Balázs Elek[1]

The CJEU and the ECtHR changing case law in judging dual administrative and criminal sanctions

Introduction

The case law on the prohibition of double jeopardy is constantly evolving. Initially, we observed a strict judgment based on the identity of the facts in the practice of the Court of Justice European Union (CJEU) and the European Court of Human Rights (ECHR). Later, we could see that more and more exceptions were given to the Member States of the European Union. Initially, parallel administrative and criminal proceedings were prohibited by case law. Later, we observed that all this is not completely forbidden.

In the practice of the courts the so-called Engel criteria have extended the number of criminal cases for cases that do not fall closely into traditional categories of criminal law. We can mention the administrative penalties, the prison disciplinary proceedings, the customs law, competition law, penalties imposed by a court with jurisdiction in financial matters.[2] these cases have further reinforced the dilemma of whether criminal and administrative cases can be conducted in parallel. It was the Engel criteria that showed that in many Member States should change the traditional perception of res judicata.[3]

It should be mentioned that in the present study I examine the issue primarily in terms of domestic law. By this I mean the requirements that the two international courts impose on Member States for parallel proceedings under national law. Of course, there may be further parallel proceedings between Member States. There may be administrative proceedings in one Member State and criminal proceedings in another Member State for the same act. In such cases, the principle of mutual recognition of decisions further complicates the procedures.[4]

International treaties and conventions prohibiting double jeopardy

The ne bis in idem principle is enshrined in various international instruments.[5]

The International Covenant on Civil and Political Rights (1966) under the auspices of the UN General Assembly. The Article 14 (7) of the Convention provides that „No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

The Convention for the Protection of Human Rights[6] and Fundamental Freedoms (1950) in Rome

[1] prof. dr. habil, Head of Criminal Procedure Department, University of Debrecen Faculty of Law, A tanulmány megírása az Igazságügyi Minisztérium jogászképzés színvonalának emelését célzó programjai keretében valósult meg. In the framework of the Ministry of Justice's programs to improve the quality of legal training.

[2] Öztürk case, Campbell and Fell v. the United Kingdom, Salabiaku v. France, 7 October 1988, Société Stenuit v. France, 27 February 1992, Guisset v. France, no. 33933/96, ECHR 2000.

[3] Herke Csongor – Fenyvesi Csaba – Tremmel Flórian: A büntető Eljárásjog elmélete. Dialóg CampusKiadó, Budapest- Pécs, 2012, p. 318.

[4] Karsai Krisztina: The principle of mutual recognition in the international cooperation in criminal matters. Zbornik Radova 2008/1-2, pp. 941–954.

[5] In a wider concept, the protection against duplication of criminal proceedings is one of the specific safeguards associated with the general guarantee of a fair hearing in criminal proceedings. (Mihalache v. Romania [GC], § 48) Both of these prinicples are aiming at ensuring the procedural aspect of justice in a criminal proceeding. Described in more detail in: Zsiros, Bettina: Az igazság és az igazságosság összefüggései a büntetőeljárásban. Magyar Jog, 2020/12, 711 – 717), Józan Flóra – Kőhalmi László, Rule of Law and Criminal Law Thoughts about the criminal justice of the Millennium Era, Journal of Eastern-European Criminal Law, 1/2017. p. 209–210.

[6] Kőhalmi László: Terrorism and human rights, Journal of Eastern-European Criminal Law, 1/2015. p. 159–160.

and its eight Additional Protocols Article 4 of the Seventh Additional Protocol contains that „No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State. The provisions of the proceeding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case."

The European Union main document on the prohibition of double jeopardy, double prosecution or punishment is theCharter of Fundamental Rights into the Treaty. The Charter declares that *„No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law."*[7]

The Convention Implementing the Schengen Agreement (CISA) Articles 54 deal with the prohibition of double jeopardy: *„A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party."*

The conventions that can be taken directly into account in the national criminal procedures are the Art. 4 of Protocol No. 7 to the European Convention on Human Rights (ECHR), Art. 50 of the EU Charter of Fundamental Rights (CFR), Art. 54 of the Convention implementing the Schengen Agreement (CISA).

