Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 7 September 2017 [1]

Case C-298/16

Teodor Ispas
Anduța Ispas
v
Direcția Generală a Finanțelor Publice Cluj

(Request for a preliminary ruling from the Curtea de Apel Cluj (Court of Appeal, Cluj, Romania))

(Reference for a preliminary ruling — Tax assessment notices establishing value added tax due — Procedural rights of taxpayers in the national procedure for collection of value added tax — Scope of application of EU fundamental rights — Rights of the defence — Article 41 of the Charter of Fundamental Rights of the European Union — Right to be heard — Access to the file — Right to have access to information and documents forming the basis of a decision)

I. Introduction

1. Mr and Mrs Ispas ('the Applicants') were subject to a tax inspection. On the basis of that inspection, it was found that the Applicants had failed to declare their value added tax (VAT) obligations correctly. Two tax assessment notices setting out the VAT amounts due were issued. The Applicants challenged those notices before the national court alleging that there had been a breach of their rights of defence during the procedure leading to the adoption of the notices. In particular, they claim that the tax authorities should have given them, on their own initiative, access to the entire content of their file, including all the documents collected before the beginning of the tax inspection.

2. It is against this background that the Curtea de Apel Cluj (Court of Appeal, Cluj, Romania) enquires about the compatibility of the relevant national practice with the rights of the defence, as protected by EU law.

3. The present case invites the Court to address the relationship between the right of access to the file, guaranteed by Article 41(2)(b) of the Charter of Fundamental Rights of the European Union ('the Charter'), and the general principle of EU law of respect for the rights of the defence. Moreover, can the right of access to the file be said to be applicable also to administrative procedures, carried out by the administrative authorities of the Member States when they act within the scope of EU law?

4. That question, however, hints at the real 'elephant in the file' in the present case, which needs to be looked at first: is the issue of potential (non-)access to an administrative file and/or documents contained therein in national VAT collection procedures within the scope of EU law, thus triggering the applicability of the Charter?

1 Original language: English.

II. Legal framework

A. EU law

1. The Charter

5. Article 41 of the Charter is worded as follows:

‘1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

2. This right includes:

(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

(c) the obligation of the administration to give reasons for its decisions.

...’

2. The VAT Directive

6. Under Article 213(1), first paragraph of the VAT Directive:[2] ‘Every taxable person shall state when his activity as a taxable person commences, changes or ceases.’

7. According to Article 242: ‘Every taxable person shall keep accounts in sufficient detail for VAT to be applied and its application checked by the tax authorities.’

8. Article 250(1) of the VAT Directive provides that: ‘Every taxable person shall submit a VAT return setting out all the information needed to calculate the tax that has become chargeable and the deductions to be made including, in so far as is necessary for the establishment of the basis of assessment, the total value of the transactions relating to such tax and deductions and the value of any exempt transactions.’

9. Under Article 273 of the VAT Directive: ‘Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.’

2 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) (‘the VAT Directive’). The tax inspection at issue in the present case related to the period from 1 January 2007 to 31 December 2011. The request for a preliminary ruling has not identified in a precise manner the specific provisions of the VAT Directive concerned. In any case, the reproduced provisions from Directive 2006/112 in substance correspond to Article 22(1), (2), (4) and (8) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

B. Romanian law

1. Code of Fiscal Procedure

10. Article 9 of the Ordonanța Guvernului nr. 92 privind Codul de procedură fiscală (Government Order No 92 on the Code of Fiscal Procedure) of 24 December 2003 ('the Code of Fiscal Procedure'),[3] provides:

'Right to be heard

(1) Before taking its decision, the tax authority shall ensure that the taxpayer has the opportunity to express his point of view concerning the facts and circumstances relevant to the making of the decision.

(2) The tax authority is not bound to apply paragraph 1 if:

(a) delay in taking the decision would constitute a risk in relation to establishing the actual tax situation as regards enforcement of the taxpayer's obligations or the adoption of other measures provided for by law;

(b) there would be an insignificant change in the factual situation presented in respect to the amounts due with regard to tax;

(c) the information provided by the taxpayer in a return or application is accepted;

(d) coercive measures of enforcement are necessary.'

11. Article 43 of the Code of Fiscal Procedure sets out the:

'Contents of and statement of reasons for a fiscal administrative act

(1) A fiscal administrative act shall be drawn up in writing, on paper or in electronic form.

(2) A fiscal administrative act which is drawn up on paper shall state the following matters:

...

(j) statements relating to the hearing of the taxpayer.'

12. Article 107 of the Code of Fiscal Procedure is as follows:

'The taxpayer's right to be informed

(1) The taxpayer shall be informed, during the tax inspection, of the findings made in the course of that inspection.

3 *Monitorul Oficial al României*, Part I, No 941 of 29 December 2003, as republished and amended, in the version applicable to the main proceedings.

(2) The tax authority shall present to the taxpayer the draft tax inspection report, containing the findings and their tax consequences, and shall give him the opportunity to set out his point of view in accordance with Article 9(1), unless the tax bases remain entirely unchanged following the tax inspection or the taxpayer has waived this right and notified the tax inspection bodies of that fact ...

(4) The taxpayer has the right to present, in written form, his point of view on the findings of the tax inspection within a deadline of 3 working days counting from the date in which the inspection has finished.'

III. Facts, procedure, and preliminary question

13. Mr and Mrs Ispas were subject to a tax inspection. It was found that they had been granted five building permits by the municipal council of Floreşti between July 2007 and June 2008. Three buildings, comprising 12, 24 and 30 apartments, as well as 4 garages and 2 storage areas, were built on the basis of those permits. From December 2007 the Applicants began to sell the apartments through a series of commercial transactions. According to the national court, the Applicants thereby conducted transactions with a permanent character, making them taxable persons for VAT purposes.

14. On 25 April 2012, as a result of the findings of the tax inspection, the Direcția Generală a Finanțelor Publice Cluj (Directorate-General of Public Finances of Cluj, Romania) ('the Defendant') issued two tax assessment notices to Mr and Mrs Ispas. Both assessment notices amount to a total of 513 489 Romanian lei (RON) (VAT due); RON 451 546 (interest on late payment of VAT); and RON 7 860 (penalty for late payment of VAT).

15. The Applicants challenged the tax assessment notices before the Curtea de Apel Cluj (Court of Appeal, Cluj), the referring court. In their application, the Applicants submitted that those notices were null and void on the grounds that their rights of defence had not been respected. The tax assessment notices made no mention of whether the Applicants had been heard during the administrative procedure.

16. In further arguments before the referring court, the Defendant has requested that the Applicants identify the documents relevant to their case, to which they were not given access by the tax authority. The Applicants have responded that they are not requesting access to those documents but that they are raising an issue of law concerning, in particular, the consequences that arise from the fact that certain information and evidence was gathered outside the formal tax inspection procedure and that no access to that information was given to them during the course of the preliminary procedure. They also seek to establish whether such a failure can be remedied by granting access to those documents in the course of judicial proceedings. The Applicants argue that the tax authority should have given them, on its own initiative, automatic access to all the relevant information on the basis of which it adopted the tax inspection report and issued the tax assessment notices, so that they would have been able to challenge those acts.

17. In those circumstances, the Curtea de Apel Cluj (Court of Appeal, Cluj, Romania) has stayed the proceedings and referred the following question for a preliminary ruling:

'Is an administrative practice consisting in the taking of a decision imposing obligations on an individual without allowing that individual to have access to all of the information and documents considered by the public authority when it adopted that decision, being information and documents contained in the administrative file (not a public file) drawn up by the public authority, compatible with the principle of respect for the rights of the defence?'

18. Mr and Mrs Ispas, the Romanian Government and the Commission have submitted written observations. Mr Ispas, the Romanian Government and the Commission presented oral argument at the hearing that took place on 4 May 2017.

IV. Analysis

19. This Opinion is structured as follows. First, I will address the admissibility of the present request for a preliminary ruling (A). Second, I will dwell on whether the question referred is within the scope of EU law, and thus if it falls within the jurisdiction of the Court (B). I will then turn to the substantive question put forward by the referring court, concerning the rights of the defence in VAT procedures before national tax administrations (C).

A. Admissibility

20. The Romanian Government submits that the request for a preliminary ruling is inadmissible. It argues that the national court has not described the factual situation in enough detail and has not shown that the question posed is relevant for the main proceedings. The Commission, even though it has not formally questioned the admissibility of the question, has also expressed concerns about the sufficient detail of the factual context provided by the referring court.

