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The impact of the Charter of Fundamental Rights of the European Union on VAT Law

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ABSTRACT: The Charter of Fundamental Rights of the European Union became legally binding following its entry into force with the Lisbon Treaty on 1 December 2009, and it has the same legal value as the EU Treaties. Since then, the EU fundamental rights aspect of VAT law has not been subject to much academic discussion or particular attention from VAT practitioners. This article contributes to further development of research in the area of EU fundamental rights and VAT law by examining; when the Charter is relevant in VAT law and if so how the Charter manifests itself in EU VAT case law, and what special interpretative principles the Charter triggers itself in connection with interpretation of fundamental rights comprised by the Charter. The Charter has proved to play an important – but also diversified – role in both formal and substantive aspects of VAT law, such as national rules on administrative sanctions and penalties, criminal proceedings, procurement of evidence, procedural guarantees, VAT fraud and abuse, VAT exemptions, VAT deductions, VAT impositions, VAT increases and so on. Any current or potential impact of the Charter on VAT-related matters must be considered in connection with legislation, case law, administrative practice etc, which must comply with the Charter given its status as EU primary law. If citizens, companies or their advisers etc are not aware of their EU fundamental rights under the Charter, this could lead to the loss of those rights and the loss of the formal or substantive case, with potential professional liability for advisers.

1. Introduction and background

The background and inspiration for this article on the interface between EU fundamental rights law and VAT law¹ is primarily drawn from some international events and the fact that this research area is relatively new.

While the Charter of Fundamental Rights of the European Union² (hereinafter the ‘Charter’) has been legally binding as an integral part of EU primary law since December 2009, international research into the concrete impact of the Charter on VAT-related matters has been modest. This article contributes – at a more basic and general level – to explaining the current and potential impacts of the Charter on VAT law.³

Further, there has recently been increased international focus on the impact of the Charter on VAT law at conferences in Europe following the increased number of cases in this area coming before the Court of Justice of the European Union (CJEU). Just to mention a few clear examples of the direct relevance of the Charter on specific VAT cases, see Case C-617/10 *Åkerberg Fransson*, which stated that national rules on tax penalties and criminal proceedings fall within the scope of Article 50 of the Charter and must comply with this principle ‘not to be punished twice for the same offence’,⁴ and Case C-419/14 *WebMindLicenses*, which established that the use of evidence obtained by the tax authorities without the taxable person’s knowledge in the context of ongoing parallel criminal proceedings must not breach Article 7 of the Charter regarding respect for private life.⁵ These and other cases below confirm the importance of considering the Charter in actual VAT cases.

Attorney and Partner Ine Lejeune, of Law Square, Belgium, gave an interesting presentation on ‘Recent VAT Case Law: In which Direction does the CJEU go?’ at the conference ‘Court of Justice of the European Union: Recent VAT Case Law’ on 14-15 December 2015 in Vienna.⁶ She discussed recent VAT decisions of the CJEU in relation to specific provisions of the Charter. On 15 January 2016, Professor Ben Terra, of Lund University, Sweden, gave a thorough and stimulating presentation on ‘The Rising Star of the Charter’ at the one-day seminar ‘EU VAT 2015’ in Lund.⁷ In Professor Terra’s opinion, the Charter will definitely come to play an important role in the development of EU VAT law as infringements of its rights, freedoms and principles will have major consequences for the parties involved.⁸ Additionally, Associate Professor Oskar Henkow, of Lund University, Sweden, gave an interesting and reflective presentation on ‘The EU Charter of Fundamental Rights and VAT’ at the UCPH VAT Link seminar on 29 September 2016 in Copenhagen⁹ where

¹The author has previously done research in cross-disciplinary fields of law and continues to do so in the fields of VAT law and tax law; her PhD project was on the interaction between VAT law and income tax law: *Interaktioner mellem momsretten og indkomstskatteretten*. The author is carrying out a 3-year postdoctoral project on ‘Combating Tax Avoidance and Protecting the Internal Market – EU VAT Grouping’: <http://jura.ku.dk/fire/english/research/combat/>, which is financed by the Danish Council for Independent Research and has been awarded the Sapere Aude-Research Talent Prize with reference ID: DFF – 6109-00146.

²Charter of Fundamental Rights of the European Union (2010/C 83/02) of 30 March 2010.

³The author has previously contributed to this area from a Danish perspective in Momspanelet, June 2016.

⁴See part 6.1.

⁵ See part 6.3.

⁶Organised by the Institute for Austrian and International Tax Law, WU (Wirtschaftsuniversität Wien).

⁷Organised by School of Economics and Management, Department of Business Law, Lund University.

⁸See Article 51(1), first sentence, of the Charter which states that the Charter is addressed to the institutions, bodies, offices and agencies of the EU and the EU Member States.

⁹Organised by FIRE – Research Group for Fiscal Relations, Faculty of Law, University of Copenhagen.

he elaborated on the scope of the Charter, the relationship between the Charter and the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the 'HR Convention') and the applicability of general principles in VAT law.

This article, and its findings on the relevance, manifestation and impacts of the Charter on VAT law, strongly supports the above view of Professor Terra.

2. The state of the art and the aim of this article

2.1. Current research in the combined areas of EU fundamental rights and VAT law (state of the art)

It appears that there has been little academic research in the combined areas of EU fundamental rights and VAT law. Of course there are many publications respectively on EU fundamental rights, the Charter and human rights law, and there are many publications on VAT law, but there are few publications which look at both areas together.

One of the leading VAT cases from the CJEU is the *Åkerberg Fransson* case which established that, to a large extent, the harmonised Sixth VAT Directive¹⁰ falls within the scope of the Charter; see part 6.1. Academic discussions have focused on this case and its consequences for VAT law,¹¹ but there does not seem to have been a general approach to this research area.

A few publications deal broadly with the impact of the Charter on tax law or fiscal matters¹² not confined to VAT law. Such publications are naturally relevant to some extent to the research focus of this article and are referred to in the following analysis and discussions, where relevant.

2.2. Research purpose of this article

The research purpose of the article is to examine, when and in what situations the Charter becomes relevant in VAT law, and in such cases, how the Charter manifest itself in EU VAT case law, and which special interpretative principles given by the Charter itself must be applied in connection with the interpretation of the fundamental rights laid down in the Charter. By manifestation I mean some form of visible or tangible impact on the VAT-related matter of the case.

To fulfil the research purpose the historical background to and objectives of the Charter are briefly explained; see part 3. This is followed by an examination of the legal implications of the Charter for EU law, including VAT law; see part 4. Then the legal method and standard methods of interpretation applied are presented in part 5, including the special interpretative principles of the Charter; see part 5.2. After that, in part 6 selected VAT decisions of the CJEU are analysed in order to exemplify and document the relevance, manifestation and impact of the Charter in practice. Finally, the results of the analysis of the legal and practical impacts of the Charter on VAT law are discussed and reflected upon; see part 7.

¹⁰Sixth Council Directive of 17 May 1977 (77/388/EEC).

¹¹Eg Filippo Fontanelli, '*Hic Sunt Nationes: The Elusive Limits of the EU Charter and the German Constitutional Watchdog*' (2013) 9 *European Constitutional Law Review* 315; Monika Szwarc '*Application of the Charter of Fundamental Rights in the Context of Sanctions Imposed by Member States for Infringements of EU Law: Comment on Fransson Case*' (2014) 20 *European Public Law* 229; and Emily Hancox, '*The meaning of "Implementing" EU law under Article 51(1) of the Charter: Åkerberg Fransson*' (2013) 50 *Common Market Law Review* 1411.

¹²Eg Eric Poelmann, '*Some Fiscal Issues of the Charter of Fundamental Rights of the European Union*' (2015) 43 *Intertax* 173.

Obviously, the VAT cases examined in the analysis are not exhaustive but are selected examples of the impact of the Charter in actual VAT cases that best serve the research purpose. The VAT cases represent a wide range of different VAT-related situations and the relevance of specific provisions in the Charter in those situations. Cases in other areas of law may also be referred to, provided they are relevant to specific elements in this article.

2.3. Limits to the scope of this article

Given the research focus and the limited extent of this article, human rights law in general, including the HR Convention and the case law of the European Court of Human Rights (ECHR), are not discussed. For the same reasons discussions of the division of competences between the CJEU and the ECHR are omitted,¹³ since such a discussion is not directly relevant for the research focus of this article.

Naturally, in a larger research project it would be interesting to carry out research involving EU fundamental rights, VAT law and human rights, since the Charter is deeply intertwined with human rights law. It would also be interesting in such a project to include other tax laws, for example in order to discover any significant differences or similarities between the impact of the Charter in direct and indirect taxation.

The Charter distinguishes between rights which must be respected and principles which must be observed; see Article 51(1), second sentence, of the Charter. This issue is not discussed in this article; see part 5.2.6. As a consequence it can be noted that the rights, freedoms and principles in Articles 1 to 50 of the Charter in overall terms are considered as general principles of EU law collectively expressed in the Charter; see parts 3 and 4.1.

Finally, unfortunately the limited scope of the article does not allow all relevant or interesting aspects to be addressed properly, and it has been necessary to make choices concerning what to include or exclude, based on an evaluation of the value of material to the focus and purpose of this article. Thus, the article contributes to further development of the research field with a preliminary study of a basic and general character.

3. Brief history of the Charter

It is appropriate to look at the history of the Charter to get a better understanding of the Charter and its context¹⁴ and of the special interpretative skills needed to apply the Charter correctly; see part 5.2. The

¹³Reference is made to other literature: Baratta, Roberto, 'Accession of the EU to the ECHR: The Rationale for the ECJ's Prior Involvement Mechanism' (2013) 50 *Common Market Law Review* 1305; William BT Mock et al, *Human Rights in Europe, Commentary on the Charter of Fundamental Rights of the European Union* (Carolina Academic Pr, 2009) pp 329–335; Julianne Kokott and Christoph Sobotta, 'The Charter of Fundamental Rights of the European Union after Lisbon', *EUI Working Papers, AEL 2010/6*, Academy of European Law, part 2, pp 4–5; Hanneke Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System, An analysis of the European Court of Human Rights and the Court of Justice of the European Union* (1st ed., 2011) pp. 33–35; Joakim Nergelius & Eleonor Kristoffersson, *Human Rights in Contemporary European Law* (Oxford: Hart Publishing, 2015); and Giacomo di Federico, 'Fundamental Rights in the EU: Legal Pluralism and Multilevel Protection After the Lisbon Treaty' in Giacomo Di Federico (ed), *The EU Charter of Fundamental Rights, From Declaration to Binding Instrument* (Springer, 2011) pp 15–54; and Robin CA White, 'The Strasbourg Perspective and its Effect on the Court of Justice: Is Mutual Respect Enough?' in Anthony Arnull et al (eds), *Continuity and Change in EU Law, Essays in Honour of Sir Francis Jacobs*, pp 139-156.

¹⁴Mats Lindfelt, *Fundamental Rights in the European Union – Towards Higher Law of the Land?* (Abo Akademi University Press, 2007) p 34.

history of the Charter will be briefly set out below with references to other sources for further details on its history.¹⁵

The original idea of drawing up a charter of the fundamental rights of the EU arose in a decision of the European Council in Cologne of 3-4 June 1999.¹⁶ The reasons for the decision were expressed as follows:¹⁷

Protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy. The obligation of the Union to respect fundamental rights has been confirmed and defined by the jurisprudence of the European Court of Justice. There appears to be a need, at the present stage of the Union's development, to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens.

From this quotation it can be seen that the reason for establishing a charter of fundamental rights was the recognition of the need to protect fundamental rights as a founding EU principle and to support the legitimacy of the EU itself. The CJEU's rulings on the obligation of the EU to respect fundamental rights add further weight to the argument of legitimacy. The European Council felt that the Charter had to be drawn up in order to make the fundamental rights more visible to EU citizens. By this means all rights, freedoms and principles are collected transparently and accessibly in one document.

