Ne Bis in Idem: How Will France Juggle Criminal and Tax Penalties?

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In this article, Dauchez and Turot reflect on the legal requirements set out in the preliminary ruling from the Court of Justice of the European Union on the combined application of tax and criminal penalties and discuss implementation in France.

The grass is always greener on the other side. Apparently not satisfied with the French Constitutional Court's rulings on the duplication of penalties, the Court of Cassation opted to take the matter to the Court of Justice of the European Union. A request for a preliminary ruling on two questions was filed on October 21, 2020.[1] The Court's resulting judgment of May 5, 2022, is the latest addition to its case law on the principle of *ne bis in idem* ("not twice for the same"), the Roman law equivalent of the double jeopardy principle that prevents an accused person from being tried or punished twice for the same offense.

Article 49 of the Charter of Fundamental Rights of the European Union enshrines the principles of legality and proportionality of criminal offenses and penalties. Also, article 50 of the charter lays down the right not to be tried or punished twice in criminal proceedings for the same criminal offense. However, article 52(1) does allow for certain limitations on these rights and freedoms when necessary, in light of general interest objectives recognized by the EU. Nonetheless, any limitations remain subject to the principle of proportionality.

Mindful of these rules and principles, the Court of Cassation's request for a preliminary ruling from the CJEU concerned two questions about the French rules on duplication of proceedings and penalties (as established primarily by case law from the French constitutional court). The first concerned the compliance of French rules with the principle of legality of criminal offenses and penalties. Notably, these rules do not appear in any legislative instrument, having instead been established over time through case law alone, based on certain broad concepts like the seriousness of the offense committed.

The second concerned whether the French rules limiting the duplication of penalties satisfied the proportionality principle. These rules stipulate

[1] Court of Cassation, Crim. Div., Case No. 19-81.929 (Oct. 21, 2020).

that, when multiple penalties are imposed for a given offense, all penalties combined cannot exceed the maximum criminal or tax penalty applicable (whichever is higher) to the offense in question. But this only applies to penalties of the same kind.

The CJEU referral went further than previous case law from both the Court of Cassation and the constitutional court on the subject. Therefore, while the CJEU's ruling is consistent with its own settled case law, it will nonetheless have far-reaching consequences in France for the foreseeability and proportionality requirements.[2]

Citing articles 50 and 52 of the charter, the CJEU confirmed that administrative penalties of a criminal nature (as per EU law) can be combined with criminal penalties. This exception to the principle of *ne bis in idem* is only possible when the relevant national law contains clear and precise rules that: (1) allow taxpayers to determine which acts and omissions can trigger a duplication of proceedings and penalties; and (2) ensure that the severity of the combined penalties imposed remains proportionate to the seriousness of the offense. It was against these requirements that the CJEU measured the French rules under which, in this case, a taxpayer could be sentenced to criminal penalties for fraudulent tax evasion (as per section 1741 of the French tax code) on top of the tax penalty for an intentional offense (40 percent of the tax payable, as per section 1729 of the French tax code).

On March 22, 2023, the Court of Cassation's criminal division handed down two judgments — one was the case for which it requested a preliminary ruling from the CJEU.[3] It quashed the court of appeal judgment in each case, holding that these judgments breached the requirements set out by the CJEU, and remanded both cases to the lower courts. This provided some clarification (albeit partial) on how the CJEU's preliminary ruling would be applied in France.

We provide a brief summary of the preexisting case law before considering, in light of the Court of Cassation's recent interpretation, what the CJEU's *BV* judgment will mean for the requirements for rules on duplication of proceedings to be foreseeable, and for the combined penalties to be proportionate.

Previous Case Law

Before we can assess how this judgment will affect the legal landscape, we need to review where the CJEU previously stood on the principle of *ne bis in idem*, as well as how the French courts have reached their current position on the combination of criminal and tax penalties.

