Limitation of Administrative Penalties by the European Convention of Human Rights and the EU Charter of Fundamental Rights

Prof. Giuseppe Marino – Professor of Tax Law – University of Milan
Taxpayers’ rights in the ECHR and the EU Charter

- Taxation and human rights are linked through the protection of taxpayers’ rights

  The protection of taxpayers’ rights is part of human rights’ movement started after the Second World War and pictured with the ECHR in 1950.

  The ECHR differently influences the legal systems of Contracting States (e.g. from UK to Italy).

- The ECtHR has the duty to enforce the fundamental principles of human beings contained in the ECHR

  Since the beginning of the century, an increasing number of cases brought before the ECtHR involves tax issues.

- Human rights’ principles have been included among EU primary law only after the adoption of the EU Charter in 2009

  Art. 6 Para. 2 of TEU attributes binding force to the Charter.

  However, Art. 6 Para. 2 of TEU needs the European accession to the ECHR (on December 18th, 2014, the CJEU found the draft accession partially incompatible with the EU Treaty structure).
Main features of administrative tax penalties

- Administrative tax penalties are imposed by Tax Authorities and not by Criminal Courts;
- They bite less serious offences (mere negligence);
- They ensure and enforce tax compliance;
- They compensate caused financial damages;
- No afflictive and repressive nature;
- Examples from national reports of behaviors triggering administrative tax penalties:
  - incorrect self-assessment of tax for reasonable amounts;
  - failure to pay the tax resulting from a correct self-assessment;
  - late payments of taxes;
Classification of administrative penalties

- **Cash penalties** can be:
  - proportional;
  - flat.

- **Temporary interdictions.** Examples from national reports:
  - ban from public offices;
  - prohibition to enter into contracts with the Public Administration;
  - suspension from certain professions (i.e. company’s director, auditor, notary);
  - prohibition to participate in public auctions;
  - suspension of licenses, permits or other administrative authorizations.
Yes, when administrative tax penalties share the **same fundamental principles of criminal penalties**. In particular:

1) when they use institutes typical of the criminal system:
   - the **principle of legality**,
   - the **intent and culpability** (Italy, Spain, Finland),
   - the **favor rei** principle,
   - the **concurrence of persons** in the offence (Italy)

2) when they bite less serious offences with **non proportional sanctions** leading to **affliction** [Belgium (200%), Italy (240%), Hungary (200%), Spain (150%), Turkey (300%)];
Art. 6 of ECHR: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.

Ferrazzini (2001) ruled out the applicability of Art. 6 to tax litigations...but not for penalties

The interpretation of ‘criminal charge’, should follow substantive rather than only formal criteria.

Therefore, administrative sanctions could be regarded as ‘criminal’ in nature.
‘Criminal charge’ under Engel’s criteria

- The interpretation of ‘criminal charge’ must disregard national definitions. See Adolf v. Austria (1982).
- The ECtHR relies on Engel’s criteria. See Engel v. the Netherlands (1976).

1) the classification of the offense in the law of the respondent State (formal criterion);

2) the nature of the offence (substantial criterion);

3) the degree of severity of the penalty (substantial criterion).
The ECtHR case law about *Engel’s* criteria

- Application of *Engel’s* criteria: from traffic code’s sanctions (see *i.e.* Ozturk v. Germany, 1984) ...to administrative tax penalties:


  **Use of substantial criteria:** 1) degree of offensiveness of the sanctions; 2) prejudice suffered by an individual as a consequence of the imposition of a penalty (pressure to comply with tax obligations and related punishment of breaches of those obligations)

  To be considered criminal, *tax surcharges must have a deterrent and punitive scope*.

- Furthermore, the minor nature of the penalty does not exclude *per se* its criminal nature. See *Jussila v. Finland* (2006).
The EU Charter’s criteria for administrative as criminal penalties

- CJEU relies on the same criteria established by ECtHR in *Engel*. See *Bonda* (2012) and *Fransson* (2013).

