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Provisional text

JUDGMENT OF THE COURT (First Chamber)

5 May 2022 (*)

(Reference for a preliminary ruling – Value added tax (VAT) – Directive 2006/112/EC – Fraudulent concealment of tax due – Penalties – National legislation which provides for an administrative penalty and a criminal penalty for the same acts – Charter of Fundamental Rights of the European Union – Article 49 – Article 50 – Principle ne bis in idem – Article 52(1) – Limitations to the principle ne bis in idem – Requirement to provide for clear and precise rules – Possibility of taking into account the interpretation of national legislation by national courts – Need to provide for rules ensuring the proportionality of all of the penalties imposed – Penalties of different kinds)

In Case C-570/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour de cassation (Court of Cassation, France), made by decision of 21 October 2020, received at the Court on 28 October 2020, in the criminal proceedings against

BV,

intervening parties:

Direction départementale des finances publiques de la Haute-Savoie,

THE COURT (First Chamber),

composed of A. Arabadjiev, President of the Chamber, I. Ziemele, T. von Danwitz (Rapporteur), P.G. Xuereb and A. Kumin, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- BV, by L. Goldman, avocat,
 - the French Government, by E. de Moustier and A. Daniel, acting as Agents,
 - the European Commission, by A. Armenia and C. Ehrbar, acting as Agents,
- after hearing the Opinion of the Advocate General at the sitting on 9 December 2021,
gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in the context of criminal proceedings brought against BV for tax offences, in particular relating to value added tax (VAT).

Legal context

European Union law

3 Article 2(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) determines the transactions subject to VAT.

4 Under the first paragraph of Article 273 of that directive:

'Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.'

National law

5 Article 1729 of the code général des impôts (General Tax Code), in the version applicable at the time of the facts in the main proceedings ('the CGI'), provides:

'Inaccuracies or omissions identified in a return or a document which refer to items that are relevant for the purposes of the taxable amount or calculation of the tax, and the reimbursement of a tax credit the payment of which has been wrongly obtained from the State, shall result in the application of an increase of:

(a) 40% where the offence is intentional;

...'

6 Article 1741 of the CGI, in the version applicable at the time of the facts in the main proceedings, resulting from loi n° 2010-1658 du 29 décembre 2010 (Law No 2010-1658 of 29 December 2010), provided:

‘Subject to the special provisions contained in this code, anyone who has fraudulently evaded or who has attempted fraudulently to evade the determination or the full or partial payment of the taxes covered by this code, whether by deliberately failing to file his or her return within the periods laid down, by deliberately concealing a portion of the sums liable to tax, by contriving his or her own insolvency or by impeding, by other stratagems, the collection of the tax, or by acting in any other fraudulent way, shall, regardless of the tax penalties applicable, be liable to a fine of EUR 37 500 and a term of imprisonment of five years. If the acts were carried out or enabled by means of purchases or sales without invoices or with invoices which do not refer to real transactions or were designed to obtain unjustified reimbursements from the State, the perpetrator of those acts shall be punished with a fine of EUR 75 000 and a term of imprisonment of five years.

However, in the case of concealment, this provision shall apply only if that concealment exceeds one tenth of the taxable amount or the sum of EUR 153.

Anyone convicted and sentenced under this article may be deprived of civic, civil and family rights, in accordance with Article 131-26 of the Criminal Code.

In addition, the court may order that the judgment given be displayed and disseminated under the conditions provided for in Article 131-35 or 131-39 of the Criminal Code.

...’

7 Article L. 228 of the livre des procédures fiscales (Code of Tax Procedures), in the version applicable at the time of the facts in the main proceedings, stated:

‘A complaint seeking the application of criminal penalties in matters relating to direct taxes, value added tax and other turnover taxes, registration fees, the tax on immovable property and the tax on the transfer of assets and documented legal transactions shall be lodged by the tax authorities after consent has been given by the Committee on tax offences, failing which the complaint will be inadmissible.’

