Directorate-General for Library,
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RESEARCH NOTE

Cumulation of administrative and criminal sanctions and the *ne bis in idem* principle

[…]

Subject matter: […] Examination of the application, in the Member States, of the *ne bis in idem* principle where there is a cumulation of administrative, particularly fiscal, sanctions and criminal sanctions, and case-law of the European Court of Human Rights relating to this issue

[…]

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[…]

SYNOPSIS

I. INTRODUCTION

1. This research note […] concerns the application, in the law of certain Member States, [2] of the *ne bis in idem* principle where there is a cumulation of, on the one hand, administrative, particularly fiscal, sanctions [3] and, on the other hand, criminal sanctions, and the case-law of the European Court of Human Rights ('ECtHR') relating to this issue.

2. The starting-point for addressing the problem is a study of the case-law of the ECtHR. Indeed, it is there that the scope of the *ne bis in idem* principle, enshrined in Article 4(1) of Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), [4] has been significantly extended. In that regard, although the scope of application of that principle was traditionally limited to criminal law in the strict sense, the case-law of the ECtHR has basically led to the extension of its application to situations of cumulation of criminal sanctions and administrative sanctions.

3. However, it is apparent from the study that the Member States adopt different approaches from that taken by the ECtHR. That is due in part to the fact that the concept of the *ne bis in idem* principle differs from one State to another.

4. In that context, in order to cover the relevant national solutions which have the same function as that principle but do not fall within its scope according to the national interpretation *stricto sensu*, it seemed appropriate to extend the scope of the research conducted for the purposes of preparing this note. Indeed, it is also necessary to include all the national mechanisms providing for the consecutive

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3 In the interests of simplification, the term 'sanctions' is used to identify the measures applied in the national laws following administrative or criminal proceedings, irrespective of the wide variety of terms existing in the Member States.

4 Under that provision, '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'.

application of administrative, particularly fiscal, sanctions and criminal sanctions, in response to the same conduct, irrespective of the principle they are intended to implement.

5. In view of those differences in approach, it is necessary to describe, first, the way in which the ECtHR envisages the application of the *ne bis in idem* principle to situations of cumulation of administrative and criminal sanctions (II), and, secondly, the solutions adopted at national level in that regard (III).

II. THE *NE BIS IN IDEM* PRINCIPLE IN THE CASE-LAW OF THE ECtHR

6. It is apparent from the case-law of the ECtHR that there is an infringement of the *ne bis in idem* principle if the following conditions are satisfied:

(1) the existence of two sets of criminal proceedings within the meaning of the ECHR;

(2) the identity of the offences prosecuted (concept of *idem*);

(3) the existence of a final decision;

(4) the duplication of proceedings (concept of *bis*).

A. THE EXISTENCE OF TWO SETS OF CRIMINAL PROCEEDINGS WITHIN THE MEANING OF THE ECHR

7. With regard to the first condition, namely the criminal nature of the proceedings, the ECtHR relies on three criteria identified in the case-law, which are not of equal value; whereas the first is only indicative, the other two are decisive:

- the legal classification of the offence under national law;

- the nature of the offence;

- the severity of the penalty incurred.

8. By following a broad and autonomous interpretation of that concept of ‘criminal nature’, the ECtHR has been able to classify as criminal proceedings those at the end

of which fiscal sanctions, such as a tax supplement or surcharge, were imposed. Conversely, fiscal proceedings seeking only recovery of the full amount of tax, without any increase being applied, have been held to be administrative or fiscal in nature and not criminal. However there is still a fine line between proceedings seeking only financial reparation and those which are punitive and dissuasive.

B. THE IDENTITY OF THE OFFENCES PROSECUTED (CONCEPT OF *IDEM*)

9. In order to conclude that the offences at issue are identical, since the judgment in *Zolotukhin,* [5] it seems that the ECtHR has focused its examination only on the facts which have given rise to the two sets of proceedings, irrespective of their legal classification, which may be different in those two sets of proceedings. The Strasbourg court was able to state in that regard that the two sets of proceedings at issue must relate to 'a set of concrete factual circumstances [which are] inextricably linked together in time and space'.

C. THE EXISTENCE OF A FINAL DECISION

10. With regard to the third condition, the existence of a decision which has become final, the case-law of the ECtHR requires the existence of an irrevocable decision.

