

Case C-570/20**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

28 October 2020

Referring court:

Cour de cassation (France)

Date of the decision to refer:

21 October 2020

Appellant in the appeal on a point of law:

BV

Respondent in the appeal on a point of law:

Direction départementale des finances publiques de la Haute-Savoie

1. Subject matter and facts of the dispute:

- 1 BV was practising as an accountant until 14 June 2011. Following audits of the years 2009, 2010 and 2011, on 10 March 2014 the tax authorities lodged a complaint alleging accounting irregularities and income tax and VAT fraud, committed in particular by means of the concealment of revenue collected, in respect of evaded VAT of EUR 82 507.
- 2 By judgment of 23 June 2017, the tribunal correctionnel d'Annecy (Criminal Court, Annecy) convicted BV and sentenced him to twelve months' imprisonment, inter alia for having fraudulently excluded transactions from the assessment and the payment, in full or in part, of VAT between 1 January 2010 and 14 June 2011.
- 3 Before the cour d'appel de Chambéry (Court of Appeal, Chambéry), BV sought his acquittal on the grounds that his conviction runs counter to the *ne bis in idem* principle enshrined in Article 50 of the Charter of the Fundamental Rights of the European Union. He explained that he had already personally been subject to a tax adjustment procedure in relation to the same acts; the outcome of that procedure

was the imposition of tax penalties amounting to 40% of the charges evaded. In BV's view, the overall severity of the system of penalties is disproportionate.

4 By judgment of 13 February 2019, the Court of Appeal, Chambéry, found that the *ne bis in idem* rule did not apply on the grounds that:

- Article 1741 of the code général des impôts (General Tax Code) provides for the possibility of a combination of criminal penalties and tax penalties further to criminal proceedings and administrative proceedings that are independent of another, have different subject matter and serve different purposes;
- the abovementioned rule is consistent with Article 50 of the Charter since the Conseil constitutionnel (Constitutional Council, France) has specified its scope, stating that:
 - it applies only to the most serious cases of fraudulent concealment of sums liable to tax, with that *seriousness* potentially arising from the amount of the charges evaded, the nature of the actions of the person prosecuted and the circumstances of their commission;
 - the total amount of any penalties imposed must not exceed the maximum amount of one of the penalties incurred, in accordance with the principle of *proportionality*.

5 The Court of Appeal, Chambéry, upheld the operative part of the judgment at first instance regarding BV's guilt and sentenced BV to eighteen months' imprisonment.

6 On 15 February 2019 BV lodged an appeal on a point of law with the Cour de cassation (Court of Cassation, France).

2. Provisions at issue:

A. *EU law*

Charter of Fundamental Rights of the European Union

7 Article 50, which is entitled 'Right not to be tried or punished twice in criminal proceedings for the same criminal offence', reads as follows:

'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.'

8 Article 52 clarifies the scope of the rights guaranteed as follows:

‘1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.’

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

9 Article 273 provides:

‘Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.’

B. French law

The General Tax Code

10 Article 1729 imposes tax penalties, in the form of increases ranging from 40% to 80% of the tax evaded, for wilful inaccuracies or omissions that vitiate a return.

11 Article 1741, in the version thereof applicable to the case at issue, inserted by Law No 2010-1658 of 29 December 2010, criminalises and makes liable to criminal penalties the offence of tax fraud, which, regardless of the applicable tax penalties, may attract a fine of EUR 37 500 and a five-year term of imprisonment.

The case-law of the Constitutional Council

12 The Constitutional Council has found that the duplication of criminal and tax proceedings and penalties in cases of concealment of sums liable to tax, such as cases of non-declaration, is consistent with the principles of the necessity and proportionality of offences and penalties.

13 The Constitutional Council has taken the view that criminal proceedings and tax proceedings are complementary:

‘... the provisions of Article 1729, like the contested provisions of Article 1741, together make it possible to ensure the protection of the financial interests of the State and equality in matters of taxation by pursuing common objectives, which are both dissuasive and punitive in nature. Recovery of the necessary public contribution and the aim of combatting tax fraud justify the initiation of complementary proceedings in the most serious cases of fraud. Thus, criminal prosecutions in circumstances and subject to procedures organised by law can be

initiated in parallel to the audits following which the tax authorities impose financial penalties.’

- 14 However, the Constitutional Council has issued three reservations on interpretation which restrict such duplication:
- a taxpayer who has been relieved of liability for the tax by a judicial decision that has become final on a substantive ground cannot be the subject of a criminal conviction for tax fraud (first reservation);
 - Article 1741 of the General Tax Code, under which tax fraud is punishable, applies only to the most serious cases of fraudulent concealment of sums liable to tax or of omissions in tax returns; that seriousness may arise from the amount of the charges evaded, the nature of the actions of the person prosecuted or the circumstances in which they occurred (second reservation);
 - if the possibility of two sets of proceedings being initiated may result in a duplication of penalties, the principle of proportionality means that, in any case, the total amount of any penalties imposed must not exceed the maximum amount of one of the penalties incurred (third reservation).