- Adoption of a ‘substance-over-form’ approach in assessing whether a sanction might be deemed as criminal or not. See *Van Straaten* (2006).

- ‘Principle of homogeneity’ of Art. 52 Para. 3: ECHR’s rights constitute the minimum standards for EU Institutions as well as Members States in respecting human rights.

- Critical issue: the competence of CJEU only to harmonized taxes (*i.e.* VAT) (art. 51 Para. 1). See e.g. CJEU, 15 April 2015, C-497/14, *Burzio*. 
The maxim in brief: a person should not be prosecuted more than once for the same criminal behavior

- Art. 4 Prot. 7 of ECHR.
- ECtHR’s case law: see Grande Stevens v. Italy, 2014.
- Art. 50 of the EU Charter.
- CJEU’s case-law: see Akeberg Fransson, 2013.
‘Ne bis in idem’: constitutive elements

Three aspects should be assessed in order to determine whether there is a violation of *ne bis in idem* principle:

1) **the criminal nature of the administrative penalty** (*i.e.* Engel’s criteria);

2) **the identity of the offensive conduct** (*i.e.* the facts under prosecution must be “substantially the same”, see Zolotukhin v. Russia, 2009);

3) **the decision must be final** (*res judicata*, see Explanatory Report to Protocol 7)
‘Ne bis in idem’: open issues (1)

- Difficulty in assessing the exact meaning of ‘idem’

- A single naturalistic event may constitute several offences under the law (i.e. ‘councours d’infractions’)
  
i.e. self-money laundering provides tax evasion and fraud as predicate offences, and an overlap of penalties on the same person may occur; i.e. no overlap between legal entity and its representative (ECtHR, Pirttimäki v. Finland, 2014; see also Art. 8 Para. 3 of ‘Market Abuse’ Directive 2014/57/EU)
‘Ne bis in idem’: open issues (2)

➢ Problematic issue of parallel proceedings.

What about the simultaneous pendency of both criminal and administrative proceedings in terms of taxpayers’ rights?

Can a taxpayer have the duty to cooperate with the Tax Authority and, at the same time, exercise his right to be silent before the Criminal Prosecutor?

Is there a violation of the presumption of innocence in case administrative tax penalties are applied before the end of the tax proceedings?

➢ In terms of taxpayers’ rights, there should be only one set of proceedings, either for an administrative surcharge, or for a criminal liability.

➢ Art. 4 Para. 1 of Protocol No. 7 of the ECHR states that “no one shall be liable to be tried or punished again in criminal proceedings” (sharp separation between the trial and the punishment moments).
‘Ne bis in idem’: solutions from national reports

• The ‘Italian compromise’: the principle of specialty, but does it really work?

• The ‘French cap’: the second kind of sanction (either administrative or criminal) could be executed only in the part exceeding the amount of the former penalty;

• The Belgian ‘Una Via’: unique procedural framework for administrative and criminal penalties and enhanced coordination between the Tax Authority and the Criminal Prosecutor.
Reforms should drive national systems in compliance with ECtHR and EU case law to avoid the ‘ne bis in idem’.

- **Principle of proportionality** (i.e. no more “overkill tendency”, see Malherbe). See Art. 5 Para. 4 of TEU and, for offences, Art. 49 Para. 3 of the EU Charter.

- **One penalty/One proceeding**, either administrative or criminal, should be imposed upon the same person for the same misconduct.

- At the very end (within the illuministic tradition of Beccaria and Bentham) criminal penalties only for major tax offences, leaving the main floor to administrative penalties [point 30 of the Communication from the Commission to the EU Parliament and Council on the Action Plan to strengthen the fight against tax fraud and tax evasion (COM(2012) 722 final), and Whereas (13) and (16) of the Proposal for a Directive on the fight against fraud and the EU financial interests by means of criminal law (COM(2012) 363 final)]
Thank you very much for your attention!

Contact: giuseppe.marino@unimi.it