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The Impact of the European Court of Human Rights' Case-Law on National Authorities' Response to Tax Criminal Offences

1. Introduction

Fraudulent behavior in tax matters represents a particular type of white collar criminality. Even so, it does share traits with other economic offences, one of these common marks being that such conduct, the law and the proceedings concerning the conduct are not to be taken into account with disregard for the impact of other fields of law or even of economic and social public interests. As such, tackling the means of fighting tax criminal offences [1] raises issues which are not of particular concern in other more „common" types of criminality.

Of course, general principles of criminal law apply as well in regard to tax criminal offences. Moreover, the impact of human rights' law on criminal law and its enforcement by national authorities follows the same general lines when discussing tax criminal offences. Exempli gratia, all principles derived from art. 6 of the European Convention on Human Rights (hereinafter the „**Convention**") apply in tax criminal offences proceedings as in any other criminal proceedings.

However, one may detect certain aspects of the principles enshrined in the Convention and in the European Court of Human Rights' (hereinafter the „**ECHR**" or the „**Court**") case-law that have a particular importance in the context of tax criminal offences. When studying the ECHR's case-law, it is difficult not to notice that tax criminal offences remain a rather more elusive issue as compared to other matters usually settled under the jurisdiction of the Court. Nevertheless, in those instances wherein tax criminal offences have been the subject of analysis, such undertakings revolved around some certain aspects.

This article will not focus on the applicability of all principles derived from the ECHR's case-law on tax criminal offence issues. Rather, the author selected those aspects that have particular significance under the ambit of the general subject touched upon

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1 This article will use the term „tax criminal offence" when addressing any type of conduct for which criminal sanctions are prescribed by law. The author is aware that terms like „tax fraud" or „tax evasion" are used alternatively. However, we take into account the fact that in different legislative systems tax frauds or tax evasions are not all necessarily criminalized. Sometimes, such notions are used also for defining conduct that is unlawful only from a fiscal law perspective (e.g. the sole omission of not paying due taxes), but not from a criminal law perspective. Another argument in favor of the term „tax criminal offence" is that it encompasses all conduct criminalized under national legislation, irrespective of the gravity degree of the offence, and, at the same time, it excludes those misconducts that fall under administrative (fiscal) liability exclusively.

by this article. From our point of view, such analysis should begin with clarifying the ECHR's stance on the application of human rights rules in tax charges. In other words, understanding when a tax charge becomes a criminal charge is mandatory for any further considerations. Given the potential duality of proceedings in the national judicial system when punishing fraudulent tax behavior, the implications of *ne bis in idem* should also be considered. In this matter, the case-law of the ECHR had an interesting evolution, with different approaches being taken. The current perspective on the matter has only recently formed and is still subject to criticism and development.

2. Tax issues becoming criminal charges. The application of the Engel doctrine in the field of tax law.

Often times, state response to fraudulent tax behavior is not a one lane highway. Fiscal matters benefit from lengthy and detailed legal provisions. Also, in cases of disobedience towards fiscal obligations, more often than not, the first authorities to intervene are the tax authorities, irrespective of their name, limits of jurisdiction or power of imposing sanctions in different national systems.

By nature, fiscal provisions are not an integral part of criminal legislation, but rather of public (or administrative) law. Provisions criminalizing fraudulent tax conduct are not the norm, but rather the exception. As a general rule, administrative punitive measures are envisaged as the proper way to address such actions in breach of fiscal legislation. Indeed, a selected number of frauds involving taxes are integrated by national legislations into their criminal provisions. Whenever this is the case and criminal proceedings are on their way, rules derived from the Convention and from the Court's practice in criminal matters stand to be fully applicable. But in all other cases in which administrative punitive measures are imposed by national legislations the question arises: are rules provided by, for example, art. 6 paras. 2 and 3 of the Convention or art. 2 of Protocol no. 7 to the Convention applicable?

As stated repeatedly in the Court's case-law, the concept of „criminal charge" has an autonomous meaning, independent of the categorisations employed by the national legal systems of the member States.[2] The criteria for determining whether a charge in the national legal system is of a criminal nature in the Court's view has been firmly established in a judgement dating from 1976, namely in the case of *Engel and others v. The Netherlands*. Since then, the criteria laid out in this judgement has been referred to as „the Engel doctrine".

According to the Engel doctrine, a charge shall be viewed as criminal after assessment on three different criteria: (i) classification in domestic law, (ii) nature of the offence and (iii) severity of the penalty that the person concerned risks incurring.[3] We will proceed with analyzing how the Court applied these criteria in its past practice concerning charges

2 Blokhin v. Russia, Judgement of 23 March 2016, Application no. 47152/06, para. 179; Adolf v. Austria, Judgement of 26 March 1982, Application no. 8269/78, para. 30; Deweer v. Belgium, Judgement of 27 February 1980, Application no. 6903/75, para. 42.

