Section 12

Formulating the association between administrative and criminal procedure to counter financial criminality and corruption in the public sector

I. Key guidelines on the association between administrative and criminal procedure

Coordinating administrative and criminal proceedings is one of the most imperative requisites for effectively countering financial crime and corruption in the public sector. Their overlapping involves a number of legal issues referring to the same facts: e.g. investigations, incumbency (or autonomy) of the criminal judge from the progress (or outcome) of administrative proceedings and vice versa. Despite these issues, there is no coherent framework of rules ensuring the vital coordination on the basis of general guidelines.

A rational and equitable system should define the relationship between administrative and criminal proceedings on certain core "organizational principles":

First of all, the application of criminal law (and thus the activation of criminal procedure) should be reserved only for cases where law enforcement actually appears indispensable (ultima ratio). This means that the formulation of special (criminal) provisions should be limited to describing acts that materially violate legal interests (in a system abiding by the ultima ratio principle, such acts are expected to be fewer than administrative infringements), and that criminal procedure has ways of ensuring that sanctions may not be imposed when a "restitution" of the legal interest has occurred, upon conditions described previously[1]. On the contrary, when the intended target is to simply force citizens to comply with requirements of the legal order that regulate their relationship with public administration (e.g. on the cooperation between citizen and authorities) or for acts that do not even endanger legal interests (except at a completely abstract level), then less onerous measures than those proposed by criminal law are preferable. The same should apply in cases of "restitution", even if the disputed conduct violated legal interests.

This assumption has an "internal" and an "external" side. The "internal" refers to criminal law itself and is linked to the proportionality principle.

The "external" side -i.e. the main subject of this section- does not (merely) refer to the balancing of means and objectives, but reflects the debate on the target itself. In this sense, this "external" side refers to the demarcation between measures of criminal repression and less onerous ones, envisaged in other branches of law.

This means that the burden of tackling financial criminality and corruption must fall (and, respectively, priority should be given) to the administrative branch, in terms of both substantive and procedural law. This involves the following modifications:

[1] See unit 8.

- Priority to administrative sanctions and utilization of criminal law only when violations exceed the "formal" rules of compliance.

- Option to abstain from criminal proceedings -and a possible limitation to administrative sanctions- upon "restitution" of the property damage under the conditions proposed in the relevant section.

- Accounting for the imposed administrative penalty during criminal sanctioning, to ensure respect for the ne bis in idem principle.

Such interventions do not necessarily or always imply the *temporal* priority of administrative proceedings over criminal ones. Such a primacy would be desirable, provided that it causes no intolerable delay in the progress of criminal proceedings. What matters, in any case, is to ensure the possibility of the administrative process to become a "levee" against the excessive enforcement of criminal law.

II. On investigations in particular

The administrative investigation resembles an "inquisitional" process, except that it is governed by rules of administrative law. Thus, a constant concern is whether it is better to select administrative or criminal law to reach the ultimate objective, i.e. to tackle financial criminality and corruption while respecting the rule of law.

In Greece, both the implementation of administrative investigations and their coordination with criminal investigations face certain problems rooted in the overregulation of the prior and the fragmented legislative interventions. Therefore, the need is urgent to codify the relevant provisions, accounting for the specificities of individual audit processes (tax/customs inspections, internal investigations, etc.)

A result of the legislative fragmentation is the excessive number of monitoring agencies that assume concurrent or intersecting responsibilities. These overlaps could be classified into three categories:

- "Unintentional" (malfunctions);

- "Partly unintentional" (e.g. gradual expansion of responsibilities, often through de facto assignment of duties);

- "Intentional", either due to suspicions over a certain agency or due to the belief that a concurrent exercise of powers by more agencies strengthens the probabilities to apprehend unlawful conduct.

However, instead of increasing the probability of detecting potentially illegal activities, drawing up intersecting cycles of jurisdiction has led to a perception of "negation" (as one agency expects an intervention by another) or, at best, a waste of time and manpower. Thus, it is clear that administrative investigations should be reformed through the following interventions:

(i) Reducing the Administration's monitoring agencies (after "mapping" their duties), and restructuring their respective fields of operation upon rational criteria for apportioning their authorities (e.g. the nature of the monitored activity and not the amount of gross revenues).

