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ANTI-TERROR DATABASE, THE GERMAN CONSTITUTIONAL COURT REACTION TO ÅKERBERG FRANSSON – FROM THE SPRING/SUMMER 2013 SOLANGE COLLECTION: REVERSE CONSISTENT INTERPRETATION.

Posted on Maggio 3, 2013 by ***Filippo Fontanelli***

In a previous post, I maintained that the judgment in the *Åkerberg Fransson* case did not extend the application of the EU Charter of Fundamental Rights beyond the familiar area derived from the doctrines of *ERT* and *Wachauf*. In that case, the Court of Justice of the European Union (CJEU) expressly defined the scope of the Charter and EU law as coterminous, therefore averting the risk that the Charter become an autonomous platform of additional EU competences. However, some commentators interpreted this judgment as a troublesome example of competence-creep sanctioned by the CJEU. Among them, in an unfortunate restaging of the post-*Mangold* drama, figure the judges of the German Constitutional Court (*Bundesverfassugsgericht*, hereinafter 'BvG'). Their reaction did not take long to materialise: less than two months after *Fransson* they delivered the decision in the "Anti-terror

Database" case (Judgment 1 BvR 1215/07 of 24 April 2013). This judgment is a loud signal to the CJEU, whereby the Karlsruhe tribunal made clear that it will not ratify any trend of uncontrolled expansion of the EU's competence in human rights protection, obtained through the application of the Charter to areas remotely touched upon by EU law.

The complainant challenged the constitutionality of the German Act on Setting up a Standardised Central Counter-Terrorism Database of Police Authorities and Intelligence Services of the Federal Government and the *Länder*. This law regulates the exchange of information between the police and intelligence agencies and poses a threat to the right to privacy of those people whose personal information are collected and exchanged.

The BvG affirmed that the challenged provisions pursue nationally determined objectives which 'are not determined by EU law,' and can regard it 'only in part.' Accordingly, the Charter cannot apply and the CJEU cannot be the *juge naturel* for the human-rights review of this measure. However, the BvG candidly exposed all the possible links between the German measure and EU law; they are not few. The EU has legislated in the field of data protection and in particular on the limitations on the use of personal data by commercial actors; it developed a series of anti-terrorism policies that include the treatment and exchange of data relating to terrorism investigations. The "Anti-terror Database," therefore, has direct implications that spread across the field of application of EU law.

The BvG refused to raise a preliminary question to the CJEU, invoking the *acte claire* doctrine of *CILFIT*, therefore making sure to reserve the last word on the matter for itself. Moreover, it refused to consider the application of the Charter to the Anti-terror Database, because it does not implement EU law under Art. 51(1) of the Charter. The strength of the link with EU law is too low to grant application of the Charter and the BvG invoked para. 22 of *Annibaldi* to validate this view. In that passage, the CJEU excluded the application of

fundamental principles to national legislation which, despite 'be capable of affecting indirectly the operation of an ,' 'pursues objectives other than those covered by .' The choice to invoke this exemption is understandable: it is the only one available in the case-law on general principles, once the application of EU law is confirmed (which is also the reason why the BvG had to resort to the *acte claire* justification to escape the obligation of Art. 267 TFEU).

What is more debatable is whether this exemption applied in fact: even if the origin of the German measure is fully domestic its objectives seemingly correspond to those pursued by EU law. There is no other primary purpose of the Anti-terror Database which makes the EU ones ancillary: the measure operates 'within the scope of EU law' and shares its aims. In this sense, the subsequent distinguishing of *Fransson* is a red-herring: the Anti-terror Database is subjected to the Charter simply because the *Annibaldi* exemption does not apply, hence there was no need to flag the destabilizing potential of *Fransson*. In this sense, the BvG tried to dress its reluctance to submit the Database to the CJEU's scrutiny as a wise act of conflict-prevention, taken 'in the spirit of cooperative coexistence' (literally, 'Im Sinne eines kooperativen Miteinanders' a formula reminiscent of that used in *Honeywell*, § 57: 'wechselseitige Rücksichtnahme,' which corresponds roughly to 'mutual consideration,' see this post).

In particular, the BvG noted that an expansive reading of *Fransson* would render it akin to an 'obvious' *ultra vires* act endangering the protection of fundamental rights in the member States, of the kind foreshadowed in the recent *Lissabon Urteil* and *Honeywell* judgments. Similar acts would force the BvG to act in civil disobedience and denounce the decision of the CJEU (as the Czech constitutional court did in 2012). Therefore the BvG specified which interpretation of *Fransson* might avert this risk, in an unprecedented exercise of *reverse consistent interpretation* (i.e., how to interpret Art. 51(1) of the Charter in conformity with the core values of the *Grundgesetz*). Art. 51(1) of the Charter, the BvG specified, cannot operate when the

domestic measure relates to the 'purely abstract scope of EU law' nor when it has a 'merely *de facto*' impact on it.

Seemingly, the BvG decided to act as the champion of constitutional gatekeepers in the Union, in the immediate wake of a couple of decisions (*Melloni* and *Fransson*) whose combined effect is perceived to sanction the inexorable marginalization of constitutional tribunals in an area where they have long lost the home-field advantage: review of human rights' compliance of domestic norms. National constitutions are sidelined when EU law applies even remotely or when domestic measures *happen* to fall within its scope (*Fransson*). In addition, State-specific constitutional guarantees stand no chance of survival when they collide with the standards set by the Charter (*Melloni*). It is fair to say that, even if neither decision seems to constitute the kind of *ultra vires* act feared by the BvG in the *Honeywell* judgment , certainly the slow but irreversible application of the Charter is eroding the jurisdiction of constitutional tribunals (see above) and the scope of application of national guarantees that do not mirror EU standards. This decision served Bruxelles with a notice of warning: the terms of the peaceful *entente* cannot act always in favour of the EU regime, lest the BvG be ready to denounce the contract (the constitutional synallagma, see G. Martinico's 'The Tangled Complexity of the EU Constitutional Process, pp. 44 f) and renegotiate the well-documented status of constitutional tolerance.