3 Engel and others v. The Netherlands, Judgement of 8 June 1976, Applications no. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, para. 82-83.

for tax misconduct.

Regarding the criterion of the classification in domestic law, as mentioned by the ECHR in multiple judgements, it is of relative weight and it serves only as a starting point.[4] The relatively minor legal significance of this criterion is particularly relevant in the case of tax misconduct. As stated previously, in many such cases, national authorities intervene only through their respective tax regulatory bodies, not involving criminal investigation bodies, irrespective of their title within the legal system of each Member State, or criminal law courts. Moreover, the majority of situations in which a taxpayer avoids taxes are treated nationally as administrative offences. As a consequence, the penalties are also of an administrative type, as seen by national legislations, mostly fines and tax surcharges.

An interesting application of the *Engel* doctrine was employed in the case of *Paykar Yev Haghtanak Ltd v. Armenia*. The Tax Inspectorate of Armenia conducted an inspection of the company's accounts. As a result of this inspection, the Ministry of State Revenue made an assessment according to which the company's tax arrears amounted to approximately 5.400 EUR, including surcharges and fines prescribed by the relevant tax laws. The applicant lodged an appeal with the Commercial Court, also requesting that payment of the court fee (known as State fee) be deferred. The Commercial Court did grant the applicant's request for deferral of payment of the court fee, but on the merits of the case granted the authorities' claim and dismissed that of the applicant company. After this decision, the company lodged a cassation appeal also requesting a deferral of payment of the court fee. The Court of Cassation informed the applicant that the appeal would be returned unexamined should the applicant fail to pay the court fee by a set date. Given that the applicant did not pay the court fee, the Court of Cassation returned the applicant's cassation appeal unexamined.

Examining the admissibility of the company's application with the Convention on the grounds of art. 6, the Court stated as follows: "Tax disputes fall outside the scope of civil rights and obligations under Article 6, despite the pecuniary effects which they necessarily produce for the taxpayer. However, when such proceedings involve the imposition of surcharges or fines, then they may, in certain circumstances, attract the guarantees of Article 6 under its "criminal" head."[5] Regarding the first criterion of the Engel doctrine, the Court noted that "the surcharges and fines in the present case were imposed in accordance with various tax laws and are not classified as criminal. This is, however, not decisive."[6] The same view on the applicability of the first criterion in cases involving tax surcharges and fines was take in cases like *Jussila v. Finland*[7] and *Janosevic v. Sweden*[8].

„The second element of the *Engel* criteria is of higher importance in this type of

4 Gestur Jonsson and Ragnar Halldor Hall v. Iceland, Judgement of 22 December 2020, Applications no. 68273/14, 68271/14, para. 85; A. Menarini Diagnostics S.R.L. v. Italy, Judgement of 27 September 2011, Application no. 43509/08, para. 39.

5 *Paykar Yev Haghtanak Ltd v. Armenia*, Judgement of 20 December 2007, Application no. 21638/03, para. 32.

6 Idem, para. 34.

7 *Jussila v. Finland*, Grand Chamber Judgement of 23 November 2006, Application no. 73053/01, para. 37.

8 *Janosevic v. Sweden*, Judgement of 23 July 2002, Application no. 34619/97, para. 66.

cases, namely the nature of the offence and of the corresponding penalty. The relevance of this criterion was recently emphasized in the case of *Melgarejo Martinez de Abellanosa v. Spain*. Following an inspection of the applicant's personal income tax returns for the years 1991, 1992 and 1993, the Spanish Tax Management Agency claimed 180.021,94 EUR from the applicant in respect of taxes for 1991, 0 EUR for 1992 and 228,90 for 1993. After judicial proceedings, the decision was upheld for the years 1991 and 1992. On 28 March 2005, the tax authorities commenced the enforcement of the debt against the applicant. They issued a tax assessment for 296.031,01 EUR, which included, in addition to the main debt, 36.004,39 EUR in respect of a surcharge for late payment and 84.181,79 EUR in respect of default interest. The applicant paid these amounts by means of a seizure of assets by the tax authorities. After the payment had been performed, the applicant lodged two separate applications for undue payment against the tax authorities' assessment, one in respect of the main debt and the other in respect of the surcharge for late payment and default interest. The Economic Administrative Court of Andalusia ("the TEARA") initially dismissed the application in respect of the main debt. However, the Central Economic Administrative Court ("the TEAC") allowed an appeal by the applicant and declared the payment of the main debt null and void. In parallel proceedings, the TEARA also dismissed the application in respect of the surcharge for late payment and default interest, as did the TEAC later, upon an appeal by the applicant. An appeal with the Audiencia National was lodged in which it was argued by the applicant that the main debt had been annulled and, as such, since the surcharge and interest were ancillary to the main debt, they should equally be declared null and void. The Audiencia National dismissed the appeal in a decision which the applicant deemed as inconsistent with the requirement of art. 6 of the Convention regarding the need for sufficiently reasoned judgements of national courts.