21. The order for reference is indeed rather brief and not exactly a paragon of clarity in its description of the factual background. It does not contain any reference to the provisions of EU law that are applicable to the present case. It merely states that the dispute in the main proceedings relates to VAT, an area governed by EU law.

22. It must be recalled that national courts are bound to observe the requirements concerning the content of a request for a preliminary ruling as set out in Article 94 of the Rules of Procedure of the Court of Justice, in the context of the cooperation instituted by Article 267 TFEU. [4]

23. However, in my opinion, although the factual information can indeed be said to be rather 'economical' as to the details, it contains the basic factual elements that, as a matter of fact, have allowed the interested parties to present observations to the Court.

24. Furthermore, even though the order for reference does not identify a specific provision of the VAT Directive, the general obligations ensuing from the VAT Directive are easily identifiable and the Court is in a position to give a useful answer to the referring court. According to established case-law, where questions are worded in imprecise terms, it is for the Court to extract from all of the information provided to it by the national court and from the documents relating to the main proceedings, the elements of EU law that need to be interpreted, having regard to the subject matter of the dispute. [5] In the present case, the fact that the question only contains a general reference to the VAT Directive does not prevent the Court from providing the national court with the elements of interpretation of EU law which may enable it to rule on the case before it. [6]

25. As a result, it is my view that the question posed by the referring court is admissible. It must, however, be pointed out that the limited detail contained in the order for reference necessarily places limits on the level of detail and precision into which this Court will be able to go in order to provide a useful response to the question posed by the referring court.

4 See, for example, judgment of 27 October 2016, *Audace and Others* (C-114/15, EU:C:2016:813, paragraph 35 and the case-law cited).

5 See, for example, judgment of 12 February 2015, *Surgicare* (C-662/13, EU:C:2015:89, paragraph 17 and the case-law cited).

6 As has also been the practice of the Court in similar cases, notably in the judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105), where the referring court referred only to the Charter, but did not invoke any specific provisions of the VAT Directive. See the Opinion of Advocate General Cruz Villalón in *Åkerberg Fransson* (C-617/10, EU:C:2012:340, point 56).

B. Jurisdiction of the Court

26. There is, however, a second preliminary issue in the present case that ought to be addressed: the scope of EU law and the correlating question of the applicability of EU fundamental rights.

27. The Romanian Government has submitted that the current case is exclusively concerned with the interpretation and application of Romanian tax law. It does not concern EU law. The Commission submits that, even though the VAT Directive does not explicitly foresee a right to be heard before Member States establish tax assessments, the situation at issue in the present case falls within the scope of EU law because it is a procedure related to the collection of VAT. This is also the position of the referring court, which assumes that as the case is in the realm of VAT, the situation in the main proceedings falls within the scope of EU fundamental rights.

28. To be or not to be within the scope of EU law, that is indeed the question (again). In the present case, the national rules at stake appear to be *generally applicable* to all national tax procedures. The actual content of the question at issue (the extent to which an individual may request access to the file/documentation in a national tax procedure) is apparently somewhat far removed from any *explicit* EU law provision that would specifically provide for any such obligation on the part of the Member States. Is this situation within the scope of EU law, which would also render EU fundamental rights applicable?

1. Applicability of EU fundamental rights

29. The point of departure is clear: EU fundamental rights, including those codified in the Charter as well as those remaining at the level of general principles of EU law, are applicable in all situations governed by EU law, but not outside such situations.[7] In other words, EU fundamental rights must be complied with where national legislation falls within the scope of EU law: situations cannot exist which are covered by EU law but where EU fundamental rights are not applicable.[8] Fundamental rights are indeed the 'shadow' of EU law.[9]

30. However, this also means that there must be a rule of EU law which is applicable, independent and different from the fundamental right itself.[10] The provisions of the Charter (or a specific fundamental right) cannot be relied on in themselves to form the basis of the Court's jurisdiction.[11] In other words, a shadow cannot cast its own shadow.

31. Thus, for the purpose of the applicability of EU fundamental rights by the authorities of the Member States, there is an equation connecting the concepts 'applicability of EU fundamental rights' and 'the scope of EU law'. However, instead of settling the issue, that equation brings the genuine question to the fore: when does a situation brought before the national authorities fall within the scope of EU law?

7 See judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 19).

8 See judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 21).

9 Lenaerts, K., and Gutiérrez-Fons, J.A., 'The Place of the Charter in the EU Constitutional Edifice', in Peers, S., Hervey, T., Kenner, J., and Ward, A., *The EU Charter of Fundamental Rights: A Commentary*, C.H. Beck, Hart, Nomos, 2014, p. 1560-1593, at 1568.

10 Of course, this does not preclude the fact that rules contained in the Treaties or in acts of secondary law which give expression to a fundamental right also trigger the protection of the corresponding EU fundamental right (such as, for example, the provision on equal treatment contained in Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16)).

11 See judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 22).

2. Scope of EU law

32. From a functional point of view, a national authority is likely to be acting within the scope of EU law *at least* in three typical scenarios.[12] First, the national authority directly applies a source of EU law to a case before it, most frequently a regulation (the *direct application* scenario). Second, the national authority applies national law that transposes or implements an EU law measure or obligation. Although the national authority is likely to apply a source of national law to a case, EU law still remains in the background, certainly for the purposes of interpretation (the *indirect application* scenario). Third, the national authority finds itself in a situation in which a national rule makes use of the derogations or justifications to restrictions allowed by EU law (the *derogation* scenario).[13]

33. It is the second situation that is engaged in the present case. In contrast to the first scenario, there are two layers of rules: national and European Union. The pertinent issue for this type of scenario becomes *proximity* between the original EU law obligation and its national (non-)realisation or, put differently, the degree of *specificity* of the EU law rule or obligation at issue.

34. The second type of situation, where EU law establishes a mandate or compels a Member State to take action,[14] may have been traditionally considered as less problematic than the 'derogation' situation.[15] After all, it is acknowledged that Member States are bound to adopt all measures necessary to implement EU law.[16] Recent case-law nonetheless demonstrates the enhanced complexity of the determination of the situations in which Member States shall be considered as implementing an EU law obligation. This complexity emanates precisely from the uncertainties regarding the situations that can be considered connected with EU law 'downstream'.[17]

3. When (and to what extent) is a Member State 'implementing' EU law?

35. Even before *Åkerberg Fransson*, in a case connected with the application of the principle of equality to limitation periods for the recovery of VAT, the Court declared that 'VAT is incontestably a matter governed by [EU] law' even if the national procedural rules at issue were not determined by EU law.[18]

12 This is an introductory shorthand for the purpose of this case that certainly does not exhaust all the possible scenarios and the correspondingly complex debate on the applicability of the Charter — see, for example, the Opinion of Advocate General Jacobs in *Konstantinidis* (C-168/91, EU:C:1992:504, point 42 et seq.); Opinion of Advocate General Poiares Maduro in *Centro Europa 7* (C-380/05, EU:C:2007:505, point 15 et seq.); Opinion of Advocate General Sharpston in *Ruiz Zambrano* (C-34/09, EU:C:2010:560, point 156 et seq.); Opinion of Advocate General Bot in *Scattolon* (C-108/10, EU:C:2011:211, point 110 et seq.); Opinion of Advocate General Cruz Villalón in *Åkerberg Fransson* (C-617/10, EU:C:2012:340, point 25 et seq.); or Opinion of Advocate General Saugmandsgaard Øe in Joined Cases *SEGRO and Horváth* (C-52/16 and C-113/16, EU:C:2017:410, point 122 et seq.).

13 This (again rather simplified) division zooms in on the individual case at the national level and the nature of legal sources applied. There is of course no shortage of other categorisations and approaches, see, for example, Sarmiento, D., 'Who's Afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe', *Common Market Law Review*, Vol. 50, 2013, pp 1267 to 1304; Besselink, L.F.M., 'The Member States, the National Constitutions and the Scope of the Charter', *Maastricht Journal of European and Comparative Law*, Vol. 8, 2001, pp. 68 to 80; Eeckhout, P., 'The EU Charter of Fundamental Rights and the Federal Question', *Common Market Law Review*, Vol. 39, 2002, pp. 945 to 994; Dougan, M., 'Judicial Review of Member State Action Under the General Principle and the Charter: Defining the "Scope of Union Law"', *Common Market Law Review*, Vol. 52, 2015, pp. 1201 to 1245; Fontanelli, F., 'The Implementation of European Union Law by Member States under Article 51(1) of the Charter of Fundamental Rights', *Columbia Journal of European Law*, Vol. 20, 2014, pp. 193 to 247.

