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NO ONE SHALL BE TWICE TRIED FOR THE SAME OFFENCE. NE BIS IN IDEM

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ABSTRACT: *The ne bis in idem principle finds its reflection not only in the criminal law, as we are quick to believe, but also in other branches of law such as administrative law, more precisely in the field of administrative legal liability. The approach to the subject is general, however it seeks to raise the interest in establishing a fair relationship between the national law and the law born out of the application of primary, secondary or complementary legislation that form the European law.*
Undoubtedly, the actuality of the subject is reflected in the jurisprudence of the Court of Justice of the European Union and the European Court of Human Rights, which is binding on the national law in what concerns its application.

KEYWORDS: *ne bis in idem principle, criminal procedure, contraventional procedure*
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According to Article 46 of the European Convention on Human Rights, ratified by Romania[1], the final judgments of the Court are binding on the Contracting Parties, and they must fully comply with them and with the interpretations given regarding the compliance of the authorities of a State with the regulated rights and freedoms protected by convention. By the Treaty of Accession to the European Union[2], Romania also committed to comply with the legislation of the Union, starting from the Constitutive Treaties (TEU, TFEU), the primary, the secondary or the complementary legislation.

The *non bis in idem* principle is usually associated with the criminal procedural law as a result of Cesare Beccaria's statement with a value of dogma in the *Dei Delitti e delle Pene*, also found in Article VIII of the Declaration of Human Rights and Citizen of 1789, but aslo approved in the Constitution of 1793. At least formally, this principle - *no one can be twice tried for the same offence* - is placed in the scaffold of modern criminal

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[1] Ratified by Law no. 30/1994 on the ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Additional Protocols to this Convention, published in the Official Gazette no. 135 of 31 May 1994
[2] Signed in Luxembourg on 25 April 2005.

procedural law, joined by another great principle, the lawfulness of incrimination and punishment - *nullum crimen sine lege, nulla poena sine lege*.

If we were to set these two principles at the "field of the criminal process", we should also invite the presumption of innocence, the principle of guaranteeing the right to defense, and also the respect for human dignity. It is obvious that the purpose of the criminal trial can only be that of finding the truth about the facts and circumstances of the case, as well as about the person who is the perpetrator (Article 5 of the Romanian Criminal Code).

Judgment can only take place in respect of the law, "*nullum judicium sine lege*", which interferes with the aspiration of any individual to stand in front of the judge in full knowledge of the factual and legal reality for which he expects "*the law to rule*"[3].

The *non bis in idem* principle is specifically provided in Article 6 of the current Romanian Code of Criminal Procedure (*ne bis in idem*), entered into force on 1 February 2014, but it was also contextualized in the old code (Article 10 paragraph 1 letter j) with the same substance, even if the drafting forms differ.

Its elements, which, of course, are the reflection of the principle in the criminal procedural law, are the following: a). no person can be prosecuted or tried; b). for committing a crime; c). when it's about the same person; d). previously received a peremptory criminal judgment; e). with respect to the same offence; f). even under another legal classification.

The application of the principle within the criminal case also expresses also the obligation of compliance with all these elements, the examination of the facts constituting a set of factual circumstances involving the same perpetrator, inextricably linked in space and time[4].

The question which arises in the presented context is whether this principle applies to other forms of legal proceedings, namely the administrative or civil proceedings.

This question becomes natural if we consider the rigidity of the Romanian Constitutional Court, which, in Decision no. 208 of 15 February 2011, stated, as in other decisions for that matter, that the presumption of innocence is inherent only to the criminal trial, having nothing to do with civil, commercial, fiscal or administrative litigation cases[5].

It is indisputable that the national rules and jurisprudence should respect the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights as interpreted by the European enforcement bodies as regards the right to a fair trial.

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[3] Incrimination by analogy was not possible neither by the 1969 Romanian Criminal Code nor by the one that came into force in 2014.

[4] ECHR, Judgment of 23 June 2015, Butnaru and Bejan-Piser v. Romania, published in the Official Gazette of Romania no. 139 of 23 February 2016.

