered to trivialize violence in a way that ran counter to the fundamental value of human dignity enshrined in the German Constitution. The affected company appealed the order and held that it infringed on their Community rights, in particular the free movement of goods and the freedom to provide services.[131]

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[126] Weiler, op. cit., pp. 65-66.
[127] Ibid., pp. 72-74.
[128] Tridimas, op. cit., p. 327.
[129] Explanations Relating to the Charter of Fundamental Rights, [2007] OJ C303/17.
[130] Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundersstadt Bonn* [2004] ECR I-9641.
[131] Ibid., paras. 6-9.

The view of the relevant national court was that the national constitution could not allow a game that supported violence and denied the fundamental right of each person to be respected and acknowledged. Therefore, the national court stayed the proceeding and asked the ECJ if it would be allowed to prohibit certain elements of the game simply because it offended values enshrined in the constitution even though such a prohibition entailed a derogation from EU law.[132]

The ECJ again stressed that fundamental rights are an integral part of Community law which observance the Court must ensure and that the Court, when ensuring fundamental rights, draws inspiration from the constitutional traditions common to the Member States as well as international human rights treaties. The Court also highlighted that it strives to ensure that the principle of human dignity is protected, but that the right had a particular standing in the German Constitution as it had the status of an independent fundamental right.[133] With reference to *Schmidberger*, the Court also held that the protection of fundamental rights could be a legitimate interest and ground for derogations. However, this would require that the measures by the Member State were proportionally which the Court considered Germany's measures to be since only certain elements of the game were prohibited.[134] Put simply, the Court recognized that human dignity had a special standing in the German Constitution and found that it was acceptable to allow an application of this higher standard. Additionally, with respect to the balancing of interest, Germany's measures were found to be proportionate.

Notably, the *Omega Spielhallen* case shows that the ECJ has accepted to allow a certain degree of diversity. According to Xavier Groussot, Article 52(4) could actually have a similar function. To begin with, he considers that Article 52 (4) is an extension of Article 4(2) TEU, which states that EU must respect the Member States' constitutional identities. Furthermore he argues that Article 52(4) actually reflects constitutional pluralism. Given this interpretation, Article 52(4) could be used by the Court in situations similar to *Omega Spielhallen* to reconcile a strong national constitutional principle with a conflicting Charter right. Thus, the article could be the vehicle for ensuring that the European legal order and the national legal orders can co-exist in a peaceful manner.[135]

[132] Ibid., paras. 15-17.
[133] Ibid., paras. 33-36.
[134] Ibid., para. 39.
[135] Groussot, Xavier, 'Constitutional Dialogues', In: Avbelj, Matej & Komárek, Jan (eds), *Constitutional Pluralism in the European Union and Beyond*, 2012, pp. 331-332.

3.4 The Level of Protection

As already stated previously in this thesis, the protection of human rights in Europe can be said to exist in three different spheres, at international, at supranational and at national level. Article 53 of the Charter declares that:

> Nothing 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.[136]

It therefore seems like Article 53 of the Charter aims at managing potential conflicts of rights and to ensure that the Charter will not undermine the already existing protection of human rights.[137]

Regarding the Charter's relation to the ECHR the meaning of Article 53 appears to be that the Charter must provide, at the minimum, the same level of protection as the ECHR secures. This assumption is strengthened by the fact that the potential risk of harming the level of protection provided for by the ECHR was a great concern of the Council of Europe and during the drafting of the Charter it indicated on several occasions that the Charter would not be accepted if it adversely affected the ECHR.[138]

With regard to the relationship between the Charter and the Member States' constitutions, the "correct" interpretation of Article 53 is far from self-evident. To begin with, it has been raised that the phrase 'in their respective fields 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 other rights, why else would there be a need to insert this article?[139]

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 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

[136] Article 53, Charter of Fundamental Rights of the European Union, [2010] OJ C83/389.
[137] Cartabia, op. cit., p. 336.
[138] Ibid., pp. 336-337.
[139] Besselink, Leonard F.M, *The Member States, the National Constitutions and the Scope of the Charter*, 2001, p. 75.

higher level of protection.[140] Hence, this interpretation would alter the relationship between EU law and national law significantly.

According to Torres, there is an alternative way of interpreting Article 53, which goes well in line with her theory that was discussed under section 2.3.3. Torres 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.[141]

[140] Besselink, op. cit. and Carozza, Paolo, 'The Member States', In: *The EU Charter of fundamental rights,* Peers, Steven and Wards, Angela (eds.), 2004, p. 45.
[141] Torres Pérez, op. cit. pp. 175-176.

4 The Charter; Altering the Relationship Between EU Law and National Law?

4.1 Recent Case Law

In February 2013, the ECJ finally delivered its rulings in *Åkerberg* and *Melloni*. Even though it at first might seem as these two cases deal with completely different issues, they are in fact closely connected and must be read in conjunction. In the following, I will therefore describe the cases and the issues concerned separately, before I start analysing the Court's reasoning under the next section of this thesis.

