Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 12 June 2012[1]

Case C-617/10

Åklagaren
v
Hans Åkerberg Fransson

(Reference for a preliminary ruling from the Haparanda tingsrätt (Sweden))

(Field of application of the Charter of Fundamental Rights of the European Union — Article 51 of the Charter — Implementation of European Union law by the Member States — National system of penalties applicable to infringements of VAT legislation — Article 50 of the Charter — Ne bis in idem as a general principle of European Union law — Accumulation of administrative and criminal penalties — Definition of the 'same facts' — Interpretation of the Charter in the light of the European Convention on Human Rights — Article 4 of Protocol No 7 to the European Convention on Human Rights — Case-law of the European Court of Human Rights — Determination of the fundamental rights of the European Union based on the common constitutional traditions of the Member States)

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I – Introduction

1. Behind the apparent simplicity of the case – punishment of a fisherman operating in the Gulf of Bothnia for failure to comply with tax obligations – the present reference for a preliminary ruling raises for the Court two particularly tricky issues and a rather perplexing situation.

2. The first of those issues concerns the admissibility of the reference for a preliminary ruling, since, in view of the unquestionably domestic nature of the case, the determination of whether the Court has jurisdiction to rule on a question of fundamental rights calls for an assessment of the case as an instance of the implementation of European Union (also 'Union') law by a Member State, which is now covered by Article 51(1) of the Charter of Fundamental Rights of the European Union ('the Charter').

3. The other, substantive, issue concerns the way in which the *ne bis in idem* principle operates in a situation where the power to impose administrative penalties and the penalising authority of a Member State are accumulated to punish the same conduct, and that issue takes us to Article 50 of the Charter.

4. The perplexing situation is derived from the first question submitted by the referring court, in which the issue, taken on its own, appears to be comparatively simpler than those mentioned above. That question concerns the scope of the principle of the primacy of Union law when it comes up against a requirement laid down by a national supreme court, such as the requirement that there must be clear support or evidence in order to supplant national law. The perplexity stems from a situation where, on the one hand, the clear support required now appears to be enshrined in the most recent case-law of the European Court of Human Rights and, on the other, rather than simplifying the reply regarding the scope of the *ne bis in idem* principle in Union law, that development makes it more complicated.

5. As far as the issue of admissibility is concerned, I shall propose that the Court of Justice should find that it lacks jurisdiction, since the Member State concerned is not implementing Union law within the meaning of Article 51(1) of the Charter. I believe, as I shall attempt to explain, that a careful examination of the circumstances of the case militates in favour of reaching that conclusion. However, there is a strong possibility that, for those purposes, the Court must adopt a number of views which I shall put forward regarding this vexed question. I must admit that those views do not follow in the wake of the case-law laid down to date.

6. In the alternative, should the Court hold that it has jurisdiction to give a ruling on the substance, I shall suggest an autonomous definition of the *ne bis in idem* principle in Union law. As I shall attempt to explain, as far as that principle is concerned, the rule in Article 52(3) of the Charter, which provides that the meaning and scope of the rights contained in the Charter are 'the same' as the corresponding rights laid down in the European Convention on Human Rights ('ECHR'), raises singular difficulties.

7. Finally, with regard to the requirement that there must be a clear basis in the ECHR and in Union law, I shall propose an interpretation of that requirement which is compatible with the principle of primacy.

II – Legal framework

A – *European Union legal framework*

8. Today, the *ne bis in idem* principle is set out in Article 50 of the Charter, which reads as follows:

'No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.'

9. Directive 2006/112/EC on the common system of value added tax [2] provides in Article 273:

'Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

…'

B – *ECHR*

10. Article 4 of Protocol No 7 to the ECHR, under the heading 'Right not to be tried or punished twice', provides as follows:

'1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention.'

C – *National legal framework*

11. Paragraphs 1 and 4 of Chapter 5 of the Taxeringslagen (Law on tax assessment, 1990:324) lays down basic provisions relating to the arrangements for tax surcharges in Sweden:

'*Paragraph 1*

If, during the procedure, the taxable person has provided false information, other than orally, for the purposes of the tax assessment, a special charge (tax surcharge) shall be levied. The same shall apply if the taxable person has provided such information in legal proceedings relating to taxation and the information has not been accepted following a substantive examination.

2 — Council directive of 28 November 2006 (OJ 2006 L 347, p. 1)

Information shall be regarded as false if it is clear that information provided by the taxable person is inaccurate or that the taxable person has omitted information for the purposes of the tax assessment which he was required to provide. However, information shall not be regarded as false if the information, together with other information provided, constitutes a sufficient basis for a correct decision. Information also shall not be regarded as false if the information is so unreasonable that it manifestly cannot form the basis for a decision.

Paragraph 4

If false information has been provided, the tax surcharge shall be 40% of the tax referred to in points 1 to 5 of the first subparagraph of Paragraph 1 of Chapter 1 which, if the false information had been accepted, would not have been charged to the taxable person or his spouse. With regard to value added tax, the tax surcharge shall be 20% of the tax which would have been wrongly credited to the taxable person.

The tax surcharge shall be calculated at 10% or, with regard to value added tax, 5% where the false information was corrected or could have been corrected with the aid of confirming documents which are normally available to the Skatteverket and which were available to the Skatteverket before the end of November of the fiscal year.

...'

12. Paragraphs 2 and 4 of the Skattebrottslagen (Law on tax offences, 1971:69) contains provisions of criminal law applicable to tax evasion, which are worded as follows:

'*Paragraph 2*

Any person who intentionally provides false information to the authorities, other than orally, or fails to submit to the authorities declarations, statements of income or other required information and thereby creates the risk that tax will be withheld from the community or will be wrongly credited or repaid to him or a third party shall be sentenced to a maximum of two years' imprisonment for tax offences.

Paragraph 4

If an offence within the meaning of Paragraph 2 is to be regarded as serious, the sentence for such a tax offence shall be a minimum of six months' imprisonment and a maximum of six years.

In determining whether the offence is serious, particular regard shall be had to whether it relates to very large amounts, whether the perpetrator used false documents or misleading accounts or whether the conduct formed part of a criminal activity which was committed systematically or on a large scale or was otherwise particularly grave.'

III – Facts and proceedings before the national court

13. Mr Fransson is a self-employed worker whose main activities are fishing and the sale of white fish (*Coregonus albula*). His fishing activity is carried out in the waters of the River Kalix, although his catches are sold on both Swedish and Finnish territory.

14. The Swedish tax authorities accuse Mr Fransson of failing to comply with his obligations to provide tax information in the 2004 and 2005 fiscal years, with the resulting loss of tax revenue from a number of taxes. As regards the VAT assessment for the fiscal years concerned, the Swedish authorities calculate that the information provided by Mr Fransson entailed a loss of revenue to the tax authorities totalling SEK 60 000 in the 2004 fiscal year and SEK 87 550 in the 2005 fiscal year.

15. On 24 May 2007, in accordance with the Swedish legislation on tax penalties, the Skatteverket (Swedish Tax Board) imposed on Mr Fransson a fine for tax offences committed in the 2004 fiscal year, of which SEK 4 872 relates to the VAT offence. As concerns the 2005 fiscal year, the Skatteverket determined a different fine, of which SEK 3 255 relates to the VAT offence. No appeal was lodged against either the penalty for 2004 or the penalty for 2005 and those penalties became final on 31 December 2010 and 31 December 2011, respectively.

16. On 9 June 2009, following an application by the Public Prosecutor, the Haparanda tingsrätt (Haparanda District Court) commenced criminal proceedings against Mr Fransson. The Public Prosecutor accuses Mr Fransson of committing an offence of tax evasion in the 2004 and 2005 fiscal years. The Public Prosecutor argues that the failure by Mr Fransson to comply with the obligations to provide tax information incumbent on him, including the obligations relating to VAT, entailed a considerable loss of revenue to the tax authorities, which justified the bringing of criminal proceedings. In accordance with Paragraphs 2 and 4 of the Skattebrottslagen, the offence with which Mr Fransson is charged is punishable by up to six years' imprisonment.

17. According to the referring court, the facts on which the charge brought by the Public Prosecutor are based are the same as the ones which formed the basis for the administrative penalty imposed by the Skatteverket on 24 May 2007.

18. On 23 December 2010, the Haparanda tingsrätt stayed the criminal proceedings brought against Mr Fransson, finding that there was a link with Union law, specifically Article 50 of the Charter which enshrines the fundamental right of *ne bis in idem*.