Ne Bis in Idem in the CJEU's Case Law

In *Åkerberg Fransson* on February 26, 2013,[4] the CJEU held that the principle of *ne bis in idem* prevented Swedish authorities from imposing both criminal and tax penalties on a person convicted of VAT fraud, on the grounds that article 50 of the charter allowed for such duplication of penalties only in cases where the tax penalties were not punitive in nature. To determine whether this was the case, the CJEU took the same approach as it did in *Bonda*,[5] relying on the criteria established by the European Court of Human Rights (ECHR) in *Engel v. The Netherlands*[6] (regarding the penalties' severity and the category and nature of the applicable offenses) to assess if certain administrative penalties could be considered criminal in nature. If, on that basis, the tax penalties were found to be criminal in nature, then no further criminal penalties could be imposed.

The CJEU subsequently revised its position considering the ECHR's judgment in *A and B v. Norway*,[7] which had a somewhat nuanced stance allowing for criminal penalties to be imposed on top of tax penalties of a criminal nature in combined proceedings. The ECHR held that when there was a sufficiently close connection in substance and time between the criminal and tax proceedings, the situation did not amount to a repetition of proceedings or penalties. In its own judgment in *Menci*,[8] though not fully adopting the

[2] *BV*, C-570/20 (CJEU 2022).

[3] Court of Cassation, Crim. Div., Case nos. 19-81.929 and 19-80.689 (Mar. 22, 2023).

[4] *Åklagaren v. Hans Åkerberg Fransson*, C-617/10 (CJEU 2013).

[5] *Bonda*, C-489/10 (CJEU 2012).

[6] *Engel v. The Netherlands*, Case No. 5100/71 (ECHR 1976).

[7] *A and B v. Norway*, Case nos. 24130/11 and 29758/11 (ECHR 2016).

[8] *Menci*, C-524/15 (CJEU 2018).

ECHR's exception to the rule, the CJEU nonetheless relaxed its position from *Åkerberg Fransson*, relying on article 52(1) of the charter to hold that the principle of *ne bis in idem* could be disregarded when three conditions were met. First, there must be "an objective of general interest" and the second set of proceedings and penalties must pursue additional objectives. Second, the rules must ensure "coordination which limits to what is strictly necessary the [resulting] additional disadvantage" for the people concerned. And third, the overall severity of all penalties imposed must not exceed what is strictly necessary in view of the seriousness of the offense in question.

This flexibility first seen in *Menci* is clearly confirmed by *BV*. In his opinion in *Menci*, Advocate General Manuel Campos Sánchez-Bordona had argued, at some considerable length, against aligning the CJEU's case law with that of the ECHR. Instead, he wanted to see the principle of *ne bis in idem* fully safeguarded by EU law.[9] He was also against allowing the duplication of proceedings and penalties in *Menci* on the grounds of article 52(1), arguing that the conditions that could justify an exception to the principle of *ne bis in idem* — in particular the nature of the penalties in question — were not met.[10] But the CJEU ultimately ruled differently. However, in his opinion in *BV*, Campos Sánchez-Bordona freely accepted the restriction of these fundamental rights, based on article 52(1) and citing the judgment in *Menci*.[11] It has come as no surprise, then, that the CJEU has now reiterated its position from *Menci*, referring to it as settled case law[12] and stating in the operative part of its judgment that the fundamental right to non-duplication of proceedings is guaranteed by article 50, to be "read in conjunction with Article 52(1)." It is now firmly established that a given offense may entail both criminal and tax penalties — the principle of *ne bis in idem* notwithstanding — subject to certain conditions.

Duplication of Proceedings and Penalties

Broadly speaking, the French rules on duplication of proceedings and penalties — rules that have now been called into question by the CJEU's judgment of May 5, 2022 — were developed through case law in two main stages.

The French constitutional court first considered the matter in its judgment of March 18, 2015,[13] in a case involving insider trading. It held that a defendant could not be tried again for the same acts carrying the same penalties by a court within the same branch of the French legal system (that is, ordinary or administrative) to protect the same societal interests. A little over a year later, in its *Wildenstein* and *Cahuzac* judgments of June 24, 2016, the constitutional court specifically considered how this principle should apply to combinations of tax and criminal proceedings.[14] It held that in these cases, duplications of proceedings were lawful, but set out three provisos: (1) a taxpayer who has been cleared of wrongdoing on consideration of the merits in a non-appealable judgment from the tax courts cannot be convicted of tax evasion by the criminal courts; (2) the criminal penalties set out under section 1741 of the French tax code must be reserved for "only the most serious offenses"; (3) the combined penalties imposed must not exceed the maximum criminal or tax penalty applicable (whichever is higher) to the offense.

