THE DISTINCTIVE FEATURES OF EUROPEAN CRIMINAL LAW

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Abstract

This study aims to analyze the case law of the ECJ and ECHR on the nature of administrative sanctions and their relation to criminal law. Also, some important criteria used by different Member States in their own legal systems in differentiating between criminal and administrative sanctions are presented. As it will be shown in this study, in establishing the difference between administrative and criminal offence sanctions, the case law of both the European Court of Human Rights and the Court of Justice of the European Union offer an indirect definition of criminal offence through its penalty. Thus, a certain behavior, if sanctioned in a procedure that could be labeled as 'criminal procedure', is necessarily a criminal offence.

1. Comparative national law analysis

1.1. Preliminary remarks*

In the old Romanian regulations, according to art. 1 of Law no. 32/1968, a *contravention* (administrative offence) was an "act committed with guilt, posing a danger of social crime and lower than is provided and sanctioned as such by laws, decrees or regulations of the bodies referred to in the present law".

The 1864 Criminal Code settled the *contravention* as the offence which the law punishes by imprisonment or by a police fine " (art. 1).

Present national regulations, GO. 2/2001[1] , state that "the *contraventional* law protects social values that are not protected by the criminal law."

We will see how the *contravention* is determined by the national legislator comparative with different other legislators.

1.2. Comparative national law analysis. Romania. Hungary. Italy. The Netherlands.

Romanian legislator made a difference between criminal offence and administrative offence, in the sense that the same conduct cannot be punished in the same time also as criminal offence and contravention. In case that such situation happens, the only punishment will be a criminal penalty.

In the same way, to describe *contravention*, Hungarian legislation settles that contraventions are the lightest type of a criminal offence regarding their weight. In 1955, it ranked a part of the *contraventions* as felonies but classified a bigger part of them under the new type of unlawful act,

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[1] Official Journal no. 268/22 of April 2002.

under the collective notion of *infraction*[2]. Currently, *infractions* are regulated by a separate Act (Act II of 2012), which includes the regulations of substantive law, procedural law and law of execution as well.

Thus, *infractions/contraventions* are not part of criminal law, but they have a *substantial relation to it*.

Social values can be protected by criminal law, administrative law or by civil law, under different aspects[3]. For example, if a professional driver exceeds the accepted speed limit, its act constitutes a contravention and also can be sanctioned by the employer.

In Italy, until 1967, only criminal and civil wrongs were admitted[4]. However, as the legislator thought that some traffic offences where not so serious as to deserve a penal punishment, the Law no. 317/1967 introduced the first administrative offences with the aim to decriminalize the previous criminal provisions.

In Netherlands there is a difference between administrative and criminal offences[5].

Criminal law is at least eligible if the nature of the offence, the seriousness of the offence, its consistency with other offences or the need for an investigation associated with coercive and investigative powers so require. Administrative law is at least eligible if the offence is easy to determine, if there is no need for an investigation associated with coercive and investigative powers and if no severe punishments are necessary, even for deterrence[6]. There is no strict separation of administrative and criminal offences. It is not a question of a uniform defined jurisdiction, but more a partially overlapping jurisdiction.

Romanian specialized literature sets that the administrative law has a subsidiary character in relation to criminal law, because administrative sanctions occur only if the same act is not a criminal offence that would be criminally sanctioned[7].

The lack of qualitative differences between criminal offences and *contraventions* should determine some juridical consequences, as some specialists in this field highlighted. The first one is the consequence of inadmissibility of coexistence between the two types of liability. Second, the inadmissibility of establishing more sever administrative sanctions than the criminal ones.

In Romania, there is an infringement of this rule, since there are administrative sanctions more sever than criminal penalties, such as Law no 297/2004 regarding capital market. Such provisions are violating the principle of proportionality. Indeed, there should be equivalence between the nature and gravity of the offence committed and the corresponding punishment.

In Hungarian legal literature, many standpoints had been formulated regarding the relation between *infractions* (previously: *contraventions*) and crimes[8].