The purpose of the Charter was to set out clearly, as general principles of EU Law, the fundamental rights, freedoms and procedural rights guaranteed by the HR Convention and those derived from the constitutional traditions common to the Member States. The Charter also includes the fundamental rights of EU citizens, including the economic and social rights contained in the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers.¹⁸ Basically, the Charter was intended to be a full catalogue of the fundamental rights and freedoms in the EU derived from all relevant sources of law, thereby aiming to put all general principles of the EU into one document.

The conditions for implementing the European Council's decision were established by the incoming Presidency at the extraordinary meeting of the European Council in Tampere on 15-16 October 1999.¹⁹ At

¹⁵Koen Lenaerts, Piet van Nuffel et al, *European Union Law* (Sweet & Maxwell, 2011) pp 830-833; *Mock (n 13)* pp ix-xv; Zarys Prawa et al, *Fundamental Rights Protection in the European Union*, pp 40-45; Lindfelt (n 14) pp 4-12; and Jacqueline Dutheil de la Rochère, 'The EU Charter of Fundamental Rights, Not Binding but Influential: the Example of Good Administration' in Anthony Arnall et al (eds), *Continuity and Change in EU Law, Essays in Honour of Sir Francis Jacobs*, pp 157-158.

¹⁶Cologne European Council, 3-4 June 1999, Conclusions of the Presidency, IV. Further Development of the European Union, para. 44, and Annex IV – European Council Decision on the drawing up of a Charter of Fundamental Rights of the European Union.

¹⁷Cologne European Council, 3-4 June 1999, Conclusions of the Presidency, Annex IV – European Council Decision on the drawing up of a Charter of Fundamental Rights of the European Union, para 1.

¹⁸*Ibid*, para 2.

¹⁹Cologne European Council, 3-4 June 1999, Conclusions of the Presidency, Annex IV. Further Development of the European Union, para 45.

the meeting in Tampere the European Council agreed on the composition, method of work and practical arrangements for the body entrusted with drawing up the Charter.²⁰

At its summit meeting on 7-10 December 2000 in Nice, the European Council welcomed the joint proclamation of the Charter by the Council, the European Parliament and the Commission and expressed a wish that the Charter should be disseminated as widely as possible among EU citizens.²¹

Nonetheless, between the Nice summit and the Brussels summit on 21-22 June 2007, the Charter was not adopted as legally binding instrument.²² This must be ascribed to the fact that the Member States' adoption of a Treaty establishing a Constitution for Europe²³ was not ratified in the summer 2005, following French and Dutch referendums.²⁴

After some adjustments, mainly to the social provisions²⁵ and the clarification of the scope and interpretative principles²⁶ made in Strasbourg in 2007,²⁷ the Charter was agreed and made legally binding at the Brussels summit.²⁸ Finally, the Charter became legally binding with the entry into force of the Lisbon Treaty on 1 December 2009, when it was given the same status as the Treaties themselves pursuant to the Treaty on the European Union (TEU) Article 6(1); see part 4.1.

4. General legal implications of the Charter

4.1. Legally binding EU primary law

Provided that the Charter is applicable, see part 4.2, the Charter must be considered to have a major effect on the doctrine of the sources of law and the interpretation hereof generally in all situations and not only in VAT-related situations. First and foremost this is due to the fact that the Charter is an integral part of EU primary law²⁹ and that the Charter itself contains many specific interpretative principles; see part 5.2,

²⁰Tampere European Council, 15 and 16 October 1999, Presidency Conclusions, Introduction, para. 4, and the Annex: Arrangements for the Body to Elaborate a Draft EU Charter of Fundamental Rights.

²¹European Council–Nice, 7–10 December 2000, Conclusions of the Presidency, I. Charter of Fundamental Rights, para 2.

²²The Charter was included as Part II in the Treaty establishing a Constitution for Europe, to be made legally binding by Article I-9 (1): 'The Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II.'

²³The Treaty establishing a Constitution for Europe was signed in Rome on 29 October 2004 and published in the Official Journal of the European Union on 16 December 2004 (C series, No 310).

²⁴EU Charter of Fundamental Rights–proclamation at Parliament in Strasbourg 12 December 2007 of 29 November 2007, Historical background and links, bullet point 7.

²⁵EU Charter of Fundamental Rights–proclamation at Parliament in Strasbourg 12 December 2007 of 29 November 2007, Legal status of the Charter, para 5.

²⁶Lindfelt (n 14) p 128.

²⁷TEU Article 6(1), first paragraph.

²⁸Brussels European Council, 21–22 June 2007, Presidency Conclusions, (11177/1/07 REV 1 CONCL 2 of 20 July 2007), Annex I, II. Amendments to the EU Treaty, para 9, and Annex 1, Amendments to the EU Treaty, Title I–Common provisions, litra 5) and its accompanying note 17. The final Charter of 7 December 2000 was adapted at Strasbourg on 12 December 2007; see TEU Article 6(1), first paragraph.

²⁹Eg Case C-216/11 *Commission v France* [2012] ECLI:EU:C:2012:819, Opinion of Advocate General Cruz Villalón, point 41. See Poelmann (n 12) p 173, para 2; Xavier Groussot, Xavier and Laurent Pech, 'Fundamental Rights Protection in the European Union post Lisbon Treaty' (2010) *Fondation Robert Schuman, European Issue No 173*, part 1.1, p 2; George Nicolaou, 'The Strasbourg View on the Charter of Fundamental Rights' (2013) *European Legal Studies, Research Papers in Law*, 3/2013, p 2; Prawa (n 15) p 147; Ola Zetterquist, 'The Charter of Fundamental Rights and the

which must be applied in connection with the interpretation and application of fundamental rights governed by the Charter.

The Charter is manifestly legally binding at the same level as the Treaties and it thereby has the highest value as a source of EU law where it is applicable. The status of the Charter is directly stated in TEU Article 6(1), first sentence:

The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

The CJEU has often referred to the Charter as having the same legal status as the Treaties, as laid down in TEU Article 6(1).³⁰

TEU Article 6(2) states that the EU shall accede to the HR Convention. So far the EU has not done so,³¹ but this and its implications lie outside the scope of this article; see part 2.3.

European' in di Federico (ed), *The EU Charter of Fundamental Rights, From Declaration to Binding Instrument* (Springer, 2011) p 3; and Koen Lenaerts, Piet van Nuffel et al, *European Union Law* (Sweet & Maxwell, 2011) p 825.

³⁰Case C-555/07 *Küçükdeveci* [2010] ECLI:EU:C:2010:21, para 22; Case C-271/08 *Commission v Germany* [2010] ECLI:EU:C:2010:426, para 37; Case C-578/08 *Chakroun* [2010] ECLI:EU:C:2010:117, para 44; Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Hartmut Eifert* [2010] ECLI:EU:C:2010:662, para 45; Case C-236/09 *Test-Achats* [2011] ECLI:EU:C:2011:100, para 16; Case C-243/09 *Günter Fuss* [2010] ECLI:EU:C:2010:609, para 66; Case C-447/09 *Reinhard Prigge, Michael Fromm, Volker Lambach* [2011] ECLI:EU:C:2011:573, para 38; Case C-155/10 *Williams* [2011] ECLI:EU:C:2011:588, para 18; Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECLI:EU:C:2010:363, para 55; Case C-214/10 *KHS* [2011] ECLI:EU:C:2011:761, para 37; Case C-337/10 *Georg Neidel* [2012] ECLI:EU:C:2012:263, para 40; Case C-544/10 *Deutsches Weintor* [2012] ECLI:EU:C:2012:526, para 43; Case C-78/11 *ANGED* [2012] ECLI:EU:C:2012:372, para 17; Joined Cases C-229/11 and C-230/11, *Alexander Heimann and Konstantin Toltschin* [2012] ECLI:EU:C:2012:693, para 22; Case C-399/11 *Stefano Melloni* [2013] ECLI:EU:C:2013:107, para 48; Case C-451/11 *Natthaya Dülger* [2012] ECLI:EU:C:2012:504, para 53; Case C-476/11 *HK Danmark* [2013] ECLI:EU:C:2013:590, para 19; Case C-546/11 *Dansk Jurist- og Økonomforbund* [2013] ECLI:EU:C:2013:603, para 40; Case C-539/12 *ZJR Lock* [2014] ECLI:EU:C:2014:351, para 14; Case C-219/14 *Kathleen Greenfield* [2015] ECLI:EU:C:2015:745, para 27; and Aidan O'Neill QC, 'How the CJEU Uses the Charter of Fundamental Rights' (2010) 17 *Judicial Review* 203, para 1; and Federico Fabbrini, *Fundamental Rights in Europe, Challenges and Transformations in Comparative Perspective*, p 10.

³¹Thus the CJEU cannot decide on the HR Convention, but solely on the Charter, see Case C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105, para 44; Case C-199/11 *Otis* [2012] ECLI:EU:C:2012:684, para 47; Case C-398/13 *P-Inuit Tapiriit Kanatami* [2015] ECLI:EU:C:2015:535, para 46; Case C-601/15 *PPU* [2016] ECLI:EU:C:2016:84, para 46; and Case C-543/14 *Ordre des barreaux francophones et Germanophone* [2016] ECLI:EU:C:2016:605, para 23.

TEU Article 6(3) states that the fundamental rights, as guaranteed by the HR Convention and as they result from the constitutional traditions common to the Member States, constitute general principles of EU law; see part 5.2.5.

Based on the *Kadi* case, Julianne Kokott & Christoph Sobotta suggest that the Charter has a more elevated position than rules of primary law that are not constitutional in nature. As a consequence, they argue that the elevated nature of the Charter means that secondary law cannot be incompatible with the Charter.³² While the Charter may not generally be considered to be elevated above the Treaties or rules of primary law that are not constitutional in nature, it is at least on the same legal level as them, thereby constituting EU primary law. Thus, in any event EU secondary law may not be contrary to EU primary law, including the Charter.³³

The legal status of the Charter means that the usual remedies for infringements of EU law, referrals to the CJEU, preliminary rulings, compensation for loss, infringement procedures etc, can be invoked by EU citizens and companies, the European Commission, the Member States etc.

It must be stressed that the general principles of EU law as laid down in the provisions of the Charter do not themselves constitute rules of law, but general principles which either can or must be applied by interpreting rules of law depending on the situation in question.³⁴ This is supported by Article 52(5) of the Charter which states that general principles in the Charter if implemented by eg legislative acts of a Member State shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality;³⁵ see part 5.2.6. Consequently, such implemented general principles are not directly applicable rules of law, but function in the legal sense as interpretation principles.³⁶

4.2. Scope of the Charter

To be applicable to a particular issue, the Charter must cover the area of national law which relates to the implementation of EU law; see Article 51(1), first sentence, of the Charter:

The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.

The meaning of ‘implementing Union law’ must be deduced from the Explanations Relating to the Charter of Fundamental Rights (hereinafter the ‘Explanations’)³⁷ and the CJEU’s case law which collectively express that the phrase unambiguously means ‘acting within the scope of’ EU law,³⁸ or in matters ‘covered’ by EU

³²Kokott & Sobotta (n 13) part 4, p 6.

³³Ibid, p 7; and O’Neill QC (n 30) p 203, para 5.

³⁴Borbála Kolozs, ‘Neutrality in VAT’ in Michael Lang et al (eds) *Value Added Tax and Direct Taxation, Similarities and Differences*, p 203; and Dutheil de la Rochère (n 15) p 163.

³⁵Dutheil de la Rochère (n 15) p 158.

³⁶Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02) of 14 December 2007, 10th paragraph of the Explanation on Article 52.

³⁷Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02) of 14 December 2007.