14 In the terminology of Lenaerts, K., 'Exploring the Limits of the EU Charter of Fundamental Rights', *European Constitutional Law Review*, Vol. 8, 2012, pp. 375 to 403, at 378.

15 For this debate see Jacobs, F., 'Human Rights in the European Union: The Role of the Court of Justice', *European Law Review*, Vol. 26, 2001, pp. 331 to 341. See, recently, Opinion of Advocate General Saugmandsgaard Øe in Joined Cases *SEGRO and Horváth* (C-52/16 and C-113/16, EU:C:2017:410).

16 Article 291(1) TFEU.

17 See, on this debate, for example: Eeckhout, P., 'The EU Charter of Fundamental Rights and the Federal Question', *Common Market Law Review*, Vol. 39, 2002, pp. 945 to 994, at 976. See also, generally, Groussot, X., Pech, L. and Petursson, G.T., 'The Scope of Application of Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication', *Eric Stein Working Paper* 1/2011.

18 Judgment of 19 November 1998, *SFI* (C-85/97, EU:C:1998:552, paragraph 31).

36. In *Åkerberg Fransson*, to which the present case bears some resemblance, the referring court did not identify the specific provisions of the VAT Directive that the Member State was 'implementing'.[19] However, the Court was able to identify an obligation incumbent upon Member States to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on their territory and for preventing evasion, on the basis of the general provisions of the VAT Directive which establish the general requirements regarding collection of VAT,together with the principle of sincere cooperation enshrined in Article 4(3) TEU.[20]

37. The answer given in *Åkerberg Fransson* was specifically on 'tax penalties and criminal proceedings for tax evasion'.[21] Nonetheless, it could be suggested that rather than formulating a comprehensive test for the assessment of the scope of EU law, that decision represented more of 'a circumloquacious statement of result, rather than a reason for arriving at it'.[22] The question thus remains: does everything concerning VAT in the Member States now come within the scope of EU law?

38. On the one hand, there are situations at the national level which are arguably closer to the specific provisions of the VAT Directive, such as setting out the necessary elements of a VAT declaration (Article 250(1) of the VAT Directive) or providing for effective and dissuasive sanctions in order to prevent evasion (Article 273 of the VAT Directive).

39. On the other hand, the question whether the possibility must exist to inspect the file or the documents contained therein in a VAT procedure at the national level is arguably more difficult to connect to any specific provision of the VAT Directive. Of course, it could be suggested that such a procedural element is still contained within the notion of 'correct collection of VAT' of Article 273 of the VAT Directive. That is, however, precisely the issue: upon such reading of the scope of EU law in VAT cases, is there any element of substance, procedure or institutional structure touching, directly or indirectly, upon VAT collection that would *not* be within the scope of EU law?

40. There is no shortage of intriguing, not to mention absurd, examples:would the question of whether a Member State is obliged to provide for the possibility of filing electronic (as opposed to paper) VAT declarations fall within the scope of EU law? What about various austerity measures touching upon a given national tax administration, such as a considerable reduction in the number of tax commissioners processing VAT declarations, which is likely to slow down VAT collection? Or the modification of the territorial jurisdiction of courts which impacts upon the speed of judicial review of tax cases? Finally, what about the closing down of a cafeteria in a regional tax office in a Member State that leads to a decrease in productivity of the staff working in that office, because they now have to leave the building to get their sandwiches?

41. In all of these cases, the argument could be made that the national measure in question impacts on the 'proper collection of VAT' and thus falls within the scope of EU law. Is this the approach to the definition of the 'scope of EU law' in VAT cases flowing from *Åkerberg Fransson*? Assuming that it is not, the actual difficult question arises: where and how is the line to be drawn?

19 See above footnote 6.

20 Those provisions were Article 2, Article 250(1) and Article 273 of Directive 2006/112, see judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 25). On a similar note, see also judgment of 12 February 2015 in *Surgicare* (C-662/13, EU:C:2015:89, paragraph 20).

21 Judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 27).

22 In slightly different context (in relation to the Court's case-law on the internal market) see Weatherill, S., in Adams., M et al. (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice*, Hart Publishing, Oxford, 2013, p. 87.

4. Proximity, necessity, specificity? The extant case-law

42. It would appear from the Court's decision in *Åkerberg Fransson* that the test is not a *subjective* one: neither the original interest of or the objectives pursued by the Union, nor the intent of the Member State in adopting the national provision in question, seem to be determinant.[23]

43. Thus, the decisive element is likely to be of an *objective* nature. Then, however, the issue of proximity between the EU requirement and the national rule, or, put differently, the specificity/concreteness of the EU rule being implemented becomes highly relevant. An objective test (or certainly an objective approach to a test) could in practice still mean anything between the requirement of complete 'textual mirror' (the provision of EU law must provide for an actual, specific rule which is then transposed to the national level) to seeing the 'proper collection of VAT' as an umbrella provision which makes any national provision touching upon any element of VAT enter the scope of EU law.

44. There are two sets of cases that are of relevance when seeking to ascertain where, between these two potential extremes, a reasonable approach may lie: first, the *general* line of cases dealing with the delineation of the scope of EU law, in particular for the purposes of ascertaining the applicability of EU fundamental rights, and second, the more *specific* cases addressing the same issues in the context of VAT.

(a) The general level

45. The Court has already clarified that a mere 'material' or 'thematic' connection with an instrument or a provision of EU law, or with an area of EU competences does not form a sufficient connection with EU law.[24] The applicability of EU fundamental rights requires a more solid degree of connection, which goes 'above and beyond the matters covered being closely related'.[25]

46. The case-law has moreover advanced several elements which can be used to 'test' the connection with EU law. Some of the elements devised by the Court to ascertain whether a legal situation falls under the scope of EU fundamental rights are 'whether the national legislation at issue is intended to implement a provision of EU law, what the character of that legislation is, and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting that law, and also whether there are specific rules of EU law on the matter or capable of affecting it'.[26]

47. However, those criteria are neither cumulative, nor exhaustive. They merely constitute indicative criteria aimed at providing guidance to national courts.[27] They are all contextually dependent on the legal situation at issue.

23 Opinion of Advocate General Cruz Villalón in *Åkerberg Fransson* (C-617/10, EU:C:2012:340, points 40 to 41 and 60 to 63) proposed an approach based on 'the presence, or even the leading role, of Union law in national law in each particular case', which would then lead to a distinction between situations in which the realisation of (the objectives of) Union law was the *causa* for the adoption of national rules as opposed to situations in which the use of those rules for national enforcement of EU law is a mere incidental *occasio*. However, certainly as far as the outcome of that case was concerned, that approach was not embraced by the Grand Chamber.

24 See, for example, judgment of 10 July 2014, *Julián Hernández and Others* (C-198/13, EU:C:2014:2055, paragraphs 36 and 46 and the case-law cited).

25 See, for example, judgments of 6 March 2014, *Siragusa* (C-206/13, EU:C:2014:126, paragraph 24); of 10 July 2014, *Julián Hernández and Others* (C-198/13, EU:C:2014:2055, paragraph 34); and of 6 October 2016, *Paoletti and Others* (C-218/15, EU:C:2016:748, paragraph 14). See also other pre-Charter cases such as the judgments of 29 May 1997, *Kremzow* (C-299/95, EU:C:1997:254, paragraph 16), and of 18 December 1997, *Annibaldi* (C-309/96, EU:C:1997:631), paragraphs 21 to 23).

26 Several judgments of the Court refer to those criteria: see judgments of 8 November 2012, *Iida* (C-40/11, EU:C:2012:691, paragraph 79); of 8 May 2013, *Ymeraga and Others* (C-87/12, EU:C:2013:291, paragraph 41); of 6 March 2014, *Siragusa* (C-206/13, EU:C:2014:126, paragraph 25); and of 10 July 2014, *Julián Hernández and Others*, C-198/13 (EU:C:2014:2055, paragraph 37).

27 See, in this connection, Thym, D., 'Blaupausenfallen bei der Abgrenzung von Grundgesetz und Grundrechtecharta', *Die öffentliche Verwaltung*, 2014, pp. 941 to 951, at p. 944.

48. It would appear that some *degree of specificity* (or proximity) is required.[28] Nonetheless, that element appears rather flexible. There does not necessarily have to be an *explicit connection* with the national rule at issue.[29] Moreover, the content of the national rule at issue does not have to be completely determined by EU law. National provisions are not required to 'mirror' provisions of EU law so as to fall within the scope of EU law. It is further apparent from the case-law of the Court that in situations in which there is a wide discretion for the Member States,[30] or where the Member States make use of exceptions, or permissible derogations are still within the scope of EU law, EU fundamental rights are applicable.[31] Despite this, the degree of specificity should still go beyond the mere existence of a connection with an EU objective or field of competence: it must reach a certain level of specificity in normative terms.[32]

49. Furthermore, despite the relative importance of the purpose of national measures aimed at implementing EU law,[33] it is not always necessary that the *objectives* pursued by the national provision at issue overlap with those of the specific provisions of EU law which establish the connection with the EU legal order.

