



*Directorate-General for Library,
Research and Documentation*

RESEARCH NOTE

Criminal penalties in the event of non-payment of value added tax

[...]

Subject: Examination of the criminal penalties to be imposed in a case where a taxable person fails to pay, within the statutory time limit, value added tax which he has previously and correctly declared — Applicability of those penalties subject to conditions

[...]

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SUMMARY

I INTRODUCTION

1. The purpose of the present research note [...] is to examine which Member States [...] impose criminal penalties to combat the failure by taxable persons to pay, within the statutory time limit, value added tax which has been previously and correctly declared. The research note will also explore any conditions attached to those criminal penalties, such as a threshold, expressed as a monetary value, above which they may be imposed.

II METHOD

2. The research note was drafted in two steps. In the first step, a survey was conducted covering the legal systems of the European Union to identify those which impose a criminal penalty, such as that referred to above. Next, the legal systems for which the answer was in the affirmative were included in the second step, in which a detailed report was drafted.
3. The purpose of the present summary is to set out and analyse the results of the second step.

III DEFINITIONS

4. First of all, the concept of a ‘criminal penalty’ must be defined for the purposes of the present research note. In some legal systems, it is conceivable that criminal penalties which are not specifically prescribed for the non-payment of value added tax, such as those imposed for offences of breach of trust,¹ may be applicable by way of penalty for non-payment of value added tax which has been previously and correctly declared.
5. There could also be legal systems in which a penalty, even though it is formally administrative in nature, is so severe that it is comparable to a criminal penalty.

¹ Although not an offence under general criminal law, an offence of breach of trust is provided for in **Portuguese law** as part of the general system of tax offences.

6. However, the present research note concerns only the criminal penalties laid down to combat failure to pay, within the statutory time limit, value added tax which has been previously and correctly declared. Nevertheless, by way of comparison, there will also be an examination of whether such penalties are also imposed in cases of non-payment of other charges or taxes.

IV LAW

7. [...]
8. [...] in the legal systems studied in connection with the present research note, the imposition of a criminal penalty requires, as will be seen, that the reasons for non-payment relate to the economic benefits gained from the undue deferral of tax payment, preferential treatment of other creditors to the detriment of the public purse or fraud such as ‘carousel fraud’.

A. NON-PAYMENT OF A DEBT AND CRIMINAL PENALTIES

9. As a preliminary point, it can be observed that the principle that no one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation is confirmed in Article 1 of Protocol No 4² to the European Convention on Human Rights and in Article 11 of Part III of the International Covenant on Civil and Political Rights.³ That principle prohibits criminal penalties entailing custodial sentences but not penalties in the form of fines. Moreover, that principle does not apply to obligations falling outside the scope of contract law, which include, inter alia, tax debts owing to the public purse.
10. Thus, criminal penalties entailing custodial or prison sentences are imposed in some Member States and, as will be seen below, serve to punish acts of misappropriation to the detriment of the Treasury. It is in order not to undermine the equal treatment of creditors, including the public purse, that Member States

² Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto. Strasbourg 16.IX.1963.

³ Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966. The Covenant entered into force on 23 March 1976, in accordance with Article 49.

provide for criminal penalties in the event of non-payment of taxes, as is the case, inter alia, in **Finnish law**.

B. TAXES AND CONTRIBUTIONS IN GENERAL

11. The study of the legal systems selected for the present research note shows that, in the event of failure to pay amounts owing to the Treasury, non-payment of value added tax is not unique in being subject to criminal penalties. Similarly, the non-payment of direct taxes, in the legal systems studied, often constitutes a criminal offence, which can lead to criminal penalties.
12. In that context, it may be noted that non-payment of taxes deducted at source by a third party is also liable to constitute a criminal offence. That is the case in the **Slovak Republic**. Such a penalty was also provided for in **Sweden** until 1996. The provision imposed criminal liability on the employer in the event of non-payment, within the prescribed time limit, of an amount corresponding to the tax deducted at source from the salary of an employee by way of income tax. However, such liability required intent or gross negligence on the part of the employer, the examination of which could sometimes require the inclusion of facts which occurred well before the expiry of that time limit, in particular where the person responsible for making the payment put himself, either intentionally or through gross negligence, in a situation which prevented him from paying the deducted taxes.⁴
13. In 1983, it was also proposed in **Sweden** that that solution be extended to employers' contributions and value added tax. However, that proposal was met with heavy criticism and was not adopted.

