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"Ne bis in idem" Principle, Double Jeopardy Guarantee and Their Application in the Fields of Punishment and Sanctioning: Differences, Merits and Demerits[1]

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Abstract: *The authors of the presented paper analyse the case law of the European Court of Human Rights in the field of the "ne bis in idem" guarantee. They focus in particular on the approach of this court to the issue of liability for crimes and payment offenses. The paper concentrates on the legal interpretation that is the Council of Europe enforcing in the field of criminal liability, concept of crime, sanctioning and punishment. The payment offenses create a relatively independent group of delicts in the field of public law. However, the guarantees connected with the right to a fair trial included in the Articles No. 6 and No. 7 of the Convention on Protection of Human Rights and Fundamental Freedoms and in the Article No. 4 of the Additional Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms shall still apply. The paper analyses the scope of their application, especially the "ne bis in idem" guarantee, in the field of liability for the tax offences and tax crimes.*

Key Words: *Council of Europe; European Court of Human Rights; Convention for the Protection of Human Rights and Fundamental Freedoms; Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms; "Ne bis in idem" Principle; Complainant; Guarantee; Administrative (Tax) Proceedings; Criminal Proceedings.*

Approach of the Council of Europe

To enforce the protection of the rights of individuals, the European Court of Human Rights interprets the terms of "crime", "criminal charge", "criminal proceedings" in an autonomous way. This fact means that the

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Strasbourg interpretation does not follow the national meanings of the mentioned institutes; or, better to say, the meanings of the legal terms imposed by the Member States are not so relevant mainly because of the factual consequences that the application of the mentioned institutes is able to interfere with the individual rights in the field of legal practice. The legal doctrine of autonomous interpretation dates back to the decision of *Engel and Others v. the Netherlands*.[2]

Two of the applicants, conscripts in the Netherlands Army and editors of a journal aimed at conscripts, had published an article which alleged unlawful behaviour on the part of several military commanders suggesting that they used intimidation techniques to suppress dissent and that conscripts had been unfairly punished. The commanding officer of the barracks in which the journal was printed deemed that the article as well as other articles in the same publication that discussed a demonstration of the Conscripts' Union against the Government tended to undermine military discipline. Following a hearing, the applicants were committed to several months' service in a disciplinary unit. The punishment represented an interference with the applicants' exercise of their *right to freedom of expression*. The interference was *"prescribed by law"*. At issue was whether the punishment was also *"necessary in a democratic society"* and pursued the legitimate aim of *"prevention of disorder"*. Furthermore, the applicants complained that their punishment had been discriminatory in nature; other conscripts who had been involved in similar writings had received only mild punishment, while a civilian in their situation would not have been punished at all. The European Court of Human Rights held an opinion that the concept of *"public order"* covered a range of situations. Therefore, it came to an opinion that the concept of *"order"* refers not only to public order, but it also covers order that must prevail within armed forces. Disorder in such groups can have repercussions on order in society as a whole. It followed that the interference represented in the disciplinary punishment met the condition of legitimate aim to the extent that its purpose was the prevention of disorder within the armed forces. While the guarantee of freedom of expression applies

[2] See TRÖNDLE, H. and Th. FISCHER. *Strafgesetzbuch und Nebengesetze*. 49. neu bearb. Aufl. München: C. H. Beck, 1999. 2052 p. ISBN 3-406-44495-4; SOLNAŘ, V., J. FENYK and D. CÍSAŘOVÁ. *Základy trestní odpovědnosti*. 1. vyd. Praha: Orac, 2003. 455 p. ISBN 80-86199-74-6; and PRÁŠKOVÁ, H. Postavení obviněného v řízení o správních deliktech (vybrané problémy). In: M. VRABKO, ed. et al. *Aktuálne otázky správneho konania*. 1. vyd. Bratislava: Univerzita Komenského v Bratislave, Právnická fakulta, 2010, pp. 108-115. ISBN 978-80-7160-304-7.

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to conscripts just as it does to others, the European Court of Human Rights considered that the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline, for example by writings. The European Court of Human Rights noted that the applicants contributed at a time when the atmosphere in the barracks was already somewhat strained to the publication and distribution of a writing that was inflammatory in nature. In these circumstances the Supreme Military Court was justified in holding that the applicants had attempted to undermine military discipline and that the imposition of a penalty was necessary. Therefore, the applicants had not been deprived of their right to freedom of expression; they had merely been punished for the abusive exercise of that right. As for the applicants' being singled out for harsher punishment than other conscript writers, the European Court of Human Rights considered that, in principle, discriminatory treatment could be found if the punishment were to depart from others to the point of constituting a denial of justice or a manifest abuse. However, the information available to the European Court of Human Rights in this case did not permit a finding of this sort.[3]

