

# **Non-payment of tax and other liabilities as a crime: fiscal crisis and the limitations of criminal legislation**

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This paper aims critically to present the crime of '*non-payment of debts to the State*' according to the Greek legal system. After a short introduction we shall endeavour to emphasise and argue for the lack of any legitimacy of this behaviour (under its current wording) to incur criminal sanctions (A). Subsequently, we shall note the legal problems of the framework and its judicial application (B). Then, the analysis will encompass the influence of past and recent crises on the introduction and stricter amendments to the legislation (C). The analysis will turn to solutions beyond criminal law (D) and finally will reach some concluding remarks.

## **Introduction – Legal Framework**

The power to design tax procedure law still rests with national States. Apart from an exchange of information, it is not harmonized within the EU. Therefore, tax surcharges, penalties and the respective procedures vary widely between different EU States. The same applies to criminal tax law at least to the extent that no cross-border situations and respective legislation exist and apply (see Article 83 Treaty on the Functioning of the EU).

The legislative and executive power has the right to take administrative or criminal measures in order to punish and/or prevent from certain behaviour. The Greek Parliament decided that the mere fact of delay in paying tax liabilities or other liabilities established by tax or

customs authorities constitutes a crime. As a result Law 1882/1990 was issued (OGG<sup>1</sup> A' 43). Article 25(1) of this statute stipulates that whoever does not pay for more than four months debts towards the State, legal persons of public law, enterprises and organisations of the broad public sector which (debts) are established by the Tax Administration is punished by imprisonment between one and five years if the accumulated sum is 100,000 to 200,000 euro and three to five years if the accumulated sum is above 200,000 euro.

This is the wording of Article 25 as amended and currently in force. It was the first time that the legislator used a measure of such general and holistic nature to fight delay in payments. Nevertheless, it was not the first time that the Greek State used criminal law to fight delay in payments. The first two measures criminalised non-payment between private parties where one party is weaker. Emergency Law 690/1945 (OGG A' 292) criminalised the non-payment by the employer of the employees' accrued income and later Legislative Decree 3424/1955 (OGG A' 282) criminalised the non-payment of farmers' consideration for the sale of their products. The third one (Emergency Law 86/1967, OGG A' 136) by way of imprisonment sentences protects the contributions owed to Social Security Funds. In this case the use of criminal law for the protection of public revenues is obvious but fragmentary. Again, the employee's contribution withheld by the employer is protected, which refers to the idea of the weaker party and also the liability in administering third parties' money. However, regarding the employer's direct obligation to pay contributions for his or her employees, this is a direct pecuniary claim of the social security fund protected by means of criminal law.

From the introduction of Law 1882/1990 until Law 3220/2204 (OGG A' 15) which entered into force in 1-1-2004 Article 25 was more complicated in its wording based on a different categorisation of debts according to the way of payment, the time due, the origin and the amount. This meant six different imprisonment frameworks and that

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<sup>1</sup> *Official Government Gazette.*

each debt could not be added to the debts arising from another legal cause.

Law 3220/2004 introduced a simple system based exclusively on the time due and the amount owed and allowed for every debt and subsequent surcharge on it to be accumulated to reach the criminal threshold. Some aspects of the new framework were more lenient but the measure became clearly more collective.

In the original provision only debts to the Public Service (i.e. strictly tax and similar liabilities to the State) were covered by the wording. According to the model of Law 3220/2004 the delay in payment of debts owed to legal persons of public law, enterprises and organisations of the broad public sector are also covered by the wording which is still in force. The sole common condition throughout the history of the provision is the requirement that each debt be established<sup>2</sup> as public revenue in the records of the Public Economic or Customs Authority. This establishment has always been the starting point for the calculation of the time after the lapse of which the delay becomes a criminal behaviour.

### **Rule of Law Challenges. Disregarding the Notions of Proportionality/Subsidiarity and *Ultima Ratio***

The rationale and wording of Article 25 Law 1882/1990 calls for an argumentation based on the mission and grounds of criminal law. The provision raises the issue (always pressing) of limitations to criminal legislation. The very essence of this crime is *delay*. Is it possible according to modern criminal law to punish by the sentence of imprisonment people who behave differently and have totally different motives<sup>3</sup> and

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<sup>2</sup> This establishment is in fact an official entry in the records of the Tax or Customs Authority. Until the end of 2013 this entry was a common starting point for the commencement of both administrative enforcement and the calculation of time for the requirements of Article 25 law 1882/1990. From 1-1-2014 onwards administrative enforcement measures can be taken immediately after the creation of the liability while criminal prosecution according to Article 25 must wait for the lapse of four months after establishment (book entry) of the revenue.

<sup>3</sup> By different motives I mean that the assimilating wording of Article 25 ad-

sequences of action just because their behaviour ends up in some euro in default? Does this meet the demands of the rule of law as applied in criminal law? The *ultima ratio* and proportionality principles may give an answer.

The relationship between *ultima ratio* and proportionality is a constant in most analyses. However, *ultima ratio* is conceptually and methodologically prior to proportionality. Whereas *ultima ratio* addresses the question whether criminal law should be used at all to address socially harmful conduct, proportionality focuses on the question of the extent to which criminal law should be used once it is assumed that it ought to be resorted to in order to address such conduct.<sup>4</sup> The other opinion is that *ultima ratio* has no normative significance on its own but only in connection with and as part of the proportionality principle.<sup>5</sup>

Judicial control of criminalisation of certain behaviours has been a great challenge for courts. The legitimacy and purpose of State punishment is a very old question. Even the Federal Constitutional Court of Germany (incest case) avoided recognising specific obstacles to the legislator's extensive power to decide on the legal means in which legal goods should be protected. As Rudolf Wendt says: 'In theory the court maintains that the principle of proportionality in criminal matters leads to a stricter examination of the relevant piece of legislation. In his actual practice the Court does not adhere to its own standards'.<sup>6</sup>

In any case and irrespective of the very interesting discussion about

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dresses cases of people who cannot or avoid paying because of tax avoidance, tax evasion (after tax authority investigation), insolvency, poor people, even cases of mistaken calculation of duties.

