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Ne bis in idem as the cornerstone of a fair trial

Abstract

The right to a fair trial belongs to the first-generation human rights. The individual rights that belong here from, in other words, the group of freedoms, as they ensure that people have an undisturbed life, activity and social status, a freedom that can only be restricted by state intervention in exceptional and justified cases. In other terms, ensuring the principle of a fair trial is essential for the exercise of liberties: the state may restrict people in exercising their freedoms only through a fair trial.

For a proper analysis of the ne bis in idem principle, it is essential to describe the significant and parallel case law of the supranational judicial forums determining European criminal law. Within the framework of this dissertation, for reasons of space, I present the relevant decisions in a table. In the grouping, I use the "usual" division of the legal literature, supplementing it with the fact that I outline the case law of the ECtHR and the CJEU in parallel.

1. The nature of the „fair trial" principle

The right to a fair trial belongs to the first-generation human rights. The individual rights that belong here, in other words, the group of freedoms, as they ensure that people are provided with an undisturbed life, activity and social status, they have a freedom that can only be restricted by state intervention, and only in exceptional, also justified cases. In other terms, ensuring the principle of a fair trial is essential for the exercise of liberties: the state may restrict people in exercising their freedoms only through a fair trial.[1]

The framework of fair trial is filled with a multitude of guarantees. The right to a fair trial is declared by several major international human rights conventions. For example, Article 6 of the European Convention on Human Rights enshrines the right to a fair trial and its components, also Articles 47 to 50 of the Charter of Fundamental Rights of the European Union and Article 14 of the International Covenant on Civil and Political Rights deal with this fundamental right. In Hungary, this principle is declared in Article XXVIII section 1 of the Fundamental Law of Hungary.

However, defining the principle of fair trial is not an easy task. It may be a matter of debate what the term "fair" shall mean, as well as the scope of rights must be granted in proceedings in order to fair.[2]

The result of which is that in most cases usually it is not the observance or non-observance of one of these rights that determines whether or not the prosecuting authorities acted fairly, but the whole procedure shall be examined.[3] The criminal human rights and guarantees mentioned above belong to the so-called second group of absolute rights: in this case, it is not a question whether the rights are falling within that scope might not be opposed to other rights, however, these rights already reflect a situation after consideration.[4]

The principle of ne bis in idem is one of the strongest procedural guarantees, part of a fair trial, part of effective legal protection. In this respect, I agree with Erika Róth's statement that procedural rights play a decisive role in the development of individual legal protection[5] – the recent evolution of criminal law also trends to this direction.

Ne bis in idem, or on the other hand, the prohibition of double jeopardy as a constitutional fundamental right, is found in the legal systems of almost all Member States, thus strengthening the cornerstone of criminal cooperation between EU Member States, also the principle of mutual trust and mutual recognition.

The principle of mutual recognition means that an institution of law is accepted by another entity independent of the creator or adopting entity, in

[1] Halmai Gábor - Tóth Gábor Attila: *Az emberi jogok rendszere* In: Halmai Gábor - Tóth Gábor Attila (ed).: Emberi jogok 2003. p 82

[2] Farkas Henrietta Regina: *A tisztességes eljárás főbb részjogosítványainak érvényesülése a büntetőperben* ujbtk.hu 01.12.2019.

[3] Róth Erika: *A tisztességes eljáráshoz való jog* In: Halmai-Tóth cited work p 703

[4] Halmai Gábor - Tóth Gábor Attila: *Az emberi jogok korlátozása* In: Halmai-Tóth cited work p 111

[5] Róth Erika: *Eljárási jogok* In: Halmai-Tóth cited work p 669

the way and as it comes from the creator or adopting entity. Its enforcement is based on the fact that Member States trust each other's criminal justice systems.[6] The essence of mutual recognition in international criminal cooperation is that a decision adopted by the judicial authority of one Member State is recognized by the other Member State and implemented as if it had been taken by its own judicial authorities.[7]

The principle of mutual recognition in criminal matters, the mutual recognition of judicial decisions, also means the extension of state criminal power, with the free movement of judicial decisions ultimately leading to the restriction and non-fulfillment of individual rights. In other words, this segment of the effects of the recognition of a foreign judgment is therefore essentially a voluntary restriction of criminal jurisdiction [8]. It should be stressed, that the principle of mutual recognition is also a major challenge to the sovereignty of the Member States, since in the single European area, national judicial decisions that are not based on generally (recognized) legislation across Europe and on the same guarantee provisions will be enforceable.