In this case,[4] the European Court of Human Rights constituted criteria for considering the criminal deeds. What does it mean to consider a criminal deed? It means to consider elements of an unlawful behaviour prescribed by national law. In this matter, the legal qualification of the relevant breach of law, the nature of the breach of law as well as the nature and the level of intensity of the breach of law are important. The European Court of Human Rights also considers the nature of the sanction or punishment prescribed by national law of the Member State of the Council of Europe. It means that it analyses the aim and the objective of measures representing the sanctioning system in the Member States. The legal qualification of the punishment within the national law is also relevant.[5] This decision creates an integral part of approximately 50 years

[3] See Engel and Others v. the Netherlands [1976-11-23]. In: *Article 19* [online]. 2017 [cit. 2017-08-14]. Available at: https://www.article19.org/resources.php/resource/2331/en/engel-and-others-v.-the-netherlands.

[4] See *Case of Engel and Others v. the Netherlands* [1976-06-08]. Judgement of the European Court of Human Rights, 1976, Application No. 5100/71, 5101/71, 5102/71, 5354/72, and 5370/72.

[5] See SVÁK, J. *Ochrana ľudských práv: (z pohľadu judikatúry a doktríny štrasburských orgánov ochrany práv)*. 2. rozšír. vyd. Žilina: Poradca podnikateľa, 2006, p. 429. ISBN 80-88931-51-7; and KMEC, J., D. KOSAŘ, J. KRATOCHVÍL and M. BOBEK. *Evropská úmluva*

long case law connected with the concept of criminal charge.[6] The object of the judicial as well as doctrinal disputes in this case was the fact whether it is possible to apply the guarantees of the Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the "Convention") also in cases relating to proceedings labelled in national law as disciplinary proceedings. Under the provision of the Article 6 of the Convention, *"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly, but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.* […] *2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.* […] *3. Everyone charged with a criminal offence has the following minimum rights:* […] *(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;* […] *(b) to have adequate time and facilities for the preparation of his defence;* […] *(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;* […] *(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;* […] *(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."*

From the above-mentioned decision of the European Court of Human Rights, it can be inferred that the concept of *"criminal charge"* can be in-

o lidských právech: Komentář. 1. vyd. Praha: C. H. Beck, 2012. 1660 p. ISBN 978-80-7400-365-3.

[6] See, for example, *Case of Delcourt v. Belgium* [1970-01-17]. Judgement of the European Court of Human Rights, 1970, Application No. 2689/65; *Case of Adolf v. Austria* [1982-03-26]. Judgement of the European Court of Human Rights, 1982, Application No. 8269/78; *Case of Stocké v. Germany* [1991-03-19]. Judgement of the European Court of Human Rights, 1991, Application No. 11755/85; *Case of Tejedor García v. Spain* [1997-12-16]. Judgement of the European Court of Human Rights, 1997, Application No. 25420/94; and *Case of Oleksandr Volkov v. Ukraine* [2013-01-09]. Judgement of the European Court of Human Rights, 2013, Application No. 21722/11.

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terpreted autonomously only in the case in which the national legislation labels the charge as criminal. As the European Court of Human Rights states, the Convention essentially allows the Member States to declare every behaviour as criminal behaviour except the cases in which the human rights and fundamental freedoms protected by the Convention are exercised. However, the opposite option is subject to stricter rules. If the Member States could, at their own discretion, classify certain actions as disciplinary offenses and not criminal offenses or in the case of their concurrence pursuit the disciplinary action prior to prosecution, the scope of application of the Convention would depend on their sovereign will, which could lead to results incompatible with the aim and object of the Convention.[7]

In simple terms, the essence of the doctrine of autonomy lies in the fact that the interpretation of the concepts contained in the Convention in a particular case is the competence of the European Court of Human Rights which examines in particular whether the law and application practice of public authorities in the State – party to the Convention corresponds to the requirements of the qualitative application of the guarantees provided by the Convention to the individual.

Concerning the notion of *"criminal charge"* as the subject of the right to a fair trial, the European Court of Human Rights has achieved its extensive perception by its decision-making process. This conclusion is confirmed also by the Constitutional Court of the Slovak Republic.[8] The established practice includes under the concept of "criminal charge" the areas of road traffic, tax issues, business and economy areas, penitentiary affairs, financial, military and procedural issues as well as the public order. Through the extensive interpretations of the concept of "criminal charge", the European Court of Human Rights has included into this area also the concepts of administrative offenses and other administrative offenses, disciplinary offenses and disciplinary sanctions. The interpretation of the concept of "criminal charge" by the European Court of Human

[7] See KMEC, J. Článek 6 Úmluvy o ochraně lidských práv a základních svobod a trestní právo daňové. In: L. VORLÍČKOVÁ, ed. *Trestní právo daňové*. 1. vyd. Praha: C. H. Beck, 2008, pp. 19-21. ISBN 978-80-7400-093-5; and PIROŠÍKOVÁ, M. K aktuálnej judikatúre Európskeho súdu pre ľudské práva týkajúcej sa aplikovateľnosti článku 6 Dohovoru. *Bulletin slovenskej advokácie*. 2012, roč. 18, č. 7-8, pp. 8-16. ISSN 1335-1079.