<sup>4</sup> Bengoetxea, 2013, '*Ultima ratio* and the judicial application of law'. *Oñati Socio-Legal Series* [online], 3 (1), 107-124, 111. Available at SSRN: <http://ssrn.com/abstract=2200875>

<sup>5</sup> Dubber, '*Ultima ratio* as caveat dominus: legal principles, police maxims, and the critical analysis of law' (July 3, 2013), pp. 3-11. Available at SSRN: <http://ssrn.com/abstract=2289479> or <http://dx.doi.org/10.2139/ssrn.2289479>

<sup>6</sup> Wendt, 2013. 'The principle of "*Ultima ratio*" and/or the principle of proportionality. *Oñati Socio-legal Series* [online], 3 (1), 81-94. Available from: <http://ssrn.com/abstract=2200873>

the existence and specific content and results of the principles it is evident that the notion of necessity is raised by these principles, namely the necessity of the means used by the legislature. There is no legitimacy for criminal law to punish any harm of a legal good deserving legal protection, but only the offences of increased social and moral disrepute which cannot be avoided by more moderate means. In this proportionality/subsidiarity/*ultima ratio* context Mylonopoulos brings an example directly connected with our provision. He says: 'therefore e.g. not all harm of property is punished, for example every default on contract obligation, but only some forms of harm: fraud etc'.<sup>7</sup> It is apparent that this example refers to private property but in my opinion the author describes a general norm.

The legislator would seek the right balance between two extreme positions: impunity where blameworthy and harmful conduct goes unpunished and overcriminalisation where any undesired conduct is criminal, or excessive criminal sanctions are stipulated and passed.<sup>8</sup>

In case of a dyadic model where only the victim and the offender exist, these own their dispute<sup>9</sup> and each one of them has to overcome a clear bias. It is highly probable that they will not care about the other party's interests. But in triadic models institutionally organized society becomes the dispute resolver and the norm maker, and the parties of the dyadic conflict lose control over their own dispute to the benefit of the State. This public response of a State owning the penal claim is the field in which the legislator must lay specific rules and principles towards his self-restraint (rule of law). One of them is the notion of *ultimum* which involves an assessment of what the last resort is (the issue of alternative response of the State away from criminal law).

If this cognitive process is to be made by the Greek legislature as regards the anti-social behavior of non-payment of liabilities to the State what should be the alternatives? Let us assume that the means available to the private claimant are not sufficient to protect the property of

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<sup>7</sup> Mylonopoulos, *Criminal Law* (General Part), 2007, p. 16.

<sup>8</sup> Bengoetxea, *op. cit.*, page 13.

<sup>9</sup> *Ibid.*, pp. 13-14, par. 9.

the State.<sup>10</sup> There must be some alternatives in the 'space' between private and civil procedure law measures on the one hand and criminal measures on the other. And indeed it is nothing new that the State can use and actually uses administrative measures to ensure the correct assessment and collection of tax and other 'claims'. In fact this 'space' is quite full of administrative compulsory measures stipulated in many instruments. In case any tax amount is not paid by the applicable deadline (at an earlier stage compared to the establishment of the debt which is a condition of Article 25), the taxpayer is subject to pay interest at a rate of 8.76% per year on the tax, for the period from the day following the due date for the payment.<sup>11</sup> Apart from that the Hellenic Republic uses an administrative enforcement procedure based on the Code on the Collection of Public Revenues (Legislative Decree 356/1974, OGG A' 90) by virtue of which it is able to collect any pecuniary claim and not only taxes and similar public law derived sums. There are so many deviations in favour of the State compared to the 'normal' enforcement procedure available to individuals and private legal persons of private law that public law scholars express their doubts about the constitutional legitimacy of these provisions.<sup>12</sup> A closer look reveals that this extra-protective scheme covers almost the whole spectrum of debts described in Article 25 i.e. debts not only of the State *stricto sensu* but also the public law legal persons and even public enterprises incorporated as private capital companies. In this case the alternative to criminal sanctions is already in force and strict enough to raise criticism about its harshness without the addition of criminal sanctions.<sup>13, 14</sup>

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<sup>10</sup> For reasons for which public revenues call for enhanced protection see Papyriakou, in Kaiafa-Gbandi (ed.), *Economic Crimes and Corruption in the Public Sector*, 2014, Vol. 1, pp. 17-18.

<sup>11</sup> According to ministerial decisions based on Article 53 par. 1 of the Code on Tax Procedure.

<sup>12</sup> See Gerontas & Psaltis, *Interpretation of the Code on the Collection of Public Revenues*, 2016, p. 6 with further references.

<sup>13</sup> In fact even the administrative sanctions are under the scrutiny of ECHR and characterized as criminal if certain criteria are fulfilled. On such limitations, often

Tax authorities refer to the Public Prosecutor and Article 25 is empowered even if no measures of administrative enforcement of the claim have still been used. Besides the Code on Collection of Public Revenues there are numerous provisions protecting the collection procedure. For example the Code on Tax Procedure (Law. 4174/2013, OGG A' 170) includes Article 46:

...in case of non-payment, inaccurate exemption or inaccurate offsetting of VAT or withholding taxes exceeding 150,000 euro, the tax authority is entitled to take preventive or protective emergency measures against the perpetrator, such as the prohibition of receipt or issuance of any document required for the transfer of assets, especially returns, agreements, attestations, and certificates, and the freezing of 50% of deposits, all accounts and the monetary content of PO boxes with credit institutions....

Similarly, and referring to any tax liability the Tax Administration is entitled to take provisory measures to safeguard the collection of taxes even before the respective amounts become due and payable (see Articles 45 and 46 of the above Code). Normally such measures against a person's property are ordered by courts but in the latter case apply also

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referred to as Engel criteria, see Seer & Wilms (eds.), 'Surcharges and penalties in tax law', *IBDF*, 2016, 133-170.

