THE SCOPE OF APPLICATION OF FUNDAMENTAL RIGHTS GUARANTEED BY EUROPEAN UNION LAW ON MEMBER STATES' ACTION. SOME JURISPRUDENTIAL LANDMARKS

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ABSTRACT

In the European Union legal order, there exists a long standing problem to define in which circumstances the fundamental rights of the European Union have a binding effect on member states. The Court of Justice of the European Union has through its case-law tried to resolve this issue, establishing that fundamental rights guaranteed by the Union are intended to be applied in all situations governed by Union law. However, it is not always clear when and whether national authorities are acting within the scope of Union law. The jurisprudence, including the most recent case, maintains a number of ambiguities, particularly with regard to the applicability of EU fundamental rights to national measures which target a field also covered by the Union law, even if they do not intend to implement EU law.

Making a brief overview of this jurisprudence, the paper focuses on identifying the major line of cases and the conditions under which a national measure is considered to fall within the scope of Union law by attracting the application of the Union’s standards of protection.

Keywords: Public Law, European Union Law, Fundamental Rights, General Principles of Law, Charter of Fundamental Rights of the European Union, National Measures, Court of Justice of the European Union

1. Introduction

In democratic systems governed by the rule of law, the exercise of all public powers must be with respect for fundamental rights. Fundamental rights are thus an essential element in the process of creating and implementing law rules.

Provided and guaranteed mainly by national constitutional provisions, the protection of fundamental rights is now also the subject of mechanisms developed at international and supranational level.

The respect of fundamental rights is one of the cornerstones of the European Union (EU), becoming today a „finalité” for it\(^2\), which needs to be taken into account

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at the level of law making and its application. It is included among the core values of the Union, according to article 2 of the Treaty on the European Union (TEU), representing a precondition of membership, according to article 49 TEU.

The European Union has progressively built its own standard of protection of fundamental rights, first developed in the praetorian way (in the absence of express provisions in the original Treaties), taking inspiration from international treaties (in particular, the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 – ECHR) and national constitutions, then to be concretized in a custom catalogue of rights contained in the Charter of Fundamental Rights of the EU (CFR or Charter). Thus, it is well known that starting with the judgments Stauder\(^3\) and Internationale Handelsgesellschaft\(^4\), handed down in 1969 and 1974 respectively, the Court recognized fundamental rights as part of the general principles of EU law. This held that fundamental rights “inspired by the constitutional traditions common to the Member States” must be ensured within the structures and objectives of the Community, and their observance is guaranteed by the Court itself. Concerned about the emphasis on the autonomous nature of the protection of the fundamental rights of the EU, the Court has recognized in its subsequent jurisprudence many fundamental rights as principles of EU law or, as expressed in doctrine as „a kind of unwritten bill of rights”\(^5\), or unwritten rules „all-pervasive in EU law”\(^6\).

The Court subsequently found that the obligation to protect fundamental rights recognized at EU level rests not only with the Union’s institutions, but also with the Member States „whenever they act within the scope of EU law”. In the case-law of the Court this includes at least two situations\(^7\): when Member States implement or apply provisions of EU law\(^8\) or when seeking to derogate from EU law on public policy or other grounds as provided for by EU law itself (ERT line of cases\(^9\)).

In the case Grant\(^10\), the Court explained the limits of the power of the Union to act in the field of fundamental rights and deriving from its powers under the Treaties, so that in Annibaldi\(^11\) it set a limit on ERT line of cases, in the sense that the general principles of EU law do not apply to national measures which only indirectly affect matters falling within the scope of EU law and which do not have the role of implementing Union law. Therefore, in order to trigger the application of EU

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fundamental rights, there must be a certain degree of connection/proximity between the national measure in question and EU law.

After that the Maastricht Treaty (Art. F(2), after the Amsterdam revision Art. 6(2) TEU) confirms the Court’s praetorian work, enshrining in primary law the general principles of law as instruments for the protection of fundamental rights in the European Union, the formal protection of fundamental rights in the EU advanced in December 2000 by the proclamation of the Charter of Fundamental Rights of the EU. With the coming into force of the Lisbon Treaty the Charter of Fundamental Rights has also become formally binding on the EU (Art. 6(1) TUE), which implies the existence of a binding catalogue of rights at the EU level12.

