Taxation and Criminal Charges: the Italian Changing Scenario and its Relevance for the Ongoing Reform in the Republic of Kazakhstan

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1 Introduction

The payment of taxes is one of the duties enshrined in the Italian Constitution[1], and every individual is bound to that as long as the tax of the case is consistent with other fundamental principles. These include the ability to pay and the necessity that the tax of the case had been passed by the Parliament[2], *inter alia*. Th Constitution of the Republic of Kazakhstan rules in the same way at Article 35[3].

As a consequence, in Italy just like in Kazakhstan, every breach of such a duty is taken seriously under the current system, but the consequences may depend on the nature of the violation, the amount of the tax left unpaid and other benchmarks. Purely formal violations are sanctioned as well, unless no harm derived from the budget of the state[4]. These latter breaches are those who consist in the failure to respect some disclosure duties or some other petty infringement.

In general terms whenever an omitted payment takes place, sanctions are charged on the perpetrator, either a natural or a legal person[5], and sometimes

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[1]Article 53 of the Italian Constitution.

[2]Article 23, Italian Constitution.

[3]The cited article provides that *Payment of legally established taxes, fees, and other obligatory payments shall be a duty and responsibility of everyone.*

[4]Article 6, § 5-bis of the Legislative decree n. 472, 18 December 1997.

[5]Legal person are held responsible directly under the Italian Legal system for administrative violation which determined a benefit on the company, under Decree law n. 269, 30 September 2003.

also on the facilitator of such a violation, such as the tax preparer or the accountant which made the violation possible[6] or enambled it.

Just like in the Criminal law, entity of the sanction and the nature of it depends on several factors: these might include for instance, the seriousness the violation, the attitude of the taxpayer and the willingness to do it, as noted above[7].

This survey is aimed at providing to the reader a basic understanding of the fines as they are charged upon Tax violation in Italy, taking into account that the system is about to be overhauled in the framework of a broad reform of taxation which has been initiated Italy last year [8] and that will arguably delivered by the end of 2023.

This reform is aimed ad addressing some of the issues that have emerged in the past, particularly after some landmark cases of the European Court of justice and the European Court on Human rights which found out some inconsistencies of the domestic legislation with commonly accepted rules, Human rights and EU law.

This paper is intended in particular for scholars of the Republic of Kazakhstan as as similar reform of the tax system is underway and the policymaker of the country might make the most of the solutions (and of the mistakes) adopted (and incurred into) in Italy.

2 Fines, Criminal Charges and Alike: a Road Map to the Punitive System in Taxation

Different countries have different understanding of what a punitive measure is: such differences are exacerbated when it comes to punitive measure connected to taxation, as the tax *per se* is a duty to pay an amount of money without any direct consideration and the attitude towards tax evasion varies from country to country.

Although the understanding differs, a sanction is routinely identified via a subset of conditions to be met: some of them are of formal nature and other of substantive one[9]. In general terms a sanction is a duty imposed to a subject as a direct and immediate consequence of a performance, act or omission, whose purpose is twofold. On one side it is aimed at create deterrence on the

[6]Legislative decree 18 December 1997 n. 472; Cuccia, A. D. (1994). The Effects of Increased Sanctions on Paid Tax Preparers: Integrating Economic and Psychological Factors. *Journal of the American Taxation Association*, *16*(1).

[7]Article 7, Legislative decree 472/97.

[8]The reform has been introduced via the Act n. 111, 14 August 2023.

[9]Oberg, J. (2013). The definition of criminal sanctions in the EU. Eur. Crim. L. Rev.; Hart, H. L. A. (2008). Punishment and responsibility: Essays in the philosophy of law. Oxford University Press; Scanlon, T. M. (2010). Punishment and the Rule of Law. Why Punish? How Much? A Reader on Punishment; Dubber, M. D. (2005). Theories of crime and punishment in German criminal law. The American journal of comparative law, 53(3), 679-707; Maculan, E., and Gil Gil, A. (2020). The rationale and purposes of criminal law and punishment in transitional contexts. Oxford Journal of Legal Studies, 40(1), 132-157.

perpetrator, as to push him in the future to behave properly or to an higher level of negligence. On the other side sanctions are shaped as deterrence on the other people the mere understanding of the consequences of a possible violation should deter them from making the same mistake[10]. The sole possibility to be sanctioned is an efficient factor to prevent people from infringing the law or behaving with careless.