4.1.1 Åkerberg

The *Åkerberg* case was referred to the ECJ under Article 267 TFEU from a Swedish court, Haparanda Tingsrätt, and concerned the Swedish system of financial- and criminal penalties and its compliance with the *ne bis in idem* principle. In 2007, the Swedish tax authority (Skatteverket) had obligated Mr Åkerberg to pay a financial penalty since he had provided Skatteverket with false information about his economic activity in his tax returns for 2004 and 2005. Due to the false information, Mr Åkerberg had withheld a significant amount of money, part of it being value added tax (VAT), from the national exchequer. In 2009, Mr Åkerberg was summoned to appear before Haparanda Tingsrätt, facing criminal charges of serious tax offences. Just like the financial penalty, the criminal charges were based on the fact that Åkerberg had provided false information in his tax returns for 2004 and 2005.[142]

The question then arose before Haparanda Tingsrätt whether Mr Åkerberg could be penalised a second time for the same conduct or if the charges should be dismissed because of the prohibition on being punished twice for the same actions enshrined in Article 4 of Protocol No 7 to the ECHR and Article 50 of the Charter. In this connection, Haparanda Tingsrätt decided to stay the proceedings and referred a number of questions to the ECJ. The questions all aimed at clarifying the national legislation's compliance with the principle *ne bis in idem* and the Member States' obligations under EU law. However, the Commission and several Member States, one of them being Sweden, objected and held that the subject-matter did not fall within the Court's jurisdiction since the circumstances of the case did not concern the implementation of Union law. Therefore, it was argued that according to

[142] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] (not yet published), paras. 12-13.

Article 51(1) of the Charter, the Member State's measures should not be reviewed in light of the Charter.[143]

Evidently, the *Åkerberg* case raised the question of how to interpret Article 51 of the Charter, and entailed a possibility to receive some clarifications from the Court regarding the scope of EU law in the post-Lisbon context. I will shortly return to this question and the Court's reasoning, but first something must be said about the *Melloni* case.

4.1.2 Melloni

As I have already highlighted in this thesis, there is potential for a conflict between constitutional rights and the Charter rights. What standard should be applied and must EU law always be given precedence over national law due to the principle of supremacy?

Within one particular area, the potential for a conflict between constitutional rights and the Charter seems to be very evident: the area of freedom, justice and security (AFSJ), which includes policies on immigration and criminal law. The *Melloni* case illustrates this as it raised the question of European Arrest Warrants (EAW) and the application of constitutional rights.

The *Melloni* case concerned an Italian citizen, Mr Melloni, who was arrested in Spain in 1996 and for whom Italy had issued an EAW in 1993. Because of the EAW, a Spanish court decided that Mr Melloni was going to be extradited to Italy. However, after being released on bail, Mr Melloni fled and could therefore not be surrendered to the Italian authorities. Even so, the proceeding against Mr Melloni continued in Italy and since he had not made appearance in court it was decided that further notice was to be given to his appointed lawyers. Subsequently, the Italian courts sentenced Mr Melloni *in absentia*, that is without him being present, to ten years imprisonment for bankruptcy fraud. Mr Melloni's lawyers appealed the sentence without any success and the Italian authorities issued an EAW for execution of the sentence.[144]

In 2008, Mr Melloni again was arrested in Spain. This time around, Mr Melloni held before the Spanish court that he should not be extradited to Italy since it would be impossible for him under Italian law to appeal against the sentence imposed *in absentia*. In the end, Mr Melloni made a petition for constitutional protection to the Spanish Constitutional Court, claiming that an extradition to Italy, without the condition that he could appeal against the sentence in Italy, would violate his constitutional rights to a fair trial. In addition, Mr Melloni held that his right to human dignity would also be undermined.[145]

[143] Case C-617/10 *Åkerberg*, paras. 14-15.
[144] Case C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] (not yet published), paras. 13-14.
[145] Ibid., paras. 15-18.

The Spanish Constitutional Court found that the extradition of a person from Spain to another country, which does not guarantee that the convicted party will be able to appeal a sentence imposed *in absentia*, would actually violate the Spanish constitutional right to a fair trial. Therefore, the Spanish Constitutional Court stayed the proceedings and asked the ECJ for a preliminary ruling.[146]

Three questions were referred to the ECJ. First of all, the relevant national court asked whether Article 4a(1) of the Framework Decision 2002/584[147] must be understood as precluding national authorities from making the execution of an EAW 'conditional upon the conviction rendered *in absentia* being open to review in the issuing Member State'.[148] The ECJ answered this question in the affirmative. The Court held, as it done previously in the *Radu*[149] case, that the execution of an EAW can only be refused on the grounds specified in article 3, 4 and 4a(1) of Framework Decision 2002/584. Article 4a(1) addresses the possibility to deny execution when the conviction was rendered *in absentia.* This provision further specifies that an EAW must be executed if the convicted person was aware of the scheduled trial and informed of the consequences of not making appearance in court, or if the convicted person gave a mandate to a legal counsellor to defend him. Furthermore, the ECJ emphasised that the framework decision was intended to harmonise the grounds for non-recognition of other Member States' judicial decisions.[150]