8 According to settled case-law of the Cour de cassation (Court of Cassation, France), it follows from the combined provisions of Article 1741 of the CGI and Article L. 228 et seq. of the Code of Tax Procedures that prosecutions for tax evasion may be brought by the public prosecutor’s office only on the basis of a prior complaint by the tax authorities, failing which such prosecutions will be inadmissible.

9 By Decisions No 2016-545 QPC of 24 June 2016, No 2016-546 QPC of 24 June 2016, No 2016-556 QPC of 22 July 2016 and No 2018-745 QPC of 23 November 2018, the Conseil constitutionnel (Constitutional Council, France) ruled that the combination of criminal and tax proceedings and penalties in cases of concealment of sums liable to tax and omission from a tax return, as provided for under Articles 1729 and 1741 of the CGI, is compatible with the principles of the necessity and proportionality of offences and penalties. The Conseil constitutionnel (Constitutional Council) has stated that those provisions ‘together make it possible to ensure the protection of the financial interests of the State and equality in matters of taxation by pursuing common objectives which are both dissuasive and punitive’, that ‘recovery of the necessary public contribution and the aim of combating tax fraud justify the initiation of complementary proceedings in the most serious cases of fraud’, and that ‘criminal prosecutions in circumstances and subject to procedures organised by law can thus be initiated in addition to inspections following which the tax authorities impose financial penalties’.

10 However, the Conseil constitutionnel (Constitutional Council), in the light of the principle of proportionality, issued three interpretative reservations which have the effect of limiting the possibility of such combination:

- first, a taxable person who is exempted from payment of tax by a judgment which has become final on substantive grounds cannot be convicted of tax evasion in criminal proceedings;
- secondly, Article 1741 of the CGI applies only to the most serious cases of fraudulent concealment of sums liable to tax or omissions from a tax return; that seriousness may arise from the amount of the charges evaded, the nature of the actions of the person prosecuted or the circumstances in which those actions occurred; and
- thirdly, although the possibility of two sets of proceedings being initiated may result in a duplication of penalties, the principle of proportionality means that, in any event, the total amount of any penalties imposed must not exceed the maximum amount of one of the penalties incurred.

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 BV, a sole trader, practised as an accountant until 14 June 2011. On that basis, and in view of his turnover, he was automatically liable for VAT under the ordinary assessment procedure and was required to file monthly returns.

12 The tax authorities carried out audits of his accounts for the years 2009, 2010 and 2011.

13 On 10 March 2014, the tax authorities lodged a complaint with the public prosecutor's office in Annecy (France) against BV, alleging that he had filed irregular accounts including VAT returns that were reduced by concealing the majority of the income received, reduced non-commercial profit returns, and reduced tax returns for his overall income recording non-commercial profits lower than those actually received. According to that complaint, the amount of VAT evaded was EUR 82 507 and the amount of income tax evaded was EUR 108 883.

14 Following a preliminary investigation by the public prosecutor's office, BV was summoned to appear before the tribunal correctionnel d'Annecy (Criminal Court, Annecy, France) to be tried for the offences of tax evasion by concealment of taxable amounts and omission of written records from an accounting document.

15 By judgment of 23 June 2017, the tribunal correctionnel d'Annecy (Criminal Court, Annecy) found BV guilty of the acts of which he was accused, sentenced him to 12 months' imprisonment and ordered the publication of the judgment at his own expense.

16 BV brought an appeal against that judgment before the cour d'appel de Chambéry (Court of Appeal, Chambéry, France). In support of his appeal, he claimed that his criminal conviction was contrary to the principle *ne bis in idem* enshrined in Article 50 of the Charter, on the ground that he had already been the subject of a tax adjustment procedure in respect of the same acts which resulted in the imposition of final tax penalties amounting to 40% of the charges evaded.