D. THE DUPLICATION OF PROCEEDINGS (CONCEPT OF *BIS*)

11. Finally, concerning the fourth and last condition, namely the duplication of proceedings, it may be noted that the ECtHR traditionally held that the mere fact that the person was prosecuted again on the same facts despite the existence of a final decision could suffice to establish an infringement of the *ne bis in idem* principle. In its case-law relating to that condition, it did not matter if the administrative proceedings preceded or followed the criminal proceedings, if the sanction imposed in the first set of proceedings was deducted from that given at the end of the second set of proceedings or even if the accused was acquitted at the end of the second set of proceedings.

12. In the judgment in *A and B v. Norway*, after reviewing its case-law concerning dual proceedings, [6] the ECtHR tempered that finding of infringement of the principle. By

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5 Judgment in *Sergey Zolotukhin v. Russia* [GC], 10 February 2009, No 14939/03.

6 'Dual' or 'parallel' proceedings refer to proceedings which combine administrative and criminal sanctions, imposed by different authorities, in response to the same conduct. The term 'dual

that judgment, it accepts that the States may punish, in dual administrative and criminal proceedings, certain conduct where there is a 'sufficiently close connection in substance and in time' between the two sets of proceedings concerned. The Strasbourg court thus considers that there is no real duplication of proceedings but rather a combination of proceedings constituting an integrated and coherent whole. The Strasbourg judges specified, with regard to the connection in time, that it was not necessary, however, for the two sets of proceedings to be conducted simultaneously. As regards the requirement for a close connection in substance, the ECtHR provided four factors for identifying it:

(1) the complementarity of the purposes of the proceedings;

(2) the foreseeability, for the person concerned, of dual proceedings;

(3) the interaction between the various competent authorities in the implementation of the proceedings;

(4) the compliance with the requirement of proportionality in fixing the overall amount of the sanctions.

13. The Member States covered by this note do not address the problem of cumulation of administrative and criminal sanctions in a uniform manner.

III. THE CUMULATION OF SANCTIONS AT NATIONAL LEVEL

14. At national level, in the eight legal orders studied, the problem of the acceptability of a cumulation of the sanctions provided for by two different branches of the law, namely the criminal and administrative branches, is a very real one. However, the approach taken frequently differs from that of the ECtHR. There are several reasons for that divergence.

15. It is necessary to make the preliminary point that, of the eight Member States covered by this research note, four are not, or do not consider themselves to be, bound by Article 4 of Protocol No 7 to the ECHR (**Germany**, **the United Kingdom**,

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proceedings' is used, in particular, in the case-law of the ECtHR. See for example the judgment in *A and B v. Norway* [GC], 15vember 2016, Nos 24130/11 and 29758/11, §§ 108 et seq.

because they have not signed and/or ratified that Protocol, and **France** and **Italy**, [7] since those two States lodged reservations or declarations limiting the scope of the *ne bis in idem* principle to criminal proceedings as defined by their national law). There are therefore significant differences between the Member States in respect of that legal framework alone.

16. Moreover, while all the Member States are bound by Article 50 of the Charter [8] — which enshrines the same principle — and by the interpretation given to it by the Court of Justice in *Åkerberg Fransson*, under Article 51 of the Charter, the scope of that principle is restricted to situations of implementation of EU law and therefore also fails to include all the situations of cumulation of sanctions which are relevant to the subject matter of this research note.

17. Furthermore, the *ne bis in idem* principle, as such, is certainly well recognised, whatever it may be called, [9] in all the Member States which are the subject of the analysis. Its sources may be different in that regard. It may be enshrined either expressly in the Constitution (**Germany**, **Hungary**), or inferred from its provisions enshrining the principles of the rule of law or of legality (**Poland**), or even enshrined at legislative level (**France**, **Italy**) or by the case-law (**United Kingdom**). However, the scope of that principle according to national rules may be different from the scope of the principle enshrined in Article 4 of Protocol No 7 to the ECHR and Article 50 of the Charter. Indeed, according to the traditional interpretation prevailing at national level, that principle is very often considered to be applicable within a single branch of the law, particularly criminal law (**Germany**, **France**, **Italy**).

18. In light of the above, those differences in legal framework have appeared to imply and justify a difference in approach to the problem at issue at national level.

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7 The reservation made by **Italy,** consisting in essence of a declaration, was however declared invalid by the ECtHR in the judgment in *Grande Stevens and Others v. Italy*, 4 March 2014, Nos 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10, §§ 204 to 211.

8 However, mention should be made of Protocol No 30 to the Treaty on the Functioning of the European Union, on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.