Secondly, the relevant national court asked whether Article 4a(1) of Framework Decision 2002/584 is in compliance with Article 47 of the Charter, protecting the right to an effective judicial remedy and the right to a fair trial, and Article 48 of the Charter, protecting the right of defence. With regard to the second question, the ECJ held that the Charter right to a fair trial is not absolute and that it can be waived either expressly or tacitly. Furthermore, this interpretation of article 47 and article 48 of the Charter is in accordance with the ECHR. Therefore, said provision of the framework decision was found to be in compliance with the rights of the Charter.[151]

Lastly, the Spanish Constitutional Court asked whether Article 53 of the Charter allows the Member States to make the execution of an EAW for a person who was sentenced *in absentia* conditional upon the conviction being open to review in the issuing Member State if a constitutional right

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[146] Ibid., paras.19-20.
[147] Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1 and Council Framework Decision 2009/299/JHA amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial [2009] OJ L81/24.
[148] Case C-399/11 *Melloni*, paras. 35.
[149] Case C- 396/11 *Ciprian Vasile Radu* [2013] (not yet published).
[150] Case C-399/11 *Melloni*, paras. 35-46.
[151] Ibid., paras. 47-54.

would otherwise be adversely affected.[152] In other words, the third question was directly aimed at the question of whether Article 53 allows Member States to apply constitutional rights when they provide a higher level of protection, even though it is contrary to the principle of supremacy. The Court's answer to this question, and the reasoning in *Åkerberg*, will be addressed in the next section of this thesis as I turn to the Court's interpretation of Article 51 and Article 53 of the Charter.

4.2 A New Test Emerging

As previous parts of this thesis has shown the decisive test for deciding the scope of application of EU fundamental rights was pre-Lisbon that the national measures fell within the 'scope of EU law'. I have also addressed the academic debate suggesting that Article 51(1) of the Charter could be interpreted as a restriction of this previous test, as it instead refers to 'only when they are implementing Union law'. Notably, a restriction would implicate that EU law would not influence and govern the protection of human rights at national level to the same extent. In *Åkerberg*, the Court finally made some much-welcomed clarifications.

Firstly, it should be highlighted that two cases previous to *Åkerberg* indicated that Article 51(1) should not be interpreted as excluding the ERT-type situations from the Charter's field of application. To begin with, the case *N.S* concerned Regulation No 343/2003[153] (the Dublin Regulation), regulating which Member State has the responsibility to examine an asylum application by a third country national.[154] The question arose whether the relevant Member State had 'implemented Union law' when using its discretionary powers provided for by said Regulation. According to Article 3(2) of the Dublin Regulation, a Member State can chose to assume the responsibility to examine an asylum application even though the Regulation assigns this task to another Member State. The Court did not elaborate on the correct interpretation of Article 51 of the Charter, but rather concluded that the discretionary powers given to the Member States is simply part of the greater Common European Asylum System. Therefore, while using its discretionary powers, the Member State was in fact implementing Union law.[155] According to Rosas, this case thereby confirmed that ERT-type situations would not be excluded form the Charter's field of application.[156]

[152] Case C-399/11 *Melloni*, para. 55.
[153] Council Regulation (EC) establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L50/1.
[154] Joined Cases C-411/10 and C-493/10 *N.S., M.S and Others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* [2011] (not yet published).
[155] Ibid., paras. 64-69.
[156] Rosas, op. cit., p. 1277.

The second case, which supported this view, was *Dereci and Others*[157]. The case concerned five third-country nationals who had been rejected residence in Austria. In addition, expulsion orders and individual removing orders had been issued for four of the applicants. Some of them had entered the country legally and others had entered it illegally. Still, the applicants all had one thing in common; they had family members residing in Austria, whom were Austrian citizens and thus EU citizens. The applicants argued that their family members' right to reside would be infringed if they were to be rejected residence and expelled from Austria. However, none of the applicants' family members had exercised their right to free movement why there were no evident cross-boarder elements that could trigger the application of EU law.[158] At first, it might seem far-fetched to argue that the case entailed a restriction of EU citizens' rights, but not in light of the ECJ's previous case law. In *Ruiz Zambrano* the Court held that the removing of a third-country national would infringe on his child's right to reside under Article 20(1) TFEU as the child was a EU citizen and economically dependent on the father. The effect of removing the father would therefore be that the child also had to leave the Union and the child would thereby be deprived of its right to reside.[159] However, in *Dereci and Other*, the applicants' family members were not economically dependent on the applicants.[160]

