Ivan Ilic, PhD,
Assistant, University of Nis, Law faculty,
ivan@prafak.ni.ac.rs

UDC.341.645.544(4-672ЕУ)

Sasa Knezevic, PhD,
Full professor, University of Nis, Law faculty,
knez@prafak.ni.ac.rs

Jelena Veselinovic, LL. M.,
Higher Court in Nis, Judical Academy,
jelenaveselinovic@yahoo.com

APPLICATION OF THE PRINCIPLE OF *NE BIS IN IDEM* IN CRIMINAL MATTERS IN THE EU

Abstract

The *ne bis in idem* principle is included in many national, European and international legal instruments. This principle is part of the European Union's area of Freedom, Security and Justice. It is included in the main EU legal sources, such as, Articles 54 to 58 of the Convention Implementing the Schengen Agreement ("CISA"), and Article 50 of the Charter of Fundamental Rights of the European Union ("Charter"). The Court of Justice of EU in its case law (see inter alia Gözütok and Brügge, Gasparini) has stated that the objective of the *ne bis in idem* principle is to ensure that no one is prosecuted for the same acts in several Member States on account of the fact that he exercises his right to freedom of movement. The principle is also included in a large number of EU instruments on judicial cooperation in criminal matters, including mutual recognition instruments, such as, the Framework Decision 2002/584/JHA on the European Arrest Warrant ("FD EAW") and the Directive 2014/41/EU on the European investigation Order in criminal matters. Moreover, the *ne bis in idem* principle is included in Article 4 of Protocol 7 to the European Convention on Human Rights. The authors analyze the practice of the Court of Justice of the European Union, paralleling the scope of the practice of the European Court of Human Rights. On the basis of the achieved standards, which have been developed by the practice of these courts, the authors see the implications for the application of this principle in Serbian judicial practice.

Key words: *ne bis in idem, case law, The Court if Justice of EU, CJEU, European Court of Human Rights, ECHR*

1. Finality of judicial decisions and the principle of *ne bis in idem*

By completing ordinary remedies proceedings, the court decision becomes final and begins to produce a legal effect. In that case, it can be executed. The court decision then becomes final and the criminal case is *res iudicata*. The existence of *res iudicata* appears as a negative procedural presumption (process impediment) to restart the criminal proceedings, and thus, partly, coincides with the principle of *ne bis in idem*, and they can be termed "cross-references".[1] Finality of judicial decisions is being protected by the validity of the *ne bis in idem* principle.[2] The principle of *non (non) bis in idem* (not two times the same) means the prohibition of a retrial of the same defendant against whom the criminal proceedings have already been finalized for the same criminal offense, and a ban on multiple persons being prosecuted at the same time.[3] In theory, this principle is often referred to as the prohibition of double jeopardy, or the principle of unrepeatability of criminal subjects (parties[4]) in the same criminal matter, as well as the principle of the ban on retrial.[5] In international documents and constitutions, this principle has the ranking of basic human rights, while in national procedural laws, it usually takes the place of one of the basic principles of criminal proceedings. The theory sometimes makes it one of the principles that apply to process entities (parties)[6], or among the principles of criminal prosecution.[7] Two prohibitions arise from the notion of this principle. The first, which protects the person against whom the proceedings have been legally terminated since the reopening of the proceedings against him for the same offense. In addition to restarting and prosecuting criminal proceedings, parallel proceedings against the same defendant in the same matter are also prohibited.

2. International legislation of *ne bis in idem* principle

The principle of *ne bis in idem* was established as the human right of an individual in international instruments. The principle of *ne bis in idem* is relativized by the provision of the Art. 4. st. 1. Protocol no. 7, which stipulates that no one can be

[1]Zivanovic, T, Basic Problems of the Criminal and Civil Procedural Law (Procedure), II Section, Belgrade, 1941, p. 62-66.

[2]See: Ilic, I, Prohibition of Double Threats and Repetition of Criminal Proceedings to the Defendant's Damage, in: Proceedings of the Law Faculty in Prishtina with Provisional Seat in KosovskaMitrovica, KosovskaMitrovica, 2011, p. 349-369, Ilic, I, The Principle of Non-Bis in Idem in the European Legal Area, in: Protection of Human and Minority Rights in the European Legal Area, Nis, 2011, p. 611-628.