[8] See *Finding of the Constitutional Court of the Slovak Republic Ref. No. PL ÚS 12/97* [1998-10-15], published in the Collection of Laws of the Slovak Republic, Section 122, under No. 319/1998.

Rights is autonomous and independent of the national legislation and national case law.[9]

The use of the "Engel Criteria" on a delict of a criminal nature may lead to fragmentation of the law. Not all the offenses may have to meet these criteria. For example, these criteria can only apply to a defined group of people. The sanction prescribed by law does not have to correspond to the concept created by the European Court of Human Rights. Therefore, Pavel Molek tends to apply the elements of the criminal charge to the law in general, provided that they also define a single offense or administrative offense that meets those claims.[10] On the other hand, according to the opinion of Olga Pouperová, it is not possible to apply the guarantees under the Article 6 Section 1 of the Convention in the full extent to the decision-making activity of the public authority.[11]

Use of the "Engel Criteria" in the area of liability for administrative tax offenses

The European Court of Human Rights also applies the "Engel Criteria" in cases of assessing liability for administrative tax offenses. The case law of the European Court of Human Rights seeks to find an answer to the question of whether an individual may face a criminal charge under the Article 6 of the Convention, even in the case of tax offenses which national legislation does not classify as a criminal offense.

In the case of *Bendenoun v. France*,[12] the European Court of Human Rights analysed the question whether the Article 6 of the Convention applies also to the surcharge for tax evasion.

Mr. Bendenoun founded a company dealing with old coins, art and precious stones. He was also its director. In connection with his activities, three proceedings against him were initiated – customs, tax and criminal proceedings. These proceedings were led more or less parallely. In his complaint, he objected to an infringement of the Article 6 Section 1 of the

[9] See *Decision of the Supreme Administrative Court of the Czech Republic Ref. No. 15 Kse 4/2012* [2012-09-25].

[10] See MOLEK, P. *Právo na spravedlivý proces*. 1. vyd. Praha: Wolters Kluwer, 2012, p. 323. ISBN 978-80-7357-748-3.

[11] See POUPEROVÁ, O. Čl. 6 Úmluvy a správní řízení. In: M. HORÁKOVÁ and M. TOMOSZEK, eds. *Vliv EU a Rady Evropy na správní řízení v ČR a v Polsku*. 1. vyd. Brno: Tribun EU, 2010, p. 26. ISBN 978-80-7399-923-0.

[12] See *Case of Bendenoun v. France* [1994-02-24]. Judgement of the European Court of Human Rights, 1994, Application No. 12547/86.

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Convention before the criminal and administrative courts on the grounds that he did not have access to the complete customs file despite the fact that the tax authorities sent evidence to the administrative court against him. He objected that the tax authorities breached his right to a fair hearing. The European Court of Human Rights came to conclusion that Mr. Bendenoun had faced criminal charge in the sense of the Article 6 of the Convention on the following grounds:

- the offenses of which he was accused are governed by the General Tax Code, which applies to all citizens;
- sanctions in the form of tax surcharges are intended not as financial compensation for the damage caused by the tax evasion, but, in particular, as a punishment to discourage the recidivism;
- these penalties are imposed on the basis of a general rule the purpose of which is both deterrent and dissuasive;
- the amount of the penalty was considerable, namely 422 534 French Francs for the complainant and 570 398 French Francs for his company, and in the event of non-payment, the applicant was threatened with the deprivation of liberty.

The European Court of Human Rights came to conclusion that a negative criminal connotation prevailed in the case. Individually the reasons are decisive; however, altogether they create a crucial situation in which the charge falls into the scope of the Article 6 of the Convention.

Another case connected with the area of administrative tax offenses includes the case of *Jussila v. Finland*.[13] On May 22nd 1998, the Tax Office in Häme, Finland, asked the applicant to submit his observations regarding some alleged errors in his value added tax declarations for the fiscal years 1994 and 1995. On July 9th 1998, the Tax Office found that the applicant was, among other things, obliged to pay tax surcharges amounting to 10 per cent of the increased tax liability. The additional tax surcharges levied on the applicant totalled 1 836 Finnish Marks (equivalent to 308.80 EUR). The tax surcharges were based on the fact that the applicant's value added tax declarations in years 1994 and 1995 were regarded as incomplete. The applicant appealed to the County Administrative Court of Uusimaa, Finland (which later became the Administrative Court of Helsinki). He requested an oral hearing and that a tax inspector as well as an expert appointed by him be heard as witnesses. On February 1st

[13] See *Case of Jussila v. Finland* [2006-11-23]. Judgement of the European Court of Human Rights, 2006, Application No. 73053/01.