50. Thus, for example, when applying the framework decision on the European arrest warrant,[34] Member States must take care that detention conditions are not contrary to the prohibition of inhuman and degrading treatment in Article 4 of the Charter, even though the European arrest warrant does not in any way engage with the determination of standards for the execution of imprisonment penalties or detention conditions.[35] Another example is the case of procedural rights. In *DEB*,[36] the generally applicable provisions of national law governing access to legal aid for legal persons did not specifically intend to implement EU law, and nor did they have exactly the same objective. However, they fell within the scope of EU law for the purposes of the right to effective judicial protection under Article 47 of the Charter in connection to the remedies provided for in EU law — in particular, a procedure for pursuing a claim seeking to establish State liability under EU law. They were *necessary* to ensure that those whose rights and freedoms guaranteed by EU law have been infringed have an effective remedy before a tribunal.

51. The example of *procedural* rights is also significant for another reason: EU law does not always determine or establish specific procedural rules. Rather, it concentrates on the substantive side of the right or obligation. However, procedural rights are necessary to ensure the effectiveness of EU law. It is in consideration of this connection that the Court has declared that even if not expressly regulated by the provisions of EU law establishing substantive rights or obligations, respect for procedural

28 See, to that effect, judgments of 13 June 1996, *Maurin* (C-144/95, EU:C:1996:235, paragraphs 11 and 12); of 6 March 2014, *Siragusa* (C-206/13, EU:C:2014:126, paragraphs 26 and 27); of 22 May 2014, *Érsekcsanádi Mezőgazdasági* (C-56/13, EU:C:2014:352, paragraphs 50 to 56); and of 8 December 2016, *Eurosaneamientos and Others* (C-532/15 and C-538/15, EU:C:2016:932, paragraph 54).

29 Opinion of Advocate General Wathelet in *Berlioz Investment Fund* (C-682/15, EU:C:2017:2, point 44).

30 See, for example, judgments of 13 April 2000, *Karlsson and Others* (C-292/97, EU:C:2000:202, paragraph 35), and of 13 June 2017, *Florescu and Others* (C-258/14, EU:C:2017:448, paragraph 48). See, on this debate, Opinion of Advocate General Saugmandsgaard Øe in *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2017:395, points 52 and 53), and Opinion of Advocate General Bot in *Florescu and Others* (C-258/14, EU:C:2016:995, point 70).

31 See, for example, judgments of 21 December 2011, *N.S. and Others* (C-411/10 and C-493/10, EU:C:2011:865, paragraphs 65 to 68), and of 16 February 2017, *C. K.* and Others (C-578/16 PPU, EU:C:2017:127, paragraph 53).

32 See, to that effect, judgment of 16 May 2017, *Berlioz Investment Fund* (C-682/15, EU:C:2017:373, paragraphs 38 and 39). See also Opinion of Advocate General Wathelet in *Berlioz Investment Fund* (C-682/15, EU:C:2017:2, point 45).

33 See, in particular, judgment of 13 June 2017, *Florescu and Others* (C-258/14, EU:C:2017:448, paragraphs 47 and 48).

34 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24; 'the Framework Decision').

35 Judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraphs 84 and 88).

36 Judgment of 22 December 2010, *DEB* (C-279/09, EU:C:2010:811, paragraph 33 et seq.).

fundamental rights, such as the right to be heard, is required.[37] In particular, the principle of respect for the rights of the defence applies when Member States act or take decisions within the scope of EU law, even if the applicable EU legislation does not expressly provide for specific procedural requirements.[38]

(b) Value added tax

52. Moving to the *specific* level of VAT and tax procedures, the Court has not, in the past, hesitated to include a number of elements of national VAT rules, procedures, and institutions within the scope of EU law, be it specifically under the VAT Directives, or under Treaty provisions. The enforcement of proper collection through sanctions constitutes an 'implementation' of the VAT Directive.[39] The setting up and application of administrative procedures leading to the collection of VAT itself has to be understood as falling within the scope of EU law.[40] As a result, by establishing the appropriate checks and setting out tax assessments, Member States are complying with an obligation imposed by EU law.

53. Indeed, the Court has confirmed that 'the failure to file a VAT return, like the failure to keep accounting records, which would allow VAT to be applied and monitored by the tax authorities, and the failure to record the invoices issued and paid are liable to prevent the correct collection of the tax and, therefore, to compromise the proper functioning of the common system of VAT'.[41] When faced with those situations, Member States are specifically under an obligation 'to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory [... and] are required to check taxable persons' returns, accounts and other relevant documents, and to calculate and collect the tax due'.[42]

54. In addition, the Court has often applied EU fundamental rights in the framework of judicial and administrative proceedings linked to tax collection.[43]

(c) The limit of reasonable functional necessity

55. It is clear that the Court's approach to date has been rather generous. On the imaginary scale outlined above in point 43 of this Opinion, in the particular context of VAT, the Court's slant is indeed more on the side of perceiving the 'proper collection of the VAT' as an 'umbrella provision' which is likely to pull any national rule concerned with that matter within the scope of EU law.

37 See, for example, judgment of 5 November 2014, *Mukarubega* (C-166/13, EU:C:2014:2336, paragraph 49 and the case-law cited).

38 See, to that effect, judgments of 18 December 2008, *Sopropé* (C-349/07, EU:C:2008:746, paragraph 38), and of 3 July 2014, *Kamino International Logistics and Datema Hellmann Worldwide Logistics* (C-129/13 and C-130/13, EU:C:2014:2041, paragraph 31 and the case-law cited).

39 See, for example, judgments of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105); of 8 September 2015, *Taricco and Others* (C-105/14, EU:C:2015:555); and of 5 April 2017, *Orsi and Baldetti* (C-217/15 and C-350/15, EU:C:2017:264). See also my Opinion in *Scialdone* (C-574/15).

40 See, judgment of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 67), where the Court declared that 'an adjustment of VAT after an abusive practice has been found ... constitutes implementation of Articles 2, 250(1) and 273 of the VAT Directive and Article 325 TFEU and, therefore, of EU law, for the purposes of Article 51(1) of the Charter'.

41 See, for example, judgment of 28 July 2016, *Astone* (C-332/15, EU:C:2016:614, paragraph 56 and the case-law cited).

42 See, for example, judgments of 17 July 2008, *Commission* v *Italy* (C-132/06, EU:C:2008:412, paragraph 37); of 29 July 2010, *Profaktor Kulesza, Frankowski, Jóźwiak, Orłowski* (C-188/09, EU:C:2010:454, paragraph 21); and of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 25).

43 See, for example, judgments of 29 March 2012, *Belvedere Costruzioni* (C-500/10, EU:C:2012:186, paragraph 24 et seq.) (regarding limitation periods and the principle of reasonable deadline in the recovery of VAT debts), and of 12 February 2015, *Surgicare* (C-662/13, EU:C:2015:89, paragraph 33) (relating to national administrative procedures applicable when revenue authorities suspect abusive practices). See also, with regard to customs duties, judgments of 18 December 2008, *Sopropé* (C-349/07, EU:C:2008:746, paragraph 34 et seq.) (on the provisions of the General Tax Law of Portugal, establishing general notifications periods), and of 3 July 2014, *Kamino International Logistics and Datema Hellmann Worldwide Logistics* (C-129/13 and C-130/13, EU:C:2014:2041, paragraph 28 et seq.) (concerning the right to be heard).

56. There appears to be, however, at least one limit to such an incidental, umbrella logic. That limit operates as a rule of exclusion from the abovementioned 'umbrella'. It is the rule of (reasonably foreseeable) functional necessity. It could be captured as follows: any national rule instrumental to the effective realisation of an EU law-based obligation on the national level, even if not specifically adopted for that purpose, will fall within the scope of EU law, *unless* the adoption and operation of that national rule is not reasonably necessary in order to enforce the relevant EU law.

57. Thus, in the context of a properly functioning national VAT system, it can reasonably be expected that a Member State provides for administrative procedures for the collection of VAT and any corresponding sanctions that may arise. It may also be expected that within such procedures, taxable persons do enjoy certain basic rights, including the right to be heard or the right to judicial review. The *particular way* in which the Member States concretely provide for those elements remains within their discretion. On a higher level of abstraction, however, there remains the reasonably foreseeable expectation that such elements are a necessary part of correct VAT collection. Conversely, whether the tax declaration will be electronic or paper-based or whether there will be an office cafeteria in a tax office cannot reasonably be seen as a necessary component for the functioning of VAT collection.