9 For example, the '*double jeopardy*' of United Kingdom law corresponds to that same principle.

A. ORIGINS AND DIVERSITY OF THE RULES APPLICABLE TO THE CUMULATION OF SANCTIONS

19. In the Member States, the problem of cumulation of criminal and administrative sanctions is likely to be treated principally on two levels, namely the legislative level and the jurisdictional level.

20. Since [2012], following the judgment in *Åkerberg Fransson*, of the legal orders examined, only **Sweden** has made significant amendments to its national legislation, to ensure conformity of the national law with the relevant case-law of the ECtHR and the Court of Justice.

21. In 2012, the **Hungarian** legislature introduced provisions for the exclusion of certain specific categories of offence from the concurrence of administrative and criminal liabilities.

22. A completely different approach was adopted by the **Spanish** legislature which, in 2015, deleted the express reference to the ban on imposing an administrative sanction following a criminal conviction.

23. In the other legal orders studied, the legislative solutions applied are those which existed previously. In that regard, some legislatures have expressly adopted rules applicable to the cumulation of sanctions. In some Member States, those express rules cover all situations of cumulation of fiscal and criminal sanctions (**France**, **Italy**). In other States, those express rules are laid down only for certain specific categories of offence or administrative infringement (**Germany**, in respect of the concurrence of criminal convictions and sanctions imposed for administrative infringements), or only for the concurrence of the criminal sanctions and the administrative sanctions laid down for specific offences governed in specific laws (**Poland**, **United Kingdom**). In most of the abovementioned cases, those rules include solutions designed to exclude situations of cumulation of sanctions. In that context, the solution provided for by the **French** legal order may be seen as an exception, in that that legal order contains a provision expressly authorising the cumulation of sanctions.

24. It should also be pointed out that the courts play a decisive role in the matter.

25. In that regard, in several Member States, certain legislative amendments have been

the result of the case-law and of decisions holding that certain solutions were unconstitutional (in **Poland**, but only as regards certain administrative infringements; in **Sweden**, where that case-law has led to the amendment of the whole system).

26. In their case-law relating to this problem, although some national courts refer to the *ne bis in idem* principle, others use other principles. In some legal orders, the principle of proportionality may be one of the key factors used instead of the *ne bis in idem* principle, where the latter is not applicable to the matter (**Germany)**, or even a secondary factor used in parallel with the *ne bis in idem* principle (**Poland**). Under recent **Swedish** law, [10] the principle of proportionality is to be applicable to the cumulation of sanctions imposed in a single set of proceedings. In **France**, it is the principle of necessity of offences and sentences which is used by the court to assess cumulation of sanctions.

27. It is apparent from the study that the questions relating to the application of the *ne bis in idem* principle as such to situations of cumulation of criminal and administrative sanctions, appear, to varying degrees, in the case-law of the **Spanish**, **Italian**, **Polish** and **Swedish** courts.

B. IMPLEMENTATION, AT NATIONAL LEVEL, OF THE RULES APPLICABLE TO CUMULATION OF SANCTIONS

28. Irrespective of the approach taken by the legislatures and courts at national level, the problem at issue has two parts: one is procedural and the other substantive. Whereas the former relates to the question of the admissibility of different proceedings in the event of a concurrence of liability rules, and to the possibility of initiating or continuing proceedings after initial proceedings have been terminated, the second concerns the question of the admissibility of and the conditions for the imposition of the second sanction after the imposition of the first.

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[10] Law (2015:632).

1. PROCEDURAL DIMENSION

29. As regards the procedural part, although the solution traditionally accepted in the Member States is that of the principle of autonomy and independence between administrative and criminal proceedings, it may nevertheless be pointed out that more and more exceptions are being made to that principle. In respect of that procedural part, four groups of Member States may be identified.

30. Thus, first, some Member States take the autonomy approach, stipulating that the initiation of criminal proceedings has no effect on the course of the administrative proceedings or vice versa (**Germany**, **France**).

31. Secondly, other Member States, while also taking that traditional approach, moderated it for a number of infringements, by providing for the second set of proceedings to be either suspended or prohibited (**Hungary**, **Poland**, **United Kingdom**).

32. Thirdly, in other Member States there are specific rules providing for the suspension of administrative proceedings following the initiation of criminal proceedings, whether during the proceedings seeking the imposition of the administrative sanction (**Spain**) or at the stage of enforcement of the sanction imposed (**Italy**).

33. In these last Member States, it appears that a criminal acquittal is no bar to the initiation or continuation of administrative proceedings for the purpose of imposing a fiscal sanction. However, both according to the traditional application of the *ne bis in idem* principle in the same branch of law and under the case-law of the ECtHR, such a situation constitutes an infringement of that principle.