Deciding upon the applicability of art. 6 in its criminal "limb", the Court stated: "As regards the surcharge for late payment, under the domestic law it was not classified as criminal but as part of the fiscal regime. Nevertheless, it was not intended as pecuniary compensation for damage but as a punishment to deter reoffending, which means that, in nature, its purpose was deterrent and punitive."[9]

A similar line of reasoning, but with a few supplemental elements, was offered by the Court in the previously mentioned case of *Paykar Yev Haghtanak Ltd v. Armenia*: "As regards the second criterion, the Court notes that the relevant provisions of the Law on Taxes and the Law on Value Added Tax are applicable to all persons - both physical and legal - liable to pay tax and are not directed at a specific group. Furthermore, the surcharges and the fines are not intended as pecuniary compensation for any costs that may have been incurred as a result of the taxpayer's conduct. The purpose pursued by these measures is to exert pressure on taxpayers to comply with their legal obligations and to punish breaches of those obligations. The penalties are thus both deterrent and punitive".[10]

We conclude from these two judgements that when applying the second criterion of

9 *Melgarejo Martinez de Abellanosa v. Spain*, Judgement of 14 December 2021, Application no. 11200/19, para. 25.

10 *Paykar Yev Haghtanak Ltd v. Armenia*, para. 35.

the *Engel* doctrine to conducts that lead to tax surcharges and/or fines, the Court takes into consideration the following elements in assessing on the criminal nature of the charge and of the penalty:

whether the relevant provisions are applicable to all taxpayers (not directed to a specific group);

whether the surcharges and/or fines are intended as pecuniary compensation for any costs incurred by the authorities or they are intended as means to exert pressure on the taxpayers so that they comply with their legal obligation;

whether such measures are prescribed with a general deterrent and punitive purpose.

Lastly, the third criterion, the severity of the penalty, even though usually it is considered as fulfilled in cases similar to the ones quoted earlier, it is not seen as being essential in determining the criminal nature of the charge. *Exempli gratia*, in the case of *Paykar Yev Haghtanak Ltd v. Armenia*, it was stated: "The Court considers that the above is sufficient to establish the criminal nature of the offence. It would, nevertheless, also point out that in the present case the applicant company had quite substantial penalties imposed on it: the fines ranging from 10 to 50 per cent and the surcharges for the period of delay cumulatively amounting from about 5 to 43 per cent of the tax due."[11] A similar assessment was made in the case of *Melgarejo Martinez de Abellanosa v. Spain*, where the Court noted that the penalty amounted to 20 per cent of the tax payable.[12]

Interestingly, in a particular case in which it was determined that an imposition of tax surcharges is a penalty that is criminal by nature, in light of the Convention, the Court did not refer expressly to the *Engel* doctrine. In *Bendenoun v. France*, the Court listed four elements as being relevant to the applicability of Article 6 in that case: that the law setting out the penalties covered all citizens in their capacity as taxpayers; that the surcharge was not intended as pecuniary compensation for damage but essentially as a punishment to deter re-offending; that it was imposed under a general rule whose purpose is both deterrent and punitive; that the surcharge was substantial.[13] Even though listing these elements as such and without mentioning the case of *Engel and others v. the Netherlands* may be seen as a deviation from the *Engel* doctrine, later on, in a different judgement, the Court dismissed such an interpretation: "These factors may be regarded however in context as relevant in assessing the application of the second and third *Engel* criteria to the facts of the case, there being no indication that the Court was intending to deviate from previous case-law or to establish separate principles in the tax sphere. It must further be emphasised that the Court in *Bendenoun* did not consider any of the four elements as being in themselves decisive and took a cumulative approach in finding Article 6 applicable under its criminal head."[14]

11 *Paykar Yev Haghtanak Ltd v. Armenia*, para. 36.
12 *Melgarejo Martinez de Abellanosa v. Spain*, para. 25.
13 *Bendenoun v. France*, Judgement of 24 February 1994, Application no. 12547/86, para. 47.
14 *Jussila v. Finland*, para. 32.

3. The ECHR's perspective on the duality of proceedings leading to sanctions for unlawful tax conduct before *A and B v. Norway*.

As stated previously, when the conduct of a taxpayer crosses a certain threshold of fraudulent behavior, the national legislator prescribes criminal liability for such acts. In such cases, criminal prosecutions are carried out by offices of the prosecutor, criminal courts then have their say on the matter and eventually a penalty will have to be served if all elements of the crime are met.

