DOI https://doi.org/10.30525/978-9934-26-685-0-20

THE PRINCIPLE OF NON BIS IN IDEM (PROHIBITION OF PROSECUTION OR PUNISHMENT TWICE FOR THE SAME ACT): ANALYSIS OF THE CONSTANT PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Snigur M.V.

INTRODUCTION

While the prohibition of multiple criminal prosecutions remains a fundamental principle and their legitimacy, the exception, the accumulation of sanctions, is more regulated than completely prohibited. The different legal regimes that coexist under the banner of the ne bis in idem principle vary depending on the subjects or instruments of EU law. However, it seems possible to consider it through identical issues.

The EU case law does not prevent the existence of the so-called sanction binary, leaving it to the discretion of Member States to sanction the same facts both administratively and criminally. The premise, however, must necessarily be consistent with Article 4, paragraph 1, Protocol 7 of the ECHR – "No one shall be subjected to prosecution or punishment by the jurisdiction of the same State for an offence for which he or she has already been acquitted or convicted after a final decision in accordance with the laws and criminal procedure of that State" – and its interpretation, as well as Articles 6 and 7 of the ECHR. The wording of the rule (Article 4 of Protocol 7 ECHR) demonstrates the potential incompatibility between the existence of double jeopardy and compliance, and it is on these assumptions that all past and current legal and doctrinal debates since 1976 with the aforementioned judgment in Engel v. the Netherlands are based.

In the judgment under review, the ECtHR wanted to define three rules for determining the criminal nature of a case and the subsequent violation of the ne bis in idem principle, in order to prevent Member States from being able to mask more typical criminal and punitive rules with administrative sanctions or otherwise through arbitrary national labelling of a case.

1. The application of the ne bis in idem principle in the doctrine of European criminal procedure and national court practice

1.1. Theoretical part

Ne bis in idem means, literally, "not (to) suffer the same thing twice". It is a traditional principle of criminal law and criminal procedure that, roughly speaking, no one may be punished or prosecuted more than once for the same act. Although this rule is generally accepted, there is debate about its various aspects: the grounds, scope, requirements, legal consequences, etc. For example, there are discussions on whether the rule should be applied beyond the borders of a sovereign state

(international ne bis in idem); what constitutes an object for which one cannot be held responsible more than once (facts or legal classification of these facts); what constitutes a second 'prosecution' (bis); whether it is addressed only to judges or also to legislators, among many other issues[1].

Over time, the principle of ne bis in idem has been analysed by theorists from two perspectives: first, procedural law – no one should be held liable twice for the same act and, second, substantive law – no one can be punished twice for the same offence[2]. It is noteworthy that the substantive law component is under constant investigation, with doctrine and courts of law searching for the ideal formula to ensure that the ne bis in idem principle does not arise when the legal qualification of competing facts is questioned.

The Regulation provides that "the principle of ne bis in idem [...] necessarily presupposes that there is mutual confidence between the Member States in their respective criminal justice systems and that each Member State accepts the application of the criminal law in force in the other Member States, even if the implementation of its own national law would lead to a different solution"[3].

According to Article 61 of the CCU, no one may be brought to legal liability of the same type twice for the same offence. Art. 4 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms establishes that no one shall be subjected to double jeopardy in a trial or punishment in criminal proceedings under the jurisdiction of the same State for an offence for which he has been finally acquitted or convicted in accordance with the law and criminal procedure of that State.

In fact, the Convention establishes three components of the ne bis in idem principle (algorithm of determination):

1) whether the proceedings were "criminal" in nature;

2) whether the proceedings concerned the same facts;

3) whether there was a duplication of proceedings.

In assessing the nature of the proceedings, the ECtHR applies the "Engel criteria" (see Engel and Others v. the Netherlands): the first criterion is the legal classification of the offence under national law, the second is the nature of the offence itself, and the third is the severity of the punishment that the person concerned is likely to face. The second and third criteria are alternative and not necessarily cumulative.

Also, in the context of the issue under study, it is important to understand the legal nature of such categories as "final decision", "criminal charge", "punishment", "same offence".

The concept of "criminal charge" has an autonomous meaning within the meaning of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("1. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (...) which shall determine (...) the validity of any criminal charge against him.").

[1] Ossandón, Magdalena. El legislador y el principio ne bis in idem. Política Criminal, v. 13, n. 26, p. 952-1002, dez. 2018. p. 959 e ss.

[2] Roșioru M. Evoluție interpretativă a criteriilor „Engel". URL: https://ibn.idsi.md/sites/default/files/imag_file/78-81_35.pdf

[3] CJCE, 11 févr. 2003, Gözütok et Brügge, nos C-187/01 et C-385/01, point 33.

The ECtHR assesses the existence of a "criminal aspect" under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms based on the criteria set out in the judgment in Engel and Others v. The Netherlands (para. 82). Thus, three criteria are considered: the criterion of national law (qualification under domestic law); the criterion of the addressee (including the nature of the proceedings, which has punitive features); the criterion of legal consequences for the addressee (severity of the punishment).

The first criterion is the national law criterion. If domestic law qualifies the offence as a criminal offence, then it is covered by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. In cases where there is no such qualification, the ECtHR examines the substantive reality of the procedure.

The second criterion is the criterion of the addressee. This criterion is associated with the effect of the norm that establishes liability by the circle of persons. If the rule applies to an indefinite number of persons, the offence is classified as criminal.

The third criterion is the criterion of legal consequences for the addressee. The essence of the criterion is that the form and severity of the legal consequences for the addressee (severity of punishment) are assessed.

The ECHR case-law demonstrates the cross-sectoral nature of the provisions of Article 4 of Protocol No. 7. The principle of "non bis in idem", which is usually applied in criminal and administrative proceedings. In determining the scope of Art. 4 of Protocol No. 7, one should be guided by three criteria, commonly known as the "Engel criteria", which should be taken into account when determining whether or not a "criminal charge" has been brought in a case.

The European Court of Human Rights has repeatedly emphasised that the conventional concepts of "criminal charge" and "criminal offence" have an "autonomous meaning". In other words, the European Court of Human Rights independently determines whether a particular act constitutes a criminal offence or not, in accordance with the established criteria. In the case-law of the European Court of Human Rights, the criteria used to determine whether the criminal aspect of Article 6 of the Convention should be applied are:

1) the legal qualification of the act in national legislation (i.e. finding out how the act is qualified in national law: criminal offence (crime), administrative offence, disciplinary offence, etc;)

2) the nature of the offence;

3) the nature and severity (degree of gravity) of the punishment that may be imposed on the person [Engel and others v. The Netherlands judgment of 8 June 1976 (applications no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72), § 82, § 83] (hereinafter – the 'Engel criteria').

At the same time, the first criterion is only an initial one and is not decisive. At the same time, the second and third criteria are decisive for determining whether an act falls within the meaning of the Convention as a "criminal offence". For the application of Article 6 of the Convention in the criminal domain, it is sufficient that the offence is considered "criminal" in terms of the Convention or that the offence was punishable by a penalty which, by its nature and severity, belongs to the "criminal" domain [judgment in Lutz v. Germany' of 25 August 1987 (application no. 9912/82), § 55].