34. Fourthly, in one of the Member States studied, namely **Sweden**, the new system, which came into force in 2016, is very innovative. It provides, in essence, in certain circumstances, that fiscal administrative proceedings shall not be initiated if criminal proceedings have been brought. Moreover, when the prosecutor decides to charge the taxpayer, the administrative proceedings are definitively prohibited. Conversely, the Swedish system prohibits criminal proceedings from being conducted once the fiscal sanction has been imposed. However, in the former situation, administrative proceedings may be initiated if the prosecutor decides not to open the investigation

procedure or closes it. Finally, in the event of a charge being brought, the new system requires the prosecutor to ask the criminal court to impose, in the criminal proceedings, an administrative sanction in addition to the criminal sanction,

35. As well as those factors relating to the link between the different proceedings, it may be pointed out that, in certain States, the administrative authorities are bound by the findings of fact made in the criminal proceedings (**Spain**, **France)**.

2. SUBSTANTIVE DIMENSION

(a) PRELIMINARY OBSERVATIONS

36. The problem of the acceptability of a cumulation of administrative and criminal sanctions as regards substance arises in situations in which the national procedural rules do not lead to the shelving of one set of proceedings following the initiation or termination of the other.

37. Where that is not the case various solutions are applied in the Member States covered by the analysis. National legislations may expressly provide that the sanctions are cumulated, imposed one on top of the other, or that one of them is eliminated.

38. As for the cumulation of criminal and fiscal sanctions, it is expressly authorised in **France**. However, under the principle of proportionality, where the two sanctions are pecuniary in nature, the court imposing the second sanction will have to limit the amount of the sanction which it imposes taking the first sanction into account.

39. The possibility of imposing one sanction on top of another is not expressly provided for by the national legislatures in the legal orders examined. However, it has been enshrined in **Spanish** case-law. Thus, if a second sanction has been imposed in exceptional circumstances (the administrative proceedings should, in principle, be suspended), the criminal sanction is adjusted by taking the fiscal sanction into account.

40. Finally should be pointed out that the solution designed to eliminate one of the two sanctions imposed is known in **Italian** law. For situations falling within the scope of the principle of speciality, [11] the fiscal sanction is annulled following the imposition

11 That principle consists in essence in applying, if there are several concurrent provisions governing the

of the criminal sanction (see paragraph 46 below). A similar solution may be found in **Polish** law, but its scope is limited to a specific administrative infringement.

41. Other than those cases in which one of the sanctions is eliminated, all the other solutions to cumulation of sanctions may give rise to judicial review, under the *ne bis in idem* principle, or under other principles which have an equivalent function.

(b) OVERVIEW OF THE APPROACHES OF THE NATIONAL COURTS

42. It seems that it is only in the case-law of the **Hungarian** and **United Kingdom** courts that the cumulation of sanctions laid down by two different branches of the law does not pose significant problems.

43. In that regard, it should be noted that in **Germany**, under the principle of proportionality, certain administrative measures, such as the deferred supplement, tax evasion interest, late payment surcharge, maybe cumulated with criminal sanctions. According to the **German** courts, none of them is criminal in nature since they are regarded, on the contrary, as administrative coercive means or essentially preventive measures.

44. As regards **Spain**, following the repeal of the law expressly prohibiting the imposition of a fiscal sanction following a criminal conviction, the legislative situation has become less clear. In that situation, it is the principle that criminal proceedings take priority [12] which seems to play the primary role in the assessment, by the courts, of the acceptability of a cumulation of criminal and administrative sanctions.

45. In **France**, although the law expressly authorises the possibility of cumulating fiscal sanctions and criminal sanctions, the case-law has limited the scope of that authorisation by assessing such cumulation in the light of the principle of proportionality, which requires the overall amount of the pecuniary sanctions imposed not to exceed the highest amount of one of the sanctions incurred. However, very recently, in the *Cahuzac* decision, the Constitutional Council stated that in that

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same situation, only one of them, namely that, as Italian law states, which contains all the elements of the other concurrent provisions, and a distinctive element called the 'specialising element'.

12 That principle is reflected in essence in the obligation of the administrative court to suspend the administrative proceedings if criminal proceedings are being conducted on the same facts, and in the adherence of the administrative authorities to the findings of fact made during the criminal proceedings.

same taxation matter, in the event of a deliberate failure to file a tax return, the cumulation of fiscal and criminal sanctions will be accepted only for the most serious cases of tax fraud, and it will therefore be prohibited for less serious cases.

