Subject 5 − Fundamental rights in tax matters: some remarkable examples in our domestic, judicial, legislative and administrative practice

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Part I

Administrative fiscal penalties as criminal penalties within the meaning of the European Convention on Human Rights and other Human Rights Instruments: the "*non bis in idem*" principle and some other practical consequences.

A. Belgian Situation

- The European Convention on Human Rights (the "Convention"), the UN International Covenant on Civil and Political Rights (the "Covenant") and the Charter of Fundamental Rights of the European Union (the 'Charter', applicable only where a Member State is implementing EU law: art. 52.1) provide various fundamental rights for someone facing a 'criminal charge' within the meaning of these international instruments.
- Court of Strasbourg on the Convention: notion of "criminal charge" is autonomous and depends on three non-cumulative criteria (ECHR, 6 June 1976, *Engel*, 21 February 1984, *Ozturk*):
  - the classification of the offence in the domestic law;
  - the nature of the offence (general, or applicable only to a group of persons with a special status; penalty with a deterrent and punitive character or with an indemnification character);
  - the degree of severity of the penalty.
- Same interpretation generally admitted for the similar provisions of the Covenant and Charter (on the Charter: ECJ judgment of 26 February 2013, C-617/10, *Hans Akerberg Fransson* - also Charter, art. 52.3).

A. Belgian Situation

- The Belgian Tax Codes provide for various administrative penalties, generally as a percentage of the evaded tax.

  Example: the income tax on unreported income is increased by a 'tax increase' ranging from 10 to 200% depending of the gravity and rank of the infringement.

- Based on well-established case law of the Court of Strasbourg (e.g. judgments of 4 March 2004, req. no.47650/99, *Silvester Horeca Services*, and of 23 July 2002, req. no 34619/97, *Janosevic*), Belgian Courts consider that the imposition of such administrative penalties involves the determination of a "criminal charge" within the meaning of the Convention (e.g. Cassation, 5 February 1999, *Silvester Horeca Services* and Cassation, 16 May 2003, no. F.00.0093.N).

- This also applies where the penalty is designed as a pure tax (special corporate tax of 309% on unreported expenses that are taxable as professional income for the beneficiary; now reduced to 103%: Cassation, 10 September 2010, no. F.09.0121.N, and 10 March 2016, no. F.14.0034.N; Constitutional Court, no. 88/2014 of 6 June 2014).

A. Belgian Situation

- Application: "*Non bis idem"* principle
  - Article 4 of the 7th Protocol to the Convention, article 14.7 of the Covenant and Article 50 of the Charter set forth the "*non bis in idem"* principle in criminal matters:

    Article 4 of the 7th Protocol – "Right not to be tried or punished twice"

    "No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."

A. Belgian Situation

- Cf. Court of Strasbourg, 10 February 2009 (Gd Chamber), *Zoloutkhine*, and 27 November 2014, *Lucky Dev*, and ECJ, 26 February 2013, C-617/10, *Hans Akerberg Fransson* (VAT → Charter did apply)
- Belgian law of 20 September 2012:
  - Consultation between Public prosecutor and Tax authorities to decide whether criminal or administrative route will be followed;
  - If administrative penalty already applied, its recovery is suspended once a criminal investigation is launched and is definitively unrecoverable if the taxpayer is called before the criminal court.
- Belgian Constitutional Court no. 2014/61 of 3 April 2014:

  The *"non bis in idem"* principle also means that, where an administrative fine has been imposed on a taxpayer and has become final, he cannot be subjected to a criminal investigation for the same facts.

A. Belgian Situation

- Other applications:
  - Principle of proportionality: the court has the power to reduce the administrative penalty if, given all the facts and circumstances, it is disproportionate to the infringement, i.e. if such a large penalty cannot be reasonably imposed (e.g. Cassation, 18 April 2013, no. F.11.0142.F).
  - Personal character of the penalty: penalty cannot be imposed on heirs of taxpayer and, where imposed on taxpayer, cannot be enforced against his heirs (Constitutional Court, no. 119/2009 of 16 July 2009; Mons Court of Appeal, 10 June 2015).
  - Right to be judged within a reasonable time (Brussels Court of Appeal, 12 June 2014, RG no. 2010/1R/3018, grounds; several cases pending before the Court of Cassation).