After Lisbon, the EU Treaty gives the Charter the first place among the sources of fundamental rights protection, this place being already confirmed in the case law of the CJEU and of the national courts. However, Article 6(3) TEU refers to the fundamental rights, as guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of the Union law. This suggests that the Charter must not be viewed in isolation but in the context of the other sources of fundamental rights protection. While there is a consensus in the doctrine that, although much of them have been codified in the Charter, general principles of law still play a role as a source of EU fundamental rights13, some authors argue that they should gradually becomes a subsidiary and complementary source of fundamental rights, which should be used when it is necessary to remedy the possible gaps/limits of the Charter (which should be considered as the „primary source“)14, while others argue that „the sources of fundamental rights listed in Article 6 TEU should be understood as being in a non-hierarchical, complimentary relationship”15.

Determining the relationship between the Charter and the general principles of law is relevant, as will be emphasized below in relation to the jurisprudence of the European Court of Justice, particularly as regards the determination for the scope of the fundamental rights of the Union. This jurisprudence demonstrates that the express provisions of the Charter are not considered as limiting the Court of

13 E. Gualco, General principles of EU law as a passe-partout key within the constitutional edifice of the European Union: are the benefit worth the side effects? Institute of European Law Working Papers, University of Birmingham, 5/2016.
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Justice, which still calls on the general principles of law to extend the material scope of the Charter, which gives it a significant margin of manoeuvre not only to protect pre-existing rights but also to establish new rights\textsuperscript{16}.

The system of protection of fundamental rights at EU level has been the subject of numerous analyses in the literature. If most of the works highlight the complexity of this system, some authors focus on highlighting its composite character and the relationships that are established between its various sources, within a „multi-level constitutionality” under construction\textsuperscript{17}, while others highlight rather the potential federal effect of this system on the relationship between the Union and the Member States\textsuperscript{18}.

The most controversial and still unclear aspect is related to the precise scope of application of the Union fundamental rights standards measures taken internally by the Member States\textsuperscript{19}. The recent jurisprudence of the Court, including that relating to Romania, brings a number of clarifications in this respect. But they are enough to give real guidance to national judges and to ensure the consistent application of fundamental rights across the Union and its Member States? This case-law raises at the same time a number of other questions on which we will turn to less in what follows. Thus, it seems to suggest the Court's intention to move to a functional approach to determination the scope of fundamental rights, which derives from the need not to affect the effectiveness of EU law. According to the Court, the objective of protecting fundamental rights in EU law is „to ensure that those rights are not infringed in areas of EU activity, whether through action at EU level or through the implementation of EU law by the Member States” and reason for pursuing that objective is ”the need to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved in such a way as to undermine the unity, primacy and effectiveness of EU law”\textsuperscript{20}.

According to this approach, it is created a functional relationship or a link of complementarity between the EU law and domestic measures, determining the imposition of Union standards for the protection of fundamental rights on national

\textsuperscript{16} J.P. Jaque, op. cit., pp. 7-8.


measures wherever the application of national fundamental rights may affect the effectiveness of EU law. On the way of this reasoning, the scope of EU fundamental rights could be extended even beyond the scope of EU law itself, and covers also areas pertaining to the exclusive competence of the Member States, leading in fact to a harmonization of fundamental rights. This new approach by the Court can be considered problematic both from a perspective of the fundamental principles governing the relations between the Union and the Member States, but also from the point of view of the possibility to ensure the highest standard of protection for a given fundamental right.

2. The scope of application of EU fundamental rights - regulatory framework and general jurisprudence

The control of compliance for the national public authorities acts with the fundamental rights is in principle a matter for the Member States, in the context of their own constitutional order and their international obligations (in particular those deriving from the ECHR). However, given „the symbiotic relationship”\(^{21}\) between the EU and national members’ legal orders, the fact that EU law is implemented in a decentralised system by the member states makes the acts of the national public authorities through which it ensures the domestic implementation of Union law (the respective authorities acting on behalf of the Union, as its agents) should be subject to the same rigor or control from the same source, namely the fundamental rights guaranteed by the EU. The original responsibility of the Member States to ensure respect for fundamental rights is thus transferred to the Union.

Since *Wachauf* decision of 1989\(^ {22}\) European Court of Justice has confirmed that EU general principles apply to Member States when they „implement Community rules”, Member States having to act so as to ensure „so far as possible” the protection of fundamental rights.

