National Media Policy within the Framework of European Union Law – The Case of Hungary

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A. The Need to Reverse the Angle

The overall theme of this volume is the inherent tension between thriving for an ever closer union and the presumptive inalienable policy domains of Member States. Whereas this take is certainly motivated by the *Lisbon* judgment of the German *Bundesverfassungericht*,[2] it fits into a broader narrative dominating both the jurisprudence of constitutional courts as well scholarly treatises since the ECJ handed down its judgment in *Internationale Handelsgesellschaft* in 1970[3]. This narrative is of a European integration which poses a threat to national constitutional values, most eminently, fundamental rights.[4] However faded this narrative may have become with the evolution of human rights protection by the ECJ, the benevolent reaction of the *Bundesverfassungsgericht* in *Wünsche Handelsgesellschaft*,[5] and ultimately with the Charter of Fundamental Rights of the EU gaining the status of a founding treaty with the Treaty of Lisbon, it never lost its charm, at least not to high courts all over Europe. This is best demonstrated by the series of constitutional challenges to the European Arrest Warrant in several jurisdictions,[6] the most recent being dealt with by the ECJ in *Melloni*.[7]

1 ELTE University Budapest.
2 Federal Constitutional Court (FCC) – 2BvR 987, 1485, 1099/10 – BverfGE 123, p. 267.
3 ECJ, Case 11/70 – Internationale Handelsgesellschaft, ECR 1970, 1125.
4 For an overview see the contributions in: *Martinico/Pollicino*, The National Judicial Treatment of the ECHR and EU Laws, 2010.
5 FCC – 2 BvR 197/83 – BVerfGE 73, p. 339.
6 See *Siegel*, Courts and Compliance in the European Union: The European Arrest Warrant in National Constitutional Courts, Jean Monnet Working Paper 05/08.

The narrative of the European Union as a risk is certainly charged with institutional hybris and fear of loss of influence.[8] Yet as every successful and long living frame of understanding certain phenomena it has had solid roots in reality. Most importantly, the ECJ has been reluctant to embrace the role of a supreme court of a European Union, the core of which is at least partly defined by the protection of human rights.[9] The traditional understanding of the EU as a functional legal order still transcends the jurisprudence of the ECJ, and this approach is certainly supported by the language of Art. 51(1) of the European Charter of Fundamental Rights.

Yet there is an additional background of viewing EU law as a potential threat, and that is the sophisticated system of human rights protection several national constitutions and constitutional courts provide. It is not by chance that the German *Bundesverfassungsgericht* and German scholarship has taken the lead role in exposing the possible sources of friction between national constitutional values and EU law. Against the background of a functioning, high level protection of fundamental rights the fear of a lowest common denominator at the European level could be very well justified.

This paper takes the example of the freedom of the press in Hungary to argue that the narrative of EU law as a potential risk should be rethought.

http://www.jeanmonnetprogram.org/papers/08/080501.pdf (last accessed 28/01/2014); *Grasso*, The European Arrest Warrant Under the Scrutiny of the Italian Constitutional Court, New Journal of European Criminal Law 2013, vol. 4, p. 120 et seq.; *Torres Perrez*, Constitutional Dialogue on the European Arrest Warrant, EuConst 2012, vol. 8, p. 105 et seq. See also Hungarian Constitutional Court, Case 32/2008. (III. 12.) AB, judgment of 12 March 2008, which found the international agreement extending the substantvie rules of the European Arrest Warrant to Iceland and Norway to be in violation of the *nullum crimen* principle of the Hungarian Constitition and thus indirectly challenging the European Arrest Warrant, http://www.mkab.hu/letoltesek/en_0032_2008.pdf (last accessed 28/01/2014).

7 ECJ, Case C-399/11 – Melloni.

8 See *Komarek*, The Place of Constitutional Courts in the EU, EuConst 2013, vol. 9, p. 420 et seq.

9 *Von Bogdandy*, The European Union as a Human Rights Organisation? Human Rights and the Core of the European Union, CML Rev. 2000, p. 1307 (1320 et seq.).

Using this narrow example it is proposed that the possibility of constitutional crises highlights the need to understand EU law as a chance of preserving the core values of every constitution in Europe: democracy, the rule of law and respect for fundamental rights. Accordingly, this paper will not be concerned with the eventual barriers a national constitution sets up in front of European integration. Instead, it will try to explore the possibilities of setting minimum standards for the media policy of a Member State of the EU. In this sense, this essay aims at offering a reverse angle.

Accordingly, the paper will first outline the sparse elements of the audiovisual and media policy of the EU. Secondly, it will briefly summarise the issues that arose with the Media Law of Hungary and the reactions of the European Union to that. It will be argued that the way the European Union handled the case reveals a typical pattern of circumventing Art. 51(1) of the Charter by recourse to internal market rules. Finally, it is proposed that the *Åkerberg Fransson* jurisprudence, applied consistently, may open a new opportunity to address issues relating, inter alia, to the freedom of the press and freedom of expression.