O.V. Shcherbanyuk notes that the first Engel criterion relates to the classification of a provision in criminal law in accordance with the national legal order. However, the ECtHR does not consider this classification to be decisive, but only a starting point for analysis[4]. In the context of the second Engel criterion, the ECtHR considers, firstly, the group of addressees of the rule that punishes a specific violation. When the rule is directed at the general public, and not, for example, in disciplinary law, at a group with a certain status, this fact indicates that the sanction is criminal in nature. In doing so, the ECtHR takes into account the purpose of the sanction provided for in the criminal provision. The criminal nature is denied if the sanction is aimed only at compensation for property damage. However, if it is aimed at repression and prevention, there is a criminal penalty. In addition, the ECtHR has taken into account (...) whether the sanction for the commission of a crime is intended to protect legitimate interests, the protection of which is usually guaranteed by the provisions of criminal law. These elements must be assessed in combination. The third Engel criterion concerns the type and severity of the sanction to be imposed. In the case of deprivation of liberty, there is generally a presumption that the sanction is criminal in nature, which will only be admitted in exceptional circumstances. Likewise, monetary penalties that carry an alternative penalty of imprisonment or that result in an entry in the criminal record are generally understood to be criminal proceedings.

It is appropriate to focus on the transnational dimension of the ne bis in idem principle that distinguishes the EU legal order before identifying the conditions under which it can be used usefully and therefore proves effective.

These criteria relate to the legal classification of the offence under national law, the nature of the offence itself and, finally, the severity of the penalty. The first one provides, at most, only an indication that the objections of national law to the criminal nature of the punishment cannot be irrefutable. In addition, "the second and third criteria are alternative and not necessarily cumulative"[5].

The principle of ne bis in idem is mobilised in areas of repressive issues that still have a sufficiently autonomous logic for the coexistence of different legal regimes under one legal banner[6].

However, the ECtHR has developed a doctrine on this principle that qualifies this applicability in more restrictive terms. According to it, the legal nature of the procedure under national law cannot be the only criterion of relevance for the applicability of the ne bis in idem principle[7].

The application of the ne bis in idem rule in a democratic state governed by the rule of law is deeply justified by numerous arguments. As A. Sakovich notes, the validity of the ne bis in idem principle can be justified, inter alia, by reference to personal freedom, dignity of the individual, protection against abuse by the state,

[4] Щербанюк О.В. Конституційна основа ЄС для тесту Енгеля та концепції санкцій. Право і суспільство. № 5/2024. С. 423-428

[5] Case of Jussila v. Finland. Application no. 73053/01 URL: https://hudoc.echr.coe.int/eng?i=001-78135

[6] Coutron L., Lecomte F. Le principe ne bis in idem dans la jurisprudence de la Cour de justice de l'Union européenne : de la diversité dans l'unité? URL: https://droit.cairn.info/revue-revue-du-droit-public-2018-1-page-5?lang=fr#re1no6

[7] Doctrina Murray y criterios Engels: dos recientes sentencias del Tribunal Supremo. URL: https://miguelrebolledo.es/2022/01/16/doctrina-murray-criterios-engels/

protection against the burden of repeated prosecution for the same act, principles of fairness and proportionality, the rule of law, legal certainty, legal security, res judicata and public order[8]. The doctrine also states, that the punishment imposed by the court fully absorbs the guilt of the offender and the unlawfulness of the act charged, but it should be emphasised that this argument relates exclusively to convictions, while the paremia in question covers other court decisions, in particular those in which the accused is acquitted of the charges[9]. In our opinion, special attention should be paid to those arguments that indicate a significant degree of interference of criminal proceedings (starting from the stage of pre-trial investigation in personam) in the sphere of dignity and freedom of the accused (suspect), as a result of which any repeated interference of the judiciary in this area (of course, based on the same facts) should not take place. Depriving a person of this peculiar sense of "legal security" can only take place in exceptional cases clearly defined by the legislator The principle of ne bis in idem can be analysed both from the point of view of international criminal law and in the context of national (domestic) criminal law orders of individual states.

1.2. Study of the practice of national courts in applying the ne bis in idem principle

In a constant search for a balance between these two rights, applying the principle of non bis in idem, courts tend, rightly so, to favour restoring the coincidence between factual reality and legal reality, while sacrificing the right of the accused to enjoy the peace of mind of a completed criminal trial. In other cases, however, the public's right to a conviction is sacrificed by keeping the accused under the cover of a completed criminal trial. Striking this balance, as well as the pervasiveness of European and conventional law, creates difficulties in applying the ne bis in idem principle[10]. In order for the ne bis in idem principle to apply, there must be a first criminal procedure that has resulted in a decision to convict or finally acquit the person against whom the criminal charge was brought, and the authorities must initiate a second criminal procedure (element bis) for the same act (element idem) involving the same person. In this second procedure, either at the stage of criminal investigation or at the stage of trial, the accused will be able to invoke the exception to res judicata and the State Ministry will issue an order not to initiate criminal investigation or to terminate criminal investigation, and the court will issue an order to terminate criminal trial on the basis of Article 10(1)(j) of the Code of Criminal Procedure. In addition, a violation of the non bis in idem principle can be invoked in the extraordinary way of filing a claim for invalidation in the case provided for in Article 386(d) of the Code of Criminal Procedure.

[8] Sakowicz A., Zasada ne bis in idem w prawie karnym w ujęciu paneu- ropejskim, Białystok 2011, s. 31.

[9] Nita B., Zasada ne bis in idem w międzynarodowym obrocie kar- nym, PiP Nr 3/2005, s. 8.

[10] Constantinescu V. Aplicarea principiului non bis in idem in jurisprudența europeană si națională. Curierul Judiciar nr. 10/2012 URL: https://www.curieruljudiciar.ro/2012/12/03/aplicarea-principiului-non-bis-in-idem-in-jurisprudenta-europeana-si-nationala/

In the case of extradition, the protection against double jeopardy applies not only to its own nationals, but this principle should also be extended to other EU citizens.

On this basis, the Higher Regional Court of Frankfurt am Main[11] declared the extradition of an Italian national by the German authorities to the United States inadmissible if the Republic of Italy had invoked the prohibition of double jeopardy in criminal law on behalf of its nationals. The prohibition of double jeopardy also applies if the EU citizen concerned has already been convicted by a Member State other than the one requesting extradition. With this decision, the Frankfurt Higher Regional Court extended the prohibition of double jeopardy for the first time to other EU citizens and thus can be applied to enforcement cases. This means that the so-called national privilege of not being extradited to third countries outside the EU is now also applicable to other EU citizens.

An Italian woman who was being persecuted was arrested at Frankfurt Airport. The US requested her extradition on charges of art forgery fraud at the expense of US citizens. The woman had previously been sentenced to prison in Italy on the same charges.

In its judgement, the Higher Regional Court of Frankfurt am Main stated that the obstacle to extradition in the form of the prohibition of double jeopardy would make extradition impossible. According to the prohibition of double jeopardy, extradition may not be granted if the person being prosecuted has already been finally acquitted or convicted by the competent authorities of the requested state of the offence for which extradition is sought. This protection against double jeopardy was in principle only applicable to its own nationals, i.e. nationals of the requested state (in this case, Germans).

However, it is only right to extend this principle to other citizens of the Union. This is the only way to ensure that an EU citizen in any other EU state has protection against extradition requests comparable to his or her country of residence and can therefore move freely within the EU. It would lead to unacceptable unequal treatment if an EU citizen could not be extradited if arrested in his or her home country, but could still be extradited if the arrest took place in another EU Member State. If the persecuted person were arrested in Italy as an Italian citizen, he or she would not be extradited to the United States; this should also apply if he or she is arrested in Germany.

For these reasons, the extradition of the persecuted persons was declared inadmissible.

The principle of “ne bis in idem” means that it is impossible to be convicted twice for the same thing. Although the main application of this great principle refers to the second sentence to a person who has already been definitively convicted of the same acts, it also applies within the same procedure. Indeed, a person can be prosecuted for acts that can be classified as having several legal classifications, in other words, which can constitute several different offenses. In this regard, the question arises whether it is possible to find guilty of committing several offenses by committing only one act, or whether it is necessary to choose between different possible classifications.