B. French situation

- According to the French *Cour de Cassation*, the "*non bis in idem*" principle only applies to penal sanctions. Possibility to cumulate penal and administrative sanctions.
- Article 1741 General tax code: "*not withstanding the applicable penal sanctions*", tax sanction can be applied in case of fraud.
- Decision Constitutional Court 18 March 2015: non cumulative penalties in case of infringement of stock exchange frauds.
- 4 conditions to be fulfilled in order to apply the "*non bis in idem*" principle:
  - ✓ same legal qualification of the facts
  - ✓ penalties have been introduced to protect the same social interests
  - ✓ two different sanctions
  - ✓ pronounced by the same judicial order (administrative or judiciary).

B. French situation

- Cases pending before the Constitutional Court:
  - ✓ ***Cass.Crim. 30 March 2016 n° 16-90.001 (Wildenstein) and n° 16-90.005 (Cahuzac)***: cumul of penalties applied to wealth tax and inheritance duties
  - ✓ ***C.E. 15 April 2016 n° 396696 (St. Richard)***: administrative penalties applied by the Court of budgetary discipline and penal sanctions
  - ✓ ***CE 18 May 2016 n° 397826***: cumul of tax penalties and Monetary code penalties for the absence of declaration of foreign bank accounts
  - ✓ ***Cass. Crim. 19 May 2016, n° 15-84.626***: same question about the cumul of administrative and penal sanctions; the question of the fourth conditions to be fulfilled and its compatibility with the principle of equality before the judge is clearly raised.
- The Constitutional Court must deliver its decision within a 3 months time limit.
- The hearings for the two first cases are scheduled on June 7 th.

C. Luxembourg situation

- The Luxembourg "*non bis in idem*" principle is mainly influenced by French rules.
- § 396(5) AO: tax swindling punished by prison of up to 5 years and fine of up to 10 times the amount at stake
  - ✓Impact of 2017 tax reform: enlargement of the scope of criminal tax law.
- Obligation for the tax authorities to forward a file including facts of tax swindling to the prosecutor (§ 421(4) AO; Case of the Administrative Court (12 July 2012))
  - ✓Issue of self-incrimination.

Part II

Fundamental rights as a safeguard in the field of the exchange of information between tax authorities.

A. Luxembourg situation

Exchange of information (EOI) – proliferation of rules

- **Law of 21 June 2005** implementing Directive 2003/48/EU on taxation of savings income in the form of interest payments (amended by Law of 25 November 2014)
- **Law of 31 March 2010** on the exchange of information on demand (amended by Law of 25 November 2014)
- **Law of 29 March 2013** implementing Directive 2011/16/EU on administrative cooperation in the field of taxation
- **Law of 26 May 2014** approving the Convention on mutual administrative assistance in Tax Matters of 29 May 2013
- **Bill of law n°6972 of 22 March 2016** on the exchange of advance cross-border rulings and advance transfer pricing arrangements
- **Double tax treaties** (**DTT**)
- **FATCA** intergovernmental agreements

A. Luxembourg situation

Increasing volume of EOI requests

Year	Number of EOI requests
2011	455
2013	659
2015	845

Source: Annual reports published by Luxembourg tax authorities

A. Luxembourg situation

A difficult "cohabitation" between fundamental rights and EOI instruments (1/3)

Should EOI prevail over fundamental rights?

"The possibility that any person concerned or having an interest in the EOI may challenge the decision to transmit that information constitutes a right, which while in substance is not objectionable, must be compatible with the effective EOI."

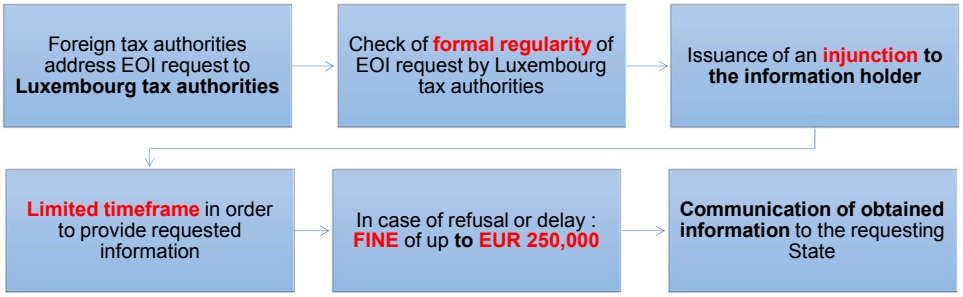
Source: OECD report / Global Forum on Transparency and Exchange of Information for Tax Purposes in November 2013

