

## **The Ne bis in idem principle**

**”not twice in the same”**

ECHR: Article 4 in Protocol 7 p. 1:

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.

(Some member states have not ratified this protocol or have made reservations against article 4, UK and Germany for instance.)

The purpose of this regulation was to introduce human rights from the UN declaration of Human rights into to ECHR. It was not certain if the article 6 in ECHR was sufficient and through the case *Ponsetti and Chesnel v. France* it was made clear that the ne bis in idem principle is covered only by article 4 in the protocol 7 and not by any other rule in the convention.

Article 50 of the Charter of Fundamental Rights of the European Union has the headline “Right not to be tried or punished twice in criminal proceedings for the same criminal offence” and reads as follows:

No one shall be liable to be tried or punished twice 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.

The Charter is only applicable regarding EU law. The Charter has been ratified by all member states. It is legally binding through the Lisbon Treaty and has the same status as a treaty.

**“The same - idem”** : The ECHR in Strasburg, Grand Chamber changed its earlier case law through its judgment in the case Zolotukhin v. Russia the 10 February 2009.

Before Zolotukhin the Strasburg court put up two conditions for when it was the same offence. 1. The same action/deed 2. The legal classification/characterisation of the offence must not differ in their essential elements

The Zolotukhin judgement has changed this, p. 82: The Article 4 of Protocol 7 must be understood as prohibiting the prosecution or a trial of a second “offence” in so far as it arises from identical facts or facts which are substantially the same. It was therefore important to focus on those facts which constituted a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings.(84). The court took into account i.a. the Schengen convention and the development within the EU (article 35).

In short: The notion “offence” is from now on interpreted as “act”.

For description of the events: See the judgement p. 12, administrative conviction and criminal prosecution -----

The Summary of findings and conclusion, article 120: -----

**“Twice- bis”**: Not only double punishment but also double proceedings are prohibited.

It is not forbidden to impose an administrative sanction and a criminal penalty in the same proceeding/trial.

**The Swedish prosecutor v. Hans Åkerberg Fransson case, Judgment of the ECJ, Grand Chamber the 26 February 2013.**

The case is about taxes but has implications in other areas where there is a combination of sanction fees (or other administrative sanctions as long as they are of a criminal nature) and criminal charges.

The Swedish law regarding tax offences and tax surcharge – see articles 7 – 11.

In 2004 the ECHR approved of the system with double sanctions in the Swedish system, criminal punishment and tax surcharge, see *Rosenquist v. Sweden*. The court attached importance to the difference in the subjective intention.

The Supreme Administrative Court also found in 2009 that the Swedish system with double sanctions and two proceedings was compatible with article 4.1 in the Protocol no 7.

Also the Supreme Court for criminal cases made the same conclusion in 2010.

Then we come to Åkerberg Fransson – a criminal case in a very small first instance court in the very north of Sweden where a colleague of ours, who used to be active in AEAJ, Anders Alenskär, asked for a preliminary ruling of the ECJ.

The facts of the case: Åkerberg Fransson was a fisherman, a sole trader with his own boat.

He was personally responsible for his taxes on his income and to pay VAT on this income. He was fishing in the Baltic Sea, a fish who gives whitefish roe, a very expensive sort of caviar which he sold, only within Sweden.

The tax authorities started to investigate his tax declarations and book-keeping. They found flaws in his book-keeping and decided to raise his income from his economic activity, employer's contribution and VAT for 2004 and 2005. His income was raised with 50 000 euros and his VAT with 15 000 euros. The tax authorities also decided on a tax surcharge of 4 700 euros for 2004 and 6 500 euros for 2005. Åkerberg Fransson did not make an appeal but paid the tax surcharges.

Then, in the year 2009 he was prosecuted at the First instance criminal court in Haparanda. The charge was serious tax offences. He was accused of having provided false information regarding income tax and VAT and for failing to declare employer's contribution.