IV – The procedure before the Court of Justice

19. On 27 December 2010, the reference for a preliminary ruling from the Haparanda tingsrätt was received at the Registry of the Court; the questions referred are worded as follows:

'(1) Under Swedish law there must be clear support in the European Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms (ECHR) or the case-law of the European Court of Human Rights for a national court to be able to disapply national provisions which may be suspected of infringing the *ne bis in idem* principle under Article 4 of Protocol No 7 to the ECHR and may also therefore be suspected of infringing Article 50 of the Charter of Fundamental Rights of the European Union of 7 December 2000 ("the Charter"). Is such a condition under national law for disapplying national provisions compatible with European Union law and in particular its general principles, including the primacy and direct effect of European Union law?

(2) Does the admissibility of a charge of tax offences come under the *ne bis in idem* principle under Article 4 of Protocol No 7 to the ECHR and Article 50 of the Charter where a certain financial penalty (tax surcharge) was previously imposed on the defendant in administrative proceedings by reason of the same act of providing false information?

(3) Is the answer to Question 2 affected by the fact that there must be coordination of these sanctions in such a way that ordinary courts are able to reduce the penalty in the criminal proceedings because a tax surcharge has also been imposed on the defendant by reason of the same act of providing false information?

(4) Under certain circumstances it may be permitted, within the scope of the *ne bis in idem* principle mentioned in Question 2, to order further sanctions in fresh proceedings in respect of the same conduct which was examined and led to a decision to impose sanctions on the individual. If Question 2 is answered in the affirmative, are the conditions under the *ne bis in idem* principle

for the imposition of several sanctions in separate proceedings satisfied where in the later proceedings there is an examination of the circumstances of the case which is fresh and independent of the earlier proceedings?

(5) The Swedish system of imposing tax surcharges and examining liability for tax offences in separate proceedings is motivated by a number of reasons of general interest, which are described in greater detail below. If Question 2 is answered in the affirmative, is a system like the Swedish one compatible with the *ne bis in idem* principle when it would be possible to establish a system which would not come under the *ne bis in idem* principle without it being necessary to refrain from either imposing tax surcharges or ruling on liability for tax offences by, if liability for tax offences is relevant, transferring the decision on the imposition of tax surcharges from the Skatteverket and, where appropriate, administrative courts to ordinary courts in connection with their examination of the charge of tax offences?'

20. Written observations were submitted by the Kingdom of Sweden, the Kingdom of the Netherlands, the Kingdom of Denmark, the Czech Republic, the Republic of Austria, Ireland and the European Commission.

21. The hearing before the Court was held on 24 January 2012, and oral argument was presented by the representatives of Mr Fransson, and the agents of the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Hellenic Republic, the French Republic, the Kingdom of the Netherlands and the Commission.

V – Jurisdiction of the Court

22. The Member States which submitted written observations (with the exception of Austria), and two of those which presented only oral argument (Germany and France), and the Commission have all submitted, like the Public Prosecutor in the main proceedings, that the solution to the difficulty raised by the guarantee of the *ne bis in idem* principle is not to be found in Union law and that that solution cannot be sought from the Court of Justice. More specifically, the issue under discussion is not governed by Article 50 of the Charter. That is why there has been frequent avoidance of any exchange of views on the substantive issue, in other words, the subject-matter and scope of the *ne bis in idem* principle in Union law, which has led to the weakening of that principle.

23. The issue which has mainly been discussed is, without question, that of the jurisdiction of the Court, in the terms set out. Thus, the Court is again faced with a difficulty in which the request for clear criteria to determine the scope of the expression 'implementation of Union law by the Member States' is matched only by the difficulty of responding to that request. [3]

24. In what follows, I seek only to submit for the Court's consideration a number of views supplementing the many and varied views which have been put forward, in particular, by Advocates General in recent times. [4] I believe that the present case provides the opportunity to put forward arguments capable of contributing to the task of establishing a body of case-law, which will not be concluded overnight.

3 — See, for example, Groussot, X., Pech, L. and Petursson, G.T., 'The Scope of Application of EU Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication', *Eric Stein Working Paper* 1/2011.

4 — See, for example, the Opinion of Advocate General Bot in Case C-108/10 *Scattolon* [2011] ECR I-7491; the Opinion of Advocate General Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177; the Opinion of Advocate General Poiares Maduro in Case C-380/05 *Centro Europa 7* [2008] ECR I-349; and the Opinion of Advocate General Jacobs in Case C-112/00 *Schmidberger* [2003] ECR I-5659.

A – *Overview*

1. An abstract scenario: implementation of Union law by the Member States

25. As I have said, the basic argument on which all those who have participated in the proceedings agree is that the criterion or requirement which is now set out in detail in Article 51(1) of the Charter, pursuant to which the Member States are caught by the provisions of the Charter 'only when they are implementing Union law' is not satisfied. The connection between that wording and what had been until then the exclusive basis in case-law for the rule may be seen in the relevant explanation of the Charter.[5] The explanations, for all that they are worth, point to continuity rather than conflict in the relationship between that case-law and its concrete expression in the Charter. In my opinion, that is correct, with some qualification.

26. Nevertheless, since the Charter was originally proclaimed in Nice, there have been many views which have pointed to a tension between that case-law of the Court – either as it stood in 2000 or as it stood in 2007 –[6] and Article 51(1) of the Charter. 'Implementation' (as the category used in the Charter) and 'field of application' (as the category used in case-law) have been put forward as the terms which encapsulate that tension.[7]

27. At this juncture, I believe that it would be helpful to view the different formulations used as expressions which are not qualitatively different. It is clear that nuances may be identified between them. However, the boundaries are always blurred. In particular, as I understand it, the two formulations concerned point to a situation where, since there is always a discretion on the part of the Member States, meaning that any infringement of a right cannot correctly be attributed to the Union, the *presence* of Union law in the scenario concerned is sufficiently strong to warrant an assessment of the scenario in the light of Union law, and therefore by the Court of Justice.

28. This means, first and foremost, that the lawfulness of a review where there is assumed to be no margin of discretion (to be clear, the 'Bosphorus' situation)[8] is, naturally, not in dispute. Those are cases of *reproduction* rather than *implementation.*

29. In any event, the 'implementation' scenario of itself sets an essentially fluid boundary as far as the distribution of responsibility for guaranteeing fundamental rights is concerned. Having stated the principle – in other words, that, in certain circumstances, where the exercise of public authority by a Member State involves some degree of autonomy, it must be analysed in the light of the fundamental rights as they govern the Union by the supreme interpreter of those rights, the Court of Justice – the question which immediately arises is that of the scope of that principle.

5 — See the explanations of Article 51 of the Praesidium of the Convention which drafted the Charter, as amended, referred to in the third subparagraph of Article 6(1) TEU.

6 — See, on the one hand, Case 5/88 *Wachauf* [1989] ECR 2609, Case C-2/92 *Bostock* [1994] ECR I-955, and *Schmidberger*, cited in footnote 4, and, on the other hand, Case C-260/89 *ERT* [1991] ECR I-2925 and Case C-368/95 *Familiapress* [1997] ECR I-3689. Contrast those judgments with the judgments in Case C-144/95 *Maurin* [1996] ECR I-2909; Case C-299/95 *Kremzow* [1997] ECR I-2629; and Case C-309/96 *Annibaldi* [1997] ECR I-7493.

7 — See, among many others, Nusser, J., *Die Bindung der Migliedstaaten an die Unionsgrundrechte*, Mohr Siebeck, Tübingen, 2011, p. 54 et seq; Kokott, J. and Sobotta, C., 'The Charter of Fundamental Rights of the European Union after Lisbon', *EUI Working Papers*, Academy of European Law, No 2010/06; Alonso García, R., 'The General Provisions of the Charter of Fundamental Rights of the European Union', No 8, *European Law Journal*, 2002; Groussot, X., Pech, L. and Petursson, G.T., op. cit. (footnote 3); Eeckhout, P., 'The EU Charter of Fundamental Rights and the federal question', No 39, *Common Market Law Review*, 2002; Jacqué, J.P., 'La Charte des droits fondamentaux de l'Union européenne: aspects juridiques généraux', REDP, Vol. 14, No 1, 2002; Egger, A., 'EU-Fundamental Rights in the National Legal Order: The Obligations of Member States Revisited', *Yearbook of European Law*, Vol. 25, 2006; Rosas, A. and Kaila, H., 'L'application de la Charte des droits fondamentaux de l'Union européenne par la Cour de justice – Un premier bilan', *Il Diritto dell'Unione Europea*, 1/2011; and Weiler, J. and Lockhart, N., 'Taking rights seriously: The European Court and its Fundamental Rights Jurisprudence – Part I', No 32, *Common Market Law Review*, 1995.

8 — Judgment of the European Court of Human Rights in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI.

