

The effect of the Charter of Fundamental Rights of the European Union on substantive VAT law

Karina Kim Egholm Elgaard

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1. A fundamental rights perspective on VAT law

First of all, I strongly support the focus on the importance of taking fundamental rights perspectives into consideration at the recurring conferences “*Court of Justice of the European Union: Recent VAT Case Law*” in Vienna.¹ In previous years, the impact of the Charter of Fundamental Rights of the European Union (Charter),² has been examined closely and discussed in depth at this academic VAT forum by some of the leading VAT experts and specialists.³ Thus, the aim of the paper is to contribute to the further development of the combined research area of VAT law and fundamental rights law. This is a research area that affects practically every legal entity and natural person in the European Union as well as governments, tax administrations, courts, lawyers, advisers and other practitioners due to the widespread effects of the EU VAT system and the EU protected fundamental rights throughout Europe.

Since the landmark case *Åkerberg Fransson*,⁴ the focus on the interface between the Charter and VAT law including the Charter’s direct impact on VAT law seems to have centered mostly on the procedural provisions relating to the VAT Directive.⁵ This is illustrated by the papers that have been published, which examine the Charter and its impact on VAT law mainly in relation to procedural VAT provisions.⁶

Therefore, the purpose of the paper is to examine the effect of the Charter on substantive VAT provisions such as provisions regarding taxable person, taxable

- 1 Many thanks to Professor Michael Lang of the Institute for Austrian and International Tax Law at the Vienna University of Economics and Business, for giving me the opportunity to contribute with a keynote paper at the conference “*Court of Justice of the European Union: Recent VAT Case Law*”, 2017.
- 2 Charter of Fundamental Rights of the European Union (2012/C 326/02).
- 3 I. Lejeune & L. Vermeire, *Trends in CJEU’s VAT Case Law – The CJEU as guardian of the Charter of Fundamental Rights of the European Union*, in: M. Lang et al. (eds.), *CJEU – Recent Developments in Value Added Tax 2015* (Vienna: Linde, 2016) p. 335 et seq.; and I. Lejeune & L. Vermeire, *Trends in the VAT Case Law of the CJEU*, in: M. Lang et al. (eds.), *CJEU – Recent Developments in Value Added Tax 2016* (Vienna: Linde, 2017) p. 319 et seq.
- 4 M. 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*, *European Public Law* 2014, p. 229; E. Hancox, *The Meaning of “Implementing” EU Law under Article 51(1) of the Charter: Åkerberg Fransson*, *Common Market Law Review* 2013, p. 1411; and U. Bernitz, *The Åkerberg Fransson Case*, in: J. Nergelius & E. Kristoffersson (eds.), *Human Rights in Contemporary European Law* (Oxford: Hart, 2015) p. 191 et seq.
- 5 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.
- 6 E.g. I. Lejeune & L. Vermeire, *Trends in CJEU’s VAT Case Law – The CJEU as guardian of the Charter of Fundamental Rights of the European Union*, in: M. Lang et al. (eds.), *CJEU – Recent Developments in Value Added Tax 2015* (Vienna: Linde, 2016) p. 335 et seq.; B. Terra, *The ne bis in idem principle in VAT cases and the Charter of Fundamental Rights of the European Union*, in: K. Egholm Elgaard et al. (eds.), *Momsloven 50 år – festskrift i anledning af 50 års jubilæet for Danmarks første momslov* (Copenhagen: Ex Tuto, 2017) p. 77 et seq.; and H. Van Arendonk, *Charter of Fundamental Rights, Tax and the Effects of the Sopropé judgment*, in: H. Van Arendonk et al. (eds.), *VAT in an EU and International Perspective* (Amsterdam: IBFD, 2011) p. 253 et seq.

supply, place of supply, VAT exemptions, reduced VAT rates, VAT deductions, and so on. Consequently, the paper consciously refrains from addressing any of the procedural provisions of the VAT Directive with regard to the Charter, in particular Arts. 39 to 50 of the Charter. More precisely, the purpose of the paper is to identify and analyse provisions in the Charter, which could potentially be in conflict with substantive provisions in the VAT Directive, including potential conflicts between Art. 20 of the Charter on the general EU principle of equal treatment and the VAT Directive. Here I delimit my analysis so that I do not perform the justification test to see whether such identified potential conflicts could be justified according to Art. 52(1) of the Charter;⁷ see more sections 3.8. and 4. as the justification test must be applied on a case-by-case basis, which is outside the scope of the article. Further, it is the purpose of this paper to discuss the relationship between Art. 20 of the Charter on the general EU principle of equal treatment and Art. 53 of the Charter regarding national principles of equal treatment under domestic constitutions.