17 By judgment of 13 February 2019, the cour d'appel de Chambéry (Court of Appeal, Chambéry) dismissed the appeal. That court held that the combination of criminal penalties and tax penalties to which BV was subject was not contrary to Article 50 of the Charter, since the application of the national legislation at issue in the main proceedings complied with the

requirements arising from the relevant case-law of the Conseil constitutionnel (Constitutional Council).

18 BV brought an appeal against the judgment of the cour d'appel de Chambéry (Court of Appeal, Chambéry) before the Cour de cassation (Court of Cassation), the referring court in the present case, claiming that the national legislation at issue in the main proceedings does not satisfy the requirement of clarity and foreseeability with which a duplication of prosecutions and penalties of a criminal nature must comply in accordance with the case-law resulting from the judgment of 20 March 2018, *Menci* (C-524/15, EU:C:2018:197, paragraphs 49 to 51). In addition, he submitted that, contrary to the case-law resulting in particular from the judgment of 20 March 2018, *Garlsson Real Estate and Others* (C-537/16, EU:C:2018:193, paragraphs 56 and 60), that national legislation does not provide for rules to ensure that the severity of all of the penalties imposed does not exceed the seriousness of the offence identified.

19 As a preliminary point, the referring court considers that, since the national legislation at issue in the main proceedings is aimed, inter alia, at combating VAT offences in order to ensure the collection of all the VAT due, it constitutes an implementation of EU law, for the purposes of Article 51(1) of the Charter, with the result that it must comply with the principle *ne bis in idem* enshrined in Article 50 of that charter.

20 As regards the requirement of clarity and foreseeability, the referring court notes that Articles 1729 and 1741 of the CGI define precisely the acts and omissions which may be the subject of criminal and tax proceedings and penalties and that their application was the subject of the three interpretative reservations by the Conseil constitutionnel (Constitutional Council) referred to in paragraph 10 above.

21 As regards, more specifically, the second interpretative reservation, the referring court states that it has clarified the detailed rules for its application. Thus, where the person charged with tax evasion provides proof that he or she has personally been subject to a tax penalty in relation to the same acts, it is for the criminal court to determine, first of all, whether the constituents of that offence are made out having regard to Article 1741 of the CGI. Next, it is for that court to establish, if necessary of its own motion, that the acts alleged are of a degree of seriousness capable of justifying criminal penalties in addition to tax penalties, in the light of the criteria laid down by the Conseil constitutionnel (Constitutional Council) relating to the amount of the charges evaded, the nature of the actions or the circumstances in which those actions occurred. Finally, the decision as to seriousness must be reasoned and be made prior to the choice of the penalties imposed and the statement of reasons on which they are based.

22 As regards whether the severity of all of the penalties imposed is limited to what is strictly necessary, the referring court notes that, in accordance with the second interpretative reservation issued by the Conseil constitutionnel (Constitutional Council), the French legislation limits criminal proceedings to offences of a certain level of seriousness, in respect of which the national legislature has provided for a custodial sentence in addition to a fine.

23 Furthermore, under the third interpretative reservation, the possibility of combining penalties is limited by the prohibition on exceeding the maximum amount of one of the penalties incurred. However, the referring court states that, according to its own case-law, the third interpretative reservation concerns only penalties of the same kind, namely financial penalties, since it presupposes that the court can compare the maximum levels of criminal and tax penalties incurred in order to determine the highest amount which constitutes the ceiling. Thus, that interpretative

reservation does not apply in the case of a combination of tax-related financial penalties and a custodial sentence.

24 In those circumstances, the Cour de cassation (Court of Cassation) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is the requirement of the clarity and the foreseeability of the circumstances in which concealments in returns relating to VAT due may be the subject of a duplication of proceedings and penalties of a criminal nature satisfied by national rules such as those described above?’

(2) Is the requirement of the necessity and the proportionality of the duplication of such penalties satisfied by national rules such as those described above?’

