

THE PRINCIPLE NON BIS IN IDEM APPLICATION FOR CRIMINAL PROCEEDINGS TRANSFER

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ABSTRACT: *Applying the non bis in idem principle in criminal proceedings transfer requires three criteria: identity regarding the sanctioned person, double sanctioning procedure and identity of the facts related to the case.*

For this purpose we have done an analysis of international and national legislation and of european jurisprudence, applying the issues found in a concrete situation encountered in national judicial practice.

KEYWORDS: *criminal proceedings transfer, non bis in idem principle, crime, misdemeanor*

INTRODUCTION

The *non bis in idem* principle implies that a person cannot be punished twice for committing an illegal act and applying this principle to the transfer of proceedings in criminal matters has as a result the refuse of the transfer requests if the requested state authorities will find that there has been a criminal trial for the same offense and the same person and by a final judgment have been found not guilty or guilty and a sanction applied.

For which we will analyze the application of this principle in the transfer of criminal proceedings highlighting theoretical aspects in concrete situations encountered in judicial practice.

Applying this principle in criminal proceedings transfer involves avoiding the risk of double sanction for the same criminal behavior, as well as ensuring the person safety by respecting all procedural guarantees of the accused person.

In this sense, the conditions under which a criminal proceedings initiated in one member state may be transferred to another member state are strictly and exhaustively provided by law with the aim of increasing the efficiency of criminal investigations and prosecutions, but also preventing the violation of the *non bis in idem* principle.

Applying the *non bis in idem* principle in the criminal proceedings transfer implies the guarantee of the investigated person fundamental rights during judicial proceedings, firstly, because this principle is stated as a fundamental right of the person and secondly because giving up the repressive proceedings initiated under the jurisdiction of one state and transmission to another state in connection only after a legal proceedings before a court.

Thus, by examining in the course of a judicial procedure a criminal charge, which aims to establish the existence of a final criminal decision by which a person has already been prosecuted for an illegal act, then the right to a fair trial was respected.

Any judicial procedure offers in itself guarantees for a person and his fundamental rights, thanks to his procedure and organization rules, fact for which we conclude that the respect for all other fundamental rights, depends, in the end, on the good administration of justice.

INTERNATIONAL AND NATIONAL LEGISLATION

To understand the *non bis in idem* principle in the criminal proceedings transfer is necessary to analyze international and national developments on its contents.

The first which must be analysed is the one provided in art. 4 of Protocol¹ no. 7 at the European Convention on Human Rights which states that no one shall be tried or punished again in criminal proceedings under the jurisdiction of the same state for an illegal act for which has already been acquitted or convicted by a final judgment under the law and criminal procedure.

Comparing to other rights from the convention, the right provided in art. 4 of Protocol no. 7 was not unanimously accepted by the signatory states, including some member states of the European Union. Thus, Protocol no. 7 was not signed by very important western countries such as Germany, Belgium, Netherlands and United Kingdom and among the states that ratified it, France made a reservation to art. 4 of the protocol, limiting its application only to the crimes qualified as such by the criminal law.²

To remove the difference between the member states on the *non bis in idem* principle, it was stated in art. 50 of the Charter of Fundamental Rights of the European Union, entitled the right not to be tried or punished twice for the same illegal act, which states that no one shall be tried or punished again for an offense for which, by final court decision, in accordance with the law, he has already been finally acquitted or convicted within the Union. As the Charter of Fundamental Rights of the European Union is now part of the primary law of the Union, after the Treaty of Lisbon become applicable on 1 December 2009, the *non bis in idem* principle can be invoked directly by European Union citizens before national courts.³

The analysis of these legal provisions concludes that art. 50 of the Charter of Fundamental Human Rights shall apply in relations between the member states, while the provisions of art. 4 point 1 of the Protocol no. 7 at European Convention on Human Rights only concerns national law.