2. Method and structure of the paper

2.1. Legal dogmatic approach and interpretation of the Charter

The method applied for the purposes of this paper is a legal dogmatic approach in order to establish current valid EU law, which is understood as the result that the Court of Justice of the European Union (CJEU) could be expected to arrive at based on the relevant sources of law as they are applied and interpreted by the CJEU.⁸

I argued in a previous paper,⁹ that when the Charter is applicable, due account must be taken of the specific interpretative principles stated in Arts. 51 to 54 of the Charter itself, particularly the Explanations relating to the Charter of Fundamental Rights (Explanations),¹⁰ and the European Convention on Human Rights

7 Art. 52(1) of the Charter: “Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”

8 K. Egholm Elgaard, *The impact of the Charter of Fundamental Rights of the European Union on VAT law*, World Journal of VAT/GST Law 2016, p. 9; and U. Neergaard & R. Nielsen, *European Legal Method – Towards a New European Legal Realism?*, (Copenhagen: DJOEF, 2013) p. 121.

9 K. Egholm Elgaard, *The impact of the Charter of Fundamental Rights of the European Union on VAT law*, World Journal of VAT/GST Law 2016, p. 9 et seq.

10 Explanations relating to the Charter of Fundamental Rights (2007/C 303/02). L. S. Rossi, *Same Legal Value as the Treaties: Rank, Primacy, and Direct Effects of the EU Charter of Fundamental Rights*, German Law Journal 2017, p. 773; J. Jacqué, *The Explanations Relating to the Charter of Fundamental Rights of the European Union*, in: S. Peers et al. (eds.), *The EU Charter of Fundamental Rights – A Commentary* (Oxford: Hart, 2014) p. 1715 et seq.; and H. Kaila, *The Scope of Application of the Charter of Fundamental Rights of the European Union in the Member States*, in: P. Cardonnel et al. (eds.), *Constitutionalising the EU Judicial System* (Oxford: Hart, 2012) p. 300 et seq.

(ECHR).¹¹ Hence, I will interpret the provisions of the Charter accordingly, however, I will not include the ECHR to a wider extent than necessary for the interpretation of the Charter and the analysis of the effect of the Charter on substantive VAT law.

With reference to CJEU case law,¹² the clear starting point is that the VAT Directive broadly falls within the scope of the Charter, presumably in all areas of VAT law, since exercising their powers under the VAT Directive is implementing EU law in terms of Art. 51(1) of the Charter.¹³ Thus, for the purposes of the paper, it is presupposed that all the substantive provisions of the VAT Directive do fall within the scope of the Charter, and therefore this will not be questioned in the paper.

2.2. Structure of the paper

This paper first examines the most significant provisions in the Charter, which could be relevant to the interpretation of substantive provisions in the VAT Directive; see section 3. Next, the potential conflicts identified between substantive provisions in the VAT Directive and the Charter are further analysed and discussed; see section 4. Special emphasis is then given to the analysis of Art. 20 of the Charter concerning the general EU principle of equal treatment; see section 5., and its effect on specific substantive provisions in the VAT Directive; see section 6. This leads to the analysis of the relationship between the general EU principle of equal treatment pursuant to Art. 20 of the Charter and the principles of equal treatment in the EU Member States' domestic constitutions according to Art. 53 of the Charter; see section 7. Finally, the paper closes with conclusions and some comments on future perspectives; see section 8.

3. The provisions of the Charter seen from a VAT perspective

Firstly, provisions of the Charter, which could be relevant within the context of VAT law, are identified and analysed. The analysis includes the provisions of the Charter that in my opinion have the most significant effect on substantive provi-

11 Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950.

12 CJEU, 26 February 2013, C-617/10, *Åkerberg Fransson*, EU:C:2013:105; CJEU, 26 September 2013, C-418/11, *Texdata Software*, EU:C:2013:588; CJEU, 8 September 2015, C-105/14, *Taricco*, EU:C:2015:555; and CJEU, 17 December 2015, C-419/14, *WebMindLicenses*, EU:C:2015:832; L. S. Rossi, *Same Legal Value as the Treaties: Rank, Primacy, and Direct Effects of the EU Charter of Fundamental Rights*, German Law Journal 2017, p. 780 et seq.

13 K. Egholm Elgaard, *The impact of the Charter of Fundamental Rights of the European Union on VAT law*, World Journal of VAT/GST Law 2016, p. 16 et seq.; and E. Poelmann, *Some Fiscal Issues of the Charter of Fundamental Rights of the European Union*, Intertax 2015, p. 174.

sions in the VAT Directive, as these provisions best fulfil the purpose of the paper. For this reason, I will not examine the less significant provisions of the Charter since they are only of remote relevance to the paper. The provisions of the Charter under consideration are analysed in numerical order below.

Arts. 20, 21, 23, and 26 of the Charter dealing with various fundamental equality rights are analysed and discussed separately in sections 5. and 6.