[5] Decision of the Romanian Constitutional Court no. 208 of 15 February 2011 published in the Official Gazette no. 218 of 30 March 2011; Decision of the Constitutional Court of Romania no. 1368 of 26 October 2010, published in the Official Gazette no. 33 of 13 January 2011; Decision of the Constitutional Court of Romania no. 900 of 6 July 2010, published in the Official Gazette no. 530 of 29 July 2010; See also para. 11 of the Preamble to Directive 2016/343/EU on the strengthening of certain aspects of the presumption of innocence and the right to be heard in criminal proceedings, published in the Official Journal of the European Union L65 on 11 March 2016.

The field of enforcement of the *non bis in idem* principle, from our point of view, also based on the jurisprudence of the ECHR and the CJEU, is certain that it cannot be confined to the field of criminal liability alone.

In this demonstration, we will depart from the general rules applicable in the light of Article 4 of Protocol no. 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[6] as well as Article 50 of the Charter of Fundamental Rights of the European Union[7].

Article 4 paragraph 1 of Protocol no.7 of the European Convention on Human Rights provides: "*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*".

Article 50 of the Charter states 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*.[8]"

As regards the interpretation of the two texts, note that, if the provisions of Article 4 of the Protocol are intended to apply only to "*the jurisdictions of the same State*", the provisions of Article 50 of the Charter are applicable "*within the Union*" therefore also between Member States of the European Union.

Elements of reporting in the assessment of the existence respectively the applicability of the *non bis in idem* principle in a particular case are the existence of a final judgment which enjoys *res judicata*, the identity of the facts of the two judicial proceedings, respectively the identity of the persons.

The non bis in idem principle between the administrative liability and criminal liability.

Designed as a fundamental legal institution of law, legal liability implies an obvious manifestation of the violation of the legal norm. The basis of liability is the unlawful act, the violation of a certain type of legal norm, the guilt under its forms, the resulting consequences, as well as the causal link between the illicit act and the damage caused. The administrative liability implies a violation of a rule of administrative law. The forms of administrative liability are: the administrative contraventional liability, the disciplinary administrative liability and the patrimonial administrative liability.

Even if the legal literature suggests that administrative-contraventional law is a forced notion, as it is not a distinct result of the "fragmentation" of administrative law (Ursuța, 2017), the institution of administrative-contraventional liability raises in the jurisprudence a whole series of questions, related to its legal nature, the applicable civil procedure, the administrative nature of the fact-finding report, which enjoys, above all, the presumption of legality, and so on.

It is important to remember that initially the offense had a tripartite division, namely, crimes, torts and contraventions. The old French law, namely Napoleon's Code of criminal instruction in 1808, provided for this tripartite division in crimes assigned to the

[6] Signed in Rome on 4 November 1950.
[7] Issued on 7 December 2000, adopted on 12 December 2000 in Strasbourg.
[8] See Article 10 of the Law no. 302/2004 on International Judicial Cooperation in Criminal Matters published in the Official Gazette of Romania no. 377 of 31 May 2011.

Court of Juries, torts assigned to Corrective Tribunals and contraventions assigned to the Police Tribunals.

This classification, which was distinguished by the gravity of the facts, was also retained in the current French Criminal Code (Article III-1).

The Criminal Codes of 1865 and 1936 in Romania also followed the same tripartite structure, where "contraventions are part of the jurisdiction of the district courts and part of the jurisdiction of the administrative courts"(Pop, 1923).

The passing of the contraventions under the administrative legal regime was accomplished in Romania by the Law no. 345/1948 and the Decree no. 184/1954, so that from the "criminal" field, these illicit deeds with a lower degree of social danger, passed in the administration field. This change in the legal regime applicable in the area of legal liability regulation is also met in other countries (Czech Republic, Russia, Germany).

However, the origin of criminal law of the contravention is in the Romanian law, starting with the definition, features, elements, causes for the elimination of the unlawful character of the offences, principal or complementary sanctions, the continuation of the contravention or the contest, the plurality of contraventions, etc.

All the more, the Romanian legislature has come to recognize the fact that the "roots" of the offense lie in the criminal field, insomuch that through the revision of the Constitution of 2003 it has admitted that even in the case of contravention the provisions on the more favorable law shall apply[9].