Subsequently, the Court extended the scope of the Member States’ obligation to comply with the fundamental rights of the EU, stating in its *ERT* decision of 1991\(^ {23}\) that Member States measures that do fall „within the scope of the treaties” are bound to respect fundamental rights when restricting the four freedoms of the Community law. Thus, the Member States autonomous actions are subject to the obligation of respect for the fundamental rights of the Union (acts of national authorities acting strictly on the basis of national law), which restricts the exercise of an economic Treaty freedom and hence comes within the scope of EU law. It is noted in the doctrine that, as opposed to the „implementation” used previously, the term „scope of application” implies a major change: „the focus is not on the

\(^{21}\) F. Fontanelli, *op. cit.*, p. 198.


aim or effect of the national measure (whether it implements EU law) but on the objective overlap of regulatory regimes (whether the national measure operates within the area affected by EU law)\(^{24}\).

In the subsequent jurisprudence of the Court, until the entry into force of the Charter, this hesitated between a narrower conception of the scope of fundamental rights (based on *Wachauf* decision)\(^{25}\) and its broader conception (based on *ERT* decision)\(^{26}\), the latter being still the majority.

The scope of the fundamental rights of the Union is today governed by the provisions of Article 51(1) of the Charter of Fundamental Rights, which states that its provisions „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”. At the same time, Article 51 (2) states that „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”. This assertion, also found in Article 6 TEU, ultimately implies that the provisions of the Charter (or a certain fundamental right) can not in themselves be invoked as the basis for the application of the standard of protection of the fundamental rights of the Union. In order for it to enable the possibility of human rights review on the basis of this, there must be another rule of EU law engaged by acts of national authorities\(^{27}\).

The expression „only when they are implementing Union law” of Article 51(1) normally refers to the narrower definition of the scope of the fundamental rights of the Union stemming from the *Wachauf* decision, not from the broader category of „the scope of EU law”, which has led to numerous doctrinal questions about the possible modification (narrowing) of the scope of the Charter as compared to the praetorian definition of the scope of the general principles of EU law. Confusion is also being maintained by the explanations attached by the Praesidium to the Charter\(^{28}\), in which, with reference to Article 51, it is stated that „it follows unambiguously from the case law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on


the Member States when they act in the scope of Union law”, reference being made to the Court’s jurisprudence on the various situations of linking the national law with the EU law, including the ERT decision.

The Advocate General in case Scattolon29 sums up this dilemma very well, while pointing out that „as yet the case-law of the Court provides no clear answer”: “While those who favour a restrictive interpretation of the concept of implementation of EU law submit that that concept refers only to a situation in which a Member State acts as a servant of the Union, those who favour a broader view consider that that concept refers more widely to a situation in which national legislation falls within the scope of EU law”. Based mainly on the explanations of the Charter, as well as the effect of weakening the level of protection of fundamental rights that would result from the existence of two separate systems of protection of fundamental rights within the Union, according to whether they stem from the Charter or from general principles of law, it proposes an extended interpretation of Article 51(1) in the sense that the provisions of the Charter apply to the Member States where they act within the scope of EU law.

That interpretation was to some extent confirmed in the jurisprudence of the Court in case N.S.30, this appreciated that a Member State when it is conferred discretion whether or not to act by a Union law instrument and deciding whether to exercise discretion „implements the Union law within the meaning of Article 6 TEU and/or Article 51 of the Charter”. So, the scope of application of the Charter and general principles seem to be considered as a unitary concept. At the same time, the doctrine notes that with this decision a new category of national measures can be identified, which could not be reduced to the typical implementation/derogation model – those adopted in the exercise of a discretionary power expressly allowed by a EU instrument “defining express boundaries in which the national lawmaker, although outside the framework of transposition, establishes its own regulation”31.

The fact that Article 51(1) of the Charter also covers the scenario of the derogation from the freedoms laid down in the Treaty, within the meaning of the ERT jurisprudence, is confirmed in Pfleger, where the Court holds that “[t]he use by a Member State of exceptions provided for by EU law in order to justify an obstruction of a fundamental freedom guaranteed by the Treaty must [...] be regarded [...] as ‘implementing Union law’ within the meaning of Article 51(1) of the Charter”32.