The content of the *non bis in idem* principle was influenced by the constant jurisprudence of the European Court of Human Rights (ECHR) which gave an autonomous meaning to the concept of final criminal judgment, assimilating to it a series of acts that are not issued by criminal courts, but by other authorities, even by administrative authorities or by the police. Court has interpreted the concept of criminal proceedings by serving the so-called Engel criteria in order to extend guarantees to art. 7 of the sanctions of public power law qualified as administrative authorities. Thus, since the judgment in Engel, ECHR uses three criteria to assess whether a penalty is criminal under Article. 7 of the Convention: qualifying illegal act under national law, illegal act nature and the severity of the penalty for the person who committed the act. The Court's reasoning was that if member states could freely transform an offense or misconduct or may choose according to procedures to judge such a case or criminal proceedings, disciplinary, then applying article 7 would be only their choice.⁴

In conclusion, these criteria were used for inclusion within the definition of criminal sanction sanctions, fiscal, disciplinary or administrative. Thus, it is applied whether she would make a court or an executive power part, should be made in compliance with all procedural safeguards provided to the person in a criminal investigation. The act by which any of such sanctions was applied represents a final criminal judgment, which makes it impossible to judge for the same act.

Regarding the romanian legislation, this principle was inserted in art. 6 of the current Criminal Procedure Code as a criminal proceedings fundamental principle according to which no person may be prosecuted or tried for committing an illegal act when it was previously given a final criminal judgment on the same act even under a different legal classification.

¹ Protocolul nr. 7 la Convenția pentru apărarea drepturilor omului și a libertăților fundamentale încheiat la Strasbourg la 22 noiembrie 1984;

² Cristinel Ghigheci – Principiile procesului penal în noul Cod de procedură penală, Editura Universul Juridic, București 2014, p.100;

³ Ibidem

⁴ Cristinel Ghigheci, op.cit., p. 103

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Although before the new Criminal Procedure Code⁵ it was not expressly provided as a fundamental principle of the romanian criminal process, it was recognized in the legal literature⁶ as the principle of *res judicata* of final criminal judgments.

In conclusion, the rule that a person can not be punished twice for the same act is general and is found in all democratic states laws, regardless under which title has been applied.

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The European Convention on the Transfer of Proceedings in Criminal Matters adopted in Strasbourg on 15 May 1972 states the transfer of proceedings in criminal matters in european legislation and in romanian legislation the Law no. 302/2004 on international judicial cooperation in criminal matters which has transposed the convention provisions into national law.

Among others, in romanian legislation this form of judicial cooperation procedure has two components. First one, the active component that includes all the specific facts and acts that precede and accompany the request of proceedings transfer which takes place in the requesting romanian state. The procedure in this case is a judicial nature because this request has to be solved by the court which is competent to judge the case at first instance if the proceedings relate to the work of the prosecution or the court before which the case is pending if the procedure refers to the judicial activity.⁷

Second one, passive component which highlights the formal rules that are in the state requested that the request for criminal proceedings transfer received from the state in connection. In this case, the procedure has a judicial character, the role of the central authorities⁸ being reduced to the receipt and transmission of the application to the competent judicial authority, without a filter of international regularity.⁹

Regarding the connection between *non bis in idem* principle and the criminal proceedings transfer is necessary to mention first of all the provisions from the European Convention on the Transfer of Proceedings in Criminal Matters which states that a person who has been the subject of a final and enforceable criminal judgment may not, for the same act, be prosecuted, convicted or subjected to a sanction execution in another contracting state:

- a) when she was found not guilty;
- b) if the sanction imposed has been fully executed or is being executed, it was pardon or an amnesty fully or in part and it can not be executed because of the prescription;
- c) if the court found the person guilty, without imposing the sanction.

However, a contracting state shall shall not be obliged, unless it has itself requested the proceedings, to recognize the effect of *ne bis in idem* principle if the act which the judgment has been committed against a person, institution or thing having public status in that state, or if he person had herself a public status in that state.

