CONFEDERATION FISCALE EUROPEENNE

Opinion Statement ECJ-TF 1/2014 of the CFE

on the decision of the European Court of Justice in case C-617/10, *Åkerberg Fransson*, concerning *ne bis in idem* in tax law

Prepared by the ECJ Task Force of the CFE

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This is an Opinion Statement prepared by the CFE ECJ Task Force[1] on Case C-617/10 Åkerberg Fransson. The CFE is the leading European association of the tax profession with 32 national tax adviser organisations from 25 European countries representing over 180,000 tax advisers. CFE is registered in the EU Transparency Register (no. 3543183647-05).

This Opinion Statement comments only on the issues of particular interest for taxpayers and their advisors. It does therefore not deal with the judgment insofar as it deals with the institutional questions asked by the Swedish court.

I. The facts and the preliminary questions

1. The case is a request for a preliminary ruling in criminal proceedings; it has been made by the Swedish District Court in Haparanda.

2. In these proceedings, Mr Åkerberg Fransson, a Swedish fisherman, was summoned to appear before that district court on charges of serious tax offences. He was accused of having provided in his tax returns for 2004 and 2005 false information exposing the national exchequer to a loss of income tax and VAT, of altogether 626.776 SEK (approx. 70.000 €), including VAT of 147.500 SEK (approx. 16.500 €). According to the indictment, the offences were to be regarded as serious, first, because they related to very large amounts and, second, because they formed part of a criminal activity committed systematically on a large scale.

3. Two years earlier, in 2007, the Skatteverket (Tax Office) had ordered Mr Åkerberg Fransson to pay tax surcharges for the years 2004 and 2005 in respect of income tax (approx. 10.000 €) and VAT (approx. 900 €). The decision imposing the tax penalties was based on the same act of providing false information as those relied upon by the Public Prosecutor's Office in the criminal proceedings. Proceedings challenging the penalties were not brought before the administrative courts.

4. Before the referring court, the question arose as to whether the charges brought against Mr Åkerberg Fransson must be dismissed on the ground that he had already been punished for the same acts in other proceedings, as the prohibition on being punished twice for the same criminal offence (ne bis in idem) laid down by Article 4 of Protocol No 7 to the ECHR and Article 50 of the EU Charter would be infringed. The Swedish court therefore referred the following questions to the ECJ for a preliminary ruling:

> 1. Under Swedish law there must be clear support in the [ECHR] or the case-law of the European Court of Human Rights for a national court to be able to disapply national provisions which may be suspected of infringing the ne bis in idem principle under Article 4 of Protocol No 7 to the ECHR and may also therefore be suspected of infringing Article 50 of the [Charter]. Is such a condition under national law for disapplying national provisions compatible

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with European Union law and in particular its general principles, including the primacy and direct effect of European Union law?

2. Does the admissibility of a charge of tax offences come under the ne bis in idem principle under Article 4 of Protocol No 7 to the ECHR and Article 50 of the Charter where a certain financial penalty (tax surcharge) was previously imposed on the defendant in administrative proceedings by reason of the same act of providing false information?

3. Is the answer to Question 2 affected by the fact that there must be coordination of these sanctions in such a way that ordinary courts are able to reduce the penalty in the criminal proceedings because a tax surcharge has also been imposed on the defendant by reason of the same act of providing false information?

4. Under certain circumstances it may be permitted, within the scope of the ne bis in idem principle …, to order further sanctions in fresh proceedings in respect of the same conduct which was examined and led to a decision to impose sanctions on the individual. If Question 2 is answered in the affirmative, are the conditions under the ne bis in idem principle for the imposition of several sanctions in separate proceedings satisfied where in the later proceedings there is an examination of the circumstances of the case which is fresh and independent of the earlier proceedings?

