Reports of Cases

Case C-524/15

Criminal proceedings against Luca Menci

(Request for a preliminary ruling from the Tribunale di Bergamo)

(Reference for a preliminary ruling — Value added tax (VAT) — Directive 2006/112/EC — Failure to pay VAT due — Penalties — National legislation which provides for an administrative penalty and a criminal penalty for the same acts — Charter of Fundamental Rights of the European Union — Article 50 — Ne bis in idem principle — Criminal nature of the administrative penalty — Existence of the same offence — Article 52(1) — Limitations to the ne bis in idem principle — Conditions)

Summary — Judgment of the Court (Grand Chamber), 20 March 2018

1. *Own resources of the European Union — Protection of the European Union's financial interests — Fight against fraud and other illegal activities — Obligation of the Member States to establish effective and deterrent penalties — Scope — Tax offences in the field of value added tax*

   (Art. 325 TFEU)

2. *Fundamental rights — Charter of Fundamental Rights of the European Union — Scope — Implementation of EU law — National legislation providing for administrative and criminal penalties aimed at ensuring the collection of value added tax and combatting fraud — Included*

   (Art. 325 TFEU; Charter of Fundamental Rights of the European Union, Arts 50 and 51(1); Council Directive 2006/112, Arts 2 and 273)

3. *Fundamental rights — European Convention on Human Rights — Instrument not formally integrated into the EU legal order*

   (Art. 6(3) TEU; Charter of Fundamental Rights of the European Union, Art. 52(3))

4. *Fundamental rights — Ne bis in idem principle — Conditions under which applicable — Duplication of criminal proceedings and penalties — Criteria for assessment — Legal classification of the offence under national law, nature of the offence and degree of severity of the penalty imposed*

   (Charter of Fundamental Rights of the European Union, Art. 50)

5. *Fundamental rights — Ne bis in idem principle — Conditions under which applicable — Existence of the same offence — Criterion for appraisal — Identity of the material facts*

   (Charter of Fundamental Rights of the European Union, Art. 50)

6. *Fundamental rights — Ne bis in idem principle — Restriction — National legislation allowing the duplication of an administrative penalty of a criminal nature and of a criminal penalty — Lawfulness — Conditions — Restriction which must meet an objective of public interest — Objective of ensuring the collection of all the VAT due — Included*

   (Charter of Fundamental Rights of the European Union, Arts 50 and 52(1))

7. *Fundamental rights — Ne bis in idem principle — Restriction — National legislation providing for the duplication of an administrative penalty of a criminal nature and of a criminal penalty — Lawfulness — Conditions — Observance of the principle of proportionality — Scope*

   (Charter of Fundamental Rights of the European Union, Arts 49(3), 50 and 52(1))

8. *Fundamental rights — Ne bis in idem principle — Affirmation in Article 50 of the Charter of Fundamental Rights of the European Union and Article 4 of Protocol No 7 to the European Convention on Human Rights — Identical meaning and scope — Level of protection provided for by the Charter not infringing that guaranteed by that convention*

   (Charter of Fundamental Rights of the European Union, Arts 50, 52(3) and 53)

9. *Fundamental rights — Ne bis in idem principle — Restriction — National legislation allowing criminal proceedings to be brought against a person, for failure to pay value added tax, which has already been subject to an administrative penalty of a criminal nature in respect of the same acts — Lawfulness — Conditions — Verification by the national court*

   (Charter of Fundamental Rights of the European Union, Arts 50 and 52(1))

1. See the text of the decision.

(see paras 19, 20)

2. Since they seek to ensure the proper collection of VAT and to combat fraud, administrative penalties imposed by the national tax authorities and criminal proceedings initiated in respect of VAT offences, such as those at issue in the main proceedings, constitute implementation of Articles 2 and 273 of Directive 2006/112 and of Article 325 TFEU and, therefore, of EU law for the purposes of Article 51(1) of the Charter (see, to that effect, judgments of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraphs 27, 52 and 53, and of 5 April 2017, *Orsi and Baldetti*, C-217/15 and C-350/15, EU:C:2017:264, paragraph 16). Therefore, they must respect the fundamental right guaranteed by Article 50 of the Charter.

(see para 21)

3. See the text of the decision.

(see para 22)

4. As regards assessing whether proceedings and penalties, such as those at issue in the main proceedings, are criminal in nature, it must be noted that, according to the Court's case-law, three criteria are relevant. The first criterion is the legal classification of the offence under national law, the second is the intrinsicnature of the offence, and the third is the degree of severity of the penalty that the person concerned is liable to incur (see, to that effect, judgments of 5 June 2012, *Bonda*, C-489/10, EU:C:2012:319, paragraph 37, and of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 35).

Nevertheless, the application of Article 50 of the Charter is not limited to proceedings and penalties which are classified as 'criminal' by national law, but extends regardless of such a classification to proceedings and penalties which must be considered to have a criminal nature on the basis of the two other criteria referred to in paragraph 26 of the present judgment.

As regards the second criterion, relating to the intrinsicnature of the offence, it must be ascertained whether the purpose of the penalty at issue is punitive (see judgment of 5 June 2012, *Bonda*, C-489/10, EU:C:2012:319, paragraph 39). It follows therefrom that a penalty with a punitive purpose is criminal in nature for the purposes of Article 50 of the Charter, and that the mere fact that it also pursues a deterrence purpose does not mean that it cannot be characterised as a criminal penalty. As the Advocate General stated in point 113 of his Opinion, it is of the intrinsicnature of criminal penalties that they seek both to punish and to deter unlawful conduct. By contrast, a measure which merely repairs the damage caused by the offence at issue is not criminal in nature.