⁵ Legea nr.135/2010 privind Codul de procedură penală, publicată în Monitorul Oficial al României nr.486/15 iulie 2010, cu modificările și completările ulterioare;

⁶ Rodica Mihaela Stănoiu, în Vintilă Dongoroz și colectiv (Siegfried Kahane, George Antoniu, Constantin Bulai, Nicoleta Ilescu și Rodica Mihaela Stănoiu) Explicațiile teoretice ale Codului de procedură penală român, partea specială, volumul VI, Editura All Beck, București, 2003, p. 311

⁷ Codul de procedură penală. Comentariu pe articole, ediția a 2 a, editura C.H.Beck, 2017 de Mihail Udrioiu, Amalia Andone-Bontaș, Georgina Bodoroncea, Sergiu Bogdan, Marius Bogdan Bulancea, Dan Sebastian Chertes, Ioan-Paul Chiș, Victor Horia Dimitrie Constantinescu, Daniel Grădinaru, Claudia Jderu, Irina Kuglay, Constantin-Cristinel Meceanu, Iulia Nedelcu, Lucreția Albertina Postelnicu, Sebastian Rădulețu, Alexandra Mihaela Șinc, Radu Slăvoiu, Isabelle Tocan, Andra-Roxana Trandafir (Ilie), Mihaela Vasiescu, George Zlati, p.326;

⁸ Parchetul de pe lângă Înalta Curte de Casație și Justiție și Ministerul Justiției;

⁹ Codul de procedură penală.op.cit, p.326

In addition, a contracting state in which the act was committed or is deemed to have been committed under the law of that state shall not be required to recognize the effect *non bis in idem* principle unless the state itself has requested the prosecution.

If a new prosecution is instituted against a person tried for the same act in another contracting state, then any period of deprivation of liberty carried out in the execution of that judgment shall be deducted from the sentence which may be imposed.¹⁰

The Law. 302/2004 on international judicial cooperation in criminal matters had taken the *non bis in idem* principle legal content.

Thus, art. 8 of the law states in general the incidence of this principle¹¹ and in order to apply the Convention implementing the Schengen Agreement (CAAS), in art. 135 of the Law. 302/2004 this principle was reiterated, after the legislation in the Schengen Agreement, which provides that a person against whom a final judgment has been given in a trial on a contracting part may not be prosecuted by another part for the same acts, in the event that a sentence has been imposed, it has been executed, is being executed or may no longer be executed under the laws of the contracting part which has given the sentence.¹²

Regarding to the application of art. 54 from the Convention implementing the Schengen Agreement, the Court of Justice of the European Union was notified by the Fifth Criminal Chamber of the Bundesgerichtshof (Federal Court of Justice - Germany) with a request to resolve the question if the prosecution concerns the same facts within the meaning of art. 54 of the CAAS when a defendant has been convicted by an Italian court for importing and possessing foreign smuggling tobacco in Italy and subsequently convicted by a German court for the acquisition of the same goods, previously from Greece, because he did not pay the custom duties to the first country he crossed so far as the defendant intended from the outset, after acquiring the goods in Greece, to transport them from Italy to the United Kingdom.¹³

The Court of Justice of the European Union has established as a relevant criterion for the application of this article the identity of material acts, understood as the existence of a set of facts linked, regardless of the legal classification of these facts or legal interest. The facts consisting in the acquisition of smuggled foreign tobacco in a contracting state and in the importation and possession of the same tobacco in another contracting state, characterized by the fact that the defendant, who was prosecuted in the two contracting states, had the intention to transport tobacco, after the first entry into possession, to a final destination, crossing several contracting states, represent the behavior which may be the "same facts" in the meaning of art. 54. In this case the courts from competent state have the final assessment.¹⁴

So, the Court of Justice of the European Union left to the discretion of each national authority that given the specific circumstances in which they were committed illegal acts to establish if the *non bis in idem* principle is incident or not.

