NE BIS IN IDEM IN EUROPEAN CRIMINAL LAW – MOVING IN CIRCLES?*

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ABSTRACT

*Current article takes a closer look at the dialogue between the Strasbourg and the Luxembourg courts on the interpretation of the ne bis in idem principle and analyses how it influenced the (non)acceptance of the possibility to conduct both, criminal and administrative penal proceedings, against the same person for the same acts. It starts with the pre-Zolotukhin jurisprudence of the European Court for Human Rights and analyses how the Luxembourg interpretation of Article 54 CISA had a major influence on the change in the way the Strasbourg court perceived the possibility to conduct both, criminal and administrative penal proceedings, against the same person for the same acts. It further explores how the Luxembourg court followed the way indicated by Zolotukhin and accepted the stance of the Strasbourg court on the possibility of duplication of criminal and administrative penal proceedings against the same person for the same acts under the ne bis in idem protection afforded to individuals by Article 50 of the Charter of Fundamental Rights of the European Union. Finally, it analyses whether the recent shift in the Strasbourg court's jurisprudence, which was also followed by the Luxembourg court, means that the ne bis in idem principle in European criminal law has, on the question of the duplication of criminal and administrative penal proceedings, basically come to the positions which were dominant in the pre-Zolotukhin jurisprudence***.***

Keywords*: ne bis in idem, European criminal law, duplication of administrative and criminal proceedings*

1. INTRODUCTION

In the last decade there has been a tremendous development with regard to the understanding of the *ne bis in idem* principle in European criminal law. At the centre of this development was the question whether it is possible, under this principle, to conduct criminal and administrative penal proceedings for the same acts or omissions of the same person. Namely, acts or omissions of a person can present, at the same time, a violation of the substantive criminal and the substantive administra-

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tive provisions of a legal order. At a first glance, the possibility to conduct criminal and administrative proceedings for the same acts or omissions does not seem to be problematic from the viewpoint of the *ne bis in idem* principle. The traditional concept of the *ne bis in idem* principle prohibits the duplication of prosecution or punishment of the same person for the same acts in *criminal proceedings*.[1] It does not touch upon the question of duplication of *criminal and administrative proceedings*. However, after the European Court for Human Rights accepted that, by virtue of its autonomous interpretation of the term "criminal charge" used in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[2] proceedings which are classified as administrative under national law may nevertheless be considered criminal under the Convention terms,[3] the duplication of criminal and administrative proceedings became one of the central issues of the interpretation of the *ne bis in idem* principle in European criminal law.

For a very long time, the main role in the interpretation of the principle in European criminal law has been in the hands of the European Court for Human Rights in Strasbourg. However, in the last two decades the Court of Justice of the European Union established itself as a very important actor in the interpretation of the *ne bis in idem* principle in European criminal law. Ever since the Court of Justice emerged as an important player in the European *ne bis in idem* scene, the interpretation of the principle has developed in the constant dialogue between the Strasbourg and the Luxembourg courts.[4]

Current article takes a closer look at this dialogue and analyses how it influenced the interpretation of the possibility to conduct both, criminal and administrative penal proceedings, against the same person for the same acts. It starts with the pre-*Zolotukhin* jurisprudence of the European Court for Human Rights and

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1 On the rationale of the principle, see the monograph van Bockel, B., *Ne Bis in Idem Principle in EU Law*, Kluwer Law International, 2010, pp. 25-30

2 Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 005, signed at Rome on 4 November 1950, and came into force on 3 September 1953

3 The Court did that by using criteria, which became famous at the *Engel criteria*. These criteria refer to the legal classification of the offence under national law, the intrinsic nature of the offence, and the degree of the severity of the penalty that the person concerned is liable to incur. More detailed on *Engel criteria*, see in Krapac, D., *Kazneno procesno pravo, Prva knjiga: Institucije*, Narodne novine, Zagreb, 2014, p. 233, Mahoney, P., *Right to a Fair Trial in Criminal Matters under Article 6 E.C.H.R.*, Judicial Studies Institute Journal, 2004, pp. 109-111

