



Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 11 July 2019¹

Joined Cases C-469/18 and C-470/18

IN (C-469/18)
JM (C-470/18)
v
Belgische Staat

(Request for a preliminary ruling from the Hof van Cassatie (Court of Cassation, Belgium))

(Reference for a preliminary ruling — Taxation — Right to an effective remedy — Judicial review of a tax assessment notice — Competence of the Court of Justice in the context of income tax assessment — Use of evidence allegedly obtained by the tax administration in violation of the right to respect for private and family life — Obligation of the judge to disregard that evidence)

I. Introduction

1. Is a Member State implementing Union law if its tax authorities use, for an income tax assessment, evidence that the investigating authorities obtained after the discovery of a VAT carousel? In other words, does a breach of fundamental rights of the European Union when gathering evidence lead to a prohibition on the use of evidence in the context of an income tax assessment? These are essentially the questions that the Court of Justice has to consider by means of two requests for a preliminary ruling from the Hof van cassatie (Court of Cassation, Belgium).

2. The questions are asked against the background of criminal investigations in the context of which Luxembourg transferred evidence to Belgium in breach of a provision stipulating judicial authority provided for in an international agreement. This evidence was used at least for the income tax assessments. It is only these assessments that are contested by the appellants in cassation in the main proceedings ('the appellants in cassation').

3. The matter at issue is therefore the application of the Charter of Fundamental Rights of the European Union ('the Charter') — Article 47 of the Charter in this case — in the context of income tax assessment. This matter goes beyond the much-discussed² *Åkerberg Fransson* judgment from 2013.³ In that judgment, the Court ruled that criminal proceedings regarding VAT fraud serve to 'implement ... Union law' within the meaning of Article 51(1) of the Charter. It is now necessary to examine whether the assessment of income tax serves to implement Union law if evidence that was obtained during a pre-trial investigation initiated due to suspicion of VAT fraud is used.

¹ Original language: German.

² See, inter alia, the statements of the Bundesverfassungsgericht (Federal Constitutional Court, 'BVerfG'), judgment of 24 April 2013, *Antiterrordatei* (1 BVR 1215/07, BVerfGE (Federal Constitutional Court Decisions) 133, 277, ECLI:DE:BVerfG:2013:rs20130424.1bvr121507, paragraph 91).

³ Judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105).

II. Legal framework

A. *International law*

4. The Treaty on Extradition and Mutual Assistance in Criminal Matters signed on 27 June 1962 in Brussels exists between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands ('the Benelux Treaty').

5. Article 20(1) and (2) of the Benelux Treaty reads as follows:

'(1) At the request of the requesting party, the requested party shall, in so far as is permitted by its law, seize and hand over property:

(a) which may serve as evidence;

(b) which has been acquired as a result of the offence or was found before or after the surrender of the person arrested.

(2) The transfer is subject to the approval of the pre-trial division (Raadkamer/Chambre du Conseil) of the first-instance court of the place where the search and seizure took place. The pre-trial division shall decide whether the seized property is to be transferred in whole or in part to the requesting party. It may order the return of property that is not directly related to the charge brought against the suspect, and, where appropriate, shall decide on objections from third parties who were in possession of the property, or from other entitled persons.'

6. Article 24(2) of the Benelux Treaty provides:

'However, letters rogatory for purposes of search and seizure shall be executed only in respect of offences which can give rise to extradition on the basis of this Treaty, and subject to Article 20(2).'

B. *Belgian law*

7. Belgian tax law does not make provision for an absolute prohibition on the use of unlawfully obtained evidence. However, the Hof van cassatie (Court of Cassation) has developed case-law, which is referred to as 'tax Antigone'. According to 'tax Antigone', the use of unlawfully obtained evidence in tax cases is impermissible only if the documentary evidence has been obtained in a such manner that the use must be regarded as impermissible in all circumstances, or if the use compromises the taxpayer's right to a fair trial. This must be assessed by the court by means of an overall evaluation.

III. The facts and the main proceedings

8. The appellants in cassation are managing directors of trading and distribution companies for computers and computer parts in Belgium.