3.1. Art. 2(1) of the Charter on the Right to life

The first provision of the Charter of relevance to the VAT Directive is Art. 2(1), which states that: “*Everyone has the right to life*”.¹⁴ This provision immediately suggests associations with the VAT treatment of supplies of fertility treatment, which has recently attracted quite a lot of attention both at national level in Denmark,¹⁵ and at the EU level.¹⁶ It is outside the scope of the paper to enter into further discussion on the legal meaning of “*life*” in a human rights context,¹⁷ as the analysis undertaken only attaches significance to the right to life to the extent that “*life*” refers to the unborn child as from the moment of conception.¹⁸

In this case, the question is whether fertility treatment is VAT exempt pursuant to Art. 132(1)(b) and (c) of the VAT Directive on hospital and medical care services. The problem centres on the definition of “*therapeutic purposes*”, as infertility/reduced fertility may not only result from disease or other health disorders – others may seek treatment, for example, a single woman, a woman in a heterosexual couple where the woman is healthy, or a woman in a homosexual couple, etc.

In 2017, the VAT Committee concluded at its 108th meeting, that the delegations of the Member States seemed to be in favour of a broad application of the VAT exemption for fertility treatment.¹⁹ Consequently, the VAT exemption for fertility treatment is – in the eyes of the VAT Committee – stretched to include all kinds of fertility treatment regardless of whether it is performed on a healthy person e.g. a single person, hetero- or homosexual person etc.

14 In the Explanations on Art. 2, it is stated that the provision corresponds to provisions in the ECHR and its Protocol, and have the same meaning and the same scope as these.

15 Press release of 28 June 2017 from the Danish Ministry of Taxation regarding VAT exemption for single people and homosexual people.

16 The EU Commission services’ question originated from Denmark to the Value Added Tax Committee, 6 February 2017, taxud.c.1(2017)751354, regarding VAT treatment of fertility treatments.

17 E. Wicks, *Article 2*, in: S. Peers et al. (eds.), *The EU Charter of Fundamental Rights – A Commentary* (Oxford: Hart, 2014) p. 31 et seq.

18 M. Olivetti, *Article 2 – Right to Life*, in: W. Mock et al. (eds.), *Human rights in Europe – commentary on the Charter of Fundamental Rights of the European Union* (Durham: Carolina, 2010) p. 12 et seq. See perhaps CJEU, 4 October 1991, C-159/90, *Grogan*, EU:C:1991:378, para. 19, and M. Cartabia, *Article 53 – Level of Protection*, in: W. Mock et al. (eds.), *Human rights in Europe – commentary on the Charter of Fundamental Rights of the European Union* (Durham: Carolina, 2010) p. 340.

19 The Value Added Tax Committee, 29 May 2017, taxud.c.1(2017)3063070, Minutes 108th Meeting, p. 5.

Clearly, there is an obvious potential conflict between Art. 2 – and even more likely, Art. 21 on non-discrimination – of the Charter and Art. 132(1)(b) and (c) of the VAT Directive, which I will discuss in more detail in section 6.3. Section 6.3. is devoted to equality and discrimination issues pursuant to Arts. 20 and 21 of the Charter in connection with the VAT treatment of fertility treatment.

For now, the statement from the VAT Committee on the VAT exemption for fertility treatment seems to contribute to securing the right to life protected by Art. 2 of the Charter, although this fundamental right seems not to have been mentioned as part of the discussions in Denmark nor at the meeting of the VAT Committee.

As an aside, other articles of the Charter could be relevant for the protection of the unborn child and/or for a future parent asking for fertility treatment in order to have a child, such as Art. 7 on respect for private and family life; Art. 9 on the right to marry and the right to found a family; and perhaps Art. 33 in terms of family protection.

3.2. Art. 3 of the Charter on the Right to the integrity of the person

Another provision in the Charter that could be relevant to the VAT Directive, is Art. 3 on the right to the integrity of the person, especially paragraph 2, which establishes that “[i]n the fields of medicine and biology, the following must be respected in particular”:²⁰ “the prohibition on making the human body and its parts as such a source of financial gain,”.

This provision expresses the principle of non-commercialization of the human body and its parts.²¹ Based on Art. 132(1)(d), cf. Art. 14 in conjunction with Art. 24 of the VAT Directive, human organs, blood²² and milk are considered to be goods, i.e. as a main rule the sale of goods constitutes a taxable supply for VAT purposes according to Art. 2 of the VAT Directive. However, it follows from Art. 132(1)(d) of the VAT Directive that the supply of human organs, blood and milk are VAT exempt. Consequently, no VAT revenue is gained from transactions concerning the human parts listed, which seems to be compliant with Art. 3 of the Charter, as such transactions do not result in a financial gain for the state.

It is not evident, that the provision is intended to comprise the state’s VAT revenue as a financial gain, but I cannot see why it should not. It appears directly from Art. 51 of the Charter, that the provisions of the Charter are addressed to the in-

20 The Explanations on Art. 3 mention among other things that the fundamental right to human integrity is part of EU law and encompasses, in the context of medicine and biology, the free and informed consent of the donor and recipient.

21 S. Michalowski, *Article 3*, in: S. Peers et al. (eds.), *The EU Charter of Fundamental Rights – A Commentary* (Oxford: Hart, 2014) p. 51.

22 Including blood plasma, see CJEU, 5 October 2016, C-412/15, *TMD Gesellschaft für transfusionsmedizinische Dienste*, EU:C:2016:738.