Problems will arise though more easily in tax cases than in other criminal matters from the perspective of the *ne bis in idem* principle. In most national systems tax authorities are the first entities called upon to investigate the taxpayer's conduct. Administrative proceedings are put in motion from such authorities. Irrespective of the criminal side of matters, tax authorities will assess the debt of the taxpayer and, if certain conditions are met, surcharges and fines which from the ECHR's perspective may entail a criminal penalty character will be imposed. If the tax authorities notice at any point in their investigation that the conduct of the taxpayer may amount to a tax criminal offence, the public prosecutor will be notified and proper criminal proceedings will start. Under such circumstances, it is easy to understand the importance of art. 4 of Protocol no. 7 to the Convention in the matter. As per this 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." The prohibition of double jeopardy has been explained by the Court in the following terms: "Article 4 of Protocol no. 7 must be understood as prohibiting the prosecution or trial of a second "offence" in so far as it arises from identical facts or facts which are substantially the same."[15] Also, in this understanding, the Court points to one of the components of *ne bis in idem*, namely the *ne bis vexari* element, the other being *ne bis puniri*.

It is now visible why the author chose to first discuss the situations in which administrative proceedings and penalties by means of the national legislation are seen as having a criminal nature in the eyes of the ECHR. Of course, the classification of a proceeding or of a penalty as being criminal in nature is not only relevant for the application of art. 6 of the Convention, but for the application of art. 4 of Protocol no. 7 as well.

The case-law of the ECHR on the application of *ne bis in idem* in tax cases is rather rich and, unfortunately, not always consistent with itself or clear and easily understandable. Also, certain developments of said case-law may be noted across time. We will proceed with analyzing some of the most relevant case-law on the matter trying to point to the most important elements that should be taken into account in such tax cases.

Chronologically, from our point of view, one of the first important cases was that of *Ruotsalainen v. Finland*. The applicant was stopped by the police during a road check on 17 January 2001. The police discovered a more leniently taxed fuel than diesel oil in the tank of his van. As such, on 26 February 2001, the applicant was fined for petty tax fraud through a summary penal order. In separate proceedings, on 17 September 2001

15 *Sergey Zolotukhin v. Russia*, Judgement of 10 February 2009, Application no. 14939/03, para. 82.

the Vehicle Administration issued the applicant with a fuel fee debit on the ground that his pickup van had been run on more leniently taxed fuel than diesel oil without prior notification to the Vehicle Administration or Customs. The applicant lodged both an application for a reduction of the fee and an appeal with a view to having the decision overturned, arguing, *inter alia*, that the fuel fee should have been claimed at the same time as the summary penal order was issued. As it had not been claimed at the same time, it was no longer possible to debit the fuel fee in the light of art. 7 of the Convention. On 10 October 2001, the National Board of Taxes rejected the application. On 28 August 2002, the Helsinki Administrative Court rejected another appeal. The applicant requested leave to appeal, alleging a breach of art. 4 of the Protocol no. 7. On 26 February 2003, the Supreme Administrative Court refused leave to appeal.

With regards to these facts, the Court stated as follows: "This recapitulation of the events and sanctions demonstrates that since the same conduct on the part of the same defendant and within the same time frame is in issue, the Court is required to verify whether the facts of the offence for which the applicant was fined and those of the offence by reason of which he was issued with a fuel fee debit were identical or substantially the same. The definition of the offences of "tax fraud" and "petty tax fraud" under Chapter 29, Articles 1 and 3, of the Penal Code referred to various types of prohibited conduct. Each of these elements was in itself sufficient for a finding of guilt. The police must be considered to have based the summary penal order on the fact that the applicant had "otherwise acted fraudulently" and thereby caused or attempted to cause a tax not to be assessed. It was also considered essential that the applicant had filled the tank himself. In the ensuing administrative proceedings, the applicant was issued with a fuel fee debit on the ground that his car had been run on more leniently taxed fuel than diesel oil. The fuel fee debit was trebled on the ground that the applicant had not given prior notice of this fact. Although the Administrative Court's decision noted that the applicant had admitted having used the wrong fuel, the imposition of the fuel fee debit did not require intent on the part of the user of the wrong fuel. To sum up, the facts that gave rise to the summary penal order against the applicant related to the fact that he had used more leniently taxed fuel than diesel oil in his pickup van without having paid additional tax for the use. The fuel fee debit was imposed because the applicant's pickup van had been run on more leniently taxed fuel than diesel oil and it was then trebled because he had not given prior notice of this fact. This latter factor has above been considered to have amounted to a punishment to deter reoffending. Thus, the facts in the two sets of proceedings hardly differ albeit there was the requirement of intent in the first set of proceedings. The facts of the two offences must, the Court considers, therefore be regarded as substantially the same for the purposes of Article 4 of Protocol No. 7. As the Court has held, the facts of the two offences serve as its sole point of comparison. Lastly, the Court notes that the latter proceedings did not fall within the exceptions envisaged by the second paragraph of the said provision."[16]

We note that in *Ruotsalainen v. Finland*, the Court took a rather simple and concrete approach to the matter at hand. Simply comparing the facts, it concluded that two sanctions

16 *Ruotsalainen v. Finland*, Judgement of 16 June 2009, Application no. 13079/03, para. 53-56.

in two different proceedings have been imposed for the same facts. The simplicity and clearness of this reasoning will be made even stronger when comparing it with the reasoning of the Court in later judgements on similar tax issues.