2000, the Administrative Court of Helsinki took an interim decision inviting written observations from the tax inspector and a statement from an expert chosen by the applicant. The tax inspector submitted her statement of February 13th 2000 to the Administrative Court of Helsinki. The statement was further submitted to the applicant for his observations. On April 25th 2000, the applicant submitted his own observations on the tax inspector's statement. The statement of the expert chosen by him was dated and submitted to the court on the same day. On June 13th 2000, the Administrative Court of Helsinki held that an oral hearing was manifestly unnecessary in the matter because both parties had submitted all the necessary information in writing. It also rejected the applicant's claims. On August 7th 2000, the applicant requested leave to appeal from the Supreme Administrative Court renewing at the same time his request for an oral hearing. On March 13th 2001, the Supreme Administrative Court refused the applicant leave to appeal. The applicant alleged that he did not receive a fair hearing in the proceedings in which a tax surcharge was imposed as he was not given an oral hearing. He relied on the Article 6 of the Convention.

The European Court of Human Rights first expressed its conviction that no consistent and authoritative basis was established in its case law to argue that the small severity of a sanction (imposed in tax or other proceedings) could be a decisive criterion under which a certain delict could fall out of the scope of the Article 6 of the Convention. In the case of Jussila, the sanction was imposed on the complainant in the form of a 10 per cent tax surcharge from the corrected amount of the tax, which in the calculation amounted to 309 EUR. The European Court of Human Rights has found that tax penalties are imposed on the basis of the general legal provisions applied to taxpayers in general. The European Court of Human Rights did not put forward the government's argument that the value added tax applies only to a limited group with a special status. It further stated, as the government admitted, that tax penalties should not be a monetary compensation for damages, but a punishment designed to deter the repeated perpetration of such an act. Therefore, it decided that the sanctions were imposed on the basis of a rule designed to deter and to punish and it came to the conclusion that this fact had established a criminal nature of the act.

However, in the case *Poniatowski v. France*, the European Court of Human Rights declared the Article 6 of the Convention inapplicable, even though it involved a considerable financial amount (tens of thousands of

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Euros). The complainant was required to pay default interest on the unpaid tax of 0.75 per cent per month. Although the European Court of Human Rights acknowledged the general nature of the rule of law and the considerably high amount of the calculated interest, it found that the obligation to pay interest on arrears was only repayable (compensation for the damage caused by the diminishing of the value of money as a result of inflation).[14]

Case law of the European Court of Human Rights on application of the "ne bis in idem" principle

The essence of the case law hitherto gathered in the whole of the application of the Article 4 of the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the "Protocol No. 7") demonstrates the existence of several approaches of the European Court of Human Rights to the issue of identity of acts in the retrial of complainants. This view was put forward by the European Court of Human Rights in the case of *Sergey Zolotukhin v. Russian Federation*.[15]

In January 2002, the applicant was arrested for bringing his girlfriend into a military compound without authorisation and was taken to the district police station. According to the police report, he was drunk, behaved insolently, used obscene language and attempted to escape. On the same day, a district court found him guilty of swearing at police employees and breaching public order shortly after his arrival at the police station. It convicted him of "minor disorderly acts" under the Article 158 of the Code of Administrative Offences and sentenced him to three days' detention. Subsequently, criminal proceedings were brought against him in relation to the same events. He was charged with "disorderly acts" under the Article 213 of the Criminal Code for swearing at police employees and breaching public order in the immediate aftermath of his arrival at the police station. He was also charged with insulting a public official under the Article 319 of the Criminal Code for swearing at a major who was drafting the administrative offence report. Lastly, he was charged with threatening violence against a public official under the Article 318 of the Criminal Code it being alleged that he had threatened to kill the major en

[14] See *Case of Poniatowski v. France* [2009-10-06]. Judgement of the European Court of Human Rights, 2009, Application No. 29494/08.
[15] See *Case of Sergey Zolotukhin v. Russian Federation* [2009-02-10]. Judgement of the European Court of Human Rights, 2009, Application No. 14939/03.

