



# Ne bis in idem and taxation: a...missing dialogue between European and national Courts

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- ▶ **The consequences of the failure to timely pay due taxes:**
  - ▶ Tax procedures operate differently
  - ▶ Interest for late payment
  - ▶ Penalties/sanctions
- ▶ **What is a tax penalty?**
  - ▶ Administrative payment connected with the failure to timely and fully comply with tax obligations (formal and substantive)
  - ▶ Tax penalty and surcharge: is there any conceptual difference?
    - ▶ Penalty creates unfavourable consequences for those who do not comply
    - ▶ Surcharges are an additional payment due for the mere reason of the failure to timely comply with a tax obligation
- ▶ **What is a tax sanction? Are tax penalties sanctions?**

## ▶ **Function**

- ▶ Both presuppose a violation: sanctions are a punishment of a violation; tax penalties can also be used to punish a minor violation
- ▶ Subjective element is always required for the levying of criminal sanctions; usually also required for penalties pursue such function, but not when their levying is (quasi-)automatic

## ▶ **Procedure**

- ▶ Tax authorities may impose penalties in the framework of tax procedures and request the imposition of criminal sanctions, for which the involvement of the judiciary is usually needed
- ▶ Different procedures often operate for tax penalties and criminal sanctions

- ▶ **Can a tax penalty and a criminal sanction apply in respect of one and the same violation?**
  - ▶ Yes - ECtHR, *A & B v Norway* (App. 24130/11 and 25798/11)
  - ▶ No – CJEU, *Åkerberg Fransson* (C-617/10)
- A difficult dialogue between the European Courts, or a different context in which tax penalties operate?**
  - ▶ Yes – CJEU, *Menci* (C-524/15)
  - ▶ No – ECtHR, *Kristjansson v Iceland* (App. 12951/18)
- ▶ **Relevant ‘Sufficiently close connection’ vs “criminal nature of the tax penalty”**
- ▶ **Tax penalties can be very high, but do not limit freedom**
- ▶ **In search for common criteria to draw a dividing line**
- ▶ **Ne bis in idem and the ancillary tax sanctions/penalties**

- ▶ **Can two different procedures be used to levy sanctions and penalties in respect of one single violation?**
- ▶ **National systems often keep a separate jurisdiction for criminal matters**
- ▶ **No control over two parallel proceedings**
- ▶ **One violation with effects in two countries (e.g. VAT)**
- ▶ **Interesting context in two CJEU pending non-tax cases on competition**

C-117/20, *Bpost* (Opinion Adv. Gen. Bobek – 2 Sep 2021)

C-151/20, *Nordzucker* (Opinion Adv. Gen. Bobek – 2 Sep 2021)

# Non-Tax Cases with Possible Tax Repercussions

**C-117/20, *Bpost*** – two fines by a postal regulator and national competition authority on the same facts

- ▶ **Opinion AG Bobek 2 Sep 2021:** “Acceptable if...proceedings...are different...either as to the identity of the offender, or as to the relevant facts, or as to the protected legal interest...in the respective proceedings pursue”

**C-151/20, *Nordzucker*** – two fines by national competition authorities of two EU Member States

- ▶ **Opinion AG Bobek 2 Sep 2021:** “examination of *idem* defined by the identity of the offender, of the relevant facts, and of the protected legal interest”... if there is identity and protection of the same legal interest, as for competition law, Article 50 EU Charter prohibits the imposition of a second sanction

***Unclear framework between different European Court produces repercussions on national law***

***Italy - Corte Costituzionale, 136/2021 of 9 Jun 2021 - Ne Bis in Idem***

- ▶ **Facts:** a final administrative tax penalty (but meeting ECtHR Engel criteria) does not prevent a criminal procedure and sanction
- ▶ **Ruling:** no violation of the principle enshrined in Art. 4, 7<sup>th</sup> ECHR Protocol (*ne bis in idem*) as implemented into the Italian Constitution
- ▶ **Motivation:** unclear evidence of similar nature of the two sanctions in the light of strict criteria established by ECtHR in A and B vs Norway, and endorsed by CJEU in C-524/15, *Menci*

## The guiding lights

- ▶ **One violation, one punishment**
- ▶ **One violation, one obligation to defend oneself**

## What is the future of tax penalties?

- ▶ **Merge with tax surcharges**
- ▶ **Merge with criminal tax sanctions**

**Ne bis in idem should apply to tax matters just as it applies elsewhere, but is this at all possible?**



**Thank you!**