All these assertions have been found to be necessary once the European Court of Human Rights itself appraised in various judgments that the Romanian legislation, through the legal treatment prescribed in the case of contraventions, has in fact perpetuated many of the elements inherent to criminal liability[10].

States may choose the legal regime applicable to the various offences, subject to a multitude of objective and subjective criteria, but must not exceed certain reasonable limits, taking into account the proportionality between gravity and sanction (Article 6 of the ECHR Convention)[11].

The problem that we raise is whether once the contravention sanction has been enforced by a final record of findings, (peremptory) the same person may, for the same offence, be the subject of another procedure, namely the criminal proceedings.

The demonstration made by the European Court of Human Rights comes to argue that, to the extent the administrative-contraventional procedure is subject to the specific rules of a criminal proceeding, the application of the *non bis in idem* principle occurs in the second case, preventing the continuation of the second procedure either to the prosecution or to the trial[12].

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[9] Article 15, paragraph 2, of the Constitution of Romania, as amended by the Romanian Constitutional Revision Law no. 429/2003, approved by the national referendum of 18-19 October 2003, in force since 29 October 2003, published in the Official Gazette of Romania, Part I, no. 758 of 29 October 2003.

[10] ECHR, Judgment of Ioan Pop v. Romania ruled on 28 June 2011; ECHR, Judgment of Nicoleta Gherghe v. Romania on 3 April 2012, available at www.echr.coe.int.

[11] ECHR, Grecu v. Romania judgment delivered on 30 November 2006; Popa v. Romania Judgment ruled on 14 December 2004; The judgment in Deweer v. Belgium, dated 27 February 1980, available on www.echr.coe.int.

[12] ECHR, Anghel v. Romania judgment of 4 October 2007; Tsonyo Tsonev judgment v. Bulgaria on 14 January 2010, available at www.echr.coe.int.

The European Court claims that by "accusation", the judicial authority practically expresses in a formal sense "the imputation of committing a criminal act"[13].

As the "accusation" is done through a report of findings, the classification of the offence and the sanction applied as being of criminal nature or not is done by applying the so-called "Engel" criteria[14]. These criteria are alternative and if the conditions are not met for any of them to be applied, they become cumulative. These alternative criteria are:

1°. If the text of the offense can be considered as having a criminal feature (featuring the offense under the national law); 2°. the identity of the facts, namely in the contraventional procedure and in the criminal proceedings (the nature of the deed); 3°. the nature and degree of severity of the sanction applied (doubling the judicial procedure)[15].

If, after checking the first criterion, the offence does not fall within the scope of criminal law, the nature of the offence requires analysis according to the provisions of Article 6 of the Convention, namely to whom the rule is addressed, if it is of a general nature, and the latter criterion involves establishing the circumstances related to the punitive feature, in order to achieve a preventive purpose, which in its entirety will attribute a criminal feature to both the offence and to the sanction. In the light of the ECHR case law, under the aspect of classifying the deed as criminal, the relatively small amount of the contravention fine is irrelevant[16].

If the above criteria show that "the record of findings constitutes a criminal charge", the presumption of the legality of the administrative act is automatically overturned and the process, in this new characterization of the procedure, requires the observance of certain safeguards such as:

a. The presumption of innocence, which, in its turn, entails a number of effects, such as the fact that the burden of proof before the court falls on the fact-finding authority (*onus probandi incumbit qui dicit, non ei qui negat*). Also, incident appears to be the right to silence, the right to refuse to declare anything and the right of the petitioner to avoid self-incrimination[17];

b. The right to defense[18];

c. The right to interrogate or request evidence (witnesses, expertise);

d. The right to interpretation and translation[19];

e. The right to information[20];

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[13] ECHR, the judgment in Foti v. Italy of 10 December 1982, available on www.echr.coe.int.

[14] ECHR, Engel and Others v. the Netherlands, 8 June 1976; The judgment in the case of Sergey Zolotukhin v. Russian Federation in the Grand Chamber of 10 February 2009, available on www.echr.coe.int.

