JUDGMENT NO. 222 YEAR 2019

In this case, the Court examined a referral order from the Criminal Court of Bergamo questioning the constitutionality of Article 649 of the Code of Criminal Procedure under Articles 3 and 117(1) of the Constitution, the latter in respect of the *ne bis in idem* principle, enshrined in both the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the Charter of Fundamental Rights of the European Union (CFREU). In particular, the referring court maintained that Article 649 of the Code of Criminal Procedure fell foul of the *ne bis in idem* principle, since it permitted a person who already had a final administrative sanction imposed on him or her for a tax offence (non-payment of VAT) to be prosecuted under the criminal law for that same wrongdoing.

The Constitutional Court recalled the recent case law of both the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU), and concluded that a legal framework providing for both an administrative and a criminal proceeding for the same conduct is, in principle, compatible with the *ne bis in idem* principle, in as far as it ensures a sufficiently close connection in substance and time between the two proceedings. According to the European courts' case law – to which the Constitutional Court adheres –, such a connection exists when (i) the two proceedings pursue complementary purposes, (ii) the duality of proceedings is a foreseeable consequence for the offender, (iii) the proceedings are conducted in such a manner as to avoid any duplication in the collection as well as any contradictory evaluation of evidence, and (iv) the overall amount of the sanctions imposed in the two proceedings is proportionate to the seriousness of the offence.

The Court was of the view that the referring court failed to properly address all these issues in its attempt to show the incompatibility between the challenged provision and the *ne bis in idem* principle. Therefore, the referral order was held inadmissible.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 649 of the Code of Criminal Procedure, initiated by the Criminal Court of Bergamo in the criminal proceedings against L. M., with a referral order of 27 June 2018, registered as No. 169 of the Register of Referral Orders of 2018 and published in the Official Journal of the Republic, No. 47, first special series, 2018.

Having regard to the entry of appearance filed by L. M. and the intervention filed by the President of the Council of Ministers;

having heard Judge Rapporteur Francesco Viganò, Counsel Vittorio Meanti for L. M. and State Counsel Gianna Galluzzo for the President of the Council of Ministers at the public hearing of 18 June 2019.

[omitted]

Conclusions on points of law

1. – The Criminal Court of Bergamo questions the constitutionality of Article 649 of the Code of Criminal Procedure, with reference to Articles 3 and 117(1) of the Constitution, the latter in relation to Article 4 of Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), "insofar as it does not preclude the possibility of conducting criminal proceedings concerning an act (non-payment of VAT) for which a final administrative penalty has been imposed on the defendant".

1.1. – At the heart of the referring court's question is the allegation that Article 649 of the Code of Criminal Procedure, as per its current and – in the referring court's view – unduly restrictive wording, conflicts with the *ne bis in idem* principle as defined by the CJEU in its judgment of 20 March 2018 in Case C-524/15, *Menci*, given in response to a request for a preliminary ruling submitted by that same Court of Bergamo.

In this regard, the referring court invokes Article 4 of Protocol No. 7 to the ECHR, whereas the *Menci* judgment – on which the reasoning in the referral order is based – in reality interprets the corresponding provision of Union law, namely Article 50 CFREU.

However, it can be inferred from the overall logic of the referral order that the Court of Bergamo wishes to submit to this Court the question of the compatibility of the challenged provision with *both* Article 4 of Protocol No. 7 to the ECHR and Article 50 CFREU, cited in the reasoning, on the assumption that the stance adopted by the ECtHR in its judgment of 15 November 2016, *A and B v. Norway*, is substantially the same as that as that adopted by the CJEU in *Menci*.

The Criminal Court of Bergamo states that it has to rule on the criminal liability of a natural person charged with a crime under Article 10-*ter* of Legislative Decree No. 74 of 10 March 2000, in relation to a failure to pay value added tax (VAT) for an amount higher than the current threshold of punishability of € 250,000. For that same act, the defendant has already had an administrative sanction imposed on him for an amount equal to 30 per cent of the sum evaded pursuant to Article 13(1) of Legislative Decree No. 471 of 18 December 1997. This sanction has now become final.

According to the referring court, the duplication of proceedings and sanctions for the same act – non-payment of the same VAT due – infringes the *ne bis in idem* principle in the terms set down in *Menci*. The conditions laid down in that judgment in order for dual proceedings for the same act to be in line with *ne bis in idem* – i.e., complementary purposes of the different proceedings, foreseeability of the duality of proceedings, coordination between the two proceedings and mechanisms apt to ensure proportionality of the overall amount of any sanctions imposed – were allegedly not met in the present case.