[3]Đurđić, V, Basic Principles of Yugoslav Criminal Proceedings and Protection of Human Rights and Freedoms, Yugoslav Journal of Criminology and Criminal Law, Belgrade, no. 2-3, Belgrade, 2011, p. 84.

[4]Grubač, M, Criminal Proceedings, Belgrade, 2006, p. 132.

[5]Bele I, Jakulin, V, Ne bis in idem, Legal Life, No. 9/2007, p. 181.

[6]Vasiljević, T, System of Criminal Proceedings of the SFRY, Belgrade, 1981, Stevanović Č, Đurđić, V, Criminal Proceedings - General part, Niš, 2006, Bejatović, S, Criminal Proceedings, Belgrade, 2008, Grubač, M, Criminal Proceedings, Belgrade, 2006 .

[7]Škulić, M, Criminal Proceedings, Belgrade, 2009.

tried again or be punished in the criminal proceedings of the same State for a criminal offense for which he has already been finally acquitted, or convicted in accordance with the law or criminal proceedings of that State. The European Convention ECHR did not contain a provision that prescribes this principle, but it is governed by Protocol no. 7 to the Convention (Article 4). Article 4 para. 2. Protocol no. 7. with the ECHR provided that the provisions of paragraph 1. do not prevent the reopening of the proceedings in accordance with the law and criminal proceedings of the State concerned if there is evidence of new or newly discovered facts, or if in the previous proceeding there have been significant violations that could have affected its outcome. As the said article is traditionally linked to the right to a fair trial, the Court, when examining whether there has been a violation of Art. 4. Protocol no. 7. calls for its practice in determining the notion of "criminal charge".

Some countries (Germany, Austria, Portugal, France, Italy) made reservations in its ratification documents, in order to strictly limit the jurisdiction of the Court in the penal area in a way that can maintain the duality of administrative penalties and criminal sanctions for the same offense. It should be noted that the reservations made by Austria and Italy held to be invalid as they failed to provide a brief statement of the law concerned, as required by Article 57(2) of the ECHR.[8]

In the Convention on the Implementation of the Schengen Agreement [9] (hereinafter: CISA), in Art. 54. it is prescribed that the person whose proceedings have been terminated legally in one of the Contracting Parties[10]may not be prosecuted in the other Contracting Party for the same acts, provided that the punishment has been imposed, that it has been executed, that it is precisely enforced, or can no longer be exercised, under the laws of the Contracting State, which pronounced it. By the Amsterdam Treaty, the Schengen acquis is integrated into the legal framework of the European Union. Article 50 of the Charter of Fundamental Rights of the EU guarantees that no one can be tried again, nor can he be convicted again in criminal proceedings for a criminal offense for which the Union has already been finally acquitted or convicted in accordance with the law.[11]The Charter provides for a narrower field of application of the principle *ne bis in idem*, referring to the criminal offense and emphasizing the criminal procedure.In addition, Article 50 of the Charter refers only to the enforceable acquittals and convictions, while the Court of Justice of the EU, by interpreting Article 54 of the CISA, included, in addition to those judgments, extra-judicial settlements between the public prosecutor and the defendant, as well as the decision of the public prosecutor to give up the prosecution.[12] However, the Charter deletes the distinction between national and transnational ne bis in idem,

[8] See respectively: *Gradinger v. Austria*, 23, § 51, *Grande Stevens*, cited above, §§ 204-211), unlike the reservation made by France (*Göktan v. France*, app. no. 33402/96, § 51).

[9] Convention on the Implementation of the Schengen Agreement of 14.06.1985.

[10]It is about contracting parties, not Member States, because the circle of States bound by the Convention is wider than the member states.

[11] Charter of Fundamental Rights of the EU, 2010 / C 83/02

[12]Ilic, I, The Principle of ne bis in idem in the European Legal Area, in: Protection of Human and Minority Rights in the European Legal Area - Thematic Collection of Works, Niš, 2011, p.625.

implies equality in the application of the principle, regardless of whether it is proceedings in the same or in different countries. The principle is also included in a large number of EU instruments on judicial cooperation in criminal matters, including mutual recognition instruments, such as, the Framework Decision 2002/584/JHA on the European Arrest Warrant ("FD EAW") and the Directive 2014/41/EU on the European investigation Order in criminal matters.