route to the regional police station. In December 2002, the same district court found the applicant guilty of the charges under the Articles 318 and 319 of the Criminal Code, but acquitted him of the charges under the Article 213, after finding that his guilt had not been proven to the requisite standard. As to the existence of a "criminal charge" for the purposes of that Article, the Grand Chamber endorsed the finding that although the initial set of proceedings against the applicant were classified as administrative in national law, they were to be equated with criminal proceedings on account, in particular, of the nature of the offence of *"minor disorderly acts"* and the severity of the penalty. As to whether the offences were the same, the European Court of Human Rights had placed the emphasis on identity of the facts irrespective of their legal characterisation. Therefore, the European Court of Human Rights decided to define in detail what was to be understood by the term "same offence" for the purposes of the Convention. Article 4 of the Protocol No. 7 prohibits the prosecution or trial of an individual for a second offence in so far as it arose from identical facts or facts that were "substantially" the same as those underlying the first offence. This guarantee came into play where a new set of proceedings was instituted after a previous acquittal or conviction had acquired the force of *res judicata*. In the instant case, no issue arose under the Article 4 of the Protocol No. 7 in respect of the applicant's prosecution under the Articles 318 and 319 of the Criminal Code, as the charges relating to his conduct towards the major had been raised for the first and only time in the criminal proceedings. The situation was, however, different with regard to the disorderly conduct in respect of which he had first been convicted in the administrative proceedings under the Article 158 of the Code of Administrative Offences and had subsequently been prosecuted under the Article 213 of the Criminal Code. The facts underlying the two sets of administrative and criminal proceedings against the applicant differed in only one element, namely the threat to use violence against a police officer, and should, therefore, be regarded as substantially the same. As to whether there had been a duplication of proceedings, the European Court of Human Rights came to conclusion that the judgment in the "administrative" proceedings sentencing the applicant to three days' detention had amounted to a final decision. The fact that the applicant had been acquitted in the criminal proceedings had no bearing on his claim that he had been prosecuted twice for the same offence. In sum, the proceedings instituted against the applicant under the Article 213 of the Criminal Code concerned essentially the same offence

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as that of which he had already been convicted under the Article 158 of the Code of Administrative Offences.[16]

Conclusions of the Zolotukhin case are built on previous case law of the European Court of Human Rights, which formed three approaches to the *"ne bis in idem"* principle.

The first approach focuses on the identity of the conduct of an unauthorised acting entity, regardless of formal legal classification (*idem factum*). The example is the case of *Gradinger v. Austria*.[17] On January 1st 1987, the applicant was involved in a road traffic accident in which a cyclist was killed. A university medical examination of a blood sample revealed 0.8 per mille alcohol in the applicant's blood at the time the sample was taken. In criminal proceedings the applicant was convicted on May 15th 1987 of causing death by carelessness within the meaning of the Article 80 of the Criminal Code. The applicant referred to the evidence by an independent expert Dr. Psick that gave short space of time between the applicant's last drink and the time of the accident, according to which the applicant could not have absorbed sufficient alcohol to have violated the law. The applicant was acquitted in the criminal proceedings of having had an unlawful amount of blood alcohol. However, on July 16th 1987, the St. Pölten District Authority issued a penal order against the applicant, which provided for a fine of 12 000 Austrian Schillings with two weeks' imprisonment in default, plus costs, in respect of the offence of driving a car under the influence of alcohol. The authority relied on a report from its own doctor that, as the level in the applicant's blood had been 0.8 per mille one and a half hours after the accident, he must have had at least 0.95 per mille alcohol in his blood at the time of the accident. The applicant made use of all the Austrian legal remedies, however, he did not succeed. The applicant considered that, as he was acquitted in the criminal proceedings of having had an unlawful amount of blood alcohol, the principle of *"ne bis in idem"* accordingly prohibited a subsequent conviction under the Article 5 Section 1 of the Austrian Road Traffic Act. He considered that the administrative proceedings brought against him were *"criminal"* within the meaning of the Convention and that no "independent and impartial tribunal" determined this criminal charge. The Eu-

[16] See Sergey Zolotukhin v. Russian Federation [GC] – 14939/03 [2009-02-10]. In: *European Court of Human Rights* [online]. 2009 [cit. 2017-08-14]. Available at: http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=002-1693&filename=002-1693.pdf.

[17] See *Case of Gradinger v. Austria* [1995-10-23]. Judgement of the European Court of Human Rights, 1995, Application No. 15963/90.

ropean Court of Human Rights found that although the designation, character and purpose of the two acts were different, Austria had broken the guarantee of the Article 4 of the Protocol No. 7 because both decisions were based on the same conduct of the complainant.