³⁸Explanations, second paragraph of the Explanation on Article 51, where reference is made Case 5/88 *Wachauf* [1989] ECLI:EU:C:1989:321; Case C-260/89 *ERT* [1991] ECLI:EU:1991:254; Case C-309/96 *Annibaldi* [1997] ECLI:EU:C:1997:631; and Case C-292/97 *Karlsson* [2000] ECLI:EU:C:2000:202, para 37. See also Case C-159/90 *Society*

law.³⁹ From a literal interpretation, rephrasing ‘implementing’ as ‘acting within the scope of’ seems to broaden the scope of the Charter.⁴⁰ The broad interpretation seems to be supported by other CJEU decisions which use the formulation ‘in all situations governed by EU law’,⁴¹ but not outside such situations.⁴² The CJEU’s case law on the scope of the Charter is extensive, therefore complicated to assess and apply in a particular situation.

The CJEU has demonstrated that the obligation to comply with substantive EU law falls within the scope of EU law, including where derogation is made from substantive EU law, and thus within the scope of the Charter.⁴³

There is further detail on the definition of ‘implementing EU law’ in decisions of the CJEU; see Case C-206/13 *Cruciano Siragusa*, paragraph 24, which stated that there is a requirement for a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other.⁴⁴ Thus, the case seems to narrow the scope of the Charter inasmuch it requires a close connection between national law and EU law and a direct impact between them.⁴⁵

The *Cruciano Siragusa* case also gave some points for guidance for determining whether national legislation is intended to implement EU law. These concern the nature of the legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law, and whether there are specific EU rules on the matter or capable of affecting it.⁴⁶

for the Protection of Unborn Children Ireland [1991] ECLI:EU:C:1991:378, para 31; and Case C-81/05 *Anacleto Cordero Alonso* [2006] ECLI:EU:C:2006:529, para 37; and *Åkerberg Fransson* (n 31) para 19. See also Thomas von Danwitz & Katherina Paraschas, ‘A Fresh Start for the Charter: Fundamental Questions on the Application of the European Charter of Fundamental Rights’ (2012) 35 *Fordham International Law Journal* 1396, pp 1399-1409; Filippo Fontanelli, ‘The Implementation of European Union Law by Member States under Article 51(1) of the Charter of Fundamental Rights’ (2014) 20 *Columbia Journal of European Law* 194, part II C; and Hancox (n 11) p 1412.

³⁹Steve Peers et al, *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing, 2014) pp 1434-1435.

⁴⁰Filippo Fontanelli, ‘The European Union’s Charter of Fundamental Right Two Years Later’ (2011) 3 *Perspectives on Federalism*, part 2, pp 26-27; Peers (n 39) p 1425, para 51.30; Mock (n 13) p 320; Fontanelli, ‘Hic Sunt Nationes: The Elusive Limits of the EU Charter and the German Constitutional Watchdog’ (n 11) p 319; Daniel Denman, ‘The EU Charter of Fundamental Rights: How Sharp are its Teeth?’ (2014) 19 *Judicial Review* 160, p 160, para 1; and Daniel Sarmiento, ‘Who’s Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe’ (2013) 50 *Common Market Law Review* 1267, pp 1274-1275.

⁴¹Case C-419/14 *WebMindLicenses* [2015] ECLI:EU:C:2015:832, para 66, where reference is made to *Åkerberg Fransson* (n 31) para 19 and the case law cited there.

⁴²Case C-650/13 *Thierry Delvigne* [2015] ECLI:EU:C:2015:648, para 26, where reference is made to *Åkerberg Fransson* (n 38) para 19, and Case C-265/13 *Torralbo Marcos* [2014] ECLI:EU:C:2015:187, para 29. See also Case C-390/12 *Pfleger* [2014] ECLI:EU:C:2014:281, para 33.

⁴³*ERT* (n 38) para 43; Case C-145/09 *Tsakouridis* [2010] ECLI:EU:C:2010:708, para 52; and *Pfleger* (n 42) para. 36. See also Peers (n 39) pp 1428-1429; Fontanelli, ‘Hic Sunt Nationes: The Elusive Limits of the EU Charter and the German Constitutional Watchdog’ (n 11) pp 317-318; Fontanelli, ‘The Implementation of European Union Law by Member States under Article 51(1) of the Charter of Fundamental Rights’ (n 38) part II A; and Hancox (n 11) pp 1419-1420.

⁴⁴See Case C-299/95 *Kremzow* [1997] ECLI:EU:C:1997:254, para 16.

⁴⁵Peers (n 39) p 1432, para 51.50; and Denman (n 40) pp 164-166.

⁴⁶Case C-206/13 *Cruciano Siragusa* [2014] ECLI:EU:C:2014:126, para 25, where reference is made to *Annibaldi* (n 38) paras 21-23; Case C-40/11 *Iida* [2012] ECLI:EU:C:2012:691, para 79; and Case C-87/12 *Ymeraga* [2013] ECLI:EU:C:2013:291, para 41.

Given the above, defining the scope of the Charter is complex but a prerequisite in cases potentially involving EU fundamental rights. The applicability of the Charter specifically to VAT law is discussed below; see part 6.

5. Methods applied in this article

5.1. The legal method and standard methods of interpretation

The legal method applied in this article in relation to the legal analysis of the impact of the Charter on VAT law is based on the relevant sources of law which are subject to the interpretation which could be expected of the CJEU.⁴⁷ The CJEU has developed its own style of interpretation and has established several methods of interpretation, as for example stated in Case 283/81 *Cilfit*⁴⁸ such as literal/textual, multilingual, autonomous, contextual and teleological⁴⁹ interpretation etc.⁵⁰ These methods of interpretation must be applied as an integral part of the legal method.

Besides these standard methods of interpretation which are generally applicable in all EU-related matters, the Charter itself contains specific interpretative principles in Articles 51 to 54 which must be taken duly into account when applying the legal method on matters covered by the Charter;⁵¹ see part 5.2. Thus, in Charter-related matters, the standard methods of interpretation by the CJEU must – in my view – be supplemented with the special interpretative principles in the Charter as the Charter becomes a relevant source of law in its own right that sets its own directions on how the provisions in the Charter must be interpreted. The specific interpretative principles listed in Articles 51 to 54 of the Charter are different from the general principles listed in Articles 1 to 50 of the Charter as the specific interpretative principles apply when interpreting Articles 1 to 50 of the Charter, and the general principles apply when interpreting EU law. This is a distinction which may not be that clear-cut in practice.

5.2. Specific interpretative principles in the Charter

The Charter lays down some specific principles of interpretation of its own which must be taken into account when interpreting its provisions; see TEU Article 6(1), third paragraph, which states that the Charter shall be interpreted in accordance with the provisions in Title VII of the Charter, ie Articles 51-54 of the Charter, governing the interpretation and application of the Charter and with due regard to the

⁴⁷CJEU is the highest authoritative interpreter of EU law according to Article 267 of the Treaty on the Functioning of the European Union (TFEU). See also Ulla Neergaard & Ruth Nielsen, *European Legal Method – Towards a New European Legal Realism?* (DJOF Publishing, 2013) p 121.

⁴⁸The methods of interpretation formulated in the *Cilfit* case have been followed since: eg Case 292/82 *Merck* [1983] ECLI:EU:C:1983:335; Case 337/82, *St Nikolaus Brennerer* [1984] ECLI:EU:C:1984:69; Case C-223/98 *Adidas* [1999] ECLI:EU:C:1999:500; Case 301/98 *KVS* [2000] ECLI:EU:C:2000:269; Case C-191/99 *Kvaerner* [2001] ECLI:EU:C:332; Case C-17/03, *Vereniging voor Energie* [2005] ECLI:EU:C:2005:362; Joined Cases C-544/03 and C-545/03 *Mobistar and Belgacom Mobile* [2005] ECLI:EU:C:2005:518; Case C-53/05 *Commission v Portuguese Republic* [2006] ECLI:EU:C:2006:448; Case C-173/06 *Agrover* [2007] ECLI:EU:C:2007:612; Case C-298/07 *deutsche internet versicherung* [2008] ECLI:EU:C:2008:572; and Case C-583/11 *P – Inuit Tapiriit Kanatami* [2013] ECLI:EU:C:2013:625.

⁴⁹Miguel Poiars Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' (2007) 2 *European Journal Legal Studies* 1.

⁵⁰Koen Lenaerts and José A Gutiérrez-Fons, 'To say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' (2014) 20 *Colombia Journal of European Law* 3; Anthony Arnall, *The European Court and its Court of Justice*, pp 607-621; and Lionel Neville Brown and Francis G Jacobs, *The Court of Justice of the European Communities*, pp 268-292.

⁵¹In the same direction: Sarmiento (n 40) p 1303.

explanations referred to in the Charter.⁵² The majority of the interpretative principles appear from the Charter Articles 52(1)-(7) regarding the scope and interpretation of rights and principles in the Charter; see below. The specific interpretative principles laid down in the Charter ensure its uniform interpretation by the Member States.⁵³

First, according to TEU Article 6(1), third paragraph, in combination with the fifth paragraph in the preamble and Article 52(7) of the Charter, the Charter shall be interpreted by the EU courts and by the Member States with due regard to the Explanations. Here it is expressly stated that the Explanations *shall* be given due regard and not *can* be given due regard, meaning that the Explanations must be taken into account, although they cannot be considered legally binding in a determinative way.⁵⁴ The introduction to the Explanations supports this view as it states that, while the Explanations do not as such have the status of law, they are a valuable interpretative tool intended to clarify the provisions of the Charter. This reflects the political consensus behind the adoption of the provisions of the Charter and the intended uniform interpretation thereof by the Member States. The CJEU's case law shows that the Explanations are a valuable source for understanding, interpreting and applying the Charter.⁵⁵ Evidently, the Explanations are a vital and integral part of any interpretation of the provisions of the Charter and must be taken into account.⁵⁶

Second, TEU Article 6(1), second paragraph, and Article 51(2) of the Charter state that the Charter does not extend the scope of EU law or establish any new powers or tasks, or modify existing EU powers and tasks as defined in the Treaties.⁵⁷ Thus the obligations of the EU institutions to promote the general principles laid down in the Charter only apply within the limits of these powers.⁵⁸ This means that the interpretation of the Charter cannot go beyond the scope of Article 51(2) of the Charter and that Article 51(2) in that way can be seen as a kind of interpretative principle which limits the scope of interpretation to the scope of the EU's existing powers as defined in the Treaties.

There have been discussions about whether Article 51(2) of the Charter adds to or detracts from the CJEU's interpretative powers,⁵⁹ or whether Article 51(2) of the Charter does not affect the CJEU's interpretative powers.⁶⁰ Here it is argued, with reference to TEU Article 6(1), second paragraph, in conjunction with Article 51(2)⁶¹ and Article 52(2) of the Charter,⁶² that the Charter cannot in itself confer additional interpretative powers on the CJEU or extend the rights, freedoms and principles of the Charter beyond the

⁵²Kokott & Sobotta (n 13) part 2, pp 2 and 4.

⁵³Ibid, part A, pp. 8-9; and Nicolaou (n 29) p 2.

⁵⁴Danwitz & Paraschas (n 38) p 1423.

⁵⁵Åkerberg Fransson (n 31) para 20; Case C-418/11 *Texdata Software* [2013] ECLI:EU:C:2013:588, para 73; *Cruciano Siragusa* (n 46) para 22; and Case C-69/14 *Dragoș Constantin Târșia* [2015] ECLI:EU:C:2015:662, Opinion of Advocate General Jääskinen, point 40.

⁵⁶Lenaerts and Gutiérrez-Fons (n 50), part IV; Peers (n 39) p 1724, para 62.29; Ingolf Pernice, *The Treaty of Lisbon and Fundamental Rights* (WHI – Paper 7/08) p 242; and Kokott & Sobotta (n 13) part 2, p 4.