3. Hesitant/sinuous jurisprudence of the Court regarding the condition of a sufficient connection with the Union law

Notwithstanding the above, the exact limit between what enters into and what does not fall within the scope of European Union law is far from clear cut by the Court. Its jurisprudence, including the most recent case, maintains a number of ambiguities, particularly with regard to the applicability of EU fundamental rights to national measures which target a field also covered by the Union law, even if they do not intend to implement EU law. There is no a clear line, a comprehensive criterion for assessing situations which can be considered as relating to the Union law, thus falling within the scope of EU law, the Court adopting a case-by-case approach, using various (sometimes contested) grounds to determine whether or not the Union’s fundamental rights are applicable.

In the case *Iida* (which at the same time makes reference to the *Annibaldi* judgment), the Court has proposed a number of elements which may be used to determine whether a national measure falls within the scope of the fundamental rights guaranteed by the Union: "whether the national legislation at issue is intended to implement a provision of European Union law, what the character of that legislation is, and whether it pursues objectives other than those covered by European Union law, even if it is capable of indirectly affecting that law, and also whether there are specific rules of European Union law on the matter or capable of affecting it". It draws attention the reference to the objectives pursued by the national legislation, the Court suggesting that if they are not the same as those covered by European Union law, even if Union law is indirectly affected by the national measure, the Charter does not apply.

Moving away from the *Annibaldi-Iida* line of cases, in the case *Åkerberg Fransson* the Court offered a very broad interpretation of the connection which must exist between a national measure and EU law to determine the applicability of the fundamental rights of the Union. It sets out, as a starting point, the overlap between the scope of EU law in general and the fundamental rights of the Union: “Since the fundamental rights guaranteed by the Charter must [...] be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.”

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36 F. Fontanelli, *op. cit.*, p. 204.
38 Judgment *Fransson*, para. 21.
It is quite clear from this context that the equivalence between the scope of the Charter and that of the fundamental principles and the fact that the Court does not feel limited by the expression „implementation” used in Article 51(1) of the Charter to verify compliance with the provisions of the Charter of a national measure which does not constitute a strict implementation of the Union law.

Although the Advocate General has suggested that there is too little link between EU law and the national measure concerned in the present case in determining the incidence of the EU standard of protection of fundamental rights (namely Article 50 of the Charter, which refers to the ne bis in idem principle39), the Court considered that the measure at issue constituted an implementation of Union law (the VAT Directive) within the meaning of Article 51(1) of the Charter. According to the Court, the fact that the national provisions (relating to “the application of fiscal sanctions and prosecution for tax fraud”) were not adopted to transpose the Directive is irrelevant, since „its application is designed to penalise an infringement of that directive and is therefore intended to implement the obligation imposed on the Member States by the Treaty to impose effective penalties for conduct prejudicial to the financial interests of the European Union”40.

Besides the various contradictions and doubtfulness of Fransson decision, which is broadly outlined in the doctrine41, we can see that it does not bring much additional clarification compared to case law based on general principles of law. By suggesting that the existence of an obligation imposed by the Union law on the Member States is sufficient for the application of the Charter, it does not provide a decisive criterion for assessing the link which must exist between those obligations and national measures. Affirming the objective criterion of overlapping between the scope of the Union law and that of the Charter, the Court also refers, in quite vague terms, to the subjective criteria linked, first, to the interest of the Union or the objectives pursued by it (VAT collection and need not to affect the effectiveness of EU law) and on the other hand, the subjective intention of the national legislature to use certain measures to implement EU law.

Notwithstanding the questionable nature of the factors which, in the Court’s view, justify the link between the national rule and the law of the European Union, Court itself effort to identify such factors show that it did not envisage an approach involving the applicability unconditionally of the fundamental rights of the Union of any national measure intervening in a normative space regulated by EU law. Such an approach, which would bring purely internal issues within the scope of the Union law and under the Charter, would be in contradiction with the system of

40 Judgment Fransson, para. 28.
competence allocation in the EU and would contradict Article 51(2) of the Charter, which states that it can not extend the powers of the Union\(^42\).

The post-\textit{Fransson} case law on the scope of the fundamental rights of the Union is at least sinuous\(^43\). If in a number of cases it confirmed the extensive approach experienced in the \textit{Fransson}\(^44\), in others the Court returned to its previous jurisprudence to impose a more restrictive interpretation of the condition relating to the link between national measures and European Union law. An exemplary case for this group of cases is \textit{Siragusa}\(^45\), where it considered that although there is a certain link between the national rule in question (national conservation rules) and EU law (environmental protection rules), this link is not enough to trigger the application of the Charter. According to the Court, “[…] the concept of ‘implementing Union law’, as referred to in Article 51 of the Charter, requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other”\(^46\). Pursuant to \textit{Annibaldi-Iida} line of cases, it proposes the same list of elements that can be taken into account “[i]n order to determine whether national legislation involves the implementation of EU law for the purposes of Article 51 of the Charter”: “[w]ether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it”\(^47\).