30. In my opinion, that question, concerning the cases in which it is necessary to carry out a 'centralised' review of the actions of Member States as regards respect for the fundamental rights, has been answered in initially specific terms by the Court, making it possible to identify a limited number of perfectly well-known scenarios which have been the subject of repeated discussions and varied assessments. [9]

31. In any event, owing perhaps to that specific origin of the case-law, there has never been a truly powerful argument, in the sense of one which explains it in sufficiently abstract terms. There may be a number of reasons for that and now does not appear to be the time to examine them.

32. Nor was any further explanation offered in the *ERT* judgment, which is the pivot between the identification of a scenario which was to some extent defined (derogation from the fundamental freedoms) and the transition to the general scenario which would eventually become established: 'scope', 'field of application', and 'implementation', always in accordance with Union law.

33. An abstract description of the phenomenon at issue would lead me to argue that a common feature of the different formulations used is the requirement that Union law must have a *presence* at the origin of the exercise of public authority; that presence, it should be added, must be as a law, that is with the capacity to determine or influence to some extent the subject-matter of that exercise of public authority in the Member State. However, 'presence' never becomes 'predetermination', in so far as the latter situation scenario should not pose a problem. [10]

34. Finally, none of the formulations referred to ('scope', 'field of application', and 'implementation') has the capacity, of itself, to restrict the scope of that statement of principle. One way of looking at it is that the formulations have little to do with the idea of *lex stricta*, if that condition is applicable to them. On the contrary, they have all the advantages and difficulties of any essentially open formulation. The much discussed term 'only' in Article 51(1) of the Charter does not lead very far either: it could sound a warning note against a broad interpretation in the future or it could express an optimistic belief with regard to the semantic capacity of the verb 'to implement'.

2. A proposed interpretation: a relationship of rule and exception

35. To my mind, on a proper interpretation of the basic constitutional structure of the compound comprising the Union and the Member States, which has been described as the 'European Verfassungsverbund', [11] it is, as a rule, for the Member States themselves, in the context of their own constitutional order and the international obligations which they have entered into, to review acts of their public authorities.

36. However, that rule is accompanied by an exception which has acquired undeniable scope and applies to cases where national public authorities are implementing Union law, to use the wording of the Charter. In my opinion, the perception of the dialectical relationship between the two scenarios in terms of rule and exception continues to be justified today.

9 — See, inter alia, the scenarios in the paradigmatic cases of *Wachauf* and *ERT*, both cited in footnote 6, in addition to the numerous examples referred to by Kaila, H., 'The Scope of Application of the Charter of Fundamental Rights of the European Union in the Member States', in Cardonnel, P., Rosas, A. and Wahl, N. (eds), *Constitutionalising the EU Judicial System. Essays in Honour of Pernilla Lindh*, Hart Publishers, Oxford-Portland, 2012.

10 — See Nusser, J., op. cit. (footnote 7).

11 — Pernice, I., 'Bestandssicherung der Verfassungen: Verfassungsrechtliche Mechanismen zur Wahrung der Verfassungsordnung', in Bieber, R. and Widmer, P. (eds), *L'espace constitutionnel européen. Der europäische Verfassungsraum. The European constitutional area*, Schultess Polygraphischer Verlag, Zurich, 1995, p. 261 et seq; and more recently, by the same author, *Das Verhältnis europäischer zu nationalen Gerichten im europäischen Verfassungsverbund*, De Gruyter, Berlin, 2006, p. 17 et seq.

37. The effect is that the assumption by the Union of responsibility for guaranteeing fundamental rights when Member States exercise public authority in those cases must be examined in terms of a *transfer*, in the sense that the original responsibility of the Member States is passed to the Union as far as that guarantee is concerned.

38. Certainly, in terms of its subject-matter, Union law changes over time and that change will inevitably and legitimately determine the scope of the exception. However, while the term 'Verfassungsverbund' continues to have meaning when it comes to describing the Union in constitutional terms, the principle, as such, gives shape to an exception to a rule in structural terms. I do not believe that an interpretation of that exception which includes the potential to convert it into a rule accords with the basic idea which I have just described.

39. That being so, I believe that now is the time for the Union judicature to make an additional effort to rationalise the basic but indeterminate view that the Member States are subject to the Charter 'when they are implementing Union law'. There have long been calls for the Court to carry out such a task, and there is no shortage of suggestions from academic writers. [12]

3. A ground: a specific interest on the part of the Union

40. In my view, the competence of the Union to assume responsibility for guaranteeing the fundamental rights vis-à-vis the exercise of public authority by the Member States when they are implementing Union law must be explained by reference to a specific interest of the Union in ensuring that that exercise of public authority accords with the interpretation of the fundamental rights by the Union. The mere fact that such an exercise of public authority has its ultimate origin in Union law is not of itself sufficient for a finding that there is a situation involving the 'implementation' of Union law.

41. I believe that, ultimately, on occasions which it is difficult to stipulate in advance, it is legitimate that the Union's interest in leaving its mark – its conception of the fundamental right – should take priority over that of each of the Member States, as I have been indicating. That interest of the Union is principally founded on the presence, or even the leading role, of Union law in national law in each particular case. In short, the cases concerned are ones in which the lawfulness of public authority in the Union may be at stake and there must be an adequate response to that situation.

4. A line of argument: the place of categories and the place of a case-by-case analysis

42. Essentially, it falls to the Court to carry out the priority task of stating reasons and, in particular, proposing guidelines which will promote the lawfulness of all judicial activity.

43. To put it another way, the category of the 'implementation of Union law', as a ground for attracting a review of such activities of the national public authorities in the light of the fundamental rights, is, in my opinion, in need of case-law which supplements and, in short, *gives order to* protean wording of the kind under consideration.

12 — See, for example, Nusser, J., op. cit. (footnote 7).

44. More specifically, if the mere invocation or brief declaration of a particular legal situation as being one involving the 'implementation of Union law' does not appear satisfactory, I believe that that is because there is no element or factor behind it which *qualifies* a situation identified as such. In short, that assertion is tantamount to calling for an express statement of grounds – in any event, one which is more extensive than that which has been provided to date – for situations where the function and responsibility of guaranteeing the fundamental rights must be transferred from the Member States to the Union.

45. At the same time, although it appears paradoxical, I believe that there is a need for a parallel strengthening of the examination of the characteristics of a case – in short, of the case-by-case analysis, correctly understood. In particular, the determination of whether a given case must be construed as one involving the implementation of Union law must frequently be the result of an appraisal of a number of factors which shape the case. In that connection, the lesser the extent to which the cases where responsibility is transferred are defined in case-law, the greater the judicial attention which must be paid to the circumstances of the case.

46. In summary, I believe that a traditionally open provision of the kind laid down in Article 51(1) of the Charter calls for a basic determination of its meaning. That must be effected, first of all, by means of a determination of the different situations in which the transfer from the Member States to the Union of responsibility for guaranteeing fundamental rights is primarily likely to be justified. Secondly, I believe that an appraisal of the specific circumstances of each case must allow a final, definitive adjudication regarding the allocation of responsibility for guaranteeing the fundamental rights to either the Union or the Member States.

B – *The reply concerning the issue of jurisdiction in this case*

47. In an attempt to apply the foregoing suggestions to the case in point, I believe that it is necessary to begin by focusing on the fundamental right of the Union in question and on the actions of the State public authorities which must be analysed in the light of that right, before moving on to the degree of connection between them.

1. The fundamental right in question

48. On this point, I propose shifting the focus to a systematic assessment which is capable of guiding the arguments. It must be borne in mind that nowadays the *ne bis in idem* principle is enshrined in the Charter, in Article 50 thereof to be exact. The codification of the fundamental rights of the Union, while coexisting with the other components of Article 6 TEU, has specific consequences. In particular, the Charter reveals 'connections of meaning' ('Sinnzusammenhänge') which, in a system of predominantly judge-made rights, remain somewhat in the shade.

49. More specifically, the scheme of the Charter significantly complicates the task of establishing differences in treatment between the guarantee enshrined in Article 50 and the many other substantive and procedural guarantees laid down in the articles comprising Title VI of the Charter, namely Articles 47 to 50, which are set out under the headings 'Right to an effective remedy and to a fair trial' (Article 47), 'Presumption of innocence and right of defence' (Article 48), and 'Principles of legality and proportionality of criminal offences and penalties' (Article 49).

2. A special sphere of the exercise of public authority: the power to impose penalties

50. At the outset, it is necessary to observe that the sphere – frequently recognised as such – of the exercise of the power of Member States to impose penalties, with an effective basis in Union law, includes rights which are not easily challenged as far as the interest of the Union is concerned.