[11] Oberlandesgericht Frankfurt am Main, Beschluss vom 19. Mai 2020 – 2 AuslA 3/20.

Historically, in the judgment in Ben Haddadi (Crim. 3 March 1960, Bull. crim. n° 138), the Criminal Chamber held that the principle of "ne bis in idem" did not apply in cases where different classifications did not protect the same victims or the same social values. Thus, in this situation, it was possible to maintain the plurality of qualifications regarding the perpetrator of the acts (in this case, the terrorist who threw a grenade on the terrace of a café was convicted of murder and intentional destruction by means dangerous to persons).

Subsequently, the Criminal Chamber firmly established the principle that "acts inseparable from a single action characterized by a single guilty intent cannot give rise to two guilty verdicts of a criminal nature against the defendant, even if they are simultaneous" (Crimea, October 26, 2016, No. 15-84.552), a principle that has been repeatedly repeated and confirmed.

Thus, for example, expressly repeating the principle of 2016, the decision of the Criminal Chamber of October 25, 2017 (No. 16-84.133) states that "without preserving the facts constituting the forgery of documents and using other than the fraudulent maneuvers that it expressly retained to find the defendant guilty of fraud". In other words, only one qualification should be maintained. In this decision, the difficulty was that the forgery was a fraudulent maneuver, a component of fraud. This decision is interesting because the qualifications are similar to the qualifications of the decision of December 15, 2021, in which a U-turn is made.

In the decision made by the plenary session of the Criminal Chamber on December 15, 2021[12], the Court of Cassation limits the scope of application of "ne bis in idem" in the presence of a qualifying conflict.

Thus, in his principle, he considered that "the prohibition on combining qualifications at the time of conviction should be maintained, except in a situation in which the characterization of the constituent elements of one of the offenses necessarily excludes the characterization of the constituent elements of the other, in cases where an identical fact or facts are in question and when one of the following two situations occurs. Further, she clarifies in a very pedagogical way what she means by this: "In the first case, one of the qualifications, as they emerge from the incriminating texts, corresponds to the constituent element or aggravating circumstance of the other, which is the only one then to be preserved", while "In the second, one of the preserved classifications, the so-called special, criminalizes the particular modality of the reprehensible act, which is punishable by another, the so-called common crime".

In the present case, the Court considered that it was possible to convict both fraud and forgery and the use of forgery of documents, taking into account the reasoning of the Court of Appeal. The Court of Appeal considered that a fraudster who provides a partner of a company with false notarial certificates guaranteeing his solvency, in order to persuade him to sell shares to him, can be convicted of both the use of official forgery and fraud. The use of forgery of documents is in itself neither an integral element of the crime of fraud, which in its formulation specifically refers only to fraudulent maneuvers, nor an aggravating circumstance of this offense.

[12] Arrêt de la Cour de Cassation, Chambre criminelle, du 15 décembre 2021 URL: https://www.courdecassation.fr/decision/61b9937eef20f6a61afc35f0

The court found that the characterization of the constituent elements of one of the offenses does not exclude the characteristics of the constituent elements of the other and that none of these offenses is a constituent element or aggravating circumstance of one of the others. Indeed, Article 313-1, which provides for criminal liability for fraud, deals with fraudulent manoeuvres and not specifically with the forgery of documents or the use of forgery as an integral element of this crime.

Thus, the appeal was dismissed, and the guilty verdict for these two crimes was upheld.

2. Analysis of the practice of the European Court of Human Rights

In the judgment in the case of "Luchaninova v. Ukraine"[13] of 9 June 2011 (application no. 16347/02), the European Court of Human Rights, applying the "Engel criteria", concluded that "in view of the general nature of the legislative provision infringed by the applicant [Article 51 § 1 of the Code], as well as the preventive and punitive purpose of the penalties provided for in that provision, the Court considers that the proceedings in question are criminal for the purposes of the application of the Convention <...>. The fact that the penalty imposed on the applicant by the Trostyanets District Court – a fine – was subsequently replaced by a reprimand cannot deprive the offence in question of its inherent criminal character".

Thus, the European Court of Human Rights, considering cases against Ukraine, recognized the administrative offenses defined in the Code as criminal both on the basis of the nature (nature) of the offense and the nature and severity (severity) of the administrative penalty. The latter primarily concerns significant fines and administrative arrest.

The above shows that, firstly, the legislation of Ukraine lacks a distinction between criminal and administrative offenses on the basis of clear criteria, and secondly, the imposition of certain administrative penalties for the commission of administrative offenses, in particular significant fines, administrative arrest, has not only a preventive purpose, but also a punitive one, which is characteristic of criminal punishment, and not administrative penalty.

In the judgment "A and B v. Norway"[14] the Court noted that the preliminary assessment was based on three so-called "Engel criteria" (the legal classification of the offence under national law; the nature of the offence; the degree of severity of the punishment to which the person concerned may suffer), as stated in the Court's judgment in Engel and Others v. the Netherlands (8 June 1976, § 82, Series A no. 22). Important for the Supreme Court's assessment was the general preventive purpose of the tax penalty and the fact that significant amounts may appear due to the fact that 30% is a high rate. The Supreme Court also referred to its judgment published in Rt. 2004 p. 645, which was made on the basis of the Strasbourg jurisprudence (that the concept of "fine" cannot have different meanings under different provisions of the Convention) that a tax penalty of 30% is a matter of

[13] Case Luchaninova v. Ukraine. Application № 16347/02). URL: https://zakon.rada.gov.ua/laws/show/en/974_788?lang=uk#Text

[14] Case of A and B v. Norway. Applications nos. 24130/11 and 29758/11 URL: https://hudoc.echr.coe.int/eng?i=001-168972

criminal justice under Article 4 of Protocol No. 7 – a position that was adopted without further discussion in Rt. 2006 p. 1409.

The Supreme Court also noted the more recent case law "Mjelde v. Norway" No. 11143/04, dated February 1, 2007; "Storbråten v. Norway" No. 12277/04, dated February 1, 2007; "Haarvig v. Norway" No. 11187/05, dated 11 December 2007, with reference to the judgment "Malige v. France" of 23 September 1998, § 35, Report of Resolutions and Decisions 1998VII; and "Nilsson v. Sweden. Sweden", No. 73661/01, ECtHR 2005XIII) that in accordance with Article 4 of Protocol No. 7, a wider range of criteria than the Engel criteria were applied to the assessment. This was confirmed in the judgment in the case of Sergey Zolotukhin (cited in paragraphs 52-57 above), and later in the judgment in the case of "Ruotsalainen v. Finland". (No. 13079/03, paras. 41-47, of 16 June 2009), Engel's three criteria for establishing the existence of a "criminal charge" for the purposes of Article 6 apply equally to the concept of criminal punishment in Article 4 of Protocol No. 7.

The Government invited the Grand Chamber to reaffirm the approach taken in a number of cases that preceded the Zolotukhin judgment, namely that a wider range of factors than the Engel criteria (formulated in accordance with Article 6) was relevant for assessing whether the sanction was "criminal" for the purposes of Article 4 of Protocol No. 7. The Government argued that factors such as the legal classification of the offence under domestic law should be taken into account; the nature of the offense; national legal characteristics of the sanction; its purpose, nature and severity; whether the sanction was applied after a conviction for a criminal offence and the procedures relating to the adoption and application of sanctions.

