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Double or Quits Jeopardy? A Quest for Procedural Justice in VAT Fraud Cases

Emanuela Matei (Mircea and Partners Law Firm) · Monday, September 14th, 2015

The establishment of a link between the financial interests of the Union and the general budget of the Union is the reason why the domestic penalties made applicable in matters of VAT fraud are covered by Union law. On 8 September 2015 the Court of Justice of the EU ("CJEU") issued its ruling in Taricco, Case C 105/14. Some scholars described this ruling as a step backwards for the protection of fundamental rights in comparison to the previous judgment in Åkerberg, Case C 617/10. This post will clarify why the two rulings concur with each other and highlight certain particular aspects that may give an impression of discrepancy.

1. Domestic procedures affording effective protection of the EU financial interests and respect for fundamental rights

It must be reminded first that the EU legislation does not make specific provision for a penalty in matters of VAT fraud. Consequently, Article 4(3) TEU obliges the Member States to take all effective measures to penalise conduct detrimental to the financial interests of the EU.[1. *Belgisch Interventie- en Restitutiebureau v SGS Belgium*, Case C 367/09, Paragraph 41.]

The EU Charter of Fundamental Rights encompasses a number of relevant provisions such as the right to fair trial, the presumption of innocence and the right of defence, the principle of legality, the protection of personal data and the prohibition of double jeopardy. Åkerberg deals with the latter, while in Taricco, the relevant provision is Article 49, the principle of legality.

Tax penalties and criminal proceedings for tax evasion constitute means of implementation of Directive 2006/112 and Article 325 TFEU and, therefore, of European Union law, for the purposes of Article 51(1) of the Charter.

1.1. The article 325 TFEU gives expression to the principle of effectiveness and equivalence of the remedies applied by Member States.

1. The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies.

2. Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests.

1.2. Under Article 2(1) of the Convention on the Protection of the European Communities' Financial Interests,[2. Council Act of 26 July 1995 Drawing Up the Convention on the Protection of the European Communities' Financial Interests (OJ 1995 C 316, P. 48).] the Member States shall take appropriate measures to ensure that tax fraud conduct is indictable and criminal penalties provided by law are effective, proportionate and dissuasive. In cases of serious fraud, penalties should include deprivation of liberty.

1.3. The VAT Directive contains certain provisions that allow derogation from the general rules in order to prevent certain forms of tax evasion or avoidance. The specific case of VAT fraud is not stipulated.

In order to summarise the above findings, it can be said that the Member States must apply equivalent and effective penalties on cases of VAT fraud, while respecting the standard of protection of fundamental rights imposed by the Charter. Depending on the serious character of the infringement, penalties should include deprivation of liberty.

2. Åkerberg and the prohibition of double jeopardy

The prohibition of double jeopardy is the matter discussed in Åkerberg in relation to the combination of administrative and criminal penalties provided for by national law in a case that contained aspects of VAT and domestic income taxation.

The prohibition states that 'No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.'

It must be reminded that the prohibition has been incorporated in Framework Decision 2002/584/JHA and it allows only narrowly defined exceptions in Articles 54-58 CISA, Article 7 of the Convention on the Protection of the European Communities' Financial Interests and Article 10 of the Convention on the fight against corruption. All grounds for derogation from the interdiction of double jeopardy must be interpreted restrictively.

The conclusion of the CJEU in Åkerberg states that as long as the applicable penalties are effective, proportionate and dissuasive, the Member States remain free to apply national standards of protection of fundamental rights, given that the level of protection provided for by the Charter and the primacy, unity and effectiveness of European Union law are not thereby compromised.

In my view, the CJEU in Åkerberg has defined an interval of legality for the tax penalties and criminal proceedings in relation to VAT frauds. It has a threshold value, which represents the effectiveness and dissuasive character of the applicable penalties and a ceiling value, which defines the observance of the fundamental rights of the tax payer. Inside this interval, the Member States are free to decide the design of the criminal proceedings and the level of tax penalties.