These three provisos caused a good deal of uncertainty in the French judiciary, in procedural terms (the criminal courts typically refused to order a stay of proceedings pending the tax court's judgment), but also in terms of substance, because of the lack of clear guidelines on how to categorize the seriousness of tax offenses. The Court of Cassation's criminal division cleared up some of this uncertainty in its September 11, 2019, judgment.[15] It held that the criminal courts could order a stay of proceedings when there was a "serious risk of conflicting judgments." It also held

[9] Opinion of Advocate General Manuel Campos Sánchez-Bordona in *Menci*, C-524/15, paras. 69-77.

[10] *Id*. at paras. 88-94.

[11] Opinion of Advocate General Manuel Campos Sánchez-Bordona in *BV*, C-570/20, paras. 45-50.

[12] Para. 29 of *BV*, C-570/20, referring to the judgments in *Menci*, C-524/15, and *Nordzucker*, C-151/20 (CJEU 2022).

[13] Constitutional Court, preliminary rulings on constitutionality in *John L.*, joined cases 2014-453/454 and 2015-462 (Mar. 18, 2015).

[14] Constitutional Court, preliminary rulings on constitutionality in *Alec Wildenstein*, Case 2016-545, and *Jérôme Cahuzac*, Case 2016-546 (June 24, 2016).

[15] Court of Cassation, Crim. Div., Case nos. 18-81.040, 18-81.067, 18-81.980, 18-82.430, 18-83.484, and 18-84.144 (Sept. 11, 2019).

that an offense's seriousness should be assessed on a case-by-case basis considering various factors, like whether it was an isolated incident or part of a long-term pattern, whether it had been committed by an elected official, whether international intermediaries were involved, and how much tax had been evaded. Moreover, it ruled that the criminal courts only needed to abide by the principle of proportionality when imposing a penalty of the same nature.

It is these last two points — how to assess the seriousness of offenses and to what extent penalties should be limited — that had cropped up again, prompting the Court of Cassation's requests for the preliminary rulings of October 21, 2020. In submitting its requests, the Court of Cassation betrayed a certain skepticism vis-à-vis the constitutional court's provisos from 2016. Indeed, it is telling that it bypassed the option of requesting a preliminary ruling on constitutionality,[16] instead bringing in the CJEU directly.

The Question of Foreseeability

The CJEU held that French rules restricting duplication of proceedings and sanctions satisfied the foreseeability requirement despite resulting from case law and referring to broad concepts. Nonetheless, the condition of reasonable foreseeability laid down by the CJEU will undoubtedly give rise to a certain amount of debate in practice.

Rules Based on Case Law Can Be Foreseeable

Two main criticisms have been leveled against the French regime on duplication of proceedings:

> first, that it was contrary to the principle of legality of criminal offenses and penalties (article 49); and
>
> second, that it failed to satisfy the requirements of clarity and precision arising from the principle of proportionality (article 52).[17]

First off, went the argument, the French rules on duplication of penalties for tax evasion lack the necessary clarity and precision, deriving solely from case law. This argument is heavily influenced by French civil law thinking, where the courts are said to be "the mouthpiece of the law"[18] — the law being, in theory, sufficiently clear by itself with no need for interpretation. The principle of duplication of proceedings and penalties is, in fact, set out in the French tax code (section 1741), but it is prefaced by the following: "Subject to the special provisions contained in this code."[19] It is true that the average French taxpayer could read the tax code and the criminal code from cover to cover and still be unsure of its meaning if the taxpayer actually faced a duplication of proceedings. Nonetheless, the CJEU relied on both its own case law[20] and that of the ECHR[21] to hold that the charter did not preclude rules on the duplication of proceedings and penalties "based only on settled case law."