A. Luxembourg situation

A difficult "cohabitation" between fundamental rights and EOI instruments (2/3)

Law of 25 November 2014:

The Luxembourg legislator seems to have taken sides



A. Luxembourg situation

A difficult "cohabitation" between fundamental rights and EOI instruments (3/3)

Issues raised by the Law of 25 November 2014…

No alteration of requested documents

No information of the targeted taxpayer

No right of appeal against EOI request

…on top of international concerns

Directive 2011/16:
- information **transferred to third countries**
- information **used for other purposes**

A. Luxembourg situation

How to protect the rights of the taxpayers under the EOI procedure (1/4)

Traditional Luxembourg safeguards?

Fiscal secrecy	• Prohibiting tax authorities from disclosing information about taxpayers to third parties
Banking secrecy	• Prohibiting financial sector professionals from disclosing information relating to customer's assets and financial circumstances as well as to the existence of their relationship with the customer
Lawyer's privilege	• Inviolability of lawyers' office and all lawyer-client communications
Data protection	• Protection of private life and of personal data
Commercial, industrial and business secrets	• Prohibition of illicit use or disclosure of commercial / industrial / business secrets

A. Luxembourg situation

How to protect the rights of the taxpayers under the EOI procedure (2/4)

Fundamental rights as the last safeguard?

Luxembourg Constitution	European Convention on Human Rights	EU Charter of fundamental Rights
Article 11 (3): Right to privacy	**Article 6:** Right to a fair trial	**Article 7:** Right to respect for private and family life
	Article 8: Right to respect for private and family life	**Article 8:** Protection of personal data
		Article 47: Right to an effective remedy and to a fair trial

A. Luxembourg situation

How to protect the rights of the taxpayers under the EOI procedure (3/4)

Increasing importance of the Luxembourg courts for the protection of the fundamental rights

Administrative Tribunal
(n° 36452 of
13 August 2015)

Focus on the amount of the fine
(reduced to EUR 150,000)

Administrative Court
(n° 36893C
of 17 December 2015)
Filing of a preliminary ruling in front of the ECJ

- Applicability of the EU Charter of Fundamental Rights (with reference to ECJ, Sabou, C-276/12)?
- Violation of **articles 8** (protection of personal data) and **47** (effective access to a court) of the EU Charter of Fundamental Rights?

Case is pending
before the ECJ
Berlioz Investment Fund (C-682/15)

A. Luxembourg situation

How to protect the rights of the taxpayers under the EOI procedure (4/4)

Increasing importance of the Luxembourg courts for the protection of the fundamental rights

In case the ECJ does not hold that the EU Charter of fundamental Rights is violated

→

The Administrative Court will analyze the case in the light of the **ECHR**
(article 6 covers criminal fines in tax matters)

B. Belgian situation

Recent Legislative Developments

- Act of 16 December 2015 on the automatic exchange of financial account information by financial institutions and the Public Service for Finance
- Bill in preparation for country-by-country reporting

B. Belgian situation

Information of the Taxpayer?

- Article 333/1 Income Tax Code provides that the Tax Administration must inform the taxpayer in the case of a request for information to his financial institution; information can be made *post factum* only where the (Belgian or foreign) Treasury's rights are at risk (e.g., risk of insolvency) - Cf. Constitutional Court: nos. 39/2013 of 14 March 2013 and 107/2015 of 16 July 2015.
- Information held by the bank and subject to the automatic exchange of information is covered by the Data Protection Act of 8 December 1992: obligation for the bank to inform taxpayer of information processed and communicated and right to correct the data.

B. Belgian situation

Regularity of evidence

- Cassation, 22 May 2015 (so-called "Antigone doctrine", initiated in criminal matters: see Cassation, 14 octobre 2003, and Cassation, 23 mars 2004):

  → Unless the law has specifically provided for a nullity, irregularly-obtained evidence is not necessarily inadmissible – The judge must make a balance of the various interests at stake

- Compare with ECJ, 17 December 2015, C-419/14, WebMindLicenses
- But limited to rules on evidence, not applicable on rules regulating the admissibility of a criminal prosecution: Cassation, 19 January 2016

C. French situation

- France has a very large network of DTC implementing the exchange of information. It is also very active in promoting such international agreements in the OECD or within the E.U.
- France has for a long time "fiscal attachés" in some embassies (London, Berlin, Washington…) to ease the exchange of information between competent authorities.
- And finally, FTA have a very large access to information from the taxpayers either by using tax audits or its "right of communication".