(d) A Coda: of lighthouses and shadows

58. It is readily acknowledged that the understanding of the scope of EU law outlined above in cases of a Member States' implementation of EU law is, at best, an approximate rule of thumb. There are two elements in particular that make the capturing of a more broadly applicable rule from the Court's case-law to date difficult.

59. First, today EU law covers a wide array of fields of law. A number of those areas contain legal acts of strikingly different scope and nature. Furthermore, not all of those areas move at the same speed. However, any *generally* applicable jurisdictional rule worthy of that name should be more broadly applicable, that is to say, not limited only to the area of VAT law, but transversally applicable. Indeed, it is hardly conceivable that there should be one test defining the scope of EU law in VAT cases, another one in social security cases, and yet another in the area of judicial cooperation, with a special subtest for cases touching upon criminal law. Equally, that rule should primarily rely on normative criteria, namely *ex ante* discernible normative characteristics of the EU rule and national rules in question, not on their potential social impact.[44]

60. Second, the preliminary rulings procedure is a system of judicial cooperation based on individual cases. Its aim is not to carry out an abstract review of national legislation, but to interpret EU law in the context of a concrete case before the national judge. Within a jurisdiction configured in such a way, it inevitably occurs that in a given case, if it is shown that an element of procedure or institutional structures of a Member State clearly connects to the realisation of an EU law-based right in the individual case, it will effectively fall within the scope of EU law, even if the same national rule, if seen abstractly on its own, would likely be deemed to be outside the scope of EU law.[45]

44 There is no shortage of examples in different areas of EU law that confirm that jurisdictional tests that seek to rely on the later social impact of the rule are difficult (or even impossible) to operate in practice, not to mention the danger that that social impact might change, which would then effectively mean that a national rule could be entering and leaving the scope of EU law over time. An example might include the duty to ascertain whether a national measure has *significant influence on marketing* in order to ascertain whether it constitutes an 'other requirement' that is notifiable under Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ 1998 L 204, p. 37) (see my Opinion in *M. and S.* (C-303/15, EU:C:2016:531, points 63 to 66).

45 See, for example, order of 28 November 2013, *Sociedade Agrícola e Imobiliária da Quinta de S. Paio* (C-258/13, EU:C:2013:810, paragraph 23). That case, like the *DEB* case, concerned access to legal aid of legal persons. However, as the Court declared, 'unlike the case giving rise to the judgment in *DEB* in which the Court interpreted Article 47 of the Charter in an action for State liability brought under Union law, there is no concrete evidence in the order for reference to indicate that Sociedade Agrícola submitted a request for legal aid for a legal action seeking to protect the rights conferred on it by Union law'.

61. However, in contrast to the question of human existence, I do not believe that the issue of being or not being within the scope of EU law must be by definition bipolar: either a case is fully 'in' or it is completely 'out'.

62. The Court has already acknowledged that there is a difference between the situations which are completely determined by EU law, and those in which the Member States retain considerable leeway. In the latter situation, provided that the level of protection of EU fundamental rights is respected, national courts remain free to apply national standards of protection of fundamental rights. [46]

63. Projecting this logic into the question of the scope of EU law, there ought to be a scale, a gradation of falling 'within the scope of EU law', based precisely on the *proximity* to a concrete and specific requirement of EU law: the closer a situation is to a clearly defined requirement of EU law, the less discretion there is on the part of the Member State and the more searching the review. Conversely, the further a case moves from a clear and specific rule of EU law, while still being within the scope of EU law, the greater the discretion on the part of the Member States in the way they implement that obligation.

64. Metaphorically speaking, what is suggested is that instead of searching for the proverbial unicorn of a clear-cut and predicable test of Member States 'acting within the scope of EU law' in the situation of transposition or implementation of EU law, which I must admit that I have difficulty finding in EU law as it stands, the Court could perhaps embrace a certain 'lighthouse approach': the closer to a specific and concrete EU law rule, the less discretion there is on the side of national law. Conversely, the further from the lighthouse, but still touched by its light (that is, without triggering the exclusion rule of the reasonable functional necessity discussed above in points 55 to 57), the less of an intensive review there is.

65. But one point remains clear: where there is light, there must also be shadow (that of EU fundamental rights). [47] If, as a matter of EU law, the Member States are obliged to provide for effective enforcement in the name of EU law, that enforcement must be controlled from the same source, that is, by EU fundamental rights. It would be inconceivable to oblige the Member States to carry out certain activities (such as to effectively collect VAT) while the control of and limits to that exercise would suddenly fall outside of the scope of EU law.

5. The present case

66. The present case concerns the application of national rules of the Code of Fiscal Procedure relating to the individual rights of defence in a procedure for the assessment and collection of VAT.

67. Although the procedural guarantees generally contained in the Code of Fiscal Procedure are not specifically provided for in EU law, those rules form part of the overall process of proper VAT collection. The fact that in a properly run VAT procedure, the tax administration is supposed to communicate with the taxable person, not only in order to provide that person with some information as to the decision to be taken, but also to ascertain the full scope of the relevant facts on which it wishes to base its decision, cannot be seen as an unnecessary or unforeseeable element of the procedure.

46 Judgments of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 29), and of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107, paragraph 60). See, for example, judgment of 30 May 2013, *F.* (C-168/13 PPU, EU:C:2013:358, paragraphs 52 to 55).

47 Thus coming back to the starting point of *Åkerberg Fransson* in point 29 above.

68. As a matter of fact, a tax inspection aimed at verifying whether or not a person became subject to VAT and whether its commercial transactions are duly documented is, on a purely textual basis, no more remote from the wording of Article 213(1) and Article 242 of the VAT Directive than 'tax penalties and criminal proceedings for tax evasion' are from the wording of Article 2, Article 250(1) and Article 273 of the VAT Directive. [48]

69. As a result, the Court has jurisdiction to give an answer to the preliminary question posed by the referring court.

C. Access to the file in VAT collection procedures

70. As a preliminary clarification, the question posed by the referring court concerns only the issue of access to information and documents contained in the administrative file. The present case is thus not concerned with any elements of a (substantive) tax assessment, such as the quality of the Applicants as taxable persons or the determination of the character of taxable transactions.

71. Furthermore, the question as phrased by the referring court explicitly mentions national administrative practice. However, as the Commission submits, it is unclear whether the tax authorities have correctly applied the procedural obligations arising from national law which concern the rights of the defence, including the right to be heard, in the case at hand. Beyond this individual case, the order for reference does not provide any further details as to what the imputed national practice ought to be. Thus, the assessment of whether national administrative practice is in accordance with national law remains a matter for the national court to ascertain.

72. In the light of those clarifications, I consider it necessary to reformulate the question posed by the referring court, in order to enable the Court to give a useful answer: Does the general principle of respect for the rights of the defence require that, in national administrative procedures aimed at the collection of VAT, an individual should have access to all of the information and documents contained in the administrative file and considered by the public authority when it adopted its decision?

73. My answer to that question will be structured as follows: I will first discuss the precise source of the rights at issue in the present case (1), before turning to the question of what precisely the respect for the rights of the defence requires with regard to the access to information and documents in the framework of national administrative procedures implementing the VAT Directive (2).

1. The applicable right or general principle

74. The referring court has posed its question exclusively with regard to the principle of respect for the rights of the defence. [49] This framing of the question is correct, to my mind. Neither Article 48 nor Article 41 of the Charter is applicable to the circumstances of the present case.

75. First, Article 48 of the Charter is not relevant to the present case. That provision lays down the presumption of innocence and rights of the defence which must be enjoyed by a person 'who has been charged'. The Applicants in the main proceedings have not been 'charged'. They were merely subjected to a tax assessment notice establishing their tax obligations. [50]

48 See judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 27).

49 Unlike the judgment of 17 July 2014, *YS and Others* (C-141/12 and C-372/12, EU:C:2014:2081, paragraph 68), where the Court underlined that the question had been exclusively posed with regard to Article 41 of the Charter.

50 See, to that effect, judgment of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 83). In spite of the fact that administrative penalties for late payment have been imposed in the present case, no indications can be found either in the request for a preliminary ruling or in the observations by the parties that would suggest that those penalties would be of a criminal nature.