9. In 1995, the Bijzondere Belastinginspectie (Belgian Special Tax Inspectorate) opened investigations in connection with VAT carousel fraud against the companies of the appellants in cassation. At the instigation of the Belgian Special Tax Inspectorate, criminal investigations were also initiated against those companies in 1996. Whether these investigations related to the evasion of value added tax or income tax is not clear from the requests for a preliminary ruling.

10. In the context of the criminal investigations, the Belgian criminal prosecution authorities sent a letter rogatory to the Grand Duchy of Luxembourg, which led to the seizure of bank documents at a Luxembourg bank on 15 July 1998. Both a Luxembourg examining magistrate and a Belgian judge were present during the seizure.

11. The Luxembourg authorities handed the documents thus obtained over to the Belgian criminal prosecution authorities without having applied for — let alone obtained — the authorisation of a Luxembourg court, as provided for in Article 20(2) of the Benelux Treaty.

12. The Belgian criminal prosecution authorities granted the Belgian tax authorities access to the case file in the criminal proceedings. Based on the information thus obtained, the Belgian tax authorities sent the appellants in cassation, in 1999 and 2000, notices of assessment adjusting the personal income tax return for the 1997 and 1998 tax years. The authorities taxed the sums that had been transferred to a Luxembourg account of the appellants in cassation as gross profits from industrial and commercial activities.

13. In response to the appeals lodged against these notices of assessment, the Belgian first-instance Finance Court exempted the appellants in cassation from a significant proportion of the additional personal income tax assessments.

14. In response to the appeal on the merits lodged by the respondents in cassation in the main proceedings, the Court of Appeal annulled the first-instance judgment to the extent that it had granted an exemption for the personal income tax assessments. It took the view that the requirements for a prohibition on the use of evidence had not been met according to the Belgian ‘tax Antigone’ doctrine. The appellants in cassation lodged an appeal in cassation against that judgment with the Hof van cassatie (Court of Cassation).

IV. Request for a preliminary ruling and proceedings before the Court of Justice

15. By orders of 28 June 2018, the Hof van cassatie (Court of Cassation) referred the following question to the Court of Justice for a preliminary ruling:

‘Should Article 47 of the Charter, in cases of value added tax, be interpreted as precluding in all circumstances the use of evidence obtained in violation of the right to respect for private life as guaranteed by Article 7 of the Charter, or does it leave room for a national regulation under which the court which has to decide whether such a piece of evidence can be used as the basis for a VAT assessment has to make an evaluation such as the one set out above under paragraph 4 of this judgment (see point 7 above)?’

16. On 6 September 2018, the President of the Court decided to join Cases C-469/18 and C-470/18 for the purposes of the written and oral procedure and the judgment.

17. The appellants in cassation, the Kingdom of Belgium, the Italian Republic, the Kingdom of the Netherlands and the European Commission submitted written observations in the preliminary ruling proceedings before the Court.

V. Admissibility of the question referred

18. It is firstly necessary to clarify whether the question referred is admissible. The reason for this is that the Hof van cassatie (Court of Cassation) expressly asks whether certain evidence may be used for a ‘VAT assessment’. However, the subject matter of the dispute in the main proceedings is not VAT assessments, but income tax assessments. Thus, it would be obvious that the question referred

bears no relation to the purpose of the main action and would be hypothetical and therefore inadmissible.⁴

19. It is settled case-law that, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the question referred to it.⁵

20. In the question referred by it, the Hof van cassatie (Court of Cassation) cannot have meant the use of evidence for a VAT assessment, because the requests for a preliminary ruling refer not to VAT assessments, but solely to income tax assessments. The term ‘VAT assessment’ appears to be an error in drafting and should therefore be replaced by the term ‘income tax assessment’.

21. In addition, the Hof van cassatie (Court of Cassation) asks about the permissibility of using evidence for that assessment ‘in cases of value added tax’. In the present case, the only link that can be seen between the assessment of income tax and VAT is the fact that it was a suspicion of VAT fraud that triggered the tax and criminal investigations, as a result of which evidence was collected and used in the income tax assessment.

