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The Principle of Official Proceedings in Practice of the CJEU and the ECtHR

1. The principle of officiality

Principle of official proceedings is a main principle of the inquisitorial system. Generally speaking, enforcement of the principals is always a relevant question in every branch of law, because principles express the specifics of the procedure and serve as guidelines in the application of law. These principles are never absolute, but they always have relative value, because they express the current social and legal policy perception. Based on this, examining the role of principles in criminal proceedings has a constant relevance to make criminal proceedings and the decision-making process more comprehensive. This way, the mechanisms, effects and possible errors in practice become visible, which, if we are aware of them, makes the whole procedure more predictable and this is essential for legal certainty and the success of the procedure.[2]

In criminal proceedings, the ex officio principle has a different meaning at the investigative and trial stages. In the course of an investigation, it means that the investigating authority or the prosecutor may also initiate criminal proceedings without a request. At the court stage, the principle of ex officio means, in the first place, that the judge is not bound by the parties' motions.[3]

For example in the Member States of the European Union there are different legal solutions as to whether the evidence can be taken of the court's own motion or only at the request of the prosecutor, the accused and the defense counsel.

Criminal procedure laws usually discuss in detail the duty of a judge without a motion by the parties. For example in criminal proceedings the judge must report ex officio if the judge is biased and unable to hear the case impartially,[4] but he must also detect if the offense in question is time-barred.[5]

The case law of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) thus repeatedly raises the question of what national courts must take into account in their proceedings in order to be lawful and not to infringe the EU law or the European Convention of Human Rights (ECHR).

2. Parallel administrative and criminal procedures in the legal systems of the Member States

The right not to be prosecuted or punished twice for the same offence is a fundamental principle of criminal law. This is called the *ne bis in idem* principle, which therefore means that no legal action can be taken twice because of the same fact, and if it begins, it cannot be continued.[6] It has a twofold rationale: Firstly, it is a key guarantee for the individual against abuses of the ius puniend and secondly it ensures legal certainty and the stability of the res iudicata.[7]

In the practice of the CJEU and the ECtHR a breach of a convention is usually established if the judge conducts the proceedings against the provisions of the conventions. As an example, we can mention the principle of the prohibition of double procedure, which is enshrined in several European documents.[8]

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[2] Angyal, Pál, *A magyar büntetőeljárásjog tankönyve I. kötet*, Atheneum, Budapest, 1915, 253.

[3] Lichtenstein, András, *The Principles of Legality and Officiality in Criminal Procedure*, In: Central & Eastern European Legal Studies; 2018, Issue 2, 290–293.

[4] Ficsór, Gabriella, *A bíró kizárásának gyakorlati tapasztalatai*, In: Büntetőjogi Szemle, 2017/2., 75–77.

[5] Polt, Péter (szerk.), *Kommentár a büntetőeljárásról szóló 2017. évi XC. t*örvényhez, Wolters Kluwer Hungary Kft., Budapest, 2020, 980–981.

[6] Puccio, Andrea, *Double jeopardy in European and Italian case law: a summary of the most significant rulings*, 2019. https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=221EE609-305A-4699-951F-48B7C3B03F2B (2021. 02. 13.)

[7] Lasagni, Giulia – Mirandola, Sofia, *The European ne bis in idem at the Crossroads of Administrative and Criminal Law*, In: eucrim. The European Criminal Law Associations' Forum, issue 2019/2, 126.

[8] Elek, Balázs, *The NE BIS IN IDEM Principle in the Aspect of Criminal*

The Charter of Fundamental Rights into the Treaty regulate the prohibition of double jeopardy – double prosecution or punishment– : „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."[9]

The Convention Implementing the Schengen Agreement (CISA) also deal with the prohibition of double jeopardy. Article 54 of the Convention states: „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."