In accordance with Article 52, paragraph 3 of the Charter, the meaning and scope of the application of Article 50 should be equal to those of the relevant provision of the ECHR. In its interpretation, it is not necessary to separate the right protected by Article 50 of Article 4 of Protocol No. 7, where the absence of ratification or the making of reservations and statements of certain States in relation to this Protocol are not relevant to the Court. This is a guideline implicit in the judgment of Åkerberg Fransson, in which it was not accepted that the ratification number of the ECHR Protocol should be influenced by its use as guidelines for the interpretation of Article 50 of the Charter, despite the warnings pointed out in that regard. The Explanatory Note to Article 52, paragraph 3 of the Charter states that "[i] s the enacted ECHR includes the Convention and the protocols thereto". It does not introduce any distinction depending on whether these protocols are binding on all EU member states (62). In addition, this distinction could lead to unequal interpretation and application of the Charter, depending on whether the State is bound by the Protocol to the Convention.

When determining whether there was a violation of the principle of *ne bis in idem*, the ECHR examined three criteria: 1) whether the defendant (in the first trial) was under a criminal charge; 2) whether the acts for which the applicant is prosecuted are the same and 3) whether two criminal proceedings have been conducted. These are, so-called "Engel criteria".[13] If we make a comparison with the practice of CJEU, as criteria which match for determining whether a violation of this principle has occurred, the CJEU defined the "criminal nature" requirement, as a distinction between (punitive) administrative sanctions and criminal sanctions, the "idem" requirement (it concerns the same acts), and "bis" requirement (it concerns a final decision). The CJEU added, the "same person" requirement and the "enforcement" requirement – the penalty has been imposed, it has been enforced, it is in the process of being enforced or can no longer be enforced.[14]

3. "Criminal nature" requirement

ECtHR has established three criteria for examining whether the proceedings were "criminal" within the autonomous meaning of Article 6 ECHR: 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; the very

[13] *Engel and Others v. the Netherlands*, app. no. 5100/71.

[14] The Principle of Ne Bis in Idem in Criminal Matters in the Case Law of the Court of Justice of the European Union, Eurojust, 2017, p. 8.

nature of the offence and the degree of severity of the penalty.[15] The second and third criteria are alternative and not necessarily cumulative. The relative lack of seriousness of the penalty cannot divest an offence of its inherently criminal character.[16]

The approach, established by the "Engel" criteria, prevents the Contracting States from avoiding the application of the guarantees referred to Art. 6. ECHR in procedures related to misdemeanor, administrative and disciplinary offenses, by defending the classifications under domestic law. While recognizing the right of States to distinguish between criminal law and disciplinary law, the ECtHR has reserved the power to satisfy itself that the line drawn between these does not prejudice the object and purpose of Article 6 ECHR.[17]

The CJEU aligned itself with the ECtHR's views on Article 4 of Protocol 7 ECHR when it stated in *Åkerberg Fransson* that Article 50 Charter does not preclude a Member State from imposing for the same acts a combination of administrative penalties and criminal penalties provided that the administrative penalty is not criminal in nature.[18] In *Bonda*,[19] and *Åkerberg Fransson*, the CJEU clarified that, also according to the CJEU, if the first administrative sanction is criminal in nature, then the EU *ne bis in idem* principle applies, and this should be directly assessed by the national judge – without waiting for the enactment of new legislation. In doing so, the CJEU applied the criteria developed by the ECtHR to assess the real nature of a sanction.

Administrative tax offences by their legal structure stand outside the standard of legal definition of delicts in the area of public law. A line of case law from *Bendenoun v. France*,[20] to the case of *Jussila v. Finland*,[21] has held that substantial administrative penalties in the form of tax surcharges imposed as a general penalty for failure to comply with tax laws constitute criminal charges, for the purposes of article 6. In none of the cases cited did the local court or the national government argue that the tax surcharge did not constitute "criminal proceedings". However, the Norwegian government in the *A and B case* seeks to argue that tax surcharges should not be regarded as criminal proceedings and so should not engage the principle of double jeopardy. This would have potentially irrational outcomes where, for example, a taxpayer does not appeal against a tax surcharge that then becomes final, so that criminal proceedings against the taxpayer cannot then continue. This outcome would be avoided if parallel proceedings could each be allowed to continue to their final outcome. However, although the Grand Chamber agreed that the tax penalty was criminal in nature, it did not consider that the twin proceedings amounted to double jeopardy. Critical to this finding was the perceived complementarity of the