[2] Ferenc Sántha, Erika Váradi-Csema, Andrea Jánosi, Foundations of (European) Criminal Law – National Perspectives, Hungary, in Norel Neagu (Ed.), Foundations of European Criminal Law, C.H.Beck Publishing House, Bucharest, 2014, forthcoming

[3] M.A. Hotca, Juridical regime of contraventions, ed. Ch. Beck, Bucharest, 2012.

[4] Clara Tracogna, Foundations of (European) Criminal Law – National Perspectives, Italy, in Norel Neagu (Ed.), Foundations of European Criminal Law, C.H.Beck Publishing House, Bucharest, 2014, forthcoming

[5] Renate van Lijssel, Foundations of (European) Criminal Law – National Perspectives, The Netherlands, in Norel Neagu (Ed.), Foundations of European Criminal Law, C.H.Beck Publishing House, Bucharest, 2014, forthcoming

[6] This is said about the Law of Prosecutoral Dispusal by the former minister of Justice, P.H. Donner.

[7] Mirela Gorunescu, *Foundations of (European) Criminal Law – National Perspectives, Romania*, in Norel Neagu (Ed.), Foundations of European Criminal Law, C.H.Beck Publishing House, Bucharest, 2014, forthcoming.

[8] Ferenc Sántha, Erika Váradi-Csema, Andrea Jánosi, Foundations of (European) Criminal Law – National Perspectives, Hungary, supra.

According to the positivistic approach, making a distinction between *infraction* and crime is not a question of content, but a decision of the legislator. This means that those acts can be considered *infractions* if they are to be qualified as such by the legislator.

According to the quantitative approach, there is only a quantitative difference between infraction and criminal offence. This means analyzing to what extent the act violates the law, and to what extent is it a threat to the society. The objective weight and the danger of the *infraction* are smaller than that of the criminal offence, and this is the reason for its lighter sanctioning.

According to a third theoretical approach, there is more of a qualitative difference between *infractions (contraventions)* and criminal offences, instead of a quantitative one. While the *infraction* is a morally neutral act against public administration (an "anti-administrative" act), the criminal offence is a (materially unlawful) behavior that violates or endangers common public values.

Italian administrative offences are a separate and autonomous branch of law[9]. However, it rarely happens that a legal provision directly defines the nature of the sanction. As a matter of fact, the main criterion to classify civil, administrative and criminal offences is the formal one, which analyses the kind of sanction provided by law: since the criminal punishment is the only one affecting freedom (even as a result of a non-fulfillment of a criminal - monetary - fine), thus all other sanctions are not criminal. Moreover, an administrative offence differs from a civil wrong in that it affects social and public interests, while a civil wrong is related to private interests.

Romanian general definition of the contravention is found in art. 1 par 2 of the GO no. 2/2001, under which:

> *"a contravention is committed with guilt, established and sanctioned by law, Ordinance, Decree of Government or, where appropriate, by decision of the local Council of the village, town, or municipality of Bucharest, sector of the County Council or General Council of Bucharest".*

Also, according to the explanatory *Dictionary of the Romanian language, slight negligence* shall mean a violation of the provisions of a law, a regulation, which, given a degree of social danger, is sanctioned with a mild punishment.

The preamble of the new Hungarian Act on Infractions (Act II of 2012) calls *infractions* "criminal acts", which violate or endanger the generally accepted rules of social coexistence, but which are not as dangerous as crimes. The Act gives us the definition of infraction. According to this,

> *"an infraction is an act or omission, ordered punishable by the law, which is dangerous for society."* (Article 1 Section 1).

This definition is completed, like the Romanian one, with the provision of the Act regarding the principle of guilt, and thus, *the elements of the legal definition of infraction* are: (1) human behavior; (2) a danger to society, although to a smaller extent than a crime; (3) guilt (intent or negligence); (4) an act ordered punishable by the law.

