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The relevance of the EU Charter for criminal lawyers

Case study – fictional scenario

The main proceedings were between the Public prosecutor and Mr Alejandro Frog, concerning proceedings brought against him for aggravated tax fraud.

Mr Frog was accused of having provided, in his tax declarations for the 2009 and 2011 tax years, inaccurate information which exposed the public Treasury to the loss of revenue in the form of income tax and value added tax (VAT).

He was also prosecuted for failing to declare employer's contributions for the reference periods of October 2009 and October 2011, which exposed the social security institutions to the loss of revenue.

In respect of the two tax years at issue, the tax administration had imposed a number of administrative penalties on Mr Frog, namely penalties as regards the income from his economic activity, as regards VAT and as regards employer contributions.

Interest was payable on those penalties and they were not challenged before the competent administrative court.

The reasons for the decision issuing them were the same facts of false declarations as those stated by the public prosecutor in the criminal proceedings.

Moreover the tax administration also relied on some declarations made by Mr Frog during the administrative investigation.

Those declarations were rendered without the assistance of a defence lawyer and Mr Frog was not informed about his rights to be assisted by a lawyer while questioned by the authority.

The declarations rendered by Mr Frog were also recalled by the public prosecutor and are part of the material collected during the criminal investigation.

Moreover has to be added that in 2013 the criminal law of the State providing the penalties for the tax fraud was changed reducing the sanctions to a penalty comprised between 3 and 6 years of imprisonment instead of a penalty comprised between 4 and 8 years as stated by the previous legislation.

Notwithstanding the imposition of severe administrative penalties the prosecutor wants to go on with the criminal trial and would like to make some use of the statements made by Mr Frog while questioned during the administrative procedure.

Questions

- 1) What a criminal lawyer that is aware of EU Law can argue in the exposed criminal case?
- 2) Is EU Law relevant for the case?
- 3) Which are the relevant provisions of the EU Charter in the case?
- 4) Which are the fundamental principles at stake in the case?
- 5) Is there some question related to fair trial that can be invoked?
- 6) Do you have idea of some ECJ case that can be considered relevant ofr the solution of the case?

Handout for participants

Discussion can be opened about whether the action brought should be dismissed on the ground that, in the other proceedings, he had already been penalised for the same facts, which could be seen as contravening the prohibition on double punishment ('ne bis in idem'), set out in Article 4 of Protocol No 7 to the European Convention on Human Rights and Fundamental Freedoms and in Article 50 of the Charter.

In particular has to be analysed whether the principle of ne bis in idem set out in Article 50 of the Charter precludes criminal proceedings for tax fraud being brought against a defendant when he has already been subject to a tax penalty for the same facts of making false declarations.

In this case the tax penalties and the criminal proceedings are connected in part to breaches of obligations to declare VAT.

Article 325 TFEU obliges the Member States to counter illegal activities affecting the financial interests of the European Union through effective deterrent measures, indicating in that regard **that for the protection of the European Union's own resources Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests.**

The European Union's own resources include VAT existing a direct link between the collection of VAT revenue in compliance with the European Union law applicable and the availability to the European Union budget of the corresponding VAT resources.

Another issue concerns art. 49 and the lex mitius principles. The question is the one regarding the retroactive application of a criminal provision where more favourable for the defendant.

The other question emerging from the case is connected to art. 47 of the Charter and to the principle of fair trial and access to a lawyer.