76. Second, Article 41(2)(b) of the Charter explicitly includes the right of access to the file as a component of the right to good administration. That provision is nonetheless clearly limited to Union institutions, bodies, offices and agencies (a). Moreover, there is a difference between Article 41 of the Charter and the principle of respect for the rights of the defence (b) concerning its precise scope and content.

(a) The right of access to the file as a component of the right to good administration

77. After some initial hesitations,[51] the Court has repeatedly held, in line with the wording of the Charter, that Article 41 of the Charter is addressed only to the institutions, bodies, offices and agencies of the European Union.[52]

78. Such an interpretation has not met with universal acclaim. An opposing view has been voiced, suggesting that that interpretation appears to contradict the general rule concerning the scope of application of Article 51(1) of the Charter. It excludes Member State action even if adopted in implementation of EU law.[53]

79. I must admit that I fail to see any such contradiction, for at least four reasons.

80. First, the text is very clear. Section 1 of Article 41 of the Charter distinctly limits, for the purpose of the entire article, its application to the 'institutions, bodies, offices and agencies of the Union'. In my view, there would have to be extremely strong arguments to effectively judicially rewrite a clear proposition of primary law, one which, moreover, has been enacted quite recently.

81. Second, by explicitly defining the addressees of the provision devoted to the right to good administration, Article 41 of the Charter gives expression to the will of the (constitutional) legislature to adopt specific provisions applicable to the European Union when acting through its *direct administration*. Essentially, as to the applicability of that specific provision of the Charter, Article 41 contains its own *lex specialis* to the general definition of the scope of application of the Charter through its Article 51(1). I see nothing contradictory or inconsistent in such a construction: as a matter of fact, it is quite common that a piece of legislation may define its own (personal, factual) scope of application in different ways. There might be an overall provision on applicability that is generally applicable unless provided otherwise. Indeed, there might be, at the same time, one or more specific provision(s) that define their own scope of application, stating for example that section X or title Y of this act applies only to a given group of persons or in specific situations.

82. Seen in that light, Article 41 of the Charter constitutes a specific expression of an autonomous fundamental right which protects individuals only when they come into contact with the *direct administration* of the European Union, which is portrayed by the Treaties as 'an open, efficient and independent European administration'.[54]

51 See, judgment of 22 November 2012, *M.* (C-277/11, EU:C:2012:744, paragraphs 81 to 84), where the Court declared that the principle of respect for the rights of the defence was affirmed in Article 41 of the Charter, and stated that 'as follows from its very wording, that provision is of general application'.

52 See judgments of 21 December 2011, *Cicala* (C-482/10, EU:C:2011:868, paragraph 28); of 17 July 2014, *YS and Others* (C-141/12 and C-372/12, EU:C:2014:2081, paragraph 67); of 5 November 2014, *Mukarubega* (C-166/13, EU:C:2014:2336, paragraph 44); of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 83); and of 9 March 2017, *Doux* (C-141/15, EU:C:2017:188, paragraph 60).

53 See, Opinion of Advocate General Wathelet in *Boudjlida* (C-249/13, EU:C:2014:2032, point 47) where he argues that: 'It seems to me neither consistent nor in accordance with the case-law of the Court for the wording of Article 41 of the Charter to allow the introduction of an exception to the rule laid down in Article 51 thereof enabling the Member States not to apply an article of the Charter, even when they are implementing Union law. I am therefore clearly in favour of the applicability of Article 41 of the Charter to the Member States when they are implementing Union law …' See also, on this debate, the Opinions of Advocate General Mengozzi in *Bensada Benallal* (C-161/15, EU:C:2016:3, points 28 to 32) and in *M* (C-560/14, EU:C:2016:320, point 27), and of Advocate General Bot in *N.* (C-604/12, EU:C:2013:714, point 36).

54 Article 298(1) TFEU.

83. Third, there is the systematic argument. The limitation of the 'addressees' who are bound to respect and comply with Article 41 of the Charter is consistent with the overall logic of the Charter which, in several of its provisions contained in Title V, sets out specifically the core rights of individuals when they enter into a direct relationship with the EU's administrative and political bodies. [55]

84. Finally, there is the broader constitutional argument. In the context of the robust and well-documented insistence of the constitutional legislature on limiting the expansive potential of Charter rights over non-attributed competences, [56]an explicit limitation of the addressees of some of the Charter's provisions can hardly be seen as an unwanted omission or a mere slip of the pen of the constitutional legislature. [57]

85. In sum, it is my view that Article 41 of the Charter constitutes a provision specifically aimed at the direct administration of the European Union with the purpose of establishing a high and autonomous standard of protection. Article 41 is therefore not applicable in the present case.

(b) The general principle of respect for the rights of the defence and good administration

86. The discussion on the scope of application of Article 41 of the Charter epitomises the more general discussion regarding the interrelation between general principles and Charter rights. [58] Precisely because Article 41 of the Charter defines its scope of application by reference to the *direct* administration of the European Union, its relationship with the principles of good administration and the rights of the defence remains a rather controversial topic. [59]

87. However, it is clear that a number of the different 'operative' components placed under the umbrella of the 'right to good administration' by the second paragraph of Article 41 also reflect specific general principles of EU law. [60] Of particular importance in this regard is the general principles of respect for the rights of the defence, including the right to be heard,or the duty to state reasons. [61]

55 Such as the right of access to documents (Article 42); the right to refer to the European Ombudsman cases of maladministration (Article 43); or the right to petition the European Parliament (Article 44). All of these rights are also logically limited as to their 'addressees'.

56 Article 51(2) of the Charter and Article 6(1) TEU.

57 Some authors expressly link this fact with the reticence of Member States: 'The intention behind such drafting is to reassure Member States that they will not have to take into account the principle of good administration in purely national administrative procedures, including those involving application of Community law', Dutheil de la Rochère, J., 'The EU Charter of Fundamental Rights, Not Binding but Influential: the Example of Good Administration' in Arnull, A., and others (eds), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs*, Oxford University Press, 2007, pp. 157 to 172, at p. 170. See also Kanska, K., 'Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights', *European Law Journal*, Vol. 10, 2004, pp. 296 to 326, at p. 310.

58 See, on this debate, Hofmann, H., and Mihaescu, C., 'The relation between the Charter's Fundamental Rights and the unwritten general principles of EU law: Good administration as the test case', *European Constitutional Law Review*, Vol. 9, 2013, pp. 73 to 101, at 73.

59 See, generally, Mihaescu Evans, B.C., *The right to good administration at the crossroads of the various sources of fundamental rights in the EU integrated administrative system*, Vol. 7, Luxembourg Legal Studies, Nomos, 2015. The 'pre-Charter' case-law specifically applying the *general principle* of good administration to national administrative procedures is rather limited. See judgment of 21 June 2007, *Laub* (C-428/05, EU:C:2007:368, paragraph 25).

60 See, for example, judgment of 8 May 2014, *N.* (C-604/12, EU:C:2014:302, paragraphs 49 and 50), where the Court declared that the right to good administration, enshrined in Article 41 of the Charter reflects a general principle of EU law and held that 'where ... a Member State implements EU law, the requirements pertaining to the right to good administration, including the right of any person to have his or her affairs handled impartially and within a reasonable period of time, are applicable in a procedure for granting subsidiary protection, such as the procedure in question in the main proceedings, which is conducted by the competent national authorities'. See also, to that effect, judgment of 22 November 2012, *M.* (C-277/11, EU:C:2012:744, paragraph 85 et seq.), and Opinion of Advocate General Kokott in *LS Customs Services* (C-46/16, EU:C:2017:247, point 77).

61 See, for example, judgments of 15 October 1987, *Heylens and Others* (222/86, EU:C:1987:442, paragraph 15); of 5 November 2014, *Mukarubega* (C-166/13, EU:C:2014:2336, paragraph 45 et seq.); and of 11 December 2014, *Boudjlida* (C-249/13, EU:C:2014:2431, paragraphs 30 to 34).

88. It is equally clear that the principle of the protection of the rights of the defence, which is pertinent to the circumstances of the present case, is applicable to Member States when they are acting within the scope of EU law, if national authorities are contemplating the adoption of a measure which will adversely affect the person in question.[62]

89. On the other hand, it is doubtful whether such general principles, such as the rights of the defence in the present case, have exactly the same content as Article 41 of the Charter. For one thing, the explicit limitation in the wording of Article 41 of the Charter impedes, as Advocate General Kokott puts it, its content from simply being 'transposed without more ado to bodies of the Member States, even when they are implementing [EU] law'.[63] On a more conceptual level, doing so would come dangerously close to the circumvention of the explicit provision of Article 41 of the Charter.