2.1. Ne bis in idem and double jeopardy in the practice of the ECtHR

In 2016, the ECtHR deviated from its previous case law and significantly narrowed the scope of the ne bis in idem principle in cases where double criminal and administrative criminal proceedings are pending for the same offense. Under strong pressure from the Contracting States to protect the practice of double-checking systems in *A and B v. Norway*, the Grand Chamber redefined the concept of *bis* and acknowledged that in certain circumstances the combination of criminal and administrative procedures is not a double procedure prohibited by Article 4 of Protocol No. 7 to the ECHR.[10]

The Court found that, if dual proceedings were "complementary responses to socially offensive behavior" and combined in an integrated way to form a "coherent whole" to deal with different aspects of a crime, they could be considered as part of a single proceeding rather than the breach of the ne bis in idem principle.[11] Therefore, the Court requires that the two sets of proceedings to be "sufficiently closely connected in substance and time" and lists the factors that determine whether there is such a close connection between them.[12]

In terms of its content, the Court considers that the dual procedure must satisfy the following four conditions:[13]

- They pursue complementary purposes and thus address, not only *in abstracto* but also *in concreto*, different aspects of the social misconduct involved;
- They are a foreseeable consequence, both in law and in practice, of the same impugned conduct;
- They avoid, as far as possible, any duplication in the collection and assessment of the evidence;
- They "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.[14]

In addition to the substantive context, it is also important that the temporal relationship must be present, although it is not necessary for the proceedings to be conducted simultaneously and the order of the proceedings is not relevant.[15]

It is clear from the decision that the examination of the fulfillment of these conditions is a requirement that must be examined ex officio by the competent authorities and courts.

Decisions A and B have been strongly criticized, as they have, according to some, undermined the protection given by the ne bis in idem principle, and its criteria for determining the compatibility of double criminal proceedings and administrative proceedings are often ambiguous and difficult to apply in practice, thereby leading to arbitrary results.[16]

While in Cases A and B the Court referred to the different purpose of the sanctions and to the other elements of the offense, namely its culpable character,[17] in *Nodet v. France* the Court had already considered the legal interest protected by the offense as an element in determining the complementarity of the proceedings.[18]

In that case, the applicant, a financial analyst, was fined by the financial markets regulator, the AMF, for manipulation of a share price, and subsequently by criminal courts for the offence of obstructing the proper operation of the stock market by the same action. He complained that he had been punished twice for the same offence.[19]

First, the Court observed that there was no sufficiently close connection in substance between the two sets of proceedings, of the AMF and of the criminal courts, in view of the purposes pursued and given, to some extent, the repetition in the gathering of evidence by various investigators; secondly, and above all, there was no sufficiently close con-

Punishment, In: Revista Facultatii De Drept Oradea. Journal of The Faculty Of Law Oradea, Publicatie bianuala 1/2019 35–44.

[9] Charter of Fundamental Rights of the European Union – TITLE VI – JUSTICE – Article 50 – Right not to be tried or punished twice in criminal proceedings for the same criminal offence.

[10] ECtHR (Grand Chamber), 15 November 2016, *A and B v. Norway*, Appl. no. 24130/11 and 29758/11. paragraph 139.

[11] ECtHR A and B v. Norway case paragraph 121.

[12] Lasagni – Mirandola, *i.m.*, 127–128.

[13] ECtHR A and B v. Norway case paragraph 132.

[14] Lasagni – Mirandola, *i.m.*, 128.

[15] ECtHR A and B v. Norway case paragraph 132.

[16] Lasagni – Mirandola, *i.m.*, 128.

[17] ECtHR A and B v. Norway case paragraph 144.

[18] ECtHR, 6 June 2019, *Nodet v. France*, Appl. no. 47342/14 paragraph 48.

[19] ECtHR Nodet v. France.

nection in time for the proceedings to be considered part of an integrated mechanism of sanctions prescribed by French law. It concluded that Mr Nodet had sustained disproportionate damage on account of his double prosecution and the double conviction, by the AMF and the criminal courts, for the same facts.[20]

As we can see, in that judgment, the ECtHR also stated that, in the case of double proceedings, the Member States had to prove that there was a close temporal and substantive connection between the individual proceedings. In the latter condition, it is necessary to examine ex officio whether the requirements apply laid down by the court.

2.2. Double-track systems and ne bis in idem in the case law of CJEU

According to the practice of the CJEU, the legal assessment of individual cases is not determined by their national classification, but by the legal nature of the cases.[21]

In some Member States, infringements are accompanied by administrative and criminal sanctions. According to the practice of the CJEU, the parallel administrative and criminal proceedings are not possible if the previous administrative proceedings were of a criminal nature. In such cases, the court or the administrative authority must examine ex officio the principle of ne bis in idem. It must be examined whether a final decision has already been taken in the case in question.

According to the practice of the CJEU the national courts are not bound by the motion of the prosecutor, the defense counsel or the accused. It is the duty of the national courts to examine ex officio the nature of the case and to compare the legal nature of the various proceedings.