The referring court points out that the law in force does not allow this infringement of *ne bis in idem* to be avoided, since Article 649 of the Code of Criminal Procedure only allows a judgment of no case to answer when a final judgment in relation to the same act has already been rendered by another *criminal* court.

Hence the referring court asks this Court to extend, by means of an additive ruling, the scope of Article 649 of the Code of Criminal Procedure to cover the case, at issue here, in which the defendant has already been punished for the same act with a final *administrative* sanction of a "punitive" nature, such as the one provided for under Article 13(1) of Legislative Decree No. 471 of 1997.

1.2. – The Criminal Court of Bergamo also considers that the inapplicability of Article 649 of the Code of Criminal Procedure to sanctions of a "punitive" nature in accordance with the "Engel criteria" – implying the possibility to commence or continue criminal proceedings for non-payment of VAT even after the imposition of a final administrative sanction for the same conduct – also gives rise to "*unequal treatment* compared to other offences set forth in Legislative Decree No. 74/2000", and questions the *reasonableness* of the challenged provision in light of Article 3 of the Constitution. According to the referring court, the so-called "double-track" system of sanctions in tax offences is justified in relation to the offences under Articles 2, 3, 4, 5, 8, 10 and 11 of Legislative Decree No. 74 of 2000, which punish *deceitful* courses of conduct and protect the Revenue's tax assessment *functions*, but lacks any justification in relation to the offences under Articles 10-*bis* and 10-*ter* of that same Legislative Decree, which directly protect the Revenue's interest in securing payment of tax, i.e. the same interest protected by the administrative sanction under Article 13(1) of Legislative Decree No. 471 of 1997.

2. – The key question raised by the referring court, which assumes that Article 649 of the Code of Criminal Procedure is inconsistent with Article 117(1) of the Constitution in relation to Article 4 of Protocol No. 7 to the ECHR (and implicitly to Article 50 CFREU), is *inadmissible*. Indeed, the referral order does not adequately clarify the reasons why the present case does not meet the conditions making "double-track" proceedings and sanctions for non-payment of VAT lawful, as enunciated in the European case law cited.

2.1. – The referring court merely stresses, on the one hand, the "punitive" nature of the administrative sanction imposed on the defendant pursuant to Article 13(1) of Legislative Decree No. 471 of 1997, and on the other hand the identity of the conduct (the non-payment of VAT due) that can *in abstracto* attract both criminal and administrative sanctions.

The latter circumstance admittedly distinguishes the act examined here from those that are crimes under Articles 2, 3, 4, 5, 8, 10 and 11 of Legislative Decree No. 74 of 2000, concerning courses of conduct which are preparatory to, or in any case different from, tax evasion.

However, the recent case law of both the ECtHR and the CJEU, on which the referring court bases its contention, does not state that the criminal prosecution of an accused person for the same act for which a final administrative sanction has already been imposed amounts, *always and necessarily*, to an infringement of the *ne bis in idem* principle.

As this Court has already had occasion to remark (Judgment No. 43 of 2018), in the judgment of *A and B v. Norway* the Grand Chamber of the European Court of Human Rights held that the right enshrined in Article 4 of Protocol No. 7 to the ECHR is not violated when there is a sufficiently close connection in substance and time between the two proceedings – administrative and criminal. Such a connection must be recognised, in particular, when (i) the two proceedings pursue complementary purposes, (ii) the duality of proceedings is a foreseeable consequence for the offender, (iii) the proceedings are conducted in such a manner as to avoid any duplication in the collection and contradictory evaluation of evidence, and (iv) the overall amount of the sanctions imposed in the two proceedings is proportionate to the seriousness of the offence. At the same time – as pointed out as well by this Court in Judgment No. 43 of 2018 – in order to examine whether Article 4 of Protocol No. 7 to the ECHR is infringed, it is necessary to establish "whether the sanctions, although "punitive" in nature, fall within the hard core of criminal

law. If so, the compatibility of a “double track system” with the *ne bis in idem* principle should be assessed under a stricter scrutiny”.

The Grand Chamber of the CJEU has come to similar conclusions in the three judgments delivered on 20 March 2018 (in Case C-537/16 *Garlsson Real Estate SA and Others*, in Cases C-596/16 and C-597/16 *Di Puma and CONSOB*, and in Case C-524/15 *Menci*, the latter relating to non-payment of VAT and, as noted above, issued precisely following a reference for a preliminary ruling from the same Criminal Court of Bergamo).