4 More on the issue, see in Gutschy, M., *Tumačenje načela ne bis in idem - Interakcija Europskog suda pravde i Europskog suda za ljudska prava nakon stupanja na snagu Lisabonskog ugovora*, Zbornik radova „Odnos prava u regionu i prava Evropske unije", Istočno Sarajevo, 2015, pp. 494–514

analyses how the Luxembourg interpretation of Article 54 CISA[5] had a major influence on the change in the way the Strasbourg court perceived the possibility to conduct both, criminal and administrative penal proceedings, against the same person for the same acts. It further explores how the Luxembourg court followed the way indicated by *Zolotukhin* and accepted the stance of the Strasbourg court on the possibility of duplication of criminal and administrative penal proceedings against the same person for the same acts under the *ne bis in idem* protection afforded to individuals by Article 50 of the Charter of Fundamental Rights of the European Union.[6] Finally, it analyses whether the recent shift in the Strasbourg court's jurisprudence, which was also followed by the Luxembourg court, means that the *ne bis in idem* principle in European criminal law has, on the question of the duplication of criminal and administrative penal proceedings, basically come to the positions which were dominant in the pre-*Zolotukhin* jurisprudence.

2. PRE-*ZOLOTUKHIN* JURISPRUDENCE AND *ZOLOTUKHIN* LEGACY

As already explained, this article focuses on the possibility to conduct both, criminal and administrative penal proceedings, against the same person for the same acts. Before we analyse the issue from the perspective of the *ne bis in idem* principle, it is necessary to remind the reader of an important explanation. The *ne bis in idem* principle, which is guaranteed, as a basic human right, with the provision of Article 4 of Protocol No. 7 to the European Convention for Human Rights, does not prohibit the possibility to conduct criminal and administrative proceedings against the same person for the same acts, as long as the administrative proceedings may not be considered criminal within the autonomous meaning of a criminal charge, a notion present in Art. 6 of the European Convention for Human Rights. Therefore, the starting point of every analysis of the question whether the duplication of criminal and administrative proceedings leads to a violation of the *ne bis in idem* principle, is the analysis of the question whether the proceedings which are formally administrative are, in their essence, criminal. If formally administrative proceedings may not be deemed criminal, there can be no violation of the *ne bis in idem* principle. If the analysis results in the conclusion that the administrative proceedings are in their essence criminal, there are still further tests that have to be undertaken in order to come to a final conclusion that there has

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5 Convention Implementing the Schengen Agreement, Official Journal L 239, 22. 9. 2000, p. 19 – 62. Extensively on the interpretation of Article 54 CISA by the Luxembourg court, see in Burić, Z., *Načelo ne bis in idem u europskom kaznenom pravu - Pravni izvori i sudska praksa Europskog suda*, Zbornik Pravnog fakulteta u Zagrebu, *Vol.* 60, No. 3-4,2010, pp. 819-859

6 Charter of Fundamental Rights of the European Union, OJ C 326, 26. 10 .2012, p. 391–407

been a violation of the *ne bis in idem* principle. These further tests refer primarily to the *idem* and the *bis*.

Before the judgment in the *Zolotukhin* case, the European Court for Human Rights, allowed, under certain circumstances, the duplication of the criminal and the administrative penal proceedings. The room for such interpretation was found in the way the European Court for Human Rights understood the term *idem*. Generally speaking, there are two main approaches to the understanding of *idem* within the framework of *ne bis in idem*. The first approach is based on *idem factum*, and the second one is based on *idem crimen*. The *idem factum* approach focuses on identity of facts, while the *idem crimen* approach requires, besides the existence of *idem factum*, also the identity of legal classifications of facts. The latter approach, *idem crimen*, is a more restrictive one, when viewed from the perspective of the individual, because it allows prosecution and punishment of an individual in both, criminal and administrative penal proceedings, as long as what is being dealt with in those two sets of proceedings is legally not the same.

Although the European Court for Human Rights took different paths in its understanding of *idem*,[7] the approach which is based on *idem crimen* was predominant in the pre-*Zolotukhin* era. That meant, as already explained, that it was possible to conduct criminal and administrative penal proceedings, which is also in essence criminal, against the same person for the same acts, without infringing the basic human right guaranteed by Article 4 of Protocol No. 7. However, the judgment in the *Zolotukhin* case brought an end to this understanding of *idem*. In that judgment, the Court decided in favour of *idem factum* approach. The Court defined *idem factum* in the following terms: "facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space".[8] In the following paragraphs, we deal with two issues. First, we look at the possible reasons which led the European Court for Human Rights to change its position on *idem* and second, we look at the consequences which this change had on the possibility to conduct two sets of proceedings, criminal and administrative penal, against the same person for the same acts.