⁵⁷Case C-27/11 *Anton Vinkov* [2012] ECLI:EU:C:2012:326, para 57. Peers (n 39) p 1721, para 62.21.

⁵⁸Explanations, third and fourth paragraphs of the Explanation on Article 51, where reference is made to Case C-249/96 *Frant* [1998] ECLI:EU:C:1998:63, para 45; and Fontanelli, 'Hic Sunt Nationes: The Elusive Limits of the EU Charter and the German Constitutional Watchdog' (n 11) p 317.

⁵⁹Groussot & Pech (n 29) p 5.

⁶⁰Pernice (n 56) pp 243-244.

⁶¹Explanations, third paragraph of the Explanation on Article 51.

⁶²Ibid, second paragraph of the Explanation on Article 52.

conditions and limits defined in the Treaties. This corresponds with the overall purpose of the Charter, as indicated in the fourth paragraph of its preamble, which is to make the (existing) fundamental rights more visible, not to create new rights or extend the existing rights.⁶³

Third, Article 52 of the Charter sets out specific principles of interpretation in relation to the interpretation and application of rights, freedoms and principles under the Charter. For strictly systematic reasons just to give an overview the interpretative principles are named below according to their nature, but the subjective naming of the interpretative principles does not in any way pretend to be correct or commonly accepted. The specific interpretative principles in Articles 52(1)-(7) and Articles 53-54 of the Charter are:

5.2.1. Limitation principle of interpretation

Article 52(1) of the Charter requires strict legality for any limit⁶⁴ to the exercise of rights and freedoms recognised by the Charter. Any such limit must be provided for by law and must respect the essence of the rights and freedoms. Further, any such limit is subject to the principle of proportionality and may only be imposed if it is necessary and genuinely meets objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others. The limitation principle is grounded in CJEU case law.⁶⁵

5.2.2. Maintenance principle of interpretation

Article 52(2) of the Charter states that rights recognised by the Charter, for which provision is made in the Treaties, shall be exercised under the conditions and within the limits defined in the Treaties. In effect, the rights already expressly guaranteed in the Treaty Establishing the European Treaty (EC Treaty) which have been recognised in the Charter and which are now found in the Treaties, shall remain subject to the conditions and limits applicable to the EU law on which they are based and for which provision is made in the Treaties. The Charter does not alter the system of rights conferred by the EC Treaty and carried forward by the Treaties.⁶⁶ In other words the rights guaranteed by the EC Treaty should be maintained by the Treaties as they now stand.

5.2.3. Alignment principle of interpretation

Perhaps the most important interpretative principle is in Article 52(3) of the Charter which entails the alignment⁶⁷ of the provisions of the Charter with the rights in the HR Convention and its Protocols.⁶⁸ In so far as the Charter contains rights corresponding to rights guaranteed by the HR Convention, the meaning and scope of those rights, including authorised limits,⁶⁹ shall be the same as those in the HR Convention. It

⁶³Ibid, second paragraph of the Explanation on Article 52; Fontanelli (n 40) pp 24-25; and Groussot & Pech (n 29) p 6.

⁶⁴Also referred to as the 'general limitations clause', see Mock (n 13) p 323 ff; and Lindfelt (n 14) p 137.

⁶⁵Explanations, first paragraph of the Explanation on Article 52, where reference is made to *Karlsson* (n 38) para 45. See *WebMindLicenses* (n 41) para 69; *Texdata Software* (n 55) para 84; Case C-418/11 *Texdata Software* [2013] ECLI:EU:C:2013:50, Opinion of Advocate General Mengozzi, point 92; Case C-201/14 *Smaranda Bara* [2015] ECLI:EU:C:2015:461, Opinion of Advocate General Cruz Villalón, point 81; and Case C-543/14 *Ordre des barreaux francophones et germanophone* [2016] ECLI:EU:C:2016:157, Opinion of Advocate General Sharpston, point 80.

⁶⁶Explanations, second paragraph of the Explanation on Article 52.

⁶⁷Also referred to as the 'homogeneity principle' by Advocate General Kokott in her Opinion in Case C-105/14 *Taricco* [2015] ECLI:EU:C:2015:293, Opinion of Advocate General Kokott, point 113.

⁶⁸Explanations, fourth paragraph of the Explanation on Article 52; and Peers (n 39) p 1490, para 52.100.

⁶⁹Explanations, third paragraph of the Explanation on Article 52.

is emphasised that the meaning and scope *shall* be the same of such corresponding rights in the Charter and the HR Convention and not just *can* be the same.

The aim of the alignment principle of interpretation is to ensure that, when limiting rights contained in the Charter and in the HR Convention, the legislator must apply the same standards and limits as apply under the HR Convention, without thereby adversely affecting the autonomy of EU law and the CJEU.⁷⁰ Since the HR Convention is not formally incorporated into EU law the CJEU can solely examine the validity of EU provisions in respect of the Charter,⁷¹ but this is different from interpreting the Charter in light of the HR Convention according to Article 52(3) of the Charter. The seventh paragraph (1) of the Explanation on Article 52 contains a list of rights in the Charter which correspond with rights in the HR Convention, where both the meaning and the scope are the same. The eighth paragraph (2) of the Explanation on Article 52 contains a list of rights in the Charter which correspond with rights in the HR Convention where the meaning is the same but where the scope of the Charter is wider.

Consequently, the interpretation of rights in the Charter which correspond with rights in the HR Convention must be aligned with interpretations of those rights by the ECHR. ECHR case law will thus be highly persuasive for the decisions of the CJEU as the ECHR determines the minimum standards of protection of those rights.⁷² In these situations, ECHR case law must be considered as an equally relevant source of interpretation, on a par with CJEU case law.⁷³ Under the alignment principle of interpretation, the ECHR's interpretations of the HR Convention are closely followed by the CJEU,⁷⁴ as the point of departure must be taken in the ECHR, although the CJEU can interpret independently,⁷⁵ which is due to the minimum principle of interpretation; see part 5.2.4.

The standard methods of interpretation applied by the CJEU, as formulated in the *Cilfit* case for example, see part 5.1, must be considered as being considerably extended by the alignment principle of interpretation since the CJEU's style of interpretation must in some way be adapted to the style of interpretation of the ECHR⁷⁶ in situations with corresponding rights comprised both by the Charter and the HR Convention.

5.2.4. Minimum principle of interpretation

⁷⁰*Ibid.*

⁷¹*Åkerberg Fransson* (n 31) para. 44; *Otis* (n 31) para 47; *P – Inuit Tapiriit Kanatami* (n 31) para 46; *PPU* (n 31) para 46; and *Ordre des barreaux francophones et Germanophone* (n 31) para 23.

⁷²Kirsten Shoraka, *Human Rights and Minority Rights in the European Union* (Routledge Chapman Hall, 2010) p 49; and Lindfelt (n 14) pp 147 and 154. On pp 148-149 *Mats Lindfelt* questions the coherent interpretation of the rights embodied in both the Charter and the HR Convention.

⁷³In the same direction: Peers (n 39) p 1498, para 52.128; O'Neill QC (n 30) p 203, para 4; Fontanelli (n 40) p 28; and Grousot & Pech (n 29) p 3.

⁷⁴Eg Case C-105/14 *Taricco* [2015] ECLI:EU:C:2015:555, para 57; *WebMindLicenses* (n 41) paras 70, 77, 78 and 81; and *Stefano Melloni* (n 30) para 50. See also Explanations, second paragraph of the Explanation on Article 19; and *ibid* fifth paragraph of the Explanation on Article 47.

⁷⁵Poelmann (n 12) p 174, para 2.1; and in the same direction: Hancox (n 11) p 1430.

⁷⁶See more about the style of interpretation of the ECHR: Jean-Paul Costa, 'On the Legitimacy of the European Court of Human Rights' Judgments' (2011) 7 *European Constitutional Law Review* 173; Shai Dothan, 'In defence of Expansive Interpretation in the European Court of Human Rights. (Interpretation in International Law)' (2014) 3 *Cambridge Journal of International and Comparative Law* 508; Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights* (OUP, 6th ed, 2014) pp 64-81; and Senden (n 13).

In Article 52(3), third sentence, of the Charter there is a reference to a minimum principle of interpretation, as the alignment principle of interpretation does not prevent EU law from providing more extensive protection than the HR Convention. This means that the level of protection afforded by the Charter may never be lower than that guaranteed by the HR Convention.⁷⁷

5.2.5. Common constitutional traditions principle of interpretation

Article 52(4) of the Charter (see TEU Article 6(3)) lays down a common constitutional traditions principle of interpretation whereby the constitutional traditions common to the Member States is binding on the interpretation of the Charter.⁷⁸ In so far as the Charter recognises fundamental rights resulting from the constitutional traditions common to the Member States, these rights must be interpreted in harmony with those traditions. The purpose of this interpretative principle is to harmonise the Charter with the constitutional traditions on which the underlying fundamental rights are based. Thus the rights in the Charter should be interpreted so as to give a high standard of protection which is adequate for EU law and is in harmony with the common constitutional traditions rather than applying a standard of the lowest common denominator.⁷⁹

For several reasons, such as evidential reasons and legal certainty, it must be assumed that fundamental rights derived from common constitutional traditions can be established with a high degree of certainty without varying significantly from one Member State to another.⁸⁰ Where this is the case the interpretative principle opens up for other international sources of interpretation which may be relevant to the interpretation of the Charter provisions.

5.2.6. Implementation principle of interpretation

The distinction between the rights and the principles of the Charter (see Article 51(1), second sentence, of the Charter), is relevant to its Article 52(5).⁸¹ The reader is referred to other literature on this point⁸² as a discussion of the distinction between the rights and the principles of the Charter is outside the scope of this article; see part 2.3.

However, it can be noted that Article 52(5) states that principles which may be implemented by legislative and executive acts taken by EU institutions, bodies, offices and agencies, and by acts of the Member States when they are implementing EU law, in the exercise of their respective powers, shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality. In other words, the

⁷⁷Explanations, fourth paragraph of the Explanation on Article 52.

⁷⁸For more on the constitutional traditions common to the Member States, see: Peers (n 39) pp 1503-1505; and Kokott & Sobotta (n 13) part 2, pp 2-3.

⁷⁹Explanations, ninth paragraph of the Explanation on Article 52, where reference is made to Case 44/79 *Hauer* [1979] ECLI:EU:C:1979:290 and Case 155/79 *AM&S* [1981] ECLI:EU:C:1982:157.

⁸⁰In the same direction: Fabbrini (n 30) p 256-257, where he warns against overestimating the concept of 'common constitutional traditions' due to the existence of significant variations in the human rights standards of the EU Member States.

⁸¹Explanations, tenth paragraph of the Explanation on Article 52.

⁸²Peers (n 39) pp 1505-1511; Prawa (n 15) pp 64-79; Denman (n 40) pp 166-170; and Danwitz & Paraschas (n 38) pp 1410-1414.

Charter's general principles only become significant for the Courts when they interpret or review legislative or executive acts.⁸³

5.2.7. National law *principle of interpretation*

Article 52(6) of the Charter merely states that full account shall be taken of national laws and practices as specified in the Charter which expresses the principle of subsidiarity.⁸⁴

5.2.8. Explanations *principle of interpretation*

See part 5.2 on the value of the Explanations as a source of interpretation; see Article 52(7) of the Charter.

5.2.9. Level of protection *principle of interpretation*

The level of protection principle of interpretation is derived from Article 53 of the Charter,⁸⁵ according to which nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their fields of application, by EU law and international law and by international agreements to which the EU or all the Member States are party, including the HR Convention, and by the Member States' constitutions.⁸⁶ Article 53 aims to maintain the level of protection currently (at the time of adoption of the Charter) afforded by EU law, national law and international law.⁸⁷

The level of protection principle of interpretation may be comparable to the maintenance principle of interpretation (see part 5.2.2), as both interpretative principles aim to maintain the level of protection of fundamental rights which existed at the time the Charter was drawn up.