The Court has recalled "that the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognized by EU law."[9] "Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU".[10]

Following the entry into force of the Treaty of Amsterdam[11], the ne bis in idem principle has become increasingly important as a partial right of a fair trial - owing to the EU's so-called III. pillar legislative 'dumping', which was the result of the opening of borders and the free movement of workers (including criminals). After 2006, this issue arose in connection with conflicts of jurisdiction at European Union level. [12]

Since 2003, the Court of Justice of the European Union (hereinafter: CJEU) has consistently stated in its judgments that the principle of ne bis in idem is both a constitutional and a defense right within the area of freedom, security and justice.[13] It is part of the right of defense, as closer cooperation between Member States in criminal matters implies stronger protection of the rights of individuals, especially as Member States have so far failed to recognize the importance of a single, binding mechanism at EU level for avoiding the conflicts of criminal jurisdiction. [14] The guarantee nature of the principle of ne bis in idem can be traced to several foundations of the rule of law, including legal certainty, equality and justice.

2. The appearance of the „ne bis in idem" principle

Despite the importance of the ne bis in idem principle, it appeared relatively late in the European criminal law. The Commission's Green Paper[15] on the procedural rights of suspects and accused persons in criminal proceedings and the Stockholm Program of 2009[16] do not even mention only the traditional elements of fair trial, such as interpretation, effective legal representation and rights of liaison and information. The Hague Program of 2004[17] explicitly stated that the protection of the security of the European Union and its Member States became urgent – especially in the light of the terrorist attacks of 11 September 2001 in the United States and 11 March 2004 in Madrid.The Hague Program underlined that the fundamental rights guaranteed by the European Convention on Human

[6] Kondorosi-Ligeti cited work [7-03] – on this topic for more details also see Farkas Ákos: *A kölcsönös elismerés elve az európai büntetőjogban* I. Ügyészségi Szemle, 2016/1. http://www.ugyeszsegiszemle.hu/hu/201601/ujsag#88 19 Oct 2017.

[7] About the negative function of mutual recognition in international criminal cooperation for more detail see Karsai Christina: *The principle of mutual recognition in the international cooperation in criminal matters*. https://heinonline.org/HOL/LandingPage?handle=hein.journals/zborrado45&div=57&id=&page= 17 July 2020. At the same time, it points out that the principle of mutual recognition also allows the determining authorities to apply the so-called forum shopping without a common judicial review mechanism. On mutual recognition as a method of negative integration, see also Werner Schroeder: *Limits To European Harmonisation of Criminal Law* Eucrim 2020-008 https://eucrim.eu/articles/limits-european-harmonisation-criminal-law/ August 11, 2020

[8] Fejes Péter: *A külföld ítélet érvényének elismerése – corpus alienum in iure criminali?* Ügyészségi Szemle, 2016/2. p 26.

[9] Opinion No 2/13, point 191, referring to the411/10 and C493/10, N.S. and M.E. Melloni-judgment 63.

[10] Opinion No 2/13 of CJEU, point 192.

[11] 1 May 1999.

[12] COM/2005/0696 final - Green Paper on Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings.

[13] Teresa Bravo: *Ne bis in idem as a defense right and procedural safeguard in the EU* New Journal of European Criminal Law Vol. 2. Issue 4., 2011.393–401. p 395.

[14] Teresa Bravo cited work p 39.

[15] COM(2003) 75.

[16] 2009/C 295/01 30 Nov 2009 OJ C 295 p. 1–3.

[17] 2005/C 53/01 OJ C 53, 3 March 2005, p. 1–14.