C. VALUE ADDED TAX

14. The examination of the various legal systems under consideration in the present research note shows that the penalties provided for in the case of non-payment of value added tax include administrative and criminal penalties. The latter penalties

⁴ It may be noted that the Swedish legislature repealed that criminal penalty in 1996, ruling that the personal liability of the representatives of the taxable person should suffice for effective recovery. Today, that system of personal liability for tax payment has been called into question in Sweden in the light of the European Convention on Human Rights, in particular Article 6 thereof, the argument being that that liability for payment could constitute a criminal charge.

are fines, custodial sentences and, in particular, prison sentences. Aside from those penalties, all the legal systems studied also provide for the application of late payment interest.

1. ADMINISTRATIVE PENALTIES

15. Administrative penalties are imposed in **Belgium, Ireland, Lithuania, the Netherlands and Portugal**.⁵
16. As regards the severity of the administrative penalties, it should be noted that **Belgian law** provides for an administrative fine of twice the amount of the tax paid late.⁶ In **Netherlands law**, the administrative penalty can be as much as 100% of the basis of assessment of the fine. In **Portugal**, administrative penalties are imposed where a taxable person — whether a natural or legal person — fails in whole or in part to pay to the tax authorities tax in an amount of no more than 7 500 euros. In that situation, the taxable person may be ordered to pay a fine in an amount which varies according to whether the offence was committed intentionally or through negligence. Similarly, where the amount of the tax payable is more than 7 500 euros, an administrative penalty is imposed when the default period is 90 days or less. Where administrative penalties are imposed on legal persons, their representatives are not, in principle, held personally liable for the payment of that penalty, although, in some circumstances, they may be held jointly and severally liable for the payment of those penalties.

2. CRIMINAL PENALTIES

17. Nine Member States impose criminal penalties in the event of non-payment, within the statutory time limit, of value added tax which has been previously and correctly declared.
18. Those States are **Belgium, Finland, Greece, Ireland, Lithuania, the Netherlands, Poland**,⁷ **Portugal** and the **Slovak Republic**. It should be noted that the criminal penalties provided for in the legal systems in question apply to value added tax as well as other taxes and charges. In **Greece**, the criminal penalties vary on the basis of the tax or charge which has not been paid.

⁵ In the **Netherlands** and **Portugal**, the amount of the administrative penalty is established on the basis of the taxable person's intent, recklessness or negligence.

⁶ It must be pointed out that that administrative penalty cannot be imposed concurrently with a criminal penalty for the same failure to pay value added tax. That administrative penalty has been held to be in the nature of a criminal penalty by the Belgian Constitutional Court.

⁷ However, in Poland, non-payment must be persistent for it to be covered by the criminal penalty.

19. With the exception of **Portuguese law**, the studies of the legal systems indicated did not show that those penalties were introduced in the interests of also protecting the European Union's own resources. In three Member States, namely **Finland**, **Lithuania** and the **Slovak Republic**, the criminal penalty for failure to pay value added tax within the prescribed period was introduced well before the accession of the State concerned to the European Union.
20. The criminal penalties imposed in those legal systems include fines and custodial sentences, in particular prison sentences. In that regard, it should be noted that **Poland** provides only for a fine as the criminal penalty in the event of non-payment of a tax or charge. Nevertheless, where that fine goes unpaid, it may be converted into a custodial sentence.
21. In other legal systems, in particular in **Belgian**, **Irish** and **Slovakian** law, it is possible for criminal fines and prison sentences for non-payment of value added tax to be imposed concurrently on the same person for the same offence.