5.2.10. Anti-abuse *principle of interpretation*

Finally, an anti-abuse principle of interpretation is included in Article 54 of the Charter which states that nothing in the Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognised in the Charter or at their limitation to a greater extent than is provided for in the Charter.⁸⁸ The rationale for this is to prohibit any interpretation aimed at destroying rights or imposing wider limits on them than envisaged in the Charter.⁸⁹ This interpretative principle may also be relevant to the limitation principle of interpretation which sets the conditions for any limit to the exercise of fundamental rights contained in the Charter; see part 5.2.1.

5.2.11. Effectiveness *principle of interpretation*

Where there is some discretion in interpreting the provisions of the Charter, as may be the case if an interpretation may be compatible or incompatible with the Charter, some authors argue that preference

⁸³Explanations, 10th paragraph of the Explanation on Article 52, which further explains that such implemented principles do not give rise to direct claims for positive action by the EU institutions or Member States' authorities. See also Dutheil de la Rochère (n 15) p 158.

⁸⁴Ibid, para. 11.

⁸⁵Fabbrini (n 30) p 39.

⁸⁶Stefano Melloni (n 30) paras 55-64.

⁸⁷Explanations, Explanation on Article 53; and Mock (n 13) p 336.

⁸⁸Article 54 of the Charter corresponds to Article 17 of the HR Convention; see Explanations, Explanation on Article 54.

⁸⁹Mock (n 13) p 345.

must be given to the interpretation that ensures a provision's effectiveness and validity.⁹⁰ This argument corresponds well with the principle of sincere cooperation in TEU Article 4, and the obligation to ensure effective fulfilment of obligations under EU primary and secondary law. This also supported by following the ECHR's interpretative style as, pursuant to the alignment principle of interpretation, the CJEU must align its interpretations of fundamental rights with the ECHR's interpretations of corresponding human rights; see part 5.2.3.

While this argument may attract support, it is for the CJEU to decide, since a thorough investigation of the possible existence of an effectiveness principle of interpretation lies outside the scope of this article; see part 2.3.

Based on the above examination of the legal implications of the Charter including in respect of the legal method and interpretation of the relevant legal sources of law, the following practical part examines the concrete relevance and implications of the Charter for the CJEU's VAT decisions by analysing selected examples from CJEU's VAT case law.

6. Application of the Charter by the CJEU and the Advocates General to VAT cases

The CJEU's case law on the combined area of the Charter and VAT law is relatively recent, stemming from the entry into force of the Charter on 1 December 2009. It is possible to see a tendency for the Charter to become increasingly relevant in the CJEU's decisions in cases on tax and VAT-related matters, especially with the emphasis of the Advocates General on the importance of the Charter in such cases. The following analysis of VAT cases will shed some light on the current and potential impacts of the Charter on VAT law in EU practice.

The job of the Advocates General is to give reasoned opinions to the CJEU on the cases before it.⁹¹ These opinions are not binding on the CJEU, and their value as a source of law may vary depending on the CJEU's premises and judgment in the actual case, and on the difference between an Advocate General's opinion *de lege lata* and an opinion on judicial policy.⁹² Referring to the legal method; see part 5.1, the opinions of Advocates General that are confirmed by the CJEU will have greater legal weight than those that are rejected by it.

The order of the VAT cases listed below is thematic, based on the inner coherence between the selected VAT cases and their relation to formal or substantive VAT law.

6.1. Tax penalties, criminal proceedings and combating VAT evasion

A leading VAT case, and one of the first in which the CJEU established the significant impact of the Charter on VAT law, is Case C-617/10 *Åkerberg Fransson*.⁹³

⁹⁰Kokott & Sobotta (n 13) part 4, p 7.

⁹¹TFEU Article 252, second paragraph.

⁹²Maduro (n 49) p 13, where it is noted that the argumentative mode of the Advocates General is a more personal and teleological one.

⁹³Peers (n 39) p 1433; and Hancox (n 11) p 1411.

Briefly, the facts were that Åkerberg Fransson was charged of serious tax offences in relation to giving false information in tax returns resulting in a loss of income tax and VAT revenue and failure to declare employers' contributions.⁹⁴ The question of EU fundamental rights arose as to whether the Charter should be interpreted as precluding criminal proceedings for tax evasion being brought against a defendant where a tax penalty has already been imposed upon him for the same acts,⁹⁵ ie whether this was in conflict with the *ne bis in idem* principle in Article 50 of the Charter and Article 4 of Protocol No 7 to the HR Convention. According to Article 50 of the Charter:

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.

According to the second paragraph of the Explanation on Article 50, the *ne bis in idem* principle refers to the prohibition of the cumulation of two penalties of the same kind, ie criminal law penalties.

The *Åkerberg Fransson* case established that tax penalties and criminal proceedings are connected, in part, to breaches of the rules on VAT declarations,⁹⁶ thereby including national rules on tax penalties and criminal proceedings within the area of VAT law and within the scope of EU law; see Article 51(1) of the Charter. The CJEU's arguments were:

- (1) Article 2, Article 250(1) and Article 273 of the VAT Directive, in combination with TEU Article 4(3), impose an obligation on every Member State to take all legislative and administrative measures appropriate for ensuring the collection of all the VAT due on its territory and for preventing evasion.⁹⁷
- (2) TFEU Article 325 obliges the Member States to counter illegal activities affecting the financial interests of the EU through deterrent measures and to take the same measures to counter fraud affecting the financial interests of the EU as they take to counter fraud affecting their own interests.⁹⁸ Given that the EU's own resources include revenue from application of a uniform rate to the harmonised VAT assessment bases determined according to EU rules,⁹⁹ there is thus a direct link between the collection of VAT revenue in compliance with the applicable EU law and the availability to the EU budget of the corresponding VAT resources, since any lacuna in the collection of the first potentially causes a reduction in the second.¹⁰⁰

⁹⁴*Åkerberg Fransson* (n 31) para 12.

⁹⁵*Ibid*, para 32.

⁹⁶*Ibid*, para 24.

⁹⁷*Ibid*, para 25, where reference is made to Case C-132/06 *Commission v Italy* [2008] ECLI:EU:C:2008:412, paras 37 and 46.

⁹⁸However, the obligation to ensure effective collection of the EU's own resources cannot be stretched too far. See Case C-500/10 *Belvedere* [2012] ECLI:EU:C:2012:186, para 23; and Case C-500/10 *Belvedere* [2011] ECLI:EU:C:2011:754, Opinion of Advocate General Sharpston, point 48.

⁹⁹Council Decision (EC) 2007/436, Euratom of 7 June 2007 on the system of the European Communities' own resources [2007] OJ L 163, p 17).

¹⁰⁰*Åkerberg Fransson* (n 31) para 26, where among others reference is made to Case C-539/09 *Commission v Germany* [2011] ECLI:EU:C:2011:733, para 72.

Thus, tax penalties and criminal proceedings related to combating tax evasion, as in the *Åkerberg Fransson* case,¹⁰¹ constitute implementation of EU law within the scope of Article 51(1) of the Charter;¹⁰² see part 4.2.

The CJEU also seems to extend the scope of the Charter situations where national legislation on which tax penalties and criminal proceedings are based has not been adopted for the purpose of transposing the VAT Directive. In the eyes of the CJEU, this does not alter the fact that the national legislation is designed to penalise infringements of the VAT Directive, and is therefore intended to implement a Member State's obligation to impose effective penalties for conduct prejudicial to the financial interests of the EU.¹⁰³

Thus, Article 51(1) of the Charter not only applies when actually implementing EU law, but also when there is an intention to impose penalties for conduct which could harm the financial interests of the EU. On the face of it, this interpretation seems to broaden the scope of the Charter,¹⁰⁴ at least in cases on national rules on administrative tax penalties.¹⁰⁵ More generally it could be seen as broadening the applicability of the Charter to situations where there is merely an intention¹⁰⁶ – without actually implementing EU VAT regulations – to implement national VAT rules to prevent conduct which could harm the financial interests of the EU.¹⁰⁷ This could be a more indirect approach to interpreting the scope of the Charter in VAT cases,¹⁰⁸ but it would seem to extend the actual wording of Article 51(1) of the Charter beyond a strict literal interpretation.

It is notable that the CJEU disregarded the opinion of Advocate General Cruz Villalón who advocated the opposite result, ie that the Member State in question could not be considered to have implemented EU law within the meaning of Article 51(1) of the Charter.¹⁰⁹ Thus, the Advocate General's opinion must be regarded as having less relevance for understanding the CJEU's judgment.

The CJEU ruled that it was a precondition for application of the *ne bis in idem* principle that the measures taken against *Åkerberg Fransson*, which had already been adopted by a final decision, could be considered

¹⁰¹The arguments of the CJEU were the same in *Taricco* (n 74), paras 36-39. The inclusion of Article 2 and Article 250(1) as part of the argumentation is criticised by Fontanelli, 'Hic Sunt Nationes: The Elusive Limits of the EU Charter and the German Constitutional Watchdog' (n 11) p 325; and Fontanelli, 'The Implementation of European Union Law by Member States under Article 51(1) of the Charter of Fundamental Rights' (n 38) 20 *Columbia Journal of European Law* 193, part III B 3.

¹⁰²*Åkerberg Fransson* (n 31) para 27; *Texdata Software* (n 55) para 72; and the Opinion of Advocate General Kokott in Case C-105/14 *Taricco* (n 67) point 36.

¹⁰³*Åkerberg Fransson* (n 31) para 28.

¹⁰⁴Szwarc (n 11) 238; Fabbrini (n 30) p 40; and Poelmann (n 12) p 174, para 2, where reference is made to *Åkerberg Fransson* (n 31); and Case C-457/09 *Claude Chartry*, para 25.

¹⁰⁵Szwarc (n 11) p 245.

¹⁰⁶It has been suggested that it is the function of the national rules that matters and not the intention of the national rules: Sarmiento (n 40) p 1279.

¹⁰⁷Fontanelli, 'Hic Sunt Nationes: The Elusive Limits of the EU Charter and the German Constitutional Watchdog' (n 11) p 315.

¹⁰⁸In the same direction: Fontanelli, 'Hic Sunt Nationes: The Elusive Limits of the EU Charter and the German Constitutional Watchdog' (n 11) p 327; and Hancox (n 11) pp 1419 and 1421.

¹⁰⁹Case C-617/10 *Åkerberg Fransson* [2012] ECLI:EU:C:2012:340, Opinion of Advocate General Cruz Villalón, point 5, and his discussion of this in points 25-65. See Peers (n 39) p 1436, para 51.63; Fontanelli, 'Hic Sunt Nationes: The Elusive Limits of the EU Charter and the German Constitutional Watchdog' (n 11) p 315; Szwarc (n 11) p 233; and Hancox (n 11) p 1414.

criminal sanctions.¹¹⁰ According to Article 50 of the Charter, Member States may combine tax penalties and criminal penalties for the same acts of non-compliance with rules on VAT declarations.¹¹¹ The three criteria for an administrative tax penalty to be considered a criminal sanction, ie the legal classification under national law, the nature of the offence and the nature and degree of severity of the penalty,¹¹² was up to the national court to decide.¹¹³

As for administrative sanctions and criminal proceedings in relation to protecting VAT revenue, combating VAT evasion and protecting EU fundamental rights, in this case the *ne bis in idem* principle, the Charter will most likely apply.¹¹⁴ In that case it is important for national legislators and tax administrations to consider carefully the risks of infringing Article 50 of the Charter or other provisions in the Charter when preparing legislation on administrative tax penalties, criminal proceedings and other measures against VAT evasion, administering VAT practice and so on.