One of the best-known criminal case before the CJEU was the *Akerberg Fransson c. Sweden case* where the court primarily ruled on whether parallel criminal and administrative proceedings are permissible.[22] However, the decision is also interesting because the CJEU has also highlighted the circumstances that the national court must examine ex officio in its own procedure.

The facts of the proceedings were the follows in the Swedish proceedings:

Mr Åkerberg Fransson was summoned to appear before the Haparanda District Court in particular on charges of serious tax offences. He was accused of having provided, in his tax returns for 2004 and 2005, false information which exposed the national exchequer to a loss of revenue linked to the levying of income tax and value added tax ('VAT'). Mr Åkerberg Fransson was also prosecuted for failing to declare employers' contributions for the accounting periods from October 2004 and October 2005. According to the indictment, the offences were to be regarded as serious, first, because they related to very large amounts and, second, because they formed part of a criminal activity committed systematically on a large scale.

Before the referring Swedish court, the question arised as to whether the charges brought against Mr Åkerberg Fransson must be dismissed on the ground that he has already been punished for the same acts in other proceedings, as the prohibition on being punished twice laid down by Article 4 of Protocol No 7 to the ECHR and Article 50 of the Charter would be infringed.

In its judgment, the CJEU defined the responsibilities of national courts as follows:

"Three criteria are relevant for the purpose of assessing whether tax penalties are criminal in nature. The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur."[23]

It is for the referring court to determine, in the light of those criteria, whether the combining of tax penalties and criminal penalties that are provided for by national law should be examined in relation to the national standards, which could lead, as the case may be, to regard their combination as contrary to those standards, as long as the remaining penalties are effective, proportionate and dissuasive.[24]

It follows from the foregoing considerations that the ne bis in idem principle laid down in Article 50 of the Charter does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of VAT, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature. It is for the national court to determine whether the first sanction was criminal in nature or not.[25]

It is thus clear from the decision that the national court, the court of the Member State must determine ex officio if the first penalty is criminal in nature or not.

In other cases, the Court has also concluded that the ne bis in idem principle guaranteed by Article 50 of the Charter of Fundamental Rights of the European Union confers on individuals a right which

[20] ECtHR Nodet v. France.

[21] Elek, Balázs, *Administrative and criminal proceedings in reflection of the principle of ne bis in idem*, In: Usaglasavanje pravne regulative sa pravnim tekovinama (acquis communautaire) Evropske Unije – stanje u Bosni i Hercegovini i iskustva drugih. Banja Luka, Istrazivacki Centar, 2018, 94-103.

[22] The case C-617/10 Hans Akerberg Fransson.

[23] Case C-489/10 Bonda paragraph 37.

[24] Case C-489/10 Bonda paragraph 37.

[25] Bana, Imre, *A „ne bis in idem" elv érvényesülése közigazgatási szankció és büntetőeljárás egyidejű alkalmazása során*, In: Új magyar közigazgatás, 10. Évf. 2. Szám, 2017, 39.

is directly applicable in the context of a dispute such as that at issue in the main proceedings.[26]

All this also means that this right of the accused must be taken into account by the national judge ex officio in the national criminal procedure, even if it is not invoked by the accused or the lawyer.

3. Principle of ex officio in evidentiary procedure

National courts have ex officio obligations not only in double jeopardy under the case law of the CJEU and the ECtHR. There are also a number of issues in the evidentiary procedure that national courts must examine ex officio in order to ensure the right to a fair trial and legal certainty.

3.1. Thorough examination of the evidence in the other proceedings

In the decision of the *Kossowski case* the CJEU also reflects the ex officio obligation of national courts in connection with the examination of evidences. The Court imposed on the national courts the obligation to examine ex officio the reasons of the decision from an other Member State.[27]

The facts of the proceedings were the follows in the German proceedings:

„On 7 February 2014, the accused, who was still wanted in Germany, was arrested in Berlin (Germany). The Hamburg Public Prosecutor's Office brought charges against him on 17 March 2014. The Regional Court, Hamburg, Germany refused to open trial proceedings, basing its decision on the fact that further prosecution had been barred, for the purposes of Article 54 of the CISA, by the decision of the Kołobrzeg District Public Prosecutor's Office terminating the criminal proceedings." [28]

The referring court took the view that, the evidence against the accused is sufficient to justify the opening of trial proceedings before the Landgericht Hamburg (Regional Court, Hamburg) and the acceptance of the indictment for the purposes of those proceedings, unless the principle of ne bis in idem laid down in Article 54 of the CISA and Article 50 of the Charter is a bar to that.[29] The referring court therefore asked, whether the accused's case has been 'finally disposed of'.