Such a case was the one of *Lucky Dev v. Sweden*. By a decision of 1 June 2004, the Tax Agency, noting that the applicant ran two restaurants together with her husband, Mr Shibendra Dev, found that they should each declare half of the proceeds and costs of that business. As the applicant, in her tax return, had not declared all her income and had, moreover, not declared it in the correct manner, the Agency revised upwards her income for 2002, finding her liable to pay tax on undeclared business income. The Agency also ordered her to pay tax surcharges amounting to 40% and 20%, respectively, of the increased income tax and VAT. This decision was upheld by the Administrative Courts with a final decision being passed on 20 October 2009.

Also, criminal proceedings were initiated against the applicant in regard to the conduct. By a judgement of 16 December 2008, the Stockholm District Court convicted the applicant of an aggravated bookkeeping offence. She was given a suspended sentence and ordered to perform community service. The offence concerned the same period as the above-mentioned tax decisions, that is, the year 2002. In regard to the public prosecutor's claim that the applicant was guilty also of an aggravated tax offence, the court considered that it could not be ruled out that, as she claimed to have relied on her husband running the business properly and their accountant having entered the correct figures in her tax return, she had been unaware that her tax return contained false information. Thus, it had not been shown that she intended to give incorrect information, for which reason the indictment was dismissed in this respect. Given that the applicant did not appeal this judgement, it acquired legal force on 8 January 2009.

The applicant complained that, through the imposition of tax surcharges and the trial for a tax offence and a bookkeeping offence, of which she was convicted of the latter, she had been tried and punished twice for the same offence.

The Court first proceeded with analyzing whether the criminal offences for which the applicant was prosecuted were the same as those for which the tax surcharges were imposed on her. To this end, the case of *Sergey Zolotukhin v. Russia* was quoted. The Court stated that "an approach which emphasised the legal characterisation of the offences in question was too restrictive on the rights of the individual and risked undermining the guarantee enshrined"[17] in art. 4 of Protocol no. 7 and that this provision has to be understood "as prohibiting the prosecution or trial of a second offence in so far as it arises from identical facts or facts which are substantially the same"[18]. The criteria that should be taken into account when assessing on the similarity of facts are based on elements as "the same defendant" and an "inextricably link in time and space". In the case of *Lucky Dev v. Sweden*, the Court noted that the facts underlying the indictment for the tax offence were at least substantially the same as those leading to the imposition of tax surcharges. On the other hand, it observed that the bookkeeping offence is based on different facts as "the applicant, while not having fulfilled the legal bookkeeping requirements, could

17 *Lucky Dev v. Sweden*, Judgement of 27 November 2014, Application no. 7356/10, para. 52.
18 Ibidem.

later have complied with the duty to supply the Tax Agency with sufficient and accurate information. (...) Thus, the applicant's trial and conviction for an aggravated bookkeeping offence was deemed as not failing to comply with the requirements of art. 4 of Protocol no. 7."[19]

However, moving further with analyzing the application of *ne bis in idem* with regard to the indictment and trial for the tax offence, the Court noted that even though the final decision by which the applicant was acquitted of the charges relating to the tax offence acquired legal force on 8 January 2009, because art. 4 of Protocol no. 7 is not confined to the right not to be punished twice, but extends to the right not to be tried twice, it gives that "further criminal proceedings against an individual are prohibited when a decision concerning the same offence is final"[20]. In the case at hand, as a consequence, the Court found that a violation of art. 4 of Protocol no. 7 occurred because "the tax proceedings were not terminated and the tax surcharges were not quashed after the criminal proceedings had become final but continues for a further nine and a half months until 20 October 2009. Therefore, the applicant was tried again for an offence for which she had already been finally acquitted."[21]

From our point of view, the most interesting part of the Court's reasoning in *Lucky Dev v. Sweden* does not concern the part regarding the continuation of the tax proceedings after the final acquittal for which a violation of *ne bis in idem* has been found, but rather the part regarding the previous period of time in which the criminal proceedings and the tax proceedings continued in a parallel manner. In respect to this issue, the Court stated that "art. 7 of Protocol no. 4 does not, however, preclude that several concurrent sets of proceedings are conducted before that final decision has been issued. In such a situation, it cannot be said that the individual is prosecuted several times for an offence for which he has already been finally acquitted or convicted."[22]

Apparently, two conclusions may be drawn from the judgement passed in *Lucky Dev v. Sweden*. Firstly, there is no principle opposing parallel proceedings. Secondly, as a rule, when a final decision is reached in one of the proceedings, the other should be discontinued.