<sup>14</sup> For many years the Greek State had the right to pursue the personal detention of debtors of public revenues as an administrative measure ordered by an administrative court. After a series of decisions of the Supreme Administrative Court, the latter finally decided that this measure contravened to the Constitution (Decision 250/2008, NOMOS Database). Every provision pertaining to personal detention (as an administrative law measure) was repealed (Article 67, Law 3842/2010, OGG A' 58). According to the Code on Civil Procedure personal detention (maximum 1 year) can be ordered by the Court in case of delay on pecuniary claims only arising from torts. The Supreme Court (Civil Jurisdiction) denies such order only in case of default caused by proven lack of resources (based on the International Covenant on Civil and Political Rights, Article 11, See Decision 158/2013, NOMOS Database). Until Law 4335/2015 (OGG A' 87) the same detention could be ordered against merchants for their commercial debts. From 1-1-2016 this potentiality was abolished.

to cases of debts deriving from direct tax assessment i.e. debts not connected with any anti-social behavior apart from delay in payment or even without any delay and without court intervention. Lastly, we must refer to the dependence of many private transactions on a tax clearance certificate which is another administrative measure towards collection.

The previous lines prove beyond any doubt that the State has taken numerous actions to protect its property (pecuniary claims). These procedures reflect the special value attributed to public revenues and the relation they have to the fulfillment of the State's obligation to provide social benefits as a welfare State.

By going further and criminalizing the non-payment of debts owed to it, the Greek State fails to make a fair judgment on the role and limitations of criminal law. To return to the triadic model referred to earlier we can easily assume that the legislature misuses its power as resolver in a case between the debtor and the claimant. The State abuses its dual role as resolver and the interested part/victim. This behavior is linked to the tacit but obvious attempt to use the threat of serious criminal sanctions as tool of collection. This behaviour grossly disregards the *ultima ratio* principle and abuses criminal law.

The legislator underestimates the discrepancy between the dispute arising from two wholly different human behaviours. At least at the level of describing criminal behaviour in abstracto Article 25 fails to make any qualitative and graduated judgments based on additional factual characteristics of the debtor e.g. transfer of property of the debtor to avoid enforcement, fraudulent behavior concerning the ability to pay or the ability to present property during the collection process.<sup>15</sup>

Likewise, the designation of 'non-payment' as a criminal behaviour is inappropriate from an evaluative and logical standpoint. This is a temporally ultimate common fact that has so many different causes (from real inability to abuse of legal personality and use of tax havens) that it is not possible to use it to put under the same umbrella so het-

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<sup>15</sup> See Papakyriakou, *op. cit.*, p. 36.

erogeneous behaviours, most of which are already punishable by provisions against tax-evasion. The legislator avoids both of his two rational choices, i.e. either to classify one behaviour as criminal by adding specific characteristics to the delayed payment in a way that the core criminal aspect would not be the delay but the concomitant characteristics of the behaviour or to describe the different acts delaying or frustrating the collection of any amount (such provisions already exist in the Greek criminal system e.g. Article 397, Criminal Code). By this avoidance the *ultima ratio* (and *Schuldprinzip*, see below) principle is ignored insofar as many of the offenders of Article 25 do not have the money or property to comply with the State claim or even being able to pay do not raise any obstacle to the State's collecting through an administrative procedure. Even one person falling in the latter category is enough to expose the provision in the very grounds of criminal law and policy. Lastly, the legislator is obliged by the proportionality principle and by the whole internal system of criminal law sanctions to achieve an escalation of the description and punishment of any behaviour. This graduated evaluation and punishment of human acts is totally disrespected by Article 25. It is for the legislator to achieve such qualitative assessments and create a system with an internal rationale. For as long time this is not possible (or favourable) for any reason the punishment is legally and morally unfounded.

### **The Instrumental and Collection-oriented Nature of Article 25 and Its Judicial Application**

#### *1. The 'if you pay me I will not punish you' model*

Throughout the history of Article 25 there are in place a series of ways out of the ongoing criminal procedure against the debtor. The legislator motivates the person in default to apply to the Tax Administration for a settlement of his or her debts. The criminal court is obliged to consider whether the application is accepted and the settlement is complied with and if so to stay the proceedings. The extra motive is that if the debtor pays the whole amount the court must terminate the procedure because no criminal interest is existent anymore!

But the trading process goes further. Even if the accused person has been finally recognised as guilty by an imprisonment sentence the application for settlement to the Tax Administration is legally binding if the debtor is regularly paying his instalments. The prosecutor must postpone or interrupt the enforcement of the sentence which is almost automatically eradicated by the full payment of the debt! As a supplement to these provisions we must note that the debtor has the opportunity to pay his or her debt at any stage of the criminal procedure and the court may decide to inflict no punishment. It is hard to recall any other criminal provision so instrumental in the Greek legal system.<sup>16</sup> Law 3842/2010 slightly changed this scheme by giving the discretion to the legislator to provide such instrumental and collection-oriented criminal provisions ad hoc (postpone prosecution etc.) through the occasional administrative programmes of debt settlements. Probably this was an attempt to show a stricter policy against debtors and make them feel unsafe regarding the inclusion of such ways out in the forthcoming administrative settlement programmes. In fact nothing changed.

## 2. Sanctions against legal persons' managers

Greek criminal law does not attribute criminal penalties to legal persons. It is common practice for the legislator in Greece to impose such penalties on managers of legal entities. Paragraphs 2 and 3 of Article 25 provide for such criminal liability of managers in such a broad manner that they deprive former managers of any legal entity of their right effectively to claim their lack of capacity at the critical point in time set out by Article 25 (for their failure to be criminally material).

More specifically, paragraph 3<sup>17</sup> provides for a scheme that can lead to the prosecution and conviction of almost all past managers with de-

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<sup>16</sup> *Ibid.*, p. 299.

<sup>17</sup> '...prosecution is pressed for debts... (already) established at the time of appointment or established during the time in capacity, even if subsequently they lost their capacity... and for debts established irrespectively of the dissolution or not of the legal persons, but were created or attributed to the time they had such capacity'.

cision-making powers, who served from the time when the legal requirements for the creation of the debt were fulfilled until the time of establishment and non-payment.