To begin with, the Court held in *Dereci and Others* that Directive 2003/86[161] and 2004/38[162] were not applicable since the family members had always resided in Austria. With regard to the Courts ruling in *Ruiz Zambrano*, the question then arose whether Article 20(1) TFEU could be applicable despite the fact that the right had never been exercised. In this connection, the Court stated that Article 20 TFEU precludes national measures, which have the effect of depriving EU citizens the genuine enjoyment of the substance of the right to reside in Article 20(1). The Court also expressed that the denial of the substance of the rights to reside should be understood as situations where the EU citizen in effect is forced to leave not only the Member State but also the Union as a whole.[163]

The Court never spelled out whether the situations in the given case before them would be considered as an infringement on the genuine enjoyment of the substance of the right to reside or not, in other words if it should be

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[157] Case C-256/11 *Dereci and Others v Bundesministerium für Inneres* [2011] (not yet published)
[158] Ibid., paras. 22-29.
[159] Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] (not yet published).
[160] Case C-256/11 *Dereci and Others*, para. 32.
[161] Council Directive 2003/86/EC on the right to family reunification [2003] OJ L251/12.
[162] Directive 2004/38/EC of the European Parliament and the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77.
[163] Case C-256/11 *Dereci and Others*, paras. 59-68.

viewed as a derogation from the Treaty. This was instead left to the national court to decide. However, the Court continued and elaborated on if another EU norm, such as the right to family life in Article 7 of the Charter, could invoke a right for the applicants to reside. With regard to this question, the Court emphasised that according to Article 51 of the Charter it is only applicable when Member States are implementing Union law and that the Charter does not extend the Union's powers. With that said, the Court held that it was for the national court to decide whether the circumstances of the applicants situations should be considered as covered by EU law or not. Importantly, the Court also stated that if EU law covered the situation, the Member State had to make sure to respect the right to family life in Article 7 of the Charter.[164]

Even though these two cases indicated that the Member States would still have to comply with EU fundamental rights when derogating from EU law, it was still not clear how to interpret Article 51 of the Charter since the Court in neither *N.S.* nor *Dereci and Others* made any clear statements about it.

In *Åkerberg*, the Advocate General Cruz Villalón addressed the question of the Court's jurisdiction and acknowledged the need for clarifications. The Advocate General emphasised that the explanations relating to the Charter points to continuity with the Court's previous case law rather than a restriction, something he agreed to with some modifications.[165] According to Advocate General Cruz Villalón, despite the different wordings used to describe the situations entailing an obligation for the Member States to comply with EU fundamental rights, there has been a common requirement; 'Union law must have a *presence* at the origin of the exercise of public authority'. In other words, a law with the ability to either determine or influence the Member States' public authority.[166] Mr Cruz Villalón also highlighted that there is a relationship of a rule and an exception. The rule is that the Member States themselves have the competence to review acts of their public authority and its compliance with their own constitutions and international treaties, while the exception is when the Member States have transferred this responsibility to the Union.[167]

In light of these observations, Advocate General Cruz Villalón concluded that just the mere presence of Union law at the origin of the exercise of the public authority should not be enough for the Union to have the competence to assume responsibility to review Member States' measures, instead it should require a specific interest of the Union.[168] In my view, the Advocate General thereby clearly argued that the ECJ should adopt a new test for deciding the Member States' obligations to comply with EU fundamental

[164] Ibid., paras. 69-74.
[165] Opinion of Advocate General Pedro Cruz Villalón in Case C-617/10 *Åkerberg*, paras. 25-26.
[166] Ibid., para. 33.
[167] Ibid., paras. 35-37.
[168] Ibid., paras. 40-41.

rights. Even though he did not make a distinction between the Wachauf-type situations and the ERT-type situations, his reasoning would in fact imply a significant restriction of previous case law by introducing a requirement of an interest of the Union.

With respect to the circumstances of the specific case, Advocate General Cruz Villalón finally suggested that the Court did not have jurisdiction. To begin with, the Advocate General did not consider there to be a sufficiently strong connection between the Union law and the exercise of public authority to clearly establish a specific interest for the Union that would allow the Union to assume responsibility for a review. In this connection, he highlighted that the only EU legislation that provides a requirement for the effectiveness of collection of VAT is Directive 2006/112 on the common system of value added tax[169]. However, the relevant national provisions on false information in *Åkerberg* are not a direct implementation of said provisions but simply a part of the general tax system. Having concluded that, the Advocate General asked whether this situation, where national legislation is simply securing the objectives established in Union law, should be comparable to the situation when the national legislation is directly based on Union law. In the specific case of *Åkerberg*, the Advocate General considered that the problems that might arise from the interpretation and scope of the *ne bis in idem* principle in Swedish law is not directly connected to the collection of VAT but is rather a general problem for that legal system. As he put it, it is a matter of *occasio* and not *causa* why it would be disproportionate for the Union to assume competence for a review.[170] Even though the Advocate General did not put it into the same words as Rosas, it seems to me as if his reasoning is in line with Rosas' view that there should be a distinction made between when another EU norm is applicable *in concreto* and applicable *in abstracto*.