The second approach is based on the premise that the conduct of the defendant which gave rise to the prosecution is the same, but the same behaviour may establish several offenses considered in separate proceedings. The doctrine came from the case of *Oliveira v. Switzerland*. In this case, Switzerland punished Ms. Oliveira with successive convictions for the failing to control her vehicle and for the negligence of causing physical injury in respect of a road traffic accident. The mentioned unlawful behaviour of Ms. Oliveira was established on the grounds of the Sections 31 and 32 of the Swiss Federal Road Traffic Act and on the grounds of the Article 125 of the Swiss Criminal Code. This case is considered to be a typical example of a single act constituting various offences. It is characterised by fact that a single criminal act was split up into two separate offences, in case before the European Court of Human Rights:

1. failure to control vehicle; and
2. negligent causing of physical injury.

Article 4 of the Protocol No. 7 was not infringed in this case since it prohibited people being tried twice for same offence, whereas in cases concerning single act constituting various offences one criminal act constituted two separate offences. However, the general opinion on this case is that it would have been more consistent with principles governing proper administration of justice if the sentence in respect of both offences, which resulted from same criminal act, would have been passed by same court in single set of proceedings.[18]

The third approach emphasises the so-called "essential elements" of the two actions. This doctrine is based on the *Franz Fischer v. Austria* case.[19] Franz Fischer was an Austrian national. While driving under the influence of alcohol, he knocked down a cyclist who was fatally injured, then drove off without giving assistance and only gave himself up to the

[18] See Oliveira v. Switzerland (84/1997/868/1080) 30 July 1998: Double Jeopardy. In: *Human & Constitutional Rights* [online]. 2017 [cit. 2017-08-14]. Available at: http://www.hrcr.org/safrica/arrested_rights/oliveira_switzerland.html.

[19] See *Case of Franz Fischer v. Austria* [2001-05-29]. Judgement of the European Court of Human Rights, 2001, Application No. 37950/97.

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police later that night. He was found guilty of a number of traffic offences including driving under the influence of a drink and fined with 20 days imprisonment in default. He was also convicted of causing death by negligence "after allowing himself to become intoxicated through the consumption of alcohol" and sentenced to six months imprisonment. The European Court of Human Rights held unanimously that there had been a violation of the Article 4 of the Protocol No. 7 and that the finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage the applicant may have sustained. The European Court of Human Rights stated that the wording of the Article 4 does not refer to the "same offence" but rather to trial and punishment "again" for an offence for which the applicant has already been finally acquitted or convicted. As a result, while the fact that a single act may constitute more than one offence is not incompatible with the Article 4, the European Court of Human Rights did not limit itself to finding that an applicant was, on the basis of one fact, tried or punished for nominally different offence.[20] Given that it would be incompatible with this provision to prosecute or to punish the complainant for crimes which were only "negligibly different", the European Court of Human Rights ruled that it was necessary to examine whether those acts had the same "essential elements". The European Court of Human Rights stressed that there were two actions that did not overlap to an insignificant extent (they were almost identical) and, therefore, there was no reason to lead two proceedings against the complainant.

Case law of the European Court of Human Rights after the decision of Zolotukhin v. Russian Federation

The problem of the interpretation of the concept of "identity of the act" can be illustrated in cases handled by the Supreme Court of Sweden in year 2010.[21] In the former case, an individual reported incorrect information in his tax return that led to a high tax evasion. In accordance with the Swedish law, such an offense is considered a criminal offense and he was, therefore, convicted by a first instance court. Before the Court of

[20] See Franz Fisher v. Austria, (37950/97) [2001] ECHR 348 (29 May 2001). In: *Human & Constitutional Rights* [online]. 2017 [cit. 2017-08-14]. Available at: http://www.hrcr.org/safrica/arrested_rights/Fisher.html.

[21] See KARLSSON, S. *Ne bis in idem: A Comparative Study of the Interpretation of the Principle in Sweden and Norway Concerning Tax Surcharge and Tax Fraud* [online]. 1st ed. Jönköping: Jönköping University, 2011. 36 p. [cit. 2017-08-14]. Available at: http://www.diva-portal.org/smash/get/diva2:419643/FULLTEXT01.pdf.

Appeals, he requested that the court should stop the proceedings on the grounds that he was already convicted of an identical act to the payment of a fine for an administrative tax offense by the Administrative Court of Appeals. The Court of Appeals halted the proceedings, citing the Article 4 of the Protocol No. 7.