An former manager can be criminally liable for an amount deriving from tax-evasion behaviours, mistakenly assessed liabilities or even delayed payments that go back to the time he was managing the legal entity even if the assessment or the establishment of the debt takes place in the present, at a time that has no connection with the management of the entity and as a result he is legally unable to order a payment or even challenge the administrative act. The provision also covers managers who are appointed after the establishment of the debt! So the rule is that one is criminally liable for debts of a legal person created, due and payable and established as such at a time when one had no legal nexus with it. The only safeguard in this latter case is that the crime committed within three months of the day of appointment. In essence managers have three months to become confident that no debts to the State, in the broad sense mentioned above, will arise from the previous history of the legal entity they are going to administer. It goes without saying that apart from challenging criminal law principles this type of legislation is creating a pyramid of what economists call perverse incentives and/or hands-off approach as regards the bearing of entrepreneurial risks.

Among the many criticisms against this kind of liability of managers<sup>18</sup> is that the ultimate goal of Article 25 is to make as many people as possible criminally liable to achieve collection. Every evaluation of human acts under the lens of criminal law must overcome the logical obstacle of the real ability to act, otherwise the *impossibilia nulla est obligatio* general principle of law is overlooked<sup>19</sup>. The behaviour described by Article 25 is by definition a failure (the general notion act is divided into action or failure). The basic argument against the stipula-

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<sup>18</sup> See Papakyriakou, *op.cit.*, pp. 293-297.

<sup>19</sup> Similar limitations may be put through the *Shuldprinzip* (claiming that managers could not act differently this preventing their behavior being attributed to their liability-*nulla poena sine culpa*).

tion of paragraph 3 is the objective inability of a former manager to fail to pay and thus to commit the crime of non-payment. He does not have the legal capacity to avoid such failure e.g. by ordering a payment. Such an argument can also be supported by the economic situation of a debtor legal entity. If the entity does not have enough cash or property, how is it possible for the manager to wilfully fail to pay the obligation<sup>20</sup>? Unfortunately courts do not accept such arguments and the result is phenomena of ad hoc cases of objective liability.<sup>21</sup> Judges do not accept such an argumentation for natural persons either.

### 3. Further problems resulting from the judicial application of Article 25

#### JUDICIAL APPLICATION DISREGARDING THE LEGALITY OF THE DEBT AND ITS ESTABLISHMENT

The legality of the establishment of the debt is subject to many challenges from both a formal and a substantive legal view. The Tax Administration system is organised in such a way that, on the one hand, it proceeds quickly and requests the payment of debts and, on the other hand, hinders the right of administrative and judicial protection of the debtors so as to accelerate the inflows of revenues. The recent Code on Tax Procedure in Article 63 further limited the right of judicial protection (both provisional and final) by introducing an administrative petition as a prerequisite to filing a judicial one. In practice it is almost impossible to get a full stay of execution effect of the title by which the Tax Administration is pursuing the collection of the debt. As a result, for a long period of time the establishment title may be based on illegal

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<sup>20</sup> The former managers can always be prosecuted under tax-evasion provisions if it is proven that they participated in such acts during their service. So there is no legal or practical reasoning for the existence of Article 25 in such cases.

<sup>21</sup> Criminal judges are only discussing about such limitations in criminal liability of managers in the context of insolvency affecting the ability of making payments. In fact it is not the real inability because of lack of resources that affects judges' arguments but the legal obligation to abstain from payments from the insolvency property after the declaration of insolvency. For references to judicial decisions and the fact that even these elements of equity are rare in judicial practice see Papakyriakou *op. cit.*, pp. 318-319.

or no grounds but the collection process may continue. Taking into account the fact that a judicial decision on the legality of the title and/or the collection procedure will take years to be issued what should be the correlation between the legality of the above and the application and interpretation of Article 25? One of the conditions of the crime in Article 25 is the establishment of the debt which, as noted above, follows an independent and much faster path than the judgment on legality. In other words, the question is whether criminal courts must be satisfied by a debt established as a formal condition or must be interested in its legality and/or a pertinent judicial decision.<sup>22</sup>

The Supreme Court does not accept any defence claims connected either with the matter of illegality of the administrative law part of the debt or with provisory measures in favour of the debtor order by the administrative court. Only when administrative courts (or civil ones, in case the underlying legal relationship which the debt derives from is of private law<sup>23</sup>) issue a final decision, mostly many years later, annulling the title of the debt or the establishment of the debt, does the Supreme Court rule in favour of the discharge of the debtor. So the Supreme Court says that by its wording Article 25 does not necessitate any such evaluation on the legality of the grounds and procedure of the debt established and, beyond that, it refers to the separation of the administrative, civil and criminal jurisdiction which is an obstacle to any attempt to decide on incidental issues.

Such an interpretation is not mandatory for criminal courts. There is a simple solution leading to an interpretation closer to the idea of sub-

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<sup>22</sup> During the discussions on the bill of law in the Parliament MPs referred to the case of the debtor who makes a petition for the annulment of the debt's title or its establishment. Even MPs who voted for Article 25 believed that there should be no prosecution in case of judicial challenge of the debt. See Minutes of the Parliaments' plenary sessions of 9-2-1990 to 9-3-1990, Vol. 2, pp. 1351-1353.

<sup>23</sup> Public Authorities establish even debts deriving from private law relationships e.g. forfeiture of guarantee constituted by the State in favour of a private party. This initially private law claim elevates to public debt by its establishment and Article 25 may be applicable. On the legitimacy of such a result see Pantelis, *The Dark Field of Criminal Law*, Penal Chronicles, p. 13.

stantive justice.<sup>24</sup> There is no provision in the Greek legal system prohibiting the criminal court to render an incidental judgment on the legality of the debt established and all the stages of its creation. A more moderate solution is the adjournment of the case for more evidence to be gathered. Moreover, if the criminal court does not wish to make such an incidental decision there is the solution of suspending the proceedings until the final decision of the other jurisdictions. These are legal ways out of the risky decision of sentencing a person based on the initial legality of the debt established. The practice of the courts is oversimplistic, enhancing the Tax Administration's appetite to collect but is totally paradoxical in light of the standards of criminal law. The principle of legality which guards the administrative action does not suffice to change the measure of persuasion that a criminal judge must reach in order to say 'guilty'.