3. ACTUS REUS AND MENS REA

22. However, in addition to the *actus reus*, namely non-payment of value added tax in a timely manner, the legal systems examined also require a *mens rea*, which consists in the taxable person's intention to infringe the obligation to pay value added tax or, in some legal systems, negligence on the part of the taxable person.
23. As regards *mens rea*, it is possible to identify two objectives with which the legislatures find fault: first, the objective of personal enrichment or the enrichment of others (**Finnish law**) or the obtaining of an unfair advantage (**Belgian law**) and, secondly, the objective of injury to the public purse (**Portuguese and Slovakian law**)⁸ or even to non-fiscal interests (**Belgian law**).
24. In that regard, **Belgian law** requires either fraudulent intent or intent to cause harm. Accordingly, fraudulent intent may, for that purpose, seek to evade payment of value added tax with a view to misappropriating it, thus creating an unlawful advantage for the benefit of the taxable person or others.
25. In **Lithuanian law**, criminal intent arises where the taxable person is aware of

⁸ In the **Netherlands**, the absence in the criminal legislation of a condition requiring an intent to harm the public purse has been criticised owing to the risk of criminal penalties being imposed on well-intentioned taxable persons.

having submitted the tax return and of his obligation to pay the taxes due but does not fulfil that payment obligation, knowing that the tax authorities have sent him a payment reminder indicating the time limit for payment.

26. In **Poland**, the imposition of a criminal penalty presupposes that the omission by the perpetrator of the offence was intentional (*dolus directus*). The taxable person's intention not to pay the tax must amount to a refusal (*dolus coloratus*) which, in conjunction with a temporal aspect, is the pre-condition for classifying the non-payment as 'persistent' and thus for considering it wrongful. In the **Netherlands**, in addition to intent, *dolus eventualis* applies where the taxable person admits to that omission.
27. Under **Irish law**, a failure to pay taxes or charges is criminalised where there is an intention not to pay (*mens rea*), whereas in **Portuguese law**, it is also criminalised where non-payment occurs through negligence.

4. INCRIMINATION THRESHOLDS

28. The vast majority of the legal systems studied lay down thresholds for criminal penalties based on the unpaid amount. That is the case, inter alia, in **Greece**, which provides not only for thresholds based on the unpaid amounts, but also for the application of different thresholds according to the type of unpaid tax. Thus, the non-payment of value added tax can give rise to a criminal penalty where the unpaid amount exceeds a threshold of 50 000 euros (minor offence), or of 100 000 euros (serious criminal offence), for each tax period or financial year, whereas, for income tax, the respective thresholds rise to 100 000 euros and 150 000 euros respectively for each tax period or financial year. Those penalties could therefore favour EU own resources over national resources.
29. Thresholds relating to the unpaid amount apply in **Lithuania**: the first covers amounts up to 380 euros, the second amounts up to 19 000 euros and the third applies to amounts over 19 000 euros. All non-payment may be subject to criminal penalties, regardless of the amount in question, even though only non-payment of amounts falling within the two higher thresholds is punishable by a prison sentence. Thresholds also apply in **Portuguese law**, with the first fixed at 7 500 euros, below which non-payment does not give rise to a penalty, and the second at 50 000 euros. Prison sentences are provided for in relation to amounts exceeding

even the first threshold. **Slovakian law** provides for a threshold of 2 660 euros, below which no penalty is applicable. Prison sentences are provided for where the unpaid amount is at least 2 660 euros. The harshest prison sentences are imposed for amounts above 133 000 euros. It should be noted that in the three legal systems, the thresholds provided for apply in the same way, regardless of the charge or tax in question.

30. **Netherlands legislation** does not lay down a threshold above which the failure to pay taxes to the Treasury constitutes a criminal offence. However, under the rules governing coordination between the tax authorities and the public prosecutor, thresholds nevertheless apply in practice. The tax authorities will not investigate whether unpaid amounts below 20 000 euros should be referred to the public prosecutor and such notification is required only in relation to amounts above 100 000 euros. **Poland** similarly does not lay down a threshold for the purpose of establishing whether a tax infringement has been committed.

5. OTHER CONSEQUENCES

31. Non-payment of the tax due within the time limit imposed can give rise to consequences other than criminal penalties for the taxable person. Thus, all the legal systems examined provide for the application of late payment interest in the event of non-payment of value added tax. In that regard, it may be noted that in **Greece**, the State has expressly stated that the late payment interest is intended not as a punishment, but to make good the damage caused to the Treasury by late payment.
32. Other consequences may include disqualification from carrying on a commercial or professional activity (as is the case, inter alia, in **Belgium**, in the **Netherlands**, and in the **Slovak Republic**) or removal from the register of business owners (in **Sweden**).