90. In the light of this important remark, each of the components of Article 41 has to be carefully and independently considered. This is particularly the case for the right of access to the file, which found its way into the wording of Article 41 as a result of a jurisprudential evolution that itself had its origins in the assessment of the practice of EU institutions in the specific field of competition law.[64]

91. In short, the applicable general principle is the respect for the rights of the defence. Its content with regard to the Member States' application of EU law may differ from the (specific and autonomous) guarantees provided for in Article 41 of the Charter, which are applicable to the direct administration of the EU. With all these considerations in mind, I will examine the requirements of the rights of the defence in circumstances such as the ones at issue in the main proceedings in the following section.

2. Access to information and documents forming the basis of a national decision within the scope of EU law

92. The Applicants have submitted that the right of access to the file, enshrined in Article 41(2)(b) of the Charter, is not explicitly regulated in national law with regard to tax procedures.[65] Therefore, taxpayers exercise their right to be heard without having proper access to their file. More precisely, the Applicants have explained that, during the administrative procedure, they did not have access to all the documents contained in their file, in particular, to the documents collected before the tax inspection formally begun.[66] The documents collected prior to the beginning of the fiscal inspection were only included in the file at the jurisdictional stage, at the request of the referring court. Those documents were not included in the annexes mentioned in the original tax assessment notices. They submit that those documents were concealed in order to mask the existence of a tax investigation before the effective beginning of the tax inspection.

62 See, judgment of 22 October 2013, *Sabou* (C-276/12, EU:C:2013:678, paragraph 38 and the case-law cited).

63 Opinion of Advocate General Kokott in *Mello*r (C-75/08, EU:C:2009:32, point 25).

64 See, in this regard, judgment of 7 January 2004, *Aalborg Portland and Others* v *Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 68). See also the Opinion of Advocate General Léger in *BPB Industries and British Gypsum v Commission* (C-310/93 P, EU:C:1994:408, point 112 et seq.). Explaining these 'origins' generally, Nehl, H.P., *Principles of Administrative Procedure in EC Law*, Hart Publishing, Oxford, 1999, p. 45 et seq.

65 They refer to Article 9(1), Article 43(2)(j) and Article 107(2) and (4) of the Code of Fiscal Procedure applicable to the case.

66 In particular, they claim that they were not given access to several pieces of information which might have been relevant. They argue that elements of information retrieved by the tax authorities before the formal opening of the tax inspection, such as consultation with notaries and banks, consultation of various databases, exchanges with other authorities, or requests for assistance from other Member States, should also be covered by the right of access to the file.

93. The applicants further explain that, in the context of national procedures, it is not possible to plead new arguments at the jurisdictional phase — namely once the administrative file has been sent to the judge according to the provisions of national law. The Applicants argue, in particular, that according to the case-law of the Court,[67] the infringement of the right of access to the file cannot be remedied where the access is granted at the stage of the judicial proceedings. In such a situation, according to the Applicants, the person concerned does not have to show that if he had had access to the file the result of the administrative procedure would have been different, but only that he could have used the elements contained in the administrative file for his defence.

94. The Commission and the Romanian Government disagree with the Applicants' arguments. In their view, the rights of the defence have not been infringed in the present case.

95. The Romanian Government submits that the relevant provisions of national law guarantee the right to be heard before a decision is taken and the right of the taxpayer to be informed throughout the procedure.[68] National law provides that the tax authority shall present to the taxpayer the draft tax inspection report, which contains the findings of the inspection and the tax consequences, and which gives the taxpayer the possibility to express his view. The final tax inspection report is communicated to the taxpayer with its annexes, containing all the relevant documents taken into account by the administration as the basis of the tax assessment notice. Furthermore, the Romanian Government states that the infringement of those requirements leads to the annulment of the fiscal administrative act.

96. In the same vein, the Commission submits that there is no violation of the rights of the defence. The Applicants have not requested access to their file and have not responded to the invitations of the tax authorities to have access to documents in the framework of the jurisdictional procedures. The Applicants have not invoked the lack of knowledge of the documents forming the basis of the tax decision. According to the Commission, the right to be heard is respected where the decision is based on elements communicated by the applicant and regarding a legal and factual context which is known to him or her. Moreover, with regard to access to the file at the jurisdictional stage, the Commission argues that the Applicants have not shown that the documents to which they did not have access, and on the basis of which the decision was taken, could have been invoked in their defence.

97. In my view, the arguments of the Applicants cannot be upheld. Before explaining in detail why that is the case, a few clarifications are necessary.

(a) Access to what exactly?

98. Part of the problem of this case, which was already apparent at the stage of admissibility, is the distinct lack of clarity as to precisely what access is sought by the Applicants and what should have been granted to them and what was not. This lack of clarity was further amplified at the hearing, where it became apparent that different parties understood 'access to a file' to mean rather different things. Thus, the exact content of the information sought in the present case remains elusive.

99. For that reason, before proceeding further in the analysis of the preliminary question, three variables ought to be clarified: access to *what*, *when*, and *how*.

67 The Applicants have repeatedly referred in their oral and written submissions to the judgment of 25 October 2011, *Solvay* v *Commission* (C-109/10 P, EU:C:2011:686, paragraphs 54 to 57).

68 They refer to Articles 9, 43 and 107 of the Code of Fiscal Procedure, cited in points 10 to 12 of the present Opinion.

100. The 'what' alludes to the object of the right of access: what exactly is a 'file' to which access is sought? The complete set of documents contained in an administrative file relating to the entire procedure, or only the specific documents in the file forming the basis of a decision? The complete file would presumably mean the entire file, including all the elements not directly relating to a decision adopted, such as some internal notes, drafts, auxiliary calculations, and all the information obtained from third parties.

101. The 'when' refers to the 'timing' of access and to the fact that information and documents may have been retrieved at different times: the preliminary enquiries, the period of formal administrative investigation leading to the tax assessment or the subsequent enforcement phase.

102. The 'how' relates to the manner in which access is granted: it can be at the request of the applicants, or following an invitation from the tax authority, or it should perhaps be granted *ex officio*, which would presumably mean the tax authority would be obliged to copy and send the file or parts of it to the applicant without being specifically requested to do so.

103. If I have understood the submissions of the Applicants correctly, as further explored at the hearing, they seem to seek to have automatic access to the entire administrative file concerning the tax assessment procedure, even reaching the stages of the preliminary enquiry, and that access to the file should be granted to them *ex officio* by the authorities, with no need for them to even request it.

104. The answer to that proposition is, in my view, a clear 'no': the general principle of EU law of respect for the rights of the defence does not guarantee any such right. What can, in my understanding, be inferred from the rights of the defence in the framework of national proceedings such as the present is much more circumscribed and nuanced: the individual should have access, upon request, to the information and documents forming the basis of the administrative decision that the administration contemplates adopting.

(b) The (failing) analogy with the right of access to the file in EU competition law

105. In order to support their arguments, the Applicants have relied on the case-law of this Court relating to access to the file in competition law cases. First, they claim that, according to this line of case-law, there is a right of access to the entire file. Second, they argue that the consequences of an infringement of that right leads to annulment of the decision if the interested person could have used the documents in his defence.

106. The case-law of the Court confirms that the assessment of whether an infringement of the rights of the defence has occurred in a particular case ought to be made having regard not only to the specific circumstances at issue, but also to the nature of the act concerned and the legal rules governing the matter in question.[69] That means that the specific requirements arising from the principle of respect for the rights of the defence and the consequences arising from an infringement thereof may differ depending on the abovementioned elements. In this connection, it is relevant to take due account of the scheme and scope of the EU law provisions within which a Member State is acting since, where those provisions do not establish specific procedural safeguards (and thus EU law cannot be deemed to have completely determined the legal situation), the rights of the defence are to be, in principle, guaranteed through national procedural law.

69 See, for example, judgments of 5 November 2014, *Mukarubega* (C-166/13, EU:C:2014:2336, paragraph 54), and of 16 May 2017, *Berlioz Investment Fund* (C-682/15, EU:C:2017:373, paragraph 97 and the case-law cited).

107. In this connection, the abovementioned propositions made by the Applicants disregard the fundamental difference between the nature of competition law cases and other, general national procedures that are carried out within the scope of EU law, such as the VAT collection procedure. Two crucial differences ought to be stressed in particular.

108. First, the nature of the procedures is simply very different. Competition law imposes sanctions of a nature and degree that reach a quasi-criminal nature.[70] By contrast, the procedures in the present case are concerned with ascertaining the amount of the tax due.[71] Unless one subscribes to rather peripheral streams of political philosophy, raising and collecting tax is unlikely to be understood as criminal in nature.