Consideration of the questions referred

25 By its two questions referred for a preliminary ruling, which it is appropriate to examine together, the referring court seeks, in essence, to ascertain whether the fundamental right guaranteed by Article 50 of the Charter, read in conjunction with Article 52(1) thereof, must be interpreted as meaning that it

- precludes a situation whereby the limitation of the duplication of proceedings and penalties of a criminal nature in the event of fraudulent concealment or omissions from a return relating to VAT provided for by national legislation to the most serious cases is based only on settled case-law interpreting restrictively the legal provisions defining the conditions for the application of that duplication, and/or
- precludes national legislation which does not ensure, in cases of the combination of a financial penalty and a custodial sentence, by means of clear and precise rules, where necessary as interpreted by the national courts, that all of the penalties imposed do not exceed the seriousness of the offence identified.

26 As a preliminary point, it should be noted that, according to settled case-law, administrative penalties imposed by national tax authorities and criminal proceedings initiated in relation to VAT offences constitute an implementation of Articles 2 and 273 of Directive 2006/112 and of Article 325 TFEU and, therefore, of EU law for the purposes of Article 51(1) of the Charter, and must therefore comply with the fundamental right guaranteed by Article 50 thereof (judgment of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraph 21 and the case-law cited).

27 According to that provision, no one is to be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

28 In the present case, in the criminal proceedings at issue in the main proceedings, BV is being prosecuted for fraudulent concealment and omissions from a return relating to VAT whereas, according to the information contained in the request for a preliminary ruling, he has already been subject, in respect of the same acts, to a final administrative penalty of a criminal nature for the purposes of Article 50 of the Charter. Such a duplication of proceedings constitutes a limitation of the fundamental right enshrined in that provision of the Charter, since Article 50 prohibits the imposition, with respect to identical facts, of several penalties of a criminal nature as a result of different proceedings brought for those purposes (see, by analogy, judgment of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraph 35).

29 Nevertheless, according to settled case-law, a limitation of the fundamental right guaranteed by Article 50 of the Charter may be justified on the basis of Article 52(1) thereof (judgments of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraph 40 and the case-law cited, and of 22 March 2022, *Nordzucker and Others*, C-151/20, EU:C:2022:203, paragraph 49).

30 In accordance with the first sentence of Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by that charter must be provided for by law and comply with the essence of those rights and freedoms. According to the second sentence of Article 52(1) thereof, subject to the principle of proportionality, limitations to those rights and freedoms may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

31 In the present case, first, it is common ground that the possibility of combining criminal proceedings and penalties and administrative proceedings and penalties of a criminal nature is provided for by law, namely by Articles 1729 and 1741 of the CGI. Although the requirement that any limitation on the exercise of fundamental rights must be provided for by law implies that the legal basis which permits the interference with those rights must itself define the scope of the limitation on the exercise of the right concerned, that requirement is broadly indissociable from the requirements of clarity and precision arising from the principle of proportionality (see, to that effect, judgment of 16 July 2020, *Facebook Ireland and Schrems*, C-311/18, EU:C:2020:559, paragraph 180), which will be examined in paragraph 34 et seq. below).

32 Secondly, national legislation such as that at issue in the main proceedings complies with the essential content of the fundamental right guaranteed by Article 50 of the Charter, since, according to the information in the case file before the Court, it allows such a duplication of proceedings and penalties only under conditions which are exhaustively defined, thereby ensuring that the right guaranteed by Article 50 is not undermined as such.

33 Thirdly, it is apparent from the case file before the Court that that legislation is intended to ensure the collection of all the VAT due. In the light of the importance that is given in the Court's case-law, for the purposes of achieving that objective, to combating VAT offences, the limitation of the principle *ne bis in idem* resulting from national legislation such as that at issue in the main proceedings meets an objective of general interest.

34 As regards, fourthly, the principle of proportionality, it requires that the duplication of proceedings and penalties provided for by national legislation, such as that at issue in the main proceedings, does not exceed what is appropriate and necessary in order to attain the objectives legitimately pursued by that legislation, it being understood that, when there is a choice between several appropriate measures, recourse must be had to the least onerous and the disadvantages caused must not be disproportionate to the aims pursued (judgment of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraph 46 and the case-law cited).