Based on the above, on the one hand, it can be said that the legal definitions of *infraction* and criminal offence are very similar, the conceptual elements are basically the same, and the only difference is the extent to which the two acts pose a threat to society.

[9] Clara Tracogna, Foundations of (European) Criminal Law – National Perspectives, Italy, supra.

In Romanian criminal law system, *contraventional* law has as sources of law: the Constitution, organic laws and emergency ordinances; ordinary laws and ordinances of the Government; decisions of the Government; decisions of the county councils and the General Council of Bucharest; local councils decisions.

Likewise, the Constitutional Court of Romania, by decision No. 251/2003[10], notes that the "notion of criminal proceedings for the purposes of the Convention is an autonomous one in relation to the meaning given in the national legislation, and for the purposes of art. 6 of the Convention, one must take into account three criteria: 1. the qualification of the offence under national law; 2. the nature of the offence; 3. the nature and the severity of the penalties that could be imposed on the person concerned.

The contraventional sanctions in Romanian law system are main and complementary. Main sanctions are: warning, fine, and community service work.

Complementary contraventional sanctions are: confiscation of goods intended for, used or resulted from the offence; suspension or cancellation, where appropriate, of approval, agreement or authorization for the exercise of an activity; closure of the establishment; blocking a bank account; the suspension of the trader; the withdrawal of the licence or permit for specific operations or for foreign trade activities, either temporarily or permanently; dismantling work and bringing the land to its original state.

Romanian law system stipulates also technical and administrative measures which can be taken in addition to an administrative penalty.

For example, according to the article 97 of OUG no 195/2002, in addition to criminal penalties, "the policeman can apply one of the following technical and administrative measures: retaining driving license and/or registration certificate or, where appropriate, proof of their replacement; the withdrawal of the driving license, registration certificate or registration number plates; the cancellation of the driving license; raising vehicles stationed illegally, etc.

Also, in the Netherlands law system[11], the General Administrative Law Act provides a scheme for administrative fines. In the Act, the administrative fine is described as 'the punitive sanction, containing an unconditional obligation to pay a sum of money'. Other than the administrative order of the cease and desist, the administrative fine is punitive, meaning that it seeks to add suffering. In addition to the fines, there are also other administrative penalties. But as a rule, it cannot be a custodial sentence. In some cases, a favorable decision will be repealed in response to unlawful conduct. The punitive administrative sanctions are also disciplinary sanctions in the sphere of the civil service law. It is possible for a competent institutions official to impose disciplinary punishment. These are sanctions such as a reprimand, a deduction of salary, a fine, a suspension or a dismissal for some time. Just like the administrative fines, the guarantees of article 6 and 7 of the ECHR apply.

In Italy, the consequence of an administrative offence is the implementation of an administrative punishment (except the cases of justifiable defense, case of need, use of a right, comply with a duty). The administrative sanction is issued at first by a written report by the administrative authority in charge and should be immediately and formally notified to the offender. If it's not possible to inform the

[10] Official Journal no 553/31 iunie 2003.
[11] Renate van Lijssel, Foundations of (European) Criminal Law – National Perspectives, The Netherlands, supra.

offender immediately after the fact happened, the report should be notified within 90 days; where else the punishment couldn't be implemented as its relevance expires. Moreover, the authority in charge of the administrative offence is entitled to ask for the payment to any of the co-offenders for the whole amount issued in the sanction.

Afterwards, the offender has 60 days to pay the monetary sanction (when expressly provided, the amount is reduced if the person pays before the deadline) or 30 days to produce defense documents and evidences and to ask for the review of the report issuing the sanction in front of a judge (*giudice di pace* or tribunal, depending on the gravity of the sanction).

The authority dismisses the charges if the offence is not proved; otherwise, it confirms the punishment issuing one (or both) of the two following administrative sanctions: monetary (which is an injunction to pay a certain sum of money) or non-monetary (which can be divided into personal sanctions, such as disciplinary sanctions, suspension, dismissal, disqualification from a profession, or other economic activities etc.) sanctions, and material sanctions, such as seizure and confiscation.