The CJEU has also declared that EU law precludes any judicial practice which obliges a national court to disapply any provision that is contrary to a fundamental right guaranteed by the Charter on the ground that an infringement is clear from the text of the Charter or from the case law relating to it. Such a rule on clarity would deprive the national court of the power to assess fully, possibly in cooperation with the CJEU, whether the provision in question is compatible with the Charter.¹¹⁵ Hence, national courts must give full effect to EU fundamental rights and, if necessary, refuse of their own motion to apply any conflicting provision in national law.¹¹⁶

Based on the above, as part of EU primary law; see part 4.1, the Charter must be complied with in any area of national law which is within its scope. This will probably occur frequently in the area of VAT law, given the high degree of EU harmonisation of VAT law by directives, regulations etc. National VAT rules will usually be directly – or indirectly – connected with the collection of VAT revenue in compliance with the applicable EU law and the availability to the EU budget of the corresponding VAT resources, consequently bringing national VAT rules within the scope of the Charter in most cases.¹¹⁷

6.2. Combating VAT fraud and abuse

In VAT ‘carousel fraud’ cases the accused has claimed the benefit of Article 49 of the Charter, on the principles of legality and proportionality of criminal offences and penalties, but the CJEU has denied that the Charter was applicable to the actual situation. Naturally, Article 49 of the Charter may be applicable in other situations that differ from the decided cases. Article 49 of the Charter involves several rules, ie no one shall be held guilty of any criminal offence which did not constitute a criminal offence at the time when

¹¹⁰Åkerberg Fransson (n 31) paras 33 and 34.

¹¹¹Ibid, para 34.

¹¹²Ibid, para 35, where reference is made to Case C-489/10 *Bonda* [2012] ECLI:EU:C:2012:319, para 37. See the Opinion of Advocate General Cruz Villalón in Case C-617/10 *Åkerberg Fransson* (n 109) point 76.

¹¹³Åkerberg Fransson (n 31) paras 35-37.

¹¹⁴WebMindLicenses (n 41) para 66; and in the same direction: Poelmann (n 12) p 178, para 3.5.3.

¹¹⁵Åkerberg Fransson (n 31) para 48.

¹¹⁶Ibid, para 45; and the Opinion of Advocate General Cruz Villalón in Case C-617/10 *Åkerberg Fransson* (n 109) point 112.

¹¹⁷Fontanelli (n 38), part III B 1, fourth paragraph.

it was committed, no heavier penalty shall be imposed than applicable at the time the criminal offence was committed, the severity of penalties must not be disproportionate to the criminal offence etc.

The first case is the Joined Cases C-131/13, C-163/13 and C-164/13 *Italmoda*, where the question was whether national authorities and courts must refuse the right to deduct input VAT, the right to a VAT exemption and the right to a VAT refund for a taxable person who knew, or should have known, that in the context of intra-Community supplies they were participating in a transaction involving VAT evasion if the national law does not contain provisions providing for such a refusal.¹¹⁸ The CJEU answered the question in the affirmative.¹¹⁹

In relation to Article 49 of the Charter, the CJEU stated that the refusal of a right stemming from the VAT system when a taxable person is involved in fraud is merely the consequence of a failure to satisfy the conditions of the relevant provisions of the VAT Directive, and that the refusal is not a penalty or a sanction within the meaning of Article 49 of the Charter.¹²⁰ Thus, the Charter was not applicable to the case.¹²¹ The case may be interpreted as meaning that a refusal of a VAT deduction, VAT exemption and other benefits derived from breaching conditions of the VAT system is not a criminal proceeding even in relation to VAT fraud, therefore such cases are outside the scope of the Charter and in this case outside Article 49 of the Charter.

Case C-105/14 *Taricco* concerned persons accused of having formed an organised conspiracy to commit various VAT offences.¹²² The question was whether these circumstances could be compared to introducing a VAT exemption not laid down in the VAT Directive. At the material time in the main proceedings, a national rule on limitation periods for criminal offences provided that the interruption of criminal proceedings in relation to VAT offences had the effect of extending the limitation period by only a quarter of its initial duration, so the accused persons were liable to enjoy *de facto* impunity.¹²³

The CJEU rephrased the question so as to ask whether the national rule amounted to an impediment to the effective fight against VAT evasion in the Member State concerned in a manner that was incompatible with the VAT Directive and with EU law more generally.¹²⁴ Thus, the CJEU responded to the rephrased question and did not address whether the national rule could be considered a VAT exemption.

If a national court should disapply a national rule because it does not fulfil an obligation pursuant to TFEU Article 325,¹²⁵ the national court must ensure that the fundamental rights of the persons concerned are respected as in that case penalties may be imposed on them which, in all likelihood, would not have been

¹¹⁸Joined Cases C-131/13, C-163/13 and C-164/13 *Italmoda* [2014] ECLI:EU:C:2014:2455, para 41.

¹¹⁹*Ibid*, para 62.

¹²⁰*Ibid*, para 61; and Joined Cases C-131/13, C-163/13 and C-164/13, *Italmoda* [2014] ECLI:EU:C:2014:2217, Opinion of Advocate General Szpunar, point 60. The CJEU referred to Case C-110/99 *Emsland-Stärke* [2000] ECLI:EU:C:2000:695, para 56; Case C-255/02 *Halifax* [2006] ECLI:EU:C:2006:121, para 93; and Case C-262/10 *Döhler Neuenkirchen* [2012] ECLI:EU:C:2012:559, para 43.

¹²¹*Italmoda* (n 118) para 62.

¹²²*Taricco* (n 74) para 18.

¹²³*Ibid*, para 34.

¹²⁴*Ibid*, para 35.

¹²⁵*Ibid*, para 58.

imposed if the national provisions had been applied.¹²⁶ As opposed to Joined Cases C-131/13, C-163/13 and C-164/13 *Italmoda* mentioned above, which did not concern criminal proceedings, the CJEU found that the *Taricco* case could involve criminal sanctions; see Article 49(1) of the Charter.¹²⁷ The provision states that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Consequently, an assessment of Article 49(1) of the Charter became relevant.

The CJEU referred to Article 7 of the HR Convention, ECHR case law and Article 49 of the Charter, and stated that the extension of the limitation period and its immediate application do not entail an infringement of the rights guaranteed by Article 7 of the HR Convention since that provision cannot be interpreted as prohibiting an extension of limitation periods where the offences have never been subject to limitation.¹²⁸ Thus the national rule was not in conflict with Article 49 of the Charter¹²⁹ and did not give rise to any fundamental rights issues. Nevertheless the case exemplifies the relevance of the Charter to the application of legal measures aimed at combating VAT fraud and abuse and the use of the alignment principle of interpretation by the CJEU; see part 5.2.3.

Similarly, Case C-662/13 *Surgicare* concerned the compatibility with the VAT Directive of a special national procedure where the existence of abusive practices was suspected in both direct and indirect taxation.¹³⁰ The CJEU found that the special national procedure was favourable to the person suspected of having committed an abuse, inasmuch as the procedure sought to guarantee certain fundamental rights, and in particular the right to be heard.¹³¹

Thereafter, the CJEU clearly stated that, even though national law must ensure the effective combating of fraud and abuse etc., it is still required to ensure judicial protection of the rights of individuals under EU law, as guaranteed by Article 47 of the Charter.¹³² Obviously, legal measures against VAT fraud and abuse must be in accordance with Article 47 of the Charter and its other provisions. Hence, legislative bodies and tax administrations must take the Charter duly into account when implementing or administering such legal measures against VAT fraud and abuse.

6.3. Use of evidence obtained from a parallel criminal procedure without the taxable person's knowledge

Case C-419/14 *WebMindLicenses* involved Articles 7, 8, 41, 47, 48, 51(1), 52(1) and 52(3) of the Charter in relation to the use, by tax authorities, of evidence obtained by interception of telecommunications and

¹²⁶Ibid, para 53; and the Opinion of Advocate General Kokott in Case C-105/14 *Taricco* (n 67) point 113.

¹²⁷*Taricco* (n 74) para 54.

¹²⁸Ibid, para 57.

¹²⁹Ibid, para 55. See the Opinion of Advocate General Kokott in Case C-105/14 *Taricco* (n 67) point 127, where she emphasises that the only requirement is that the solution adopted should be applied in a fair trial (see Article 47 of the Charter and Article 6(1) of the HR Convention) in a non-discriminatory manner and on the basis of clear, comprehensible and generally applicable criteria.

¹³⁰Case C-662/13 *Surgicare* [2015] ECLI:EU:C:2015:89, para 24.

¹³¹Ibid, para 29.

¹³²Ibid, para 33, where reference is made to Case C-472/11 *Banif Plus Bank* [2013] ECLI:EU:C:2013:88, para 29, and the cases cited there. See *Belvedere* (n 98) para 23.

seizure of e-mails without the taxable person's knowledge in the context of ongoing parallel criminal proceedings. The company had not been given access to the evidence.¹³³

The question was whether the tax authorities' measures complied with Article 7 of the Charter (respect for private life), Article 8 (protection of personal data),¹³⁴ Article 41 (right to good administration) and Article 48 (right of defence), combined with Article 47 (right to an effective remedy and to a fair trial).¹³⁵ However, Articles 41 and 48 of the Charter were not relevant since Article 41 is not addressed to the Member States and Article 48 only applies to persons who have been charged.¹³⁶

The CJEU started by saying that the EU's fundamental rights are applicable in all situations governed by EU law.¹³⁷ This seems to confirm the broad scope of the Charter, including its applicability to VAT law; see parts 4.2 and 6.1. The CJEU then stated that a VAT adjustment after an abusive practice has been found constitutes implementation of Articles 2, 250(1) and 273 of the VAT Directive and TFEU Article 325, and therefore of EU law for the purposes of Article 51(1) of the Charter.¹³⁸ As in the *Åkerberg Fransson* case, this case also confirms that the Charter has a wide field of application within the EU harmonised area of VAT law.

As the case was covered by the Charter, the use of evidence must comply with the EU's fundamental rights, especially the Charter.¹³⁹ According to Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and must respect the essence of those rights and freedoms;¹⁴⁰ see part 5.2.1 bringing the limitation principle of interpretation into play. It was for the national court to decide whether the conditions in Article 52(1) of the Charter had been fulfilled.¹⁴¹

It was also for the national court to decide whether, in the context of the administrative proceedings, the company had had the opportunity to have access to the evidence and to be heard concerning it, in accordance with the general principle of the right of defence.¹⁴² If this were not the case or if the evidence had been obtained and used in an administrative procedure in breach of Article 7 of the Charter, the national court had to disregard that evidence and annul a decision which, as a result, had no basis.¹⁴³

¹³³*WebMindLicenses* (n 41) paras 23 and 61.

¹³⁴Articles 7 and 8 of the Charter are closely related. See in Case C-419/14 *WebMindLicenses* [2015] ECLI:EU:C:2015:606, Opinion of Advocate General Wathelet, points 108-109; and in the same direction Case C-73/07 *Satakunnan* [2008] ECLI:EU:C:2008:266, Opinion of Advocate General Kokott, point 40.

¹³⁵*WebMindLicenses* (n 41) para 28, Nos 13-15.

¹³⁶*Ibid*, para 83.

¹³⁷*Ibid*, para 66, where reference is made to *Åkerberg Fransson* (n 31) para. 19 and the cases cited there; and the Opinion of Advocate General Wathelet in Case C-419/14 *WebMindLicenses* (n 134) point 104. See also *Texdata Software* (n 55) para 72.

¹³⁸*WebMindLicenses* (n 41) para 67.

¹³⁹*Ibid*, paras 68 and 90.