  → FTA does not have to inform the taxpayer of the use they would make of the collected information

  → In case of request of information to another State, the status of limitation can be extended in order to allow the tax inspector to get those information; in this case, the taxpayer should be informed.

C. French situation

The use of "stolen "information

- Principle: in "civil" matters, the proof should be regular; in "penal" matters, all proofs are admissible.
- Taxation is a civil matter, even if tax audits could lead to penal sanctions.
  - → Tax investigations were cancelled by the Court of Cassation because they were based on stolen documents (HSBC; rec: Cass.Com. 31-1-12, N.111-13097 and Cass.Com. 21-2-12, N.11-15-162)
  - → Article L 10.0.AA of the Tax Procedure Book (art. 37 Law 2013-1117 of December, 6, 2013): except for domicile investigations, the FTA is allowed to use information that are regularly brought to its knowledge, for instance by international exchange of information, even if they have an illegal origin; example:

Stolen documents → Foreign Tax administration → FTA

Those information can be utilized.

Part III

How human rights principles are implemented in the tax field?

A. France situation

France has developped a rather complete system of control to implement the Human Rights principle in its tax legislation.

This could be summarized as follows:

Text	Control
Constitution	-
⇩	
Laws (Finance Act)	Constitutional Court
⇩	
Regulations	State Council / Cassation Court
⇩	
Instructions	State Council (excess of power)

A. France situation

1. **Constitution**: Reference in the preamble to the Human Rights Declaration of 1789.

Two provisions are commonly refered to in tax cases:

- Art. 6: *''[The law] shall be the same for all, either it protects or it punishes*'';
- Art.13: ''*For maintening public forces, and for administrative expenses, a common contribution is indispensable; it could be equally shared between all citizens, according to their faculties*''.

There is also a reference to the preamble of the 1946 Constitution (pinciples that are ''*particulary usefull to our time*'').

Could be also invoqued before French Courts:

- European declaration of Human Rights
- Chart of fundamental rights of European Union (2007).

A. France situation

2. Laws

Can be controlled at two steps:

A priori control: after having been adopted by the Parliament and before being enacted by the President of the Republic:

- can be deferred to the Constitutional Court by:
  - the President, the Prime Minister, President of the National Assembly or President of the Senate, or
  - 60 Members of the Parliament or 60 Senators, which is the most commonly used.

All Finance Bills (except one) have been deferred by the MP or Senators to the C.C.

A. France situation

2. Laws

A posteriori control (since 2010): Priority Question of Constitutionality (QPC)

- can be raised by any taxpayer before any Court
- transmitted to either the State Council or the Cassation Court
- they decide to transmit it to the C.C. if three criterions are fulfilled (questions applicable to the litigation; not previously examined; seriousness of the question).

This is becoming the most frequent way of control that laws comply with Human Rights principles.

In both cases, the C.C. can decide that:

- the provisions of the law (or the bill) comply with those principles and confirm them;
- they do not comply with those principles: they are cancelled or cannot be enacted by the President of the Republic;
- they comply with those principles, provided that they are interpreted in a certain way, which will be compulsory both for courts and administrative authorities.

A. France situation

3. Regulations

They are administrative acts that should comply to the law.
In case they do not comply to Human Rights principles and are used by the Tax Authorities to assess any taxation, they can be challenged:

- before the competent courts during the litigation
- or before the State Council as being an ''*excess of power*'': in this case, the regulation may be cancelled by the S.C.

It is also possible to ask for their withdrawal but this is scarcely used.

Problem: cancellation of such regulations (by way of the ''*excess of power*'' procedure) can be required only within a time limit of 2 months after their publication, which is quite short. Thus, this is not commonly used.

A. France situation

4. Instructions

They are official positions taken by the Tax Authorities and published in their Official Bulletin.
Based on article L80 of Tax Procedure Book, instructions can be opposed to the FTA, even if they are contrary to laws and regulations. This is based on the ''*legitimate trust principle*''.

For a long time, instructions could not be challenged before the Courts as they were considered not being a source of law (which they are not indeed), except when they were adding to the law (and became a regulation).