Another argument retained by the Court to justify the non-application of the Charter is that EU law in the subject area “did not impose any obligation on the Member States with regard to the situation in issue in the main proceedings”\(^48\).

Last but not least, the Court has held that the application of EU fundamental rights to national measures pursues the objective of ensuring the “unity, primacy and effectiveness” of EU law. Consequently, when “nothing in the order for reference to suggest that any such risk is involved”, is no need for the Charter to apply\(^49\).


\(^{47}\) Judgment \textit{Siragusa}, para. 25.


\(^{49}\) Judgment \textit{Siragusa}, paras. 31-32.
In the context of the abundance of arguments used by the Court to justify the non-application of the Charter, while some authors consider that it impossible to discern a clear test, or even to determine which among them would be sufficient, taken separately\textsuperscript{50}, others still identify as the first criterion the intensity of the link between the national rule and the EU law, considering that only if that link is too weak, the argument relating to the risk of affecting the effectiveness of EU law should be used to determine the applicability of the Charter\textsuperscript{51}. However, with regard to the Fransson judgment, the arguments used in Siragusa make it possible to identify more consistent criteria in relation to which the scope of the fundamental rights of the Union can be determined than by simply referring to an approximate general rule.

There is a consensus on the fact that, proving the Court’s „pragmatism”\textsuperscript{52}, the formula used in Siragusa to justify the non-application of the Charter is a reaction to the fears expressed by some national courts following the adoption of the Fransson judgment\textsuperscript{53}, transmitting a clear signal that the fundamental rights protection in those situations which are not (very) directly connected with EU law remains the primary responsibility of the domestic legal system and its courts, “potentially at the expenses of the protection of citizens’ fundamental rights”\textsuperscript{54}.

However, the subsequent application of the test proposed in Siragusa to determine the link between the national rule and the EU law has proved to be extremely flexible. It seemed obvious that they are only indicative, not exhaustive or cumulative criteria, to be applied according to the context of the case in question. For example, if we refer only to the case related to Romania, the criterion of the correspondence between the objectives pursued by the national regulation and those of the specific provisions of the EU law seem to be of relative importance. In case Florescu\textsuperscript{55}, the fact that the national measure at issue (the prohibition on cumulating the pension with salary in the public sector under Law no. 329/2009) pursues the same objectives as those of the Union law (Council Decision 2009/458/EC of 6 May 2009 granting mutual assistance to Romania and the Memorandum of Understanding) is the decisive criterion for determining the applicability of the Charter (Article 17 on property rights), even if the Union law documents in question leave Romania room for manoeuvre to decide on the measures which are most

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\textsuperscript{50} F. Fontanelli, op. cit., p. 242.

\textsuperscript{51} S. Platon, loc. cit.

\textsuperscript{52} F. Fontanelli, op. cit., p. 246.

\textsuperscript{53} See Judgment of 24 April 2013 of the German Federal Constitutional Court (the Bundesverfassungsgericht/BverfG), docket number 1 BvR 1215/07, available at http://www.jusline.de/index.php?cpid=8d9dec3ee36c05c3417a89eeec877615&feed=153512.


\textsuperscript{55} Judgment of 13 June 2017, Florescu and others, C-258/14, EU:C:2017:448, paras. 47-48.
appropriate to ensure compliance with those commitments. In Căldăraru, concerning the implementation of Framework-Decision 2002/584 on the European arrest warrant, the correspondence between the objectives pursued by the national measure and those of the Union legislation is not required. So, even though the European arrest warrant does not in any way engage with the determination of standards for the execution of imprisonment penalties or detention conditions, Member States must take care that detention conditions are not contrary to the prohibition of inhuman and degrading treatment in Article 4 of the Charter.

4. The applicability of the fundamental rights enshrined as general principles of the Union law. Case Ispas (C-298/16)

The case Ispas, having the subject a request for a preliminary ruling formulated by the Cluj Court of Appeal concerning the application of the national rules of the Fiscal Procedure Code on the individual right to defence in a procedure for determining and collecting VAT, appeared to be the perfect occasion for the Court to clarify some relatively ambiguous issues in its jurisprudence: the relationship between the rights enshrined in the Charter and the general principles of law (namely, the right of access to the file, guaranteed by Article 41 (2) (b) of The Charter and the general principle of EU law of respect for the rights of the defence), on the one hand, and the intensity of the link to be established between the national rule relied on and the EU law in order to bring the Union standard of protection of fundamental rights, on the other hand.

