

NE BIS IN IDEM PRINCIPLE. A NEVER-ENDING SAGA IN EU LAW AND NATIONAL LAW

TUDOR DUMITRU VIDREAN-CĂPUȘAN

Babes-Bolyai University of Cluj

Cluj-Napoca, Romania

tudor.vidrean@ubbcluj.ro

Abstract:

Ne bis in idem is one of the most important principles in EU law. Also, it has a constitutional role in all EU member states. Because of the economic growth of the economies of the member states, the number of parallel tax and criminal procedures has increased. Because of that, the national courts of law are often confronted with a situation where the results of the two procedures are in conflict. In fact, it can be said that even the high courts, like national constitutional courts, European Court of Justice or European Court for Human Rights.

In this complicated context, I believe it is of outmost importance to make deep research that must engulf the roots of the principle and its reflection in the case law. Also, I would like to propose some solutions regarding the role of the principle in the EU members which are ruled by the principle of the rule of law.

In the end, the purpose of the article is to draw conclusions related to the impact of the principle in complex of EU human rights system and how a modern approach of the principle can benefit to privates, member states and EU by guaranteeing the fairness of the tax and criminal procedures in the process of the application of EU and member states taxation rules.

Keywords: *ne bis in idem; taxation; rule of law; constitutional.*

JEL Classification: K2.

1. INTRODUCTION

Ne bis in idem principle is one of the most important principles in the family of European law principles. Initially, it was applicable only to the traditional criminal law cases. The idea behind the principle was that no one should be given two penalties for the same offence (Conway, 2003). If the criminal area covered only traditional domains and did not interfere with other law areas, the application of the principle did not generate many discussions.

Because of the extension of business law principles of traditional criminal law principles interfered with the domain (Lotito Fedele, 2020). Tax law is part of business law and is under heavy scrutiny from the state authorities. Being watched by state authorities, decisions and indecision of taxpayers were being applied

sanctions, both administrative and criminal. There were many examples when the same state of fact was analyzed by both administrative and criminal procedures and the European courts were asked many times to deliver their opinion.

The first famous example when the European courts were asked to analyze the application of both administrative and criminal sanctions related to the same state of fact is the case *Engel vs. Netherlands* (ECHR, 1976). The European Court of Human Rights was asked to analyze the compatibility between the two types of sanctions (Baker, 2021). From the start, the Court of Strasbourg underlined that there is no restriction on applying both administrative and criminal sanctions to the same state of fact. But the court issued a warning: state authorities must pay attention that administrative sanctions do not transform in criminal sanctions. The famous Engel criteria test was born: the scope of the sanction; the amount of the sanction; the qualification of the sanction in the national law.

Engel case is a landmark decision because it was for the first time the application of the *ne bis in idem* principle was explained in relation to both administrative and criminal procedures. Furthermore, it is important to underline that prior to the entry into force of the European Charter of Fundamental Rights, the European Union had no competence in the fundamental rights area. It is important to notice that the case law of European Union Court of Justice prior to the entry into force of the Charter did not focus on this topic.

Everything changed after the entry into force of the Charter and the Court of Justice of the European Union became interested in interpreting the *ne bis in idem principle* in cases that have both administrative and criminal impact. Especially, art. 325 from the Treaty of the Functioning of the European Union says that the European Union and the member states have the obligation to protect the budgetary resources of the European Union, even by using criminal methods.

The first *ne bis in idem* case that was analyzed by the European Union Court of Justice, is *Fransson* (CJEU, 2013). This is a Swedish case origin that has roots in a tax law problem that was related to problems of VAT payment (Lock, 2019). Mr. Fransson was accused by the Swedish tax authorities that he was behind a fraudulent scheme to avoid paying VAT. In parallel, a criminal procedure was opened against him.

The Swedish court of law wanted to find if the criminal procedures can go on in the context when Mr. Fransson was issued an administrative tax decision that obliged him to pay the amount of VAT, default interest and tax penalties. In its reasoning, the Court of Justice of the European Union referred to the Engel criteria test and agreed fully to the theoretical explanations made by the European Court of Human Rights in the *Engel* case.

The Court explained that the tax amounts to which Mr. Fransson was forced to pay cannot be considered a criminal sanction. The supreme court of the European Union argued that the amount of VAT and the default interest do not have a criminal aspect because their role is to cover the damage suffered by the

national budget which was deprived by a legitimate right. The role of tax penalties is to force the taxpayer to comply with tax regulations in the future. The role of the criminal sanctions is to sanction the person who disobeyed a clear tax rule.

It can be said that Fransson case opened the area for a width discussion about the role of the *ne bis in idem* principle in the complicated tax vortex of the European Union and the member states cooperation under the auspices of art. 325 from the Treaty of the Functioning of the European Union. In this context, it can be said that the role of the *ne bis in idem* in the European taxation landscape is of utmost importance. The role of the present paper is to select the most important cases delivered by the European Union Court of Justice and to extract the teachings made that came out.

2. DUAL PROD (EUCJ, C-412/21) CASE. PARALLEL TAX AND CRIMINAL PROCEDURES

One of the most important questions that arises in modern taxation problems is what to do when the same state of fact is examined from two sides in parallel: tax approach and criminal approach. The problem was analyzed in some cases of the European Court of Human Rights. The first case is *Lungu and others vs. Romania* (ECHR, 2014). In this case, the Mr. Lungu was accused of tax evasion by the Romanian authorities. In the tax procedure, Suceava Court of Appeal decided that the amount of damage produced by Mr. Lungu is 60 euros.

In the criminal procedure, the same Suceava Court of Appeal decided to ignore the result of the tax procedure and decided that the amount of damage is 30,000 euros. Accordingly, the criminal sanctions were higher because they are in direct connection with the amount of the damaged produced by the taxpayer.