It is important to note that, in the case in the main proceedings, under Polish law the decision of the Kołobrzeg District Public Prosecutor's Office terminating the criminal proceedings precludes any further prosecution in Poland.[30]

The Court considered that, the referring court is essentially asking whether the ne bis in idem principle must be interpreted as meaning that a decision of the public prosecutor terminating criminal proceedings and finally closing the investigation procedure against a person – albeit with the possibility of its being reopened or annulled, without any penalties having been imposed, may be characterised as a final decision for the purposes of those articles, when that procedure was closed without a detailed investigation having been carried out.[31]

In this point, we need to highlight that the European enforcement of the ne bis in idem principle is of fundamental significance in EU law. It is because exercising the right to free movement of persons can only be effectively observed if a perpetrator knows that once his trial has been finally disposed of, after having been prosecuted and sentenced and following the imposition of a penalty in one member state, or in the event of being acquired upon a final judicial decision, he may freely move in the Schengen area without having to fear criminal prosecution in an other state because the said criminal act under the laws there is considered a different crime.[32]

According to the Court, for a person to be regarded as someone whose trial has been 'finally disposed of' within the meaning of Article 54 of the CISA, in relation to the acts which he is alleged to have committed, it is necessary, in the first place, that further prosecution has been definitively barred.[33] That first condition must be assessed on the basis of the law of the Contracting State in which the criminal-law decision in question has been taken.[34] If the decision given in the first Contracting State does not exclude the criminal liability of the person subject to the proceedings, there can not be obstacle to the initiation or continuation of criminal proceedings against that person in the other Contracting State.[35]

In the light of the foregoing, the Court stated that the principle of ne bis in idem laid down in Article 54 of the CISA, read in the light of Article 50 of the Charter, must be interpreted as meaning that a decision of the public prosecutor terminating criminal proceedings and finally closing the investigation procedure against a person, without any penalties having been imposed, cannot be characterised as a final decision when it is clear from the statement of

[26] Case C-537/16 Garlson case, Case C-524/15 Luca Menci case.
[27] Case C-486/14, Kossowski case.
[28] Case C-486/14, Kossowski case paragraph 19.
[29] Case C-486/14, Kossowski case paragraph 20.
[30] Case C-486/14, Kossowski case paragraph 36.
[31] Case C-486/14, Kossowski case paragraph 32.
[32] Karsai, Krisztina, *Transnational ne bis in idem principle in the Hungarian fundamental law,* In: Europe in Crisis: Crime, Criminal Justice, and the Way Forward, Sakkoulas Publications, Athens, 416.
[33] Case C-486/14, Kossowski case paragraph 34.
[34] Case C-486/14, Kossowski case paragraph 35.
[35] See, to that effect, judgments of 22 December 2008 in Turanský, C-491/07, EU:C:2008:768, paragraph 36, and 5 June 2014 in M, C-398/12, EU:C:2014:1057, paragraphs 32 and 36.

reasons for that decision that the procedure was closed without a detailed investigation having been carried out. According to the Court, in that regard, the fact that neither the victim nor a potential witness was interviewed is an indication that no such investigation took place.[36]

Finally, the Court stated that, Article 54 of the CISA necessarily implies that „the Contracting States have *mutual trust* in their criminal justice systems and that each of them recognises the criminal law in force in the other Contracting States even when the outcome would be different if its own national law were applied."[37] That mutual trust requires that the relevant competent authorities of the second Contracting State accept at face value a final decision communicated to them which has been given in the first Contracting State.[38]

It is important that the mutual trust can prosper only if the second Contracting State is in a position to satisfy itself ex officio, on the basis of the documents provided by the first Contracting State, that the decision of the competent authorities of that first State does indeed constitute a final decision including a determination as to the merits of the case. It thus follows from that decision that the principle of mutual trust is also an ex officio obligation for the court of the Member State to examine that the final decision in an other Member State was the result of a procedure where the evidence in the case was examined.