22. The Court of Justice may therefore reformulate the question referred such that it asks whether Article 47 of the Charter should be interpreted as precluding in all circumstances the use, in an income tax assessment, of evidence obtained in violation of Article 7 of the Charter during a pre-trial investigation initiated due to suspicion of VAT fraud, or does it allow an interpretation according to which the court which has to decide whether such evidence may be used for an income tax assessment must carry out an evaluation on a case-by-case basis.

23. Reformulated as such, the request for a preliminary ruling is admissible.

VI. Jurisdiction of the Court of Justice

24. However, pursuant to Article 267(1)(a) TFEU, the Court of Justice has jurisdiction to give preliminary rulings concerning the interpretation of EU law. It is questionable in this respect, however, whether the Charter is relevant from a temporal (point 25 et seq.) and material perspective (point 30 et seq.).

A. Temporal applicability of the Charter

25. It is firstly necessary to clarify whether the Charter, which entered into force on 1 December 2009, is temporally applicable to an alleged breach of procedure in 1998.

26. On the one hand, in the *Sabou* case, which also pertains to the field of direct taxation, the Court of Justice ruled that the Charter is not applicable because the mutual assistance procedure which led to the additional notice of assessment that was the subject matter of that dispute had ended before the Charter entered into force.⁶

⁴ See, only recently, judgment of 28 March 2019, *Verlezza and Others* (C-487/17 to C-489/17, EU:C:2019:270, paragraph 29 and the case-law cited).

⁵ Most recently, judgments of 11 March 2008, *Jager* (C-420/06, EU:C:2008:152, paragraph 46); of 8 December 2011, *Banco Bilbao Vizcaya Argentaria* (C-157/10, EU:C:2011:813, paragraph 18); and of 28 February 2013, *Petersen and Petersen* (C-544/11, EU:C:2013:124, paragraph 23).

⁶ Judgment of 22 October 2013, *Sabou* (C-276/12, EU:C:2013:678, paragraph 25), following my Opinion in the same case (EU:C:2013:370, point 34).

27. On the other hand, the *Åkerberg Fransson* case, for instance, also concerned notices of assessment from the period before 1 December 2009. However, the criminal law judge had to take the *ne bis in idem* principle into account in his decision in that case. That period fell within the temporal scope of the Charter.

28. The situation in the present case is similar. Even if the gathering of evidence took place in 1998, the question regarding the use of the evidence arises for the national court at the time of its decision and therefore after the entry into force of the Charter.

29. Whereas — as in the *Sabou* case referred to in point 26 — the process of informing the taxpayer of the request for assistance and any participation in the formulation of the request is completed when the mutual assistance procedure ends, any prohibition on the gathering of evidence remains important for the evaluation regarding a prohibition on the use of evidence. As a result, the Charter is temporally applicable in the present case.

B. Material applicability of the Charter

30. The scope of the Charter is defined in Article 51 thereof. Pursuant to the first sentence of the first paragraph of that provision, the Charter is addressed to the Member States only when they are implementing Union law.

31. In this respect the Court has already observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law.⁷

32. Several parties to the proceedings have doubts regarding the jurisdiction of the Court of Justice on account of the Charter not being applicable. Both Belgium and the Commission take the view that the Court of Justice lacks jurisdiction because the issuing of income tax assessments does not serve to implement Union law. Even the Hof van cassatie (Court of Cassation) observes that the present case ‘concerns income taxes, which are not governed by EU law’.⁸

33. In order nevertheless to substantiate the applicability of the Charter, two connecting factors come into consideration in the present case: in addition to mutual assistance (point 34 et seq.), this is primarily the harmonisation of VAT under EU law (point 38 et seq.) in the present case.

1. Implementation of Union law in the context of mutual assistance

34. Firstly, there could be implementation of Union law within the meaning of Article 51(1) of the Charter if the evidence had been obtained by means of mutual assistance pursuant to Directive 77/799 (‘the Mutual Assistance Directive’).⁹

⁷ Judgments of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 19); of 30 April 2014, *Pfleger and Others* (C-390/12, EU:C:2014:281, paragraph 33); of 27 March 2014, *Torralbo Marcos* (C-265/13, EU:C:2014:187, paragraph 29); of 6 October 2015, *Delvigne* (C-650/13, EU:C:2015:648, paragraph 26); of 30 June 2016, *Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci* (C-205/15, EU:C:2016:499, paragraph 23); and of 8 December 2016, *Eurosaneamientos and Others* (C-532/15 and C-538/15, EU:C:2016:932, paragraph 52).