[15] ECHR, Engel v. Netherlands judgment of 8 June 1976; The judgment in Ozturk v. Germany of 21 February 1994, available on www.echr.coe.int.;

[16] ECHR, The ruling in the case Jussila v. Finland on 23 November 2006; Anghel v. Romania, judgment of 4 October 2007, available on www.echr.coe.int.;

[17] Directive 2013/343/EU of the European Parliament and of the Council of 9 March 2016, published in the Official Journal of the European Union no. 165/1 of 11 March 2016 (Preamble to para. 27, "supposes that the competent authorities should not oblige the suspected or accused persons of supplying information against their will, on the contrary, the ECHR, the judgment O'Halloran and Francis v. UK of 29 June 2007.

[18] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013, published in the Official Journal of the European Union no. 1294/1 of 6 November 2013.

[19] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010, published in the Official Journal of the European Union no. 1280 of 26 October 2010.

[20] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012, published in the Official Journal of the European Union no. 142/1 of 1 June 2012;

Therefore, a second file can not be constituted in the criminal proceedings for the same offences and against the same person, except in violation of the *non bis in idem* principle.

In relation to all the arguments presented, as a guarantee against a new criminal action or such a risk, the courts are required to examine whether or not the above criteria are met. The aspect to be clarified does not require to determine whether the elements of the offense are identical or not and whether they are treated both as administrative offenses and as offenses under the national law (Article 4 of the Protocol) or the Union law (Article 50 of the Charter)[21].

Non bis in idem principle between disciplinary administrative liability and criminal liability

It is interesting to note that in its case law, ECHR has stated that the *non bis in idem* principle also finds its reference in the case of disciplinary administrative liability. Thus, the ECHR has shown that a guarantee of the criminal proceeding provided by Article 6 paragraph 2 of the Convention, namely the presumption of innocence, finds its application in another proceeding, that is, in the disciplinary one[22].

Non bis in idem principle between administrative fiscal liability and criminal liability

In its case law, the ECHR argued that "by adopting an autonomous interpretation of the notion" "criminal charge", by applying the Engel criteria, the Convention bodies laid down the basis for the progressive extension of the application of the criminal aspect of Article 6 to areas that do not officially fit in the traditional category of the criminal law, such as administrative contraventions, ... penalties for violating the prison disciplinary, ... customs offenses, ... financial penalties imposed for violation of the Convention, ... as well as fines imposed by financial jurisdictions.[23]"

These considerations, in their substance, are reiterated in other judgments, such as the judgment in case A and B against Norway[24], but it is to be seen how the application of the *non bis in idem* principle would be applied in the case law of the Romanian courts when we find ourselves in the presence of a criminal procedure and an administrative-fiscal procedure has been definitively consumed. The revolution should take place in the judiciary system, having as a binding target a greater respect for the human being, for the values that the human being sums up, because life itself is unrepeatable.

The criminal proceedings in all cases involving fiscal implications (evasion, deception, embezzlement, etc.) must be brought to an administrative authority in an administrative-fiscal procedure (additional tax decision, accessories, delay payment penlty, etc.).

The administrative-fiscal procedure implies, through the consequences of a "punishment", the normal framework for asserting a "criminal charge" in fullness of the word[25].

The Grand Chamber of the Court of Justice of the European Union in Aklagaren v. Hans Akerberger Fransson (Sweden), in its judgment of 26 February 2013, argued that the Member States for the same acts of non-compliance with the declaratory obligations in the field of value added tax , can impose in succession also a fiscal sanction and a criminal

[21] ECHR, Muslja v. Bosnia and Herzegovina judgment of 14 January 2014, available at www.echr.coe.int.
[22] ECHR, Vanjak v. Croatia judgment of 14 January 2010, available on www.echr.coe.int.
[23] ECHR, Judgment in Jussila v. Finland judgment of 23 November 2006, available on www.echr.coe.int.
[24] ECHR, Judgment in case A and B v. Norway of 15 November 2011, available on www.echr.coe.int.
[25] See Article 4 paragraph 1 of Protocol no. 7, Articles 6 and 7 of the European Convention on Human Rights.

sanction, in so far as the first sanction does not have a criminal feature, a matter that must be verified by the first instance court[26].