It is not an exaggeration to claim that the decisive influence on the Strasbourg court to change its position on *idem* came from the Luxembourg court. The latter, in its interpretation of Article 54 CISA has established and has consistently held, and still does, the approach of *idem factum*. The issue of understanding of *idem*

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7 Ivičević Karas, E.; Kos, D., *Primjena načela ne bis in idem u hrvatskom kaznenom pravu*, Hrvatski ljetopis za kazneno pravo i praksu, *Vol.* 19, No. 2, 2012, p. 561

8 *Sergey Zolotukhin v. Russia*, Grand Chamber Judgment of 10 February 2009, Application no. 14939/03, § 84

has first appeared before the Court of Justice of the European Union in 2006, in *Van Esbroeck* case.[9] In that case, the Court relied on two main arguments to reject the *idem crimen* approach. Firstly, it relied on the text of Article 54 CISA, which refers to the "same acts", unlike the text of Article 4 of Protocol No. 7 to the European Convention for Human Rights, which refers to "an offence".[10] However, what was more important to the Court of Justice of the European Union for the acceptance of *idem factum* approach was the context in which Article 54 CISA is being applied. The context is a transnational one, a context of a single legal area of freedom, security and justice where freedom of movement is guaranteed to every citizen and where differences in national legal orders of Member States would represent a significant limitation to that freedom, if *idem crimen* approach was accepted.[11] Namely, the acceptance of *idem crimen* approach in the transnational context would mean that a person who has already been criminally prosecuted in one Member State may again be prosecuted in another Member State, if the acts he or she committed have different legal classifications in those two legal systems involved. Such a solution is obviously inacceptable for the European Union, which is founded on freedom of movement of persons, as one of its leading values.[12] The Court of Justice of the European Union understood *idem factum* in the following way: "Identity of the material acts, understood in the sense of the existence of a set of concrete circumstances (facts) which are inextricably linked together".[13] The Court added that the facts need to be inextricably linked together "in time, in space and by their subject-matter".[14] The approach inaugurated in *Van Esbroeck* was followed, without exceptions, in the ensuing jurisprudence of the Luxembourg court on Article 54 CISA.[15] Without entering into a deeper analysis of the issue, it is worthy noticing that the context in which the Court of Justice of the European Union accepted *idem factum* approach in its interpretation of the *ne bis in idem* principle is very different from the context in which the Strasbourg court interprets *ne bis in idem*. On one side, there is the problem of multiple criminal prosecutions of the same person for the same acts in different European jurisdictions (Luxembourg perspective) and on the other side there is the problem

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9 *Leopold Henri Van Esbroeck*, Judgement of the Court, 9 March 2006, C-436/04

10 *Ibid*, § 28

11 *Ibid*, § 29-35

12 Burić, *op. cit.*, note 5, pp. 843-844

13 *Leopold Henri Van Esbroeck*, § 36

14 *Ibid*, § 38

15 See, for example, the following judgments: *Jean Leon Van Straaten*, Judgement of the Court, 28 September 2006, C-150/05, § 49-50, *Gasparini and Others*, Judgement of 28 September 2006, C-467/04, § 148–154, *Kretzinger*, Judgement of the Court, 18 July 2007, C-288/05, § 37, *Norma Kraaijenbrink*, Judgement of the Court, 18 July 2007, C-367/05, § 29-31, *Gaetano Mantello*, Grand Chamber Judgment, 16 November 2010, C-261/09, § 39-40

of duplication of criminal and administrative penal proceedings against the same person for the same acts (Strasbourg perspective).