(see paras 26, 30, 31)

5. According to the Court's case-law, the relevant criterion for the purposes of assessing the existence of the same offence is identity of the material facts, understood as the existence of a set of concrete circumstances which are inextricably linked together which resulted in the final acquittal or conviction of the person concerned (see, by analogy, judgments of 18 July 2007, *Kraaijenbrink*, C-367/05, EU:C:2007:444, paragraph 26 and the case-law cited, and of 16 November 2010, *Mantello*, C-261/09, EU:C:2010:683, paragraphs 39 and 40). Therefore, Article 50 of the Charter prohibits the imposition, with respect to identical facts, of several criminal penalties as a result of different proceedings brought for those purposes.

Moreover, the legal classification, under national law, of the facts and the legal interest protected are not relevant for the purposes of establishing the existence of the same offence, in so far as the scope of the protection conferred by Article 50 of the Charter cannot vary from one Member State to another.

(see paras 35, 36)

6. As regards the question whether the limitation of the *ne bis in idem* principle resulting from national legislation, such as that at issue in the main proceedings, meets an objective of general interest, it is apparent from the case file before the Court that that legislation seeks to ensure the collection of all the VAT due. In the light of the importance that is givenin the Court's case-law, for the purposes of achieving that objective, to combating VAT offences (see, to that effect, judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraph 34 and the case-law cited), a duplication of criminal proceedings and penalties may be justified where those proceedings and penalties pursue, for the purpose of achieving such an objective, complementary aims relating, as the case may be, to different aspects of the same unlawful conduct at issue, which it is for the referring court to determine.

In that regard, in relation to VAT offences, it appears legitimate for a Member State to seek, first, to deter and punish any violation, whether intentional or not, of the rules relating to VAT returns and collection by imposing fixed administrative penalties, where appropriate, on a flat-rate basis and, secondly, to deter and punish serious violations of those rules, which are particularly damaging for society and which justify the adoption of more severe criminal penalties.

(see paras 44, 45)

7. As regards compliance with the principle of proportionality, it requires that the duplication of proceedings and penalties provided for by national legislation, such as that at issue in the main proceedings, does not exceed what is appropriate and necessary in order to attain the objectives

legitimately pursued by that legislation, it being understood that, when there is a choice between several appropriate measures, recourse must be had to the least onerous and the disadvantages caused must not be disproportionate to the aims pursued (see, to that effect, judgments of 25 February 2010, *Müller Fleisch*, C-562/08, EU:C:2010:93, paragraph 43; of 9 March 2010, ERG and Others, C-379/08 and C-380/08, EU:C:2010:127, paragraph 86; and of 19 October 2016, *EL-EM-2001*, C-501/14, EU:C:2016:777, paragraphs 37 and 39 and the case-law cited).

In that regard, it must be noted that, according to the case-law cited in paragraph 20 of the present judgment, Member States are free to choose the applicable penalties in order to ensure that all VAT revenue is collected. In the absence of harmonisation of EU law in the matter, the Member States have therefore the right to provide eitherfor a system in which VAT offences may be subject to proceedings and penalties only once, or fora system authorising the duplication of proceedings and penalties. In those circumstances, the proportionality of national legislation, such as that at issue in the main proceedings, cannot be called into question by the mere fact that the Member State concerned made the choice to provide for the possibility of such a duplication, as otherwise that Member State would be deprived of that freedom of choice.

With regard to its strict necessity, national legislation, such as that at issue in the main proceedings, must, first of all, provide for clear and precise rules allowing individuals to predict which acts or omissions are liable to be subject to such a duplication of proceedings and penalties.

Next, national legislation, such as that at issue in the main proceedings, must ensure that the disadvantages resulting, for the persons concerned, from such a duplication are limited to what is strictly necessary in order to achieve the objective referred to in paragraph 44 of the present judgment.

As regards, first, the duplication of proceedings of a criminal nature which, as is apparent from the information in the case file, the requirement noted in the above paragraph implies the existence of rules ensuring coordination so as to reduce to what is strictly necessary the additional disadvantage associated with such a duplication for the persons concerned.

Secondly, the duplication of penalties of a criminal nature requires rules allowing it to be guaranteed that the severity of all of the penalties imposed corresponds with the seriousness of the offence concerned, that requirement resulting not only from Article 52(1) of the Charter, but also from the principle of proportionality of penalties set out in Article 49(3) thereof. Those rules must provide for the obligation for the competent authorities, in the event of the imposition of a second penalty, to ensure that the severity of all of the penalties imposed does not exceed the seriousness of the offence identified.

(see paras 46, 47, 49, 52, 53, 55)

8. See the text of the decision.

(see paras 60-62)

9. Article 50 of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding national legislation in accordance with which criminal proceedings may be brought against a person for failing to pay value added tax due within the time limits stipulated by law, although that person has already been made subject, in relation to the same acts, to a final administrative penalty of criminal nature for the purposes of Article 50 of the Charter, on condition that that legislation:

– pursues an objective of general interest which is such as to justify such a duplication of proceedings and penalties, namely combating value added tax offences, it being necessary for those proceedings and penalties to pursue additional objectives,

– contains rules ensuring coordination which limits to what is strictly necessary the additional disadvantage which results, for the persons concerned, from a duplication of proceedings, and

– provides for rules making it possible to ensure that the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned.

It is for the referring court to ensure, taking into account all of the circumstances in the main proceedings, that the actual disadvantage resulting for the person concerned from the application of the national legislation at issue in the main proceedings and from the duplication of the proceedings and penalties that that legislation authorises is not excessive in relation to the seriousness of the offence committed.

(see paras 63, 64, operative part 1, operative part 2)