In light of the above, in a situation where the illegal act committed is under Romanian law is a misdemeanor (for which Romanian judicial authorities have ordered the application of sanctions) and under the laws of the requesting member state is a crime (which is why the

¹⁰ art. 35 din Convenția europeană privind transferul de proceduri în materie penală, adoptată la Strasbourg la 15 mai 1972, ratificată prin Ordonanța nr. 77/1999 publicată în Monitorul Oficial al României nr. 420 din 31 august 1999;

¹¹ Art. 8 din Legea nr.302/2004 privind cooperarea judiciară internațională în materie penală, republicată în Monitorul Oficial al României, Partea I nr. 441/27 mai 2019;

¹² Art. 54 din Convenția de punere în aplicare a Acordului Schengen din 14 iunie 1985 între guvernele statelor din Uniunea Economică Benelux, Republicii Federale Germania și Republicii Franceze privind eliminarea treptată a controalelor la frontierele comune, semnată la Schengen la 19 iunie 1990 și intrată în vigoare la 26 martie 1995;

¹³ Cauza C-288/05 -procedură penală împotriva lui Jürgen Kretzinger, Repertoriu I – 6470, punctul 31; (www.curia.europa.eu/consultat_la_data_25.03.2020)

¹⁴ Cauza C-288/05 -procedură penală împotriva lui Jürgen Kretzinger, Repertoriu I – 6470, concluzii; (www.curia.europa.eu/consultat_la_data_25.03.2020)

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judicial authorities opened a criminal investigation and asked the romanian judicial authorities to hand over the goods that were the object of the smuggling crime in order to continue the criminal proceedings), the romanian court held the incidence of the *non bis in idem* principle and refused the procedures transfer request.

Specifically, the Bucharest Court of Appeal rejected the request for legal assistance regarding the goods transfer that had been smuggled in order to continue the criminal proceedings on the member state territory, formulated by the prosecutor from Republic of Bulgaria, retaining the *non bis in idem* principle.

Starting from the fact that in the *non bis in idem* principle application must be identity regarding the sanctioned person, a double sanctioning procedure and identity of the facts judged by the court, I applied these criteria and found that the romanian court stated that a bulgarian citizen was investigated in Romania for the act of introduction, on the romanian territory goods without paying the customs duties, deed for which he received a misdemeanor (sanction that the person executed voluntarily).

At the date of the request, the bulgarian citizen was being investigated by the prosecutor's office of the Republic of Bulgaria for the crime of smuggling, the criminal investigation being initiated by the bulgarian authorities based on the notification of the initiation of criminal proceedings received from the romanian judicial authorities, given the fact that it was established that the goods detained by the romanian authorities were illegally removed from Bulgaria.

Therefore, the court stated that, in its materiality, in essence, the deed for which the bulgarian citizen was prosecuted and subsequently sanctioned for contravention by the romanian authorities is the same as the one for which the person is prosecuted by the bulgarian authorities.

Considering the above, the court held, correctly, the *non bis in idem* principle incidence principle which prevents any action, including international judicial cooperation, from revealing the acceptance to continue the proceedings by the authority finding the incidence of this principle.¹⁵

Romanian legislation provides also situations in which the provisions of the *non bis in idem* principle do not apply, respectively if:

- a) the deeds covered by the foreign judgment were committed in whole or in part on Romania's territory. In this case, the exception shall not apply if the acts were committed in part in the territory of the member state where the judgment was given;
- b) the facts covered by the foreign judgment are a crime against the security of the state or against other Romania's essential interests;
- c) the deeds covered by the foreign judgment were committed by a Romanian official in breach of his duties.

However, the exceptions shall not apply where, for the same facts, the member state concerned has requested that criminal proceedings be instituted or the extradition granted..¹⁶

Regarding the effects of the principle *non bis in idem* on the passive competence of the criminal proceedings transfer, according to the provisions of Law no. 302/2004 the request of the foreign state to take over or initiate criminal proceedings is rejected if the criminal prosecution's exercise is contrary to the *non bis in idem* principle.¹⁷

In the same note, the request's acceptance to take over or initiate criminal proceedings is revoked when the continuation of criminal proceedings in Romania is contrary to the principle.¹⁸

¹⁵ Hotărâre nr. 64/2017 din 31/03/2017 Curtea de Apel București - Secția a II-a penală; www.lege5.ro, consultat la data de 14.08.2020;

¹⁶ Art. 135 din Legea nr.302/2004 privind cooperarea judiciară internațională în materie penală;

¹⁷ Art. 128² din Legea nr. 302/2004 privind cooperarea judiciară internațională în materie penală;

¹⁸ Art. 128³ din Legea nr. 302/2004 privind cooperarea judiciară internațională în materie penală;

In conclusion, from the analysis made, it results that the *non bis in idem* principle's incidence in criminal proceedings transfer has as a consequence the rejection by the Romanian authorities of the execution of the request to take over and to continue the criminal proceedings if they found that the person of which the transfer is requested has already been punished for the act committed.