46. In **Italy**, the application of the specialty principle [13] seems to be able to eliminate the risk of dual sanction. However, there are examples in the case-law in which the court seised has held that that principle did not apply. In that situation, the cumulation of sanctions had to be assessed in the light of the *ne bis in idem* principle. In connection with that assessment, the Italian courts have considered that the scope of the *ne bis in idem* principle was limited to criminal proceedings *stricto sensu*. Therefore, according to the courts, the imposition of a sanction under administrative law, including fiscal law, did not have the effect of infringing the principle at issue, since that sanction is not regarded as a criminal sanction.

47. As for the **Polish** courts, the Constitutional Court carried out a review of the acceptability of such cumulation from the perspective of the *ne bis in idem* and proportionality principles. The former seems in principle, with a few exceptions, to be in line with the case-law of the ECtHR relating to Article 4 of Protocol No 7 to the ECHR. The determining criterion for assessing the acceptability of a cumulation of sanctions is the evaluation of the possible criminal nature of an administrative sanction, determined inter alia by its punitive nature. However, the finding that a sanction is of that nature is often not enough to classify it as criminal within the meaning of the *ne bis in idem* principle. Indeed, in some decisions, other criteria are applied following a finding that the sanction at issue is punitive. These include, inter alia, the arguments relating to the functions and objectives of each sanction or to their degree of severity.

48. In **Sweden**, the supreme courts appear to have kept a close eye on developments in the case-law of the ECtHR and of the Court of Justice on the matter. They have even kept pace with them, so that following judgments of the European courts, they have decided to review a large number of decisions in which it might be considered that the imposition of dual sanctions constituted an infringement of the *ne bis in idem* principle. The decisions of those supreme courts have led the Swedish legislature to introduce significant amendments in the **Swedish** legal order, as described above. Given those legislative developments, those courts will probably have a lesser role to

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13 See footnote 11.

play in the application of the *ne bis in idem* principle.

C. THE TAKING INTO ACCOUNT, BY THE NATIONAL LEGAL ORDERS, OF THE CRITERION OF THE 'SUFFICIENTLY CLOSE CONNECTION IN SUBSTANCE AND IN TIME'

49. In the light of the case-law of the ECtHR in *A and B v. Norway*, the research carried out in the preparation of this research note has not revealed, apart from a decision given by a court of first instance in **Italy**, national decisions in which the argument relating to the *sufficiently close connection in substance and in time* between the proceedings is applied. However, the recent **Swedish** law [14] allowing for fiscal sanctions and criminal sanctions to be imposed in a single set of proceedings may be seen as consistent with that approach.

CONCLUSIONS

50. The extensive case-law of the ECtHR and the judgment of the Court of Justice in *Åkerberg Fransson* concerning the question of the cumulation of administrative, particularly fiscal, sanctions and criminal sanctions are complemented by a renewed vigour in the treatment of this problem. The Member States envisage it in different ways, particularly in view of the fact that some of them are not bound by Article 4 of Protocol 7 to the ECHR and by the ECtHR's broad interpretation of the scope of the *ne bis in idem* principle enshrined therein.

51. This principle is not, moreover, the only criterion for assessing the acceptability of a dual penalty, since others are also applied, inter alia the principle of proportionality.

52. So far as concerns the *ne bis in idem* principle, its interpretation by the ECtHR seems to develop certain criteria for its application, such as that relating to the *sufficiently close connection in substance and in time* which seems to play a more significant role than previously.

53. This case-law has a varied effect in Member States that apply Article 4 of the Protocol

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[14] The aforementioned Law (2015:632). By authorising the **Swedish** criminal court to impose, in addition to the criminal sanction, a possible fiscal sanction, it creates in effect that close connection between the two sets of proceedings.

No 7 to the ECHR without reservation. On the one hand, it has had a very significant effect on the **Swedish** legal order, since it has led to the recent substantial amendment of the system for imposing sanctions in response to conduct both in the category of administrative infringements and that of criminal offences. On the other hand, in other Member States, the national legislatures seem to have preferred to leave the decision on the matter to the national courts.

54. It is apparent from this overview that application of the *ne bis in idem* principle in the Member States is not always consistent with the case-law of the ECtHR, since the conditions for applying that principle may be interpreted differently at national level, particularly with regard to its scope.

55. The research carried out in the preparation of this research note has not revealed national decisions of the highest courts in which the argument relating to the *sufficiently close connection in substance and in time* between the proceedings has been applied.

[…]