But what do criminal courts believe that the core of criminal behaviour is in case of Article 25? The coherent answer according to the judges' trust on the establishment title is that the criminal behaviour is limited to the non-payment behavior (of every debt irrespective of its substantive legality) as is the wording of the provision. But here comes the revelation of the real core and substance of the criminal behaviour which the Supreme Court cannot deny when the accused person is finally discharged of the debt after its annulment. Supreme Court Decision 403/2013 states: '...in case of final annulment of the debt in the framework of the civil procedure this is a reason of rehearing the case... because the debt for which he was sentenced has already been eradicated'. This is the result of an irrational adherence to the literal interpretation of courts. But we must recall that this is only the extremely conservative and mistaken interpretation of the courts. The ultimate reason of the problem is the legislator's disregard for the basic principles of criminal law and his failure to describe the real abusive behaviours that he wanted to punish.

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<sup>24</sup> Papakyriakou, *op. cit.*, pp. 287-290.

JUDICIAL APPLICATION DISREGARDING THE *LEGAL GOOD* (*RECHTSGUT*)  
PRINCIPLE AND THE *NE BIS IN IDEM* PRINCIPLE

It is real life, especially in times of crisis, that reveals the major problems of a legal system. One of these problems is the following very common situation in the current Greek criminal law world. When the Tax Administration or the Prosecutors find out about alleged tax-evasion crimes, they take action so that criminal charges are brought. But the real tax-evasion crimes<sup>25</sup> are in the end about non-payment of direct or indirect taxes and other liabilities. Of course their wording is not the same as in Article 25 because in tax evasion the criminal behaviour is to do with certain failures and undisclosed information. In other words non-payment is inherent in the behavior. Nevertheless, the existence of the different criminal provisions, both Articles 25 and 66 of Law 4174/2013 put the judges again before a serious and indeed difficult problem of evaluation. Is it possible for both criminal provisions (Article 25 and the respective tax evasion according to the tax evaded) to be applied according to the notion of 'genuine joinder of charges' notion or the application of one of them satisfies the criminal 'claim' of the State?

For one more time most judgments choose a very narrow interpretation and sentence the same person twice for the same amount of money non-paid.<sup>26, 27</sup> According to the Greek legal system which is affected by the basic principles of the German one, most evaluations in such a context in which more than one provisions seem likely to apply to a situation are made on the basis of specific evaluative rules. And the content of the judgment is whether we must apply both provisions and multiply the punishment or choose among the provisions the one which punishes the criminal behavior in such a way that no other provisions should apply (constructive or virtual joinder). The criterion is the minimal correlation between the criminal behaviour and the of-

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<sup>25</sup> Article 66, Law 4174/2013 (OGG A' 170).

<sup>26</sup> See Supreme Court Decisions 459/2015 and 130/2016, NOMOS Database.

<sup>27</sup> See Pavlou, 'The criminal delay of payment to the state', *Penal Chronicles*, 5-7 and Papakyriakou, *op. cit.*, pp. 299-301.

fence of the legal good (here the property of the State in the broad sense) compared to the (later or earlier) existence of the more serious and core criminal behaviour. In our context, to my mind, the core behaviour which Article 25 encompasses is the tax-evasion behaviour in the form of actions and failures decreasing or eliminating the State claim. This latter behaviour by definition includes the non-payment behaviour.

The legal good theory which underpins most aspects of German and Greek law is also applied in the genuine or constructive joinder discussion. As an analytical tool it is used to clarify if the coinciding provisions and the respective behaviours harm the same or different legal goods. If they harm the same legal good it is possible that the joinder may not be genuine. Of course if one of the two behaviours stipulated increases the harm against the legal good in a qualitative manner then each harm is of separate importance for the legal order and both provisions must produce their sentencing result.

This is a court-made evaluation system of correlated provisions and thus it is very difficult to apply it coherently. During the last two years there are no signs that the Supreme Court accepts the constructive joinder solution. Thus it does not accept that the harm of the legal good is substantially the same. A critical point is that the time of the perpetration of the crime is different and this is correct. Scholars criticising the Supreme Court propose a more substantial and holistic approach of the harmful behaviour in which the real harm to the legal good is only one and the (mostly) subsequent application of Article 25 is absorbed by the core criminal behaviour. It is true that the judgments that accepted this position in the past<sup>28</sup> did not found their decision in a very persuasive or at least analytical manner. The real difficulty is that a dual evaluation takes place. The court must at each time decide on the identical nature or not of the harm but at the same time the analytical tools (legal good theory, genuine and constructive joinder and absorption) are also under evaluation because they are not hard and fast rules but tools shaped in judicial practice.

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<sup>28</sup> See Supreme Court Decision 446/2014, NOMOS Database.

The constructive joinder solution is undeniable if we refer to the *ne bis in idem* principle which is not a creation of national legal order but a principle shaped by ECHR and applicable across the European continent.<sup>29</sup> We shall not refer in detail to the principle for it goes beyond our analysis and the jurists are very familiar with it. Suffice to say that the criteria of ECHR are functional and far more solid than the grounds of the above evaluative tools of the Greek criminal system. It is obvious that in light of this body of ECHR cases such a hermeneutic approach can help in the direction of protection of the debtors from double sanctioning which is in any case morally unacceptable.

### **The Influential Crisis Factor**

#### *1. The two crises*

The history of Law 1882/1990 is connected with a major crisis in the political and economic life of Greece in the late '80s. A series of scandals reaching the highest political and economic level led to a broad coalition government who served for a few months in 1989-1990. It was in the late days of this government that the bill ('measures against tax-evasion in direct and indirect taxation', including Article 25) was passed (8 March 1990).<sup>30</sup>

The Greek State traditionally faced difficulties in collecting sufficient revenues. It is easy to suppose that this type of permanent failure was the ratio of Article 25 but the Finance Minister who brought the bill claimed (in his introductory report) that the real reason was the great number of debtors who repeatedly avoided owning property in their own name on which the State could enforce and also that commercial companies lacked movable or immovable property or the existent one was under encumbrance and as a result the State could not collect even indirectly. It is more interesting that the reasoning states that the provisions do not address all debtors generally as criminals but only the debtors who repeatedly fail to pay their liabilities. As a

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<sup>29</sup> Pavlou, *op. cit.*, pp. 7-8, Seer & Wilms (eds.), 'Surcharges and penalties in tax law, *IBDF*, 2016, pp. 21-22.