Moving on to the second issue, we look at the consequences which the acceptance of *idem factum* by the Strasbourg court had on the possibility to conduct two sets of proceedings, criminal and administrative penal, against the same person for the same acts. The acceptance of *idem factum* approach meant that it was no longer possible for national jurisdictions to conduct two sets of proceedings, criminal and administrative penal, against the same person for the same acts, because such practice contradicts the basic human right which is guaranteed by Article 4 of Protocol No. 7 to the European Convention for Human Rights. Namely, if it was not enough to rely on the differences in the treatment of the same acts in criminal law, on one side, and in the administrative penal law, on the other side, the space inside which duplication of criminal and administrative penal proceedings against the same person for the same acts was in accordance with the *ne bis in idem* guarantee was lost. This is exactly why the *Zolotukhin* judgment was so important and why it caused such a strong reaction by the national (criminal) justice systems. It meant that the national (criminal) justice systems had to find a way to bring an end to the practice of a two-track system, pursuant to which it was possible to punish the same person for the same acts in both, criminal and administrative penal, proceedings. In other words, their two-track systems had to be transferred into a single-track system, whereby a person can, due to his or her unlawful acts, be punished either in the criminal proceedings or in the administrative penal proceedings. This meant that they had to use their substantive criminal and administrative penal law or procedural mechanisms of their justice system do draw a line between these different reactions of the national legal system to a single human act.[16]

3. LUXEMBOURG COURT'S ALIGNMENT WITH *ZOLOTUKHIN*

As elaborated before, the jurisprudence of the Luxembourg court on the interpretation of the transnational *ne bis in idem* had a decisive influence on the Strasbourg court's interpretation of the national *ne bis in idem* which is primarily problematic in the area of cumulative criminal-administrative legal response to the same acts of the same person. However, in 2013, the former court came into a

[16] For the reaction of the Croatian criminal justice system, see Ivičević Karas, E., *Povodom presude Europskog suda za ljudska prava u predmetu Maresti protiv Hrvatske – Analiza mogućeg utjecaja na reformu prekršajnog prava u Republici Hrvatskoj*, Program III. specijalističkog savjetovanja: Primjena Prekršajnog zakona i ostalih propisa s područja prekršajnog prava u Republici Hrvatskoj, Hrvatsko udruženje za kaznene znanosti i praksu, Zagreb, 2009, pp. 1-18, Novosel, D.; Rašo, M.; Burić, Z., *Razgraničenje kaznenih djela i prekršaja u svjetlu presude Europskog suda za ljudska prava u predmetu Maresti protiv Hrvatske*, Hrvatski ljetopis za kazneno pravo i praksu, *Vol.* 17, No. 2, 2010, pp. 785-812

position to decide whether the *Zolotukhin* judgment and its legacy developed in the jurisprudence of the European Court for Human Rights are acceptable for the Luxembourg court in the context of national cumulative criminal-administrative penal response in the area of non-payment of VAT. Here, we are talking about the case of Åkeberg *Fransson*.[17]

There are three interconnected factors which differentiated the factual-legal background of *Fransson* case from the previous jurisprudence of the Court of Justice developed in the context of Article 54 CISA. First of all, *Fransson* did not deal with the interpretation of Article 54 CISA, but with the interpretation of Article 50 of the Charter. Article 54 CISA regulates the question of transnational *ne bis in idem*. On the other hand, Article 50 of the Charter deals both with transnational dimension of the *ne bis in idem* principle, but also with its national dimension, which is limited within the single legal regime of an individual Member State. In this case, it was the question of the Swedish national legal system and its compatibility with the *ne bis in idem* guarantee contained in the Charter. Second, it did not deal, as was the case in the jurisprudence established in relation to Article 54 CISA, with the cumulative criminal response of multiple criminal justice systems to the same acts of the same person. It dealt with the cumulative criminal-administrative response of the single justice system to the same acts of the same person. And third, it dealt with the area of protection of financial interests of the European Union, since it related to the evasion of VAT payments. All these factors taken together made it difficult to predict whether the Luxembourg court will follow the jurisprudence of the Strasbourg court which was established on *Zolotukhin* and its legacy or it would find a way to interpret Article 50 of the Charter in a way which is more efficiency-friendly, and less individual-protective.

Despite all these considerations Luxembourg court was faced with, it reached a conclusion which put its interpretation of the national dimension of the *ne bis in idem* principle guaranteed in Article 50 of the Charter in line with the jurisprudence of the European Court for Human Rights established in *Zolotukhin* and ensuing judgments. The Luxembourg court concluded that "the *ne bis in idem* principle laid down in Article 50 of the Charter does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of VAT, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature".[18] In other words, the Court of Justice concluded that the duplication of criminal and administrative penal proceedings,

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17 Åkeberg *Fransson*, Grand Chamber Judgment, 26 February 2013, C-617/10. For a detailed analysis of the case, see Gutschy, *op. cit.*, note 4, pp. 502-504

18 Åkeberg *Fransson*, § 37

which are in nature criminal, against the same person for the same acts is contrary to the right guaranteed by Article 50 of the Charter. With this judgment the dialogue between the Courts on the interpretation of the *ne bis in idem* principle which was started with *Zolotukhin* continued. However, the Strasbourg court, in 2016, with a major shift in its understanding of *ne bis in idem*, opened another round of talks between the Courts.