[15] *Jussila v Finland*, app. no. 73053/01, §.30-31, *Ezeh and Connors v the United Kingdom*, app. no. 39665/98 and 40086/98, §. 82-86.
[16] *Öztürk v. Germany*, app. no. 8544/79 § 54, *Lutz v. Germany*, app. no. 15073/03 § 55.
[17] *Weber v Switzerland*, app. no. 11034/84, §.30.
[18] *ÅkerbergFransson*, C-617/10, §34.
[19] *Bonda*, C-489-10.
[20] *Bendenoun v. France* , app. no. 12547/86
[21] *Jussila v. Finland* , app. no. 73053/01

proceedings, that reiterated the importance of the Engel criteria, rather than the decision in the case of *A and B*, to an assessment of double jeopardy.

4. "Idem" criterion

In application of *idem* criterion, courts must define their approach by answering the question what is the decisive in the application of the principle of *ne bis in idem*, whether the legal identity, or the identity of the facts is sufficient.The consequences of selected approach are significant, since the legal qualification of the same facts can be different in various legal systems, even if offences have the same name, the elements of the offences can be significantly different. As some authors pointed out, in some situations identity of the facts is not sufficient criterion and has to be supplemented with corrective criteria (the identity of protected legal goods, whether the facts have to be completely the same or whether certain deviations are possible, etc.).[22] Since the different solutions were accepted on the national plan of different countries, common standards don't exist. Access to this issue on international level is also different.

International covenant on civil and political rights (ICCPR) in Art.14(7), and art. 50. of Charter of fundamental rights of the European Union interpret "idem"criterion through the „same offence" standard. American convention on human rights in Art. 8 embodied "idem" criterion by using „same cause" standard. Convention of Implementing the Schengen Agreement ("CISA") in art. 54 forbids criminal proceedings for *same acts.* Art. 20. of Rome Statut of International criminal Court relates to conduct which formed the basis of crimes for which the person has been convicted or acquitted. CJEU and ECtHR determined *idem factum* approach.

The European Court of Justice in the *Van Esbroeck* judgment explained the linguistic interpretation of Art. 54. CISA, which deals with "the same acts". This constitutes a fundamental difference in relation to the provisions of Art. 14. International Covenant on Civil and Political Rights and Art. 4. Protocol 7 of the ECHR, which use the term "criminal offense", which presupposes that the same legal qualification is required for the application of the principle of *ne bis in idem* under these international documents.[23] Interpretation that would require the identity of legal qualifications and protected legal matter would create as many obstacles to the free movement of persons, as there are different criminal justice systems, which would be contrary to the objective of Art. 54 CISA.

For this reason, CJEU has opted for the identity of the facts which defines as "identity of the material acts", understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together. These circumstances must be linked with in time, in space and by their subject-matter."[24] The CJEU gave

[22]Burić, Z, Principle ne bis in idem in European criminal justice sources and case law of the European Court, Proceedings of the Law Faculty in Belgrade, no.3-4/2010, p. 821.
[23]*Van Esbroeck*, C-436/04, *Van Straaten*, C-150/05 § 51, *Gasparini and others*, C-467/04. § 55.
[24]*Van Esbroeck*, C-436/04, § 36-38.

an autonomous interpretation of that part of Article. 54. CISA, which avoided legal uncertainty, due to the diversity of national legal systems. Therefore, by interpreting the position of the Court of Justice, we conclude that even the identity itself does not have to be complete. This concept enables the expansion of the scope of ne *bis in idem* principle even in those cases in which there is no complete identity of facts, as long as different facts in different procedures make spatial, temporal and substantial "inseparable unity". Whether the degree of connection between different facts is such that it does not break their unity, the national court decides on the basis of an assessment of the particular case facts."[25]