<sup>30</sup> *Supra* note 22.

commentator says, “unfortunately this rational reasoning is not included in the wording of Article 25”.<sup>31</sup>

The real reason may have been a combination of the aforementioned scandals and the subsequent feeling of decay in the political sphere and the unique opportunity of a coalition government to produce an important law regarding the serious and permanent problem of tax evasion (in principle irrelevant to the mere non-payment behaviour). But the reasoning report reveals the instrumental nature of the measure. It is true that failure to trace enough property and enforcement constitute a major problem for the State as well as for private parties. Article 25 was proposed in order to request that pressure be exerted on debtors to reveal the property that may hide or hold through third parties or otherwise present cash and pay to avoid criminal sanctions.<sup>32</sup>

So this short historical analysis designates the instrumental and thoughtless use of the criminal law weapon. In fact the provision does not include in its wording the real harm that seeks to punish. This façade is not enough to cover the unacceptable breadth of the provision and the problems it causes.

In fact the perennial problem in Greek fiscal policy was tax-evasion and not default rates.<sup>33</sup> In the twenty years that followed the problem of tax-evasion rates remained in the limelight both in media and politics. Article 25 was applied but was not central to the anti-tax-evasion fight. In fact I do not believe that Article 25 is a genuine economic crime<sup>34</sup>. The major indicator towards this result is that the thresholds of debts were always relatively low. Article 25 does not punish tax evasion at least primarily. Instead it leads to inadmissible doubling of the sanctioning without any special evaluation on the real existence of any

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<sup>31</sup> Papakyriakoy, *op. cit.*, p. 311.

<sup>32</sup> According to the minutes of the discussion on the bill (see p. 1352) we learn that indeed some MPs voted halfheartedly for Article 25 believing that it was necessary to help in debt collection!

<sup>33</sup> Four billion (current market prices) according to the minutes on the bill.

<sup>34</sup> Most writers include Article 25 in economic crimes. See e.g. Courakis, *Economic Crimes*, 2007, Vol. II.

further harm. Evasive behavior is already punished by other provisions and the mere default in payments is not a criminally interesting behaviour.

But this provision became pivotal at the dawn of the Greek fiscal crisis in 2010. Twenty years after the first crisis (a complex of corruption in the political and economic arena) it was the first time that the provision found a real 'user'. The 2011 Government amended the provision (due and payable debts to the State were already above 20 billion) in a way that made the initial legal problems of the provision minimal compared to the amendments. I shall not proceed to any detailed analysis because the amendments introduced by Law 3943/2011 (OGG A' 66) are fortunately not in force anymore since Law 4321/2015 (OGG A' 32) but I would like to make a quick reference so as to highlight the endangering of the rule of law principle during a severe fiscal crisis.

The first change in the provision concerned the minimum threshold of debt which was lowered from 10.000 (set by Law 3220/2004) to 5,000 euro. In conjunction with the outburst of the crisis, the cuts to the employees' income and the increasing of tax rates and other charges, this provision came out of anonymity and scarce application and touched a great part of the population in Greece.

The second and most extreme amendment was the inclusion of a provision according to which 'the time of perpetration of the crime is the period of time from the lapse of the four months (period after the debt establishment after which the crime is committed) until the passing of the 1/3 of the limitation period stipulated at each time'.

This expression transformed the crime from an instant one (committed only once at the time of the failure to make the payment) to a continuous one. This intended to bear the procedural consequence that the perpetrator of a continuous crime could be arrested at any time as if he were arrested after hot pursuit because the criminal behaviour is artificially characterised by continuity. It is obvious that the legislator made this addition for the prosecutors and the police to have the right to arrest the debtors (as if it were possible to commit the crime of non-

payment every second i.e. by not paying every second). This contradicts any rational thinking. The time of perpetration according to Greek Penal Code is decided either by the time of behaviour or in some cases from the time of the result deriving from such behaviour. It is not possible to argue that the result of non-paying is subsequent non-paying so the starting point of the limitation period cannot be changed and the crime cannot be continuous. Even if we suppose that this is logically acceptable, an arrest based on the notion that the debtor is continuously committing such a crime is against Article 6 of the Greek Constitution which obviously implies a genuine and not artificial in flagrante crime and a perpetrator caught in actual hot pursuit. Also, such an artificially continuous crime does not correspond to any actual behavior and as a result the *nullum crimen nulla poena sine lege* (Article 7, Greek Constitution) principle is violated.

Apart from the serious offence against the pillars of our legal system the result was the humiliation of many debtors irrespective of the legality of the debt or the real cause of their default. People were arrested and brought handcuffed in front of the prosecutors. Of course the media presented the phenomenon as catharsis and legal values were disregarded. The years that followed proved that the extremely fast rise in debts to the State was a result of the crisis and the measures against it and not the opposite.<sup>35</sup>

The conclusion is that the legislator is not allowed to use the threat of criminal punishment in a symbolic manner.<sup>36</sup> The artificially continuous crime which Law 3943/2011 created did not exist in reality as such. No harm to the legal good was taking place repeatedly but politics made use of such means in order to manage the crisis as a communication game.

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<sup>35</sup> The amount of debts to the State rose from 20 to 70 billion in the period during which Law 3943/2011 was in force!

<sup>36</sup> For the concept of symbolic criminal law see Lauterwein, 'The limits of criminal law: a comparative analysis of approaches to legal theorizing', 2016, p. 14.

*Shift to rationality and 'relevant' justice. Finally, an economic crime?*

In a more society-friendly approach the legislator set the threshold of the criminal behaviour first to 50,000 and 150,000 euro (Law 4321/2015) and then with the Law 4337/2015 (OGG A' 129) currently in force to 100,000 and 200,000 euro respectively. This amendment protected a great part of the population from prosecution in the future and relieved all the people who were affected by previous legislation as the new framework is more lenient than the previous one and thus applicable retrospectively. Also, special provisions terminated the enforcement and prosecution at any stage for debts below 100,000. The elimination of artificial continuity of the crime was another step towards legal rationality.