We can observe until now that in all these law systems, these offenses are regulated as distinct ones, that they borrow constitutive elements from criminal offences, maintaining the guilt requirement. The only difference is that an administrative offence can not affect the freedom of the individual, as can happen in case of a criminal offence.

2. European Court of Human Rights and European Cour of Justice case-law

2.1. European Court of Human Rights

The European Court has dealt with the distinction between criminal and administrative procedures in the case **Engel v. the Netherlands**.

The case originated in five applications against the Kingdom of the Netherlands which were lodged with the Commission in 1971 by Cornelis J.M. Engel, Peter van der Wiel, Gerrit Jan de Wit, Johannes C. Dona and Willem A.C. Schul, all Netherlands nationals.

As to the facts presented in this decision, all applicants were, when submitting their applications to the Commission, conscript soldiers serving in different non-commissioned ranks in the Netherlands armed forces. On separate occasions, various penalties had been passed on them by their respective commanding officers for offences against military discipline (unallowed absences, reckless driving of a vehicle, failure to comply with orders received and the publication of articles intended to undermine military discipline.). The applicants had appealed to the complaints officer (beklagmeerdere) and finally to the Supreme Military Court (Hoog Militair Gerechtshof) which in substance confirmed the decisions challenged but, in two cases, reduced the punishment imposed[12].

The applicants complained that the penalties imposed constituted deprivation of liberty contrary to Article 5 of the Convention, that the proceedings before the military authorities and the Supreme Military Court were not in conformity with the requirements of Article 6 and that the manner in which they were treated was

[12] ECHR, Engel and Others v. the Netherlands, 8 June 1976, para.12.

discriminatory and in breach of Article 14 read in conjunction with Articles 5 and 6.

The Court investigated whether the proceedings against the applicants concerned "any criminal charge" within the meaning of Article 6 of the Convention. The Court stated that the Convention without any doubt allows the States, in the performance of their function as guardians of the public interest, to maintain or establish a distinction between criminal law and disciplinary law, and to draw the dividing line, but only subject to certain conditions. The Convention leaves the States free to designate as a criminal offence an act or omission not constituting the normal exercise of one of the rights that it protects.

The converse choice, for its part, is subject to stricter rules. If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction, under Article 6 (art. 6) and even without reference to Articles 17 and 18, to satisfy itself that the disciplinary does not improperly encroach upon the criminal.

In short, the "autonomy" of the concept of "criminal" operates, as it were, one way only.

In this connection, it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States.

The very nature of the offence is a factor of greater import. In evaluating this second criterion, which is considered more important[13], the following factors can be taken into consideration: whether the legal rule in question is addressed exclusively to a specific group, or is of a generally binding character[14]; whether the proceedings are instituted by a public body with statutory powers of enforcement[15]; whether the legal rule has a punitive or deterrent purpose[16]; whether the imposition of any penalty is dependent upon a finding of guilt[17]; how comparable procedures are classified in other Council of Europe Member states[18]. The fact that an offence does not give rise to a criminal record may be relevant, but is not decisive, since it is usually a reflection of the domestic classification[19].

However, supervision by the Court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring. In a society subscribing to the rule of law, there belong to the "criminal" sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be

[13] See *Jussila* v *Finland*, Decision of 23 November 2006, [2007] ECHR, para. 38
[14] See, for example, *Bendenoun* v *France*, Decision of 24 February 1994, [1995] ECHR, para. 47.
[15] See *Benham* v *the United Kingdom*, Decision of 10 June 1996, [1997] ECHR, para. 56.
[16] See *Bendenoun* v *France* case, *supra*, para. 47.
[17] See *Benham* v *the United Kingdom*, *supra*, para. 56.
[18] See *Öztürk* v *Germany*, Decision of 21 February 1984, [1985] ECHR, para. 53.
[19] See, for example, *Ravnsborg* v *Sweden*, Decision of 23 March 1994, [1995] ECHR, para. 38.

appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so[20]. Thus, the third criterion is determined by reference to the maximum potential penalty which the relevant law provides for[21].