Under both legal texts, the following four elements are necessary to the application. First of all the two sets of proceedings of criminal nature (bis). Secondly concerning the same facts (idem). The third condition is „against the same offender", and finally „a final decision".

The jurisprudence of the Courts of Strasbourg and Luxembourg on the prohibition of double jeopardy until 2016

The ruling of the European Court of Human Rights is based on the European Convention on Human Rights. The Court of Justice of the European Union act in accordance with the Treaties of the European Union. However, it can be stated that the tasks of the Court of Justice of the European Union are not limited to judicial review of acts of EU legal institutions. The Court of Justice of the European Union also examines the fundamental criteria of the rule of law in judicial review.[8] This includes the prohibition of double jeopardy.

Until 2016, the jurisprudence of the Courts of Strasbourg and Luxembourg on the prohibition of double jeopardy aligned towards a higher level of protection.[9]

In Case C-436/04 the criminal proceedings against Leopold Henri Van Esbroeck the Europen Union Court said that article 54 of the Convention must be interpreted as meaning that the relevant criterion for the purposes of the application of that article is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected. So punishable acts consisting of exporting and importing the same narcotic drugs and which are prosecuted in different Contracting States to the Convention are, in principle, to be regarded as 'the same acts' for the purposes of Article 54, the definitive assessment in that respect being the task of the competent national courts.[10] In this circle, I cannot ignore mentioning Hager's scientific achievements. Hager pointed out that „when analysing the process of the establishment of the statement of facts, we need to have a particular consideration for the search for the truth, for the specific truth theories, and for the accessibility of truth in the criminal procedure. The law in force does not require the obtaining of the objective truth any more, it only obliges the court to establish a statement of facts that is true. The task of the court is to do justice, so I think that the judge of the court has to strive to reach justice at all costs. However, in many cases, due to the particularities of verification, to the difficulties of recognition, and due to other objective and subjective circumstances, objective truth cannot be reached, only the procedural truth can prevail."[11] The description of the datas and facts of a previous proceedure undoubtedly falls within the sphere of procedural truth.

In the case Sergey Zolotukhin v. Russia Judgment the European Court of Human Rights find that „although the initial set of proceedings against the ap-

[7] Karsai Krisztina: The principle of mutual recognition in the international cooperation in criminal matters. Zbornik Radova 2008/1-2, pp. 941–954.

[8] Czine Ágnes: A tisztességes bírósági eljárás. Audiatur et altera pars. hvgorac Lap- és Könyvkiadó Kft., Budapest, 2020, p. 50.

[9] Giulia Lasagni – Sofia Mirandola: The European ne bis in idem at the Crossroads of Administrative and Criminal Law. 2/2019, pp. 126-135, https://eucrim.eu/articles/european-ne-bis-idem-crossroads-administrative-and-criminal-law/#docx-to-html-fn14.

[10] ECJ, 9 March 2006, case C-436/04, Van Esbroeck, para. 42.

[11] Háger Tamás: A tényállás megalapozottsága, megalapozatlansága a büntetőperben. Globe Edit, 2018, p. 88. (ISBN 978-620-2-48777-1)

plicant 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 Court had adopted a variety of approaches in the past, placing the emphasis on identity of the facts irrespective of their legal characterisation, on the legal classification as the same set of facts could give rise to different offences, or on the existence of essential elements common to both offences. Taking the view that the existence of these different approaches was a source of legal uncertainty which was incompatible with the fundamental right guaranteed by Article 4 of Protocol No. 7, the Court decided to define in detail what was to be understood by the term "same offence" for the purposes of the Convention."[12]

The courts adopted a similarly strict position on the issue of notion of bis.