In the latter case, a natural person was convicted by a first instance court for a tax abatement crime. The decision was also confirmed by the Court of Appeals. The judgment was handed in to the Swedish Supreme Court because of the existence of a valid final decision of the Administrative Court of Appeals, which confirmed the imposition of a sanction for an administrative tax offense. The Supreme Court found that, in both cases, the proceedings were based on the same facts. Comparing the administrative tax offenses, the only difference in the legislation relating to tax crimes was the requirement for deliberate action or gross negligence in the case of a criminal offense. From this point of view, the Swedish system appears to be contrary to the principle of "ne bis in idem", as it is expressed by the Article 4 of the Protocol No. 7. The Swedish Supreme Court therefore examined whether it is possible that a different requirement as to the fault may be a factor which leads to the conclusion that these behaviours will not be regarded as actions of the same kind. The Swedish Supreme Court concluded that this was excluded. Nevertheless, based on the judgment of the European Court of Human Rights in the case of *Nilsson v. Sweden*,[22] the Swedish Supreme Court found that new proceedings could begin if the first proceedings were foreseeable and there was a factual and temporal link between these proceedings. It follows that new penalties may be added to those already imposed. In conclusion, the Swedish Supreme Court emphasised that this requires clear support in the Convention or in the case law of the European Court of Human Rights or the European Union Court of Justice so that the Swedish Supreme Court may depart from the Swedish law. It should be noted that different opinions were attached to that decision.

The fact that the Supreme Court of Sweden did not decide unanimously in the matter has weakened its authority in the eyes of the Swedish public. The weakened authority also led to the initiation of a preliminary ruling in the case of *Hans Åkerberg Fransson* which concerned the interpretation of the *"ne bis in idem"* principle in relation to tax offenses.

[22] See *Case of Nilsson v. Sweden* [2005-12-13]. Judgement of the European Court of Human Rights, 2005, Application No. 73661/01.

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The Court of Justice of the European Union in the *Case C-617/10* of February 26th 2013 in which it considered this principle in connection with the Article 50 of the European Union Charter of Fundamental Rights stated that the Article 50 does not preclude a Member State from imposing tax sanction and criminal sanction on the grounds of the same behaviour that is for failure to submit a value added tax return, but only on condition that the first sanction is not of a criminal nature. For the purpose of assessing the criminal nature of the tax penalty, the Court of Justice of the European Union defined criteria that are identical to the "Engel Criteria" used by the European Court of Human Rights.

This situation resulted in a number of complaints being filed in similar cases to the European Court of Human Rights. In the case of *Lucky Dev v. Sweden*[23] was minutely analysed the concept of "identity of the act" in the case of tax offenses.

The complainant and her husband operated two restaurants. The taxpayer was taxed by a tax authority decision and imposed a fine (tax increase) because she did not declare all her income and because she did not do it correctly. The aforementioned decision of the tax authorities was also confirmed in the subsequent court proceedings by the Administrative Court and the Supreme Administrative Court. The prosecutor also began criminal prosecution. The complainant was convicted of misdemeanour of misinterpreted accounting. The Criminal Court found that the books on the operation of restaurants had serious deficiencies and that the applicant and her husband were responsible for errors in the bookkeeping of substantial sums and value added tax.

Before the European Court of Human Rights, she argued that the imposition of a fine and subsequent conviction for an accounting misdemeanour had led to a breach of the Article 4 of the Protocol No. 7. According to the European Court of Human Rights, this guarantee is to be interpreted as prohibiting prosecution and persecution for the second charge if it is based on identical facts or facts which are essentially the same. The European Court of Human Rights findings should, therefore, focus on those facts which constitute a set of specific facts relating to the same accusation and which are inextricably linked temporally and spatially, and whose existence must be established in order to ensure conviction or to initiate criminal proceedings.

[23] See *Case of Lucky Dev v. Sweden* [2014-11-27]. Judgement of the European Court of Human Rights, 2014, Application No. 7356/10.

The European Court of Human Rights pointed out that the two allegations were based on a failure to grant taxable income and value added tax and both the tax and criminal proceedings concerned the same period and, in principle, the same amount of the reduced tax. It follows from the above-mentioned that the *idem* element of the *"ne bis in idem"* principle was fulfilled. According to the European Court of Human Rights, the situation was different in the case of a charge for an accounting offense. Although the complainant had failed to comply with the statutory accounting obligations, it could later fulfil her duty to provide the tax authorities with sufficient and correct information that would be sufficient to establish the basis for calculating the tax. Under the circumstances, the allegations in the present case were sufficiently different to conclude that the applicant was not punished twice for the same deed.

Decision of A and B v. Norway

In the late part of the year 2016, the European Court of Human Rights has given a judgment in the case *A and B v. Norway*.[24] The European Court of Human Rights held that there had been no violation of the Article 4 of the Protocol No. 7. The case concerned two taxpayers who submitted that they had been prosecuted and punished twice – in tax proceedings and criminal proceedings – for the same offence. The Grand Chamber of the European Court of Human Rights considered the case in which complainants as taxable persons were twice punished for the same unlawful conduct. The complainants received a foreign income of 12 600 000 EUR. This income was not reported in their tax returns, with the result that they unlawfully reduced their tax liability to the amount of 3 600 000 EUR. Subsequently, a criminal prosecution was initiated against them in year 2007 for suspicion of tax evasion. In year 2008, the financial authorities initiated the administrative proceedings which were based on evidence obtained in the criminal proceedings. Even in year 2008, the financial authorities decided on the imposition of a 30 per cent tax arrears on the complainants.[25]

[24] See *Case of A and B v. Norway* [2016-11-15]. Judgement of the European Court of Human Rights, 2016, Application No. 24130/11 and 29758/11.