CONCLUSIONS

The *non bis in idem* principle is a consequence to a the final nature of a criminal sanction resulting in two guarantees, which also apply to the transfer of criminal proceedings in criminal matters, namely the guarantee that a solution given to a criminal charge, and which has acquired the authority and power of *res judicata* can no longer be rediscussed, as well as a guarantee of the right of defense of the investigated person who assumes that his previously sanctioned act and behavior cannot be analyzed again.

The content of this principle was influenced by the jurisprudence of the European Court of Human Rights and the Court of Justice of the European Union in that it led to the inclusion in the notion of criminal sanction to contraventional, fiscal, disciplinary or administrative sanctions; these sanctions, regardless of whether they are applied by a court or not, should be made in compliance with all procedural guarantees granted to the person investigated. The act by which any of such sanctions was applied represents a final decision, which makes it impossible to prosecute or to judge for the same act.

Therefore, in criminal proceedings transfer the application of the *non bis in idem* principle prevents any action that could reveal the authority's acceptance to continue the proceedings when it finds the incidence of this principle.

BIBLIOGRAPHY

- Legea nr.302/2004 privind cooperarea judiciară internațională în materie penală, republicată în Monitorul Oficial al României, Partea I nr. 441/27 mai 2019;
- Legea nr.135/2010 privind Codul de procedură penală, publicată în Monitorul Oficial al României nr.486/15 iulie 2010, cu modificările și completările ulterioare;
- Convenția europeană privind transferul de proceduri în materie penală, adoptată la Strasbourg la 15 mai 1972;
- Convenția de punere în aplicare a Acordului Schengen din 14 iunie 1985 între guvernele statelor din Uniunea Economică Benelux, Republicii Federale Germania și Republicii Franceze privind eliminarea treptată a controalelor la frontierele comune, semnată la Schengen la 19 iunie 1990 și intrată în vigoare la 26 martie 1995;
- Cristinel Ghigheci – Principiile procesului penal în noul Cod de procedură penală, Editura Universul Juridic, București 2014;
- Rodica Mihaela Stănoiu, în Vintilă Dongoroz și colectiv (Siegfried Kahane, George Antoniu, Constantin Bulai, Nicoleta Iliescu și Rodica Mihaela Stănoiu) Explicațiile teoretice ale Codului de procedură penală român, partea specială, volumul VI, Editura All Beck, București, 2003;
- Codul de procedură penală. Comentariu pe articole, ediția a 2 a, editura C.H.Beck, 2017 de Mihail Udroi, Amalia Andone-Bontaș, Georgina Bodoroncea, Sergiu Bogdan, Marius Bogdan Bulancea, Dan Sebastian Chertes, Ioan-Paul Chiș, Victor Horia Dimitrie Constantinescu, Daniel Grădinaru, Claudia Jderu, Irina Kuglay, Constantin-Cristinel Meceanu, Iulia Nedelcu, Lucreția Albertina Postelnicu, Sebastian Rădulețu, Alexandra Mihaela Șinc, Radu Slăvoiu, Isabelle Tocan, Andra-Roxana Trandafir (Ilie), Mihaela Vasiescu, George Zlati;
- Repertoriu I – 6470 - cauza C-288/05 -procedură penală împotriva lui Jürgen Kretzinger; Hotărâre nr. 64/2017 din 31/03/2017 Curtea de Apel București - Secția a II-a penală;
- www.lege5.ro;
- www.curia.europa.eu.