In the case in question, the Swedish national paid additional fees as a result of the imputation made by the tax administrative body on the one hand, being charged with false statements (tax offense), on the other hand. The question was whether the charge had to be withdrawn once he had already been taxed for the same acts (Article 4 of the Protocol and Article 50 of the Charter).

On February 26, 2013, the Grand Chamber of the Court of Justice of the European Union delivered the judgment and, consequently, on 11 June 2013, the Supreme Court of Sweden, through an appeal in the interest of the law, interpreted "*that no person who was administratively sanctioned by payment of a tax/additional tax, can no longer be prosecuted for the same material offences*".

On its own way, Finland, by a decision of the Supreme Court of 5 July 2013, in a preliminary interpretation procedure, changed its case-law in similar cases, establishing that if administrative sanctions were applied, the criminal proceedings can no longer be started.

As the Court of Justice of the European Union will become more consistent in this matter, the more the right itself will be subject to a multitude of problems.

Contravention liability vs tort liability

The Constitutional Court of Romania, by Decision no. 57 of January 26, 2012[27], stated that it is possible to aggregate the contraventional liability with the tort liability and other civil liability, the payment of a contravention fine, on the one hand, and, on the other hand, an indemnity fee based on the essential difference between each type of liability. Thus, the Court assesses that we are not faced with the application of the *non bis in idem* rule because if in the case of contractual liability the incrimination of an unlawful conduct is intended, by establishing a civil liability, the repair of the damage suffered is intended.

Instead of conclusions:

A first observation is related to the rigidity with which national courts apply the principles deriving from the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, respectively the Charter of Fundamental Rights of the European Union.

A second observation concerns the slowness with which the European institutions, the courts designated as forums for the interpretation and enforcement jurisdiction of the relevant legislation, support and extend the fundamental rights and principles recognized by the Charter and ECHR, the right to a fair trial, the presumption of innocence stated in before any judicial or administrative authority and to any type of judicial (criminal, administrative, civil, etc.) proceedings, to genuinely guarantee the right to defense. The great principles of law do not produce the segregation of branches of law but are applicable to any procedure, regardless of its nature.

A third observation concerns the observance and application of the provisions of Article 6 of the Treaty of the European Union (TEU), which shows that the Union recognizes the rights and freedoms set out in the Charter and under which the fundamental

[26] CJEU, Judgment of the Court of Justice (Grand Chamber) in the case of Aklagarea v. Hans Akerberg Fransson (Sweden) dated 26 February 2013, available at http://curia.europa.eu.

[27] Published in the Official Gazette of Romania no. 244 of 11 April 2012.

rights, as guaranteed by the European Convention on Human Rights and as they result from the constitutional traditions common to the Member States, constitute general principles of the Union law. The level of protection established by the Member States should never be inferior to the standards set out in the Charter or the ECHR, as interpreted by the EU Court of Justice and the European Court of Human Rights[28].

A fourth observation requires the Romanian Constitutional Court to revert to its practice by which it has removed the procedure for settling the contravention complaints by the ECHR and the CJEU case law, but above all by the traditions of the Romanian procedural and administrative procedural law, and to abolish the autocracy of the fact finding administrative authorities, opening the doors to the democratization and transparency of criminal and administrative proceedings.

REFERENCES

Emmanuel Dreyers, 2014. *Droit penal général p.146 (crimes – crimes like manslaughter, rape, offences of public servants, counterfeiting currency or bank tickets, torts – assumed serious contraventions, –*. 3e Edition ed. s.l.: Lexis Nexi.

Pop, T., 1923. *"Drept penal comparat". Parte generală, vol.II, pp.197-199*.. Cluj: Institutul de Arte Grafice "Ardealul".

Ursuța, M., 2017. "Este dreptul contravențional un rezultat al fragmentării dreptului administrativ; Scurte considerații". *Dreptul no.3,* pp. 54-59.

[28] See para. 47.48 of the Preamble to Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and the right to be heard in criminal proceedings, published in the Official Journal of the European Union L65 on 11 March 2016.