⁸ Paragraph 11 of the requests for a preliminary ruling.

⁹ Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15), since repealed by Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ 2011 L 64, p. 1); See, to that effect, for instance, pending Cases C-245/19, *State of the Grand Duchy of Luxembourg* and C-246/19, *State of the Grand Duchy of Luxembourg*.

35. The Mutual Assistance Directive governs only administrative cooperation in the field of taxation, and not mutual assistance in criminal matters, like the Benelux Treaty, for instance. In substance, administrative assistance is confined to cooperation between the Member States with regard to the exchange of information, whereas, in the context of mutual assistance in criminal matters, specific investigative measures for obtaining evidence can be implemented.

36. On the one hand, the transfer of bank documents which is the subject matter of the dispute goes beyond the mere exchange of information in the context of mutual assistance. Rather, that evidence was seized on the basis of a letter rogatory. On the other hand, mutual assistance in criminal matters had not yet been harmonised when the evidence was gathered in 1998.¹⁰

37. In the present case, implementation of Union law therefore cannot be assumed on the basis of the mutual assistance granted.

2. The assessment of income tax as implementation of Union law

38. Thus, it would have to be possible for the assessment of income tax to be regarded as implementation of Union law. In principle, the assessment of income tax does not constitute implementation of Union law, owing to a lack of provisions of Union law in that area.

39. Income tax law is governed only sporadically in secondary law on the basis of Article 115 TFEU (Parent-Subsidiary Directive,¹¹ Merger Directive,¹² Interest and Royalties Directive,¹³ and Directive laying down rules against tax avoidance practices¹⁴). Moreover, pursuant to settled case-law, direct taxation falls within the competence of the Member States.¹⁵ The personal income tax on which the main proceedings are based is direct income tax, for which Belgium is therefore solely competent.

40. However, the special nature of the present case resides in the fact that evidence that the Belgian criminal prosecution authorities obtained during a pre-trial investigation initiated due to suspicion of VAT fraud was used for the assessment of income tax.

(a) VAT law as implementation of Union law

41. If the legal instruments contested in the main proceedings were notices of VAT assessment, implementation of Union law within the meaning of Article 51(1) of the Charter could be assumed. The reason for this is that, on the one hand, the Court of Justice has ruled that it follows from Articles 2, 250(1) and 273 of Directive 2006/112 (the VAT Directive)¹⁶ and Article 4(3) TEU that

¹⁰ See what is now Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (OJ 2014 L 130, p. 1).

¹¹ Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 2011 L 345, p. 8).

¹² Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States (OJ 2009 L 310, p. 34).

¹³ Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (OJ 2003 L 157, p. 49).

¹⁴ Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (OJ 2016 L 193, p. 1).

¹⁵ Judgments of 7 September 2004, *Manninen* (C-319/02, EU:C:2004:484, paragraph 19); of 25 October 2007, *Porto Antico di Genova* (C-427/05, EU:C:2007:630, paragraph 10); and, recently, of 19 December 2018, *Cadeddu* (C-667/17, EU:C:2018:1036, paragraph 15).

¹⁶ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1); however, Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization 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) was still applicable in the period of the VAT carousel underlying the facts of the present case.

every Member State is under an obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory.¹⁷ An adjustment of VAT after an abusive practice has been found constitutes implementation of EU law, for the purposes of Article 51(1) of the Charter.¹⁸

42. On the other hand, even if Union law does not contain any provisions regarding either fiscal criminal law or administrative sanctions, sanctions that are intended to ensure that the correct amount of VAT is collected and to counter fraud pursuant to Article 325 TFEU serve to ‘implement ... Union law’ within the meaning of Article 51(1) of the Charter.¹⁹

43. It is not clear from the facts communicated by the Hof van cassatie (Court of Cassation) which measures under VAT law and which criminal sanctions Belgium adopted owing to VAT fraud. The referrals relate solely to measures under income tax law, that is to say the income tax assessments.