TheCourt (ECtHR) has developed several different approaches through the development of its case-law in relation to the identity of the offences, which lacked consistency in the interpretative approach to the meaning of the notion of "offence". In one line of cases the Court focused on the "same conduct".[26] In another, it laid emphasis on how such conduct might be classified, thus justifying more than one charge,[27] and then in a third, in order to lessen the impact of the classification test which considerably weakened the protection, afforded by that provision, it introduced "the essential elements" qualification, which aimed at avoiding a subsequent prosecution for offences that were only "nominally different".[28] Following the decision of the CJEU, in the case of *Van Straaten,*[29] the Court, aware of the need to consolidate its current practice, decided on the identity of the facts in terms of *"idem",* in the *Zolotukhin v Russia,*[30] which seeks clarification and removing the existing uncertainty which, as it rightly recognized, was incompatible with such a fundamental right.

5. "Bis" criterion

When it comes to interpreting the term "bis", the first question that arises is what kind of court decisions activate the effect of this principle. Whether these are merely decisive decisions, or some procedural decisions, whether it relates only to decisions of judicial authorities, or to decisions of another judicial, or administrative authority. In order for the principle of double jeopardy to be avoided, it is necessary that decisions have become final (*res iudicata*) and that no regular remedy is available at all, or the party has exhausted such remedies, or the deadline has expired. Objective of Art. 4. Protocol no. 7 to the ECHR is to prohibit the reopening of the criminal proceedings, which is concluded by a final decision. The final decision is one that has acquired the force of *res iudicata*. This is the case when it is irrevocable, which means that there are no more regular remedies, or the parties have exhausted such remedies, or allowed to pass the deadline without having used them.[31]Decisions against which

[25]Buric, Z,op.cit., p. 849
[26]*Gradinger v. Austria*, app. no. 15963/90.
[27]*Oliveira v. Switzerland*, app. no. 25711/94.
[28]NicolaouG, The Strasbourg View on the Charter of Fundamental Rigth, Djiver, 2013, p. 8
[29]*Van Straaten*, C-150/05
[30]*Zolotukhin v Russia*, app. no. 14939/03.
[31]*Zolotukhin v Russia*, app. no. 14939/03, § 107, *Nikitin v Russia*, app. no. 50178/99, § 37.

an appeal is allowed are excluded from the scope of the guarantees contained in Art. 4. Protocol no. 7, until the deadline for the lodging of such an appeal expires.

It is clear that the principle of *ne bis in idem* does not include decisions of the public prosecutor, such as the decision to reject the criminal complaint. Also, in the case of removable disturbances, the legislator foresaw the decision to terminate an investigation or to reject the indictment, when the defendant can not invoke the principle of ne bis in idem. However, the legislator does not prescribe a ban on the initiation of a renewed criminal procedure in respect of which the criminal complaint was previously rejected, since the public prosecutor acted with the use of opportunity, and the defendant paid a certain amount for humanitarian purposes, or engaged in certain socially-useful work, or performed some other measure, ordered by public prosecutor.Then there can be an absurd situation that a public prosecutor who has previously dismissed a criminal complaint, later resumes criminal proceedings against the same person for the same criminal offense.This would constitute unfair treatment and obvious abuse.

On the contrary, in the case of *Hüsein Gözütok and Klaus Brügge,* in addition to the final decisions, the Court of Justice ruled that the principle of *ne bis in idem* could be implemented also to the prosecution's decisions.[32] This case relates to the decision of the public prosecutor to suspend further prosecution after the fulfillment of the suspect's obligations established by their mutual agreement and by this decision the EU Court of Justice placed the Schengen legal system above the constitutions of the member states.

The plea agreement can be concluded upon the issuance of an order to carry out the investigation, until the completion of the trial, which means that the public prosecutor's retirement from criminal prosecution for a particular criminal offense may already come at the investigation stage. As the order to suspend the investigation does not represent one of the decisions prescribed in article. 4. of CPC, it does not produce the effect of *ne bis in idem*. The plea agreement can also be concluded in a summary procedure, where there is no investigation, as well as in a regular criminal procedure when the indictment is raised directly, and it is possible that the public prosecutor will abandon the criminal prosecution by a decision on the dismissal of a criminal charge, which is typically a procedural nature. It can be concluded that the defendant would be far more likely to be charged with this criminal offense, and that at a later stage in the criminal proceedings the public prosecutor would refuse to prosecute, as this would result in a court decision which produces a ne bis in idem effect. From the point of view of legal certainty, the defendant would also be entitled to issue a decision on the termination of the criminal proceedings, but the CPC among the reasons for issuing such a decision, after the indictment has already been raised (Article 338), practically does not include the dismissal of the public prosecutor from criminal prosecution.[33]There seems to be an opportune adoption of a broader definition, which would include in the "bis" element, in addition to the final court