Rights shall be fully respected[18]; furthermore the comprehensive program of measures to implement the principle of mutual recognition of judicial decisions in criminal matters shall be completed. It shall also include judicial decisions taken at any stage of criminal proceedings or otherwise relevant to such proceedings, such as gatherings and admissibility of evidence, conflicts of jurisdiction, principle of ne bis in idem, and final decisions sentencing imprisonment or other (alternative) sanctions. Attention must be paid to any further suggestion in this relation.[19] The Hague Program emphasized that the further implementation of mutual recognition as a cornerstone of judicial cooperation entails the development of uniform rules on procedural rights in criminal proceedings, based on studies of the current level of safeguards in the Member States, with due respect for Member States' legal traditions.[20]

From the point of view of fundamental rights, it is "worthwhile" to mention that the Hague Program also stated that, in order to achieve its objectives, EU should accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Therethrough the EU – by their institutions in addition to the Charter of Fundamental Rights – could undertake a legal obligation not only to respect fundamental rights in all areas of EU's activity, but also to actively promote them.[21] As it is well known, this has not happened until now, In this context, after 10 years (!), the CJEU, acting upon the initiative of the European Commission, concluded[22] that the accession would bind the EU institutions and the Member States the same as other international agreements concluded by the Union, therefore would become an integral part of law. In that case, the Union, like all the other contracting parties, would be subject to external control to ensure the respect for the rights and freedoms enshrined in the ECtHR. Thus, the Union and its institutions would be subject to the control mechanisms provided for in this Convention, and in particular subject to the decisions and judgments of the ECtHR.[23, 24]

Nevertheless or even strengthening, conventions drawn up under the auspices of the Council of Europe in the field of criminal cooperation between the Member States of the European Union play an important role[25] as the legal basis for EU cooperation, despite the specific nature of cooperation within the Council of Europe.[26]

3. The relevant case law of CJEU and ECtHR

Returning to the principle of ne bis in idem, it was initially reflected in the case law of the CJEU, first published in Case 7/72. Boehringer Mannheim GmbH v Commission of the European Communities of 14 December 1972, but at that time it was not yet a criminal rather in the field of competition law. The subject was a violation of U.S. competition law, so the concerned was fined $ 80,000 on 3 July 1969, for participation in an international cartel, which was paid on 11 July 1969, by the company concerned. However, the applicant was also fined 180,000 units of account (EUA)[27] by the Commission of the European Communities on 16 July 1969 for participating in the same international cartel. By letter of 3 September 1969, the applicant requested the Commission to comprise in the amount of the fine imposed the amount of the fine already paid in the United States, which was rejected by the Commission.[28]

For a proper analysis of the ne bis in idem principle, it is essential to describe the significant and parallel case law of the supranational judicial forums determining European criminal law. Within the framework of this paper, for reasons of space, I present the relevant decisions in a table. In the grouping, I use the "classical" division of the legal literature, supplementing it with the fact, that I outline the case law of the ECtHR and the CJEU in parallel aspects. The table highlights the key words of the international practice developed by each decision, the relevant international conventions and their relevant legal provisions, as well as all the decisions made on this legal issue until the conclusion of this study. [29]

[18] Point II.1 of the Hague Program..
[19] point III.3.2 of the Hague Program.
[20] point III.3.3.1 of the Hague Program.
[21] point II.2 of the Hague Program.
[22] Opinion 2/13. of the Court (Full Court) 18 December 2014 [ECLI:EU:C:2014:2454].
[23] Press release No. 180/14 18 Dec 2014.
[24] About the interaction between EU law and the ECtHR see for more details Mohay Ágoston: *A nemzetközi jog érvényesülése az uniós jogban* Pécs, Studia Europaea 2019 p 55-81 and Paul Craig – Grainne de Burca: *EU law – text, cases and materials* Oxford University Press Sixth Edition 2015. p 419–423.

[25] Villányi József: *Az EU kölcsönös bűnügyi jogsegélyéről szóló egyezményhez kapcsolódó jogalkotási feladatok* http://acta.bibl.u-szeged.hu/7535/1/juridpol_doct_003_209-252.pdf 10 July 2020. p 210.
[26] E.g. the range of ET Member States is much wider than EU Member States; the CoE, as an international organization, does not have an independent legislative capacity independent of the Member States; the Member States of the CoE are making greater use of declarations of assurance during the ratification process, thus international treaties under the auspices of the CoE become part of the domestic law of the Member States to varying degrees.
[27] See judgement no 45/69. of CJEU.
[28] For more information on the impact of the Court's judgment in the field of competition law see Alessandro Rosano: *Ne Bis Interpretatio In Idem? The Two Faces of the Ne Bis In Idem Principle in the Case Law of the European Court of Justice* German Law Journal, Jan2017, Vol. 18 Issue 1, pp 39–58. p 44–45., also Gerard Conway: *Ne Bis in Idem in International Law* International Criminal Law Review, Jul2003, Vol. 3 Issue 3, pp 217–244 pages 230–231.
[29] Sources:
– ECtHR Guide on Article 4 of Protocol No. 7. to the European Con-