51. The present case concerns a situation where the power of the Member States to impose penalties has its ultimate origin in Union law, an area about which there is considerable guidance in case-law, as was made clear again at the hearing. Thus, it is settled case-law of the Court that the power of Member States to impose penalties must be exercised with respect for the general principles of Union law, the scope of which it logically falls to the Court to interpret.[13] It is difficult not to conclude that those general principles now comprise the fundamental rights, as set out in the Charter.

3. The extent of the transfer of responsibility for guaranteeing the *ne bis in idem* principle from the Member States to the Union

52. Against that background, the question is: must that call for respect for those principles in the exercise of the power to impose penalties be construed as a proclamation of the general transfer to the Union judicature of all the guarantees mentioned at the beginning which, together with the *ne bis in idem* principle, make up Title VI of the Charter?

53. In my opinion, the imposition of penalties by the Member States based on Union law creates a principle of legitimation of the transfer of the responsibility for guaranteeing rights. Although the punishment of individual conduct which is contrary to Union law has so frequently been left to the Member States, that is not a reason to state that there is a complete absence of interest on the part of the Union in ensuring that that power to impose penalties is exercised with respect for the basic principles which govern a community established under the rule of law, like the Union.

54. That said, that principle of legitimation inevitably needs to be supplemented by and comprise a number of arguments derived from the circumstances of the case. In other words, I believe that the mere finding that the exercise of the power of the State to impose penalties in a particular case is ultimately based on a provision of Union law is not, of itself, sufficient for the purposes of transferring the review of any constitutional guarantees applicable to the exercise of that power from the sphere of responsibility of the Member States to that of the Union.

55. Those considerations lead me to conclude that the determination of the Court's jurisdiction to rule on whether there is sufficient respect for the *ne bis in idem* principle in this case must be based on an assessment of the subject-matter concerned: the imposition of penalties by the State pursuant to Union law. Initially and in principle, that will militate in favour of a positive reply. However, there must be a careful analysis of the fundamental law relied on and of the facts of the case in order to obtain a definitive answer.

4. Conclusion: a case to which the scenario 'implementation of Union law' does not apply

56. First and foremost, the way in which the referring court has presented and structured the reference for a preliminary ruling can only be a cause for concern. The relevant provisions of Union law, as they appear in the order for reference, are confined to the citation of Article 6 TEU and Article 50 of the Charter, without any attempt being made to identify the Union provisions which the Member State is

13 — See, among many others, Case 118/75 *Watson and Belmann* [1976] ECR 1185; Case 8/77 *Sagulo and Others* [1977] ECR 1495; Case C-326/88 *Hansen* [1990] ECR I-2911; Case 68/88 *Commission* v *Greece* [1989] ECR 2965; Case C-7/90 *Vandevenne and Others* [1991] ECR I-4371; Case C-177/95 *Ebony Maritime and Loten Navigation* [1997] ECR I-1111; Case C-546/09 *Aurubis Balgaria* [2011] ECR I-2531; and Case C-210/10 *Urbán* [2012] ECR. More specifically, as regards national penalties imposed in compliance with European Union directives, see, inter alia, Case C-262/99 *Louloudakis* [2001] ECR I-5547; Case C-13/01 *Safalero* [2003] ECR I-8679; Case C-12/02 *Grilli* [2003] ECR I-11585; Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565; and Case C-430/05 *Ntionik and Pikoulas* [2007] ECR I-5835.

'implementing'. More worrying still is the referring court's assertion that the Swedish provisions were not adopted in order to transpose Union law and that, in any event, the reply may be useful for other cases in relation to which it would be very useful to have already obtained a ruling from the Court of Justice. [14]

57. In addition to the uncertainties of the referring court, the fundamental question to analyse in the present proceedings is the connection between Union law – without question Directive 2006/112 in this case – and the situation created in the Member State as a result of the conception prevailing there of the scope of the *ne bis in idem* principle. It must be recalled that the premiss for finding that the Union has an interest in assuming responsibility for guaranteeing the fundamental right concerned in this case is the degree of connection between Union law, which is in principle being 'implemented', and the exercise of the public authority of the State. In my opinion, that connection is extremely weak and is not, in any event, a sufficient basis for a clearly identifiable interest on the part of the Union in assuming responsibility for guaranteeing that specific fundamental right vis-à-vis the Union.

58. It is only possible to identify a requirement for effectiveness in the collection of VAT in Directive 2006/112. [15] It is clear that, in our societies, the suppression of infringements of tax obligations is an essential condition of the effective exercise of the power of taxation. As a logical consequence, Member States must use their general tax system, including the system of penalties, for the purposes of collecting VAT, just as they must also use their tax authorities for the same purposes.

59. The statutory provisions which establish, respectively, the administrative power to impose penalties and the State's right to punish in the true sense clearly fall within that logic. In this case, the provision of false information to the tax authorities by taxable persons is punished in a general way, as an essential prerequisite of that system of penalties. It is that part of the Swedish tax system which is used for the purposes of collecting VAT.

60. In those terms, the question is whether a State legislative activity based directly on Union law is equivalent to the situation in this case, where national law is used to secure objectives laid down in Union law. In other words, the question is whether the two situations are equivalent from the perspective of the qualified interest of the Union in assuming direct, centralised responsibility for guaranteeing the right concerned.

61. I believe that, in the analysis of this difficult subject, it must be possible to perceive the difference between the *causa*, whether or not immediate, and the simple *occasio*. The difficulty, in so far as it exists, with the conception of the scope of the *ne bis in idem* principle in Swedish law is a general difficulty regarding the structure of the Swedish law on penalties which is, as such, completely independent from the collection of VAT, where punishment of the conduct in the present case, involving the falsification of information, is treated as a mere *occasio*.

62. That being so, the question is whether, as a result of this *occasio*, the Union judicature must interpret, with inevitably general consequences, the scope of the *ne bis in idem* principle in Swedish law, an interpretation which must take priority over the one which is derived from Sweden's constitutional structure and international obligations.

63. My view is that it would be disproportionate to infer from this *occasio* a shift in the division of responsibility for guaranteeing the fundamental rights between the Union and the Member States. Similarly, it seems to me that it would be disproportionate if the questions referred to the Court had been ones concerning the right to an adequate defence, the sufficiency of the evidence or other

14 — See point 17 of the order for reference.

15 — See Article 273 of Directive 2006/112.

matters included in Title VI of the Charter. In short, it appears to be risky to assert that, by means of a provision such as Article 273 of Directive 2006/112, the legislature was anticipating the transfer of all the constitutional guarantees governing the exercise of the Member States' power to impose penalties – including the collection of VAT – from the Member States to the Union.

64. I believe, therefore, having assessed all the circumstances of the case, that the reference for a preliminary ruling from the referring court must not be regarded as a situation involving the implementation of Union law within the meaning of Article 51(1) of the Charter. Accordingly, I propose that the Court should declare that it lacks jurisdiction to give a ruling in these proceedings.

65. However, if the Court decides that it does have jurisdiction to give a ruling on the substance of the case, I propose, in the alternative, to reply below to the questions referred for a preliminary ruling by the Haparanda tingsrätt

VI – The questions

66. The five questions referred for a preliminary ruling by the national court can be reduced to two. As I shall go on to explain, the second, third, fourth and fifth questions concern the application of the *ne bis in idem* principle, laid down in Article 50 of the Charter, to situations where Member States impose both administrative and criminal penalties for the same offences. The first question, which it is appropriate to answer last, concerns the conditions laid down by the Swedish Supreme Court for the application of the ECHR and the Charter by Swedish courts.

A – *The second, third, fourth and fifth questions*

1. Reformulation and admissibility

67. As I stated above, the second, third, fourth and fifth questions referred for a preliminary ruling by the Haparanda tingsrätt concern the interpretation of Article 50 of the Charter. In particular, the second question concerns the classification of the same facts for the purposes of the *ne bis in idem* principle, in other words, the finding that the same conduct is being tried again. The third and fourth questions concern the procedural aspect of the *ne bis in idem* principle, which involves the prohibition of double prosecution. The fifth question is formulated in somewhat hypothetical terms, since it refers, as a reference parameter, to national legislation other than that in force in Sweden.

68. In my view, the second, third and fourth questions can be answered together. The three questions refer to different elements of the same fundamental right, which I shall examine below, but always as an integral part of the *ne bis in idem* principle. In short, the referring court seeks to ascertain whether that principle, as laid down in Article 50 of the Charter, precludes a Member State, when implementing Union law, from imposing both an administrative and a criminal penalty in respect of the same facts.