[32]*Gözütok and Brügge*, C-187/01, C-385/01.
[33]Škulić, M, *op.cit*., p. 25.

decisions, and other decisions to which the proceedings have been finalized, as well as out-of-court settlements in the pre-trial procedure.[34]

To date, the CJEU has accepted as "a decision that has been finally disposed of" an out-of-court settlement with the public prosecutor,[35]a court acquittal based on lack of evidence.[36]However, the CJEU found in *Kossowski* case, it does not apply if the prosecution in another Member State has been discontinued by the public prosecutor's without any obligations imposed by way of penalty having been fulfilled and without any detailed investigation. Article 54 CISA require that the decision was given "after a determination has been made as to the merits of the case". In light of the objective and context of Article 54 CISA and in light of Article 3(2) TEU, this requirement is not fulfilled in the following cases.Firstly, if the prosecuting authority did not undertake a more detailed investigation for the purpose of gathering and examining evidence. Next situation is when prosecuting authority did not proceed with the prosecution solely because the accused had refused to give a statement and the victim and a hearsay witness were living in Germany. It is also not fulfilledwhen it had not been possible to interview them in the course of the investigation and therefore not been possible to verify the statement made by the victim), a court acquittal arising due to the prosecution of the offence being time-barred.[37]Finally, it is in the case when decision of non lieu, i.e. a finding that there was no ground to refer the case to a trial court because of insufficient evidence.[3839]

ECtHR has change its case law on the *ne bis in idem* principle by attitude that a combination of tax penalties and criminal penalties as punishment for the same tax offences did not infringe the principle. The Court developed the principle of "sufficiently close connection in substance and in time" between the proceedings. The ECtHR concluded that there was no duplication of trial or punishment, prescribed by that article, although the tax penalties at issue in those cases were of a criminal nature and had become definitive before the imposing of the criminal penalties, because there was 'a sufficiently close connection, both in substance and in time' between the tax and criminal proceedings in question.[40]It does not, however, outlaw legal systems which take an "integrated" approach to the social wrongdoing in question, and in particular an approach involving parallel stages of legal response to the wrongdoing by different authorities and for different purposes.[41] The ECtHR added that 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 proceedings forming a coherent whole so

[34]Ilic, I, The Act of the principle of bis in idem in the European legal area, in: Protection of human and minority rights in the European legal area - thematic collection of papers, 2011, Niš, p. 628.
[35]*Gözütok and Brügge,* § 27-35
[36]*Van Straaten* § 55-59
[37]G*asparin*i § 23-30
[38]*M.* C-398/12, § 28-41.
[39] The Principle of Ne Bis in Idem in Criminal Matters in the Case Law of the Court of Justice of the European Union, Eurojust, 2017, p. 9-10.
[40]*A. and B. v Norway,* app. no. 24130/11 and 29758/11, §130 and 147.
[41]*A. and B. v Norway,* § 123

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.[42]

The ECtHR reiterated that respondent State must demonstrate convincingly that the dual proceedings in question have been "sufficiently closely connected in substance and in time", so that it must be shown that they have been combined in an integrated manner so as to form a coherent whole.[43] As material factors for determining whether there is a sufficiently close connection in substance include: - whether the different proceedings pursue complementary purposes and thus address, not only *in abstracto* but also *in concreto*, different aspects of the social misconduct involved; whether the duality of proceedings concerned is a foreseeable consequence, both in law and in practice, of the same impugned conduct (idem); - whether the relevant sets of proceedings are conducted in such a manner as to avoid as far as possible any duplication in the collection as well as the assessment of the evidence, notably through adequate interaction between the various competent authorities to bring about that the establishment of facts in one set is also used in the other set; - and, above all, 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 concerned is in the end made to bear an excessive burden, this latter risk being least likely to be present where there is in place an offsetting mechanism designed to ensure that the overall amount of any penalties imposed is proportionate.[44]