(b) Gathering of evidence in preliminary investigations due to suspicion of VAT fraud as implementation of Union law

44. However, the evidence that was used for the assessment of income tax was not gathered by for instance the tax authorities in the context of their own investigations. In fact, it originates from criminal investigations that were opened following a report made by the Belgian Special Tax Inspectorate in connection with VAT carousel fraud. Such gathering of evidence in the context of criminal investigations could constitute implementation of Union law within the meaning of Article 51(1) of the Charter.

45. Criminal law lies at the heart of national sovereignty.²⁰ The Union has only limited competence in this area (Article 83 and Article 325(4) TFEU). Moreover, the substantive and procedural criminal laws of the Member States have not been harmonised at EU level.²¹ Competence in the area of criminal law therefore rests in principle with the Member States.

46. However, in *Åkerberg Fransson*, the Court ruled, in relation to criminal court proceedings for VAT-related offences, that not only tax penalties but also criminal proceedings for tax evasion owing to the provision of false information concerning VAT constitute implementation of European Union law for the purposes of Article 51(1) of the Charter.²² The Court stated that, in view of the obligations arising from the VAT Directive, Article 4(3) TEU and Article 325 TFEU, the fact that the national legislation on sanctions and procedural rules had not been adopted to transpose the VAT Directive was irrelevant.²³

47. The Court subsequently developed the principle of effectiveness of the prosecution of VAT offences.²⁴ According to the principle of effectiveness of the prosecution of VAT offences, the Member States are obliged to penalise effectively infringements of the VAT Directive.

17 Judgments of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 25); of 20 March 2018, *Menci* (C-524/15, EU:C:2018:197, paragraph 18); and of 21 November 2018, *Fontana* (C-648/16, EU:C:2018:932, paragraph 33).

18 Judgment of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 67). See Opinion of Advocate General Bobek in *Ispas* (C-298/16, EU:C:2017:650, point 52).

19 Judgments of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraphs 26 and 27); of 5 April 2017, *Orsi and Baldetti* (C-217/15 and C-350/15, EU:C:2017:264, paragraph 16); and of 20 March 2018, *Menci* (C-524/15, EU:C:2018:197, paragraph 21).

20 See Opinion of Advocate General Bot in *Ognyanov* (C-554/14, EU:C:2016:319, point 121).

21 Judgment of 27 May 2014, *Spasic* (C-129/14 PPU, EU:C:2014:586, paragraph 76).

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

23 See judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 28).

24 Judgment of 17 January 2019, *Dzivev and Others* (C-310/16, EU:C:2019:30, operative part of the judgment and paragraphs 39 and 41).

48. However, according to the Court,²⁵ the principle of effectiveness of the prosecution of VAT offences must be respected not only during the trial procedure, but also as early as during the stage of the preliminary criminal investigation, ‘from the moment when the person concerned becomes an accused’.

49. However, the precise time to which this refers is not entirely clear from the case-law. On the one hand, the relevant time could be the official notification given by the competent authority of an allegation that a criminal offence has been committed.²⁶ However, not all legal regimes make provision for such an official notification of the opening of a preliminary investigation. If the preliminary investigation is terminated, an accused is sometimes completely unaware that he had been the subject of a preliminary investigation. Were such an official notification to be used as the basis, the determination of the point from which the fundamental rights under the Charter are to apply would lie in the hands of the investigating authorities.

50. In this respect, it must be sufficient that the case files show that criminal investigations were opened for the purpose of prosecuting VAT fraud. This point in time can be determined in a reliable manner. From that point in time, the authority is thus bound by fundamental rights of the European Union, even in the context of its criminal investigations.

51. However, it is unclear in the present case whether the criminal investigations and the gathering of evidence took place for the purpose of prosecuting VAT fraud or for the purpose of prosecuting income tax fraud. In principle, the Hof van cassatie (Court of Cassation) would have to resolve this lack of clarity subsequent to the preliminary ruling proceedings.