In the opinion of the EU’s highest court, there is no infringement of the *ne bis in idem* principle enshrined in Article 50 CFREU when (i) the two sanctions pursue complementary aims relating to different aspects of the same unlawful conduct, provided that the law (ii) ensures coordination between the two sets of proceedings so as to reduce to what is strictly necessary the additional disadvantage associated with such duplication, and (iii) provides for rules making it possible to ensure that the severity of all of the sanctions imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned.

The substantial overlapping of these criteria with those set out by the Court of Strasbourg is expressly emphasised by the CJEU, which refers to the equivalence clause of Article 52(1) CFREU (*Menci*, paragraphs 61-62).

In the light of these criteria, the CJEU itself concluded in *Menci* that the Italian legislation on the non-payment of VAT – which criminalises only violations exceeding certain thresholds of evaded tax, and attributes *inter alia* relevance to voluntary payment of the tax due and the administrative fines imposed, as a factor potentially leading to the exclusion or reduction of criminal liability – appears to “ensure”, albeit “subject to verification by the referring court”, that “the duplication of proceedings and penalties which it authorises does not exceed what is strictly necessary in order to achieve the objective” that all VAT revenue be collected (paragraph 57). As a consequence, on the one hand the Court of Justice, suggests to the referring court that the overall system of proceedings and sanctions laid down by Italian law in relation to the non-payment of VAT does not infringe, in general terms, the *ne bis in idem* principle enshrined in the Charter, without prejudice to the different conclusion that could well be drawn by the referring court when applying the criteria set out in general terms by the CJEU. And, on the other hand, the CJEU tasks national courts with verifying that in the actual cases before them, “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” (*Menci*, paragraph 64).

2.2. – The referring court calls upon this Court to hold that the duplication of proceedings and sanctions envisaged in general by Italian law as regards the non-payment of VAT is incompatible with the *ne bis in idem* principle, as enshrined in Article 4 of Protocol No. 7 to the ECHR and Article 50 CFREU. In the opinion of the Criminal Court of Bergamo, such an incompatibility always and necessarily gives rise to a violation of the principle in question when the taxpayer, having already had a final administrative sanction imposed on him or her, is prosecuted under the criminal law for the same violation.

However, such a conclusion – which is, by the way, contrary to the *prima facie* holding in *Menci* – would have needed to be more substantiated by the Criminal Court of Bergamo, in light of the criteria set out by the two European courts in the abovementioned judgments.

2.2.1. – With regard to the purpose pursued by the two sanctions (the first of the criteria set out by both European courts), the referral order merely states that their purpose is the same, without clarifying – in particular – the reasons why the prospects of a combination of a custodial sentence for evasion of annual VAT exceeding € 250,000 and an administrative fine calculated as a percentage of the amount evaded cannot pursue the legitimate aims, first, of strengthening the deterrent effect of the tax provision at issue; second, of expressing the firm disapproval of conduct that is seriously detrimental to national and European financial interests; and finally, of ensuring *ex post* the effective collection by the tax authorities of the amounts evaded, thanks to the benefits granted to the accused persons in the criminal trial, associated with full payment of the outstanding tax.

2.2.2. – The referral order is also silent as regards the requirement – enunciated by the ECtHR in *A and B v. Norway* – of the necessary foreseeability of the combination of sanctions. As a matter of fact, that foreseeability is indisputable since Italian law clearly provides, on the one hand, for the imposition of administrative sanctions for offences under Article 13(1) of Legislative Decree No. 471 of 1997 and, on the other hand, for criminal liability under Article 10-*bis* of Legislative Decree No. 74 of 2000, the latter limited to non-payment of amounts exceeding € 250,000.

2.2.3. – Furthermore, as State Counsel points out, the Criminal Court of Bergamo asserts that the combination of administrative and criminal proceedings is excessively burdensome for the accused in the proceedings before it – which would actually lead to infringement of the *ne bis in idem* principle according to the case law of both European courts –, but does not provide any plausible reasoning for that assumption.

Indeed, the referral merely quotes Articles 19, 20 and 21 of Legislative Decree No. 74 of 2000 – relating to speciality between administrative and criminal proceedings, the absence of dependency between administrative and criminal proceedings and the staying of the enforcement of administrative sanctions while criminal proceedings are pending – only to then assert that the provisions in question infringe the *ne bis in idem* principle, being incapable of preventing the commencement or continuance of criminal proceedings after the administrative sanction becomes final.