Nevertheless, to complicate matters further, not even this last rule is an absolute one, as we will note from a different case of the ECHR regarding tax criminal offences, namely *A and B v. Norway*, a case which will benefit from a thorough analysis in the next section. The path towards the reasoning of the Court in *A and B v. Norway* has been, however, paved with an assessment made in *Lucky Dev v. Sweden*: "Notwithstanding the existence of a final decision, the Court has found in some cases that although different sanctions (suspended prison sentences and withdrawal of driving licenses) concerning the same matter (drunken driving) have been imposed by different authorities in different proceedings, there has been a sufficiently close connection between them, in substance and in time. The conclusion in those cases was that the individuals were not tried or punished

19 Idem, para. 55.
20 Idem, para. 59.
21 Idem, para. 63.
22 Idem, para. 59.

again for an offence for which they had already been finally convicted and that there was thus no repetition of the proceedings."[23] This was, however, not the case in *Lucky Dev v. Sweden*, as the Court found that the applicant's criminal guilt and her liability to pay tax surcharges were determined in proceedings that were wholly independent of each other.

4. The *ne bis in idem* rule in and after *A and B v. Norway*.

Probably one of the most influential judgements of the ECHR in cases involving tax criminal offences is the one passed in *A and B v. Norway*, its importance being proven even by the sheer size of the judgement. This was a joined case involving two individuals that had been referred to the Grand Chamber.

Applicant A was arrested in December 2007 for serious tax fraud. In October 2008, he was indicted. On 24 November 2008, the Tax Administration amended his tax assessment with reference *inter alia* to the tax audit, to the criminal investigation, to the evidence given by him and to documents seized by the office of the prosecutor in the investigation. As such, the applicant was ordered to pay a tax penalty of 30%, to be calculated on the basis of the tax that he owed in respect of the undeclared amount. The taxpayer did not appeal this decision and paid the outstanding tax due, together with the penalty, before the expiry of the three-week time limit for lodging an appeal. In March 2009, the Follo District Court convicted A on charges of aggravated tax fraud and sentenced him to one year's imprisonment. In determining the sentence, the national court had regard to the fact that the applicant had already been significantly sanctioned by the imposition of the tax penalty. The applicant appealed, complaining that this decision breached art. 4 of Protocol no. 7. In 27 September 2010, the Supreme Court rejected his appeal. It first noted that there was no doubt that the factual circumstances underlying the decision to impose tax penalties and the criminal prosecution arose from the same facts and they were inextricably linked together. However, it stated that "there could be no doubt that there was a sufficient connection in substance and time between the two penalties imposed on the applicant" and that "to a great extent the administrative-law and criminal-law processing had been interconnected".

Applicant B had also been subjected to a 30% tax surcharge in December 2008, a decision which became final by not being appealed. In November 2008, he had been indicted for tax fraud. The public prosecutor requested the Oslo City Court to pass a summary judgement based on his confession. On 10 February, the applicant withdrew his confession, as a result of which the public prosecutor issued a revised indictment on 29 May 2009, including the same charges. On 30 September 2009, the City Court convicted the second applicant on the charges of aggravated tax fraud and sentenced him to one year's imprisonment, account being taken of the fact that he had already had a tax penalty imposed on him. His appeal against this decision was dismissed on the same grounds as in the case of the first applicant, namely that there was sufficient connection between the tax surcharges and the later criminal conviction.

In this case, the issues presented before the Grand Chamber were more complex than

23 Idem, para. 61.

in other cases concerning tax criminal offences. First of all, the Government asked the Grand Chamber to confirm that a wider range of factors than the *Engel* criteria (of which it was claimed that they were formulated with strict reference to art. 6) were relevant for the assessment of whether a sanction was "criminal" for the purposes of art. 4 of Protocol no. 7. Secondly, it invited the Court to state that art. 4 of Protocol no. 7 does not prohibit parallel proceedings and, moreover, it does not preclude such proceedings even when one of them continues after the other has reached a final decision. Finally, it raised the question whether the tax surcharge proceedings and the criminal proceedings have a sufficiently close connection so that they can be considered a single set of proceedings leading to cumulative outcomes.

Regarding the first issue, the Court pointed that for the purposes of art. 4 of Protocol no. 7 the classic *Engel* criteria should be applied. "The *ne bis in idem* principle is mainly concerned with due process, which is the object of art. 6, and is less concerned with the substance of the criminal law than art. 7. The court finds it more appropriate, for the consistency of interpretation of the Convention taken as a whole, for the applicability of the principle to be governed by the same, more precise criteria as in *Engel*."[24]