35 National legislation which provides for the possibility of such a duplication of proceedings and penalties is capable of achieving the legitimate objective of combating VAT offences in order to ensure the collection of all the VAT due (judgment of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraph 48).

36 As regards the strict necessity of such national legislation, the Court stated, in paragraphs 49, 53 and 55 of the judgment of 20 March 2018, *Menci* (C-524/15, EU:C:2018:197), that it must provide for clear and precise rules which, first of all, allow the individual to predict which acts and omissions are liable to be subject to such a duplication of proceedings and penalties, secondly,

ensure the procedures are coordinated so as to reduce to what is strictly necessary the additional disadvantage associated with the duplication of proceedings of a criminal nature conducted independently, and finally, make it possible to guarantee that the severity of all of the penalties imposed corresponds with the seriousness of the offence concerned.

37 The referring court is uncertain, in the first place, about the first of the requirements referred to in the preceding paragraph, which, as regards the fundamental right guaranteed by Article 50 of the Charter, also reflects the principle that offences and penalties must have a proper legal basis, enshrined in Article 49(1) of the Charter. As the Advocate General observed in points 56 to 58 of his Opinion, the latter principle applies to the combination of a final administrative penalty of a criminal nature, for the purposes of Article 50 of the Charter, and criminal proceedings, in so far as that combination is capable of leading to a more serious outcome, for the person concerned, than that resulting from criminal proceedings alone. In particular, the punitive element resulting from the combination of penalties of a criminal nature is liable to go beyond that provided for by law in respect of the conduct complained of, which is why any provision authorising double punishment must comply with the requirements relating to the principle that offences and penalties must be defined by law, as guaranteed by Article 49(1) of the Charter.

38 As regards the principle that offences and penalties must be defined by law, the Court has held that, although that principle requires the law to provide a clear definition of offences and the penalties which they attract, that condition is satisfied where the individual is in a position to ascertain from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, which acts and omissions will make him or her criminally liable (judgments of 22 October 2015, *AC-Treuhand v Commission*, C-194/14 P, EU:C:2015:717, paragraph 40 and the case-law cited, and of 11 June 2020, *Prokuratura Rejonowa w Słupsku*, C-634/18, EU:C:2020:455, paragraph 49).

39 Thus, the fact that the conditions required for a duplication of proceedings and penalties of a criminal nature derive not only from legislative provisions but also from their interpretation by national courts is not, in itself, such as to call into question the clear and precise nature of the national legislation, provided, however, that the individual is in a position to ascertain from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, which acts and omissions may give rise to such a duplication of proceedings and penalties.

40 As regards the use, by the national legislature, of broad concepts for the purpose of determining the actions liable to give rise to a duplication of proceedings and penalties of a criminal nature, it must be recalled that, in paragraphs 52 and 53 of its judgment of 20 March 2018, *Garlsson Real Estate and Others* (C-537/16, EU:C:2018:193), the Court held that the national legislation at issue in the case which led to that judgment was sufficiently clear and precise, even though that national legislation made the duplication dependent on whether the conduct at issue was liable to 'affect significantly' the value of financial instruments and, therefore, on the interpretation of a broad concept requiring significant discretion on the part of national courts.

41 It is apparent from the case-law relating to the principle that offences and penalties must have a proper legal basis that that principle cannot be interpreted as precluding the gradual, case-by-case clarification of the rules of criminal liability by judicial interpretation, provided that the result was reasonably foreseeable at the time the offence was committed, especially in the light of the interpretation put on the relevant provision in the case-law at the material time (judgments of 22 October 2015, *AC-Treuhand v Commission*, C-194/14 P, EU:C:2015:717, paragraph 41 and the case-law cited, and of 11 June 2020, *Prokuratura Rejonowa w Słupsku*, C-634/18, EU:C:2020:455, paragraph 50).