B. The Sparse Regulatory Framework of the Audiovisual and Media Policy of the EU

The regulation of media is primarily a concern for EU law as long as it has a link to the internal market. Media as such only appears in Protocol 29 of the TEU which addresses the funding of public service broadcasting.[10] Accordingly, the regulatory framework of the audiovisual and media policy of the EU is rather sparse, with the Audiovisual Media Services Directive[11] at its centre. Beyond that Directive, two recommendations on the protection of minors and human dignity[12] and one on film heritage[13] are

10 Protocol (29) on the System of Public Broadcasting in the Member States (OJ 2012 C 326, p. 312).

11 Directive 2010/13/EU of the European Parliament and the Council of 10/03/2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (OJ 2010 L 95, p. 1-24).

12 Council Recommendation 98/560/EC of 24/09/1998 on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effec-

listed by the European Commission as parts of the regulatory framework of audiovisual and media policy.[14]

The Audiovisual Media Services Directive, having its roots in the internal market and being based on Arts. 53(1) and 62 TFEU, is certainly not capable of shaping national media policy as such. It is primarily aimed at setting up minimum rules and ensuring the country of origin principle, however, it may contain important provisions on exclusive rights of broadcasting of events that possess major importance for society, teleshopping and advertising or the right of reply. What is more, print media and the freedom of expression in general fall outside of the scope of the Directive.

With this limitation on the policy driven actions of the EU, substantive barriers towards Member State actions threatening the freedom of the press and the freedom of expression could only be sought in EU fundamental rights. The example of Hungary shows, however, that a narrow understanding of the competences of the EU in this field produces unsatisfactory results.

C. Concerns Relating to the Media in Hungary and the Reactions by European Institutions

The 2010 elections in Hungary resulted in a landslide victory for a single party (*Fidesz*). Possessing more than two-thirds of the votes in Parliament, the governing party gained a legally unlimited power to amend the constitution and to reshape the legal order of Hungary. Although issues that

tive level of protection of minors and human dignity (OJ 1998 L 270, p. 48-55); Recommendation 2006/952/EC of the European Parliament and the Council of 20/12/2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry (OJ 2006 L 378, p. 72-77).

13 Recommendation 2005/865/EC of the European Parliament and the Council of 16/11/2005 on film heritage and the competitiveness of related industrial activities (OJ 2005 L 323, p. 57-61).

14 http://ec.europa.eu/avpolicy/reg/index_en.htm (last accessed 28/01/2014).

arose herefrom are many, I am focusing on those questions relating to the media that provoked reactions by the European Commission.

One of the first steps of reshaping the legal landscape in Hungary was to adopt new laws on print and electronic media: Act CIV of 9 November 2010 on the freedom of the press and the fundamental rules on media content (Press Freedom Act)[15] and Act CLXXXV of 30 December 2010 on media services and on the mass media (Mass Media Act). These laws raised a number of grave concerns from the perspective of the freedom of the press.[16] To name a few, the new regulation provided for an obligation to register for all media, including print, electronic and online media;[17] it obliged all media to provide balanced coverage;[18] it contained general, broadly framed content based prohibitions for all media to protect vaguely defined concepts as human dignity,[19] human rights and privacy;[20] it reduced significantly the protection for sources of information; created the position of a Media Ombudsman giving it vaguely defined sanctioning powers and it authorised the newly created National Media and Infocommunications Authority to impose severe sanctions.[21] The President of the National Media and Infocommunications Authority was to be appointed for the unusually long term of nine years (more than two legislative periods) by the President of the Republic.[22]

It is by no surprise that the European Commission reacted quickly and strongly to the new legislation.[23] Already on 23 December 2010 *Neelie*

15 For an English translation of the original text see http://cmcs.ceu.hu/sites/default/files/domain-69/cmcs-archive/act_civ_media_content.pdf (last accessed 28/01/2014).

16 For a critical appraisal see *Polyák*, Context, rules and practice of the new Hungarian Media Law – How does the Media Law affect the structure and the functioning of publicity in: von Bogdandy/Sonnevend (eds.), Constitutional Crisis in the European Constitutional Area, Theory, Law and Politics in Hungary and Romania (forthcoming in 2014).

17 Sec. 41(4) Mass Media Act as of 31 December 2010.

18 Sec. 13 Press Freedom Act and Sec. 12(1) Mass Media Act as of 31 December 2010.

19 On this specific aspect see *Koltay*, The Protection of Human Dignity in Hungarian Media Regulation, German Law Journal 2013, vol. 14, no. 7, p. 823 et seq.