The second and third criteria are alternative and not necessarily cumulative. This, however, does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge[22].

2.2. Court of Justice of the European Union

The ECJ also addressed the matter of differentiating between administrative and criminal law penalties.

The ECJ adopted the ECHR Engel criteria in two recent decisions, cases C-489/10[23] and C-617/10[24] .

In **Bonda case**, as the Advocate General pointed out, as a result of incorrect declarations in an application for European Union agricultural aid, the national administration imposed on a farmer the reductions provided for in a European Union Regulation in the aid applied for. Subsequently, on the basis of the same false declarations, the farmer was charged with subsidy fraud in proceedings before a criminal court.

Consequently, the main issue in this case is the question whether the administrative proceedings were of a criminal nature, with the consequence that criminal proceedings may not also be brought against the recipient of aid, as a result of the prohibition of double penalties (*ne bis in idem* principle).

As legal context, there were mentioned the following provisions:

- Article 50 of the Charter of Fundamental Rights of the European Union:

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

- Article 138(1) of Regulation (EC) No 1973/2004, in the version in force at the time the aid application at issue was lodged (16 May 2005) and at the time of the administrative decision (25 June 2006), stated as follows:

"Except in cases of *force majeure* or exceptional circumstances as defined in Article 72 of Regulation (EC) No 796/2004, where, as a result of an administrative or on-the-spot check, it is found that the established difference between the area declared and the area determined, within the meaning of point (22) of Article 2 of Regulation (EC) No 796/2004, is more than 3% but no more than 30% of the area determined, the amount to be granted under the single area payment scheme shall be reduced, for the year in question, by twice the difference found. If the difference is more than 30% of the area determined, no aid shall be granted for the year in question. If the difference is more than 50%, the farmer shall be excluded once again from receiving aid up to an amount which

[20] Engel, supra, par.81-82.
[21] See *Campbell and Fell* v *the United Kingdom*, Decision of 28 June 1984, [1985] ECHR, para. 72; *Demicoli* v *Malta*, Decision of 27 August 1991, [1992] ECHR, para.34.
[22] See *Jussila* v *Finland* case, *supra*, and *Ezeh and Connors* v *the United Kingdom*, Decision of 15 July 2002, [2003] ECHR.
[23] C-489/10, *Sąd Najwyższy v. Łukasz Marcin Bonda*, nyr.
[24] C-617/10, *Åklagaren v Hans Åkerberg Fransson*, nyr.

corresponds to the difference between the area declared and the area determined. That amount shall be off-set against aid payments to which the farmer is entitled in the context of applications he lodges in the course of the three calendar years following the calendar year of the finding."

Taking into account that on 14 July 2009, as a result of the above incorrect declarations in his aid application, Mr Bonda was convicted by the Sąd Rejonowy w Goleniowie for the offence of subsidy fraud under Article 297(1) of the Polish Criminal Code and sentenced to a term of imprisonment of eight months suspended for two years and a fine of 80 daily rates of PLN 20 each, Mr Bonda appealed against the above judgment to the Sąd Okręgowy w Szczecinie. That court allowed the appeal and discontinued the criminal proceedings against Mr Bonda. It held that as a result of the fact that a penalty had already been imposed on Mr Bonda pursuant to Article 138 of Regulation No 1973/2004 for the same conduct, criminal proceedings against him were not admissible. As a result of the appeal on a point of law lodged by the Prokurator Generalny, the proceedings are now pending before the Sąd Najwyższy, the referring court.

The main issue of the preliminary question is whether Article 138(1) of Regulation No 1973/2004 must be interpreted as meaning that the measures provided for in the second and third subparagraphs of that provision, consisting in excluding a farmer from receiving aid for the year in which he made a false declaration of the eligible area and reducing the aid he can claim within the following three calendar years by an amount corresponding to the difference between the area declared and the area determined, constitute criminal penalties.