(ii) Effective structuring of internal inspections that are not governed by uniform rules or operational methodology. Establishing an independent inspection and monitoring body operating outside the monitored agencies; this could be single or divided into sections per sector (e.g. by ministry, under the US model) that could cooperate or even carry out peer reviewing.

(iii) Defining the investigating powers of each authority, to clarify which public officials are considered (special) preliminary investigators and what measures they can take against citizens/suspects. Under this proposal, the relevant problems are to some extent addressed through the establishment of a special Prosecutor's Office for Financial Crime and Corruption staffed by officials with special preliminary investigation tasks. As for issues whose preliminary investigation is not subject to the specific Prosecutor's Office, it would be suitable to staff each relevant agency with specially trained persons to conduct preliminary investigations.

(iv) Upgrading citizens' rights during administrative investigations, to resemble what applies in criminal investigations, is an urgent requisite of equitability.

(v) Finally, managing each individual case at two levels is crucial. At the first, a mechanism is necessary to resolve affirmative or negative conflict of responsibilities between administrative monitoring agencies. This apparatus could be established through a supervising authority to ensure the division of powers (preventive) or resolve any conflicts (repressive). At a second level, a parallel mechanism could operate to decide which cases have criminal implications and should be referred to prosecuting authorities. Here, the French system of managing tax evasion cases is particularly interesting. Therefore, it is proposed to establish an Administrative Board for the Identification of Criminal Cases (ABICC) operating within the local IRS offices and composed of tax officials (with at least one being a legal expert) to deal with cases after the completion of tax audits -including the issuing of the relevant tax assessment- before referring them to the Prosecutor. At least during its initial stage of operation, the Board will screen cases from a purely organizational aspect, assessing the criminal (or not) status of each tax violation to avoid referring purely administrative violations to criminal justice. This implies the continuation of the administrative process alone for cases without criminal interest, according to the Board's assessment. It is not yet apt to acknowledge discretion on which cases will be referred to the prosecuting authorities on the basis of feasibility, as this would entail observance of certain requirements, including -predominantly- the existence of a suitable instrument.

III. Operational monitoring and coordination of Administrative auditing bodies

The recent Law 4320/2015 brings new features to the monitoring and supervision of financial criminality and corruption, and particularly to the coordination of Administrative auditing agencies, on the basis of a "centralized" system under direct political control.

The new law establishes the General Secretariat for Combating Corruption as a public agency that will coordinate auditing bodies, monitor their effectiveness, and provide instructions and recommendations. It is also entrusted with the critical task of eliminating conflicts and resolving duplications of responsibilities between departments or agencies active in corruption fighting.

Furthermore, Article 12 of the Law grants significant competencies to the Minister of State, who is authorized for fighting corruption and financial criminality. Namely, the Minister:

i) Constructs coordinated action plans and supervises their implementation by auditing and enforcement agencies and Administrative bodies;

(ii) Exercises operational control over the Financial Police, the Economic Crimes Enforcement Agency (SDOE), the Ministries' Internal Auditing Agencies, the Health and Welfare Services Inspection, coordinates and supervises their activities;

(iii) Especially in cases of corruption fighting, maintains control over the actions of the Special Secretary of SDOE and the Director of the Internal Affairs Office of the Greek Police, all of whom must act solely upon his/her commandments.

These provisions have some positive features; however, specific points generate reservations as to the feasibility of the adopted division of powers:

First of all, it is clear that the existence and concurrent operation of a large number of Administrative auditing bodies causes intolerable delays, duplication of powers, and an inevitable wasting of resources and manpower. The recent Law 4230/2015 attempts to actually respond to the operational control deficit by concentrating powers. This effort seems to meet the needs of the Greek public administration, which normally responds to initiatives of the executive when they directly relate to political (and especially governmental) control.