However, the Court did not agree with Advocate General Cruz Villalón. To begin with, the Court held that Article 51 of the Charter confirms the Court's previous case law. Just like previous case law have shown, the Member States have an obligation to comply with fundamental rights when acting within the scope of EU law. In addition, the Court agreed with the Advocate General as it held that this is evident from the explanations relating to the Charter.[171] Thus, in the words of the Court: 'The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter'.[172] Thereby, the Court clarified once and for all that Article 51 of the Charter does not exclude ERT-type situations. In my view, this should be welcomed if not only for the reason, which Craig has highlighted, that there could otherwise be two parallel systems of review. Something that would complicate matters significantly.

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[169] Council Directive 2006/112 on the common system of value added tax [2006] OJ L347/1.
[170] Opinion of Advocate General Pedro Cruz Villalón in Case C-617/10 *Åkerberg*, paras. 57-63.
[171] Case C-617/10 *Åkerberg Fransson*, paras. 18-20.
[172] Case C-617/10 *Åkerberg Fransson*, para. 21.

The Court also emphasised that it has no jurisdiction outside the scope of EU law since the provisions of the Charter, on their own, cannot be relied upon to create a basis for jurisdiction. In this connection, the Court referred to Article 6(1) TEU and Article 51(2) of the Charter.[173] This is hardly surprising since the opposite would entail a significant shift of powers from the Member States to the EU.

The Court then answered whether the situation in *Åkerberg* was within the scope of EU law or not and started by concluding that the matter was partly connected to the collection of VAT and Directive 2006/112. It also highlighted that Article 4(3) of said Directive defines that the Member States 'have an obligation to take all legislative measures appropriate for ensuring collection of all VAT due in its territory and for preventing evasion'. Unlike the Advocate General, the Court also found another provision of EU law to be involved, Article 325 TFEU, placing an obligation on the Member States to effectively prevent illegal activities affecting the financial interest of the Union. The Court held that if the Member States failed to collect VAT it would in the end harm the financial interests of the Union. These conclusions led the Court to decide that the situation in *Åkerberg* was in fact within the scope of EU law, despite the fact that the national legislation was not adopted to transpose Directive 2006/112.[174]

To sum up, the Court confirmed that the ERT-type situations are not excluded from the Charter rights field of application. The *Åkerberg* case also envisages a rather extensive interpretation of the scope of EU law since the national legislation in question was not adopted to directly implement Union law. It was therefore a situation similar to the second category of cases that could be detectible within the Wachauf-line of cases: when Member States apply or interpret any national provisions that fall within the scope of EU law. However, after deciding that the *Åkerberg* case fell within the scope of EU law, the Court continued and stated that:

> 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 purpose 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).[175]

What is the Court saying with this statement? In order to analyse this part of the ruling, I find it necessary to first return to *Melloni* and the third question

[173] Case C-617/10 *Åkerberg*, paras. 22-23.
[174] Case C-617/10 *Åkerberg*, paras. 24-28.
[175] Case C-617/10 *Åkerberg*, para 29, (Italic by the authour)

referred from the national court to the ECJ. Just as a reminder, the third question concerned the interpretation of Article 53; could it entail that Member States are free to apply the national standards, in other words constitutional rights, when it provides a higher level of protection than the Charter?

In *Melloni*, the Court rejected this interpretation of Article 53 as it would be contrary to the principle of primacy and enable the Member States to disapply provisions of EU law that are in compliance with the Charter. In this connection, the Court referred to *Internationale Handelsgesellschaft* and emphasised that it is settled case law that not even the Member States' constitutions can be allowed to undermine the effectiveness of EU law.[176] Thereby, the Court settled the speculations regarding Article 53 and whether it could mean that national courts are free to apply constitutional rights in all situations where the national standard provides a higher level of protection. Then what is the meaning of Article 53? The Court held in *Melloni* that:

> It 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.[177]

With respect to the situation in *Melloni*, the Court found that the framework decision in question represented a fully regulated area of EU law, intended to harmonise the conditions of execution of EAW and built on the principle of mutual recognition. Therefore, the Member States must apply the standard of protection provided for by the Charter to not compromise the efficacy of EU law.[178]

The quotation above is actually the one referred to by the Court in the previous quotation from *Åkerberg*. Reading these two quotations in conjunction, what do they signify?