52. However, as this question is relevant to the admissibility of the request for a preliminary ruling itself, I propose that, in this respect, the Court of Justice rely on the presumption in settled case-law that, in the case of doubt, the question referred for a preliminary ruling is relevant.²⁷

53. The reason for this is that, according to the facts portrayed by the Hof van cassatie (Court of Cassation) in its requests for a preliminary ruling, it has in any event been established that evidence gathered in preliminary investigations that were opened following a report made by the tax authorities, which had launched investigations in connection with VAT carousel fraud, was used for the income tax assessments. Thus, it will be presumed in the further course of the proceedings that the gathering of evidence took place in the context of a pre-trial investigation for the purpose of prosecuting VAT fraud.

(c) Use of evidence obtained in such a manner in the assessment of income tax as implementation of Union law

54. However, neither the investigations of the tax authorities into VAT carousel fraud nor the criminal investigations led to a request for a preliminary ruling.

55. However, does it now follow from the case-law of the Court of Justice since *Åkerberg Fransson* that a Member State also implements Union law within the meaning of Article 51(1) of the Charter if evidence that had previously been gathered during a pre-trial investigation due to VAT fraud is used for an income tax assessment?

²⁵ Judgments of 5 June 2018, *Kolev and Others* (C-612/15, EU:C:2018:392, paragraph 71), and of 17 January 2019, *Dzivev and Others* (C-310/16, EU:C:2019:30, paragraph 33).

²⁶ See judgment of the ECtHR of 10 September 2010, *McFarlane v. Ireland* (CE:ECHR:2010:0910JUD003133306, § 143), in relation to Article 6(1) ECHR.

²⁷ See, inter alia, judgments of 12 February 2009, *Klarenberg* (C-466/07, EU:C:2009:85, paragraph 27), and of 6 October 2015, *Capoda Import-Export* (C-354/14, EU:C:2015:658, paragraph 25).

56. According to the settled case-law of the Court of Justice, the concept of ‘implementing Union law’, as referred to in Article 51(1) of the Charter, presupposes a degree of connection between the measure of EU law and the national measure at issue which goes beyond the matters covered being closely related or one of those matters having an indirect impact on the other.²⁸

57. According to the case-law of the Court of Justice, in order to determine whether a Member State implements EU law for the purposes of Article 51(1) of the Charter, some of the points to be determined are whether the national legislation in question is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it.²⁹

58. The fact that any infringement in the gathering of evidence is not affected by the purpose for which the evidence is ultimately used can be considered in itself as an indication that there is implementation of Union law. If evidence has been gathered within the scope of Union law, it could be argued that Union law would also have to apply to the use of evidence.

59. The implementation of Union law in the gathering of evidence would then effectively extend to the areas in which the evidence is used, even if those areas — the assessment of income tax here — are not part of Union law. This would be an interpretation that would go far beyond the interpretation of the concept of ‘implementing Union law’ given in *Åkerberg Fransson*. This is because the arguments in that case were based on Article 325 TFEU and the context of criminal proceedings for VAT fraud and the effective collection of VAT. This line of argument does not apply in the case of effective implementation of income tax.

60. The fact that, in a situation such as that in the present case, it is a matter of chance as to whether the tax or criminal authorities open an investigation on account of income tax evasion or VAT fraud also militates against this solution. In many cases, VAT fraud (failure to disclose taxable transactions) is connected with income tax fraud (failure to disclose taxable income).

61. If all subsequent administrative measures were to be regarded as implementation of Union law based solely on the matter of chance as to whether the preliminary investigation has been opened due to income tax evasion or due to VAT evasion, this would be contrary to the aforementioned case-law of the Court of Justice.³⁰

62. The reason for this is that, firstly, the Member States do not intend to implement EU law when they issue income tax assessments. Income tax law also does not serve to implement obligations under EU law, but falls within the competence of the Member States, as explained above in points 38 and 39.