109. Second, the case-law on access to the file in EU competition law proceedings lays down an autonomous standard applicable to the actions of EU institutions in the context of the adoption of decisions imposing sanctions. Those procedures and their consequences are governed solely and exclusively by EU law. The standard of protection must thus be appropriately robust and elevated as a matter of EU law, as only EU institutions can adopt and review such decisions. It is in that specific context that the particular case-law on the right of access to the file in competition cases has been developed, in parallel with an evolution of the administrative practice and regulation of that issue at EU level.[72]

110. By contrast, in the absence of specific procedural EU law rules, the procedural conditions for respect for the rights of the defence and the consequences of infringements of those rights are in principle governed by national law.[73] There are, of course, requirements as a matter of EU law, but those are, in the reasoning already outlined,[74] set at a different level.

111. The case-law adduced by the Applicants in the present proceedings is therefore not transposable to national procedures for the collection of VAT.

(c) Effectiveness of the right of the defence

112. Where then might those standards lie? The limits as to the choice to be exercised by the Member States in this regard emanate from the well-known requirements of equivalence and effectiveness. National procedural rules ought to be similar to those applicable to comparable situations under national law. They should not make it impossible or excessively difficult to exercise the rights of the defence conferred by EU law.[75]

113. In my view, and subject to the verification of the national court, it has not been demonstrated that the national procedural provisions at issue in the present case would infringe the requirements of equivalence and effectiveness.

70 See, to that effect, judgment of 8 July 1999, *Hüls* v *Commission* (C-199/92 P, EU:C:1999:358, paragraph 150). See also judgment of the European Court of Human Rights of 27 September 2011, *A. Menarini Diagnostics S.r.l. v. Italy* (CE:ECHR:2011:0927JUD004350908, §§ 38 to 42). Accordingly, the Court has declared that Article 48 of the Charter applies in the context of competition law proceedings. See, for example, judgment of 22 November 2012, *E.ON Energie* v *Commission* (C-89/11 P, EU:C:2012:738, paragraphs 72 and 73).

71 See above, footnote 50.

72 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

73 See, for example, judgments of 10 September 2013, *G. and R.* (C-383/13 PPU, EU:C:2013:533, paragraph 35); of 3 July 2014, *Kamino International Logistics and Datema Hellmann Worldwide Logistics* (C-129/13 and C-130/13, EU:C:2014:2041, paragraph 75); and of 11 December 2014, *Boudjlida* (C-249/13, EU:C:2014:2431, paragraph 41).

74 Above, points 62 to 65 of this Opinion.

75 See, to that effect, judgments of 18 December 2008, *Sopropé* (C-349/07, EU:C:2008:746, paragraph 38), and of 3 July 2014, *Kamino International Logistics and Datema Hellmann Worldwide Logistics* (C-129/13 and C-130/13, EU:C:2014:2041, paragraph 75).

114. As for the first of those requirements, it ought to be noted that the present case is concerned with general procedural tax rules which are not specific to VAT. Thus, the requirement of *equivalence* is by definition satisfied.

115. The examination of the requirement of *effectiveness* is more complex. Its examination effectively overlaps with the assessment of the substantive content of the rights of the defence. [76]

116. First, access to file as such, understood as the *complete* set of documents and information in possession of the administrative authorities, should be clearly distinguished from the right to have access to the documents upon which the final administrative decision is based.

117. Access to the documents and information that form the basis of an administrative decision is indeed closely connected with the effective respect for the rights of the defence, as a general principle of EU law, and in particular, with the right to be heard. In accordance with that principle, 'the addressees of decisions which significantly affect their interests must be placed in a position in which they can effectively make known their views as regards the *information on which the authorities intend to base their decision*'. [77]

118. The relevance of the right to be heard has been explained by the Court in the following terms: 'the purpose of the rule ... is to enable the competent authority effectively to take into account all relevant information. In order to ensure that the person or undertaking concerned is in fact protected, the purpose of that rule is, inter alia, to enable them to correct an error or submit such information relating to their personal circumstances as will argue in favour of the adoption or non-adoption of the decision, or in favour of its having a specific content'. [78]

119. I consider that access defined as such, to the information or documents that form the basis of an administrative decision, appropriately and effectively guarantees the right to be heard and thus the rights of the defence. It enables the taxpayer to make his position known with regard to the key elements which form the basis for the administrative decision.

120. Moreover, it might also be added that such a timely and appropriate exchange is not solely in the interest of the taxpayer. It is also in the interest of the tax administration to adopt a correct decision on the basis of all the pertinent information. That type of exchange provides for a collaborative set-up enabling fluid communication between the individual and the administration.

121. Thus, there is no right to see the complete file, but rather to have access to the key information or documents that form the basis for the administrative decision. Furthermore, as far as the temporal element translating into the scope of information is concerned, I share the view of the Commission, according to which the investigation stage in which the information has been collected is to be distinguished from the contradictory phase. [79] Therefore, to the extent that such documents do not form the basis of a decision, I do not see the obligation, as a matter of EU law, to give access to all the documents and information collected during the investigation phase, even if the information collected in that preliminary phase might have contributed to triggering the adoption of the proposed adjustment.

76 See, for example, that the Court has declared that the requirements of equivalence and effectiveness 'embody' the rights of the defence. See judgments of 5 November 2014, *Mukarubega* (C-166/13, EU:C:2014:2336, paragraph 52), and of 11 December 2014, *Boudjlida* (C-249/13, EU:C:2014:2431, paragraph 42).

77 See, for example, judgments of 18 December 2008, *Sopropé* (C-349/07, EU:C:2008:746, paragraph 37), and of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 84) — emphasis added.

78 See, for example, judgment of 3 July 2014, *Kamino International Logistics and Datema Hellmann Worldwide Logistics* (C-129/13 and C-130/13, EU:C:2014:2041 paragraph 38 and the case- law cited).

79 Judgment of 22 October 2013, *Sabou* (C-276/12, EU:C:2013:678, paragraphs 40 and 41).

122. Finally, it ought to be noted that, as the Commission rightly argues, there is not, in my view, a requirement to provide the pertinent documents or information *ex officio*. Taxpayers can be expected to act with due diligence in the framework of the procedure affecting them. The national procedural framework must establish the avenues to make it possible for the taxable person to have access to the pertinent information should he wish to, that is, upon request. [80]

123. In the present case, as the Commission and the Romanian Government submit, the applicable provisions of national law seem to provide for the right to express the taxable person's point of view concerning the relevant facts and circumstances prior to the adoption of the decision (Article 9(1) of the Code of Fiscal Procedure). They also set out the right to be informed, and in particular, to receive the draft tax inspection report which contains the findings and the tax consequences (Article 107(2) of the Code of Fiscal Procedure).

124. In my view, and subject to the verification of the national court, that legal framework does not appear to make the realisation of the right to be heard impossible or excessively difficult. As already stated, it is for the national court to ascertain whether those rules have been complied with in the individual case of the Applicants and whether there might be other, potentially problematic elements in the national administrative practice. [81]

125. Finally, as regards the argument of the Applicants concerning the barring of new pleas at the jurisdictional stage, there is no evidence before this Court allowing a proper assessment of that issue. That issue has not been put forward in the order for reference submitted by the national court. It has been invoked by the Applicants in the course of these proceedings, but strongly contested by the Romanian Government. In such circumstances, it can only be recalled that the right to an effective judicial remedy enshrined in Article 47 of the Charter entails that the courts reviewing the legality of decisions implementing EU law 'must be able to verify whether the evidence on which that decision is founded has been obtained and used in breach of the rights guaranteed by EU law and, especially, by the Charter'. [82]

126. In the light of the foregoing, it is my view that the question posed by the referring court should be answered in the following way: the general principle of respect for the rights of the defence requires that, in a national VAT collection procedure, an individual should have access, upon request, to the information and documents forming the basis of the administrative decision setting out his VAT obligations.

V. Conclusion

127. In the light of the aforementioned considerations, I propose that the Court of Justice answer the question posed by the Curtea de Apel Cluj (Court of Appeal, Cluj, Romania) as follows:

The general principle of respect for the rights of the defence requires that, in a national value added tax collection procedure, an individual should have access, upon request, to the information and documents forming the basis of the administrative decision setting out his VAT obligations.

80 Several instruments are in line with this view, such as the Council of Europe Committee of Ministers Resolution (77) 31 on the protection of the individual in relation to the acts of administrative authorities (Principle II) or the European Code of Good Administrative Behaviour adopted by the European Ombudsman (Article 22).

81 Above, point 71 of this Opinion.

82 Judgment of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 87).