However, the perception of direct political control being the only -or preferable- route to solve serious social problems (especially when these emanate primarily from the ills of public administration) is not unquestionable. The selected power structure makes addressing the problem a prey to shifting political expediency, if not to personal aspirations. Additionally, the recent law features some challenging issues on the distinction between the executive and the judiciary, as the Minister of State is entrusted with the authority to bind investigative bodies that normally fall under the powers of the Prosecutor according to the GCCP.

It is suggested, therefore, that the central role be granted to an Independent Authority of Public Administration Coordination and Monitoring (ASEDD), which will merge the existing structures of the Inspector General of Public Administration and the Auditors of Public Administration. This single Authority will supervise the administrative auditing bodies, whose numbers should be reduced.[2]

Under this proposal, priority should be given to the consolidation of the perception that tackling financial crime and corruption in the public sector is an established practice and not a political choice driven by ephemeral objectives to cover cash requirements or the "decompression" of public discontent.

IV. On the relationship between administrative and criminal sanctions in particular

Financial criminality and corruption are fields where broad "intersections" of administrative and criminal sanctions occur. Selecting the type of imposable sanction for each case is not necessarily based on a "horizontal" list of criteria uniformly referring to all forms of wrongdoing.

Onerous administrative penalties appearing similar to criminal sanctions exist in Greece today. For example, the imposition of multiple duty fees according to the Customs Code can hardly be understood as a simply coercive or restorative measure (as to the State property), while their extent and consequences significantly exceed those of pecuniary sanctions envisaged in the GPC, even for serious crimes. Similarly, the imposition of an administrative fine that may amount up to three times the benefit incurred by the violation of EU interests is difficult to be perceived as a non-sanctioning tool of combatting such behaviors. These examples demonstrate the failure to turn the range of adverse impacts into a discrimination criterion, as it is not at all uncommon for the intensity of the criminal reprimand to be significantly lesser than the administrative one. This is sometimes exacerbated by the absence of criminal stigma being occasionally compensated by the direct enforceability of administrative sanctions, unlike the warranties of criminal repression (see esp. suspended sentence, suspensive appeal, etc.) Therefore, it becomes clear that punitive consequences threatened in the law often tend to reject their status as "indicators" for diagnosing particular disapproval expressed by criminal law. Hence, the purely "quantitative" criterion of distinction between criminal and administrative sanctions -besides being doctrinally precarious- could not effectively function under the current Greek law.

Consequently, formal criteria remain, such as the "organic", which sets the margin according to the competent body for imposing each penalty. A consequence of this distinction is the process by which each sanction (administrative or criminal) is imposed and the guarantees that apply in favor of the respondent taxpayer or the defendant, respectively. However, the mere adoption of "formal" criteria to define criminal and administrative sanctions appears not only inadequate, but also

[2] For an overview of the proposed structure of its powers see Section XIII, under III.

equitably hazardous. In particular, there is a risk in circumventing the guarantees of Art. 7 of the Constitution for the threatening of any sanctions according to the unrestrained will of the common legislator. Consequently, it is still necessary to find a convincing "substantive" criterion for the herein discussed demarcation.

This necessary delimitation should involve not only the distinction between criminal sanctions (distinctly repressive and punitive in nature) and administrative penalties (repressive, yet not punitive), but also between administrative penalties and non-punitive administrative measures serving a mainly preventive purpose. Accordingly, even if the problem distinguishing between administrative and criminal sanctions was successfully resolved, two essential issues would persist: a) the ("internal") distinction between purely "restorative" and (inter alia) "punitive" administrative sanctions, and b) where criminal sanctions are envisaged for certain offenses, their accumulation with administrative sanctions is questionable as to equitability. Therefore, problems arise at three levels, for each of which the following apply:

- As for the distinction between administrative and criminal sanctions, it would be appropriate to first employ not purely quantitative, but qualitative criteria. In any event, priority should be given to administrative penalties, while the threat of criminal sanctions should only be reserved for significant violations of legal interests (e.g. public property) as illustrated above (without this meaning that the substantial infringement of legal interests alone suffices to criminalize certain conducts). Furthermore, it is important to categorize deviant behaviors depending on how they manifest in connection with the perpetrator's duties; these could include: (i) offenses which trigger property transfer (e.g. fraud), (ii) violations reducing public revenues through the breach of specific duties of compliance (e.g. tax evasion), and (iii) "passive" infractions, referring to the non-fulfillment of personalized (ad hoc) obligations that would generate only contractual claims between private parties (e.g. debts to the State). The burden of establishing the need to repress such behaviors increases as one switches to a lesser category: in the first, the threat of criminal sanctions is always justified; in the second, it has to depend on ancillary criteria (e.g. the amount of appropriated revenue); cases of the third category could be utterly excluded from the threat of criminal sanctions, and only dealt through administrative penalties.

- At a second level, it is important to distinguish between "administrative sanctions" and non-punitive "administrative measures", with a view on taxpayer compliance and not on repression of specific conducts. This distinction is certainly meaningful. As for categories of administrative and criminal sanctions ("administrative measures" excluded) one would have to seriously discuss the need to emulate guarantees for their imposition, even if the relevant process is different in principle. Therefore, the imposition of fines exceeding a certain threshold should only take place on the basis of certain fundamental guarantees of criminal law (including the prohibition of retroactivity, the lex mitior principle, the proportionality principle, etc.)

- Finally, as regards the important issue of double jeopardy due to the imposition of both administrative and criminal sanctions for the same act, a harmonization is required with the ECtHR case law. Truly, the parallel initiation of administrative and criminal proceedings on the same events and the consequent possibility to impose both types of sanctions raises doubts for the respect of the ne bis in idem principle. A convincing distinction between "administrative penalties" and "administrative measures" would address the problems associated with the essentially penal nature of certain administrative sanctions. The French model is particularly appealing in avoiding double jeopardy. It allows for more sanctions to be imposed for the same violation (in the same or different procedures), yet the sum of penalties may not exceed the maximum of each of the threatened (individual) ones. Such a restriction is proposed for Greek law, as it would be readily applicable when imposing similar penalties (e.g. administrative fines against pecuniary sanctions). Possibly extending such a practice to incorporate even dissimilar sanctions would require the adoption of a single "measurement unit" allowing for the usage of a uniform penalty range. Adopting such a measure is incongruous, as it would distort the current sanctioning regime in Greece. Instead, it seems fitting to abate sentences through (specifically predicted) mitigating circumstances for cases where the imposition and execution of the administrative sanction predates the criminal conviction (e.g. verified payment of the administrative fine to acknowledge such a mitigating circumstance in the criminal conviction for the same offense). For the identity of legal grounds, it is appropriate to apply this principle also in the opposite direction: if final criminal sentencing comes first, it should be accounted for in the subsequent imposition of an administrative sanction, leading to its reduction by a legally determined rate. This calculation can apply even if the sentence imposition follows the administrative body's sanction but precedes the trial by the competent administrative court.

V. On the mutual 'binding' effect (or lack thereof) of decisions by criminal and administrative courts, in particular

As to the expediency of a precedent that binds the criminal and/or administrative courts, we need to discriminate between the following two aspects:

Regarding the first part -that starts from the criminal and ends to the administrative trial- the general provision of Art. 5 § 2 of the Code of Administrative Procedure (CAP) applies. It states that when the Administrative Court deals with a certain administrative violation, it is not bound by a previous acquittal by the criminal court, but merely accounts for it in formulating its sovereign judgment. However, it is bound by final convictions of criminal courts as to the perpetrator's guilt. This legislative approach reflects the belief that a criminal acquittal does not necessarily exclude administrative liability, as the latter is possible to affirm with (comparatively) limited requirement; reversely, criminal conviction suggests an overcoming of the major evidentiary exertions of a criminal trial, and therefore somehow entails the a fortiori "establishment" of administrative liability. Besides, the procedure behind administrative assessments (leading to the imposition of administrative sanctions) is independent of the criminal proceedings by direct constitutional decree.