In regard to the second and the third issue, however, the Court first noted that the "States should be able legitimately to choose complementary legal responses to socially offensive conduct (such as non-compliance with road traffic regulations or non-payment/evasion of taxes) 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."[25] In the next paragraph of the judgement, the Grand Chamber provides an apparent definition of the "coherent whole": an integrated system enabling different aspects of the wrongdoing to be addressed in a foreseeable and proportionate manner so that the individual concerned is not thereby subjected to injustice.[26] The Court also pointed to the criterion of a "sufficiently close connection in substance and time" between the two proceedings.[27] As per the Court's reasoning, factors that should be taken into account when deciding on the previously mentioned connection are, *exempli gratia*:

whether the purposes that are pursued are complementary, addressing *in concreto* different aspects of the social misconduct involved;

whether the duality of proceedings is a foreseeable consequence of the impugned conduct;

whether the sets of proceedings are conducted so as to avoid a duplication in the collection and assessment of evidence, mainly through an adequate interaction between the competent authorities;

whether the sanction imposed in the proceedings which become final first is taken into account in those which become final last, so as to prevent that the individual is made

24 *A and B v. Norway*, Grand Chamber Judgement of 15 November 2016, Applications no. 24130/11, 29758/11, para. 107.

25 Idem, para. 121.

26 Idem, para. 122.

27 Idem, para. 130.

to bear an excessive burden.[28]

As a consequence of this criterion being met, "the order in which the proceedings are conducted cannot be decisive of whether dual or multiple processing is permissible under art. 4 of Protocol no. 7."[29]

Interestingly, even though the Court emphasises that "where the connection in substance is sufficiently strong, the requirement of a connection in time nonetheless remains and must be satisfied", it also states that "this does not mean, however, that the two sets of proceedings have to be conducted simultaneously from beginning to end. It should be open to States to opt for conducting the proceedings progressively in instances where doing so is motivated by interests of efficiency and the proper administration of justice, pursued for different social purposes, and has not caused the applicant to suffer disproportionate prejudice."[30]

Based on the previously quoted considerations, in the case of *A and B v. Norway* the Grand Chamber found that there has been no violation of art. 4 of Protocol no. 7. It mainly based the judgement on the fact that the two proceedings were found to be sufficiently connected in substance and in time, a connection within an integrated system of penalties which was foreseeable for the applicants.

The judgement passed in *A and B v. Norway* does a thorough review of previous case-law relevant to the issues on which it was decided by the Grand Chamber. Noting different approaches in these issues, a certain desire for unification of previous criteria is read between the lines. However, as noble the desire and as necessary a unique approach is on the problem of dual proceedings, unfortunately, in our opinion, the judgement does not provide clear and foreseeable elements that should determine in future cases whether a violation of art. 4 of Protocol no. 7 did occur.[31] On the contrary, the judgement may have elevated the level of uncertainty in the matter. It is worthy to mention that judge Pinto de Albuquerque expressed a very well-documented and well-argued dissenting opinion to the judgement in *A and B v. Norway*. His dissenting opinion states, amongst other criticism: "The obvious purpose of the Grand Chamber is to establish a principle of European human rights law that is applicable to all cases involving a combination of administrative and criminal proceedings. The problem is that the Grand Chamber's reasoning cuts some corners. The imprecise description of the conditions required for the combination of administrative and criminal penalties and the perfunctory application of these conditions to the Norwegian legal framework and practice leave a lingering impression of lightness of reasoning."[32]

It was stated in the judgement that an important element is whether the duality of proceedings is a foreseeable consequence. It may be debated on the relevance of this aspect in regard to the principle of *ne bis in idem*. Certainly, the foreseeability of law is a

28 Idem, para. 132.
29 Idem, para. 128.
30 Idem, para. 134.
31 See also G. Lasagni, S. Mirandola, "The European ne bis in idem at the Crossroads of Administrative and Criminal Law," *The European Criminal Law Associations' Forum*, 2/2019, p. 127-129.
32 *A and B v. Norway*, Dissenting opinion of Judge Pinto de Albuquerque, para. 1.

general requirement, mainly in criminal matters. Regulations on proceedings and potential penalties must be in place. However, in our view, a lack of foreseeability on these issues would rather fall under the scope of art. 7 of the Convention than the scope of art. 4 of Protocol no. 7.[33] Generally, national legislation will provide for the proceedings that are to be expected, irrespective of the issue of conformity with the *ne bis in idem* principle.

Also, the Court stated that an important goal is to avoid the possibility to subject the individual to injustice by being subjected to multiple proceedings. One may note the vagueness of such criteria. It does warrant a certain "case by case" approach, but it also raises the question of stability and uniformity of future case-law.

Regarding the "connection in substance" element, at first glance, it is rather difficult to differentiate between this aspect and the general conditions for the applicability of art. 4 of Protocol no. 7. As we noted previously, a general pre-condition for the applicability of *ne bis in idem* is the identity or substantial similarity of facts in different proceedings. We can only understand the "connection in substance" aspect as referring to other aspects, such as procedural steps or complementarity of penalties. However, the extent to which such connection should exist is unclear. For example, if the proceedings in front of the administrative authority only take into account part of the evidence gathered in the criminal investigation and attach supplementary evidence that is not taken into account in the latter, does a sufficient connection arise? Moreover, the complementarity of penalties is a matter that is strongly dependent on the nature of the conduct. The ECHR did mention that it is necessary to prevent an excessive burden on the individual. The threshold from where the burden becomes excessive will, nevertheless, be assessed upon on a "case by case" basis.