5. The Swedish system of imposing tax surcharges and examining liability for tax offences in separate proceedings is motivated by a number of reasons of general interest … If Question 2 is answered in the affirmative, is a system like the Swedish one compatible with the ne bis in idem principle when it would be possible to establish a system which would not come under the ne bis in idem principle without it being necessary to refrain from either imposing tax surcharges or ruling on liability for tax offences by, if liability for tax offences is relevant, transferring the decision on the imposition of tax surcharges from the Skatteverket and, where appropriate, administrative courts to ordinary courts in connection with their examination of the charge of tax offences?"

II. The judgment of the Grand Chamber and the diverging Opinion of Advocate General *Cruz Villalón*

5. The ECJ dealt jointly with questions 2 to 4, declared question 5 inadmissible and in its reply to question 1 declared Swedish law incompatible with EU law on the basis that it restricted the possibility of national courts to disapply rules which they consider contrary to EU law.

6. Before answering the questions, the Grand Chamber of the ECJ stated – against the view of the intervening Member States, the Commission and Advocate General *Cruz Villalón*[2] – that it had jurisdiction in this case because the sanction was in part imposed as implementation of the EU VAT legislation which required the Member States to ensure that taxpayers respect their VAT obligations. In addition, the impact of VAT fraud on the EU's own resources represented an additional link to the EU sphere. The condition of Article 51 of the Charter that Member States must have acted in the "implementation" of EU law was therefore fulfilled so that they had to live up to their obligations flowing from Article 50 of the Charter.

7. In its reply to the questions 2 to 4 – to which this Opinion Statement is limited – the ECJ recognised that the Member States were free to apply national standards of protection of fundamen-

[2] See opinion of Advocate General Cruz Villalón of 12 June 2012, paras. 56 to 64.

tal rights and to choose the nature of the applicable penalties. These could be penal, administrative or a combination of both. Article 50 of the Charter only applies if the administrative measures taken were final and of a criminal nature[3].

8. It considered that three criteria were relevant in order to determine whether an administrative penalty can be considered as a criminal penalty to which Article 50 of the Charter would be applicable:[4]
   - the legal classification of the offence under national law;
   - the very nature of the offence; and
   - the nature and degree of severity of the penalty.

   In this case the ECJ left the decision about the characterisation of the penalty as criminal to the national judge.[5]

9. As regards the question to what extent a non-criminal penalty must be taken into account in the determination of a subsequent criminal sanction for the same facts, Advocate General *Cruz Villalón* opined that this was a question of proportionality,[6] whereas the ECJ did not take this issue up at all.

III. Comments

10. As the applicability of the Charter to acts of Member States is conditioned by their action in the field of EU law, in particular when implementing EU law, it is not surprising that the broad interpretation of this condition by the ECJ is received by Member States reluctantly. They see their activities to a great extent being made subject to the EU Charter of fundamental rights.[7]

11. The judgment clarifies the scope of legal protection of the citizens and taxpayers even with regard to acts, where EU law is not the central issue, but rather is touched upon marginally. This raises the question what is really an "implementation" of EU law within the meaning of Article 51 of the Charter.

12. In the *Åkerberg Fransson* decision, the Court read "implementation" as requiring only that the domestic law "falls within the scope of European Union law",[8] so that the Charter's scope is not limited to domestic acts in relation to the specific implementation of EU law and its application. Specifically, a general national rule penalizing non-compliance with tax obligations that also applies in the area of VAT falls under the Charter as *(1)* Member States are under an obligation "to take all legislative and administrative measures appropriate for ensuring collection of all VAT due on its territory and preventing evasion" under the VAT Directive,[9] and *(2)* financial interests

[3] Paras. 33-34 of the judgment.
[4] Para. 35 of the judgment.
[5] Para. 36 of the judgment.
[6] See opinion of Advocate General Cruz Villalón of 12 June 2012, paras. 95-96.
[7] This hesitation was subsequently confirmed by a decision of the German Constitutional Court (Bundesverfassungsgericht of 24 April 2013, 1 BvR 1215/07 – "Antiterrordateigesetz") that has put emphasis on the domestic constitutional framework, the effectiveness of which may not be compromised. See also the Constitutional Court's Press release no. 31/2013 of 24 April 2013 (in English).
[8] Para. 21 of the judgment; see also the Explanation on Article 51, [2007] OJ C 303/32 (14 December 2007).
[9] Para. 25 of the judgment.