20 Part Two Chapter I Mass Media Act as of 31 December 2010.

21 Secs. 185-187 Mass Media Act as of 31 December 2010.

22 Sec. 111/A.(1) Mass Media Act.

23 For a highly informative collection of relevant documents see https://cmcs.ceu.hu/node/26249#euro (last accessed 28/01/2014). See also *Hoff-*

Kroes, vice-president of the European Commission, addressed her Hungarian counterpart in a letter, stating her concerns in general terms.[24] This letter was followed by a more detailed one on 21 January 2011[25] requiring clarifications of three issues. These included the obligation to provide balanced coverage applicable to all audiovisual media service providers on the basis of Sec. 13 Press Freedom Act and Sec. 12(1) Mass Media Act, the power of the National Media and Infocommunications Authority to impose fines and other sanctions on media service providers established in other Member States of the EU on the basis of Sec. 176 ad 177 Mass Media Act, as well as the requirement in Sec. 41 Mass Media Act that all media, in particular press and online media, be registered. The Commission and the Hungarian authorities thereafter held meetings in Brussels at expert level between 7th February and 15th February. The Hungarian side gave in rapidly to all points raised by the Commission. Although the amending legislation was only adopted on 7 March and published in the *Official Gazette* on 22 March 2011,[26] Commission Vice-President *Kroes* welcomed the planned amendments to the Hungarian Media Law in a

meister, Enforcing the EU Charter of Fundamental Rights in Member States – how far are Rome, Budapest and Bucharest from Brussels?, in: von Bogdandy/Sonnevend, (fn. 16).

24 http://www.kormany.hu./download/8/01/10000/kroes.pdf (last accessed 28/01/2014). According to the letter: "Independent regulatory authorities for the broadcasting sector have an important role to play to ensure the existence of a wide range of independent and autonomous media. Concerns have been expressed by numerous commentators that the recently adopted Media Act risks jeopardising the rights by giving very broad competences to the Media Athority. These same commentators also allege that the composition of the Media Authority does not seem to guarantee its independence. In addition, doubts have been raised about some of the provisons of the Act which apparently are applicable to broadcasters established in other Member States, which raises potential questions of coherence with one of the basic principles of the Audiovisual Media Services Directive."

25 http://cmcs.ceu.hu/sites/default/files/domain-69/cmcs-archive/EC_lettertoHungary_2011Jan21.pdf (last accessed 28/01/2014).

26 *A sajtószabadságról és a médiatartalmak alapvető szabályairól szóló 2010. évi CIV. törvény és a médiaszolgáltatásokról és a tömegkommunikációról szóló 2010. évi CLXXXV. törvény módosításáról szóló 2011. évi XIX. törvény.*

press release already on 16 February.[27] The amendments agreed included the following:

limitation of the balanced coverage requirements to broadcasting, these no longer apply to on-demand media services;

broadcasters and other audiovisual media service providers legally established and authorised in other Member States can no longer be fined for breaching the Hungarian Media Law's provisions on incitement to hatred;

on-demand audiovisual media service providers, media product publishers and ancillary media service providers established in Hungary and in other Member States are no longer subject to prior authorisation by the Hungarian authorities;

the prohibition not to cause offence to individuals, minorities or majorities is limited to situations of incitement to hatred or discrimination.

Notably, these amendments did not address many general concerns relating to the freedom of the press and focused on those aspects that had a direct link to European Union law – an aspect that will be dealt with below.

It was not until 17 January 2012 that the European Commission addressed again the Hungarian Government in a letter. In that letter, Commission Vice-President *Kroes* raised, *inter alia*, the issue of a radio station known for its stark critical stance towards the government (named: *Klubrádió*) that – after operating successfully for a long time – was bidding unsuccessfully for a renewed radio licence. Vice-President *Kroes* noted that there were "widespread expressions of concern about the effect of this decision on the overall objective of a free and pluralist media landscape, in particular as regards the range of political commentary in broadcast media".[28] These concerns remained unanswered by the Hungarian Government, yet the European Commission did not follow up on the issue.

It is important to note that none of the above instances of intervention by the European Commission ever came close to an infringement procedure. The modest attempts of the European Commission to influence the fate of media freedom in Hungary are in strong contrast with domestic ju-

27 http://europa.eu/rapid/press-release_MEMO-11-89_en.htm (last accessed 28/01/2014).

28 http://blogs.r.ftdata.co.uk/brusselsblog/files/2012/01/KroesHungaryLettter1.pdf (last accessed 28/01/2014).

dicial decisions and also with a broad protest articulated by European institutions in and outside of the European Union.