[25] See ŠAMKO, P. A. a B. proti Nórsku – prelom vo výklade zásady ne bis in idem pri daňových trestných činoch. In: *Právne listy* [online]. 2017-01-15 [cit. 2017-08-14]. Available at: http://www.pravnelisty.sk/clanky/a530-a-a-b-proti-norsku-prelom-vo-vyklade-zasady-ne-bis-in-idem-pri-danovych-trestnych-cinoch.

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The European Court of Human Rights concluded that it had no cause to cast doubt on the reasons why the Norwegian legislature had opted to regulate the socially harmful conduct of non-payment of taxes by means of an integrated dual (administrative/criminal) process. Nor did it call into question the reasons why the Norwegian authorities had chosen to deal separately with the more serious and socially reprehensible aspect of fraud in the context of criminal proceedings rather than an ordinary administrative procedure. The European Court of Human Rights found that the conduct of dual proceedings, with the possibility of a combination of different penalties, had been foreseeable for the applicants who must have known from the outset that criminal prosecution as well as the imposition of tax penalties was possible, or even likely, on the facts of their cases. The European Court of Human Rights observed that the administrative and criminal proceedings had been conducted in parallel and were interconnected. The facts established in one of the sets of proceedings had been relied on in the other set and, as regards the proportionality of the overall punishment, the sentence imposed in the criminal trial had taken account of the tax penalty. The European Court of Human Rights was satisfied that, while different penalties had been imposed by two different authorities in the context of different procedures, there had, nevertheless, been a sufficiently close connection between them, both in substance and in time, for them to be regarded as forming part of an overall scheme of sanctions under the Norwegian law.[26]

Conclusions

The case law of the judicial authorities in Europe at the level of the "ne bis in idem" guarantee is rich and the approaches vary. The European Court of Human Rights has developed several approaches to assessing parallel liability for administrative offense and criminal liability. However, it has to be said that the administrative tax offenses by their legal structure and the "anchoring" stand a little outside the standard of legal definition of delicts in the area of public law. This has already been reflected in the national case law.[27]

[26] See A and B v. Norway. Ne bis in idem Principle Was Not Infringed by the Conduct of Administrative and Criminal Proceedings Resulting in a Combination of Penalties. ECHR. In: *TaxLive* [online]. 2016-11-15 [cit. 2017-08-14]. Available at: http://taxlive.nl/-/a-and-b-v-norway-ne-bis-in-idem-principle-was-not-infringed-by-the-conduct-of-administrative-and-criminal-proceedings-resulting-in-a-combination-of-pe.

[27] See *Resolution of the Supreme Court of the Czech Republic Ref. No. 15 Tdo 832/2016* [2017-01-04].

However, in our opinion, the problem in the case law of the European Court of Human Rights is to justify concurrent, respectively related proceedings for the imposition of a tax sanction (tax penalties for non-fulfilment of the tax liability, the so-called payment offenses) which is connected with criminal proceedings for criminal offense consisting in the act of reducing the pecuniary obligation (obligation to pay) to the public budget. Therefore, we believe that the argument – that the parallel conduct of those proceedings, within the framework of the theory of temporal and matter links, does not create an obstacle to the principle of "ne bis in idem" as long as there is not only a sufficiently close connection between the tax and criminal proceedings, but also a temporal link – is incorrect.

Provision of the Article 4 of the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms is so fundamental that it cannot be withdrawn even in the cases provided for in the Article 15 of the Convention (war, state of war, etc.). In addition, the requirement of the Article 17 of the Convention, which provides for a ban on the abuse of rights guaranteed by the Convention, shall also be considered. Under the mentioned provision, *"Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."*

In our view, the case law of the European Court of Human Rights itself raises doubts whether the interpretation and application of the safeguards laid down in the Convention are applied in the originally intended direction. In the case of A and B v. Norway, the guarantee provided for in the Convention is restricted, but on the basis of a condition which the Convention does not provide. Finally, it can be concluded that the decision in the case A and B v. Norway does not provide legal certainty as to the case law of the Strasbourg authorities in the field of the "ne bis in idem" principle since it constitutes a departure from the theory of conformity in the essential elements of the behaviour which already has been accepted in the past.

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