KEYWORD	ARTICLE	CASE TITLE & NUMBER[30]
1. *Criminal nature*	Article 50 of Charter Article 4 of Protocol No. 7.	Engel *and others v. The Netherlands* No. 5100/71., 5101/71. 5102/71.; 5354/72.; 5370/72. 8 June 1976 *Ruotsalainen v. Finland* no. 13079/03. 16 June 2009 *Akerberg Fransson* C-617/10. 2013.02.26. *A and B. v. Norway* no. 24130/11. and 29758/11. 15 Nov 2016 *Johannesson and Others v. Iceland* no. 22007/11. 17 May 2017 *Menci* C-524/15. 20 March 2018 *Garlsson Real Estate* SA C-537/16. 20 March 2018
2. *Duplication of administrative punitive and criminal proceedings*	Article 50 of Charter Article 4 of Protocol No. 7.	*Sergey Zolotukhin v. Russia* no. 14939/03. 30 Dec 2008 *Ruotsalainen v. Finland* no. 13079/03. 16 June 2009 *Akerberg Fransson* C-617/10. 2013.02.26. *Grande Stevens and others v. Italy* nos. 18.640/10., 18.647/10., 18.663/10. 04 March 2014 *A and B. v. Norway* no. 24130/11. and 29758/11. 25 Nov 2016 *Johannesson and Others v. Iceland* no. 22007/11. 18 May 2017 *Šimkus v. Lithuania* no. 41788/11. 19 June 2017 *Menci* C-524/15. 20 March 2018 *Garlsson Real Estate SA* C-537/16. 20 March 2018 *Di Puma and Zecca* C-596/16. and C-597/16. 20 March 2018
3. *Enforcement condition:* – *compatibility with Charter* – *out-of-court settlements* – *pre-trial detention* – *suspended sentences* – *partial enforcement* – *unenforceable sentence*	Article 50 of Charter Article 54 of CISA Article 4 of Protocol No. 7.	*Gözütök and Brügge* C-187/01. and C-385/01. 11 Febr 2003 *Kretzinger* C-288/05. 18 July 2007 *Bourquain* C-297/07. 11 Dec 2008 *Spasic* C-129/14. 27 May 2014 *Kadusic v. Switzerland* no. 43977/13 9 Sept 2018

vention on Human Rights – Right not to be punished twice, updated on 30 April 2020 https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_7_ENG.pdf 10 May 2020.

- Eurojust *Case law by the Court of Justice of the European Union on the principle of the ne bis in idem in criminal matters* April 2020 http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/caselawanalysis/Case%20law%20by%20the%20Court%20of%20Justice%20of%20the%20European%20Union%20on%20the%20principle%20of%20ne%20bis%20in%20idem%20in%20criminal%20matters%20(April%202020)/2020-04_Case-law-by-CJEU-on-NeBisInIdem_EN.pdf 10 May 2020

[30] Chronologically ordered.