Case-law of the Court of Cassation

- 15 With regard to the second reservation concerning the seriousness of the acts capable of justifying the imposition of criminal penalties as well as administrative penalties, the Court of Cassation has clarified the detailed rules governing its application as follows:

‘Where the person charged with tax fraud provides proof that he has personally been subject to a tax penalty in relation to the same acts, it is for the criminal court, after determining that the constituents of that offence are made out having regard to Article 1741 of the General Tax Code, and prior to the imposition of criminal penalties, to establish that the acts alleged are of the degree of seriousness capable of justifying additional criminal penalties. The court is required to state the reasons for its decision, with the seriousness potentially arising from the amount of the charges evaded, the nature of the actions of the person prosecuted or the circumstances of their commission, including any aggravating circumstances. If no such degree of seriousness exists, the court cannot consider a conviction.’

- 16 Certain factual elements deemed to characterise the criteria laid down by the Constitutional Council can be found in judgments given by the Court of Cassation, in particular repeated omissions in returns over a long period despite several letters of formal notice, one of the two persons charged being an elected official of the French Republic, the use of intermediaries established in another country and the amount of the charges evaded.

- 17 With regard to the third reservation concerning the proportionality of the duplication of criminal and tax penalties, the Court of Cassation has similarly clarified the detailed rules governing its application as follows:

‘Where the person charged provides proof that he has been personally subject to a tax penalty imposed with final effect in relation to the same acts, the criminal court is required to ensure that the requirement of proportionality is observed only where it imposes a penalty of the same kind.’

- 18 It follows from the foregoing, in the view of the Court of Cassation, that the principle of proportionality is not infringed where a court sentences an accused, on whom final tax penalties have been imposed, to a suspended term of imprisonment since a criminal fine has not been imposed on him (judgments cited above).
- 19 The reservation on interpretation can relate to penalties of the same kind only, since implementation of that reservation assumes that the court ruling last is able to compare the maximum thresholds of the criminal and tax penalties incurred in order to determine the maximum amount, which is thus the ceiling.

3. Position of the appellant:

- 20 The appellant complains that the court of appeal (i) infringed Article 50 of the Charter of Fundamental Rights by refusing to disapply Article 1741 of the General Tax Code, the provisions of which – as interpreted by the Constitutional Council – are neither clear nor precise, and (ii) did not ensure that the cumulative burden of all the penalties imposed on him was not excessive having regard to the irregularities alleged.

4. Assessment of the Court of Cassation:

- 21 According to the Court of Justice, where they seek to ensure the correct collection of VAT and combat fraud, administrative penalties imposed by the national tax authorities and criminal proceedings initiated in respect of VAT-related offences constitute implementation of Articles 2 and 273 of Directive 2006/112 and Article 325 TFEU and, therefore, of EU law, within the meaning of Article 51(1) of the Charter, and must therefore respect the right guaranteed in Article 50 of the Charter (see judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105).
- 22 The Court of Justice has also held that a limitation of the *ne bis in idem* principle enshrined in Article 50 of the Charter can be justified on the basis of Article 52(1) of the Charter (see judgment of 27 May 2014, *Spasic*, C-129/14 PPU, EU:C:2014:586).

23 By judgment of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, the Court of Justice ruled:

‘1. Article 50 of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding national legislation in accordance with which criminal proceedings may be brought against a person for failing to pay value added tax due within the time limits stipulated by law, although that person has already been made subject, in relation to the same acts, to a final administrative penalty of criminal nature for the purposes of Article 50 of the Charter, on condition that that legislation:

- pursues an objective of general interest which is such as to justify such a duplication of proceedings and penalties, namely combating value added tax offences, it being necessary for those proceedings and penalties to pursue additional objectives,
- contains rules ensuring coordination which limits to what is strictly necessary the additional disadvantage which results, for the persons concerned, from a duplication of proceedings, and
- provides for rules making it possible to ensure that the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned.

2. It is for the national court to ensure, taking into account all of the circumstances in the main proceedings, that the actual disadvantage resulting for the person concerned from the application of the national legislation at issue in the main proceedings and from the duplication of the proceedings and penalties that that legislation authorises is not excessive in relation to the seriousness of the offence committed.’

24 There can be no question that the legislation at issue seeks, inter alia, to combat VAT-related offences, with a view to guaranteeing that all the VAT due is collected, and thus addresses an objective of general interest capable of justifying a duplication of proceedings and penalties of a criminal nature which pursue additional objectives.