Furthermore, the Court stressed that the Court has no cause to call into doubt either the reasons why do the countries in their legislature opted to regulate the socially undesirable conduct of non-payment of taxes in an integrated dual (administrative/criminal) process or the reasons why the competent authorities chose to deal separately with the more serious and socially reprehensible aspect of fraud in a criminal procedure rather than in the ordinary administrative procedure.[45]

Turning to the standard of *sufficiently close connection in time* between the two proceedings, The ECtHR found that where the connection in substance is sufficiently strong, the requirement of a connection in time nonetheless remains and must be satisfied, but, that this does not mean, 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. However, the connection in time must be sufficiently close to protect the individual from being subjected to uncertainty and delay and from proceedings becoming protracted over time (see, as an example of such shortcoming, *Kapetanios and Others*, cited above, § 67), even where the relevant national system provides for an "integrated" scheme separating administrative and criminal components. The weaker the connection in time the greater the burden on the State to

[42]*A and B v Norway*, § 121
[43]*A and B v Norway*, § 130-134
[44]*A and B v Norway*, § 138
[45]*A and B v Norway*, § 146

explain and justify any such delay as may be attributable to its conduct of the proceedings.[46]

On the contrary, in the case of *Johannesson and Others v. Iceland*,[47] ECtHR has concluded that even if the two proceedings pursued complementary purposes in addressing the issue of taxpayers' failure to comply with the legal requirements relating to the filing of tax returns (§ 51), there was no sufficiently closed connection between them, due to the limited overlap in time and the largely independent collection and assessment of evidence (§ 55).[48]

6. The "enforcement" requirement

The "enforcement" criterion is included in Article 54 CISA, but not in Article 50 Charter, and not in Article 4 of Protocol 7 ECHR. Notwithstanding this lack of uniformity, the CJEU acknowledged the relevance of the enforcement requirement for the ne bis in idem principle in the EU's area of freedom, security and justice and underlined its compatibility with the Charter.[49] In the CJEU case law, it was held that out-of-court settlements,[50] and suspended sentences,[51] §must be regarded as penalties which are actually in the process of being enforced, or which have been enforced. Similarly, it accepted that "the enforcement condition" was fulfilled if a penalty could no longer be enforced, regardless of whether that penalty could ever have been executed in practice.[5253] By contrast, the CJEU rejected the fulfillment of the criterion

[46]*A and B v Norway*, § 138
[47]*Johannesson and Others v. Iceland* app. no. 22007/11
[48] Namely, the overall length was about nine years and three months, and that, during that period, the proceedings were conducted in parallel for just a little more than a year. Moreover, the applicants were indicted on 18 December 2008, 15 and 16 months after the mentioned tax decision had been taken and nine and ten months after they had acquired legal force, and the criminal proceedings then continued on their own for several years: the District Court convicted the applicants on 9 November 2011, more than four years after the decisions of the State Internal Revenue Board, and the Supreme Court´s judgment was not pronounced until more than a year later, on 7 February 2013This, again, stands in contrast to the case of *A and B v. Norway* (cited above), 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 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. (see *A. and B.*, cited above, § 134).
[49]*Spasic*, C-129/14, PPU.
[50]*Gözütok and Brügge, §27-35*
[51]*Kretzinger*, C-288/05, § 40-44
[52]*Bourquain*, C-297707,*§* 47-50
[53] The Principle of NeBis in Idem…, op. cit., p. 21.

in case of a short length of time that a suspect was in police custody,or being held on remand pending trial,[54] and in case where the sentence has been enforced partly.[5556]

7. Interaction between Luxembourg and Strasbourg iurisprudence

The ECtHR and the CJEU have been interacting through their case law which, over the years, have been sensitive and receptive to human rights developments. They have established, through mutual respect, a truly harmonious relationship as the necessary means for achieving coherence in the protection of human rights.[57]As two main European human rights instruments, CFREU and ECHR, it was a challenge the way in which the CJEU would answer in the questions that have been submitted to it in several cases.[58]To be noted that in *Menci* case, which has similar facts of the case such as those in *A and B v. Norway*, the CJEU, in its Order of 25 January 2017 for the reopening of the oral part of the procedure, emphasized the importance of the questions raised by the *A and B v. Norway* judgment of the ECtHR, with regard to the interpretation of Article 50 Charter. Article 52(3) CFREU providesthat if a right in the CFREU corresponds to a right guaranteed by ECHR, the meaning and scope of that right will be *the same*as those laid down by the ECHR. However, on the other hand, the same Article states that EU law can provide *more extensive protection.*