²⁸ 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, recently, Opinion of Advocate General Saugmandsgaard Øe in *Associação Sindical dos Juizes Portugueses* (C-64/16, EU:C:2017:395, point 43, footnote 36), and of Advocate General Bobek in *Ispas* (C-298/16, EU:C:2017:650, point 45); or in the words of the Bundesverfassungsgericht (Federal Constitutional Court) in response to the *Åkerberg Fransson* judgment: ‘the mere existence of any factual connection between a [national] provision and the merely abstract scope of EU law or purely factual effects on the latter [is] not sufficient for the Member States to be bound by the fundamental rights of the European Union enshrined in the Charter of Fundamental Rights’, BVerfG, judgment of 24 April 2013, *Antiterrordatei* (1 BVR 1215/07, BVerfGE 133, 277, ECLI:DE:BVerfG:2013:rs20130424.1bvr121507, paragraph 91).

²⁹ Judgments 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), and, recently, order of 7 September 2017, *Demarchi Gino and Garavaldi* (Joined Cases C-177/17 and C-178/17, EU:C:2017:656, paragraph 20).

³⁰ 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).

63. Secondly, the national legislation on income tax pursues by its nature objectives other than those covered by EU law. Although the Member States' obligations arising from Article 325 TFEU with regard to the Union's own resources may extend into whatever element of national law effectively implements those obligations,³¹ income taxes are not Union resources, but resources of the Member States.

64. Thirdly, with the exception of the secondary law referred to in point 39, EU law does not contain any specific rules for the field of income tax. It would be neither reasonably foreseeable nor functionally necessary for indirect effects that VAT law may have on income tax law to be sufficient for the assumption of implementation of Union law within the meaning of Article 51(1) of the Charter.

65. Were any indirect effects of VAT law on income tax law to be sufficient to substantiate the applicability of Union law, it would become practically impossible to determine the few remaining areas of income tax law that are to be assessed solely under national law. In particular, a failure to disclose transactions subject to VAT is generally indirectly accompanied by a failure to disclose income relevant to income tax. In that sense, that would ultimately undermine the competence for direct taxation that is left to the Member States at the current stage of development of EU law.

66. As a result, there is therefore no implementation of Union law within the meaning of Article 51(1) of the Charter if evidence obtained during a preliminary investigation due to VAT-related offences is used for an income tax assessment.

67. As correctly stated by Advocate General Saugmandsgaard Øe recently, this does not however mean that there are gaps in the protection of Union citizens' fundamental rights. With regard to the assessment of income tax, those citizens still have national remedies at their disposal, together with their fundamental rights under national law, and, where those remedies have been exhausted, they may bring proceedings before the ECtHR.³²

3. *Interim conclusion*

68. In summary, it can be stated that the Charter is not materially applicable. The Court of Justice therefore does not have jurisdiction to give the preliminary rulings.

VII. In the alternative: Substantive appraisal of the question referred

69. In the event that the Court of Justice nevertheless accepts its jurisdiction and assumes implementation of Union law in the assessment of income tax, the Hof van cassatie (Court of Cassation) essentially asks, in substance, whether Article 47 of the Charter precludes the use of unlawfully obtained evidence or permits an evaluation by the national court. In particular, in this connection the Hof van cassatie (Court of Cassation) asks for clarification of the relevant passages in the *WebMindLicenses* judgment.³³

70. The *WebMindLicenses* judgment concerned the requirement that the evidence on which a decision implementing EU law (*in casu*, the assessment of VAT) is founded has not been obtained and used in breach of the rights guaranteed by EU law and, especially, by the Charter.³⁴

31 Opinion of Advocate General Bobek in *Ispas* (C-298/16, EU:C:2017:650, points 26 to 65) and in *Dzivev and Others* (C-310/16, EU:C:2018:623, point 68).

32 Opinion of Advocate General Saugmandsgaard Øe in *Commission v Hungary* (rights of usufruct over agricultural land) (C-235/17, EU:C:2018:971, point 109).

33 Judgment of 17 December 2015, *WebMindLicenses*, (C-419/14, EU:C:2015:832, paragraphs 86 to 89).

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

71. In that regard, the Court of Justice found that that requirement is satisfied if the court hearing an action challenging that decision is empowered to check that the evidence upon which that decision is founded was obtained in accordance with the rights guaranteed by EU law.³⁵

72. In the *WebMindLicenses* judgment, the Court of Justice therefore merely stated that the national court must review the lawfulness of the manner in which that evidence was gathered. However, contrary to the view taken by the appellants in cassation, it is not clear from this whether an infringement in the gathering of evidence automatically results in a prohibition on the use of evidence or whether the national court may carry out an evaluation.