25 First, according to the Court of Justice, a limitation may be placed on the *ne bis in idem* principle only if it is necessary, and it must therefore ‘provide for clear and precise rules allowing individuals to predict which acts or omissions are liable to be subject to such a duplication of proceedings and penalties’ (judgment of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraph 49).

26 In that judgment, the Court of Justice found that the Italian legislation ‘clearly and precisely lays down the circumstances in which the failure to pay VAT due may be subject to a duplication of proceedings and penalties of a criminal nature’. The Court thus stated that that legislation defines the ‘conditions according to which the failure to pay VAT due within the time limits prescribed by law may give rise

to the imposition of an administrative penalty of a criminal nature ... and also, if it relates to an annual tax return covering an amount of VAT greater than EUR 50 000, be subject to a term of imprisonment of between six months and two years' (judgment of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraphs 50 and 51).

- 27 According to the appellant, the French legislation does not satisfy the condition that the duplication of criminal and tax proceedings and penalties is clear and foreseeable.
- 28 It should be noted, in the first place, that Articles 1741 and 1729 of the General Tax Code, cited above, precisely define the acts or omissions capable of forming the subject of criminal and tax proceedings and penalties.
- 29 In the second place, in accordance with the reservation on interpretation issued by the Constitutional Council, the ability to impose criminal penalties on a taxpayer who has already been the subject of tax penalties is limited to certain cases that can be classified as the most serious cases of fraudulent concealment or omissions in returns. That seriousness may stem from the amount of the charges evaded, the nature of the actions of the person prosecuted or the circumstances of their commission.
- 30 In addition, certain factual elements have been identified in the case-law of the Court of Cassation which help to clarify the detailed rules governing the implementation of those criteria. That court has also added that the aggravating circumstances provided for in Article 1741 of the General Tax Code can characterise the criterion of seriousness.
- 31 However, the pre-requisite that the acts of tax fraud are serious does not follow solely from the amount of the charges evaded; rather account can also be taken of other circumstances relating to the nature and the context of the actions of the person concerned.
- 32 In those circumstances, it cannot be claimed that the proper application of EU law is so clear as to leave no room for any reasonable doubt.
- 33 Second, according to the Court of Justice, 'the duplication of penalties of a criminal nature requires rules allowing it to be guaranteed that the severity of all of the penalties imposed corresponds with the seriousness of the offence concerned, that requirement resulting not only from Article 52(1) of the Charter, but also from the principle of proportionality of penalties set out in Article 49(3) thereof. Those rules must provide for the obligation for the competent authorities, in the event of the imposition of a second penalty, to ensure that the severity of all of the penalties imposed does not exceed the seriousness of the offence identified' (judgment of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraph 55).
- 34 By contrast, in another judgment given on the same day, the Court of Justice found that the Italian legislation on market manipulation does not guarantee that

the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned (judgment of 20 March 2018, *Garlsson Real Estate and Others*, C-537/16, EU:C:2018:193). The Court thus stated that that legislation merely provides that, where, with respect to the same acts, a criminal fine and an administrative fine of a criminal nature have been imposed, recovery of the former is limited to the part exceeding the amount of the latter, and that that legislation covers only the duplication of pecuniary penalties and not the duplication of an administrative fine of a criminal nature and a term of imprisonment (paragraph 60).

- 35 The appellant alleges that the court of appeal failed to ensure that the disadvantage resulting from all of the penalties imposed on him was not excessive having regard to the offence concerned, which involves first considering whether the French legislation satisfies the condition that the duplication of the criminal and tax penalties is proportionate *in abstracto*.
- 36 It should be noted, in the first place, that, in accordance with the reservation on interpretation set out by the Constitutional Council, the French legislation restricts criminal prosecutions to offences exhibiting a certain degree of seriousness, in respect of which the national legislature has made provision *inter alia*, in addition to the imposition of a fine, for a term of imprisonment.
- 37 In the second place, in accordance with another reservation on interpretation issued by the Constitutional Council, the option of combining penalties is limited by the condition that the total must not exceed the maximum amount of one of the penalties incurred. However, that rule concerns only penalties of the same kind, namely financial penalties.
- 38 In those circumstances, it cannot be claimed that the proper application of EU law is so clear as to leave no room for any reasonable doubt.

5. The questions referred for a preliminary ruling:

- 39 The following questions should be submitted to the Court of Justice:
- 1) Is the requirement of the clarity and the foreseeability of the circumstances in which concealments in returns relating to VAT payable may be the subject of a duplication of proceedings and penalties of a criminal nature satisfied by national rules such as those described above?
 - 2) Is the requirement of the necessity and the proportionality of the duplication of such penalties satisfied by national rules such as those described above?