As I see it, it provides a new test for deciding the field of application of EU fundamental rights. Notably, the wordings 'implementing Union law' in Article 51 of the Charter has the same meaning as the 'scope of EU law' did pre-Lisbon. However, as I interpret the quotations above, the Court held that Article 53 entails that the national courts can apply the national standard of protection instead of the Charter rights when they are reviewing measures by the Member States, which falls within the meaning of 'implementing Union law', and if EU law does not entirely determine how it should be implemented. Although they still have to respect the level of protection provided for by the Charter and the primacy, unity and efficacy of EU law. In contrast, the Member States have to apply the Charter rights in situations

[176] Case C-399/11 *Melloni*, paras. 57-59.
[177] Ibid., para. 60.
[178] Ibid., paras. 61-63.

like *Melloni* where it is already determined by EU law which measures that must be taken. In a way, the Member States' margin of discretion will therefore be determining their obligations.

In my view, this also entails that the Court actually used Article 53 of the Charter as the basis for determining the Charter rights' field of application. However, it is also my view that this interpretation of Article 53 is somewhat confusing with respect to the fact that Article 51 of the Charter has the headline 'field of application' while Article 53 has the headline 'level of protection'. In addition, it could well be argued that if some other article than Article 51 should be used to determining the Charter rights' field of application, Article 52(4) would be a better choice since it is one of the articles that are placed under the headline 'scope and interpretation of rights and principles'.

Nevertheless, the Court's interpretation in *Åkerberg* and *Melloni* seems important since it actually allows the national courts to rely on the national standard of protection in some situations. Furthermore, it could well be argued that the national courts are also given a more significant part to play. In the next section I will therefore discuss whether *Åkerberg* and *Melloni* could actually be seen as a reflection of constitutional pluralism.

4.3 A Reflection of Constitutional Pluralism?

Under this section I will examine whether the cases *Åkerberg* and *Melloni* could actually be seen as reflections of constitutional pluralism. In this part I will continue to rely on discursive constitutional pluralism and the theories of Maduro and Torres. As previous parts of this thesis have shown, they both focused on the co-operation between the ECJ and the national courts and the potential for a shared discourse between the courts since they consider it to be a way of legitimising the ECJ's authority. According to Torres, it is also important that the national courts get a more significant part to play for the interpretation of EU fundamental rights. In addition, they have both dealt with the underlying tension between uniformity and diversity.

The pre-Lisbon case law shows that the ECJ has consistently upheld the principle of primacy and denied that constitutional rights could be used to review EU legal acts or measures by the Member States that falls within the scope of EU law. One of the main reasons supporting this view is that it has been held that the unity and efficacy of EU law could otherwise be adversely affected. In other words, that the European integration would be harmed. Instead, the constitutional traditions common to the Member States have been used as a mere influence and guideline when interpreting EU fundamental rights. Thereby, the Court has safeguarded the autonomy of the EU legal order and made clear that the protection of fundamental rights in

EU law must be adapted to the specific nature of the EU legal order. In addition, it has positioned itself as the final arbitrator. Is there really something in the cases *Åkerberg* and *Melloni* that shows a different approach?

First of all, after the Court had clarified in the *Åkerberg* case that national courts are under certain circumstances allowed to apply national standards of protection of fundamental rights, it continued and emphasised that when it is necessary for the national courts to interpret the Charter they may in some cases, and must in some cases, make a reference for a preliminary ruling. As a consequence, the Court concluded that it had jurisdiction to answer the questions referred from the relevant Swedish court.[179] In other words, even though the situation in *Åkerberg* was not entirely determined by EU law the Court assumed jurisdiction to answer the referred questions and to interpret the content of the Charter right in question. The reason for this is probably that even though the national courts are free to apply national standards of protection of fundamental rights they still have to respect the level of protection provided for by the Charter. Therefore, it can be concluded that the ECJ is still claiming the authority to interpret EU fundamental rights, even when the connection to EU law is quite weak, and the national courts must take the ECJ's interpretation into consideration when deciding on the case. Furthermore, the national courts therefore always must make a reference to the ECJ when it is not clear how to interpret the Charter.

From this section of the *Åkerberg* case it could well be argued that the ECJ has not changed its position at all. In addition, the obligations of the national courts were further highlighted as the Court answered the first question referred to it from Haparanda Tingsrätt, which aimed at clarifying if the Swedish courts' judicial practice was compatible with EU law. As already highlighted previously in this thesis, the *Simmenthal* case established that national courts have an obligation to disapply national legislation when it is contrary to EU law. In contrast, the Swedish courts' judicial practice had made that obligation, with regard to rights protected by the ECHR and the Charter, conditional upon the infringements being clear from the text of these instruments or relevant case law. The ECJ considered this practice to be contrary to EU law and held that the national courts must ensure that national legislation does not hinder EU law from having full force and effect at national level.[180]

In this connection, the Court also reminded that the national courts are obligated under certain circumstances to make a reference for a preliminary ruling when hearing a case that involves EU law and when the meaning or scope of EU law is not clear.[181] This remainder was probably directly aimed to the Swedish courts since the Swedish High Court, in 2011, refrained from making a reference for a preliminary ruling in a case quite similar to the

[179] Case C-617/10 *Åkerberg*, paras. 30-31.
[180] Case C-617/10 *Åkerberg*, paras. 43-46.
[181] Case C-617/10 *Åkerberg*, para. 47.