In so doing, the Criminal Court of Bergamo fails to consider that, in accordance with the case law of the two European courts, the excessive burden of administrative and criminal proceedings for the person concerned must be ruled out when they are closely connected in substance and in time.

In particular, the referring court fails to mention the numerous legislative provisions, other than Articles 19, 20 and 21 of Legislative Decree No. 74 of 2000, that govern the relationship between administrative and criminal proceedings in tax law. Leaving aside a fleeting mention by that court of Article 13(1) of Legislative Decree No. 74 of 2000 (which provides that voluntary payment of the tax due and administrative penalties extinguishes criminal liability), the referring court does not even mention the other measures introduced by Legislative Decree No. 158 of 24 September 2015, in order to ensure a better coordination between payment of the tax due and the prosecution and outcome of criminal proceedings – such as granting the taxpayer additional time to pay off the balance of the tax due in instalments (Article 13(3) of Legislative Decree No. 74 of 2000), and the inapplicability of confiscation by the criminal court of a sum equivalent to of the amount of the tax due, once the latter has been fully paid by the defendant pending the criminal proceeding (Article 12-*bis* of that same legislation).

Neither does the Criminal Court of Bergamo take into account the provisions that oblige the *Guardia di Finanza* (Revenue Police) to report tax offences to the prosecutorial authorities (Article 331 of the Code of Criminal Procedure) and, *vice versa*, oblige the latter to report tax offences to the Revenue Police (Article 36 of Decree of the President of the Republic No. 600 of 29 September 1973) and the *Agenzia dell'Entrate* (Inland Revenue Agency) (Article 14(4) of Law No. 537 of 24 December 1993), which are aimed at ensuring that the administrative and criminal investigations are instituted at the same time.

Neither does the Criminal Court of Bergamo consider the provisions that allow the evidence gathered in criminal investigations to be shared for the purposes of tax assessments and vice versa (Article 63(1) of the Decree of the President of the Republic No. 633 of 26 October 1972 and, by the same token, Article 220 of the Implementing, Coordinating and Transitional Provisions of the Code of Criminal Procedure).

There is not even any reference to the case law on the admissibility of investigative material gathered in each set of proceedings as evidence and elements informing the conclusions of the court hearing the other proceedings […].

2.2.4. – Again, as State Counsel rightly objects, the Criminal Court of Bergamo does not explain why the imposition of a custodial sentence – which is, moreover, likely to be conditionally suspended – would be disproportionate to the seriousness of the crime (consisting, in this case, of the failure to pay outstanding VAT in the amount of € 282,495.76) if combined with the administrative sanction already imposed (equal to 30 percent of the tax evaded).

2.2.5. – Finally, no argument is put forward by the Criminal Court of Bergamo on the issue of whether or not the criminal sanctions provided for in the matter of evasion of VAT form part of the "hard core of criminal law", in relation to which – according to the ECtHR's judgment in *A and B v. Norway* – the scrutiny of the compatibility of 'double-track' sanctions with the Conventional principle of *ne bis in idem* should be, in principle, stricter.

2.3. – The shortcomings pointed out above undermine the admissibility of the question raised in respect of Article 117 of the Constitution, in relation to Article 4 of Protocol No. 7 to the ECHR and Article 50 CFREU.

3. – The doubts expressed by the referring court on the constitutionality of the challenged provision under Article 3 of the Constitution closely depend on those put forward with reference to its constitutionality under Article 117(1) of the Constitution. Indeed, from the perspective of the referring court Article 649 of the Code of Criminal Procedure gives rises to "inequality of treatment" and appears "unreasonable", essentially for the same reasons for which the challenged provision is said to infringe the *ne bis in idem* principle, in light of the indications provided in *Menci*.

The shortcomings in the reasoning as regards the doubts expressed with reference to Article 117(1) of the Constitution cannot but lead to the inadmissibility also of this further question.

[omitted]

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

declares inadmissible the questions as to the constitutionality of Article 649 of the Code of Criminal Procedure raised with reference to Articles 3 and 117(1) of the Constitution

– the latter in relation to Article 4 of Protocol No. 7 to the ECHR and Article 50 CFREU – by the Criminal Court of Bergamo with the referral order referred to in the headnote.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 15 July 2019.

Signed:

Giorgio Lattanzi, President

Francesco Viganò, Author of the Judgment