From amongst the domestic reactions, most important was the Constitutional Court's, which found in its Decision Nr. 165/2011. (XII. 20.) AB that many of the provisions of the Press Freedom Act and the Mass Media Act were unconstitutional.[29] The Decision struck down, *inter alia*, the provision in the Press Freedom Act which extended the scope of the Act to the print media, thereby eliminating the content based limitations relating to it; obliged Parliament to provide for an appropriate protection of sources in all relevant laws; and in general annulled the entire section on the Media Ombudsman. Even if this Decision left the institutional structure envisaged by the legislation almost untouched, it could address many of the concerns that remained after the intervention of the European Commission.

In the case of the licenses of *Klubrádió*, the Budapest appeals court handed down four consecutive judgments in favour of *Klubrádió*. After the fourth ruling the Media Council finally awarded a frequency in March 2013, almost three years after the license to a frequency was declined. It seems, again, that there were legitimate concerns that could not be resolved by an intervention of the European Commission.

Not only domestic courts exposed problems related to the freedom of the press. The European Parliament has repeatedly drawn attention to the situation of the media in Hungary.[30] Most importantly, a resolution of the European Parliament on 10 March 2011 deplored the Commission's decision to target only three points in connection with the implementation of the *acquis communautaire* by Hungary and called on the Commission to continue the close monitoring and assessment of the conformity of Hun-

29 165/2011. (XII. 20.) AB, ABH 2011, p. 478 et seq. For an English summary see http://hunmedialaw.org/dokumentum/94/08_1652011_Abh_final.pdf (last accessed 28/01/2014).

30 For an exquisite overview see https://cmcs.ceu.hu/node/26249#euro (last accessed 28/01/2014).

garian media law in accordance with European legislation, particularly with the Charter on Fundamental Rights.[31]

Outside of the European Union, the OSCE Representative on Freedom of the Media condemned the Hungarian legislation on more than one occasion[32], as endangering media freedom and, if misused, threatening to silence critical media and public debate in the country.[33] The OSCE Representative maintained her concerns even subsequent to the amendments to the relevant legislation that Hungary had agreed upon with the European Commission.[34] In a similar vein, the Council of Europe's Commissioner for Human Rights issued an opinion on 25 February 2011, concluding that the wide range of problematic provisions in Hungary's media legislation were sufficient to warrant a wholesale review of the "media package". It recommended that "the goals of such a review include the reinstatement of precise legislation promoting pluralistic and independent media, and the strengthening of guarantees of immunity from political influence on the part of the media regulatory mechanisms".[35] The Council of Europe also set up an expert body to assess the Hungarian media legislation. The expert body delivered its report on 11 May 2012[36], which contained 61 recommendations on how to harmonise the Hungarian media laws with Eu-

31 http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0094+0+DOC+XML+V0//EN (last accessed 28/01/2014).

32 For an overview, again, see https://cmcs.ceu.hu/node/26249#euro (last accessed 28/01/2014).

33 Press release, Hungarian media law further endangers media freedom, says OSCE media freedom representative. http://www.osce.org/fom/74687 (last accessed 28/01/2014).

34 Despite adjustments, Hungary's media law continues to violate OSCE commitments, says OSCE representative on freedom of the media. http://www.osce.org/fom/75999 (last accessed 28/01/2014).

35 Opinion of the Commissioner for Human Rights on Hungary's media legislation in light of Council of Europe standards on freedom of the media, Strasbourg, 25 February 2011, CommDH(2011)10, https://wcd.coe.int/ViewDoc.jsp?id=1751289 (last accessed 28/01/2014).

36 Council of Europe Secretariat-General, Directorate General Human Rights and Rule of Law, Expertise by Council of Europe experts on Hungarian Media Legislation: Act CIV of 2010 on the freedom of the press and the fundamental rules on media content and Act CLXXXV of 2010 on media services and mass media, Strasburg, 11 May 2012; http://hub.coe.int/c/document_library/get_file?uuid=fbc88585-eb71-4545-bc5d-b727e35f59ae&groupId=10227 (last accessed 28/01/2014).

ropean standards and the case-law of the European Court of Human Rights.[37]

D. Trapped by the Competence Problem

How, one might ask, could the European Union have achieved so little in a matter so grave and so obvious for domestic and European institutions? The answer is naturally clear and lies in a traditional understanding of European Union law as the law of the internal market. It is noted that the communication of Commission Vice-President *Kroes* with Hungary uses arguments based on the internal market to address restrictions on media freedom.[38] The reason for that seems to be clear: the European Commission could only rely on the Audiovisual Media Services Directive to support its case and the Directive is limited to the issues that were actually raised by the Commission. Yet a closer look at the different letters of the Commission Vice-President reveals that this was not a complete necessity.