6. GROUNDS FOR EXEMPTION OR MITIGATING CIRCUMSTANCES

33. Several legal systems provide for an exemption in the case of difficulties in making payments relating to taxes and, in particular, value added tax. That is the case in **Finnish** and **Slovak law**, under which a criminal penalty may be imposed only where non-payment of value added tax is not a result of insolvency. However, in **Finnish law**, in insolvency proceedings consideration is given to whether the

conduct of the taxable person leading to the insolvency favoured certain creditors over the public purse. As regards failures to pay small sums, there is no infringement where that wrongful act is remedied without delay or where the taxable person has agreed a payment plan with the tax authorities and adheres to it. By contrast, in **Slovak law**, insolvency appears, in itself, to exclude any intentional fault on the part of the taxable person.

34. In **Lithuanian law**, reasoning identical to that of **Finnish law** applies. Thus, where the taxable person becomes insolvent *before* the tax debt becomes payable, no criminal liability arises, whereas, in a situation of intentional insolvency, criminal liability of the taxable person is not excluded.
35. Under **Polish legislation**, a penalty exemption is possible provided that all the tax due is paid before the criminal law proceedings in relation to the non-payment have been initiated. In **Slovak law**, the amount due must be paid, at the latest, on the day following that on which the taxable person is notified of the results of the criminal investigation, while in **Portuguese law**, payment of the amount due within a maximum period of 5 years from the date of the criminal conviction may give rise to suspension of the prison sentence.
36. By contrast, **Lithuanian law** provides that the criminal liability of the taxable person cannot be excluded by payment of the tax debt after the time limit for payment. However, such payment may be taken into account by the criminal court in order to reduce the penalty imposed. Some actions taken by the taxable person may have a similar effect, such as the voluntary reparation of damage arising from the non-payment of tax.
37. In **Greek** and **Portuguese law**, a taxable person who establishes that he is in a difficult financial situation may be offered a payment plan for the tax. That measure may be granted at the request of the taxable person, even where the request is made after the statutory time limit for payment of the tax has elapsed. In **Greece**, the taxable person may also transfer his right of ownership in immovable property to third persons, at the same time assigning the debt owed to him to the State. Likewise, in **Netherlands law**, an inability to pay can exclude criminal liability on the part of the taxable person, provided that the tax collection authority is notified as soon as possible or the taxable person has requested a deferral of that payment. It appears that, in the latter legal system, an inability to pay is a sufficient

ground for exemption, regardless of any possible wrongful intent on the part of the debtor, so long as a request for deferral of the payment has been submitted.

38. In **Irish law**, it is possible to apply mitigating measures only to financial penalties.
39. In **Portuguese law**, total or partial non-payment of value added tax is punishable only where the taxable person has actually received the tax from his customers.

V CONCLUSION

40. The study of the legal systems selected for the present research note shows that criminal penalties may be imposed in the event of a taxable person's failure to pay, within the statutory time limit, the value added tax which he has previously and correctly declared. Indeed, non-payment not only of value added tax, but also of other taxes generally constitutes a criminal offence.
41. Aside from the *actus reus* of non-payment of the tax, the *mens rea* of intent on the part of the taxable person to infringe the obligation to pay value added tax or indeed, in some legal systems, of negligence on the part of that taxable person, is a requirement for the imposition of a criminal penalty.
42. To differentiate between infringements according to their seriousness, thresholds based on the unpaid amount are applied, either on the basis of the provisions laid down by law or, in practice, so that only infringements reaching particular amounts are subject to criminal proceedings. In one case, the thresholds applied differ according to the type of the unpaid tax.
43. Finally, in the legal systems studied, grounds for exemption apply. As an example, financial difficulties may exclude criminal liability on the part of the taxable person, at least where insolvency is not intentional, but also where the taxable person himself has not been paid the tax by his customers. Payment of the tax after the prescribed time limit but before the initiation of criminal proceedings may exclude liability, or at least be a mitigating factor, in respect of the imposition of a criminal penalty.