69. However, the fifth question is inadmissible. The referring court asks whether the Swedish system is compatible with Article 50 of the Charter, in the light of a hypothetical alternative system (which does not currently exist in Sweden) of prior decisions in criminal cases. Replying to that question would lead to the Court giving an indirect ruling on a non-existent national measure of Swedish law. The hypothetical nature of the question would result in the Court giving a ruling which is more akin to an opinion than a preliminary ruling on interpretation, something which the Court has rejected on many

occasions.[16] I therefore propose that the Court should rule that the fifth question is inadmissible.

2. Analysis of the second, third and fourth questions

70. The questions referred by the Haparanda tingsrätt are particularly complex and are just as difficult as the issue which I dealt with above. On the one hand, the imposition of both administrative and criminal penalties in respect of the same offence is a widespread practice in the Member States, especially in fields such as taxation, environmental policies and public safety. However, the way in which penalties are accumulated varies enormously between legal systems and displays special features which are specific to each Member State. In most cases, those special features are adopted with the aim of moderating the effects of the imposition of two punishments by the public authorities. On the other hand, as we shall see below, the European Court of Human Rights recently gave a ruling on this subject and confirmed that such practices, contrary to how things might initially appear, infringe the fundamental right of *ne bis in idem* laid down in Article 4 of Protocol No 7 to the ECHR. However, the fact is that not all the Member States have ratified that provision, while others have adopted reservations or interpretative declarations in relation to it. The effect of that situation is that the requirement to interpret the Charter in the light of the ECHR and the case-law of the European Court of Human Rights (Article 52(3) of the Charter) becomes, so to speak, asymmetrical, leading to significant problems when it is applied to this case.

a) Article 4 of Protocol No 7 to the ECHR and the relevant case-law of the European Court of Human Rights

i) Signature and ratification of Article 4 of Protocol No 7 to the ECHR

71. The *ne bis in idem* principle was not an explicit part of the ECHR at the outset. It is common knowledge that the principle was incorporated into the ECHR by means of Protocol No 7, which was opened for signature on 22 November 1984 and entered into force on 1 November 1988. Among other rights, Article 4 contains the guarantee of the *ne bis in idem* principle, with the aim, according to the explanations on the protocol drawn up by the Council of Europe, of giving expression to the principle pursuant to which no one may be tried in criminal proceedings for an offence in respect of which he has already been finally convicted or acquitted.

72. Unlike the other rights laid down in the ECHR, the right in Article 4 of Protocol No 7 to the ECHR has not been unanimously accepted by the States signatories to the convention, including a number of Member States of the European Union. As at the date of delivery of this Opinion, Protocol No 7 has still not been ratified by Germany, Belgium, the Netherlands and the United Kingdom. Among the Member States which have ratified the protocol, France lodged a reservation to Article 4, restricting its application solely to criminal offences.[17] In addition, at the time of signature, Germany,

16 — See, inter alia, *Schmidberger*, cited in footnote 4, paragraph 32; Case C-478/07 *Budějovický Budvar* [2009] ECR I-7721, paragraph 64; and Case C-384/08 *Attanasio Group* [2010] ECR I-2055, paragraph 28.

17 — The reservation lodged on 17 February 1986 states: 'Le Gouvernement de la République française déclare que seules les infractions relevant en droit français de la compétence des tribunaux statuant en matière pénale doivent être regardées comme des infractions au sens des articles 2 à 4 du présent Protocole.'

Austria, Italy and Portugal lodged a number of declarations leading to the same situation: restriction of the scope of Article 4 of Protocol No 7 so that the protection under that provision applies only to double punishment in respect of criminal offences, within the meaning laid down in national law. [18]

73. The foregoing demonstrates clearly and expressively the considerable lack of agreement between the Member States of the European Union regarding the problems resulting from the imposition of both administrative and criminal penalties in respect of the same offence. The problematic nature of the situation is reinforced in the light of the negotiations on the future accession of the European Union to the ECHR, in which the Member States and the Union have decided to exclude, for the time being, the protocols to the ECHR, including Protocol No 7. [19]

74. That lack of agreement can be traced back to the importance of measures imposing administrative penalties in a large number of Member States, in addition to the special significance also afforded to criminal prosecution and penalties in those Member States. On the one hand, States do not wish to abandon the characteristic effectiveness of administrative penalties, particularly in sectors where the public authorities seek to ensure rigorous compliance with the law, such as fiscal law or public safety law. On the other hand, the exceptional nature of criminal prosecution and the guarantees which protect the accused during proceedings incline States to retain an element of decision-making power as regards actions which warrant a criminal penalty. That twofold interest in maintaining a dual – administrative and criminal – power to punish explains why, at the moment, a significant number of Member States refuse, by one means or another, to be bound by the case-law of the European Court of Human Rights, which, as I shall now go on to examine, has developed in a direction which practically excludes that duality.

ii) The case-law of the European Court of Human Rights on Article 4 of Protocol No 7 to the ECHR

75. The treatment in the ECHR system of cases where both an administrative and criminal penalty are imposed has developed considerably since the entry into force of Protocol No 7 and it comprises three elements which I shall consider below: the definition of criminal proceedings, the identity of acts classified as offences and double prosecution.

76. First, the European Court of Human Rights interpreted the term ‘criminal proceedings’ many years ago, relying on the so-called ‘Engel criteria’ to extend the guarantees in Articles 6 and 7 of the ECHR to penalties imposed by the public authorities that are formally classified as administrative. [20] As is well known, since the judgment in *Engel*, the European Court of Human Rights has used three criteria to assess whether a particular penalty is a criminal penalty for the purposes of Articles 6 and 7 of the ECHR: the classification of the offence in national law, the nature of the offence, and the degree of severity of the penalty imposed on the offender. [21] Those criteria have been applied to tax surcharges,

18 — The wording of those declarations is virtually identical to that of the French reservation, with a few differences. Nevertheless, it should be borne in mind that, in the case of *Gradinger v. Austria,* the European Court of Human Rights ruled that the Austrian declaration on Article 4 of Protocol No 7 to the ECHR was invalid (judgment of 23 October 1995, §§ 49 to 51, Series A no. 328-C), albeit on procedural grounds and in accordance with the case-law starting with the well-known case of *Belilos v. Switzerland,* 29 April 1988, Series A no. 132. In that connection, see Cameron, I. and Horn, F., ‘Reservations to the European Convention on Human Rights: The Belilos Case’, *German Yearbook of International Law*, 33, 1990, and Cohen-Jonathan, G., ‘Les réserves à la Convention européenne des droits de l’homme’, *Revue générale de droit international public*, T. XCIII, 1989.

19 — See Report to the Committee of Ministers on the elaboration of legal instruments for the accession of the European Union to the European Convention on Human Rights of 14 October 2011, CDDH(2011)009, p. 17, point 19 et seq.

20 — *Engel and Others v. the Netherlands,* 8 June 1976, § 82, Series A no. 22.

21 — See, inter alia, *Öztürk v. Germany*, 21 February 1984, Series A no. 73; *Lauko v. Slovakia,* 2 September 1998, *Reports of Judgments and Decisions* 1998-VI; and *Jussila v. Finland* [GC], no. 73053/01, ECHR 2006-XIV. The last two criteria are alternatives but the European Court of Human Rights may, depending on the circumstances of the case, assess them cumulatively.

including the surcharge provided for in Swedish law at issue in these proceedings,[22] and the European Court of Human Rights has confirmed that this type of measure comes under the heading of a criminal penalty within the meaning of Articles 6 and 7 of the ECHR and, by extension, of Article 4 of Protocol No 7 thereto.[23]

77. Secondly, referring directly to the *ne bis in idem* principle, the European Court of Human Rights, after some initial hesitation, confirmed in its case-law that the prohibition of double punishment refers to punishment for the same acts and not punishment for conduct classified in the same way by the provisions which define the offences concerned. While the latter approach, which is clearly formalistic and reduces the scope of Article 4 of Protocol No 7 to the ECHR, may be observed in a number of judgments adopted after the protocol entered into force,[24] in 2009 the Grand Chamber of the European Court of Human Rights confirmed the former approach in the judgment in the case of *Zolotukhin*.[25] In that case, the European Court of Human Rights stated categorically that Article 4 of Protocol No 7 to the ECHR must be understood as meaning that it prohibits any prosecution resulting from a second offence where that offence is based on identical or substantially similar facts to the ones which were the basis for another offence.[26] Thus, the European Court of Human Rights adopted an interpretation of double punishment which is consistent with the interpretation developed by the Court of Justice in its case-law on Article 54 of the Schengen Agreement.[27]

78. Thirdly and finally, as regards the procedural dimension of the *ne bis in idem* principle, or what also tends to be described as the prohibition of double prosecution, the European Court of Human Rights has held that once it has been established that a penalty has been imposed in respect of the same acts, all new proceedings are prohibited provided that the first penalty has become final.[28] That assertion applies to those cases where the first penalty is administrative and the second is criminal,[29] but also to cases where the penalties were imposed in the reverse order.[30] Lastly, after the present reference for a preliminary ruling was made, the European Court of Human Rights held that it is irrelevant if the first penalty has been discounted from the second in order to mitigate the double punishment.[31]

79. In summary, the evolution of the case-law of the European Court of Human Rights shows that, at the moment, Article 4 of Protocol No 7 to the ECHR precludes measures for the imposition of both administrative and criminal penalties in respect of the same acts, thereby preventing the commencement of a second set of proceedings, whether administrative or criminal, when the first penalty has become final. The current state of the case-law, particularly in the rulings of the European Court of Human Rights since the judgment in *Zolotukhin*, is evidence of the existence of a conclusive statement of the law from Strasbourg. In principle, that statement of the law should provide the referring court with more than sufficient criteria, from the perspective of the ECHR, to enable it to dispose of the dispute between Mr Fransson and the Swedish State.