While the concept of "criminal charge" in Article 6 in the light of Engel's criteria has been expanded beyond the traditional categories of criminal law (malum in se – Latin. "evil in nature") to cover other spheres (malum quia prohibitum – lat. "evil because it is forbidden") criminal charges differ in severity. In the case, for example, of tax penalties that fall outside the "severity" of criminal law, the safeguards under the criminal context of Article 6 of the Convention do not necessarily have to be respected with their full severity (Jussila, cited above, §43). This should be taken into account when determining the scope of application of Article 4 of Protocol No. 7.

In the decision of Tomasovich(Tomasović), the applicant was prosecuted and convicted twice for the same offence of possession of drugs, first as a "misdemeanour" (recognised as "criminal" under the second and third Engel criteria (ibid., §§22-25) and then as a "criminal offence". Since the second proceedings were not discontinued after the conclusion of the first, the Court concluded that there had clearly been duplication of criminal proceedings in breach of Article 4 of Protocol No. 7 (see, by analogy, Muslija, cited above, §§28, 32 and 37, concerning the infliction of serious bodily harm).

Furthermore, in Grande Stevens and Others v. Italy[15] (Nos. 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10, 4 March 2014), the Court found that there had been repeated proceedings concerning the same fraudulent conduct, namely market manipulation by disseminating false information. The first, administrative

[15] Case of Grande Stevens and others v. Italy. URL: https://hudoc.echr.coe.int/eng?i=001-141794

proceedings (from 9 February 2007 to 23 June 2009), which are considered "criminal" under the Engel criteria, were conducted by the National Commission for Companies and the Stock Market (Commissione Nazionale e la Societa e la Borsa – "CONSOB"), continued by an appeal to the Court of Appeal and Cassation and concluded with the imposition of a fine of 3 million. EUR (with a ban on engaging in business). The second criminal proceedings (from 7 November 2008 to 28 February 2013, not yet concluded by a final judgment at the time of the Court's hearing) were conducted in the District Court, the Court of Cassation and the Court of Appeal. The Court found that the new proceedings, concerning the second "offence", took place in the same circumstances as those which had been the subject of the first and last, an argument sufficient for the Court to conclude that there had been a violation of Article 4 of Protocol No. 7.

In view of the need to take into account the application of Article 6 of the Convention in cases of the type currently under consideration (see Jussila, cited above, §43):

"It is clear that there are criminal cases which do not give rise to significant "stigmatization". There are clearly "criminal charges" of varying gravity. Moreover, the autonomous interpretation adopted by the Convention institutions of the concept of "criminal charge", applying the Engel criteria, contributes to the gradual extension of the criminal context to cases which do not fall within the traditional categories of criminal law, such as administrative fines, ..., prison disciplinary proceedings, ..., customs law, ..., competition law, ... and fines imposed by a court in financial matters .... Tax surcharges are not "severe" in the sense of criminal law; therefore, criminal law guarantees do not necessarily have to be applied with all the "severity ...".

In the case Öztürk v. Turkey[16], the Court used three decisive arguments to swim against the tide of decriminalisation and to support the position that the administrative offence at issue, a traffic offence, was "criminal" for the purposes of Article 6: the ordinary meaning of the terms, the criminality of the wrongful conduct in "the vast majority of Contracting States" and the general scope of the rules that were violated – the provisions of the Road Traffic Act. On closer examination, none of these arguments is convincing. It is difficult to draw a dividing line between administrative and criminal offences on the basis of the "ordinary meaning of the terms", whatever that may mean for the Court. Moreover, while it is true that the European consensus is certainly a decisive criterion for the criminalisation of conduct with a high degree of social inadmissibility, it is difficult to understand why the Court should endorse, on the basis of the European consensus on the decriminalisation of minor offences, a trend which reflects an attitude in favour not only of the person, who will no longer be liable under the criminal conditions for his/her conduct and will even possibly avoid trial, but also of ensuring the effective functioning of the courts, which are henceforth relieved in principle of the task of combating the vast majority of such offences. First of all, the Court errs in equating criminal offences with norms of the general personal sphere of regulation. It seems very strange that the established European tradition regarding criminal offences with

[16] Case of Öztürk v. Turkey. Application no. 22479/93 URL: https://hudoc.echr.coe.int/eng?i=001-58305

a limited personal scope, namely rules applicable to certain categories of citizens who differ in their personal or professional characteristics (Sonderdelikte or Pflichtendelikte), is being ignored. Therefore, criminal offences and rules with a limited personal scope are not mutually exclusive.

In the case Västberga Taxi Aktiebolag and Vulic v. Sweden[17], the Court made no reference to the Bendenoun case or to any other specific method it had used in that case, but proceeded directly to examine the case on the basis of the Engel criteria. After confirming that the administrative proceedings had imposed a "criminal penalty" on the applicant, the Court concluded that the judicial review in cases before the courts was secured by the guarantees provided for in Article 6 § 1, since the administrative courts had jurisdiction to examine the questions before them in all their aspects. Their examination was not limited to questions of law but could also extend to questions of fact, including the assessment of evidence. If they disagreed with the tax authority's findings, they had the right to quash the contested decision by appealing against it. The Court added that the starting point for tax authorities and courts must be that the inaccuracies found in the tax assessments arose from an undisputed act attributable to the taxpayer and that the tax assessment as a penalty for that act was not unreasonable. The tax authorities and courts are required to consider whether there are grounds for exemption from the penalty, even if the taxpayer has not made any declaration to that effect. However, the obligation to consider whether there are grounds for exemption from the penalty arises only where the circumstances of the case so permit; the burden of proving that there is a reason for cancelling the assessments, in fact, lies with the taxpayer. The Court concluded that a tax system which operates on the basis of a presumption that the taxpayer must prove the contrary is compatible with Article 6 § 2 of the Convention.

The lack of conceptual clarity in the definition of "severe criminal law" under Article 6 is further compounded by the fact that the application of the Engel test is usually more a question of degree, depending on the penalties imposed and those that may be imposed, than a question of the nature of the charges brought against the accused. The Court has often preferred to decide whether the Engel test applies by resorting to a purely quantitative assessment rather than the qualitative nature of the offences. When it begins its analysis of the essential nature of the offence, it often resorts to the fallacious argument from Öztürk concerning the limited personal limits of the norm.

The Court in "Saquetti Iglesias v. Spain" the criminal nature of the penalty imposed on the applicant was established, taking into account the "Engel criteria".

Classification in national law: the essence of such a penalty under national law is that failure to comply with the provisions of the legislation on customs declarations established by the Law on the Prevention of Money Laundering and Financing of Terrorism was essentially an "administrative" offence.

Nature of the offence: the relevant provision of this law was of a general nature and extended its effect to any natural or legal person who crosses the state border and carries out actions related to the movement of his capital. The purpose of applying

[17] Case of Västberga Taxi Aktiebolag and Vulic v. Sweden. Application no. 36985/97 URL: https://hudoc.echr.coe.int/eng?i=001-60627

such a type of penalty as a fine was not to protect the state from the loss of capital, but to deter and prevent the spread of crime. In view of the above, the present case differed from previous cases, such as Inocencio v. Portugal (dec.) (no. 43862/98, judgment of 11 January 2001, Information Note 26) in which a fine of only EUR 2,500 was imposed for unauthorised work, and Butler v. the United Kingdom (no. 41661/98, judgment of 26 June 2002, Information Note 43) in which a more severe penalty was imposed; although the authorities had carried out a proportionality test and had adduced admissible and relevant evidence that the applicant, who had a criminal record, had been involved in the commission of the offence of smuggling.

Severity of the penalty imposed: according to the provisions of national law, the severity of the penalty imposed is determined taking into account the qualification of the crime committed by the person as "serious" and provides for the payment of a fine of at least 600 euros, which is twice the amount in question.

