The ne bis in idem principle and the impact of criminal proceedings on judicial administrative proceedings

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Legal Basis

• ECHR – Art. 4 of Protocol No. 7 ("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")

• EU law: general principle / Art. 50 of the Charter of Fundamental Rights ("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")

  - direct effect
  
  - presupposes sufficient nexus with scope of EU law (Art. 51 of the Charter - e.g. ECJ C-617/10, paras. 17-31)
  
  - however, also applicable in proceedings taking place in different Member States (ECHR: only in the same State)
Essential scope/content

• Applicable only to “punitive” proceedings – Rule pertinent only to sanctions (not applicable to other measures, such as taxes, which may be challenged in the context of the same judicial administrative procedure)
• Precludes the duplication of such proceedings
• Mainly, “due process” guarantee [ECHR (GC) A and B v. Norway, para. 107]
• Legal effect: the second procedure (the one which is still pending when the other has been terminated with a final decision) must close with a decision favorable to the accused: annulment by the administrative court of the contested administrative sanction, if final criminal judgment
Legal justification/origin
(criterion for interpretation)

• Rule of law
• Proportionality
• Res judicata – Legal certainty and stability of legal relations

Greek Council of State (CoS) 1102/2018
Most important judgments at the European level

**ECtHR (GC)**

* Zolotukhin v. Russia, 10.2.2009 (14939/03)

**CJEU (GC) 20.3.2018**

* C-524/15, Menci
* C-537/16, Garlsson Real Estate
* C-596/17 & C-597/17, Di Puma & Zecca
1/4 “Criminal” proceedings
Autonomous concept - *Engel* criteria:
(i) classification under national law
(ii) nature of the rule/offence (purpose, addressees and protected interest - disciplinary offences of public servants generally excluded)
(iii) nature and severity of the potential penalty
Criteria (ii) and (iii) alternative (not necessarily cumulative)
“Criminal” administrative sanctions under the case law of the ECtHR:
- monetary sanctions (fines) for violations of tax law, social security law, competition law, urban legislation, capital markets legislation etc.
- non-monetary sanctions (e.g. revocation of driving licence for one month)
ECHR - conditions of applicability

2/4 Bis: two distinct “criminal” proceedings condition not met if the proceedings at issue are sufficiently closely connected in substance and in time, so as to form an integrated/coherent whole (A and B, paras. 130-134)

Criteria for close connection in substance:
(a) complementary purposes & different aspects of misconduct,
(b) duality is a foreseeable consequence of the conduct at issue,
(c) no duplication in the collection and assessment of evidence,
(d) first (final) sanction taken into account when determining the second one, so as their combination respects proportionality
ECHR - conditions of applicability

3/4 “Final” decision on one of the proceedings (outcome not relevant)
- *res judicata* force: irrevocable decision, namely no “ordinary” remedies available or exhaustion of such remedies or time-limits have expired (*Zolotukhin*, para. 107)
- what is an “ordinary” appeal seems to depend on its conditions of admissibility and the content of the admissible pleas
- “extraordinary”: request for reopening of proceedings
ECHR - conditions of applicability

4/4 **Idem**: both proceedings must be directed against the same person and must concern, in substance, the same violation

- condition not met if one procedure against a company and the other one against its legal representative

- same violation: same set of concrete facts, inextricably linked together, in time and space (legal characterisation or protected interests not important)
EU law – applicability and scope of protection

Points of similarity with the ECHR, as interpreted by the ECtHR

- “criminal” proceedings: *Bonda* criteria, similar to *Engel* criteria (emphasis on the punitive purpose of the procedure)

- idem: similar approach (identity of material facts – legal classification and protected legal interest not relevant)
EU law – applicability and scope of protection

Divergence from the approach of the ECtHR

- CJEU has not adopted, as regards the condition of bis, the criterion of “sufficiently close connection in substance and in time”

- instead, it examined, under Art. 52 of the Charter, whether the duplication of criminal proceedings is a justified/legitimate limitation of the right protected by Art. 50
EU law – Justification for the limitation of the ne bis in idem right

• Legal basis (sufficiently clear and foreseeable)
• Objective of general interest
• Proceedings and penalties pursue complementary aims, relating, as the case may be, to different aspects of the same unlawful conduct (e.g. flat-rate administrative fine for infringements, whether intentional or not, and severe criminal penalties for serious violations)
• Proportionality (appropriate and strictly necessary measure)
EU law – Proportionality of the limitation

• it implies rules ensuring coordination of the procedures
• need for respect of the principle of proportionality of all (cumulative) penalties, in relation to the seriousness of the offence (problem when penalties do not have the same nature/content, e.g. imprisonment - fine)
EU law – Proportionality of the limitation – Criminal Acquittal

• In case of a final criminal judgment acquitting the accused, because the facts of the offence were not established, proceedings for an administrative fine clearly exceed what is necessary (Di Puma)

• Criminal prosecution terminated by a final decision, applying the relevant statute of limitations. Is this an acquittal?

Greek CoS 1102/2018: No, ne bis in idem not applicable, because an “acquittal” decision presupposes assessment of whether the offence has been committed or not [cf. C-486/14, Kossowski and ECtHR, Margus v. Croatia, paras. 118-121 - the Gasparini judgment (C-467/04, concerning art. 54 of the Convention implementing the Schengen Agreement) has been overruled by the Spasic (C-129/14), Kossowski, Menci and Garlsson Real Estate judgments of the CJEU]
EU law – Proportionality of the limitation - Criminal Conviction

• In case of a final criminal conviction, proceedings for an administrative fine exceed what is strictly necessary, in so far as the conviction is such as to punish the offence committed in an effective, proportionate and dissuasive manner (Garlsson Real Estate – cf. also C-617/10, Fransson, paras. 26-36)

• Greek CoS 1887/2018: conviction for evasion of custom duties amounting to 220,000 euros, by using fraudulent actions – suspended one year prison sentence manifestly too lenient to satisfy the above condition – administrative fine equal to the evaded duties does not infringe the ne bis in idem principle
Conclusion

• In general, the decisions of the two European Courts move along similar lines, towards the same direction.
• “Justification for the limitation” approach of the CJEU covers, to a large extent, the elements pertaining to the “close connection” criterion, adopted by the ECtHR.
• Although not identical, the level of protection afforded by EU law is compatible (and comparable) with that guaranteed by the ECHR (Menci, para. 62).
• National administrative courts may still face considerable difficulties in applying the rules laid down by the two European Courts – Further clarifications might be necessary.