Most of the sanctions are defined as such by the law, but this formal qualification might also be omitted in many cases, such as in taxation.

In the area of tax the borders of the concept of sanction blurs as some of them are shaped in a way to be disguised as ordinary taxing rules, this creating confusion on the reader or the interpreter.

This could be the case of a tax incentive that might be lost if some omissions are made by the taxpayer (for instance, he fails to deliver on time his tax return). The lost of the tax benefit turns out to be an aggravation of the tax liability of the taxpayer in the case, but the way in which such a consequences is ruled might actually confuse the reader.

Academics are used to qualify these adverse economic consequences, stemming from omissions or failure to timely report, as improper sanctions, or sanctions in disguise[11]. Rather than being a pure formal distinction: this might actually have an impact on the way in which they are charged ad n the proportionality of their amount considering the actual violation.

Improper sanctions, or sanctions in disguise, should be avoided in any system as they lack of transparency, certainty and for sure they risk application together with ordinary sanctions, eventually ending up in a disproportionate punishment.

Another relevant distinction in most of the legal systems is the one between Administrative sanctions[12] and criminal ones[13]. This classic separation that has been addressed in literature by centuries, arguably, in every area of the world. Yet most of the distinctive characters of these to realms of punitive law have been blurring too in recent times.

Basically today one certainty persists: the fact that all the measures which end up in a restraint on the freedom of a in individual to move freely belong to the field of criminal law[14]. These include the freedom to move in any part of the country, such as imprisonment, custody and alike. Personal freedom, one of them highest ranking values in the world, at any latitude, can be compressed only if special procedures are follower and if the Criminal law provides for that.

[10]Ball, H. V., & Friedman, L. M. (2017). The use of criminal sanctions in the enforcement of economic legislation: A sociological view. In *White-Collar Criminal* (pp. 3-19). Routledge.

[11]Falk, A., Fehr, E., and Fischbacher, U. (2000). Informal sanctions.

[12]Vugt, A. D. M. V. (2012). Administrative sanctions in EU law. Review of European Administrative Law, 5(1), 5-48; Yeung, K. (2013). Better regulation, administrative sanctions and constitutional values. Legal Studies, 33(2), 312-339; Herlin-Karnell, E. (2014). Is Administrative Law still relevant? How the battle of sanctions shaped EU Criminal law. draft of a chapter to appear as finalized version in M Bergstrom, V Mitsilegas, and T Konstadinides (eds), Research Handbook on EU Criminal Law (Edward Elgar 2015).

[13]Oberg, J. (2013). The definition of criminal sanctions in the EU. Eur. Crim. L. Rev., 3, 273.

[14]De Moor-Van Vugt, A. (2013). Administrative sanctions in EU law. Administrative sanctions in the European Union, 607-639.

There are other measures that impact the freedom, such as the seizure of the passport (this the limitation of cross border freedom) or the prohibition to carry on a business activity in and independent manner (this may happen in my country due to tax violation). Although even these measure can be intended as a threat to freedom, they are not normally considered a criminal by design.

As a consequence, normally a formal approach is followed, where criminal sanctions are those which end up in a limitation of the natural freedom of the individual or in pecuniary payments qualified as such (that is, criminal punishments) by the law.

All the other sanctions are administrative, and they generally end up in the payment of a sum of money plus possibly the suspension of a business activity or equivalent[15]. In both situations (Administrative and Criminal) the seizure of an asset may be provided either if in connection with the crime perpetrated.

Such a distinction has been obliterated by the European Court of Human Rights in the interpretation of Article 6 of the Convention[16], where reference is made expressly to "Criminal charges" as for the application of the due process clause[17].

In that respect the Court was asked how to qualify a "Criminal charge" as only if the process is pertinent to this field the due process rule can be applied (the other condition being rights and obligations of civil character).