Principles of interpretation: According to the Explanatory Report to Protocol No. 7 to the Convention, when deciding whether an offence is of a minor nature, an important criterion is whether a custodial sentence is possible. In the present case, if the applicant had not paid the fine, this sentence could not have been replaced by another sentence, namely detention. However, this aspect was not decisive, since other criteria had to be taken into account.

Therefore, after the Engel and Others v. the Netherlands case in 1976, it is no longer possible to classify a sanction in purely formal terms, since the interpreter must recognize it as "criminal in nature" if at least one of the criteria developed by the now consolidated Strasbourg case-law (namely the "Engel criteria") is met: (1) the classification under national law; (2) the nature of the offence; (3) the severity of the penalty. And for this purpose, it is sufficient that only one of the three criteria mentioned above is present.

In the case of "Lázaro Laporte v. Spain" the Court is concerned, first of all, with determining whether the administrative disciplinary proceedings in the present case constitute a "criminal offence" or a "criminal proceeding" within the meaning of the Convention. Turning to the facts of the present case, with regard to the first of the above criteria, namely the legal classification of the offence and the procedure under domestic law, this Court notes that the rules applicable to the impugned administrative proceedings form part of the disciplinary system governing the activities of civil servants in the State administration. The disciplinary proceedings were based on the fact that the applicant, in the performance of his duties and in the use of university equipment and premises, had obstructed "the exercise of civil liberties". As regards the second criterion, namely the nature of the offence in question, the Court considers, first of all, that they were a sanction typical of a disciplinary offence and could not be regarded as equivalent to a criminal penalty. The Court considers that these sanctions were imposed in connection with the misconduct of officials in the performance of their duties and that the domestic courts distinguished between the legitimate interests protected by criminal proceedings and those protected by disciplinary proceedings. The lawfulness of the disciplinary sanctions was subject to judicial review.

The Court subsequently noted that in the present case the applicant's suspension from service for four years had been imposed in connection with a very serious

misconduct and that the university authorities had the power to punish the misconduct of civil servants in disciplinary proceedings, provided that such misconduct had been properly dealt with. In that connection, this Court notes that the decision of the competent criminal court (see paragraph 3 above) had acquitted the applicant on the ground that his unauthorised access to e-mail accounts had affected e-mail accounts provided by the institution and which were not used for private purposes. However, the decision also found it proven that the applicant had systematically accessed the e-mails of certain colleagues without their consent, using the university's equipment and facilities. Facts established by final court decisions in criminal cases are binding for disciplinary proceedings under domestic law.

The European Court of Human Rights in the case of "Grande Stevens and Others v. Italy"[18]: On 4 March 2014, the Strasbourg Court was to rule on a possible violation by Italy of Article 4 of Protocol No. 7 on the right not to be tried or punished twice, which the Italian State had accepted with reservations, which provided for the application of that article only to formally criminal proceedings. The Consob had sentenced the applicants, under Article 187-tTUF, to administrative fines of several million euros; while, despite the final closure of the administrative proceedings, they were convicted in the criminal proceedings of an offence under Article 185 of the same text.

The ECtHR held that Article 187-t, formally administrative, was essentially criminal, overlapping, in essence, with that provided for in Article 185: thus, by recognising the criminal nature of the offence, the guarantees governing criminal proceedings follow, with the recognition of the right to a fair trial and, consequently, the conviction against Italy for a violation of Article 6 of the ECHR, since there was no public hearing in the appeal court.

The further consequence of the recognition of the criminal proceedings is a violation of the principle of ne bis in idem, in this case the Court finds two separate proceedings for the same conduct, with a subsequent violation of Article 4 Protocol 7 and declaring the reservation of the Italian State invalid in relation to the violation of Article 57 of the ECHR, since it is "general and vague".

The State was therefore ordered to remedy this violation. The Court thus effectively rejected the two-track system proposed by the Italian legislature, since it undermines the aforementioned principle of ne bis in idem.

The Grade Stevens case is nothing other than the product of a jurisprudential evolution that is still ongoing at the ECtHR under the principle of ne bis in idem, which began with the broadening of the concept of criminal cases, which occurred with the judgment of the Grand Chamber in the case of Engel and Others v. the Netherlands of 8 June 1976. In that judgment, the Court establishes three criteria by which it can determine which measures are essentially criminal in nature and, thus, confer the appropriate guarantees on the parties. These criteria, which in the Engel case concern the field of military law, have been made general and enshrined in the case-law of the Court itself in the judgment of 21 February 1984 in the case of Öztürk v. Germany. These include: the domestic legal classification, according to

[18] Case of Grande Stevens and others v. Italy. URL: https://hudoc.echr.coe.int/eng?i=001-141794

which "it is necessary first of all to know whether the provisions defining the offence in question fall within the scope of criminal law, disciplinary law or both"[19]; the nature of the offence and the function of the measure envisaged, which must be applied in a general manner and have a preventive and repressive purpose. Finally, the seriousness of the sanction, which does not necessarily have to consist in deprivation of personal liberty, as confirmed in subsequent decisions (cf. A and B v. Norway, Grand Chamber, 15.11.2016; Jóhannesson v. Iceland, 18.5.2017).

At the hearing on 23 November 2006 in the case of Jussila v. Finland, the Grand Chamber confirmed that these criteria, being general, must be applied in any field, excluding their sectoral applicability, and reiterated that they are alternative and not cumulative.

3. Analysis of the case law of the Court of Justice of the EU

"Ne bis in idem" – "No one shall be tried or punished twice for the same offence" – this central legal principle can be found not only in the European Convention on Human Rights (ECHR) but also in the Charter of Fundamental Rights of the European Union (Article 50 of the Convention on Human Rights).

However, now the European Court of Justice has recently ruled (C-524/15; C-537/16; C-596/16; C-597/16) that there may be limitations to this double jeopardy in order to protect the financial interests of the European Union and its financial markets.

The starting point for the landmark decision was four cases from Italy in which the Court of Justice had to consider whether criminal and administrative sanctions could be imposed on the same person at the same time for the same act. The Luxembourg judges ruled "yes", but only if the national regulation providing for the "ne bis in idem" exception meets four conditions:

1. It must have an objective of general interest capable of justifying such accumulation of penalties.

2. National legislation must establish clear and precise rules enabling citizens to foresee which acts and omissions may constitute double jeopardy.

3. Such legislation must ensure that procedures are harmonised. Finally, the burden associated with double jeopardy must be minimised for the person concerned.

Finally, such legislation must ensure that the penalties imposed are limited to what is strictly necessary in relation to the seriousness of the offence in question. The Court of Justice did not consider these conditions to be met in all four cases referred. For example, the Court held that the principle of proportionality was not respected in the case of a regulatory act aimed at prosecuting market manipulation. That Italian legislation provides that administrative criminal proceedings may be brought even if the case has already been the subject of a criminal conviction. This is unacceptable, according to the judges of the Court of Justice: here "the criminal sanction itself is already suitable for effective, proportionate and dissuasive punishment for the criminal offence". Furthermore, the regulatory act does not appear to provide any guarantee that the severity of any penalties imposed will be limited to what is strictly

[19] Goisis F., La tutela del cittadino nei confrontaciones delle sanzioni amministrative tra diritto nazionale ed europeo, G.Giappichelli, Torino, 2014, p.1.

necessary in relation to the seriousness of the offence in question, according to the Court of Justice.