Åkerberg case. The majority considered the question to be outside the scope of EU law, while two judges revealed in their dissenting opinion that they considered it to be within the scope.[182] In fact, it could easily be argued that the Swedish High Court should have considered it necessary to make a reference since the opinion of the two dissenting judges indicates that it was not a clear-cut case at all. Consequently, the Court's reasoning in *Åkerberg* also entails that the ECJ is claiming the authority to decide whether the measures taken by the Member State are to be considered as 'implementing Union law' or not.

Importantly, the Court concluded in the following that:

> It follows that European Union law precludes a judicial practice which makes the obligation for a national court to disapply any provisions contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the text of the Charter or the case-law relating to it since it withholds from the national court the power to asses fully, with, as the case may be, *the cooperation of the Court of Justice*, whether that provision is compatible with the Charter.[183]

In my view, it is significant that the Court used the word co-operation. First of all, it could be interpreted as a response to the previously mentioned *Maastricht* decision, by which the FCC held that it exercises its jurisdiction in co-operation with the ECJ. Secondly, this part of the *Åkerberg* case could also be seen as not only a testimony to how the ECJ defines the national courts' obligations, but also to how it defines the very nature of the relationship between the national courts and the ECJ; there must be a co-operation and Article 267 TFEU is the vehicle.

The FCC actually responded to the ECJ's statement in April 2013. In a case concerning the German counter-terrorism database act and its compliance with the German Constitution, the FCC held that it did not have to make a reference for a preliminary ruling to the ECJ. In this connection, the FCC emphasised that the act did not constitute implementation of Union law according to Article 51(1) of the Charter[184]. It also held that the *Åkerberg* case did not change this conclusion and stated that:

> As part of a cooperative relationship, this decision must not be read in a way that would view it as an apparent *ultra vires* act or as if it endangered the protection and enforcement of the fundamental rights in the member states in a way that questioned the identity of the Basic Law's constitutional order. The senate acts on the assumption that the statements in the ECJ's decision are based on the distinctive features of the law on value-added tax and express no general view.[185]

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[182] Högsta domstolens avgörande den 29 juni 2011, Mål nr B 5302-10.
[183] Case C-617/10 *Åkerberg*, para. 48 (Italic by the author).
[184] BVerfG, 1 BvR 1215/07, 24 april 2013 and Press release no. 31/2013 of 24 April 2013, para 2.
[185] BVerfG, 1 BvR 1215/07, 24 april 2013 and Press release no. 31/2013 of 24 April 2013, para 2.

As I see it, this could be interpreted as a warning from the FCC to the ECJ that it will not accept the interpretation of 'implementing Union law' to be so extensive that it could include all situations that are remotely related to EU law. It also shows that in a way there is some sort of dialogue between the ECJ and the national courts, at least between the ECJ and the FCC. The two courts are using the same language and are to some extent also trying to adjust themselves to the claims of the other, but also setting limits to the other courts jurisdiction.

To sum up my discussion so far, I consider that the Court's reasoning in *Åkerberg* shows that the ECJ acknowledge that there must be a co-operation between the ECJ and the national courts for the protection of fundamental rights. I would also like to argue that this is actually a reflection of discursive constitutional pluralism.

However, it is not clear to what extent the ECJ will actually engage in a dialogue with the national courts on the interpretation of the Charter rights. It seems as if the ECJ is still claiming to be the final arbitrator of how to interpret these rights. Even so, the fact that national courts are free to apply national standards of the protection of fundamental rights under certain circumstances, where the ECJ contributes by interpreting the Charter rights, seems to signal that the national courts and the national interpretation of fundamental rights are given a more significant part to play. Furthermore, the application of national standards might also render in a judicial practice that is more allowing of minor differences in the protection of human rights among the Member States since there might be a slight difference between 'not compromising the level of protection provided for by the Charter and the primacy, unity and efficacy of EU law' and applying EU fundamental rights directly. As I see it, this is a new nuance and has the potential to open up for some interesting cases.

In this connection, I would again like to address the underlying tension between uniformity and diversity that has been discussed previously in this thesis. As I interpret Torres, her theory essential seeks a way of reconciling the differences in protection of fundamental rights in the European legal order and the national legal orders. According to Torres, this should be achieved through an on-going dialogue between the ECJ and the national courts. She has also highlighted that a certain degree of diversity must be allowed. In this connection, Torres has suggested that Article 53 could be interpreted as allowing deference to the interpretation of a fundamental right under national law when the national standard provides a higher level of protection and no other rights and interests would be harmed. The Court's interpretation of Article 53 has some clear similarities with this suggestion since the national courts are free to apply the national standard in situations where the Member States have been given a margin of discretion. In addition, it would only be allowed when the national standard provides a higher level of protection than the Charter since it is not allowed if it undermines the level of protection provided for by the Charter. Lastly, it would only be allowed when it does not undermine the primacy, unity and

efficacy of EU law, which could be understood as other interests. As I have already mentioned above, I also believe that this interpretation of Article 53, could open up for allowing minor differences.