KEYWORD	ARTICLE	CASE TITLE & NUMBER
4. *„Bis"* *(final decision)* – *decision barring further prosecution* – *decision on merits of the case* – *decision by a public prosecutor*	Article 50 of Charter Article 54 of CISA Article 4 of Protocol No. 7.	Gözütök and Brügge C-187/01. and C-385/01. 11 Febr 2003 *Miraglia* C-469/03. 10 March 2005 *Van Straaten* C-150/05. 28 Sept 2006 *Turansky* C-491/07. 22 Dec 2008 *Sergey Zolotukhin v. Russia* no. 14939/03. 30 Dec 2008 *Mantello* C-261/09. 16 Nov 2010 *M.* C-398/12. 5 June 2014 *Kossowski* C-486/14. 29 June 2016 *Ramda v. France* no. 78477/11. 18 Dec 2017 *AY* C-268/17. 25 July 2018 *Mihalache v. Romania* no. 54012/10. 8 July 2019
5. *„Idem"* *(same facts)*	Article 50 of Charter Article 54 of CISA Article 4 of Protocol No. 7.	*Gradiner v. Austria* no. 15963/90. 23 Oct 1995 *Oliveira v. Switzerland* no. 25711/94. 30 July 1998 *Franz Fisher v. Austria* no. 38275/97. 30 May 2002 *Van Esbroeck* C-436/04. 9 Sept 2006 *Van Strateen* C-150/05. 28 Sept 2006 *Gasparini* C-467/04. 28 Sept 2006 *Kretzinger* C-288/05. 18 July 2007 *Kraaijenbrink* C-367/05. 18 July 2007 *Ruotsalainen v. Finland* no. 13079/03. 16 June 2009 *Sergey Zolotukhin v. Russia* no. 14939/03. 30 Dec 2009 *A and B. v. Norway* no. 24130/11. and 29758/11. 25 Nov 2016 *Johannesson and Others v. Iceland* no. 22007/11. 18 May 2017 *Ramda v. France* no. 78477/11. 18 Dec 2017 *Mihalache v. Romania* no. 54012/10. 8 July 2019 *Korneyeva v. Russia* no. 72051/17. 8 Oct 2019
6. *National remedies*	Article 50 of Charter Article 54 of CISA	*XC and Others* C-234/17. 24 Oct 2018
7. Same person	Article 50 of Charter	*Orsi and Baldetti* C-217/15. and C-350/15. 15 Apr 2017 *AY* C-268/17. 25 July 2018

During the detailed analysis of the above mentioned cases, it has to be mentioned that both international courts follow the approach of applying the most favorable interpretation for the accused person.[31] The case law of the CJEU – also according to the chronological order analysis – is based primarily on the Strasbourg's conception of fundamental rights, and has merged it. Later, the development of the case-law of the CJEU had a reaction on the decisions of the ECtHR, thus creating a de facto mutual recognition between the two courts, we could say, the trust.[32] Acknowledging the fundamentally identical dogmatic solutions of the two law enforcement institutions, some authors stated while the case law of the ECtHR can be considered mature, the CJEU's one does not.[33] However this finding cannot be applied to criminal law at my point of view, as the cases cited above also strengthen that CJEU case-law is consistent and cumulative regarding this issue. [34]

[31] Norel Neagu: *The Ne Bis in Idem Principle in the Interpretation of European Courts: Towards Uniform Interpretation* Leiden Journal of International Law, Dec 2012, Vol. 25 Issue 4, pp 955–977 p 957.

[32] For details on differences of interpretation between the Court of Justice of the European Union, the European Court of Human Rights, Supreme Court of the United States see Norel Neagu cited work.

Michiel Luchtman also points out that the identical wording of Article 50 of the Charter and Article 4 of the 7th Additional Protocol to the ECHR does not cover the same "legislative intention", since the Explanations relating to the Charter of Fundamental Rights [*OJ C 303, 14.12.2007, p. 17–35*], the prohibition rule applies to a set of two sanctions of the same nature, in the field of the criminal law (both in the English and Hungarian language versions).

– Michiel Luchtman: *Transnational Law Enforcement in the European Union and the Ne Bis In Idem Principle* Review of European Administrative Law, 2011, Vol. 4 Issue 2, pp 5–29. p 11.

[33] Alessandro Rosano cited work p 58.

[34] Darius-Dennis Pătrăuș, in the context of Romanian law, takes the opposite view in part, arguing that in the Gasparini case the CJEU deviated from its own doctrine by opening the door to forum shopping on the one hand and the institution of obsolescence on the other. At the same time, it acknowledges that the CJEU's practice is fully in line with the ECtHR's interpretative guidelines and is, in principle, more consistent. Darius-Dennis Pătrăuș: *The Non Bis in Idem Principle in the Case Law of the Court of Justice of the European Union - Consistency or Inconsistency?* AGORA International Journal of Juridical Sciences, 2018, Issue 1, pp 25–34. p 31 & 34.