It can be observed that the CJEU recognises the procedural autonomy of the Member States by using a specific language: 'It is for the referring court to determine…' whether the applicable national provisions permit the effective and dissuasive punishment of cases of serious fraud affecting the financial interests of the European Union.

3. Taricco and the quits jeopardy

The ECtHR recognised that Article 7 of the ECHR enshrines both the principle of *nullum crimen, nulla poena sine lege* and the principle that the criminal law may not be applied broadly, especially by analogy, to the detriment of the defendant.

Limitation periods, which are a common feature of the domestic legal systems of the Contracting States, serve several purposes, which include ensuring legal certainty and finality and preventing infringements of the rights of defendants, which might be impaired if courts were required to decide on the basis of evidence which might have become incomplete because of the passage of time.[3. *OAO Neftyanaya Kompaniya Yukos v. Russia*, Application No. 14902/04, Judgement of 17 January 2012, Paragraph 570.]

The Italian rule specified that the interruption of criminal proceedings concerning serious fraud in relation to VAT had the effect of extending the limitation period by only a quarter of its initial duration, usually for this type of cases from 6 to 1.5 years. (Articles 161 and 416 of the Italian Penal Code)

The first question posed was whether the reduction of the regular duration of the limitation period is compliant with the principles of effectiveness and equivalence. Since it led to de facto impunity, the measure does not comply with the principle of effectiveness. Moreover, at the hearings it has been disclosed that the Italian law did not provide any absolute limitation period in respect of the offence of conspiracy to commit crimes in relation to import duties on tobacco products. If this information could be confirmed, then the measure would neither comply with the principle of equivalence.

The next question is whether the act of setting aside the reduction of the limitation period, which amounts to a new possibility to indict the previously non-indictable person, could entail a breach of Article 49 of the Charter.

The indictable act and the relevant law defining the offence and giving ground to the indictment are exactly the same. Moreover, according to the constant jurisprudence of ECtHR, the extension of the limitation period and its immediate application do not entail an infringement of the rights guaranteed by Article 7 of the ECHR convention – which corresponds in substance to Article 49 of the Charter – since that provision cannot be interpreted as prohibiting an extension of limitation periods, given that the resultant development is consistent with the essence of the offence and this result could be reasonably foreseen.[4. *OAO Neftyanaya Kompaniya Yukos v. Russia*, Application No. 14902/04, Judgement of 17 January 2012, Paragraph 569.]

In Case C-397/03 P, the applicant, Archer Daniels Midland argued that antitrust fines would have a genuine deterrent effect if the consequences of the conduct engaged by an undertaking were foreseeable. The CJEU disagreed, finding that the legal certainty principle did not require that wrongdoers should be able to calculate in advance the precise amount of the fine which might be imposed on them for infringements of EU antitrust law. An increase in the severity of the fines should be nonetheless foreseeable for the traders concerned at the time when the infringements giving rise to penalties were committed. By analogy, in Taricco case, the decision of setting aside the absolute limitation regime in order to comply with EU law obligations must have been foreseeable for the traders involved. The CJEU has concluded the following.

A national rule in relation to limitation periods for criminal offences – such as discussed in the

present case – is liable to have an adverse effect on the fulfilment of the Member States' obligations under Article 325(1) and (2) TFEU:

- if that national rule prevents the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union, or
- provides for longer limitation periods in respect of cases of fraud affecting the financial interests of the Member State concerned than in respect of those affecting the financial interests of the European Union,

which it is for the national court to verify.

In my opinion this ruling is perfectly aligned with the constant case law of the CJEU that deals with domestic remedies employed for the fulfilment of EU law obligations. The observance of the principles of effectiveness and equivalence is even enshrined in the provisions of Article 325 TFEU.

4. Is Åkerberg still relevant for a Taricco situation?

I would say yes. In all cases where the wrongdoers have been subject to administrative penalties with *de facto* punitive character, Åkerberg would interdict the Member States to apply another punishment under the domestic criminal law that does not take into account the previous sanctions. The principle of *ne bis in idem* stays valid and it requires in conjunction with the principle of proportionality of penalties to implement a regime of procedural justice alongside with the obligation to provide for effective criminal penalties for irregularities in matters of VAT.

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