The latter amendments raised the thresholds in such a way that the crime seems now to pertain to *economic crime* at least because of the relatively high amounts. Nevertheless, none of the pre-2011 problems of the provision were addressed. It is apparent that the legislator in the modern use of the provision targets legal entities which are among presumable debtors because of their economic activity which produces liabilities to the State. It is highly possible that such groups will try to avoid bearing or even paying debts to the State in a market with high tax rates and other levies and with low liquidity and revenues. So the question is: can these groups commit economic crimes? The answer is obviously yes. And many economic crimes are stipulated to control their behaviours.<sup>37</sup> Is Article 25 an economic crime as the raise in the thresholds may suggest? My answer is no. Of course some of the defining factors of economic crime<sup>38</sup> are present in the whole discussion. The disruption of the normal function of the economy because of the owing of a great amount of money to the State which has a central role in the whole economic structure is present. But most businesses do not make plans of deliberately owing to the State. They use more sophisticated ways to avoid or evade taxes and other duties and become debtors

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<sup>37</sup> See Courakis, *op.cit.*

<sup>38</sup> For an excellent analysis of such factors in general see Courakis, *op.cit.*, Vol. I, pp. 37-57.

only after State intervention.

After the legislator's choice to structure the provision closer to the economic crime quantitative standards the target is no longer to exert pressure on every citizen to pay his or her debts but the businessmen and medium-and large-sized players of the economy. But Article 25 is not a rule worded in such a manner as to be addressed to such players. It is not a rule related to unfair competition, tax evasion, or other aspects of economic crime. On the contrary it refers to the possible result (debt) of successful investigations against entities and wealthy people. This result is nothing to do with criminal behaviour for two reasons. If the amount derives from the revelation of illegality in some cases criminal justice must not have any further interest in punishing the debtor again because of the *ne bis in idem* principle and other similar reasons analysed previously. In case of the different scenario whereby the debt is not correlated at all with previous criminal and generally illegal behaviour the use of criminal law is unacceptable for the many proportionality/*ultima ratio* etc. reasons.

For reasons of sequence of facts in real life (tax evasion causing subsequent debts) and reasons of principle the choice of non-payment descriptive wording is not the appropriate one to describe a crime, whether economic or not. On the one hand, the economic part of the underlying behaviour is already taken up by other criminalized behaviours not leaving space for more condemnation on the same events of life. On the other hand, the so-called simple *deviance* or *order infringements* which are closer to the citizen's attempts to non-payment of smaller amounts make the punishment unjustifiable.

### **Solutions Beyond Criminal Law and Policy**

The latest amendments of Article 25 are undeniably a step forward. Nevertheless, the modern history of the provision and the confusion in which societies and political systems find themselves during crises make the current form of the provision uncertain. Until its repealing the legal and value-oriented problems it bears will not be resolved.

The criminal nature attached to the non-payment of debts must not

be simply abolished. It must be replaced by a new relationship between State and citizens. In an environment that the only given is the continuation of the crisis and the fiscal adversities (among other factors debts to the State are already over 90 billion-September 2016) we have to explain to the State that criminalising is not the rational way to collect money.

But how can we explain this, taking into consideration the fact that criminal law principles have proved to be insufficient tools to control the legislator either by self-control or by judicial control?<sup>39, 40</sup>

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<sup>39</sup> The courts in Greece avoided testing Article 25 by *ultima ratio*/proportionality standards. In Greece there is no Constitutional Court but each judge can control the conformity of a measure to the Constitution. The German Federal Court's approach (incest and abortion cases) indicates that courts in such marginal situations face a judicial activism problem. If they go one step ahead and make use of hermeneutic tools and principles that can be logically derived from the Constitution they may be criticised for excess of powers. Public law specialists and Courts are very familiar with such a discussion and in criminal law the activism needed may be far more difficult to support.

This respect for the decisions of the legislator and his margin of decision creates a psychological wall which has proven impenetrable so far. Maybe it is because of this psychological difficulty that not even defense lawyers put forward such arguments. This divergence between the theoretical founding and teaching of the *ultima ratio* principle in the criminal law world and the judicial practice unveils the real practical effect of such principles.

The whole confusion around the founding of the *ultima ratio* principle and its specific practical effect on the general context of the question of whether and how the criminal legislator can be controlled is another reason for which these principles prove insufficient to protect debtors from criminal sanctions. If we face the *ultima ratio* principle from the constitutional standpoint of proportionality it is quite easy to assume that it is part of this greater principle. Even if the principle has been created in the area of criminal law the reference to constitutional law and fundamental rights can add increased normative justification and analytical precision (see Tuori, 2013. *Ultima ratio* as a constitutional principle. *Oñati Socio-legal Series* [online], 3(1), 6-20. Available from: <http://ssrn.com/abstract=2200869>, p. 11). Nonetheless, the principle seems to wield constitutional power. The famous decision of the Federal German Constitutional Court on abortion was clear: 'The penal norm represents, to a certain extent, the 'ultimate reason' in the armory of the legislature'. But as we saw earlier it has never been possible to define the exact effective-

This explanation process may start from the comparative datum that in most European countries tax law is under decriminalization not only concerning minor offences but also as regards more important offences. This decriminalisation does not only refer to the transformation of a punishment by restriction of personal freedom to administrative penalties but also to decreasing the administrative penalties (e.g. penalties not calculated on the tax owed but a fixed sum). It is interesting that the comparative analysis refers to the non-payment of tax liabilities as formal or less serious infringement.<sup>41</sup> In Italy for example a general rule exists under which 'formal violations' are completely decriminalised. This occurs when the taxpayer's infringement does not compromise the control activities of the tax authorities and does not af-

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ness of the principle and take the step forward actually to limit the legislator.

Maybe this is why Roxin, one of the major advocates of the principle worldwide was criticised (Dubber, *op. cit.*, p. 9) for his conclusion on the normative power of the *ultima ratio* principle ('more a guideline of criminal policy than a mandatory requirement'). Perhaps this conclusion after so many persuasive attempts and analyses by Roxin and many others is another indication of the difficulty of such an argumentation line actually to limit the very old power of the State to use the threat of criminal sentencing to achieve the so-called general good and preventive function needed to maintain social order.

