CJEU: New Italian Law on Unpaid VAT Compatible with EU Rules

Thomas Wahl

eucrim
European Law Forum: Prevention • Investigation • Prosecution

News

AUTHOR

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

ISSN: 1862-6947
https://eucrim.eu

On 2 May 2018, the CJEU rendered a judgment in Case C-574/15 (criminal proceedings against *Mauro Scialdone*). The case concerns the interpretation of Art. 4(3) TEU and Art. 325 TFEU, Council Directive 2006/112 on the common system of value added tax (the "VAT Directive") and the PIF Convention of 26 July 1995.

The referring Italian court doubted that amendments to the Italian legislation on sanctioning VAT offences are compatible with EU law. In the case at issue, the Italian authorities had conducted investigations against Mr. Scialdone in his capacity as sole director of a company because he did not pay the VAT resulting from the company's annual return for the tax year 2012 within the time limit prescribed by law. The total amount of VAT due was €175,272. In May 2015, the public prosecutor brought criminal proceedings against Mr. Scialdone before the referring court. In October 2015, amendments in Italian legislation entered into force that retroactively apply to the conduct ascribed to Mr. Scialdone, since the provisions are more favourable to the defendant.

The referring court noticed that the amendments may lead to criminal impunity of the defendant, since the threshold for criminalisation of non-payment of VAT for a given financial year was raised from €50,000 to €250,000. In addition, the Italian legislator introduced a different threshold (€150,000) for the offence of failing to pay withholding income tax, which, according to the referring court, would afford better protection of national financial interests than of the EU's financial interests.

The CJEU preliminarily observed that Member States enjoy procedural and institutional autonomy to counter infringements of harmonised VAT rules, but this autonomy is (above all) limited by two principles of EU law:

¡Penalties must be effective and dissuasive (principle of effectiveness);

¡Penalties must be analogous to those applicable to infringements of national law of a similar nature and importance that affect national financial interests (principle of equivalence).

As regards the principle of effectiveness, the CJEU stated that, indeed, the PIF Convention in its Art. 2 requires that Member States foresee penalties involving deprivation of liberty at least in cases of serious fraud. Serious fraud is defined by way of the amount of fraud which cannot set by the Member States greater than €50,000 by the Member States. Given the *Taricco* judgment, VAT fraud also falls within this requirement.

The CJEU further noted that, in the present case, this threshold of the PIF Convention is not relevant, however, because Mr. Scialdone duly complied with his obligation to declare VAT, but only failed to pay VAT. This does not constitute fraud within the meaning of Art. 325 TFEU, irrespective of whether the failure was

intentional or not. Since the failure not to pay VAT does not present the same degree of seriousness as VAT fraud, the national legislator can treat both types of conduct differently.

Nonetheless, failure to pay VAT constitutes an "illegal activity" and must be subject to effective, proportionate, and dissuasive penalties. The CJEU held, however, that the Italian legislation is sufficiently effective and dissuasive because it provides for fines that can amount, in principle, to 30% of the tax due. In addition, the tax authorities require default interests to be paid.

As regards the principle of equivalence, the CJEU stated that it must determine whether a failure to pay withheld income tax may be regarded as an infringement of national law of a similar nature and importance as a failure to pay declared VAT. Although the CJEU saw some common lines of argument, both types of failure differ in their constituent elements and the difficulty involved in their detection. These differences justify a different treatment of the two types of offences by the Italian legislator.

In sum, the CJEU held that neither the VAT Directive nor the PIF Convention (read in conjunction with Art. 4(3) TEU and Art. 325 TFEU) preclude national legislation, which provides that failure to pay the VAT resulting from the annual tax return for a given financial year, within the time limit prescribed by law, constitutes a criminal offence punishable by a custodial sentence only if the amount of unpaid VAT exceeds a criminalisation threshold of €250,000, whereas a criminalisation threshold of €150,000 is laid down for the offence of failing to pay withheld income tax.

About eucrim

eucrim is the leading journal which regularly informs about current developments in European criminal and "criministrative" law.
All news items are freely accessible at: https://eucrim.eu/news/
Stay informed by emailing to eucrim-subscribe@csl.mpg.de to receive alerts for new releases of issues.
The project is co-financed by the Union Anti-Fraud Programme (UAFP), managed by the European Anti-Fraud Office (OLAF).

Co-funded by
the European Union