Finally, we already touched on the lack of clarity regarding the "connection in time" element. Proof of the instability of such criteria was seen in more recent case-law of the ECHR. In the case of *Johannesson and others v. Iceland*, the Court did hold that there has been a violation of art. 4 of Protocol no. 7. In this case, the Directorate of Tax Investigations initiated a tax audit on the applicants on 17 November 2003. The final reports were issued on 27 October 2004 and 24 November 2005. On 12 November 2004, the tax authority reported the matter to the police for criminal investigation. In August 2006, the police questioned the applicants and other witnesses for the first time and informed the applicants about their status as suspects in the criminal investigation. The tax authorities' decisions were issued on 29 August 2007 and 26 September 2007, becoming final six months later. In the criminal case, the indictment was issued on 18 December 2008. A first judgement was passed on 9 December 2011 and on 7 February 2013 the conviction was upheld by the Supreme Court. Comparing the situation in this case with the one in *A and B v. Norway*, the Court noted: "This, again, stands in contrast to the case of *A and B v. Norway*, where the total length of the proceedings against the two applicants amounted to approximately five years and the criminal proceedings continued for less than two years after the tax decisions had acquired legal force, and where the integration between the two proceedings was evident through the fact that the indictments against the applicants were

33 See also M. Luchtman, "The ECJ's recent case law on ne bis in idem: Implications for law enforcement in a shared legal order," 55 *Common Market Law Review*, 2018, p. 1727.

issued before the tax authorities' decisions to amend their tax assessments were taken and the District Court convicted them only months after those tax decisions."[34]

Such case-law comparison does raise the question: what is a "fair" period of time for which the second proceeding should be allowed to continue after the final decision was passed in the first proceeding? Moreover, one may find it difficult to differentiate between the issue of time as an element of *ne bis in idem* and the ECHR's application of art. 6 of the Convention in cases of excessive length of proceedings.[35]

Taking into account all of the above, in accordance with other scholars, we note that in *A and B v. Norway*, the ECHR developed a significant and controversial exception to the *ne bis in idem* principle enshrined in art. 4 of Protocol no. 7.[36] The exception is controversial to the extent that it may become unforeseeable in its application and it may open the door for arbitrariness in generally similar cases.

5. Conclusions

As stated in the introduction to this article, we note that most case-law involving the conduct of evading taxes and liabilities presented by such actions is met in relation to art. 6 of the Convention and art. 4 of Protocol no. 7 to the Convention. In particular, the characterization of a tax charge as being criminal and the applicability of *ne bis in idem* in subsequent proceedings raises certain questions.

The responses provided by the ECHR's case-law to these questions are quite different from a qualitative point of view. In our opinion, the ability to distinguish between a criminal or a non-criminal nature of a proceeding generated as a response to tax misconduct is based on solid criteria set out in the Court's case-law. With virtually no deviation, the *Engel* criteria has been constantly recognized as being perfectly constructed to be used also in regard to tax charges.

However, the case-law relating to the application of *ne bis in idem*, the interdiction of double jeopardy, seriously fluctuated. Initial approaches were indeed simple enough to be applied in a predictable manner, but they lacked the capacity to adapt to more complex judicial situations. An intermediate development tried to mitigate the simplicity of initial analysis. To this end, it observed that parallel proceedings are permissible under art. 4 of Protocol no. 7, but should one of these proceedings reach an end, the other should be discontinued. However, even from this intermediate level, it has been pointed that dual proceedings should be justified in certain cases in which the national legal system provides for a coherent and integrated approach. This lead to the current state of affairs, stated in the leading case of *A and B v. Norway* where the ECHR admitted that not even

34 *Johannesson and others v. Iceland*, Judgement of 18 May 2017, Application no. 22007/11, para. 54.

35 See also F. Viganò, "Una nuova sentenza di Strasburgo su *ne bis in idem* e reati tributari," *Diritto penale contemporaneo, 2017,* available at https://archiviodpc.dirittopenaleuomo.org/d/5430-una-nuova-sentenza-di-strasburgo-su-ne-bis-in-idem-e-reati-tributari, accessed on 16 March 2022.

36 K. Ligeti; S. Tosza, "Challenges and Trends in Enforcing Economic and Financial Crime: Criminal Law and Alternatives in Europe and the US," in: K. Ligeti, S. Tosza (eds.), *White Collar Crime: A Comparative Perspective*, Hart Publishing, 2019, p. 32.

the prolonging of one proceeding past the termination of the other breaches *per se* the interdiction of double jeopardy.

The ECHR tries to set up a flexible framework for the applicability of art. 4 of Protocol no. 7. Further developments are, however, necessary as the flexibility of the current criteria could be misconstrued for uncertainty and an invitation for arbitrariness in future cases.