At least in relation to the second of these issues, the judgment of the Court of 9 November 2017 not only fails to meet expectations, but, through the minimalist explanation, it induces a certain degree of perplexity, proving that, at least in the certain fields (such as VAT, which is subject to harmonization), the Fransson generalist approach to the scope of the fundamental rights of the Union (with all its ambiguities), which I thought could have occurred after the Siragusa jurisprudence, remains viable. Although it follows the conclusions of its Advocate General, this Court’s minimalism contrasts with its position, which, underlining the existing uncertainties about the two above-mentioned issues has, nevertheless, engaged in a wide-ranging analytical exercise.

Thus, although the question raised by the national court concerned the extent to which a person may request access to the file/documentation in the national tax procedure, without identifying any explicit EU law provision that would specifically provide for any such obligation on the part of the Member States, the Court has

57 Case C-298/16, Teodor Ispas, Anduța Ispas v Direcția Generală a Finanțelor Publice Cluj.
held that this situation is subject to EU law, attracting the application of fundamental rights guaranteed by the Union. To conclude this, the Court does not retain any specific provision in the Union law, but refers generally to the VAT Directive\(^{60}\), stating that „the general obligations ensuing from that directive are easily identifiable”\(^{61}\). Referring to Åkerberg Fransson’s judgment, it states that the situation in question must be examined in the light of the general principle of EU law of respect for the rights of the defence, which „applies in circumstances such as those at issue in the main proceedings in which a Member State, in order to comply with the obligation arising from the application of EU law to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing fraud (...), submits taxpayers to a tax inspection procedure”\(^{62}\).

Unlike Fransson’s decision, in which he sought to identify provisions of the VAT Directive which could substantiate the obligation incumbent on the Member States, and in doing so also referred to the principle of loyal cooperation enshrined in Article 4 (3) TEU\(^{63}\), in Ispas the Court does not do it, not even in the sense proposed by Advocate General, which suggested that the procedural element in question, namely the access to the administrative file or the documents contained therein in the context of a VAT procedure conducted at national level, may be covered by the concept of „correct collection of VAT” under Article 273 of the VAT Directive\(^{64}\).

Similar to those retained in Fransson with regard to the applicability of the Charter, the identification of obligations, even of a general nature, imposed on Member States by Union law appears to be a sufficient condition for determining the applicability of fundamental rights enshrined as general principles. The lack of indications as to the intensity of the link to be established between those obligations and the national measures in question, that is to say, the degree to which they determine the actions of the Member States, can be interpreted as bringing any national rule relating to that matter, even if not specifically adopted for that purpose, within the scope of European Union law. By pointing out that such an interpretation could lead to even absurd situations where purely internal situations, including the institutional structure, would be included in the scope of

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\(^{61}\) Judgment Ispas, para. 23.

\(^{62}\) Judgment Ispas, paras. 27-28.

\(^{63}\) Judgment Åkerberg Fransson (C-617/10, EU:C:2013:105), para. 25.

\(^{64}\) Opinion of Advocate General Bobek, point 39. According to him (point 68 of the Opinion), „[a]s a matter of fact, a tax inspection aimed at verifying whether or not a person became subject to VAT and whether its commercial transactions are duly documented is, on a purely textual basis, no more remote from the wording of Article 213(1) and Article 242 of the VAT Directive than ‘tax penalties and criminal proceedings for tax evasion’ are from the wording of Article 2, Article 250(1) and Article 273 of the VAT Directive”.
the EU law, Advocate General Bobek suggests that there is a limit to this broad approach to the definition the scope of the Union law, in the form of the regulation “reasonable functional necessity”, according to which a national rule whose adoption and operation “is not reasonably necessary in order to enforce the relevant EU law” do not fall within the scope of the Union law. And this time the Court prefers not to engage in such a theoretical exercise, which perpetuates the state of uncertainty and leaves the national courts without too much guidance on how to address the situations in which the internal measures concerned, although intervening in a domain regulated by EU law, have a poor connection with it.