Since 2003, it is possible to challenge them before the State Council by the ''*excess of power*'' procedure: the S.C. can cancel the provisions of an instruction, ''*even if they are a reproduction of the law*'' when they do not comply with Human Rights principles.

This is a very efficient procedure:
- the 2 months time limit is not applicable since tax instructions are not published in the Official Gazette;
- judgements occurs in a reasonable time (2 years);
- they can be combined with a QPC or a request of preliminary ruling to ECJ.

A. France situation

5. Some outstanding issues

- Constitutional Court does not verify that laws comply with international (including European) principles. This is mainly justified by practical reasons (short time to judge either a priori or a posteriori and diversity of international instruments).
- The ''filter'' of State Council and Cassation Courts seems sometimes to be too narrow: the ''seriousness'' criteria leaves a large margin of appreciation to transmit the QPC to the C.C.; no control of the decision of primary or secondary courts to transmit the QPC to the State Council or to the Cassation Court.
- The question to know whether a taxpayer could prevail himself of an instruction that would be contrary to European or internationial principles is still open.
- In order to avoid cancellation of its instructions, Tax Authorities are developping ''soft laws'' that cannot be challenged before the courts (''draft instructions'', ministerial answers to MP's questions, prohibition of ''abusive'' schemes…).

B. Belgian situation

1. Oversight of new domestic provisions

- Any person having an interest (i.e. including private individuals) can petition for annulment of a newly published legal provision breaching a fundamental right guaranteed by the Constitution, the Convention, the Covenant or the Charter (most of their provisions being of direct effect):
  - if the breach is contained in a statute (federal, regional or Community), before the Constitutional Court, within six months of publication;
  - if the breach is contained in an executive order or administrative circular of regulative character *(de caractère règlementaire)* before the Conseil d'Etat (Supreme Administrative Court), within 60 days of publication.

B. Belgian situation

Notes:

a) For breaches of the Charter (as for other EU-law instruments), article 267 TFEU obliges the Constitutional Court and the Conseil d'Etat to refer a question to the ECJ for preliminary ruling, unless it establishes that the question raised is irrelevant or the EU-law provision in question has already been interpreted by the Court or correct application of EU law is so obvious as to leave no scope for any reasonable doubt.

b) In principle, the Constitutional Court has power only to rule on the conformity of statutes with the fundamental rights guaranteed by the Constitution; however, it takes the view that, where a statute breaches a provision of international law of direct effect, it also breaches the non-discrimination article in the Constitution and therefore the Constitutional Court has power to rule on the breach.

B. Belgian situation

2. Oversight of existing domestic provisions

- All judicial and administrative courts have power to set aside the application of any domestic legal provision to the extent they consider it incompatible with the Convention, the Covenant or the Charter (most of their provisions being of direct effect) (the Belgian Court of Cassation's "Le Sky" doctrine of 27 May 1971)

- However, the conformity of domestic statutes (federal, regional or Community) with the Constitution can only be ruled on by the Constitutional Court

  → reference for a preliminary ruling

  → Priority to the Constitutional Court where the question arises of the conformity of a Belgian statute with a fundamental right that is protected in substantially identical terms by both the Belgian Constitution and an international instrument (e.g., principle of non-retroactivity)

B. Belgian situation

Notes:

a) For breaches of the Charter see above, under "Oversight of new domestic provisions", the note on the mandatory reference to the ECJ for preliminary ruling by the Constitutional Court and the Conseil d'Etat

b) For breaches of the Convention, the Covenant and the Charter by a statute, forum shopping is *de facto* possible since, on the one hand, all judicial and administrative courts will rule on the issue, but the Constitutional Court will acquiesce in giving a ruling on a question referred to it citing breach of the Convention, the Covenant and the Charter by a statute in combination with breach of the non-discrimination clause of the Constitution.

C. Luxembourg situation

1. **Laws**
   - Human Rights Advisory Commission delivers opinion on bills of law
     - ✓ No opinion delivered yet in tax matters

2. **Administrative circulars and notes**
   - "Internal" instructions addressed to tax officials
   - No binding effect on taxpayers and Courts
   - **Administrative circulars**
     - ✓ Interpretation of law, no legal character
     - ✓ Examples of circulars adding to / derogating from legal provisions
   - ***Notes de service***
     - ✓ Increasing relevance
     - ✓ In general no publication
     - ✓ To some extent accessible through ministerial answers