¹⁴⁰*Ibid*, para 69. See *Texdata Software* (n 55) para 84; the Opinion of Advocate General Mengozzi in Case C-418/11 *Texdata Software* (n 65) point 92; and the Opinion of Advocate General Cruz Villalón in Case C-201/14 *Smaranda Bara* (n 65) point 81. See also the Explanations, Explanation on Article 52.

¹⁴¹*WebMindLicenses* (n 41) para 91.

¹⁴²Perhaps Joined Cases C-29/13 and C-30/13 *Global Trans Lodzhistik* [2014] ECLI:EU:C:2014:140 para 57; and Case C-276/12 *Jiří Sabou* [2013] ECLI:EU:C:2013:678 paras 28 and 38.

¹⁴³*WebMindLicenses* (n 41) para 91.

The case demonstrates that the Charter provides extensive protection in both formal and substantive matters, and can be decisive for the result of a case. Based on the Charter, the CJEU has laid down conditions for the collection and use of evidence under national administrative rules. It must be assumed that these are generally applicable to other administrative procedures governed by procedural tax rules and must be taken into account in such situations. In that case the Charter could significantly affect those national administrative rules governed by Article 7 of the Charter.

6.4. Reduced VAT rate on the services of lawyers under a legal aid scheme

An early CJEU VAT case which explicitly referred to the Charter was Case C-492/08 *Commission v France*, on VAT treatment under a legal aid scheme where the services of lawyers were subject to a reduced VAT rate.

The facts of the case were that France applied a reduced VAT rate to the services of lawyers that were paid for wholly or partly by the State under a legal aid scheme.¹⁴⁴ In the French view these lawyers should be considered as providing services related to social wellbeing,¹⁴⁵ and in that context the services were entitled to a reduced VAT rate. France's argument for such VAT treatment was that the lawyers were engaged in welfare or social work, since legal aid helps ensure that the most disadvantaged people have access to justice; see Article 47, third paragraph, of the Charter which states:¹⁴⁶

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

It appears from the third paragraph of the Explanation on Article 47 that, in line with ECHR case law, provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy.¹⁴⁷ Thus, the right of access to justice is directly protected by the Charter. But does the Charter also protect, more indirectly, against the imposition of VAT on services provided by lawyers under a legal aid scheme? Or in other words, would the application of the normal VAT rate constitute an obstacle to the right of access to justice?¹⁴⁸

In fact no direct answer was given to this by the CJEU which could mean that the CJEU did not find the question to be relevant nor problematic and the answer could in principle be interpreted as an implicit no. The CJEU decided the case solely on the basis of whether the services of the lawyers under the legal aid scheme could be considered as services related to social wellbeing and could be classified as 'engagement in welfare or social security work'. The CJEU rejected this.¹⁴⁹ Apparently, the CJEU found that the substantive matter of the case only related to VAT law¹⁵⁰ and did not concern, indirectly, an infringement of the Charter.

¹⁴⁴Case C-492/08 *Commission v France* [2010] ECLI:EU:C:2010:348, para 1; Case C-492/08 *Commission v France* [2010] ECLI:EU:C:2010:72, Opinion of Advocate General Jääskinen, point 1.

¹⁴⁵*Commission v France* (n 144) para 23.

¹⁴⁶*Ibid*, para 26.

¹⁴⁷In the Explanations, seventh paragraph of the Explanation on Article 47, reference is made to ECHR judgment of 9 October 1979, *Airey*, Series A, Volume 32, p 11.

¹⁴⁸Opinion of Advocate General Jääskinen in Case C-492/08 *Commission v France* (n 144) point 34.

¹⁴⁹*Commission v France* (n 144) para 47. See also *Ordre des barreaux francophones et Germanophone* (n 31) para 68.

¹⁵⁰Opinion of Advocate General Sharpston in Case C-543/14 *Ordre des barreaux francophones et Germanophone* (n 65) point 38.

Thus, this CJEU ruling is not so relevant for the research focus of this article, in contrast to the interesting views of Advocate General Jääskinen in his Opinion in Case C-492/08 *Commission v France*, where he suggested that the case be decided on a different basis.¹⁵¹ To start with he explained how the provisions concerned had been applied. Then he argued that legal aid is a fundamental right and that the legal aid scheme in France fulfilled this right. He then discussed the financial aspects of the case and the methods of interpretation relevant to it, before analysing the provisions concerned.

The Advocate General argued that the fundamental right in Article 47 of the Charter was fundamental to the case¹⁵² and that the objective of promoting access to justice for persons with insufficient resources is in accordance with the fundamental values of the system of judicial protection prevailing within the EU.¹⁵³ Thus he sought to establish the normative legal values as a basis for his opinion before dealing with the substantive provisions of the VAT Directive.

The Advocate General started to address the substance of the case by outlining the economic aspects of VAT, including that the economic burden of the legal aid scheme was borne by the State in full or in part.¹⁵⁴ He argued that in case of full legal aid the reduced VAT rate had no perceptible impact on the recipient of the legal aid as the reduced VAT rate only affected the State's budget.¹⁵⁵ In contrast, the recipient of partial legal aid had to pay a negotiated supplementary fee to the lawyer, so the reduced VAT rate might not necessarily benefit the recipient.¹⁵⁶

Where there was partial legal aid the recipient bore a VAT cost. This raised the question, not addressed by the CJEU, as to whether the application of the normal VAT rate limited the right to access to justice.¹⁵⁷ While the CJEU did not positively address the question, the Advocate General answered it in the negative, based on the argument that it is the level of aid afforded to recipients and not the rate of VAT applied that determines the accessibility of the services of lawyers.¹⁵⁸

Thus it is not the VAT rate itself that may limit access to justice, thus potentially infringing the Charter, but rather the level of aid given. A possible interpretation of the Advocate General's opinion could be that a reduced VAT rate only has an indirect link to the Charter – Article 47 in this actual case – as a reduced VAT rate would not directly affect the level of aid given. If this interpretation were generally applicable there would be a question as to whether reduced VAT rates may be outside the scope of the Charter. However, the validity of this interpretation must be confirmed by a decision of the CJEU, although this interpretation may be too hypothetical.

6.5. VAT exemption for the services of lawyers

In continuation of the foregoing case on reduced VAT rates on lawyers' services under a legal aid scheme, Case C-543/14 *Ordre des barreaux francophones et germanophone* concerns a Belgian VAT exemption for

¹⁵¹Opinion of Advocate General Jääskinen in Case C-492/08 *Commission v France* (n 144) point 17.

¹⁵²*Ibid*, points 18-24.

¹⁵³*Ibid*, point 24.

¹⁵⁴*Ibid*, point 30.

¹⁵⁵*Ibid*, point 31.

¹⁵⁶*Ibid*, point 32.

¹⁵⁷*Ibid*, point 34.

¹⁵⁸*Ibid*, point 35.

the services of lawyers in general. There is a clear difference between Case C-543/14 *Ordre des barreaux francophones et germanophone* which explicitly deals with EU fundamental principles and Case C-492/08 *Commission v France* which only indirectly concerned EU fundamental principles.¹⁵⁹

The background to Case C-543/14 *Ordre des barreaux francophones et germanophone* is that Belgium abolished the VAT exemption for the services of lawyers with effect from 1 January 2014.¹⁶⁰ A number of Belgian bar councils, together with human rights and humanitarian organisations and individuals,¹⁶¹ have opposed the abolition of the VAT exemption. Their argument is that the resulting increase in the cost of litigation breaches various guarantees of the right of access to justice protected by the Charter,¹⁶² ie principally Article 47 of the Charter and secondarily Articles 20 and 21 of the Charter.¹⁶³ Articles 20 and 21 of the Charter did not become relevant in the case.¹⁶⁴ In her Opinion, Advocate General Sharpston discussed Articles 20 and 21 of the Charter respectively regarding the equality principle and non-discrimination in conjunction with TFEU Article 19, Article 14 of the HR Convention and fiscal/VAT neutrality.¹⁶⁵ The discussion is very interesting¹⁶⁶ but impossible to pursue within the limits of this article.

Responding to the bar councils' and others' arguments, the Belgian Constitutional Court declared that the legislator must give concrete effect to general principles such as the right of access to courts and equality of arms between litigants.¹⁶⁷ The Court also noted that the increase in VAT to 21% on the cost of lawyers' services could, for some litigants, limit the right of access to legal advice, and that the different treatment of VAT deductions for taxable persons and non-taxable persons is liable to upset the equality of arms of litigants.¹⁶⁸ As a final point, the Court said that the aim of the abolition of the VAT exemption was principally a budgetary matter, on which the legislator has broad discretion, but such an aim could not justify discrimination with regard to access to the courts and to legal advice.¹⁶⁹ The Court seems to support the arguments of the bar councils and others.

¹⁵⁹Opinion of Advocate General Sharpston in Case C-543/14 *Ordre des barreaux francophones et Germanophone* (n 65) point 38.

¹⁶⁰*Ordre des barreaux francophones et Germanophone* (n 31) para 18. The VAT exemption originated from a transitional provision in the Sixth VAT Directive; see the Opinion of Advocate General Sharpston in Case C-543/14 *Ordre des barreaux francophones et Germanophone* (n 65) point 1.

¹⁶¹Opinion of Advocate General Sharpston in Case C-543/14 *Ordre des barreaux francophones et Germanophone* (n 65) point 28.

¹⁶²*Ibid*, point 2.

¹⁶³*Ordre des barreaux francophones et Germanophone* (n 31) para 21.

¹⁶⁴*Ibid*, para 69.

¹⁶⁵Opinion of Advocate General Sharpston in Case C-543/14 *Ordre des barreaux francophones et Germanophone* (n 65) points 61 and 101-109.

¹⁶⁶Especially with regard to Case C-390/15 *RPO* which is not yet decided by CJEU. See also Rita Szudoczky, *The Sources of EU Law and Their Relationships: Lessons for the Field of Taxation* (Amsterdam IBFD 2014), pp 111-116; Christian Amand, 'VAT Neutrality: A Principle of EU Law or a Principle of the VAT System?' (2013) 2 *World Journal of VAT/GST Law* 164; and Frans Vanistendael, 'The Role of (Legal) Principles in EU Tax Law' in Cécile Brokelind (ed) *Principles of Law: Function Status and Impact in EU Tax Law* (Amsterdam, IBFD 2014), p 41.

¹⁶⁷Opinion of Advocate General Sharpston in Case C-543/14 *Ordre des barreaux francophones et Germanophone*, (n 65) point 36.

¹⁶⁸*Ibid*, point 37; and *Ordre des barreaux francophones et Germanophone* (n 31) para 26.

¹⁶⁹Opinion of Advocate General Sharpston in Case C-543/14 *Ordre des barreaux francophones et Germanophone* (n 65) point 38.

Hence, the question is whether an imposition of VAT by the abolition of an existing VAT exemption in fact can constitute a breach of EU fundamental rights. An answer in the affirmative could have had far-reaching consequences for legislative bodies and tax administrations, but this was clearly rejected by the CJEU in every aspect of the case.