Moreover, it could be argued that, in stipulating that proceedings can only be duplicated in the most serious cases of tax evasion, the French rules came up against the issue of foreseeability. Indeed, the constitutional court's 2016 judgment establishing this condition merely indicated that the seriousness of an offense might be assessed based on the sums evaded, the defendant's behavior, or the circumstances involved — it was not until the Court of Cassation's judgment of 2019 that clear guidelines were given on how to interpret this condition and establish how serious an offense was. Even then, the Court of Cassation itself apparently felt that its judgments warranted further explanation, taking the highly unusual step of issuing accompanying guidance notes. In his *BV* opinion, the advocate general considered whether this reference to "the most serious cases" might be equivalent to the Italian law condition that proceedings and penalties can be duplicated

[16] Court of Cassation, Crim. Div., Case No. 18-90.035 (Mar. 6, 2019).

[17] See paras. 31 and 37 in *BV*, C-570/20, for a discussion of how the requirements arising from these various principles hang together.

[18] Montesquieu, *The Spirit of the Laws*, XI, 6 (1748) ("Judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour.").

[19] A reference to the tax penalties provided for in the French tax code, particularly under section 1729.

[20] *AC-Treuhand*, C-194/14 P (CJEU 2015).

[21] *Olsson v. Sweden*, Case No. 10465/83 (ECHR 1988).

when the sums involved exceed €50,000, upheld by the CJEU in *Menci*. That might be pushing it! Saying that the clarifications from the Court of Cassation exceeded "the minimum necessary" for national legislation to determine, in a reasonably foreseeable manner, when penalties could be duplicated, the advocate general nonetheless wrote that "a better systematisation of all the applicable criteria would be desirable."[22]

When Exactly Was Foreseeability Satisfied?

The CJEU has said that for the French case law regime on duplication of penalties not to run afoul of article 50, the rules must have been reasonably foreseeable when the offense was committed. This condition could raise all sorts of questions in practice. The obvious conclusion to draw could be to shield offenders from the risk of a second prosecution if they committed their offenses before June 24, 2016 (the date of the constitutional court's judgment establishing the first rules on duplication of tax proceedings and penalties).

But it may be more complicated than that, partly because that judgment refers solely to tax evasion by concealment. The rules on duplication of penalties in cases of tax evasion by non-declaration were not established until two years later.[23] And above all, both the advocate general and the CJEU specifically reference the later case law from the Court of Cassation's criminal division, which clarified the rules first established by the constitutional court. So arguably, the condition of foreseeability was not satisfied until the Court of Cassation's judgments of September 11, 2019.

In its most recent judgments of March 22, 2023, the Court of Cassation adopted a much stricter approach. It ruled that, even though the court of appeal had indeed erred by failing to ascertain, as required, whether the taxpayer could have reasonably foreseen the risk of a combination of criminal and tax penalties when he committed the offense, this error should not invalidate the judgments. The Court of Cassation took the view that, at the time of the offenses (which in fact predated the constitutional court's 2016 judgment), both criminal and tax penalties could in fact already be imposed for the same acts or omissions under sections 1729 and 1741 of the French tax code. This rather hard-line position on the condition of foreseeability will need to be further clarified and cemented by future rulings.

The Question of Proportionality

The CJEU's response to the second question is more radical — that the French rules on duplication of proceedings and penalties do not satisfy the proportionality requirement. It is on these grounds that the Court of Cassation quashed the judgments from the court of appeal in its rulings of March 22, 2023. In failing to provide any solution to this issue, the CJEU also left considerable uncertainty in its wake — uncertainty that has not been totally dispelled by the Court of Cassation.

Flawed Method on Penalty Limitation

The CJEU held the French regime on the duplication of proceedings to be incompatible with article 50, ruling that the requirement for proportionality of penalties "applies, without exception, to all of the penalties imposed cumulatively and, therefore, to both the duplication of penalties of the same kind and the combination of penalties of a different kind."[24]

The effects of this part of the judgment will be far-reaching. The CJEU tasks the referring court with ensuring that the severity of all penalties imposed remains proportionate to the seriousness of the offense. The French government has asserted that this is already the case, because the criminal courts have the power to vary any criminal penalties imposed, but it is hard to see how the referring court could stick to that claim considering the CJEU's judgment. Given that the principle of proportionality applies in conjunction with the legality of criminal offenses and penalties, the CJEU held that the criminal courts' obligation to ensure proportionality "must be clearly and precisely laid down in the national legislation at issue."[25] This can hardly be said to be

[22] Opinion of Advocate General Manuel Campos Sánchez-Bordona in *BV*, C-570/20, para. 79.