His legal defender asked for a dismissal of the case because of the *ne bis in idem* principle.

The court asked for a preliminary ruling from the ECJ. The ECJ found the case to be important and took it to a Grand Chamber (11 judges). Seven member states intervened, also the European Commission. Five of them and the EC claimed that the case did not involve European law. Therefore the penalties and proceedings did not come under the ne bis in idem principle in the Charter.

The Court answered this: Article 24-26 – so had court had jurisdiction.

So, Member States must, when they are constructing sanctions in order to carry out rules in EU directives, keep themselves within the rules of the Charter, i.a. the ne bis in idem principle.

The Court then said that the question was if tax surcharges are criminal in nature. “It is only if the tax penalty is criminal in nature for the purposes of Article 50 of the Charter and has become final that the provision precludes criminal proceedings in respect of the same acts from being brought against the same person. (article 34)

Then, the Court described the three criteria (the so-called Engel criteria) which are relevant for the purpose of assessing whether tax penalties are criminal in nature (article 35).

1. The legal classification of the offence under national law
2. The very nature of the offence
3. The nature and the degree of severity of the penalty that the person concerned is liable to incur

The second and third criteria are alternative and not necessarily cumulative.

The Court here referred to its own case *Bonda*, Case C-489/10, 2012, which in turn refers to the *Zolotukhin* case.

The Court said that it is up to Haparanda Tingsrätt (court) to decide whether tax surcharges are criminal in nature.

This question, however, had already been decided in the ECHR in the cases *Janosevic v. Sweden* and *Västberga Taxi AB* and *Vulic v. Sweden*, the 23 July 2002. The Swedish tax surcharges were, even when imposed in an administrative proceeding, to regard as criminal in nature.

The result is that the Swedish system with double sanctions and double proceedings in tax cases is not compatible with article 50 in the Charter and article 4.1 in the Protocol no 7.

But the case is not only relevant for taxes: There are many areas where there is a combination of sanction fees and criminal charges - environmental law, customs law and the fishery area.

As long as there are: 1. Double proceedings, 2. EU-law is applied and 3. a sanction fee of a criminal character.

### **The impact of the Åkerberg Fransson case in Sweden:**

The 11 June 2013 the Supreme Court changed 180 degrees and declared that the Swedish system with double sanctions and two proceedings could no longer be upheld.

Nota bene: Not only regarding VAT but all taxes, even only national taxes. Only physical persons but also when these are responsible for company taxes.

In a decision the 16 July 2013 the Supreme Court found that when a criminal verdict given after the 10 February 2009 (the day of the Zolotukhin judgment) a person convicted for a tax crime foregone by a tax surcharge, must have the right to a new trial in order to interrupt an ongoing detention.

In a plenum verdict the 29 October the Supreme Administrative Court agreed with the Supreme Court and found that if someone has been charged with a tax crime there is a hinder against imposing tax surcharges for the same false information that led to the criminal charge.

In a judgement the 5 June 2014 the Supreme Administrative Court decided that a person should be entitled to a new trial regarding the tax surcharge when the criminal charge had come first.

After the change of practice in the Supreme Court in the summer 2013 the Prosecutor and the Tax Agency changed their routines so that the same person in the future should not risk having two different sanctions. Also this had led to that 42 persons already in the summer 2013 were released from jail and out of 2 700 tax judgements 541 applications of a new trial have been made.

The Government is preparing a government bill to the Parliament, proposing a change of the rules. In short, there will be a prohibition against the prosecutor to start a criminal process if the tax authorities already have decided on tax surcharges in the same matter and opposite – the Tax authorities must not decide on tax surcharges if the prosecutor has started a criminal process.

A single court procedure will be introduced: the general courts will be able to impose tax surcharges in a criminal procedure, although tax surcharges will still be regarded as administrative sanctions.

The new legislation will – if Parliament so decides - enter into force the 1 January 2016.