The CJEU declared that a detailed investigation of the case is necessary for a decision to be given after a determination of the merits of the case.[13] „The Kossowski judgment introduces an autonomous concept of the final disposal of criminal proceedings, which in the aspect of termination of investigation is different from that at the national level in Poland. There is no doubt that the decision to terminate an investigation, issued by the public prosecutor and not appealed against by the parties, after the time for an appeal has elapsed, becomes final, and any new proceedings in Poland would be barred by the domestic ne bis in idem principle (article 17 § 1 (7) of the Polish Code of Criminal Procedure)."[14]

This requirement of a detailed investigation has been taken up by the ECtHR as well for determining whether a decision to discontinue the proceedings constitutes an "acquittal" for the purposes of Art. 4 of Protocol No. 7 ECHR.[15] (Mihalache v Romania) „In view of the foregoing considerations, a decision terminating criminal proceedings, such as the decision in issue before the referring court – which was adopted in a situation in which the prosecuting authority, without a more detailed investigation having been undertaken for the purpose of gathering and examining evidence, did not proceed with the prosecution solely because the accused had refused to give a statement and the victim and a hearsay witness were living in Germany, so that it had not been possible to interview them in the course of the investigation and had therefore not been possible to verify statements made by the victim – does not constitute a decision given after a determination has been made as to the merits of the case."[16]

In fact, this stricter approach meets the requirements of litigation economy, the cost-effectiveness ont he part of the state.[17]

Reduction of the protection afforded by ne bis in idem

The ECtHR in the decision A and B v Norway and the CJEU (2018) in decisions Menci, Garlsson and Di Puma and Zecca dealt with the so-called double-track enforcement regimes, and said that it is a widespread reality in several Member States especially in the field of economic and financial crime.[18]

Both courts reduced the protection afforded by the ne bis in idem principle. The courts declared that joint imposition of administrative and criminal sanctions are permissible in respect of the same conduct.

In Garlsson case the CJEU said that Article 50 of the Charter of Fundamental Rights of the European Union must be interpreted as precluding national legislation which permits the possibility of bringing administrative proceedings against a person in respect of unlawful conduct consisting in market manipulation for which the same person has already been finally convicted, in so far as that conviction is, given the harm caused to the company by the offence committed, such as to punish that offence in an effective, proportionate and dissuasive manner.

In Enzo Di Puma case the CJEU said that Article 14(1) of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), read in the light of Article 50 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding national legislation in accordance with which proceedings for an administrative fine of a criminal nature may not be brought following a final criminal judgment of acquittal ruling that the acts capable of constituting a violation of the legislation relating to insider dealing, on the basis of which those proceedings had also been initiated, were not established.[19] So if the accused is acquitted by the criminal court for lack

[12] 10 February 2009, Sergey Zolotukhin v Russia, Appl. No. 14939/03, para. 84.

[13] Kossowski Case C-486/14.

[14] Arkadiusz Lach : Effective investigation of crime and the European Ne Bis In Idem Principe 1, ISSN 2029-4239 (online)Teisės apžvalga Law review No.2 (16), 2017, p. 5–16.

[15] Giulia Lasagni – Sofia Mirandola: The European ne bis in idem at the Crossroads of Administrative and Criminal Law. 2/2019, pp. 126-135, https://eucrim.eu/articles/european-ne-bis-idem-crossroads-administrative-and-criminal-law/#docx-to-html-fn14.

[16] Case of Mihalache v. Romania 54012/10.

[17] Ligeti Katalin: A klasszikus bűnügyi együttműködési formák. In: Kondorosi Ferenc – Ligeti Katalin (szerkesztette): Az Európai Büntetőjog Kézikönyve. Magyar Közlöny Lap- és Könyvkiadó, Budapest, 2008, p. 66.

[18] The Principle of Ne Bis in Idem in Criminal Matters in the Case Law of Court of Justice of the European Union. Eurjust, Sept, 2020, p. 1-25. file:///C:/Users/elekb/AppData/Local/Temp/QP0220233ENN.en.pdf.