4. A SHIFT IN STRASBOURG COURT'S UNDERSTANDING OF *BIS*

In November 2016, the Grand Chamber of the European Court for Human Rights, in the case of *A and B v. Norway*,[19] was, once again, more than 7 years after *Zolotukhin*, faced with a difficult issue of duplication of criminal and administrative penal proceedings against the same person for the same acts. However, unlike in *Zolotukhin*, this time the main issue did not evolve around *idem*. Rather, it evolved around the understanding of *bis*. The European Court was to decide whether two sets of proceedings against the same person for the same acts, criminal proceedings and administrative penal proceedings, can represent, not two responses to the unlawful conduct, but one "combined and integrated"[20] response which represents a "coherent whole".[21]

In this case, applicants were prosecuted and punished in tax proceedings and in criminal proceedings for the same acts. National courts and the European Court concluded that the administrative (tax) proceedings was in essence criminal. However, the national courts concluded that there was no breach of Article 4 of Protocol No. 7 to the Convention because "there was a sufficient connection in substance and time"[22] between the tax proceedings and the criminal proceedings the applicants were subjected to. This connection was founded on the following factors: both proceedings are based in the same factual circumstances, they had been conducted in parallel and had to a great extent been interconnected.[23] The European Court was now to decide whether the argumentation of the Norwegian national courts was acceptable to it and whether duplication of criminal and administrative penal proceedings against the same person for the same acts may be

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19 *A and B v. Norway*, Grand Chamber Judgment of 15 November 2016, Application nos. 24130/11 and 29758/11

20 *Ibid*, § 111

21 *Ibid*.

22 *Ibid*, § 29

23 *Ibid*.

in accordance with the *ne bis in idem* guarantee proclaimed in Article 4 of Protocol No. 7 to the Convention.

The Court gave a lot of weight to the national legal differences[24] and to the powers of the Contracting States "to choose how to organise their legal system, including their criminal-justice procedures".[25] It went on to conclude that "States should be able legitimately to choose complementary legal responses to socially offensive conduct […] through different procedures forming a coherent whole so as to address different aspects of the social problem involved, provided that the accumulated legal responses do not represent an excessive burden for the individual concerned".[26] Finally, the Court concluded that two sets of proceedings may not necessarily represent a duplication of trial and punishment in the meaning of *bis*, provided these two sets of proceedings "were sufficiently closely connected in substance and in time".[27] The Court also defined criteria for the assessment whether the proceedings were sufficiently closely connected in substance and in time. Applying these criteria to the circumstances of the case, the Court concluded that there was no violation of Article 4 of Protocol No. 7 to the Convention, although the applicants were prosecuted for the same acts in criminal proceedings and in administrative proceedings, which were in their essence criminal.

Without undertaking a deeper analysis of the criteria for the assessment whether the proceedings were sufficiently closely connected in substance and in time, some general remarks need to be given with regard to the conclusions of the Court. First of all, the Court accepted that parallel criminal and administrative penal proceedings against the same person for the same acts may not present a violation of *ne bis in idem* rule. However, such an outcome is accepted by the Court as an exception to the rule of a single-track response to socially offensive conduct. Namely, the Court emphasized that "the surest manner of ensuring compliance with Article 4 of Protocol No. 7 is the provision, at some appropriate stage, of a single-track procedure enabling the parallel strands of legal regulation of the activity concerned to be brought together, so that the different needs of society in responding to the offence can be addressed within the framework of a single process".[28] Second, what seems to be essential for the Court to launch an assessment whether the proceed-

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[24] By referring to the Opinion of the Advocate General before the Court of Justice of the European Union in the *Fransson* case, who reminded that „the imposition of penalties under both administrative law and criminal law in respect of the same offence is a widespread practice in the EU Member States, especially in fields such as taxation, environmental policies and public safety". *Ibid*, § 118