The above assumption, although hard to reverse, calls for an improvement that accounts for the legal basis of the acquittal pronounced by the criminal court. An administrative act whose minor proposal is based on real facts whose absence is verified within the acquitting judgment (or an exculpatory decree by the judicial council) lacks legal basis. This applies particularly in the case of disciplinary bodies, which should be bound by acquitting decisions of criminal courts as to the absence of facts establishing (inter alia) the disciplinary liability. Therefore, a legislative intervention is required to moderate the absolute rule of Art. 5 § 2 CAP, at least for those cases where the defendant is acquitted by a criminal court: a) with expressed certainty and not "by reasonable doubt", and b) based on the absence of an act rather than the mere non-fulfillment of the individual elements of the offense's actus reus or mens rea (absence of an external condition of culpability or lack of intent should not exclude the imposition of administrative sanctions). The equation of the required standard of proof for imposing administrative sanctions to that entailed in criminal procedure should be discussed, so that the acquittal by a criminal court "by reasonable doubt" as to the act itself blocks the imposition of administrative sanctions by the competent bodies.

Furthermore, one must consider the possibility of imposing a criminal sanction while administrative proceedings pend. In this case, the administrative authority should "include" the prior criminal sanction in imposing the corresponding administrative penalty. This could occur by introducing a "measurement" rule applicable when imposing the administrative penalty, similar to the logic of mitigating circumstances in criminal law. This inclusion should occur even when the imposition of a criminal sanction follows the administrative body's sanction but precedes the trial by the competent administrative court.

On the flipside (that initiating on the administrative end and ending on the criminal one), the recent legislative amendments on tax evasion preserved Art. 21 § 3 of Law 2523/1997 in force. This provision establishes the so-called "tax precedent", stating that "the final judgment of the Administrative Court is binding for courts that try the case's criminal aspects as to the amount of net income unreported and its attributable income tax, always according to the latest tax statement properly submitted. Likewise, the same final judgment is binding as to the amount of other taxes payable to either the State or another designated institution, and as to the assessment of the difference in tax accrued by each incorrect statement." This rule affects the offenses in both Art. 17 of Law 2523/1997 and Art. 18 of Law 2523/1997. It is striking that this provision remained unaltered even after the drastic overhaul in the dependence of criminal proceedings from the triggering administrative procedure. In combination, however, with the "disconnection" of the progress of criminal proceedings from the administrative ones and the priority given to criminal court trials (Art. 21 § 2 of Law 2523/1997 – not necessary to await upon the outcome of appeals brought before the administrative courts), it is possible to obtain a conviction for an offense of Law 2523/1997 without having yet declared the existence (or not) of the tax liability. Upon a subsequent judgment of the

administrative court on the absence of such an obligation, it is obvious that the defendant will have faced legal consequences in violation of principles of equitability. Therefore, it would be fitting to explicitly envisage the option to postpone criminal trial (even conditionally) and, in any case, introduce the means to overturn even a final criminal judgment, through an express provision in Article 525 GCCP.

Finally, as already noted[3], it is proper to alleviate the penalty imposed on conviction by a criminal court through the recognition of a mitigating circumstance, if the conviction was preceded by the imposition and execution of an administrative sanction. Hence, a provision is required for this specific mitigating circumstance, envisaging that the latter will only be granted if the taxpayer (and defendant, by criminal standards) verifiably endured the execution of the administrative sanction.

VI. On disciplinary and criminal procedure in particular

Despite the recent consecutive amendments to the Civil Service Code (CSC), the disciplinary process and its coordination with criminal proceedings have failed to effectively tackle corruption in public sector.

On the one hand, inefficiency appears to be an intense problem. The toughening of disciplinary legislation via Law 4093/2012 has not yielded the desired outcomes, due to lengthy court proceedings and the set of defenses provided to civil servants through administrative law. Suspension of duties is a typical example: the employee can return to service by achieving the issuing of a provisional order while the case pends before the Disciplinary Board.