The most important aspect that the Court is highlighting based on this decision is that administrative penalties laid down in pursuance of the objectives of the common agricultural policy form an integral part of the schemes of aid, that they have a purpose of their own, and that they may be applied independently of any criminal penalties, if and in so far as they are not equivalent to such penalties.

The Court also settled that the administrative nature of the measures provided for in the second and third subparagraphs of Article 138(1) of Regulation No 1973/2004 is not called into question by an examination of the case-law of the European Court of Human Rights on the concept of 'criminal proceedings' within the meaning of Article 4(1) of Protocol No 7, to which the national court refers.

The Court expressly referred in its analysis to the Engel criteria[25]: legal classification of the offence under national law, the very nature of the offence, the nature and degree of severity of the penalty that the person concerned is liable to incur.

It is shown that the measures provided for in the second and third subparagraphs of Article 138(1) of Regulation No 1973/2004 are to apply only to economic operators who have recourse to the aid scheme set up by that regulation, and that the purpose of those measures is not punitive, but is essentially to protect the management of European Union funds by temporarily excluding a recipient who has made incorrect statements in his application for aid.

An interesting approach regarding the analysis of the third Engel criterion was made by the Advocate General in her conclusions, highlighting that in assessing the severity of the penalty which is liable to be imposed, the assessment may not be based on whether, at face value, a measure

[25] ECHR, *Engel and Others v. the Netherlands*, 8 June 1976, §§ 80 to 82, Series A no. 22, and *Sergey Zolotukhin v. Russia*, no. 14939/03, §§ 52 and 53, 10 February 2009.

ultimately has a financially disadvantageous effect. On the contrary, an evaluator consideration is advisable, which should include whether the penalty adversely affects interests of the person concerned which are worthy of protection. If this must be answered in the negative, there is no severe penalty within the meaning of the third Engel criterion. In making this examination it is conspicuous in connection with the case at issue that the penalty does not adversely affect the current property of the person concerned, as would be the case with a fine. Neither is there any interference with legitimate expectations. By means of the reduction, the person concerned is merely faced with the loss of the prospect of aid. However, with regard to this prospect of aid, there is no legitimate expectation of aid where a beneficiary of aid has knowingly made false declarations: he knew from the start that he would not get any aid which was not reduced if he made false declarations.

So, through the analysis of the Engel criteria, the Court concluded that the sanctions provided for in Article 138 (1) of Regulation No 17. 1973/2004 are not to be qualified as criminal sanctions.

In the second case, **Fransson** (C-617/10), Mr. Fransson was accused of having provided, in his tax returns for 2004 and 2005, false information which exposed the national exchequer to a loss of revenue linked to the levying of income tax and value added tax, and also prosecuted for failing to declare employers' contributions for the accounting periods from October 2004 and October 2005, which exposed the social security bodies to a loss of revenue amounting to SEK 35 690 and SEK 35 862 respectively. According to the indictment, the offences were to be regarded as serious, first, because they related to very large amounts and, second, because they formed part of a criminal activity committed systematically on a large scale.

As legal context, the following provisions were invoked, the most important in our opinion:

- *European Convention for the Protection of Human Rights and Fundamental Freedoms*

- Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms:

"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.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the [European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950; "the ECHR"]."

European Union law

- Charter of Fundamental Rights of the European Union

Article 50 of the Charter of Fundamental Rights of the European Union:

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

Article 51:

"1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are

implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties."

- Sixth Directive 77/388/EEC
- *Swedish law*

Paragraph 2 of Law 1971:69 on tax offences:

"Any person who intentionally provides false information to the authorities, other than orally, or fails to submit to the authorities declarations, statements of income or other required information and thereby creates the risk that tax will be withheld from the community or will be wrongly credited or repaid to him or a third party shall be sentenced to a maximum of two years' imprisonment for tax offences."

Paragraph 4:

"If an offence within the meaning of Paragraph 2 is to be regarded as serious, the sentence for such a tax offence shall be a minimum of six months" imprisonment and a maximum of six years.

