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Court of Justice of the European Union

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Advocate General's Opinion in Case C-617/10  
Åklagaren v Hans Åkerberg Fransson

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**In the view of Advocate General Cruz Villalón, the EU Charter of Fundamental Rights does not prevent a person from being sanctioned in criminal proceedings for facts in respect of which a final penalty has already been imposed in administrative proceedings for the same conduct**

*Nonetheless, the principle of the prohibition of arbitrariness requires that account be taken of the prior existence of an administrative penalty for the purposes of mitigating the criminal penalty*

EU Member States, along with other European States, have ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The European Court of Human Rights, based in Strasbourg, ensures compliance with the obligations resulting from that convention.

Moreover, on adoption of the Treaty of Lisbon, the EU adopted a binding Charter of Fundamental Rights. In particular, the Charter recognises the *ne bis in idem* principle, namely the right not to be tried or punished twice **in criminal proceedings** for the same offence.

In the event that a fundamental right is laid down in both the Charter and the ECHR, the Charter stipulates that that right must be given the meaning and scope which results from the ECHR.

Mr Fransson is self-employed. During the 2004 and 2005 tax years, he failed to comply with his obligations to provide tax information in Sweden. On 24 May 2007, the Swedish tax authorities imposed on Mr Fransson a fine for tax offences committed during the 2004 tax year, of which 4 872 Swedish Krona concerned VAT-related infringements – a tax regulated by a directive from 2006<sup>1</sup>. As regards the 2005 tax year, the Swedish authorities imposed another fine, of which 3 255 Swedish Krona concerned VAT-related infringements.

No appeal was lodged against either the penalty for 2004 or the penalty for 2005 and those penalties thus became final. On 9 June 2009, criminal proceedings were brought against Mr Fransson. The Public Prosecutor accuses Mr Fransson of committing an offence of tax evasion in the 2004 and 2005 fiscal years. The offence with which Mr Fransson is charged is punishable by up to six years' imprisonment. The facts on which the charge brought by the Public Prosecutor are based are the same as the ones which formed the basis for the administrative penalty imposed on 24 May 2007.

In that context, the Haparanda Tingsrätt (District Court of Haparanda, Sweden), which is hearing the criminal proceedings, asks the Court of Justice whether the *ne bis in idem* principle, laid down in the Charter, precludes a Member State, when faced with an infringement of VAT legislation, from imposing both an administrative and a criminal penalty in respect of the same facts.

Situations in which the Charter is applicable

In today's Opinion, the Advocate General notes that the Member States are affected by the provisions of the Charter only when they are implementing EU law. Accordingly, in cases in which

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<sup>1</sup>Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

national public authorities are ‘applying’ EU law, the European Union is required to ensure that fundamental rights are protected in actions taken by the Member States.

In the present case, the Advocate General considers that **the degree of connection between EU law ‘being applied’ (in this case, Directive 2006), and the actions of Sweden is not a sufficient basis for a clearly identifiable interest on the part of the European Union in assuming responsibility for guaranteeing the *ne bis in idem* principle.** The Swedish tax penalty system is not based directly on EU law, since the directive at issue does not regulate penalties for VAT-related infringements. As a result, Sweden has made its tax penalty system merely an adjunct to the levying of VAT.

**Considering that the present case does not fall within the scope of EU law, the Advocate General proposes that the Court of Justice declare that it lacks jurisdiction to give a ruling on the question referred by the Swedish national court.**

#### The *ne bis in idem* principle

**However, in the case that the Court of Justice decides that it does have jurisdiction to give a ruling on the substance of the case, the Advocate General examines the scope of the *ne bis in idem* principle under EU law** and, in particular, whether that principle, as laid down in the Charter, precludes a Member State, when implementing EU law, from imposing both an administrative and a criminal penalty in respect of the same facts.

In the context of that examination, the Advocate General notes that the Charter provides that the meaning and scope of the rights contained therein are ‘the same’ as the corresponding rights laid down in the ECHR.

The Advocate General states that the ECHR recognises the *ne bis in idem* principle. Moreover, in accordance with the interpretation of the Convention by the European Court of Human Rights in Strasbourg, **the ECHR precludes measures which impose both an administrative and a criminal penalty in respect of the same facts**, thereby preventing new proceedings from being brought, whether administrative or criminal, if the first penalty has become final.

Nonetheless, the Advocate General notes that **the *ne bis in idem* principle laid down in the ECHR has not been unanimously accepted by the States signatories to the ECHR, including a number of Member States of the EU.** Certain EU Member States have ratified that provision and others have adopted reservations or interpretative declarations relating to it.<sup>2</sup>

That being the case, **the Advocate General considers that the requirement that the Charter is to be interpreted in light of the ECHR must be qualified when – as in the present case – a fundamental right recognised by the ECHR (in this case, the prohibition of the imposition of both administrative and criminal penalties for the same offence), has not been incorporated fully into national law by all EU Member States.** In such a situation, the Advocate General is of the view that the ECHR inspires EU law, and that the obligation to place the level of protection provided for in the Charter on an equal footing to that provided for in the ECHR is not as effective.

On the basis of that consideration, the Advocate General considers that there is nothing in the wording of the Charter which leads to the conclusion that the intention was to prohibit the accumulation of an administrative and a criminal sanction for the same conduct. Moreover, the language used in the Charter stresses the criminal law dimension of the *ne bis in idem* principle. However, Advocate General Cruz Villalón points out that the principle of proportionality and, in any event, the principle of the prohibition of arbitrariness, which is inherent in the rule of law, requires

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<sup>2</sup> As at the date of delivery of this Opinion, Article 4 of Protocol No 7 to the ECHR, which recognises the *ne bis in idem* principle, has not been ratified by Germany, Belgium, the Netherlands and the United Kingdom. Among the Member States which have ratified the protocol, France lodged a reservation to Protocol No 7, restricting its application solely to criminal offences. Likewise, at the time of signature, Germany, Austria, Italy and Portugal lodged a number of declarations leading to the restriction of the scope of Article 4 of Protocol No 7 so that the protection under that provision applies only to double punishment in respect of criminal offences, within the meaning laid down in national law.

that, in criminal proceedings, account be taken of the fact that the facts at issue in the proceedings have already been the subject of an administrative penalty.

Consequently, the Advocate General concludes that **the Charter does not preclude the Member States from bringing criminal proceedings relating to facts in respect of which a final penalty has already been imposed in administrative proceedings, provided that the criminal court is in a position to take into account the prior existence of an administrative penalty for the purposes of mitigating the criminal penalty to be imposed by it.** It is for the Swedish national court to assess whether such 'offsetting' is permitted under its national law.

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**NOTE:** The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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*The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.*

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