In her first relevant letter of 23 December 2010, Vice-President *Kroes* seemed to take a broader approach which would have warranted the examination of the Hungarian legislation on the basis of the Charter of Fundamental Rights. First, the letter expressed the understanding that the media legislation "primarily aims to transpose the Audiovisual Media Services Directive (Directive 2010/13/EU)". It then continued by stating that "[t]he freedom of expression constitutes one of the essential foundations of our democratic societies[…]. Media pluralism, freedom of expression and press freedom are underlying elements of European democracy guaranteed by the Charter of Fundamental Rights."[39] This opening could be understood as paving the way for the application of Art. 51(1) of the Charter of Fundamental Rights inasmuch as it referred to the Hungarian legislation as an implementation of EU law.

37 For a summary see *Hoffmeister*, (fn. 23).

38 *Dawson/Muir*, Hungary and the Indirect Protection of EU Fundamental Rights and the Rule of Law, German Law Journal 2013, vol. 14, p. 1959 (1968 et seq.).

39 http://www.kormany.hu./download/8/01/10000/kroes.pdf (last accessed 28/01/2014).

In contrast, the following letter of 21 January 2011 took a narrow approach and only relied on specific provisions of the Audiovisual Media Services Directive as well as on the freedom of establishment and the free provision of services guaranteed by Arts. 49 and 56 TFEU.[40] This letter made no mention of the Charter of Fundamental Rights whatsoever. The letter that addressed licensing of *Klubrádió* is not different in this respect, even if there, Vice-President *Kroes* expressed general concerns about the media in Hungary.[41]

It is submitted that this traditional, narrow approach is not unique. On the contrary, it is in harmony with the other cases where the European Commission attempted to intervene with undesired constitutional developments in Hungary by means of an infringement procedure.

The issues addressed by the Commission were the sudden reduction of the retirement age of judges from 70 to 62, the removal of the Data Protection Commissioner and the independence of the Central Bank. First, in a letter dated 12 December 2011,[42] *Viviane Reding*, Vice-President of the European Commission, raised the issues of the judiciary and the Data Protection Commissioner. Shortly thereafter, in a letter that was leaked to the press, the President of the European Commission "strongly advised" the Hungarian Prime Minister to withdraw the Bills of two cardinal laws on the Hungarian Central Bank and on financial stability from Parliament because of their incompatibility with European Union law. Consequently, on 17 January, three Letters of Formal Notice were sent to Hungary as the first stage in the infringement procedure. The letters concerned the independence of the central bank and data protection authorities and the forced retirement of judges above a certain age.[43] Ultimately, the latter two issues were pursued and submitted to the ECJ.

40 http://cmcs.ceu.hu/sites/default/files/domain-69/cmcs-archive/EC_lettertoHungary_2011Jan21.pdf (last accessed 28/01/2014).

41 http://blogs.r.ftdata.co.uk/brusselsblog/files/2012/01/KroesHungaryLettter1.pdf (last accessed 28/01/2014).

42 www.kormany.hu/download/4/8b/60000/Letter%20from%20Vice-President%20Viviane%20Reding%20to%20Vice-Prime%20Minister%20Tibor%20Navracsics.pdf (last accessed 28/01/2014).

43 European Commission, Press release, European Commission launches accelerated infringement proceedings against Hungary over the independence of its central bank and data protection authorities as well as over measures affecting the judiciary, Strasbourg, 17 Jan. 2012, www.europa.eu/rapid/pressReleasesAction.do?reference=IP/12/24 (last accessed 28/01/2014).

The independence of the data protection supervisory authority was seen as to have been breached because the six-year term of the incumbent Data Protection Commissioner was prematurely brought to an end by constitutional provisions that created a new National Agency for Data Protection to replace the current Data Protection Commissioner's Office as of 1 January 2012. The action brought on 8 June 2012 by the European Commission relied on Art. 28(1) of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, arguing that the removal from office before time of the authority responsible for supervising data protection undermined the independence of that authority required by the Directive.[44] The opinion of Advocate General *Wathelet* of 10 December 2013 agreed with the Commission and found a violation of Art. 28 of the Directive.[45] It is remarkable, that the central concern of the opinion of the Advocate General is whether the previous Data Protection Commissioner could have been appointed to lead the new National Agency for Data Protection. This entails the assumption that the abolition of the previous Data Protection Commissioner's Office would be acceptable from the perspective of EU law, if the previous Commissioner had been elected to lead the newly created authority. This indicates, that the case is orchestrated as a matter of the personal fate of the previous Commissioner, and not as a matter of principle.

Similarly, the lowering of the mandatory retirement age of judges from 70 to 62 was not addressed by the European Commission as an obvious matter of the independence of the judiciary, but as discrimination at the workplace on grounds of age in the light of the rules on equal treatment in employment (Directive 2000/78/EC). The ECJ acceded to the position of the European Commission and ruled on 6 November 2012 that the relevant national legislation gave rise to a difference in treatment on grounds of age which was neither appropriate nor necessary to attain the objectives pursued and therefore did not comply with the principle of proportionality.