In determining whether the offence is serious, particular regard shall be had to whether it relates to very large amounts, whether the perpetrator used false documents or misleading accounts or whether the conduct formed part of a criminal activity which was committed systematically or on a large scale or was otherwise particularly grave.'

- Law 1990:324 on tax assessment

They addressed to the Court 5 preliminary questions.

Through these questions the Court is requested to determine whether the ne bis in idem principle set out in article 50 of the Charter should be interpreted in the sense that it opposes the deployment of prosecution in respect of a defendant under the aspect of tax offences, since the latter was already a fiscal penalty applied for the same acts of false declarations.

The Court grouped the second, third, fourth and fifth questions focusing on the application of the principle ne bis in idem, embodied in article 50 of the Charter, in the case of administrative and criminal penalties double imposed by Member States.

The first preliminary question which the Court addressed refers to the conditions imposed by the Swedish Supreme Court pursuant to the ECHR and the Charter of the courts of that State.

The most important issue that rises here is if whether or not the prior existence of administrative proceedings in which there is a final judgment imposing a penalty precludes the commencement of criminal proceedings, and a possible criminal conviction, on the part of the Member States.

This shows that article 50 of the Charter does not imply, as the existence of a prior administrative penalties to prevent final definitely switching to proceedings before the Criminal Court and finally apply for a conviction.

Also, it adds, the principle of the prohibition of arbitration, linked to the principle of the rule of law (article 2 TEU), obliges the national legal order permitting criminal court to take into account, in one way or another, the existence of a prior administrative penalties, in order to reduce the criminal penalty.

Most important, the Advocate General concludes that Article 50 of the Charter must be interpreted as meaning that it does not preclude the Member States from bringing criminal proceedings relating to facts in respect of which a final penalty has already been imposed in administrative proceedings

relating to the same conduct, provided that the criminal court is in a position to take into account the prior existence of an administrative penalty for the purposes of mitigating the punishment to be imposed by it.

Analyzing the first preliminary question, the Court understands that the national court asks, in essence, whether a national judicial practice is compatible with European Union law if it makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the ECHR and by the Charter conditional upon that infringement being clear from the instruments concerned or the case-law relating to them

At this preliminary question, the Court settles that European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law

3. Conclusion

We can observe from the three decisions that we've shortly presented, that the issue that arises is if the same act of same person can be punished at the same time also with an administrative and criminal penalty without violating the principle of *ne bis in idem*.

The European Courts solved this problem in two stages.

The first one is to establish whether the administrative penalty applied is in fact a criminal penalty, and this is accomplished by analyzing the three Engel criteria, as we've shown above.

The second stage is to establish if the same act can also be administrative and criminally sanctioned at the same time.

In Fransson case, the last analyzed, the Advocate General and the Court found out that art. 50 of the Charter would not be infringed if the national court consider that there are necessary both of the sanctions at the same time, however, with the condition that where administrative penalty remains final before applying and criminal sanction (or vice versa), should be taken into account in the determination of its amount and intensity of the first.

Only in such a situation, the *ne bis in idem* rule would not be violated.

We believe that the reasoning of the Court is quite clear and effective, but is still a question we think that needs to be clarified. We also can observe that national Courts have adopted the criteria established by the European Court of Human Rights and the European Court of Justice in its case-law.

We appreciate that administrative sanctions are removed from illicit criminal sphere, while having a distinct character of criminal sanctions, but even in this case they are still instruments of punishment. As a result, concurrent application would not be a violation of the principle of ne bis in idem.

So, why the Court sets that criminal penalty should be reduced in case of application by of an administrative sanction? In our opinion, a criminal penalty should be appreciated and reduced only depending on criminal instruments that the legislator of each member-state provides, and not being influenced by an administrative sanction.

The only accepted situation that an administrative sanction could influence in a sort of way, is only when the first applied is the criminal penalty, the only one that can influence other types of sanctions.

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