As can be noticed, the same court of law applied to different sanctions related to the same state of fact. The problem was presented before the court of Strasbourg from the point of view of *ne bis in idem* principle. The European court ruled that two parallel procedures are possible, but the results cannot be different. That means that the result from the procedure that ends first is automatically opposable in the second procedure and cannot be ignored.

In conclusion, Romania was condemned because of breaching the *ne bis in idem* principle because the criminal procedure ignored the amount of damage from the tax procedure and should have determined the sanctions is straight relation with outcome of the tax procedures. A few years later, the court of Strasbourg was faced with the same problem from Norway in *A and B vs. Norway* (ECHR, 2016) case and the conclusions of the court were the same (Neagu, 2019).

We can keep in mind that two parallel procedures are possible, but state authorities must pay attention in handling such topics not to harm fundamental rights of taxpayers (Groussot *et al.*, 2011). In Dual Prod case, the hot topic was brought to the attention of the European Union Court of Justice. According to the Romanian tax legislation, when an excise duty warehouse is charged with criminal

accusation related to breaching the obligation that arises from the quality of an excise duty warehouse, automatically its excise duty warehouse will be suspended if the criminal procedure is pending.

The problem is that the Romanian legislation has no provision related to the length of the criminal procedure. Dual Prod is a Romanian excise duty warehouse authorized to produce ethylic alcohol and to trade alcohol beverages. In 2018, a criminal procedure was launched against it. In 2020, it was officially indicted to breach obligations specific to excise duty warehouses, but the accusations were never presented before a criminal law judge.

In this context, the Romanian tax authorities decided to suspend for an indefinite time its excise duty warehouse authorization, suspension that set to last until the conclusion of the criminal procedure. Satu Mare Tribunal, a Romanian court of law decide to suspend the procedure and to submit a preliminary question before the European Union Court of Justice, according to art. 267 of the Treaty of the Functioning of the European Union.

The Court of Luxembourg joined the opinion of the Court of Strasbourg previously presented but decided to criticize the Romanian legislation. It has been ruled that the Romanian legislation is incompatible with the *ne bis in idem* principle because it is not acceptable to apply a tax sanction that depends on the indefinite time length of a criminal procedure. In conclusion, it is important to underline that no sanction cannot be applied in advance of one of the procedures.

3. ECOSERV (EUCJ, C-570/24) CASE. *RES JUDICATA* AND *NE BIS IN IDEM* PRINCIPLE

Another Romanian origin case is tackling the problem of the *ne bis in idem* principle in connection with the *res judicata* principle. Ecoserv is a Romanian excise duty warehouse. Its former manager was convicted by a Romanian criminal court of law for abusing company's property, especially for selling the company's alcohol products without paying excise duties and VAT. The criminal indictment decided that only the former manager is to be held responsible for the breach and the damage will be recovered by the Romanian tax authorities only from the budget of the former manager (CJEU, 2024).

The Romanian tax authorities issued a decision before the end of the criminal procedure and decided that only the company is to be held responsible to pay excise duties and VAT. Cluj Court of Appeal is entitled to decide whether to annul or to uphold the tax administrative decision. Because of the decision delivered by Cluj Court of Appeal – Criminal Chamber, Cluj Court of Appeal – Tax Chamber decided to open a preliminary procedure.

The Romanian court wants to find if the European law, especially *ne bis in idem* principle, opposes to an interpretation according to which it is possible to ignore the criminal decision taken by a court of law and to uphold the

administrative tax decision. At the time of writing the present article, the European Union Court of Justice has not delivered a decision yet.

Nonetheless, an opinion should be expressed because also the principle of *res judicata* it is applicable. In the *Lucchini* case, the European Union Court of Justice declared that the principle of *res judicata* cannot be breached in the process of applying the EU law and is mandatory to be considered (Cappai and Colangelo, 2023).

Although, the Romanian tax authorities have the obligation to protect the financial interests of the EU financial resources, according to art. 325 of the TFUE and of the member states, our opinion is that still the principle of *res judicata* has priority. Because the criminal procedure ended first, its result should automatically be reflected in the tax procedure (Turmo, 2021).

What is important to underline is that the decision delivered in the criminal procedure decided who is responsible for the damaged represented by unpaid excises duties and VAT in the person of the former manager and the Romanian tax authorities are tasked to put that decision into force. If the European Union Court of Justice would reject the above proposed point of view, our opinion is that will open the Pandora box by targeting directly the principles of *res judicata* as part of the wider principle of the legal certainty. Furthermore, even the foundation of the *ne bis in idem* principle will be shaken because that will mean that the result of the first terminated procedure is no longer opposable in the second procedure.

As can be noticed, the principle of *ne bis in idem* is the origin of complex and important debates over its application and its effects on taxation (Ardizzone, 2023). The reality proves that member states want to put into practice art. 325 of the Treaty of the functioning of the European Union and that is an objective that should be praised. But, as can be noticed from the above-mentioned cases, it is of utmost importance to comply with all standards of fundamental rights of taxpayers (Radvan and Schweigl, 2016).

4. CONCLUSIONS

From our perspective, it is important to underline that the European Union needs to improve its legislative instruments to approach correctly the balance between protecting taxpayer fundamental rights and protecting the financial interests of the European Union. The Member States' competencies should be limited only to put into practice European legislation, not to make legislation.

Furthermore, future European legislation should approach in a comprehensive manner the parallelism of procedures with the aim of providing a logical interference between tax and criminal procedures. Otherwise, a situation like the one from Dual Prod case will happen again. Nonetheless, member states courts of law should be instructed to use extensively the preliminary procedures according to art. 267 of the Treaty of the Functioning of the European Union. The

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