The Court has held that the obligation to observe the rights of the defence, in the sense that the addressees of the decisions which have a significant effect on their interest in making their point of view of the matters which the administration intends to base its decision, it is for the Member States’ administrations when they take decisions which come within the scope of EU law, even if the EU legislation applicable does not expressly provide for such a procedural requirement.

As regards the challenge raised by the Ispas cause as regards the relationship between the right of access to the file, expressly included in Article 41(2) (b) of the Charter, as a component of the right to good administration, and the principle of respect for the rights of the defence, and here the Court is rather stingy in explanations. Without making any reference to Article 41 of the Charter (the scope of which, according to the settled jurisprudence, is limited to the action of the Union institutions/bodies and is not regarded as opposing the Member States), it is necessary to examine the situation in question in the main proceedings the light of the principle of the rights of the defence, in close connection with the principle of the procedural autonomy of the Member States and of its limits stemming from the principles of equivalence and effectiveness.

However, it is indirectly analyzed the content of this principle by comparison with the guarantees contained in Article 41 of the Charter, clearly demonstrating that the standard of protection contained in the general principle of respect for the rights of the defence is lower than that applicable to the direct administration of the Union under Article 41 of the Charter. While the effective observance of that right requires that there is a real possibility of access to the information and documents which form the basis of the administrative decision which the administration is planning to adopt, the national tax authorities are not subject to a general obligation to provide full access to the file nor to communicate ex officio the documents and information underlying the envisaged decision. In addition, reasons of general interest may justify restricting access to those documents and information. The assessment of the fulfilment of the requirement for the effectiveness of the defence rights must be

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65 Opinion of Advocate General Bobek, points 56-57.
67 Judgment Ispas, paras. 31-36.
achieved not only by reference to the content of the relevant national procedural rules but also to the stage of their practical implementation (in the context of administrative practices), which is the task of the referring court.

5. Concluding remarks

Despite the inherent complexity of such an approach, determining the precise scope of the Union’s fundamental rights is of crucial importance not to frustrate the expectations of citizens to a meaningful protection of their fundamental rights. In the context of the rather ambiguous formulation of Article 51(1) of the Charter, pressure from this point of view falls on the Court of Justice, which has to make a difficult balance between the imperative of respecting the constitutional allocation of competences and to ensure effective protection of fundamental rights in all situations subject to European Union law.

The analysis of the Court’s jurisprudence reveals that the inclusion in the scope of Union law and the imposition of Union standards for the protection of fundamental rights on national measures that do not implement striceto sensu EU law do not currently have a generally applicable rule. Such a rule is rather difficult to identify given the extreme diversity of the nature and scope of the legal acts of the Union (in relation to the different legal areas currently covered by the Union law), the variability in time of these acts, but also the limits to the Court on the specificity of the reference for a preliminary ruling (the causal context of the interpretation of EU law, the answer being dependent on the questions put by the referring court in the normative and factual context which it defines).

The Court’s approaches seem to vary depending on the area of the case (in the areas subject to harmonization, the Court is more intrusive in requiring the application of the Union standards than in those in which the Union’s legal acts have only a coordination role), but also in relation to the existing interests (mainly the interests of the Union, whether linked to the enlargement of integration, or to ensure supremacy and effectiveness of EU law).

If, in most cases, the Court has proved cautious in imposing a Union standard for the protection of fundamental rights on internal measures which have no clear/direct link with EU law, in cases where it has adopted a more intrusive position, it has often left the national courts to carry out the relevant assessments to determine the outcome of the case.68

This fragmentation of the Court’s jurisprudence through the alternation between the different approaches, the lack of a clear line on what is and does not fall within the field of EU law, and consequently the application of the Union’s standards of protection not only does not simplify the task of national judges but can even lead to the impact of what the Court is so persistently pursuing - the uniform and integral application of Union law.

68 E. Spaventa, op. cit., p. 22.
The appeal by numerous Advocates Gener als of the Court, including in very recent cases, such as Ispas, for a stronger motivation of situations in which there must be a shift of function and responsibility for guaranteeing fundamental rights from states to the Union by identifying a general criterion (or a limit), proves that the problem is far from being cut. A first step in this direction may be an element which transpires both from the Fransson-Ispas jurisprudence and from the Siragusa jurisprudence - the existence of EU law obligations on the Member States in the specific situation. Of course, giving a possible central role to this element remains to be confirmed and refined in the subsequent jurisprudence of the Court.

REFERENCES