On the other hand, one cannot ignore the equitability problems associated with the imposition of onerous measures (e.g. automatic suspension of duties after the referral to a criminal court), which also owe to the inherent delays in criminal process, and the subsequent prolongation that burdens consistent and reliable employees who become targets of undeserved accusations.

Interventions in this field must restore the balance between effectiveness and the need to respect employee rights. The following improvements can be suggested:

- Measures to accelerate proceedings before both the disciplinary board and criminal courts. As to the latter, it might be appropriate to establish a priority for trials of employees/defendants on temporary suspension of duties, through special hearings.

- The toughening of disciplinary law has resulted in a perplexed view as to the system's effectiveness. Therefore, it is essential to collect and systematically process combined statistical data that record the progress and outcome of each case, the cost or benefit to the State from employee suspensions, and the rate of convictions and acquittals by type of violation and by agency, to easily monitor the accuracy of

[3] Under III.

likelihood expressed through the imposition of onerous (temporary) measures, such as suspensions of duty.

- Restoring the State's capacity to challenge the resolutions of disciplinary bodies by filing complaints and appeals against decisions of the disciplinary boards of the first instance, a competence of the Inspector General prior to Law 4057/2012.

- Civil action within criminal proceedings should be allowed for the State agency sanctioned to challenge administrative decisions; this will allow better coordination of the administrative and penal safeguarding of public service.

- Finally, it is necessary to harmonize the Greek legal order with ECtHR case-law on the binding effect of criminal court acquittals on administrative justice, regardless of Art. 5 § 2 CAP.

VII. On the relationship between administrative procedure and admissibility of criminal prosecution in particular

As discussed earlier[4], the current criminal tax law provisions that link the initiation of criminal proceedings to the filing of a complaint or an application for prosecution to the Prosecutor's Office by the head of the competent tax authority (accompanied by all relevant evidence and supporting documents) are positive, as they strengthen the effectiveness of the criminal judicial mechanism by expressly obliging administrative agencies to *immediately* provide all necessary information and assistance to criminal authorities, and also protect citizens against the risk of premature and arbitrary prosecutions based on inaccurate evidence. Therefore, these provisions should remain in force in the context of an effective legislative policy. In contrast, other current provisions (e.g. Art. 21 § 2 of Law 2523/1997) that assign almost all tax offense variants to different requirements for prosecution according to the nature and gravity of the perpetration and also to the authority that commences the investigation or prosecution, do not only draw a picture of *procedural disorder*, but also lead to the *multiplication of criminal proceedings*, since most offenses falling under the same context must be separated and follow different procedures. Obviously, this situation neither facilitates the already exceedingly congested criminal courts, nor does it promote the economy of criminal proceedings, while remaining open to severe objections as to the safeguarding of the defendants' rights.

Therefore, it would be more apposite to eliminate this casuistry and allow the prosecution of all tax offenses *immediately* after the conclusion of tax audits and the issuing of the relevant tax assessments, when such are required. Mediation by the ABICC[5] before referring the file to the Prosecutor is expected to contribute to the safeguarding of both the taxpayer and the criminal judicial mechanism from dealing

[4] See Unit 2, XII.

[5] See in this unit, II.

with cases lacking a substantial criminal aspect. To correct existing case-law oversights, the obligation of criminal courts to investigate tax issues whenever they are vital for its judgment should be explicitly envisaged, based exclusively on the permissible evidence of criminal procedure. Criminal courts should also retain the ability to suspend criminal trials -and, consequently, the statute of limitations for the relevant offenses- until the finalization of the administrative proceedings. By doing so, criminal justice will be able to utilize and assess the results of the administrative process without being bound by them.

VIII. On the relationship between administrative settlement and criminal procedure in particular

Lastly, the relationship between the effects of various forms of “administrative settlements” in criminal proceedings is noteworthy. Especially as regards tax and customs offenses, the temporal evolution of this relationship creates a need to regulate this field with stable provisions that reflect the particularities of the infringed legal interest, and not in a fragmented manner. Their conceptual proximity to repentance and full compensation led to their inclusion in the section referring to the victim’s restoration.