22 — See *Västberga Taxi Aktiebolag and Vulic v. Sweden,* no. 36985/97, 23 July 2002, and *Janosevic v. Sweden,* no. 34619/97, ECHR 2002-VII.

23 — See *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, ECHR 2009.

24 — See *Oliveira v. Switzerland,* 30 July 1998, *Reports of Judgments and Decisions* 1998-V; *Franz Fischer v. Austria,* no. 37950/9729, May 2001; *Sailer v. Austria,* no. 38237/97, 6 June 2002; and *Öngün v. Turkey,* no. 15737/02, 23 June 2009.

25 — Cited in footnote 23.

26 — *Sergey Zolotukhin*, cited in footnote 23, §§ 82 to 84.

27 — See, inter alia, Joined Cases C-187/01 and C-385/01 *Gözütok and Brügge* [2003] ECR I-1345; Case C-469/03 *Miraglia* [2005] ECR I-2009; Case C-436/04 *Van Esbroeck* [2006] ECR I-2333; Case C-150/05 *Van Straaten* [2006] ECR I-9327; Case C-467/04 *Gasparini and Others* [2006] ECR I-9199; and Case C-297/07 *Bourquain* [2008] ECR I-9425.

28 — See *Franz Fischer,*cited in footnote 24, § 22; *Gradinger*, cited in footnote 18, § 53; and *Vladimir Nitikin v. Russia,* no. 15969/02, § 37, 2 November 2006.

29 — *Sergey Zolotukhin*, cited in footnote 23.

30 — *Ruotsalainen v. Finland,* no. 13079/03, 16 June 2009.

31 — *Tomasović v. Croatia,* no. 53785/09, 18 October 2001, contrary to the original ruling in *Oliveira*, cited in footnote 24, which received strong criticism and now appears to have been abandoned. In that connection, see Carpio Briz, D., 'Europeización y reconstitución del *non bis in idem*', *Revista General de Derecho Penal*, No 14, 2010, Iustel, Madrid.

80. The difficulties of the case referred to the Court do not end here, however, and instead they could be said to begin. The fact that the referring court appears to assume that Article 4 of Protocol No 7 to the ECHR and the Charter are on an equal footing raises serious difficulties, as I have noted.

b) The *ne bis in idem* principle in Union law: Article 50 of the Charter and its interpretation in the light of Article 4 of Protocol No 7 to the ECHR

i) A partially autonomous interpretation of Article 50 of the Charter: limits of an interpretation exclusively in the light of the ECHR

81. Article 52(3) of the Charter provides that where the rights laid down in the Charter correspond to rights guaranteed by the ECHR 'the meaning and scope of those rights shall be the same as those laid down by the said Convention'.

82. As I shall go on to explain, the present case raises a new issue which affects both the scope of the requirement laid down in Article 52(3) of the Charter and the proclamation that the rights contained in the ECHR are general principles of Union law. Although Article 50 of the Charter enshrines a right which corresponds to a right laid down in Article 4 of Protocol No 7 to the ECHR,[32] the aspect of the *ne bis in idem* principle with which these proceedings are concerned is far from widespread and established in the States signatories to the ECHR. As I stated in point 72 of this Opinion, a significant number of Member States have not ratified Protocol No 7 to the ECHR or have lodged reservations or declarations specifically in relation to Article 4 of the protocol in order to preclude its application to administrative penalties.

83. As I have already stated, the Member States of the Union all, to varying degrees, grant administrative authorities the power to impose penalties. In a large number of Member States, that power is compatible with the right to punish and can lead to the imposition of both administrative and criminal penalties for the same offence. However, that does not mean, under any circumstances, that Member States which allow double punishment do so with absolute discretion. On the contrary, in most cases, States which have measures for double punishment have provided for a formula which precludes an excessive punitive outcome.[33] Thus, in France, the Constitutional Council has stipulated that the total amount of two penalties may not exceed the highest penalty laid down for each offence.[34] The German courts apply a criterion of proportionality on a case-by-case basis, which is aimed at ensuring that the total amount of the penalties does not become excessive.[35] Other States have established a rule of prior decisions in criminal cases pursuant to which administrative courts must stay the proceedings pending the final outcome of a criminal trial.[36] Union law also provides for

32 — That is confirmed by the explanations drawn up to provide guidance on the interpretation of the Charter, which must be given regard by all courts, as stipulated by Article 52(7) of the Charter. The explanation on Article 50 concludes by stating: 'As regards the situations referred to by Article 4 of Protocol No 7 [to the ECHR], namely the application of the principle within the same Member State, the guaranteed right has the same meaning and the same scope as the corresponding right in the ECHR.'

33 — See the comparative analysis of Moderne, F., 'La sanction administrative. Elements d'analyse comparative', *Revue française de droit administratif*, No 3, 2002.

34 — See the judgments of the Constitutional Council of 28 July 1989, No 89-260 DC, Loi relative à la sécurité et à la transparence du marché financier, recital 22, and of 30 December 1997, No 97-395 DC, Loi des finances pour 1998, recital 41. On that case-law, see Gutmann, D., 'Sanctions fiscales et Constitution', *Les nouveaux Cahiers du Conseil constitutionnel*, No 33, 2011.

35 — See, for example, the judgment of the OLG Celle of 6 August 1970, 1Ss 164/70.

36 — That is, for example, the case in Spain, where Article 7 of Royal Decree 1398/1993 governing the power of public administrative authorities to impose penalties provides that criminal proceedings are to take priority over administrative proceedings which lead to the imposition of a penalty. In that regard, see Queralt Jiménez, A., *La interpretación de los derechos: del Tribunal de Estrasburgo al Tribunal Constitucional*, Centro de Estudios Políticos y Constitucionales, Madrid, 2008, p. 263 et seq., and Beltrán de Felipe, M. and Puerta Seguido, F., 'Perplejidades acerca de los vaivenes en la jurisprudencia constitucional sobre el "ne bis in idem"', *Revista española de derecho constitucional*, No 71, 2004.

an approach of that kind, for example in Article 6 of the regulation on the protection of the Union's financial interests.[37] In other legal systems, as appears to be the case of Sweden, a criminal court which is seised of the second set of proceedings is entitled to deduct the administrative penalty from the amount of the criminal penalty.

84. In those circumstances, it is my view that the proclamation in Article 52(3) of the Charter of necessity acquires its own definition when it is applied to the *ne bis in idem* principle. Further, to use the expression in Article 6(3) TEU, the ECHR does not actually 'guarantee' the *ne bis in idem* principle in the same way as it guarantees the core principles of the ECHR by which all the States that are parties to the convention are bound. I believe that the ECHR, as referred to in primary Union law, is the convention *as it stands*; in other words, the convention, with its combination of provisions which are mandatory and provisions which are, to a certain extent, conditional. The interpretation of the references to the ECHR contained in primary Union law cannot disregard that point.

85. For all those reasons, I believe that the requirement that the Charter is to be interpreted in the light of the ECHR must be qualified when the fundamental right in question, or an aspect of it (as is the case of the applicability of Article 4 of Protocol No 7 to the ECHR to the imposition of both administrative and criminal penalties for the same offence), has not been incorporated fully into national law by the Member States. Further, even where, in such circumstances, the fundamental right and the case-law of the European Court of Human Rights in that regard constitute a principle which inspires Union law, I believe that the obligation to place the level of protection provided for in the Charter on an equal footing to that provided for in the ECHR is not as effective.