42 Accordingly, and subject to the same conditions, the fact that the national case-law refers, in its interpretation of the relevant legislative provisions, to broad concepts which must be clarified gradually does not, in principle, preclude national legislation from being regarded as laying down clear and precise rules allowing individuals to predict which acts and omissions are liable to be subject to a duplication of proceedings and penalties of a criminal nature.

43 In that context, it should also be borne in mind that the scope of the foreseeability thus required depends to a considerable degree on the content of the text in question, the field it covers and the number and status of those to whom it is addressed. A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances of the case at issue, the consequences which a given action may entail. This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can therefore be expected to take special care in assessing the risks that such an activity entails (see, to that effect, judgments of 28 June 2005, *Dansk Rørindustri and Others v Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 219 and the case-law cited; of 22 October 2015, *AC-Treuhand v Commission*, C-194/14 P, EU:C:2015:717, paragraph 42; and of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 166).

44 In the present case, although it is for the referring court to ascertain whether the national legislation at issue in the main proceedings complies with the requirements of clarity and precision referred to in paragraph 36 above, it is appropriate for the Court to provide some useful indications in that regard to enable the referring court to decide the case before it (see, by analogy, judgment of 22 June 2021, *Staatssecretaris van Justitie en Veiligheid (Effects of an expulsion decision)*, C-719/19, EU:C:2021:506, paragraph 82 and the case-law cited).

45 First, it is apparent from the information contained in the request for a preliminary ruling that Article 1729 of the CGI lays down the conditions under which fraudulent concealment or omissions from a return relating, inter alia, to VAT may give rise to the imposition of an administrative penalty of a criminal nature. According to Article 1741 of the CGI and under the conditions referred to in that provision, such conduct may, ‘regardless of the tax penalties applicable’, also be subject to a criminal fine and a custodial sentence.

46 Next, the Conseil constitutionnel (Constitutional Council) held that the duplication of proceedings and penalties provided for by those articles may apply only in the most serious cases of fraudulent concealment of sums liable to tax or omissions from a tax return, while specifying that that seriousness may arise from the amount of the charges evaded, the nature of the actions of the person prosecuted or the circumstances in which those actions occurred. Subject to the assessment of the referring court, such an interpretation by that court in the light of the principle of proportionality does not appear, in itself, to be unforeseeable.

47 Finally, the referring court points out that it has already applied on several occasions the case-law of the Conseil constitutionnel (Constitutional Council) referred to in the preceding paragraph and has thus further clarified its scope. It is for the referring court to ascertain whether, in the light of those case-law precedents, it was reasonably foreseeable for BV, at the time when the acts at issue in the main proceedings were committed, that they could give rise to a duplication of proceedings and penalties of a criminal nature under Articles 1729 and 1741 of the CGI.

48 In that context, the fact that BV should, where appropriate, have had recourse to legal advice in order to assess the consequences that might result from the acts alleged against him in the light of

the conditions for the application of the duplication of proceedings and penalties of a criminal nature laid down in those articles, as interpreted by the national courts, is not, in accordance with the case-law referred to in paragraph 43 above, such as to call into question the clear and precise nature of the national legislation at issue in the main proceedings. That applies a fortiori to BV, since he appears to have committed those acts in the course of his professional activity as an accountant.

49 In the second place, the referring court is unsure about the third requirement referred to in paragraph 36 above, resulting from both Article 52(1) of the Charter and the principle of proportionality of penalties enshrined in Article 49(3) thereof, which requires the competent authorities, in the event of the imposition of a second penalty, to ensure that the severity of all of the penalties imposed does not exceed the seriousness of the offence identified (see, to that effect, judgment of 20 March 2018, *Garlsson Real Estate and Others*, C-537/16, EU:C:2018:193, paragraph 56).

