

CJEU: Criminal Penalty in Addition to Penalty in Tax Proceedings to Combat VAT Fraud Possible

Thomas Wahl

In the case *C-524/15, Luca Menci*, the CJEU had to give guidance as to whether criminal proceedings against an individual – for the same act – can be brought after an administrative penalty was already imposed for not having paid high amounts of value added tax (VAT).

In the case at issue, the Italian tax authorities imposed an administrative penalty (30% of tax debt) against Italian citizen Luca Menci. After this decision became final, the public prosecutor launched criminal proceedings with respect to the same acts before the Tribunale di Bergamo (District Court, Bergamo, Italy). It was argued that that the failure to pay VAT constituted a criminal offence provided for and punishable by Art. 10a(1) and Art. 10b(1) of the Decreto legislativo n. 74 (“Legislative Decree No 74/2000”).

The Tribunale di Bergamo posed the question whether Art. 50 CFR, read in the light of Art. 4 of Protocol No 7 annexed to the ECHR, must be interpreted as precluding national legislation allowing criminal proceedings to be brought against a person for failing to pay VAT (due within the time limit stipulated by law), although that person has already been made subject to a final administrative penalty in relation to the same acts.

The referring court was of the opinion that the provisions of Legislative Decree No 74/2000 require that the criminal and administrative proceedings are to be conducted independently and therefore do not prevent a person from being subject to criminal proceedings after imposition of a final administrative penalty.

The CJEU first assessed whether the proceedings and penalties at issue in the main proceedings were criminal in nature and reiterated its case law setting out the criteria for determining this requirement – opening the door to Art. 50 CFR. In this context, the following three criteria are relevant:

- The legal classification of the offence under national law;
- The intrinsic nature of the offence;
- The degree of severity of the penalty that the person concerned is liable to incur.

The CJEU considered the second criterion (the intrinsic nature of the offence) to be fulfilled, because the Italian law allowing imposition of an administrative penalty in addition to the amount of VAT due has a punitive purpose. According to the CJEU, this purpose is “the hallmark of a penalty of a criminal nature for the purposes of Article 50 of the Charter.”

AUTHOR

Thomas Wahl

Senior Researcher
Max Planck Institute for the
Study of Crime, Security and
Law

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After having confirmed that the second requirement of Art. 50 CFR – the existence of the same offence – is given, the CJEU considered the Italian practice indeed a limitation of the *ne bis in idem* principle. Yet, this may be justified on the basis of Art. 52(1) of the Charter.

In this context, the CJEU clarified the criteria for the proportionality test within the meaning of Art. 50 CFR. Hence, the following aspects must be examined when national legislation allows the duplication of administrative and criminal penalties:

- National legislation must pursue an objective of general interest and the duplicated proceedings and penalties must pursue additional objectives;
- It must provide for clear and precise rules allowing individuals to predict which acts or omissions are liable to be subject to such a duplication;
- It must ensure coordination of the proceedings so that disadvantages resulting from such proceedings are limited to what is strictly necessary in order to achieve the objective;
- It must limit the severity of all the penalties imposed to what is strictly necessary in relation to the seriousness of the offence concerned.

The CJEU concluded that the Italian legislation seems to comply with these requirements. However, it is for the referring court to assess the proportionality of the practical application of the Italian legislation in the context of the main proceedings. Above all, the referring court must balance the seriousness of the tax offence at issue, on the one hand, and the actual disadvantage for the individual from the duplication of proceedings and penalties at issue, on the other.

In the end, the CJEU noted that the established case law in *Menci* ensures a level of protection of the *ne bis in idem* principle not contrary to that laid down in Art. 4 of Protocol No 7 annexed to the ECHR. The ECtHR held in *A and B v Norway* that a duplication of tax proceedings and criminal proceedings/penalties punishing the same tax law violation does not infringe the *ne bis in idem* principle if the tax and criminal proceedings in question are sufficiently closely connected in substance and time.

The CJEU's ruling is remarkable as it deviates from the [opinion of the Advocate General](#). Under the conditions of the case, the AG doubted that the essence of the *ne bis in idem* principle will actually be respected. In particular, the AG believes that a limitation of the principle is not necessary within the meaning of Art. 52 CFR, since the Member States have at least two different solutions available for penalising non-payment of VAT (administrative, criminal, or a combination of the two). The single-track systems are able to guarantee this penalisation as well. Thus, unlike the Luxembourg judges, the AG concluded that the infringement of *ne bis in idem* is unjustified in the *Menci* case. The Court, however, continues to give the Member States the effective possibility to determine the method of penalisation of such acts themselves by sacrificing part of the right not to be tried or punished twice in criminal proceedings for the same criminal offence.

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