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

87. That being the case, it is my view that Article 50 of the Charter calls for a partially autonomous interpretation.[38] Clearly, regard must be had to the current state of the case-law of the European Court of Human Rights but the protective threshold which the Court of Justice is required to respect must be the result of an independent interpretation which is based exclusively on the wording and scope of Article 50 of the Charter.

ii) Article 50 of the Charter and the imposition of both an administrative and a criminal penalty for the same offence

88. The *ne bis in idem* principle is well established in Union law. Before the Schengen Agreement and the framework decision on the European arrest warrant enshrined the principle as a restriction on the Member States' right to punish, and even before the entry into force of Protocol No 7 to the ECHR, the Court of Justice applied the principle in the field of competition law and in the case-law on staff

37 — Under Article 6(1), administrative proceedings may be suspended as a result of the commencement of criminal proceedings in connection with the same facts. Article 6(3) goes on to provide: 'When the criminal proceedings are concluded, the suspended administrative proceedings shall be resumed, *unless that is precluded by general legal principles*' (emphasis added).

38 — In that connection, see Burgorgue-Larsen, L., 'Les interactions normatives en matière de droits fondamentaux', in Burgorgue-Larsen, L., Dubout, E., Maitrot de la Motte, A. and Touzé, S., *Les interactions normatives – Droit de l'Union europeenne et droit international*, Pedone, 2012, Paris, pp. 372 and 373.

cases of the Union.[39] In his Opinion in *Gözutok and Brügge*, Advocate General Ruiz-Jarabo Colomer gave a detailed account of the principle in the historical development of Union law,[40] as did Advocate General Kokott more recently in her Opinion in *Toshiba Corporation and Others*.[41] I shall not dwell on that question and I shall confine myself, therefore, to referring to both documents.

89. As the case-law currently stands, the Court of Justice affords the *ne bis in idem* principle fairly uniform treatment, with a number of exceptions which I shall describe below.[42]

90. As a starting point, the Court adopted a broad definition of the concept of penalty, in line with the *Engel* case-law of the European Court of Human Rights, in order to situate the penalties imposed by the Commission in the field of competition within the scope of that case-law.[43] From that perspective, and in line with the case-law of the European Court of Human Rights, a tax surcharge imposed in order to ensure compliance with Union law must be regarded as being a substantively criminal penalty.

91. Next, the Court – albeit with some exceptions – has also given a very protective interpretation when defining the elements on which the imposition of double penalties is based. With regard to the interpretation of Article 54 of the Schengen Agreement and the framework decision on the European arrest warrant, the Court has held that the identity required by the *ne bis in idem* principle refers to 'the same acts' and not to the same types of offence or the same protected legal interests.[44] The context of this case concerns the implementation of Union law in a Member State, which is precisely the sphere in which the broadest conception of the *ne bis in idem* principle applies. Accordingly, I believe that this must also be the treatment warranted by a situation such as that in the instant case, which is, in turn, the treatment which the European Court of Human Rights has opted for since the judgment in *Zolotukhin*.

92. Finally, the only question which remains to be answered is whether or not the prior existence of administrative proceedings in which there is a final judgment imposing a penalty precludes the commencement of criminal proceedings, and a possible criminal conviction, on the part of the Member States.

93. Having thus reduced the question, and subject to the essential proviso which I shall add, I believe that Article 50 of the Charter does not currently mean that the prior existence of a final administrative penalty definitively rules out the commencement of criminal proceedings which may lead to a conviction. The proviso which I shall state is that the principle of the prohibition of arbitrariness, which is inseparable from the rule of law (Article 2 TEU), requires national law to enable criminal courts to have the power to take into account, by whatever means, the prior existence of an administrative penalty for the purposes of mitigating the criminal penalty.

39 — See the early judgments in Joined Cases 18/65 and 35/65 *Gutmann* v *Commission of the EAEC* [1966] ECR 103), in relation to the civil service, and Case 45/69 *Boehringer Mannheim* v *Commission* [1970] ECR 769, in relation to competition.

40 — Cited in footnote 27, point 47 et seq.

41 — Opinion in Case C-17/10 [2012] ECR, point 96 et seq.

42 — For a complete list, see van Bockel, B., *The Ne Bis in Idem Principle in EU Law*, Kluwer, The Hague, 2010, p. 205 et seq.

43 — In that regard, see the detailed analysis of that question by Advocate General Kokott in her Opinion in Case C-489/10 *Bonda* [2012] ECR, point 32 et seq. See also the Opinion of Advocate General Sharpston in Case C-272/09 P *KME Germany and Others* v *Commission* [2011] ECR I-12789, point 64; the Opinions of Advocate General Bot in Joined Cases C-201/09 P and C-216/09 P *ArcelorMittal Luxembourg* v *Commission and Others* [2011] ECR I-2239, point 41, and Case C-352/09 P *ThyssenKrupp Nirosta* v *Commission* [2011] ECR I-2359, point 49; and the Opinion of Advocate General Kokott in Case C-280/06 *ETI and Others* [2007] ECR I-10893, point 71.

44 — See *Van Esbroeck*, cited in footnote 27, paragraphs 27, 32 and 36; *Van Straaten*, cited in footnote 27, paragraphs 41, 47 and 48; and Case C-261/09 *Mantello* [2010] ECR I-11477, paragraph 39. That approach diverges from the one adopted in relation to competition, where the Court continues to lay down a threefold condition of identity of the facts, unity of offender and unity of the legal interest protected. See, inter alia, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 338, and *Toshiba Corporation and Others*, cited in footnote 41, paragraphs 97 and 98. In that connection, see also Advocate General Kokott's criticism of those special arrangements applicable to the field of competition in her Opinion in *Toshiba and Others*, cited in footnote 41.

94. First of all, there is nothing in the wording of Article 50 of the Charter, as such, which leads to the conclusion that the intention was to prohibit all cases where there is a convergence of the power of the administrative authorities to impose penalties and the power of the criminal courts to do so in respect of the same conduct. In that connection, attention should be drawn to the fact that Article 50 of the Charter uses the adjective 'criminal' ('penal' in the Spanish version), in contrast to the language used in Article 4 of Protocol No 7 to the ECHR. That is the case of the title of each provision and also, in the Spanish versions of each one, of the reference to the 'sentencia firme', which is described as 'penal' in the former provision but not in the latter. That difference could be regarded as significant since the provision of the Charter was drafted years after the provision of Protocol No 7.

95. Secondly, the principle of proportionality and, in any event, the principle of the prohibition of arbitrariness, as derived from the rule of law which results from the common constitutional traditions of the Member States,[45] preclude a criminal court from exercising jurisdiction in a way which completely disregards the fact that the facts before it have already been the subject of an administrative penalty.

96. Accordingly, it is my opinion that Article 50 of the Charter must be interpreted as meaning that it does not preclude the Member States from bringing criminal proceedings relating to facts in respect of which a final penalty has already been imposed in administrative proceedings relating to the same conduct, provided that the criminal court is in a position to take into account the prior existence of an administrative penalty for the purposes of mitigating the punishment to be imposed by it.

c) Article 50 of the Charter applied to the present case

97. At this juncture and in line with what I have proposed so far, I believe that, as Union law currently stands, the only point to examine is whether, under national law, a criminal court is entitled to take into account the prior imposition of a final administrative penalty in order to ensure that the final outcome reached is not disproportionate and does not, in any event, infringe the principle of the prohibition of arbitrariness inherent in the rule of law.

98. It appears from the case-file that Mr Fransson paid the administrative financial penalties which were imposed on him at the relevant time by the Skatteverket and that those decisions have become final.

99. In addition, as Mr Fransson's representative explained at the hearing, his client is currently facing criminal proceedings for offences under Articles 2 and 4 of the Skattebrottslagen, which are punishable by up to six years' imprisonment.

100. It does not appear from the case-file that the Swedish legislation explicitly provides for a system of offsetting but the order for reference states that Swedish courts must 'have regard to' the previously imposed surcharge 'in determining the penalty for tax offences'.

101. Accordingly, it is for the referring court, rather than the Court of Justice, to assess the specific features of the system of offsetting provided for in Swedish law, whether on a legislative level or in the judicial practices of the Swedish courts. If there were an offsetting mechanism enabling the first penalty to be taken into account with mitigating effects on the second penalty, I believe that the holding of a second set of proceedings would not be contrary to Article 50 of the Charter. However, if the criterion used in Swedish law does not permit offsetting in those terms, thereby leaving open the possibility that Mr Fransson would be exposed to a second penalty, it is my view that there would be an infringement of Article 50 of the Charter.

45 — See Bingham, T., *The Rule of Law*, Allen Lane, London, 2010, p. 66 et seq.

B – *The first question*

102. By its first question, the Haparanda tingsrätt asks the Court about the compatibility with Union law of a criterion laid down in Swedish law, specifically in the case-law of the Swedish Supreme Court, pursuant to which it is a condition for disapplying a Swedish provision which is contrary to the rights laid down in the Charter and the ECHR that there must be clear support in the provisions of the Charter and the ECHR and in the case-law of the European Court of Human Rights.