[25] *Ibid*, § 120

[26] *Ibid*, § 121

[27] *Ibid*, § 130

[28] *Ibid*, § 130

ings were sufficiently closely connected in substance and in time is that the proceedings are complementary, meaning that the proceedings had been pursued with their "purposes and means employed being complementary".[29] That means if both sets of proceedings have the same purpose and employ the same means, or have different purposes and means, but which are not complementary, a duplication of those proceedings is contrary to the *ne bis in idem* rule. Third, the understanding of the *ne bis in idem* principle which was abolished with *Zolotukhin*, namely, that it is possible to conduct criminal and administrative penal proceedings against the same person for the same acts, was now resurrected with the *A and B* judgment. But, unlike the in the pre-*Zolotukhin* jurisprudence, where such possibility was built on the interpretation of *idem*, in *A and B* the Court built that possibility on the understanding of *bis*. It seems that the European Court for Human Rights came back where it stood in the pre-*Zolotukhin* era, however, by using different means. This conclusion is accentuated by the fact that the assessment of complementarity of purposes and means is very much look-alike to the assessment of "essential elements" of the offence, which was characteristic for the pre-*Zolotukhin* understanding of idem.[30] To sum up, it seems like the European Court for Human Rights has made a circle in its understating of the *ne bis in idem* principle, going back to the positions which predated *Zolotukhin*. Fourth, this newest change in the understating of *ne bis in idem* principle represents a shift from an individual-protective understanding of the principle to its efficiency-friendly interpretation.

With *A and B v. Norway* the European Court for Human Rights significantly altered its interpretation of the *ne bis in idem* principle and notably limited the scope of its application with regard to the possibility to duplicate criminal and administrative penal proceedings against the same person for the same acts.[31] It did not take long before the Luxembourg court was faced with a dilemma – to follow the path indicated by the Strasbourg court or to insist on the broader scope of the *ne bis in idem* principle, under which duplication of criminal and administrative penal proceedings is not allowed, notwithstanding the fact that the two sets of proceedings might be sufficiently closely connected in substance and in time? The first case in which the Luxembourg court had to decide on the issue was *Luca Menci*.

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29 *Ibid*, § 129

30 *A and B v. Norway, Dissenting opinion of judge Pinto de Albuquerque*, § 56

31 Some authors find that the Court, with its judgment in *A and B v. Norway*, "developed a significant and controversial exception" to *the ne bis in idem* right guaranteed by Article 4 of Protocol No. 7 to the Convention. See Ligeti, K.; Tosza, S., *Challenges and Trends in Enforcing Economic and Financial Crime: Criminal Law and Alternatives in Europe and the US*, in: Ligeti, K.; Tosza, S. (eds.), *White Collar Crime: A Comparative Perspective*, Hart Publishing, 2019, p. 32

5. LUXEMBOURG FOLLOWS STRASBOURG ONCE AGAIN

On 20 march 2018, the Court of Justice of the European Union delivered its long-awaited judgment in the *Luca Menci* case.[32] What made this judgment so significant was the fact that in it the Luxembourg court needed to give an answer to the question whether the position of the European Court for Human Rights adopted in the case of *A and B v. Norway* is possible and acceptable from the point of view of Article 50 of the Charter. The case concerned a cumulation of administrative (tax) proceedings and criminal proceedings against the same person for the same acts – non-payment of VAT.

The Court of Justice first noticed that Italian law allows for duplication of proceedings and penalties in administrative penal (which are criminal in nature) proceedings and criminal proceedings against the same person for the same acts.[33] It further noticed that such duplication represents a limitation to the fundamental right guaranteed by Article 50 of the Charter[34] and went on to analyse whether such a limitation is justified.[35] In its analysis, the Court of Justice basically integrated the criteria which the European Court for Human Rights inaugurated in *A and B v. Norway* judgment and adapted them to the specific context of justified limitations of rights guaranteed by the Charter. Such an operation of the Court of Justice resulted in a Luxembourg-modified version of sufficiently closely connected in substance and time-criteria.[36] To conclude, the Luxembourg court

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32 *Luca Menci*, Grand Chamber Judgment, 20 March 2018, C-524/15. On the same day, the Court decided in two further cases which dealt with the same legal issue: *Garlsson Real Estate and Others*, Grand Chamber Judgment, 20 March 2018, C-537/16 (duplication of administrative penal proceedings for market manipulation and criminal proceedings) and *Di Puma*, Grand Chamber Judgment, 20 March 2018, C-596/16 (duplication of administrative penal proceedings for insider dealing and criminal proceedings). In the latter two cases, the Court adopted the same legal standards as in the *Luca Menci* case. Therefore, those cases will not be the object of the analysis undertaken here

33 *Luca Menci*, § 39

34 *Ibid*.