The implementation of that idea in EU law has been somewhat difficult for a number of reasons. Three of them are worth singling out. First, in a composite legal space such as the European Union, be it horizontally (Member States – Member States) or vertically (Member States – European Union), the practical implementation of that idea results in an enhanced level of complexity[20]. There are simply too many variables. Second, new segments, layers, and sub-fields of regulation are being introduced. New bodies or authorities responsible for their supervision are being created. This sometimes leads to an overlap in mandates and confusion as to where the competence to investigate and punish lies. Third, there is the 'Engel-multiplication'. The rather expansionist criteria, originally coined by the European Court of Human Rights ('the ECtHR') to broaden its jurisdiction under Article 6(1) of the European Convention of Human Rights (ECHR), are now also being used in other contexts. That includes the assessment of what constitutes a 'criminal offence' for the purposes of Article 50 of the Charter. As a result, many rules and procedures that were in the past perceived on a conceptual level as being administrative, are now considered to be criminal.

The combination of those three factors has vastly expanded the set of procedures and sanctions to which the principle ne bis in idem has become applicable. Finding a reasonable balance between the protection of fundamental rights and the safeguarding of legitimate interests when punishing certain types of behaviour has thus proven difficult over the years. The case-law of this Court, developed through interactions with the ECtHR, is marked by fragmentation and partial inconsistency. It can hardly be characterised as (ne) bis in idem, but rather by now a quater or quinquies in idem, while uncertainty continues to plague bis as well.

The Court was faced with the decision of whether to embrace the approach adopted by the ECtHR in A and B, or whether to maintain its previous approach adopted in a similar context in Åkerberg Fransson. In the latter case, it was held that the principle ne bis in idem did not preclude a Member State from successively imposing, for the same acts of non-compliance with VAT obligations, a tax penalty and a criminal penalty in so far as the first penalty was not criminal in nature (based on the Engel criteria)[21].

Menci is a paradox. In the interest of providing increased protection in accordance with the case-law of the ECtHR, its surprising consequence is that it fails to provide effective individual protection.

As a preliminary point of context, it must be acknowledged that part of the problem stems at the outset from the definition and application by the ECtHR of what is commonly referred to as the Engel criteria, through which the ECtHR developed a rather expansionist view of what constitutes a "criminal" matter. That broad interpretation of the concept of "criminal" matter has been used to bring under the

[20] Opinion of Advocate General Bobek delivered on 2 September 2021. Case C-117/20. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62020CC0117&qid=1742116089163

[21] Judgment of the Court (Grand Chamber) 26 February 2013 . Case C-617/10 URL: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62010CJ0617

jurisdiction of the ECtHR national proceedings that would have otherwise fallen outside the scope of Article 6 ECHR due to their classification, in national law, as administrative matters.

It would appear that, at present, the Engel criteria are unlikely to be revisited. However, this means that, unless any and every second set of administrative-criminal proceedings is to be found inadmissible, irrespective of the various purposes or objectives that it may pursue, the definition of idem must become more demanding. Otherwise, if both the definition of criminal and the definition of idem are too broad, most of the parallel administrative regimes in the Member States will face considerable problems in terms of their enforcement, not to mention the fact that parallel administrative procedures may take place across the Member States or at EU level.

However, it is in the case-law of the ECtHR that the concept of protected legal interest exhibits truly chameleonic qualities. First, in the period before Zolotukhin, the difference in legal interests pursued seemed to be part of the definition of idem, at least in most cases. That is particularly well illustrated in the case-law of the ECtHR concerning applicants who caused car accidents in respect of which criminal and administrative penalties were imposed on them, the latter consisting in the withdrawal of their driving licence. The ECtHR has accepted the possibility of that combination despite the licence withdrawal usually being qualified as Engel-criminal[22]. Second, it is true that the judgment in Zolotukhin denied the relevance of the difference in legal interest. Third, a few years later, however, in A and B, the difference in protected legal interest was de facto re-introduced once again. This time, and as the Court did later in Menci, it morphed into the considerations relating to the complementary objectives pursued by the legislation applied in both proceedings at issue. Unlike the Court's approach in Menci, however, and perhaps somewhat surprisingly on a conceptual level, whether 'different proceedings pursue complementary purposes and thus address … different aspects of the social misconduct involved' has suddenly re-emerged as part of the assessment of the bis criterion and the question whether (or not) there is a sufficient connection in substance.

The present case concerns two sets of administrative proceedings, qualified a priori as Engel-criminal, and conducted within one Member State. It thus represents a variety of the third scenario outlined above, but is limited to the same Member State. Alternatively, it could also be seen as an alteration of the Menci scenario: it is situated within the same Member State, but involves two sets of proceedings that are criminal, not because of its national original conception, but because of Engel.

The decision in the Van Esbroek case 2006 even suggests that these two criteria are mutually exclusive when it is stated that "it is clear from the wording of Article 54 of the CISA, which uses the words "the same acts", that this provision concerns only the precision of the facts in question, to the exclusion of their legal classification [... The only relevant criterion for the purposes of applying Article 54 of the Convention for the Protection of Human Rights and Fundamental Freedoms is the criterion of identity of the material acts, understood as the presence of a set of specific circumstances inextricably linked to one another", which means "a set of

[22] Opinion of Advocate General Bobek delivered on 2 September 2021. Case C-117/20. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62020CC0117&qid=1742116089163

facts which are by their nature inextricably linked". However, it is "for the competent national authorities to determine whether the relevant material facts constitute a set of facts inextricably linked in time, space and purpose".

According to the Walt Wilhelm judgment of 1969, "if [...] the possibility of a double procedure [...] should lead to a duplication of penalties, the general requirement of fairness, expressed in the end of paragraph 2 of Article 90 of the EAEC Treaty, requires that any previous punitive decision must be taken into account in determining the possible penalty" (Judgment of the Court of 13 February 1969. Walt Wilhelm and others v Bundeskartellamt. Case 14-68). Fairness, a concept that may seem specifically designed to combat anti-competitive conduct, may not, however, constitute the best basis for formulating the cumulation of penalties in the criminal sphere in the strict sense. However, since, on the one hand, the principle of ne bis in idem can be linked to the notion of dignity, and, on the other hand, "the cumulation of penalties is not necessarily prohibited as long as the penalty remains effective, proportionate and dissuasive", one might wonder whether the principle of proportionality would not be a better justification and a better standard for constructing a legal regime for the cumulation of penalties. In this respect, one might consider, as Advocate General Colomer did, that the two concepts are mixed and that the rule of proportionality is an instrument of the principle of fairness.

In the case C-489/10 – a request for a preliminary ruling submitted by the Polish Supreme Court to the Court of Justice of the European Union (a good example of the symbiosis that exists between the ECHR of the Council of Europe and the CJEU of the European Union). On 15 December 2011, Advocate General Juliane Kokott delivered her Opinion, in which she referred in more detail to these criteria (§§ 47-49):

The first Engel criterion concerns the classification of a provision in criminal law in accordance with the national legal order. However, the ECtHR does not consider this classification to be decisive, but only a starting point for the analysis.

In the context of the second Engel criterion, the ECtHR considers, first, the group of addressees of the rule punishing a specific offence. When a rule is aimed at the general public and not, for example, in disciplinary law at a group with a certain status, this fact indicates that the sanction is of a criminal nature. In doing so, the ECtHR takes into account the purpose of the sanction provided for in the criminal provision. The criminal nature is denied if the sanction is aimed only at compensating for material damage. However, if it is aimed at repression and prevention, there is a criminal penalty. In addition, the ECtHR took into account (...) whether the sanction for the commission of a crime is intended to protect legitimate interests, the protection of which is usually guaranteed by the rules of criminal law. These elements must be assessed in a complex.