44 ECJ, Case C-288/12, Action brought on 8 June 2012 – European Commission v Hungary (OJ 2012 C 227, p. 15-16).

45 ECJ, Case C-288/12, (fn. 44), Opinion of AG *Wathelet* of 10/12/2013, para 82.

Thus, according to the ruling, Hungary had failed to fulfil its obligations under Council Directive 2000/78/EC.[46]

At the time of writing this paper, these two instances are the only infringement procedures initiated against Hungary for concerns relating to the values listed in Art. 2 TEU. They show a pattern similar to the one followed in the case of the Hungarian media legislation which can be best characterised by recourse to narrow internal market related provisions and by strictly avoiding the conflicts that may arise from the application of the Charter of Fundamental Rights to a Member State.[47]

E. Revisiting Art. 51(1) European Charter of Fundamental Rights

The above case study clearly demonstrates that the competence problem and the resulting indirect protection of fundamental rights is anything but satisfactory. This warrants the question whether there are alternative ways to ensure respect for the fundamental values enshrined in Art. 2 TEU by the Member States.

The founding treaties of the EU are rather ambiguous as to how the EU shall address disrespect for the foundational values of Art. 2 TEU by the Member States.[48] *Prima facie* it can be argued that besides the "nuclear option" of Art. 7 TEU there are no appropriate means to address such concerns.

A tempting and innovative proposal would tackle this problem and utilise the *Ruiz Zambrano* ruling of the ECJ[49] to enable domestic courts to ask for a preliminary ruling on the basis of Art. 2 TEU if it cannot be presumed that the Member State in question ensures the essence of fundamental rights enshrined in Art. 2 TEU.[50]

46 ECJ, Case C-286/12 – Commission v Hungary.

47 *Dawson/Muir*, (fn. 38), p. 1974.

48 *Dawson/Muir*, (fn. 38), p. 1959.

49 ECJ, Case C-34/09 – Ruiz Zambrano v. Office National de L'emploi, ECR 2011, I-01177.

50 *Von Bogdandy*, Reverse Solange–Protecting the essence of fundamental rights against EU Member States, Common Market Law Review 2012, vol. 49, issue 2, p. 489-519.

It is submitted that, ultimately, it is not unproblematic to yield to the tempting vision of a competence-wise unlimited – yet minimum – protection by EU law against Member State actions. The basic question is the relationship between the Charter and the provision of Art. 2 TEU which declares respect for human rights to be a foundational value of the EU common to the Member States. The reverse *Solange* proposal suggests that the difference between the two is in the level of protection. Accordingly, the Charter contains the full *acquis* of EU fundamental rights, whereas Art. 2 TEU aims at safeguarding essentials. The essence to be protected under Art. 2 TEU should be identical to the essence of fundamental rights which is also protected by Art. 52(1) of the Charter and Member States constitutions.

This is the point, however, where difficulties arise: if the Charter itself contains an essence guarantee – which it does in Art. 52(1) –, then this is also subject to the limitation of Art. 51(1) of the Charter. In other words, Member States are bound under Art. 51(1) of the Charter to respect even the essence of fundamental rights only inasmuch as they are implementing EU law. Assuming that Art. 2 TEU does not lift the limitation of Art. 51(1) of the Charter, it occurs that the difference between the Charter on the one hand and Art. 2 TEU on the other is not in the level, but in the nature of the protection. The Charter shall function as the foundation of judicial enforcement of fundamental rights, and Art. 2 TEU as the basis of political decision-making under Art. 7 TEU.

Besides, a reference to the practical value of the reverse *Solange* proposal is needed. The essence guarantee has a symbolic role expressing that certain values are beyond reach of the State. But it is extraordinarily difficult for a Member State court to utilise this test as the single tool under EU law in cases where Art. 51(1) of the Charter seemingly prevents recourse to the full guarantees of the Charter. This difficulty seems to be even greater in countries where courts would actually need this tool because of highly problematic statutes: a political climate which allows the adoption of such laws definitely requires clear cut and obvious tests so that the courts do not have to fear public criticism. Unfortunately, the essence guarantee does not seem to offer such a practical toolkit.

It is submitted, therefore, that Art. 51(1) Charter of Fundamental Rights is insurmountable and the success of the European Union in maintaining its values listed in Art. 2 TEU will depend on the interpretation of Art. 51(1) of the Charter. In this respect, the ruling of the ECJ in the *Åkerberg*

Fransson case[51] seems to offer a promising opportunity. The concluding part of this paper will therefore devote attention to the potential of this ruling.