Therefore, the Court's statement in *Åkerberg* and *Melloni* could once again be understood as a reflection of constitutional pluralism since it in a way acknowledges that EU law does not always have to prevail in every single situation. Instead, a common standard must be respected in order for EU law to be efficient and to promote the European integration, but beyond that the Member States can apply a higher standard of protection. The Court's interpretation therefore has the potential to reconcile the European legal order with the national legal orders, instead of claiming that the Charter rights or the constitutional rights are inherently superior to the other.

It could well be argued that this function could instead have been given to Article 52(4) and that it in one way would have been more logical since said article can be viewed as an extension of Article 4(2) TEU, which states that the EU must respect the Member States' constitutional identities. However, in my view, the two articles have the potential to assign similar functions to the ECJ and to the national courts. The result of the ECJ's interpretation of Article 53 of the Charter is not only that it is allowing the national courts to apply the national standard of protection in some situations, but also obligates them to respect the Charter rights and the fundamental principles of EU law. As a consequence, the national courts must interpret the national standard in harmony with EU law. In a similar vein, Article 52(4) states that the ECJ, when interpreting the Charter rights, must interpret them in harmony with the constitutional traditions common to the Member States. As I see it, it is a fair conclusion that both articles can have the effect of reconciling the protection of human rights at supranational level and at national level. The difference between the articles is that the Court's interpretation of Article 53 places the obligation of harmonious interpretation on the national courts while Article 52(4) places this obligation on the ECJ. Again, this envisages that the ECJ and the national courts have equally important functions for the European integration and that there must be a co-operation.

To sum up, I do believe that the Court's reasoning in *Åkerberg* and *Melloni* could be seen as a reflection of discursive constitutional pluralism. First of all, the Court's language in *Åkerberg* shows that it acknowledges that it is practicing its jurisdiction to review measures by the Member States in co-operation with the national courts. Secondly, even though the Court did not give the wordings 'implementing Union law' a narrower interpretation, its interpretation of Article 53 shows that the national courts and the constitutional rights are given a more significant part to play. At the end of the day, this might have the effect of creating harmony between the European legal order and the national legal orders.

5 Final Conclusions

In this final section of the thesis I will return to the questioned that I posed at the beginning; what are the implications of the Charter for the relationship between EU law and national?

As I have shown in this thesis, the actual meaning of the horizontal provisions of the Charter has been discussed in the academic literature and the discussions started long before the Charter became legally binding. Both *Åkerberg* and *Melloni* are thus important cases since they contribute with some actual answers to some of these questions.

To begin with, it has been raised that Article 51(1) of the Charter could imply a narrower interpretation of the scope of EU law and exclude ERT-type situations from its field of application. It is, however, evident from the Court's reasoning in *Åkerberg* that this is not the case. Even so, the Court restricted the Charter rights field of application through its interpretation of Article 53; although the Member States must at all times comply with the level of protection provided for by the Charter at a minimum when they are 'implementing Union law'. This interpretation of Article 53 also settles the speculations regarding weather it could ultimately threaten the supremacy of EU law. Instead, I would like to argue that the Court's interpretation reflects constitutional pluralism. This also strengthens the idea that when examining the relationship between the European legal order and national legal orders we should not search for a 'grundnorm', to put it into Kelsen's terms, but instead focus on how the different legal systems interact and influence each other.

As I have pointed out, the ECJ is still claiming the authority to interpret the rights of the Charter and the wide interpretation of 'implementing Union law' also implies that the Court will continue to influence upon state policies to a great extent. Even so, the Court's reasoning in *Åkerberg* also envisages that the Court acknowledges that it is practicing its jurisdiction in co-operation with the national courts. Yet, the FCC's response in April 2013 can be interpreted as a warning to the ECJ that it will not be enough to simply claim that there is a co-operation. As a part of the co-operation, the ECJ cannot extend its jurisdiction to infinity. Nevertheless, it can also be interpreted as that there is actually some kind of dialogue between the courts, at least between the ECJ and the FCC. In this thesis I have only focused on the FCC because of the fact that it has previously voiced its position in a number of cases. Though, it would be interesting to examine more closely the role of the national courts in other Member States, and probably necessary, to get a better understanding of the potential for a dialogue between the courts.

Then, if *Åkerberg* and *Melloni* could be viewed as a reflection of constitutional pluralism, does it mean that the Court's interpretation

significantly alters the relationship between EU law and national law? I am inclined to answer this question in the negative. The reason for this is that it could well be argued that it does not alter something; it only confirms what was already true.

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