In a landmark decision the Court on Human Rights of Strasbourg[18] ruled that any measure whose goal is not compensatory has to be intended as criminal in its nature and to be treated accordingly. The consequence of this approach would be that any payment due for the infringement of the law whose goal is not to compensate the public authority or the other people from a damage has to be intended as criminal.

The scope of the provision has thus remarkably increased with that.

[15]Bernatt, M. (2016). Administrative sanctions: between efficiency and procedural fairness. *Review of European Administrative Law*, *9*(1), 5-32. In the Italian legal system (Article 21, Legislative Decree 472/97) provides for a list of ancillary sanctions ranging from the prohibition to have some qualified business to the possibility to act as general contractor or negotiate with the public administration. See also Articles 12 and 12 *bis*, Decree 74/00 that rules the conditions under which money or assets can be seized in the enforcement of criminal sanctions or in teh framework of a criminal procedure

[16]1 *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice (...).*

[17]Greggi, M. (2023). Shades of Transparency: DAC6 and the Client-Attorney Privilege. *EC Tax Review*, *32*(2).

[18]Öztürk v Germany, Merits and Just Satisfaction, App No 8544/79, (1984) 6 EHRR 409, IHRL 45 (ECHR 1984), 21st February 1984, European Court of Human Rights [ECHR]. See also Bahceci, B. (2020). Redefining the Concept of Penalty in the Case-law of the European Court of Human Rights. European Public Law, 26(4); Baron, J., and Poelmann, E. (2017). Tax penalties: minor criminal charges?. Intertax, 45(12).

3 Blurring Borders: Coupling Administrative and Criminal Charges in Taxation and the Rise of the *Ne Bis in Idem* Principle

In taxation law, legislators make use of criminal sanction and administrative sanctions depending on the seriousness of the breach of the law.

Occasionally they are applied both[19], as the violation of the taxpayer might actually trigger the two consequences.

If this is the case, on some occasions the principle of speciality should lead the interpreter to apply one or the other in order to prevent redundant punishments. This dilemma (criminal or administrative sanctions) is not always decided in favour of the first one, as all depends on the *lex specialis* applicable to the case[20]. On some occasions being the administrative sanction more pertinent to the violation as the behaviour of the taxpayer is inherently connected to the one described in that, the administrative is applied and the criminal is not.

Yet in many circumstances when such a criterion not be used on several grounds, both are applied and the taxpayer is charged both under an administrative aspect and a criminal one.

This situation is very frequent in tax law, where for instance the use of false invoices[21] or forged document might led to tax evasion. In such cases forgery of documents is sanctioned under a criminal law perspective, but the evasion is punished either: normally with a fine which depends on the amount of the tax evaded[22].

This consequence has been considered for a long time as a feature of the system, and double punishment at the end of the day acceptable under a constitutional framework, as long as the principle of proportionality, loosely intended, could be maintained.

The scenario changed dramatically when, once again, the European Court on Human right on another landmark case[23] ruled that a double punishment for the same violation, thus the combined application of criminal and administrative charges is not acceptable and once one of the two is served, the other should not e applicable, This decision has led several legislators to adjust spontaneously the domestic system in order to comply with such a principle.

In the matter, it has to be observed that academia has been stigmatising the *bis in idem* situation for a long time, without any reaction by the legislature in

[19]Kawka, J. (2020). The Problems of Applying Both Criminal and Administrative Penal Sanctions in Light of Article 50 of the Charter of Fundamental Rights of the European Union. Studia Iuridica, (82), 161-173; Day, J. M. (2002). The Intertwining of Administrative Actions and the Criminal Justice System. Tex. Tech. J. Tex. Admin. L., 4, 99; Ligeti, K. (2000). European criminal law: Administrative and criminal sanctions as means of enforcing community law. Acta Juridica Hungarica, 41(3-4), 199-212.

[20]Article 12, Legislative Decree 472/97 and Article 19, Legislative decree 74/00.

[21]Article 8, Legislative decree 74/00.