103. The question, as formulated by the referring court, refers to two distinct matters. The first is the compatibility with Union law of a criterion for the application of the ECHR in so far as it is an international agreement containing rights which *constitute general principles* of the European Union legal system (Article 6(3) TEU). Secondly, the referring court asks about the compatibility of that criterion when it is extended to the application of the Charter and, therefore, to Union law.

1. 'Clear support' as a criterion for the application of the ECHR by the national court

104. The Haparanda tingsrätt has given details of case-law of the Swedish Supreme Court, according to which, before disapplying a Swedish provision which is incompatible with the ECHR, there must be clear support either in the convention itself or in the case-law of the European Court of Human Rights. The Swedish Supreme Court has applied that condition in a number of cases concerning the issue in this case; in all those cases, it concluded that the case-law of the European Court of Human Rights relating to Article 4 of Protocol No 7 to the ECHR did not provide clear support. However, as I stated in points 75 to 79 of this Opinion, the most recent case-law of the European Court of Human Rights confirms that there is now clear support for Mr Fransson's claim.

105. The reason for this question from the Haparanda tingsrätt is explained by the amendments introduced by the Treaty of Lisbon. It is well known that the wording of Article 6(3) TEU is not the same as that of the old Article 6(2) EU. Before 1 December 2009, Article 6(2) EU stated that the Union 'shall *respect* fundamental rights, as guaranteed by the [ECHR]', whereas the current wording provides that fundamental rights, as guaranteed by the ECHR 'shall *constitute general principles* of the Union's law'. [46] Therefore, the fundamental rights guaranteed by the ECHR have gone from being *respected by the Union* to *constituting general principles* of its legal system. That change is important and the referring court seems to believe that the ECHR acquired a new status in Union law in 2009, regardless of whether the Union accedes to it in the future.

106. In the light of the foregoing, since the rights laid down in the ECHR *constitute general principles of Union law*, it is legitimate for the referring court to question whether Union law precludes a criterion of the kind developed by the Swedish Supreme Court, pursuant to which there must be clear support in order to be able to disapply a national provision which is contrary to the ECHR.

107. The reply to that question follows from the recent judgment of the Court of Justice in *Kamberaj*. [47] In that case, the Court was asked whether, when there is a conflict between a provision of domestic law and the ECHR, Article 6(3) TEU obliges the national court to apply the provisions of the ECHR directly and to disapply the incompatible provision of domestic law.

46 — Emphasis added.

47 — Case C-571/10 [2012] ECR.

108. After pointing out that Article 6(3) TEU simply reflects the Court's settled case-law, the Court held that the new wording of the provision does not alter the status of the ECHR in Union law and, therefore, nor does it do so in the legal systems of the Member States.[48] The Court went on to state that, in the same way, Article 6(3) TEU 'does [not] ... lay down the consequences to be drawn by a national court in case of conflict between the rights guaranteed by that convention and a provision of national law'.[49]

109. In short, although the rights laid down in the ECHR constitute general principles of Union law, the ECHR as such is not a legal instrument which has been formally incorporated into European Union law. The situation will change when there is compliance with the requirement that the Union must accede to the ECHR, laid down in Article 6(2) TEU. However, as the process of integration currently stands, the criteria for the application of Union law, in particular the principles of direct effect and primacy, cannot be transposed to the ECHR when it is applied by the courts of the Member States. Thus, in accordance with the recent statement of the law in *Kamberaj*, the Court of Justice cannot carry out an assessment of the 'clear support' criterion, as applied by the Swedish Supreme Court to situations relating exclusively to the interpretation and application of the ECHR.

2. 'Clear support' as a criterion for the application of the Charter by the national court

110. The Haparanda tingsrätt also refers to the application of the 'clear support' criterion to the rights protected by the Charter, in particular Article 50 thereof. In this instance, the question does not concern the relationship between the ECHR and Union law but rather Union law alone.

111. Accordingly, it is necessary to ask, as the referring court does, whether, when applying Union law, the requirement of clear support, as laid down by the Swedish Supreme Court, places conditions on the judicial function of the Swedish lower courts such as the Haparanda tingsrätt.

112. According to settled case-law of the Court of Justice, national courts which are called upon, within the exercise of their jurisdiction, to apply provisions of Union law are under a duty to give full effect to those provisions, if necessary refusing of their own motion to apply any conflicting provision of national legislation, without requesting or awaiting the prior setting-aside of such provision by legislative or other constitutional means.[50] That reasoning is equally applicable to the national case-law of a higher court which precludes or hinders the full effectiveness of provisions of Union law, such as, in the instant case, the 'clear support' requirement laid down in the case-law of the Swedish Supreme Court for the purposes of disapplying a national provision which is incompatible with the Charter.

113. To my mind, the 'clear support' requirement is not, a priori, an obstacle which precludes or renders excessively difficult the disapplication of a national provision that is incompatible with the Charter. In accordance with the case-law of the Swedish Supreme Court, a declaration of incompatibility of a domestic provision must be preceded by a sufficiently conclusive fundamental right in order for a national court to be able to give a ruling in that regard. In short, the 'clear support' requirement acts as a requirement that there must be a minimum level of clarity in the wording of the legislation, since otherwise the national court would lack the information necessary to adjudicate on the disputed national provision. It is not controversial to state that before the judgment in *Zolotukhin*, the case-law of the European Court of Human Rights suffered from a significant lack of clarity, especially when applied to a situation, such as the Swedish one, which had still not been scrutinised by the European Court of Human Rights and had nothing in common with other cases which had been dealt with by that court.

48 — Ibid., paragraph 61.

49 — Ibid., paragraph 62.

50 — Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 24, and Case C-314/08 *Filipiak* [2009] ECR I-11049, paragraph 81.

114. What cannot be accepted under any circumstances is the conversion of the 'clear support' requirement into a condition which affects the rigour of the review which national courts normally carry out when they apply Union law. The requirement that a provision which serves as a criterion for assessment must be clear cannot become a requirement pursuant to which the unlawfulness of the national provision must be manifest. In other words, a requirement that the wording of a provision of Union law must be clear cannot serve as a ground for reducing the rigour of the review which national courts conduct when they apply Union law. Otherwise, an excessive burden of proof would lie with parties who claim that a national provision is incompatible with a provision of Union law, which would impede the full effectiveness of directly applicable provisions of Union law. That conclusion is bolstered further, where the requirement of clarity reduces the rigour of the review carried out by the courts solely in relation to Union law but not in relation to purely domestic provisions. In that case, not only would the effectiveness of Union law be undermined but there would also be an infringement of the principle of equivalence, as developed in extensive case-law of the Court. [51]

115. In short, I believe that Union law must be interpreted as meaning that it does not preclude a national court from assessing, prior to disapplying a national provision, whether a provision of the Charter is 'clear', provided that that requirement does not hinder the national courts in exercising the powers of interpretation and disapplication assigned to them under Union law.

VII – Conclusion

116. In the light of the arguments set out in points 48 to 64 of this Opinion, I propose that the Court should declare that it lacks jurisdiction to reply to the questions referred by the Haparanda tingsrätt.

117. In the alternative, in the event that the Court holds that it has jurisdiction to rule on the substance, I propose that the replies to the questions referred should be as follows:

(1) In the current state of the process of European integration, Article 50 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that it does not preclude the Member States from bringing criminal proceedings relating to facts in respect of which a final penalty has already been imposed in administrative proceedings relating to the same conduct, provided that the criminal court is in a position to take into account the prior existence of an administrative penalty for the purposes of mitigating the punishment to be imposed by it.

It falls to the national court to assess whether, in the present case, and in the light of the national provisions which govern the matter, it is necessary to take into account the prior administrative penalty which would mitigate the decision of the criminal court.

(2) The Court of Justice lacks jurisdiction to rule on the compatibility with the European Convention on Human Rights of a requirement of Swedish law pursuant to which there must be 'clear support' in order for national courts to disapply a domestic provision.

European Union law must be interpreted as meaning that it does not preclude a national court from assessing, prior to disapplying a national provision, whether a provision of the Charter of Fundamental Rights of the European Union is 'clear', provided that that requirement does not hinder the national courts in exercising the powers of interpretation and disapplication assigned to them under European Union law.

51 — See, inter alia, Case C-231/96 *Edis* [1998] ECR I-4951, paragraph 36; Case C-326/96 *Levez* [1998] ECR I-7835, paragraph 41; Case C-78/98 *Preston and Others* [2000] ECR I-3201, paragraph 55; and Joined Cases C-392/04 and C-422/04 *i-21 Germany and Arcor* [2006] ECR I-8559, paragraph 62.