In relation to the right to an effective remedy according to Article 47 of the Charter, the CJEU found that individuals who are not entitled to legal aid are deemed to have sufficient resources to have access to justice by being represented by a lawyer. Thus Article 47 of the Charter does not in principle guarantee a right to VAT exemption on lawyers' services.¹⁷⁰ Still the imposition of such VAT costs can be challenged provided that those costs represent an insurmountable obstacle or they make it in practice impossible or excessively difficult to exercise the EU fundamental rights.¹⁷¹ The CJEU emphasises that no close or mechanical correlation can be established between the charging of VAT on lawyers' services and the increase in price due to the lawyers' corresponding right of VAT deduction and price negotiations between lawyers and clients.¹⁷² Consequently, the protection guaranteed by Article 47 of the Charter cannot be extended to the imposition of VAT on services supplied by lawyers.¹⁷³

Another question in the case relates to Article 47 of the Charter and the principle of equality of arms, on the ground that VAT on lawyers' services puts non-taxable individuals who cannot deduct VAT at a disadvantage compared with individuals who have the status of taxable persons with a right to deduct VAT.¹⁷⁴ In the CJEU's opinion this pecuniary disadvantage is not likely to affect the procedural balance of the parties, the disadvantage is not a complete disadvantage and a higher fee does not necessarily translate into better representation.¹⁷⁵ Therefore the CJEU held that the principle of equality of arms cannot be extended to the charging of VAT at a rate of 21% on lawyers' services.¹⁷⁶

The case demonstrates that even though the imposition of VAT and the VAT rate on services supplied by lawyers are within the scope of the Charter, the VAT treatment does not in itself compromise the fundamental rights and principles in Article 47 of the Charter. This is an example of a core area of substantial VAT law where the Charter is relevant and must be considered accordingly, but where the Charter on a concrete basis does not result in an actual impact on the substantive matter of the VAT case.

As a remark the case – seen together with pending CJEU cases¹⁷⁷ and the *VDP Dental Laboratory* case, see part 6.6 – indicates a growing focus on the future impact of the Charter on substantive VAT law specifically in relation to the general principle of equal treatment pursuant to Article 20 of the Charter.

6.6. VAT exemption for dental prostheses

¹⁷⁰*Ordre des barreaux francophones et Germanophone* (n 31) para 28.

¹⁷¹*Ibid*, para 31. See Case 279/09 *DEB* [2010] ECLI:EU:C:2010:811, para 61; Case C-156/12 *GREP* [2010] ECLI:EU:C:2010:811, para 46; and Case C-61/14 *Orizzonte Salute* [2015] ECLI:EU:C:2015:655, paras 48, 49 and 58.

¹⁷²*Ordre des barreaux francophones et Germanophone* (n 31) paras 33-35; and Opinion of Advocate General Sharpston in Case C-543/14 *Ordre des barreaux francophones et germanophone* (n 65) points 82-87.

¹⁷³*Ordre des barreaux francophones et Germanophone* (n 31) para 38.

¹⁷⁴*Ibid*, para 39.

¹⁷⁵*Ibid*, paras 43-45.

¹⁷⁶*Ibid*, para 46.

¹⁷⁷Eg *RPO* (n 166).

Joined Cases C-144/13, C-154/13 and C-160/13 *VDP Dental Laboratory* concern the VAT treatment of dental prostheses sold by an intermediary.¹⁷⁸ The question was whether VDP was covered by the VAT exemption for dental technicians.¹⁷⁹ The CJEU did not explicitly address the issue of EU fundamental rights, but in her opinion Advocate General Kokott made some interesting points of a more judicial policy nature in regard to the general principle of equal treatment. While the Advocate General's opinion was not followed by the CJEU (see the introduction to part 6), the opinion is still interesting.

The Advocate General explained that the distortions of competition in another case, Case C-240/05 *Eurodental*, resulted from the different rules governing the right to deduct input VAT and that that situation was the consequence of the incomplete harmonisation of VAT in the EU.¹⁸⁰ Since the cause of the problem in this case lay in the derogation under Article 370 of the VAT Directive, this was the only place to look for a solution. The Advocate General asked the interesting question: Does Article 370 of the VAT Directive satisfy the requirements of EU primary law, in particular the general principle of equal treatment according to Article 20 of the Charter, applicable to taxable persons, and the particular principle of equality in TEU Article 4(2), applicable between Member States?¹⁸¹ She argued:¹⁸²

After all, Article 370 of the VAT Directive does not fall into the traditional category of a provision subject to a process of only gradual harmonisation that gives all Member States the scope to apply different national rules. On the contrary, that provision allows only very specific Member States to derogate from the VAT Directive's provisions on exemptions, which are, however, binding on the other Member States. *Such differences in the treatment of Member States and the consequential differences in the treatment of the taxable persons established in them may be justified for a transitional period with a view to the attainment of an objective of harmonisation.* In the present case, however, no time-limit is prescribed for the derogation provided for in Article 370 of the VAT Directive. Consequently, the different powers exercised by the Member States in relation to the application of the exemption provided for in Article 132(1)(e) of the VAT Directive have been in place since the Sixth Directive first came into force, in other words for more than 36 years. [Emphasis added.]

It can be understood from this quotation that it is questionable whether Article 370 of the VAT Directive, and possibly other derogations/stand-still provisions, related to the supposedly transitional period in Articles 370-374 of the VAT Directive, can be considered in breach of EU primary law, ie EU fundamental rights and principles of equal treatment on several levels, both in terms of equality between the Member States and equality between taxable persons. While this important question of principle was not the subject matter of the case, the Advocate General urged in the light of the distortions of competition that it was incumbent on the EU legislator to satisfy the requirements of TFEU Article 113 on the harmonisation of turnover taxes by formulating the VAT Directive accordingly.¹⁸³ It must be assumed that the Advocate

¹⁷⁸Joined Cases C-144/13, C-154/13 and C-160/13 *VDP Dental Laboratory* [2015] ECLI:EU:C:2015:116, para 22.

¹⁷⁹*Ibid*, para 24.

¹⁸⁰Joined Cases C-144/13, C-154/13 and C-160/13, *VDP Dental Laboratory* [2014] ECLI:EU:C:2014:2163, Opinion of Advocate General Kokott, point 83, where reference was made to Case C-240/05 *Eurodental* [2006] ECLI:EU:C:2006:763, paras 48-53.

¹⁸¹*Ibid*, point 84.

¹⁸²*Ibid*, point 84.

¹⁸³*Ibid*, point 85.

General's request to the EU legislator is not made in general but relates directly to the question of compatibility of Article 370 of the VAT Directive, and potentially Articles 370-374 of the VAT Directive, with Article 20 of the Charter and TEU Article 4(2), as the question and the request form two consecutive sentences in the same point 85 of the Advocate General's Opinion.

The relationship between TFEU Article 113, TEU Article 4(2), Article 20 of the Charter and Articles 370-374 of the VAT Directive, as formulated by the Advocate General, is interesting in illustrating the potential impact of the Charter on substantive VAT law beyond the impact observable in the CJEU's current VAT case law as future EU legislation or case law from the CJEU on this matter could have significant consequences for specific VAT exemptions, VAT deductions etc in certain Member States. Actually, the Advocate General used the Charter as an argument for the further harmonisation of VAT law by referring to the necessity of achieving its consistency with EU primary law. This could indicate that the role of the Charter may become more important in a judicial policy sense, as the Charter to some extent could provide a supplementary political argument for completing the harmonisation of the EU VAT system,¹⁸⁴ including abolishing the VAT exemptions etc, although this may be an optimistic thought.

7. Conclusions and reflections

Based on the above analysis of the legal and practical impacts of the Charter on EU VAT law, I believe that the Charter has already had a significant impact on VAT law and will continue to do so¹⁸⁵ as a consequence of the growing awareness and increased application of the Charter to VAT cases at EU and national levels.

The Charter has been shown to have an important role in the CJEU's VAT case law as the area of VAT law that has been harmonised in the EU very largely lies within the scope of the Charter; see for example the *Åkerberg Fransson* and the *WebMindLicenses* cases. Given its broad scope in the area of VAT, the Charter is clearly relevant to most cases concerning VAT in EU law as well as national law. The analysis of the EU VAT cases above has established the relevance of the Charter to many different situations, both with regard to formal and substantive VAT law, such as national rules on administrative sanctions and penalties, criminal proceedings, procurement of evidence, procedural guarantees, VAT fraud and abuse, VAT exemptions, VAT deductions, VAT impositions, VAT increases and so on. The list of situations is already long, and where the Charter could potentially have an impact on VAT law it must be even longer.

While the Charter has broad general relevance for VAT law, its manifestation in actual VAT cases differs in many ways and its impact varies widely. This will be explained in the following.

One of the VAT cases in which the Charter had a significant impact on the application and interpretation of formal and substantial VAT rules is the *WebMindLicenses* case. If it had been found by the national court that there was a breach of the Charter this could have had severe consequences for the case in the form of disregarding evidence or annulling a decision. The Charter had a high level of impact on this case.

¹⁸⁴The ambition of achieving a common consensus in the EU on a definitive VAT system was recently expressed in the EU VAT Action Plan: Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on an action plan on VAT Towards a single EU VAT area – Time to decide, COM(2016) 148 final of 7 April 2016.

¹⁸⁵Poelmann (n 12) p 178, para 4.

At the other end of the scale are cases where the Charter has no effect, even though a case falls within its scope. These cases include: the *Italmoda*, *Commission v France* and *VDP Dental Laboratory* cases. In these cases the CJEU did not address fundamental rights issues, but focused only on the substantive VAT law issues of the case. Thus in these cases the Charter had a low impact.

Finally, there have been cases where the Charter has had an intermediate level of impact, where it has had a visible and tangible effect as it was the centre of the main proceedings, making fundamental rights a core issue in the case. However, in the cases discussed no breach of the Charter was found to exist; see the *Taricco* and the *Ordre des barreaux francophones et germanophone* cases. Since an extensive assessment of the Charter had to be made in these cases, the impact of the Charter on VAT law must be considered as being at the higher end of the scale.

The above analysis of EU VAT case law illustrates the various manifestations of the influence of the Charter on VAT law, ranging from the lowest, through the medium and to the highest level of the Charter's impact on VAT law in a variety of situations, with particular reference to Charter provisions such as its Articles 7, 20, 47, 49, 50 etc. Based on the findings of the analysis, it can be concluded that while the Charter has direct relevance in most VAT cases, its actual impact on substantive VAT rules must still be considered moderate. Nonetheless, in the light of the CJEU's many pending cases on fundamental rights issues in VAT law and the great emphasis put on the Charter by the Advocates Generals as seen, for example, in the *Commission v France*, *Ordre des barreaux francophones et germanophone* and *VDP Dental Laboratory* cases, the impact of the Charter on VAT law is still being developed and may continue to be developed.

A legal consequence of the impact of the Charter on VAT law, where it applies and where an assessment is required of any infringement of fundamental rights protected by the Charter, is that the special principles of interpretation in its Articles 51-54 become relevant. This is because the Charter becomes a relevant source of law in its own right, with its own interpretations of the rights, freedoms and principles in its Articles 1 to 50; see part 5. The CJEU's application of the special interpretative principles in Articles 51-54 in cases covered by the Charter can be seen in the *Taricco* and *WebMindLicenses* cases, for example.

In order to comply with the Charter, with its status as EU primary law, its impact on VAT-related matters must be considered in connection with the legislation, case law, administrative practice and guidelines etc. It is advisable to take the Charter into consideration at the earliest possible stage in the legislative process, for example, in order to legislate with due regard for the fundamental rights guaranteed by it.¹⁸⁶

It is my impression that VAT practitioners generally feel that invoking the Charter in VAT cases before tax administrations or the courts is not well regarded, so they abstain from making arguments based on the Charter for fear of weakening their client's position. I think that the supposedly bad reputation of the Charter could originate from the ECHR's case law and the CJEU's early VAT cases, since many of these cases related to tax penalties, criminal proceedings, VAT fraud and abuse and the like, where as a last resort the accused person tried, maybe in vain, to call upon the Charter.

I believe that any such bad reputation of the Charter is mistaken. The Charter protects the fundamental rights, freedoms and principles of all individuals in European society and objectively every individual has the same rights. If individuals, ie citizens, companies, their advisers etc do not know their guaranteed EU

¹⁸⁶Nicolaou (n 29) p 10.

fundamental rights or if they refrain from asserting those rights, the consequences could be significant and in worst case result in the loss of those rights, loss of the formal or substantive issue in the case, potential professional liability for advisers etc. In principle, negative consequences are unnecessary and could be avoided simply by taking the Charter into consideration in due time.

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