F. Åkerberg Fransson – Promising Continuity

Åkerberg Fransson attracted wide attention in academia,[52] and the reaction is not completely positive. *Åkerberg Fransson* is said to be based on a too far-reaching understanding of the ECJ's competences, creating the power to apply EU fundamental rights in a potentially wide range of cases not covered by the language of Art. 51(1) Charter of Fundamental Rights. What is more, it is argued that the inversion of the rule that primarily the Member States themselves are responsible for fundamental rights protection would engender the danger that fundamental rights protection becomes dissociated from the still primarily national societies in which it has to function. Also, the domestic separation of powers is seen as endangered as, so it is claimed, dislocating fundamental rights protection from the national arena may undermine and erode the functioning of these courts in the national constitutional spheres.[53]

More striking than that, the German *Bundesverfassungsgericht* reacted promptly and harshly to *Åkerberg Fransson* in a judgment concerning a counter-terrorism database.[54] The language of the press release to the judgment is especially surprising:

51 ECJ, Case C-617/10 – Åkerberg Fransson.

52 See, *inter alia*, *Rathke*, Mangold Reloaded? 8 March 2013, http://www.verfassungsblog.de/de/eugh-akerberg-fransson-mangold-reloaded/#comments (last accessed 28/01/2014); *Lavranos*, The ECJ's Judgments in Melloni and Åkerberg Fransson: Une Ménage à Trois Difficulté, European Law Reporter 2013, no. 4, p. 133-141; Editorial Comment, After Åkerberg Fransson and Melloni, EuConst 2013, vol. 9, p. 169-175; *Gstrein/Zeitzmann*, Die "Åkerberg Fransson"-Entscheidung des EuGH – "ne bis in idem" als Wegbereiter für einen effektiven Grundrechtsschutz in der EU?, ZEuS 2013, vol. 16, p. 239 et seq.

53 Editorial Comment, (fn. 52), p. 171.

54 FCC – 1 BvR 1215/07 – NVwZ 2013, p. 1335, http://www.bundesverfassungsgericht.de/entscheidungen/rs20130424_1bvr121507.html (last accessed 28/01/2014). For a detailed analysis and critical appraisal see *Thym*, Separation versus Fusion – or: How to Accommodate National Auton-

"As part of a cooperative relationship, this decision must not be read in a way that would view it as an apparent ultra vires act or as if it endangered the protection and enforcement of the fundamental rights in the Member States in a way that questioned the identity of the Basic Law's constitutional order. The Senate acts on the assumption that the statements in the ECJ's decision are based on the distinctive features of the law on value-added tax, and express no general view."[55]

This reaction by the *Bundesverfassungsgericht* can be best understood as defending the separation of the roles of fundamental rights protection between national and European instances.[56] It is argued convincingly that the "separation thesis" propagated by Karlsruhe tries to uphold, for the time being, the *status quo ante* in the area of fundamental rights protection in Europe.[57]

It is submitted that the critical reactions of academia and of the *Bundesverfassungsgericht* overstate the novel nature of the reasoning in *Åkerberg Fransson,* at least as regards the abstract interpretation of Art. 51(1) Charter of Fundamental Rights. This is because the central thesis of the ruling is nothing but the revitalisation of a jurisprudence more than two decades old. Reading para 19 of the ruling makes this abundantly clear:

"In this respect the Court has already observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law. On the other hand, if such legislation falls within the scope of European Union law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures."[58]

omy and the Charter? Diverging Visions of the German Constitutional Court and the European Court of Justice, EuConst 2013, vol. 9, p. 391-419.

55 For the press release on the judgement (fn. 54) in English language (press release no. 31/2013 of 24 April 2013) see http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg13-031en.html (last accessed 28/01/2014).

56 *Thym*, (fn. 54), p. 404 et seq.

57 Ibid., p. 407.

58 ECJ, Case C-617/10, (fn. 51), para 19.

In fact, the famous *ETR* ruling quoted here by the ECJ used almost literally the same language twenty two years before *Åkerberg Fransson* was handed down.[59] The "coup" of the ECJ in *Åkerberg Fransson* therefore consists in nothing else but interpreting the term in Art. 51(1) Charter of Fundamental Rights "implementing EU law" as confirming the previous relevant jurisprudence of the ECJ.[60] *Åkerberg Fransson* is thus the continuation of a jurisprudence that is several decades old and by far no revolutionary step.

This leads to the central question of the present paper, whether the inherent tension between Art. 2 TEU on the one hand and Art. 51(1) Charter of Fundamental Rights on the other can be mitigated by a broader interpretation of Art. 51(1) of Charter. The language of *Åkerberg Fransson* according to which a Member State action has to be within the scope of European Union law in order to trigger the application of the Charter seems promising in this respect. Yet this language is also open to interpretation, and the existing case law is still ambiguous.