[19] Enzo Di Puma (C-596/16) case of the CJEU.

of evidence, the subsequent administrative proceedings may not be conducted if a criminal fine can be imposed there.

In the practice of ECHR the Grand Chamber also redefined the notion of bis and admitted that under certain circumstances a combination of criminal and administrative procedures does not constitute a duplication of proceedings.[20] In A and B v Norway case the ECHR found that where dual proceedings represent *"complementary responses to socially offensive conducts"* and are combined in an integrated manner so as to form a "coherent whole" in order to address the different aspects of the offence, they should rather be considered as „parts of one single procedure", and not as an infringement of the ne bis in idem principle.[21]

The dual proceeedings are not in violation of conventions if pursue complementary purposes and thus address, not only in abstracto but also in concreto, different aspects of the social misconduct involved; they have a foreseeable consequence, both in law and in practice, of the same impugned conduct; avoid, as far as possible, any duplication in the collection and assessment of the evidence; and "above all" put in place an offsetting mechanism designed to ensure that the sanction imposed in the first proceedings is taken into account in the second proceedings, so that the overall amount of any penalties imposed is proportionate.[22]

The ECtHR emphasised that complementarity condition would be more likely met if the proceedings are not formally classified as criminal and do not carry any significant degree of stigma.[23] In parallel the ECtHR in A and B referred to the different purpose of the sanctions the additional constitutive elements of the offence, namely its culpable character, and the legal interest protected by the offence as element to assess the complementarity of the proceedings.

In Case C-617/10, Åklagaren v Hans Åkerberg Fransson, the Court decision also was that the ne bis in idem principle laid down in Article 50 of the Charter of Fundamental Rights of the European Union does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of value added tax, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine.[24]

It should be noted that this stricter concept also includes practices that do not recognize the prohibition of double jeopardy for war criminals after the convict has been pardoned in the first state.[25]

Conclusion

It can be seen that the ne bis in idem principle does not completely rule out parallel administrative criminal proceedings in the Member States. However, the national courts of the Member States have a duty to pay attention to the preventive administrative procedure. However, the CJEU and ECtHR now recognize the historical tradition in some Member State of sanctioning different procedures for different legal purposes.

Under strict conditions, parallel procedures do not run counter to the criteria of the rule of law. Condition, however, that they are combined in an integrated manner so as to form a "coherent whole" in order to address the different aspects of the offence, they should rather be considered as „parts of one single procedure", and must be foreseeable.

[20] A and B v Norway case, The Principle of Ne Bis in Idem in Criminal Matters in the Case Law of Court of Justice of the European Union. Eurjust, Sept, 2020, p. 1-25. file:///C:/Users/elekb/AppData/Local/Temp/QP0220233ENN.en.pdf

[21] A and B v Norway case, The Principle of Ne Bis in Idem in Criminal Matters in the Case Law of Court of Justice of the European Union. Eurjust, Sept, 2020, p. 1-25. file:///C:/Users/elekb/AppData/Local/Temp/QP0220233ENN.en.pdf

[22] Giulia Lasagni – Sofia Mirandola: The European ne bis in idem at the Crossroads of Administrative and Criminal Law. 2/2019, pp. 126-135, https://eucrim.eu/articles/european-ne-bis-idem-crossroads-administrative-and-criminal-law/#docx-to-html-fn14

[23] ECtHR, 23 November 2006, Jussila v Finland [GC], Appl. No. 73053/01, A and B v Norway

[24] Case C-617/10, Åklagaren v Hans Åkerberg Fransson

[25] Tóth Andrea Noémi: Súlyos emberi jogsértések a strasbourgi bíróság esetjogának tükrében – Háborús és emberiesség elleni bűncselekmények, népirtás. Kúriai Döntések, 2016/10, p. 1243