50 In that regard, it must be specified that, according to the case-law referred to in paragraphs 36 and 49 above, that requirement applies, without exception, to all of the penalties imposed cumulatively and, therefore, to both the duplication of penalties of the same kind and the combination of penalties of a different kind, such as financial penalties and custodial sentences. The mere fact that the competent authorities intend to impose penalties of a different kind cannot exempt them from the obligation to ensure that the severity of all of the penalties imposed does not exceed the seriousness of the offence identified, failing which the principle of proportionality would be infringed.

51 In those circumstances, the Court held, in paragraph 60 of the judgment of 20 March 2018, *Garlsson Real Estate and Others* (C-537/16, EU:C:2018:193), that legislation which provides, in respect of the combination of a criminal fine and a financial administrative penalty of a criminal nature, that the recovery of the former is limited to the part exceeding the amount of the latter, without also providing for such a rule in respect of the combination of a financial administrative penalty of a criminal nature and a custodial sentence, does not comply with the requirement of proportionality.

52 In the present case, although, according to the information contained in the request for a preliminary ruling, the referring court has already held, on the basis of proportionality considerations, that the total amount of a penalty imposed in the case of a duplication of penalties must not exceed the highest amount of one of the penalties incurred, that court has specified that that limitation applies only to penalties of the same kind, namely financial penalties. As the Advocate General observed in point 103 of his Opinion, such a limitation is not such as to ensure that the seriousness of the offence is reflected in the severity of all of the penalties imposed where a financial penalty is combined with a custodial sentence.

53 Since the French Government has submitted before the Court that the criminal court is required to comply with the principle of proportionality of penalties which confers on it the power to vary the criminal penalty in the light of the circumstances of the case, it follows from the case-law referred to in paragraphs 36 and 49 above, first, that the competent authorities are under an obligation to ensure that the severity of all of the penalties imposed does not exceed the seriousness of the offence identified and, secondly, that that obligation must be clearly and precisely laid down in the national legislation at issue.

54 It is for the referring court to ascertain whether that is so in the present case, taking into account the fact that it held, also on the basis of proportionality considerations, that the limitation referred to in paragraph 52 above applies only to the duplication of penalties of the same kind.

55 In the light of the foregoing considerations, the answer to the questions referred is that the fundamental right guaranteed by Article 50 of the Charter, read in conjunction with Article 52(1) thereof, must be interpreted as meaning that

– it does not preclude a situation whereby the limitation of the duplication of proceedings and penalties of a criminal nature in the event of fraudulent concealment or omissions from a return relating to VAT provided for by national legislation to the most serious cases is based only on settled case-law interpreting restrictively the legal provisions laying down the conditions for the application of that duplication, provided that it is reasonably foreseeable, at the time when the offence is committed, that that offence is liable to be the subject of a duplication of proceedings and penalties of a criminal nature, but

– it precludes national legislation which does not ensure, in cases of the combination of a financial penalty and a custodial sentence, by means of clear and precise rules, where necessary as interpreted by the national courts, that all of the penalties imposed do not exceed the seriousness of the offence identified.

Costs

56 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

The fundamental right guaranteed by Article 50 of the Charter of Fundamental Rights of the European Union, read in conjunction with Article 52(1) thereof, must be interpreted as meaning that

– **it does not preclude a situation whereby the limitation of the duplication of proceedings and penalties of a criminal nature in the event of fraudulent concealment or omissions from a return relating to value added tax (VAT) provided for by national legislation to the most serious cases is based only on settled case-law interpreting restrictively the legal provisions laying down the conditions for the application of that duplication, provided that it is reasonably foreseeable, at the time when the offence is committed, that that offence is liable to be the subject of a duplication of proceedings and penalties of a criminal nature, but**

– **it precludes national legislation which does not ensure, in cases of the combination of a financial penalty and a custodial sentence, by means of clear and precise rules, where necessary as interpreted by the national courts, that all of the penalties imposed do not exceed the seriousness of the offence identified.**

[Signatures]