of the EU with regard to its own resources from VAT are affected and addressed by Art. 325 TFEU.[10]

13. Just like in its pre-Charter case-law,[11] the ECJ takes a broad approach when it states that "situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails the applicability of the fundamental rights guaranteed by the Charter."[12] The main consequence of this broad reading lies in the extended possibility to refer preliminary questions with regard to the EU Charter to the ECJ. This, of course, raises the question which concrete situations are covered by the Charter and the rights enshrined in it. Three situations may be distinguished:

    a. First, the EU Charter applies, without doubt, to all domestic acts that transpose or apply secondary EU legislation.

    b. Second, and as illustrated by the *Åkerberg Fransson* decision, domestic general acts that are linked to (and not adopted because of) EU law are also covered. Such a link may stem in particular from a general obligation to ensure the effectiveness of EU secondary law and to counter illegal activities affecting the financial interests of the EU. Hence, "implementation" within the meaning of Article 51 extends beyond its narrow technical sense.[13]

    c. Third, it might be more difficult to determine whether a domestic measure is "within the scope European Union law" and hence falls under the Charter, e.g., when one looks at the ordinary use of the fundamental freedoms. Would the taxation of a house owned by a citizen of another MS – who could buy the house due to the free movement of capital – be within the scope of Article 51 of the Charter? It remains to be seen if situations covered by the fundamental freedoms automatically trigger protection by the Charter as well, especially in light of the limits of the competences and powers of the EU referred to in Article 51(2) of the Charter.[14]

14. As regards the principle *ne bis in idem*, the ECJ lays out three criteria that are relevant for assessing whether tax penalties are criminal in nature[15] but leaves the qualification of tax penalties as criminal – and thus the decision whether a subsequent criminal procedure is inadmissible due to Article 50 of the EU Charter – to the national judge,[16] who may also have to consider the case law of the European Court of Human Rights on this question. It must be noted that the right not to be tried or punished twice in criminal proceedings for the same criminal offence has a cross-border scope under the Charter: It refers not only to two charges by the same Member State but also to situations where charges in different Member States are concerned.

IV. The Statement

[10] Para. 26 of the judgment.
[11] See the references in Para. 19 of the judgment, specifically ECJ, 18 June 1991, Case C-260/89, *ERT*, [1991] ECR I-2925.
[12] Para. 21 of the judgment.
[13] See the Explanation on Article 51, [2007] OJ C 303/32 (14 December 2007).
[14] Para. 23 of the judgment.
[15] Paras. 35-36 of the judgment.
[16] This corresponds to the variety of approaches in different Member States as regards sanctions for noncompliance with tax obligations. Even though possible distorting effects of such variety can conceivably be detected, it appears inappropriate to push for a harmonisation of sanctions at the EU level.

15. The *Confédération Fiscale Européenne* welcomes the decision of the European Court of Justice in that it clarifies that the fundamental rights enshrined in the EU Charter have to be respected by Member States in all situations "within the scope" of EU law. Therefore rights flowing from the Charter can even be claimed in situations where the EU aspect is not prevailing or where it has been absent at the time when national legislation was adopted, which has subsequently been used to comply with EU obligations as well.

16. The *Confédération Fiscale Européenne* notes that the European Court of Justice did not accept the restrictive view as to its jurisdiction presented by a number of Member States, the Commission and Advocate General *Cruz Villalón*.

17. The *Confédération Fiscale Européenne* would welcome Member States bearing in mind the Internal Market approach underlying the Charter and reflecting it in all legislation, particularly fiscal, adopted in the exercise of their sovereign powers in non-harmonised fields.