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FRANSSON AND THE APPLICATION OF THE EU CHARTER OF FUNDAMENTAL RIGHTS TO STATE MEASURES – NOTHING NEW UNDER THE SUN OF LUXEMBOURG

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In case C-617/10 *Fransson*, the elusive matter of the application of the Charter to national measures came to the forefront once more (see this previous post that touched on the issue). The Swedish referring court asked the CJEU whether the principle of *ne bis in idem* (a general principle of EU law, but in any case one codified in the Charter, see Art. 50) could apply and be used to set aside certain domestic provisions. Under these norms, when a taxpayer provides false information to the authorities for the purpose of tax assessment, not only might she incur a tax surcharge, but she could also face criminal prosecution for the same misconduct. The claimant in the main proceedings argued that this scheme of penalties amounted to a violation of the principle of *ne bis in idem*, contained in the EU Charter (Art. 50) and the ECHR (Art. 4 of Protocol No 7), and requested the judge to set aside the Swedish provisions.

The judge, however, could not conclude with certainty whether the Charter applied in the case at stake, as it was controversial whether Swedish dual system of tax penalties had an impact on the 'implement

Union law,' or in any case fell, *ratione materiae*, within the scope of application of EU law, as required by Art. 51(1) of the Charter. Some 'presence' of EU law was traceable in the form of Directive 2006/112. Art. 273 of the Directive entitles States to 'impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion.' Would that be enough to consider the Swedish bifurcated system of imposing tax surcharges and prosecuting tax offences as falling within the purview of EU law (for the purpose of the application of the Charter)?

Advocate General Cruz Villalón conceded that the case-law has not yet clarified the specific import of Art. 51(1) of the Charter, and daringly suggested a principled approach to interpret it, which would help clarify its construction also *pro futuro*. He took cues from the rationale behind the possibility that State action be reviewed for conformity with EU principles. He saw in this possibility an exception to the rule that it is for member states to review acts of their public authorities. The controlling criterion, the AG said, is the existence of a 'specific interest' of the Union to centralize the human-rights review of measures governing certain matters. Not every exercise of power whose ultimate origin is located in EU law needs to be informed by the EU-conception of a fundamental right: it must be possible to isolate those situations in which 'the Union's interest in leaving its mark … should take priority over that of each of the Member States.' Only in such cases, where the Union has an interest to review the lawfulness of the exercise of State public authority, is it possible to subject state measure to the provisions of the Charter (and to EU general principles at large).

As regards the instant case, the AG ultimately argued that the link between the EU legislation and the Swedish measures appeared to be too tenuous to substantiate this interest. The AG distinguished between the case in which national legislation is 'based directly on Union law' and the hypothesis that it is 'used to secure objectives laid down in Union law' , referring to the difference between *causa* and *occasio*. In the main proceedings, the commencement of criminal prosecution – the only element that could fall within the reach of the *ne bis in idem* rule – was

simply an inessential circumstance, a Member-specific normative contingency incapable of affecting the EU competence on VAT collection.

The CJEU thought otherwise. It ignored the AG's invitation to investigate the EU's *specific interest* and to mind the gap between *causæ* and *occasiones*, and stuck to the classic (and sibylline) interpretation of Art. 51(1) of the Charter, whereby domestic acts must comply with EU law when they fall within the scope thereof (see *Annibaldi*,). In short, the CJEU recalled all provisions of EU law that require member states to ensure the collection of VAT and to prevent VAT evasion and noted that any shortcoming in the domestic collection of VAT affects the EU budget, in so far as the latter depends directly on the former . Moreover, since member states are obliged to counter all wrongdoing affecting the EU's financial interests, under Art. 325 TFEU, the Court concluded resolutely that:

tax penalties and criminal proceedings for tax evasion, such as those to which the defendant in the main proceedings has been or is subject because the information concerning VAT that was provided was false, constitute implementation of Articles 2, 250(1) and 273 of Directive 2006/112 (previously Articles 2 and 22 of the Sixth Directive) and of Article 325 TFEU and, therefore, of European Union law, for the purposes of Article 51(1) of the Charter .