It is my opinion that Article 25 is a very apt example of an excessive measure which can produce a groundbreaking jurisprudence based on *ultima ratio* control. And it is so because it does not raise such controversial ethics questions as the abortion and incest decisions of the German Court. We must finally note that the two main factors against such an outcome are the fiscal crisis making the judges even more conservative in favour of State revenues and the absence of a Constitutional Court in Greece.

<sup>40</sup> The whole discussion is affected by the EU Law. See e.g. Communication of the Commission (COM, 20.9.2011, 573), p. 7: "The EU legislator should follow two steps when taking the decision on criminal law measures...Step 1 The decision on whether to adopt criminal law measures at all, Necessity and proportionality – Criminal law as a means of last resort ('ultima ratio'). ...criminal law must always remain a measure of last resort. This is reflected in the general principle of proportionality...)"

<sup>41</sup> See Seer & Wilms (eds.), *op.cit.*, pp. 11 and 112.

fect the tax basis nor the determination of the tax due.<sup>42</sup>

Comparative analysis also highlights another deficiency of the Greek tax system which is against decriminalization. This deficiency ends up rendering Article 25 even harsher. Most tax systems in Europe have cooperative characteristics between the State and taxpayers even during the investigation process. The Greek system totally lacks advance general rulings (whereby taxpayers would not be accused of any infringement because the tax administration's opinion would be known in advance). The secrecy of tax administration practice is well connected with the creation of mistakenly created debts. Unfortunately, one can only nostalgically reminisce at the waiver of criminal liability in cases of administrative settlement with the tax authority for the corresponding administrative tax penalties which was applicable under the previous regime and motivated taxpayers to settle cases.<sup>43</sup> The current regime does not offer this way out.

Special reference should be made to the U.S. tax criminal law system. The United States seem to have the most extensive enumeration of tax crimes in their tax code (more than 50) and apply criminal penalties not only to wilful tax evasion, but also to willful failure to pay tax etc.<sup>44,45</sup> No special criticism is attracted by this provision in the U.S. as

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<sup>42</sup> The categorisation implied by this example between acts against the existence of the debt and acts against the payment of the debt (see also Papakyriakou, *op.cit.*, p. 33) is crucial both for the internal gradation of sanctions of each category and the evaluation of mere non-payment without supplementing vicious behaviour as non-criminal. The criminal courts and especially the legislator have so far failed to make this important judgment and Article 25 is still connected with tax evasion even if it concerns only tax default/delay.

<sup>43</sup> Fortsakis, Pantazopoulos in Seer & Wilms (eds.), *op.cit.*, p. 405.

<sup>44</sup> See Seer & Wilms (eds.), *op.cit.*, pp. 747-748.

<sup>45</sup> USC, Section 7203: "Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, ... at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$25,000 (\$100,000 in the case of a corporation), or imprisoned not more than 1 year, or both,

criminalisation is quite an undeniable right of the State in this country. I do not believe that the U.S. part of the comparative analysis can particularly support the existence of Article 25. The U.S. paradigm of criminalisation is lacking any legitimacy argumentation due to legal tradition in the U.S. so the European one is far more sophisticated though imperfect<sup>46</sup>.

Of course, one could claim that comparative analysis is not enough to persuade the State. Every State has its own pressing problems accompanied by different traditions in law and administration. In that case we should return to the core objective of the tax system and its real problem. The tax system is founded on the objective of generating tax revenue in full and on time. As a result the State must be interested in the compensation of the damage incurred to public property by non-payment. The damage consists of the uncollected tax amount, the inflation difference due to late collection and the additional public cost arising for the provision of public service (due to the unpaid amount of money the State must then borrow on increased rates and/or make privatisations etc. which bear extra costs). The market interest rate can be very helpful in calculating the damage and the Code on the Collection of Public Revenues (see above) can be used in conjunction with current or additional measures on tax or other forms of legislation in order to compensate for the damage caused to the State.

We should also bear in mind the cost of criminal prosecution which is resource-intensive and not always effective because of procedural mistakes or even due to the running of the periods of prescription. On the contrary these resources should be transferred to the creation of a more sophisticated and proactive supervisory and assessment system targeting the avoidance of debt creation followed by an effective collection system in case of default. It goes beyond the aim of this paper and is highly technical but it is common sense that the means of electronic technology can be used effectively to protect public revenues. The pre-

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together with the costs of prosecution”.

<sup>46</sup> Cf. Dubber, *op. cit.*, pp. 2-3.

ventive nature of the system must prevail.<sup>47</sup>

### Conclusion

The more control techniques offered by modern technology over citizens' and businesses' property and income improve (and become cheaper) the more the legitimacy of criminalisation of mere delay in payment of liabilities vanishes. In combination with the aforementioned discussion on *ultima ratio* and the realistic objective of collection of taxes and other liabilities it is obvious that the evolution of human achievements should not leave the old questions surrounding the limits of criminal law and the concepts of ultimatum and alternatives unaffected.

Apart from the modern enhanced abilities of the State to involve and identify tax evasion and/or collect debts effectively we must emphasise the inappropriateness of criminal law to shape the timely payment culture and tax consciousness of citizens. The social culture on payment of public levies must be shaped through modern approaches of administrative law which view the citizen as the centre of interest of public action and no longer as a mere addressee of public obligations.<sup>48</sup> The modern view of the State as a provider of services can establish the obligation for the State to evolve and improve the level of its services by making use of every smart effective means of fair imposition and timely collection of public revenues away from anachronistic and ineffective criminal sanctions. Shaping the tax consciousness of citizens with co-operative means must also be included in this evolution.

After all, equity, proportionality, modern administrative law and in the end rationality not only should lead to the total repealing of Article 25 and similar provisions but also demand the shaping of a new cul-

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<sup>47</sup> One obvious deficiency of the Greek system is the extremely low percentage of payments carried out through electronic systems, a deficiency against the proactive character of the system.

<sup>48</sup> For such modern approaches to European administrative law see Efstratiou, *Systematic Foundations of European Administrative Law*, 2016, pp. 124-126.

tural and educational approach towards public levies and a collection system of increased effectiveness and minimum criminalisation. The mere non-payment of tax and other liabilities (especially in light of all the other invasive means available to the State) should no longer be a crime on its own even in times of fiscal crisis.