04 July 2022

The Italian Constitutional Court rules on the application of the *ne bis in idem* principle - possible impacts on criminal-tax matters

1. Introduction

With the decision No. 149 of 10 May 2022 filed on 16 May 2022, the Constitutional Court declared the constitutional illegitimacy of Article 649 of the criminal procedure code where it does not provide for the judge to state the acquittal or the entering a non-suit in relation to a person accused for one of the crimes provided for by Article 171-*ter* of Law No. 633/1941 (regarding the protection of copyright) in cases where, in relation to the same fact/s, the person has already been subjected to an administrative procedure for the administrative offense referred to in Article 174-*bis* of the same law.

The principle stated by the Constitutional Court in the decision at issue is absolutely innovative and may have significant impacts also in the context of criminal-tax matters, where the interplay between administrative and criminal proceedings has always created duplications and coordination difficulties, as well as concerns and significant burdens for taxpayers.

2. The decision of the Constitutional Court

The question of constitutional illegitimacy of the aforementioned Article 649 was raised by the ordinary Tribunal of Verona in relation to a copyright infringement for which both pecuniary administrative penalties (Article 174-*bis* of the Law No. 633/1941) and criminal penalties (Article 171-*ter* of Law No. 633/1941) may be applied.

By accepting the question of illegitimacy raised by the Tribunal of Verona, the Constitutional Court acknowledges that the principle of the so called *ne bis in idem* – also recognized at international level by Article 4, Par. 1. Prot. N. 7 European Convention of Human Rights (ECHR):

- represents a fundamental right of the person aimed at warding off inflicting additional suffering and costs deriving from a new trial over the same facts for which a decision has already been issued, regardless of the outcome of the first trial (which could well have ended with an acquittal);

- must be applied to criminal proceedings which shall be interpreted in a broad sense in the light of the so-called Engel criteria[1], used by the European Court of Human Rights to establish the scope of application of "criminal matters" for the purposes of Articles 6 and 7 of the ECHR (concerning respectively the right to a fair trial and the impossibility of imposing penalties for facts not provided for by law as crimes at the time of commission). Therefore, the assessment of the criminal nature of the proceedings shall be based on the following principles:

    - as a starting point, it will be necessary to verify whether the relevant piece of law qualifies as criminal law under the national laws;

1 From the decision of the European Court of Human Rights, Engel and others v. Netherlands (Grand Chamber) of 8 June 1976.

- furthermore, the scope of the piece of law shall be considered, both in terms of recipients and purpose that is set with the penalty provided. In this respect, the criminal nature is recognized where the envisaged penalty has a repressive and preventive function (unlike the case in which it is, for example, aimed at only compensating for pecuniary damages); and

- finally, the nature and severity of the threatened sanction (which does not necessarily have to be detention) shall be considered.

This implies that the qualification of the procedure and the penalty as "criminal" by the national legal system will not be decisive, but their substantially "punitive" nature shall be assessed on the basis of the mentioned Engel criteria.

Furthermore, the Constitutional Court specifies that, for a case to become relevant under the *ne bis in idem* principle, the relevant proceedings must not be close, in substance and in time, so to represent parts of a single integrated system for the protection of the same legal rights. Otherwise, the dual system, *per se*, would not be incompatible with Article 4, Par. 4, Prot. No. 7 of the ECHR and, with Article 117, paragraph 1 of the Constitution. As clarified by the Constitutional Court, there is no *ne bis in idem* when:

- proceedings pursue complementary purposes and address different aspects of the contested conduct;

- the duality of proceedings is a foreseeable consequence, not only *in abstracto* but also *in concreto*, of the same conduct;

- proceedings are conducted so as to avoid, to the maximum extent possible, any duplication in the collection as well as the assessment of evidences;

- there is in place an offsetting mechanism that protects the individual from bearing an excessive burden.

Moreover, even in the event that between the two proceedings a sufficiently close connection in substance exists, if, in practice, there is no adequate connection in time, a violation of the principle could still occur since the individual would not be protected against an unjustifiably protracted status of uncertainty.