35 In its previous jurisprudence, the Court of Justice already accepted limitations to the right guaranteed by Article 50 of the Charter, on the basis of Article 52(1) thereof. See the *Spasic* case, *Zoran Spasic*, Grand Chamber Judgment, 27 May 2014, C-129/14 PPU. Generally about the limitations on the exercise of the rights and freedoms recognised by the Charter, see in Lenaerts, K., *Exploring the Limits of the EU Charter of Fundamental Rights*, European Constitutional Law Review, *Vol.* 8, 2012,, pp. 388-393. More on *Spasic* case, see in Vervaele, J., *Schengen and Charter-related ne bis in idem protection in the Area of Freedom, Security and Justice: M and Zoran Spasic*, Common Market Law Review, *Vol.* 52, 2015, pp. 1343-1348, Munivrana Vajda, M., *The trust is not blind – Reviewing the idea of mutual trust in the EU in the context of conflicts of jurisdiction and ne bis in idem principle*, EU and Comparative Law Issues and Challenges Series – Issue 2, 2018, p. 332

36 *Ligeti* and *Tosza* find that „the CJEU opted not to preclude the use of criminal sanction for facts that have already been the subject to sanctions of a different kind. However, the criteria chosen by the Court in order to make this permissible were different". See Ligeti; Tosza, *op. cit.*, note 31, p. 33.

found that the duplication of administrative penal proceedings and criminal proceedings against the same person for the same acts may, under certain conditions, present a justified limitation of the right guaranteed by Article 50 of the Charter.[37] By doing so, the Luxembourg court once more followed the Strasbourg court in its interpretation of the *ne bis in idem* principle. However, unlike in *Fransson* case, where the path indicated by the Strasbourg court was directed towards greater protection of individual, this time it was directed towards limitation of the rights of the individual in the interest of maximized State efficiency.

6. CONCLUSION

The goal of this contribution was twofold. First, to show interesting developments and trends in the interpretation of the *ne bis in idem* principle in European criminal law. Second, it was also to analyse the way in which the interaction and the dialogue of the Strasbourg and the Luxemborug courts influenced these developments and trends. This article showed that there were two major turning points in the development of the *ne bis in idem* principle in European criminal law. The first turning point was the judgment of the European Court for Human Rights in *Zolotukhin* case. This judgment represented a strong shift of the Strasbourg court towards an individual-protective understanding of the *ne bis in idem* principle. At the same time, it was a strong message to the national jurisdictions of Contracting States that they need to reorganize, at least some of them, their national justice systems in order for these systems to be in line with the Strasbourg human rights guarantees. The second turning point was the decision of the European Court for Human Rights in *A and B v. Norway* case. In this decision, the Strasbourg court showed that it might have bit off more than it could have chew in its *Zolotukhin* decision. Faced with the unwillingness of Contracting States to adapt their justice systems to *Zolotukhin* standards, the European Court for Human Rights took a step back in its understanding of the *ne bis in idem* principle and opened the doors to the upholding of the practices that were meant to be abolished with the *Zolotukhin* judgment. Now, going back to its pre-*Zolotukhin* positions, the European Court for Human Rights opened the door for the cumulation of criminal and administrative penal response of the State to the same acts of the same person. Such a shift of the Strasbourg court in its understanding of the *ne bis in idem* principle shows, together with some other trends in the development of Court's jurisprudence, that there are some new winds in Strasbourg, not favouring the activism of the Court in the development of ever stronger human rights protection standards.

[37] For a more detailed analysis of the judgment in the *Luca Menci* case and its implications for Article 50 of the Charter, see Lo Schiavo, G., *The principle of ne bis in idem and the application of criminal sanctions: of scope and restrictions*, European Constitutional Law Review, *Vol.* 14, 2018, pp. 644-663

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