Engel's third criterion concerns the type and severity of the sanction envisaged. In the case of deprivation of liberty, there is generally a presumption that the sanction is of a criminal nature, which will admit proof to the contrary only exceptionally. Similarly, financial penalties, the non-fulfilment of which provides for an alternative penalty of deprivation of liberty or which entail an entry in the criminal record, constitute, in general, an understanding that criminal proceedings are taking place.

Opinion of Advocate General Bobek in Case C-117/20 bpost SA v. Autorité belge de la concurrence, has also recently been included in the debate.

The lawyer opens the proceedings by emphasizing that the issue is difficult to resolve given the regulatory and organizational space in which it arises: that of the European Union, a dimension characterized by a layering of bodies and regulations that often conflict with each other, among which it is difficult to determine with certainty the competences.

The difficulties are also linked to the correct interpretation of Article 50 of the Charter and the definition it gives to the term "crime". In a legal substratum such as that which began with the Engel judgment, it becomes fundamentally important to understand when cases considered administrative can be defined as criminal in nature.

In any case, the extension of administrative cases that are criminal in nature has also extended the application of Art. 50 of the Charter to an increasingly numerous cases, which makes it necessary to reconcile opposing interests: on the one hand, respect for constitutional guarantees and, on the other, the freedom for Member States to adopt the instruments they consider necessary to suppress unlawful conduct, perhaps even with the opening of double judicial proceedings in two different places – criminal and administrative.

The lawyer points out that the response of the European legal institutions on this issue has been and remains largely unsatisfactory due to the past tendency to use the Engel criteria to transfer national proceedings that were otherwise excluded from its jurisdiction to the jurisdiction of the ECtHR, formally classifying administrative proceedings as "criminal".

In an attempt to "set things straight", the Advocate General therefore considered it necessary to define a new criterion on which to focus: the legitimate interest protected. Thus, the assessment of idem for the purposes of Article 50 of the Charter must be based on the triple identity: the author, the relevant facts and the protected legal interest.

As regards the identity of the author, the discipline must be unquestionable without further clarification.

Secondly, as regards the relevant facts, the correlation is that, to the extent that the two proceedings overlap, there is an identity in that overlap, understood not as a simple similarity but as a precise factual identity.

Finally, as regards the legal interest in question, the Advocate General's consideration becomes more complex, stressing that such investigation and research must be carried out at a higher level, defined as "natural", which disregards the simple classification given by the national legislature. It will therefore not be sufficient to indicate how the offence is included in that part of the Code which protects public order or public administration, but the facts must be "delocalised" from the specific national regulatory context, just as was the case for a certain time for the same sanctions which were formally administrative but essentially criminal.

To sum up, the current European normative, doctrinal and jurisprudential situation can be presented as follows: after a long period of operation and application – almost "messy", if you want to use the term – of the Engel Criteria, the case-law has taken a significant step back, recognizing the need to establish limitations to Article 50 of the Convention for the Protection of Human Rights and Fundamental Freedoms in the light of Article 52 of the Convention for the Protection of Human Rights and Fundamental Freedoms, limits that will have to be assessed and

set in the light of the criteria provided by the case-law of the ECtHR, to which the Advocate General, in his opinion, intends to instill new ones.

The European Court of Justice (ECJ) has now decided the question of the conditions under which there is a "European prohibition of double jeopardy" under Article 54 of the CISA in conjunction with Article 50 of the Charter (Judgment of the Court (Grand Chamber) of 29 June 2016. Criminal proceedings against Piotr Kossowski.). The decision was based on a request from the Hanseatic Higher Regional Court of Hamburg in the context of the preliminary ruling procedure under Article 267 TFEU.

The Hamburg Public Prosecutor's Office opened an investigation against the accused in 2005 on suspicion of aggravated robbery and extortion committed in Hamburg. The accused was subsequently arrested in Poland. Subsequently, the competent Polish Public Prosecutor's Office also initiated an investigation on the same suspicion and forwarded the investigation materials from Hamburg to it by way of administrative assistance. Some time later, the Polish Public Prosecutor's Office closed the investigation due to the lack of sufficient suspicion, justifying this decision solely on the grounds that the accused had not given evidence and that witnesses living in Germany could not be questioned.

In 2009, the Polish District Court refused to execute a European arrest warrant issued by the Hamburg Public Prosecutor's Office, citing the final conclusion (discontinuation) of Polish criminal proceedings. In 2014, the defendant was arrested in Berlin on the basis of an arrest warrant issued by the Hamburg District Court in 2006 and was charged shortly thereafter. The Hamburg District Court refused to open the main proceedings because the Polish Public Prosecutor's Office's decision to discontinue the proceedings did not allow criminal charges to be brought and therefore there was a prohibition on double prosecution under Article 54 of the CISA. The Public Prosecutor's Office immediately appealed against this decision to the Hanseatic Higher Regional Court, which referred the case to the Court of Justice of the EU.

In its judgment, the CJEU focuses on the second question referred by the Higher Regional Court, namely whether the decision of the Polish Public Prosecutor's Office to discontinue the proceedings can be considered a "final decision" within the meaning of Articles 54 CISA and 50 of the Charter if the proceedings were discontinued without prior detailed investigations.

The CJEU first explains that the occurrence of a final prohibition on criminal prosecution is assessed in accordance with the national provisions of the Member State concerned which issued the decision (paragraph 35). This was in principle also the case with the decision to discontinue the proceedings under Polish law. It is also irrelevant that this decision was not taken by a court but by a body designated to participate in the conduct of criminal proceedings. Furthermore, it is irrelevant that no further sanctions within the meaning of Article 54 CISA were imposed, since this is only a necessary condition in the event of an actual conviction (paragraphs 39-41).

However, according to the case-law of the Court of Justice, an additional prerequisite for the prohibition of double prosecution is that the decision to (discontinue) the case was taken after the examination of the merits of the case. The Court of Justice justifies this by the meaning and purpose of Articles 54 CISA and 50 of the Charter. The provisions on the prohibition of double prosecution are

primarily intended to protect a person who has been finally convicted from being prosecuted again in other Member States for the same acts, which would affect his freedom of movement within the European Union as an area of freedom, security and justice. On the other hand, these provisions are not intended to protect a suspect from being investigated in several Member States for the same offence (paragraphs 44-45). In this regard, this area of freedom, security and justice must also protect all its citizens against crime and criminal offences by means of appropriate measures in the light of Article 3(2) of the Treaty on European Union.

In view of this, the decision to close the case, which is taken without conducting an in-depth investigation, does not meet the objectives of Article 54 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The Polish prosecutor's reasoning that the accused refused to testify and other witnesses could not be heard was insufficient and already indicated that a decision on the merits had not been taken (paragraphs 48, 53).

In view of all the above, the decision of the Polish prosecutor's office to close the proceedings in a specific case does not constitute a final decision within the meaning of Articles 54 CISA and 50 of the Statute. Therefore, there is no prohibition of double jeopardy here.

According to this judgment of the Court of Justice of the EU, the prohibition of double jeopardy no longer stands in the way of criminal proceedings before the Hamburg District Court. Given the fact that the alleged act occurred in 2005 and that the criminal proceedings are now only commencing eleven years later, the criterion of "excessive length of proceedings" should at least be borne in mind. According to the case-law of the Federal Constitutional Court, excessively long court proceedings may also be disproportionate and, in some cases, lead to an obstruction of the proceedings.