3.2. The principle of official proceedings in relation to the presumption of innocence

The presumption of innocence is one of the most important guarantee principles of criminal proceedings, from which the evidentiary requirements arise in criminal proceedings. It follows from the presumption of innocence that, during criminal proceedings, the trial court can only assess facts in its decision, which have been duly substantiated during the evidentiary procedure, in accordance with the requirements of the evidentiary procedure and supported beyond doubt by the guarantee rules. Another consequence arising from the presumption of innocence is the duty of the accuser to prove the guilt of the accused. This also means that if during the criminal proceedings it is not obtained beyond any doubt that the offense, which is the subject of the proceedings, was committed by the accused, his guilt cannot be established and the court acquits the accused in the absence of sufficient evidence.[39]

At the level of EU law, a directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings was adopted in 2016.[40]

The ECHR also already contains presumption of innocence, as the right to a fair trial enshrined in Article 6 includes the presumption of innocence. It states that: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law".

The EU Directive provides a wider range of guarantees than before, prohibiting public authorities from imputing guilt to a suspect or accused person in their public statements, decisions or informing the media until their guilt has been established.[41] However, several recitals in the Preamble refer to the Directive, as in general in sources of law guaranteeing the rights of defendants at EU level, again relying on the interpretation enshrined in the ECHR and reflected in the case law of the ECtHR and the Charter of Fundamental Rights.[42]

This is due, inter alia, to the fact that the ECtHR has extensive practice in relation to the presumption of innocence. The ECtHR ruled that there had been a violation of Article 6. 2 in, for example, *Lamanna v Austria case*, since, following the applicant's final acquittal, the courts had made findings in the damages proceedings that the applicant's suspicion remained.[43]

The Court also found a violation of the presumption of innocence in the *Pándy v Belgium case*, as the investigating judge compared the accused at the end of the criminal investigation phase to notorious serial killers. The Court held that that statement could, in essence, also be regarded as a finding of guilt, which could have given the impression to the public the guilt of the accused in advance and could even foresee the decision of the judge hearing the case.[44]

In *Grabchuk v Ukraine case*, the Court ruled that the presumption of innocence is also infringed if, in a decision terminating criminal proceedings partly for lack of evidence and partly for the limitation period for negligent acts, the court uses wording that clearly states that the accused committed the crime.[45]

In addition to the above, there are a number of cases in which the ECtHR deals with the presumption of innocence. This is significant for the purposes of the present study because the presumption

[36] Case C-486/14, Kossowski case paragraph 54.
[37] Judgment of 11 December 2008 in Bourquain, C-297/07, EU:C:2008:708, paragraph 37.
[38] Case C-486/14, Kossowski case paragraph 51.
[39] Fantoly, Zsanett – Gácsi, Anett Erzsébet, *Eljárási büntetőjog, statikus rész*, Szeged, Iurisperitus Bt. Szeged, 2013, 74, 204.
[40] Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.
[41] Directive (EU) 2016/343 of the European Parliament and of the Council Article 4.
[42] Róth, Erika, *Irányelv az ártatlanság vélelméről*, In: Miskolci Jogi Szemle, 12. Évfolyam, különszám, 2017, 96.
[43] ECtHR, 10 July 2001, *Lamanna v Austria*, Appl. no. 28923/95.
[44] ECtHR, 21 September 2006, Pándy v Belgium, Appl. no. 13583/02.
[45] ECtHR, 21 September 2006, *Grabchuk v Ukraine*, Appl. no. 8599/02.

of innocence and the enforcement of the requirements laid down by the Court in this regard are also an ex officio obligation for national courts.

4. Conclusions

In summary, we can state that the principle of official proceedings is a widespread and important principle of the criminal law. It follows from the practice of either the CJEU or the ECtHR that national courts have a number of obligations which they must examine ex officio, whether they have been requested by the parties. The significance of this is that the *principle of fair trial* and the rights guaranteed by the ECHR (such as right to liberty and security, presumption of innocence, no punishment without law, etc.) should not depend on the motion of the parties. For this reason, all judges are obliged to enforce parts of the fair trial *ex officio* during criminal proceedings.

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C-489/10 Bonda case

C-297/07 Bourquain case

C-617/10 Hans Akerberg Fransson case

C-537/16 Garlson case

C-486/14, Kossowski case

C-524/15 Luca Menci case

C-398/12 M case

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