Based on the above-mentioned principles, in examining the case at issue, the Constitutional Court concluded for a violation of the *ne bis in idem* for the following reasons:

- the copyright law structurally creates the conditions for the same person to be sanctioned, under both a criminal and an administrative set of rules, for the same fact/s;

- the applicability of two separate penalties implies two separate proceedings (one led by the Public Prosecutor office, the other by the Prefect – an administrative authority) that may evolve either in parallel or consecutively but both against the same individual. Therefore, as soon as one of two proceedings comes to a conclusion, it is equally physiological that the one that is still to be opened – or still pending – becomes a "*bis*" with respect to the proceeding already concluded;

- administrative penalties have a punitive and dissuasive nature since they are usually determined by assuming as the basis of the calculation the double of the market price of the violated work or support, multiplied by the number of copies illegally duplicated or replicated, so to inflict on the transgressor an economic sacrifice higher than the profit obtained from the offense;

- between the two proceedings there is no sufficiently close connection:

    - in fact, it cannot be concluded that the two proceedings pursue complementary objectives, or concern different aspects of the illicit behavior. In this regard, the Constitutional Court notes the absence of a system of thresholds (as for certain tax matters) capable of selecting only the conducts that, due to their seriousness, appear to deserve a criminal sanction;

- the administrative system does not provide for any mechanism to avoid duplication in the collection and evaluation of evidences, and to ensure a reasonable coordination in time of the proceedings;

- finally, there is no specific mechanism that allows the criminal judge (or the administrative authority in the event of a previous criminal final decision) to take into account the penalty already inflicted, in order to avoid that the same behavior is punished disproportionately.

3. Possible effects of the decision at issue on criminal-tax matters

The principles established by the Constitutional Court with the decision at stake might have effects and/or application in the criminal-tax field.

The dual system of administrative and criminal proceedings in tax matters certainly involves duplications in terms of costs and efforts in relation to the same issues, absent a suitable mechanism aimed at preventing them. The criminal proceeding is independent from the administrative one and it could well continue for a long time even after the conclusion of the first one as, for example, in the event that the taxpayer decides to settle the tax claim.

Moreover, administrative penalties may, under certain circumstances, be considered punitive, similarly to the case examined by the Constitutional Court since the taxpayer may be requested to pay penalties above the saving obtained from the offense. For example, penalties provided for in the case of an unfaithful, or an omitted or a fraudulent tax return vary respectively between, 90% and 180%, 120% and 240%, 135% and 270% of the higher taxes that were assessed. In this respect, the existence of thresholds for the conduct to qualify also as a tax crime does not appear to be a suitable way of the system to avoid a duplication.

In conclusion, the decision might represent a precedent (though on a different set of rules) to argue that a violation of the *ne bis in idem* principle is present each time a tax violation triggers a dual trial system. It should be also worth exploring the bearing of the decision in the tax field when violations are contested to two separate persons; *i.e.*, on one side, the administrative penalties to the relevant company and, on the other side, the tax crime to the relevant individual/s who seat on board or are in charge of the tax matters.

It should be noted that in the latest years the issue has been submitted to the scrutiny of the Constitutional Court but it has not been substantially addressed by the latter for procedural reasons and, specifically, for insufficient motivation by the referring court with respect to the conditions outlined by the European Court of Justice and the European Court of Human Rights, as indicated to in the decision at stake[2].

2 See Decision 222/2019, Order 114/2020 and Order 136/2021.

This document is delivered for information purposes only.
It does not constitute a basis or guidance for any agreement and/or commitment of any kind.
For any further clarification or research please contact:

Fabio Chiarenza
Partner

Head of Tax Department
Rome
+39 06 478751
fchiarenza@gop.it

Luciano Acciari
Partner

Tax Department
Rome
+39 06 478751
lacciari@gop.it

Mario d'Avossa
Partner

Tax Department
Milan
+39 02 763741
mdavossa@gop.it

Luciano Bonito Oliva
Partner

Tax Department
Rome
+39 06 478751
lbonitooliva@gop.it

Alessandro Zalonis
Partner

Tax Department
Rome
+39 06 478751
azalonis@gop.it

Vittorio Zucchelli
Partner

Tax Department
Milan
+39 02 763741
vzucchelli@gop.it

Valeria Romagnoli
Senior Associate

Tax Department
Milan
+39 02 763741
vromagnoli@gop.it