CONCLUSION

In view of the above, in order for the accusation to be considered within the framework of criminal proceedings, in accordance with Article 6 of the ECHR, it is sufficient that the offence is criminal in nature under the Convention or that the sanction provided for by its nature and gravity falls within the criminal sphere. This orientation prevails in supranational jurisprudence in connection with the degree of severity of the sanction system such that it is necessary to speak of a quantitative assessment of the "tone of suffering of the sanction". It should be borne in mind that the Engel criteria are alternative, not cumulative, considering the possibility of applying a unitary approach if the separate analysis of each of them does not allow to arrive at a clear determination of the presence of the accusation in criminal proceedings.

The so-called Engel criteria, developed by the European Court of Human Rights, are therefore currently a cornerstone of Strasbourg case-law and are also fully shared by the European Court, which recalls that in assessing the "criminal nature of proceedings and sanctions (...) Three criteria are relevant ...". The European Court of Justice states that Member States are entitled to resort to administrative and criminal measures simultaneously, provided that "the formal classification of the former does not in fact conceal an unjustified duplication of penalties in disregard of the

prohibition of double jeopardy", underlining the relevance of the Engel criteria, which would in such a case lead the interpreter to consider that he has encountered a breach of the bis in idem prohibition under Article 50 of the Statute. Finally, "the assessment of the compatibility of the totality of penalties with ne bis in idem is primarily a matter for the national court", which may rely on national standards of protection, "provided that that this will not affect the level of protection guaranteed by the Charter and the primacy of European Union law."

SUMMARY

The evolution of the case law on the identity of different proceedings based on identical facts in the application of the ne bis in idem principle by the European Court of Human Rights from the moments preceding the adoption of Protocol 7 to the present. Discrepancies or, more precisely, a vacuum in the interpretation of the applicability of the ne bis in idem principle in situations of legal classifications of facts with the same identity, the same essence, which should be covered by national courts by fulfilling the positive obligation to directly apply the provisions of the ECHR and the case law of the ECtHR and the CJEU.

Ne bis in idem is a principle of criminal law that prevents the same person from being prosecuted or punished more than once for the same offence. It is "a guarantee of the citizen against the punitive power of the state in order to protect his subjective right to criminal prosecution in accordance with due process of law" and to ensure that, if the accused is found guilty, the sanction is "proportionate and consistent with the offence against the legal good affected by the unlawful conduct". The conduct of criminal proceedings based on the rule of law is subject to certain procedural principles. This includes the fact that there may be no procedural obstacles to the conduct of criminal proceedings. Such a procedural obstacle may result from the prohibition of double jeopardy or the prohibition of double jeopardy (ne bis in idem).

Key words: criminal proceedings, ne bis in idem principle, Engel criteria, European Court of Human Rights, Court of Justice of the European Union

Bibliography

1. Arrêt de la Cour de Cassation, Chambre criminelle, du 15 décembre 2021 URL: https://www.courdecassation.fr/decision/61b9937eef20f6a61afc35f0

2. Case C-117/20: Request for a preliminary ruling from the Cour d'appel de Bruxelles (Belgium) lodged on 3 March 2020 – bpost SA v Autorité belge de la concurrence. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62020CN0117&qid=1742121477369

3. Case Luchaninova v. Ukraine. Application № 16347/02). URL: https://zakon.rada.gov.ua/laws/show/en/974_788?lang=uk#Text

4. Case of A and B v. Norway. Applications nos. 24130/11 and 29758/11 URL: https://hudoc.echr.coe.int/eng?i=001-168972

5. Case of Grande Stevens and others v. Italy. URL: https://hudoc.echr.coe.int/eng?i=001-141794

6. Case of Jussila v. Finland. Application no. 73053/01 URL: https://hudoc.echr.coe.int/eng?i=001-78135

7. Case of Öztürk v. Turkey. Application no. 22479/93 URL: https://hudoc.echr.coe.int/eng?i=001-58305
8. Case of Saquetti Iglesias v. Spain. Application no. 50514/13 URL: https://hudoc.echr.coe.int/eng?i=001-203699
9. Case of Västberga Taxi Aktiebolag and Vulic v. Sweden. Application no. 36985/97 URL: https://hudoc.echr.coe.int/eng?i=001-60627
10. Case-law references of judgments, advisory opinions and key case decisions. URL: https://www.echr.coe.int/documents/604084/839313/Case_law_references_ENG.pdf
11. CJCE, 11 févr. 2003, Gözütok et Brügge, nos C-187/01 et C-385/01, point 33.
12. Constantinescu V. Aplicarea principiului non bis in idem in jurisprudența europeană si națională. Curierul Judiciar nr. 10/2012 URL: https://www.curieruljudiciar.ro/2012/12/03/aplicarea-principiului-non-bis-in-idem-in-jurisprudenta-europeana-si-nationala/
13. Coutron L., Lecomte F. Le principe ne bis in idem dans la jurisprudence de la Cour de justice de l'Union européenne : de la diversité dans l'unité? URL: https://droit.cairn.info/revue-revue-du-droit-public-2018-1-page-5?lang=fr#re1no6
14. Decision Jorge Manuel Lázaro Laporta against Spain. Application no. 32754/16 URL: https://hudoc.echr.coe.int/eng?i=001-185991
15. Doctrina Murray y criterios Engels: dos recientes sentencias del Tribunal Supremo. URL: https://miguelrebolledo.es/2022/01/16/doctrina-murray-criterios-engels/
16. Goisis F., La tutela del cittadino nei confrontaciones delle sanzioni amministrative tra diritto nazionale ed europeo, G.Giappichelli, Torino, 2014, p.1.
17. Goisis FRANCESCO, La tutela del cittadino nei confronti delle sanzioni amministrative tra diritto nazionale ed europeo, G.Giappichelli, Torino, 2014, p.1.
18. Judgment of the Court (Grand Chamber) 26 February 2013 . Case C-617/10 URL: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62010CJ0617
19. Judgment of the Court (Grand Chamber) of 29 June 2016. Criminal proceedings against Piotr Kossowski. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CJ0486
20. Judgment of the Court (Grand Chamber), 5 June 2012. Case C-489/10. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62010CJ0489
21. Judgment of the Court (Second Chamber) of 9 March 2006. Criminal proceedings against Leopold Henri Van Esbroeck. Case C-436/04. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62004CJ0436
22. Judgment of the Court of 13 February 1969. Walt Wilhelm and others v Bundeskartellamt. Case 14-68. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61968CJ0014
23. Nita B., Zasada ne bis in idem w międzynarodowym obrocie karnym, PiP Nr 3/2005, s. 8.
24. Oberlandesgericht Frankfurt am Main, Beschluss vom 19. Mai 2020 – 2 AuslA 3/20.

25. Opinion of Advocate General Bobek delivered on 2 September 2021. CaseC-117/20. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62020CC0117&qid=1742116089163

26. Opinion of Advocate General Bobek delivered on 2 September 2021. Case C-117/20. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62020CC0117&qid=1742116089163

27. Ossandón, Magdalena. El legislador y el principio ne bis in idem. Política Criminal, v. 13, n. 26, p. 952-1002, dez. 2018. p. 959 e ss.

28. Roșioru M. Evoluție interpretativă a criteriilor „Engel". URL: https://ibn.idsi.md/sites/default/files/imag_file/78-81_35.pdf

29. Sakowicz A., Zasada ne bis in idem w prawie karnym w ujęciu paneuropejskim, Białystok 2011, s. 31.

30. Щербанюк О.В. Конституційна основа ЄС для тесту Енгеля та концепції санкцій. *Право і суспільство*. № 5/2024. С. 423-428.

Information about the author:
Snigur Mykola Vasyliovych,
Postgraduate student of the Department of Procedural Law
Yuriy Fedkovych Chernivtsi National University
2, Kotsiubynskoho str., Chernivtsi, 58012, Ukraine