Even if the Swedish legislation at bar was not designed to transpose Directive 2006/112, its application 'is designed to penalise the infringement of that directive' and, therefore, 'intend' to implement the Treaty-derived obligation to safeguard the financial interests of the EU through the imposition of effective penalties. As a result, the Charter applied, and the CJEU just made a point to quote the *Melloni* decision, published on the very same day, to remind Sweden that it was still possible to apply national standards, provided that the level of protection required by the Charter was complied with, lest the 'primacy, unity and effectiveness' of EU law be compromised.

A couple of comments are in order. First, the CJEU should be excused for the generous use of words like 'designed' and 'intended' to describe the link between the application of national measures and the

implementation of EU obligations. Not only are the relevant provisions of Swedish laws on tax offences and tax assessments referred to taxes in general, and do not contain an express reference to VAT, but a factual remark might suffice to appreciate how the ideas of design and intention are ill-suited. The relevant Swedish provisions, quoted in the judgment, were adopted in 1971 and 1990. Since Sweden joined the EU only in 1995, it is hard to believe that the Swedish legislator *designed* them with the *intention* to implement obligations that did not bind Sweden at the time. A semantic shift from the area of intentions and aims to that of effects and results would certainly be appropriate (a well-rehearsed topic of international trade law, see here, for example). Moreover, it would certify that the focus idea of implementation of Art. 51(1) of the Charter is not the *subjective* element of state measures but their *objective* contribution to the implementation of EU law. This shift would better explain situations like the Swedish one, in which national measures happen, more or less unintentionally, to govern matters covered by EU law, and are therefore capable of hindering or promoting the attainment of the objectives set therein.

Second, a look at the EU provisions 'implemented' might provide further insight on the CJEU's take on Art. 51(1) of the Charter. Of the provisions of Directive 2006/112 that were mentioned, one simply lists the transactions subject to VAT (Art. 2), one simply requires that all taxable persons submit their VAT return (Art. 250(1)), and one empowers member states to impose additional obligations to ensure the correct collection of VAT and prevent evasion (Art. 273). Of the three, only Art. 273 seemingly bears a link with the Swedish system of sanctions for tax evaders, whereas the other two are only useful to identify who is under the obligation to pay VAT, for which transactions, and through which assessment procedure. The CJEU, it is argued, should have kept Art. 2 and Art. 250(1) of the Directive out of the discussion on the relationship between the Swedish scheme of sanctions and EU law. To be sure, these provisions clarify the reach of the obligation to whose enforcement Art. 273 refers. However, unlike the latter provision, Articles 2 and Art. 250(1) of the Directive are hardly implemented by the Swedish measures. As to Art. 325 of the TFEU,

instead, it is arguably uncontroversial that the national provisions sanctioning tax evasion, in so far as they also apply to VAT evasion, act as a deterrent implementing EU-imposed obligation to 'counter fraud and any other illegal activities affecting the financial interests of the Union.'

Although the CJEU missed the opportunity to set the record straight and devise a brand new test for the application of Art. 51(1) of the Charter, as suggested by the AG, at least it gave helpful guidance to the national judge, unlike in previous cases like Kamberaj and Scattolon. Yet the mixture, in the decisive paragraphs, of EU provisions that are arguably implemented by the national measures and others that are not might prove confusing, and the impression is that some of them would not have justified the application of the Charter under Art. 51(1) thereof, if considered separately.

Parsing one judgment is not the ideal starting point to venture into a far-reaching analysis of how Art. 51(1) of the Charter might be construed in the future. If anything, one should keep an eye on the Court's practice of considering within the scope of EU law those national measures that, simply, contribute to the implementation of an EU obligation without being primarily designed to transpose it. There might be cases where the link might prove too thin to matter, and the Court may then regret having discarded Cruz Villalón's suggestion to exercise value-judgment, in order to make that call with more confidence.