[23] Constitutional Court, preliminary ruling on constitutionality in *Thomas T.*, Case No. 2018-745 (Nov. 23, 2018).

[24] *BV*, C-570/20, at para. 50.

[25] *Id.* at para. 53.

the case: The French case law only imposes a limit when the various penalties are all financial in nature. The criminal courts can freely impose a prison sentence and further nonfinancial penalties (such as disqualification, or a ban from standing for elected office) on top of any tax penalties. The authority of the French tax courts represents a further stumbling block to such a minimalist reading of the CJEU's judgment, because unlike the criminal courts, a tax court cannot vary the penalties it imposes for a given offense. So, if a taxpayer has already been sentenced to criminal penalties and is subsequently found guilty by the tax court, too, then the only way for the latter to ensure that the severity of all penalties imposed does not exceed the seriousness of the offense would appear to be to impose no tax penalties at all — hardly a reasonable solution.

Devising a Route to Compliance

Opinions have differed in France as to how the CJEU's preliminary ruling on the second question should be applied in practice.[26] Based on a maximalist reading (for which there is some justification), even if the French rules on limitation of penalties can be brought into compliance with the charter, the CJEU's ruling would preclude duplication of proceedings in cases where "clear and precise rules" were not available to the taxpayer at the time of the offense. As a result, any ongoing duplicate proceedings should be dropped. Some have argued that this maximalist reading should only apply when a taxpayer faces a custodial sentence on top of financial penalties. There has also been a lack of consensus on how to bring the French rules into compliance. Given the difficulties involved in assessing proportionality when dealing with a combination of different types of penalty, one solution might be for the courts to stick to just one type of penalty (whether financial, custodial, or other) for any given offender. Alternatively, it has been suggested that a new schedule of penalties might be what is needed.

Once again, the Court of Cassation's judgments of March 22, 2023, reflect a rather restrictive interpretation. The court ruled that, under the charter, if a party charged with tax evasion can show that a definitive tax penalty has already been imposed for the same acts or omissions, section 1741 of the French tax code must be applied "in such a way that the final burden resulting from all the penalties pronounced, *whatever their nature*, is not excessive in relation to the seriousness of the offense committed."[27] (Emphasis added.) The court of appeal was thus required to justify why it was pronouncing criminal penalties (including a custodial penalty in Case No. 19-81.929) on top of the tax penalties already imposed. However, it remains uncertain at this stage how this criterion of the seriousness of the offense should be applied, considering the second requirement of the constitutional court — namely, that the criminal penalties set out under section 1741 of the French tax code must be reserved for only the most serious offenses. It will be interesting to see how the lower courts will address that point now that the matter is back in their hands.

Things are unlikely to end there. Article 51 limits the charter's scope to cases involving EU law. VAT fraud falls into this category, as confirmed by the CJEU in *Åkerberg Fransson* and *Menci*. But it is hard to see how the scope of the *BV* judgment could be restricted to EU cases alone: Doing so would surely result in potential discrimination against offenders in purely domestic cases. Cue an appeal to the ECHR. ■

[26] Marc Pelletier, "*Non bis in idem* et cumul des sanctions fiscales et pénales: épilogue provisoire?" 20(176) *Rev. Droit Fiscal* (2022) (in French); Jérôme Turot, "Le droit européen encadre les cumuls de poursuites et de sanctions que peut subir un contribuable," 28(6) *Navis* (2022) (in French); Catherine Cassan and Paul Mispelon, "Cumul des sanctions pénales et fiscales: une histoire sans fin?" 27(276) *Rev. Droit Fiscal* (2022) (in French).

[27] Court of Cassation, Crim. Div., Case No. 19-81.929, para. 22, and Case No. 19-80.689, at para. 27 (Mar. 22, 2023).