[22]Article 1, Legislative decree n. 471, 18 December 1997.

[23]Grande Stevens and Others v. Italy, Merits, App No18640/10, ECtHR 7 July 2014. See also Lamandini, M. (2015). Limitations on supervisory powers based upon fundamental rights and SSM distribution of enforcement competences. In ECB Legal Conference (p. 121).

several countries[24].

4 The Italian Tax Reform (and some Highlights for Kazakhstan)

Italy is experiencing and overhaul of the tax system: unprecedented for its broadness ever since the early seventies of the last century. Sanctioning system (both criminal and administrative) hasn't been left untouched as it is connected to tax.

On the opposite, the reform has been the occasion to think about many adjustments that were needed for a long time: the Act opening the reform and setting the principles to be followed by the Government in the introduction of the changes has been issued months ago, an apparently goes in this direction.

The Act provides for the rationalisation of the administrative and criminal sanctioning system, through greater integration between the different types of sanctions, in order to be fully compliant with the principle of *ne bis in idem* (which occurs when the contested facts are identical under the law in their structural elements: conduct, event, causation, circumstances of time and place).

The law also provide for a improved celebration of the processes aimed ad assessing whether a crime took place and if the evasion of a tax occurred. as a matter of fact and under the law these who assessment might lead to different results, as for instance not any tax evasion is a crime, and not all the crimes lead to an actual evasion of a tax.

Moreover in cases of an irrevocable sentence of acquittal because the fact does not exist or the accused did not commit it, the material facts ascertained during the trial will also have to be considered in the tax trial as regards the verification of the same facts .

Eventually if the unfaithful taxpayer, once discovered, spontaneously pays the tax allegedly evaded, would have the criminal consequences of his behaviour mitigated, making the prosecution exceptional.

The amount of the fines has been addressed as well, in order to make them ore consistent with the principle of proportionality.

[24]Lelieur, J. (2013). 'Transnationalising'Ne Bis in Idem: How the Rule of Ne in Idem Reveals the Principle of Personal Legal Certainty. Utrecht L. Rev., 9, 198; Vervaele, John AE. "Ne bis in idem: towards a transnational constitutional principle in the EU?." Utrecht L. Rev. 9 (2013): 211; Lasagni, G., and Mirandola, S. (2019). The European ne bis in idem at the Crossroads of Administrative and Criminal Law. Eucrim, 2019(2), 126-135; Neagu, N. (2012). The ne bis in idem principle in the interpretation of European Courts: towards uniform interpretation. Leiden Journal of International Law, 25(4), 955-977; van Bockel, B. (2012, November). The ne bis in idem principle in the European Union legal order: between scope and substance. In ERA Forum (Vol. 13, No. 3, pp. 325-347). Berlin/Heidelberg: Springer-Verlag.

5 Concluding Remarks

As apparently the Republic of Kazakhstan is considering improvement of the domestic tax and punitive systems[25], the Italian experience on the matter might play a role.

On the one side the extended application of he principles of reasonableness and proportionality played a role in convincing the legislator that the punitive approach do not support a high level of compliance.

Rather, the tax system of the future should be inspired by collaboration between the parties, with fines in general an criminal fines in particular to be applied only in very rare circumstances and in cases of clear and present danger only.

The case la of the Court of justice on human rights proved to be a precious compass in the matter and would be advisable for Kazakhstan in the future to study or plan and approximation to the legal system of the Council of Europe, in any way that will be consistent with the domestic priorities.

[25]Sullivan, C. J. (2018). Kazakhstan at a Crossroads. asia policy, 13(2), 121-136; De Vries, M. S., and Sobis, I. (2014). Reluctant reforms: the case of Kazakhstan. Public Organization Review, 14, 139-157; Janenova, S., and Knox, C. (2019). Civil service reform in Kazakhstan: trajectory to the 30 most developed countries?. International Review of Administrative Sciences, 85(3), 419-439; Kembayev, Z. (2017). Recent constitutional reforms in Kazakhstan: A move towards democratic transition?. Review of Central and East European Law, 42(4), 294-324.