In *Åkerberg Fransson* the Commission, the Advocate-General and various national governments had rejected the applicability of the Charter because of the high level of abstraction of common rules for value added tax.[61] Even the Court admitted that the Charter applied even though the national Swedish rule "has not been adopted to transpose" Directive 2006/112/EC.[62] On the other hand, the Court noted that the application of the national legislation was designed to penalise an infringement of the Directive and was therefore intended to implement the obligation imposed

59 ECJ, Case C‑260/89 – Elliniki Radiophonia, ECR 1991, I‑2925 para 42: "As the Court has held […] it has no power to examine the compatibility with the European Convention on Human Rights of national rules which do not fall within the scope of Community law. On the other hand, where such rules do fall within the scope of Community law, and reference is made to the Court for a preliminary ruling, it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the European Convention on Human Rights."

60 This is expressly stated in para 18 of the ruling: "That article of the Charter thus confirms the Court's case-law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union."

61 *Thym*, (fn. 54), p. 394.

62 ECJ, Case C-617/10, (fn. 51), para 28.

on the Member States by the Treaty to impose effective penalties for conduct prejudicial to the financial interests of the European Union.[63]

In *Texdata*[64], confirming *Åkerberg Fransson*, the ECJ followed a similar logic inasmuch as it decided in favour of the applicability of the principles of effective judicial protection and respect for the rights of the defence as enshrined by the Charter because the main proceedings concerned the penalty imposed for failure to comply with disclosure obligations foreseen by a company law directive of the Council.[65]

This jurisprudence certainly offers a relatively broad interpretation of the term "falling within the scope of EU law". The remaining question is to what extent can it be utilised in explosive cases involving possible violations of fundamental values of the EU by a Member State. A recent example is less encouraging in this respect. A Hungarian Court requested a preliminary ruling from the ECJ on the question of whether dismissal from public service without any reasons constitutes a violation of Art. 30 Charter of Fundamental Rights providing for protection against unjustified dismissals.[66] This request was peculiar in the sense that previously both the European Court of Human Rights[67] and the Hungarian Constitutional Court[68] found the respective Hungarian legislation (which was enacted in 2010) to be in violation of the fair trial guarantees of Art. 6(1) European Convention on Human Rights and the Hungarian Constitution, respectively. In contrast, the ECJ was reluctant to take up the case and ruled in October 2013 – explicitly quoting *Åkerberg Fransson* – that the case did not in any fashion fall within the scope of EU law.[69]

63 Ibid.

64 ECJ, Case C‑418/11 – Texdata Software Gmbh, para 72.

65 Eleventh Council Directive 89/666/EEC of 21/12/1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State (OJ 1989, L 395, p. 36-39).

66 ECJ, Joined Cases C‑488/12, C‑489/12, C‑490/12, C‑491/12 and C‑526/12 – Order of the Court (eight chamber) 10 October 2013.

67 ECtHR, Case of K.M.C. v. Hungary, judgment of 10 July 2012, No. 19554/11.

68 Hungarian Constitutional Court, Case 29/2011. (IV. 7.) AB, ABH 2011, p. 181 et seq.

69 ECJ, Joined Cases (fn. 66), para 17.

Here, it would have been perfectly legitimate to argue – as already the President of the Republic of Hungary had argued against the adoption of the relevant law in 2010[70] – that the obligation to give reasons for a dismissal is inevitable to make the complete anti-discrimination law of the EU effective in the domestic jurisdiction. In other words, legal provisions providing for the obligation to give reasons for a dismissal are implementing the anti-discrimination directives. Apparently, the ECJ was not ready to go down that road.

G. Conclusion

The example of the treatment of Hungarian media laws by the European Union reveals that the traditional narrow understanding of EU law as the law of the internal market can no longer ensure respect for the fundamental values of the EU as enshrined in Art. 2 TEU. The language of Art. 51(1) Charter of Fundamental Rights is certainly an obstacle in the way of enforcing such respect. Yet the recent *Åkerberg Fransson* jurisprudence offers a chance to address issues as to the *status quo* of democracy, the rule of law and fundamental rights in Member States and in a more comprehensive fashion. This shall not be seen as a threat to functioning constitutional democracies in the EU, nor to the activity of constitutional courts. Rather, a broad interpretation of Art. 51(1) Charter of Fundamental Rights can make the proclamation of the values of the EU in Art. 2 TEU credible and may ensure homogeneity within the European Union in this pivotal respect. The Hungarian experience shows that it is time to grasp EU law as a chance for fundamental constitutional values.

70 http://solyomlaszlo.hu/archiv//admin/data/file/6935_20100614_visszakuldo_level_kormanytisztviselok_cimerrel.pdf (last accessed 28/01/2014).