73. In this regard, it should be noted, first, that EU law does not provide for any rules on the gathering and use of evidence in the context of criminal proceedings in the field of VAT, and hence that sphere falls, in principle, within the competence of the Member States.³⁶ Criminal procedures for countering infringements in the field of VAT therefore fall within the procedural and institutional autonomy of the Member States. This applies a fortiori to the use of evidence for the assessment of income tax if that evidence was gathered in a preliminary investigation due to VAT-related offences.

74. In the implementation of Union law, that autonomy is nevertheless limited by the fundamental rights and the principle of proportionality as well as the principles of equivalence and effectiveness.³⁷

75. Against this background, however, it is not apparent that the principles of equivalence and effectiveness preclude an evaluation by the national court in the context of assuming a prohibition on the use of evidence.

76. Nor is violation of fundamental rights apparent. Article 47 of the Charter does not entail an automatic prohibition on the use of evidence.

77. Even before the Charter entered into force, and applying the case-law of the European Court of Human Rights,³⁸ the Court of Justice ruled that it cannot be excluded as a matter of principle and in the abstract that unlawfully obtained evidence may be admitted, but rather it is for the national courts to assess the evidence they have obtained.³⁹

78. An assessment of the proportionality of the intervention on a case-by-case basis is the best way of taking the fundamental rights into account, as takes place in the evaluation by the national courts (for instance according to the Belgian ‘tax Antigone’ doctrine). In this respect, in a case concerning the drawing up of a list of personal data for the purpose of collecting tax, the Court of Justice ruled that the national courts must determine on a case-by-case basis whether evidence to support a legitimate interest in the possible confidentiality of the list in question takes precedence over interest in the protection of the rights of the individual.⁴⁰

³⁵ Judgment of 17 December 2015, *WebMindLicenses*, (C-419/14, EU:C:2015:832, paragraph 88).

³⁶ See judgments of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 65); of 2 May 2018, *Scialdone* (C-574/15, EU:C:2018:295, paragraph 25); and of 17 January 2019, *Dzivev and Others* (C-310/16, EU:C:2019:30, paragraph 24).

³⁷ See, to that effect, judgments of 2 May 2018, *Scialdone* (C-574/15, EU:C:2018:295, paragraph 29), and of 17 January 2019, *Dzivev and Others* (C-310/16, EU:C:2019:30, paragraph 30).

³⁸ Judgments of the ECtHR of 18 March 1997, *Mantovanelli v. France* (ECLI:CE:ECHR:1997:0318JUD002149793, §§ 33 and 34), and of 25 March 1999, *Pélissier and Sassi v. France* (ECLI:CE:ECHR:1999:0325JUD002544494, § 45).

³⁹ See judgment of 10 April 2003, *Steffensen* (C-276/01, EU:C:2003:228, paragraph 75).

⁴⁰ Judgment of 27 September 2017, *Puškár* (C-73/16, EU:C:2017:725, paragraph 97).

79. In a case such as the present case, the national court's evaluation on a case-by-case basis will have to take account primarily of which provision has been infringed and what the nature of that infringement is. To this end, it will be necessary to consider that a Belgian judge was present at the seizure of evidence by the Luxembourg judge, meaning that there may 'only' be an infringement of the Benelux Treaty, which does not automatically constitute an infringement of Article 7 of the Charter.

80. In conclusion, Article 47 of the Charter does not preclude a national provision pursuant to which a national court that must decide whether a piece of evidence that was obtained in violation of EU law during a preliminary investigation due to VAT-related offences may be used for the assessment of income tax must carry out an evaluation, taking account primarily of the nature of the infringement.

VIII. Conclusion

81. In view of the foregoing considerations, I propose that the Court of Justice should declare that it lacks jurisdiction to answer the question of the Hof van Cassatie (Court of Cassation, Belgium).