On 12 September 2017, the Advocate *General Campos Sánchez-Bordona* presented his Opinions in the Italian cases mentioned above, in which he clearly argues for the development of an autonomous EU concept of *ne bis in idem*, different from the one emerging from the most recent ECtHR case law. This is necessary because the 'fundamental rights recognized in the Charter must be easily understood by all and the exercise of those rights calls for a foreseeability and certainty', which is not ensured by the new approach of the ECtHR.[59] However, the CJEU in the newest decisions in the *Menci* case brought the justification for the limitation of *the ne bis in idem* principle. The CJEU, in accordance with the Article 52 of the Charter, analyzed the conditions for limitation the exercise of the rights and freedoms recognized by that Charter and found that the answer to the question referred is that Article 50 of the Charter must be interpreted as not precluding national legislation in accordance with which criminal proceedings may be brought against a person for failing to pay VAT

[54]*Kretzinger*, § 40-44
[55]Spasic, C-129/14, PPU.
[56]*Ibidem.*
[57]Nicolaou G, op. cit, p. 2.
[58]See: *Menci*,C-524/15,*Garlsson et al.C-537/16, and joined cases: Di PumaC-596/16 and ZeccaC-597/16*
[59]Opinion AG in *Menci*, Case C-524/15, §73. In short, in *Bonda* and *Åkerberg Fransson*, the Court interpreted Article 50 of the Charter in line with the dominant case-law of the ECtHR on the principle *ne bis idem*. That common approach was logical, in view of the similarity between the provisions governing the principle *ne bis in idem* in Article 4 of Protocol No 7 and those in Article 50 of the Charter. On conclusion of the administrative proceedings resulting in the imposition of a penalty, the Public Prosecutor's Office commenced criminal proceedings against Mr Menci on 13 November 2014, on the ground that non-payment of VAT was an offence contrary to Article 10b of Legislative Decree 74/2000.

although that person has already been made subject of administrative penalty for the same acts, if national legislation meets certain conditions. Firstly, it has to pursue a general interest which justifies such a duplication of proceedings and penalties, it being necessary for those proceedings and penalties to pursue additional objectives; secondly, it has to containrules which ensure coordination that limits to what is strictly necessary the additional disadvantage which results, for the persons concerned, from a duplication of proceedings; and lastly, national legislation has toensure that the severity of all of the penalties imposed is limited to what is strictlynecessary in relation to the seriousness of the offence concerned.[60] Also, it stated that national legislation must provide clear and precise rules allowing individuals to predict which acts or omissions are liable to be subject to such a duplication of proceedings and penalties.[61]

The ECtHR has paid increasing attention to the CJEU case law in order to overcome previous fluctuating interpretations and to define what amounts to 'idem" according to the ECHR, i.e. the material conduct and not the legal classification, notwithstanding that Protocol No. 7 ECHR refers to "offence' instead of facts".[62] What is interesting to notice is that CJEU in the *Menci* case doesn't follow the "sufficiently close connection in substance and time" test established by the ECtHR in *A and B v Norway*. For now, there is an open question whether this Court rejects that approach or simply has different interpretation in adopting standards. At the end, although this relationship between the two courts has status "It's complicated", we can conclude that there exists institutional respect between them.

8. Implementation of *ne bis in idem* standards in Serbian courts practice

Legislature of Serbia extends the application of *ne bis in idem* principle to procedural decisions, when the proceedings have been terminated legally or the legally binding act has been rejected, beside decisions to which a person has been finally acquitted or convicted. The negative trend, which is represented in the practice of our courts, is that the misdemeanor procedure is first conducted and this is most often due to the appearance of obsolescence in the conduct of it. This approach would result in depending the relevant process path for the criminal protectionof the most important social values,on the discretion of the administrative authority (and especially the police), which could lead to numerous abuses in practice.In the case of *Milenkovic in Serbia*, where there has been a violation of the principle ne bis in idem, the Court warned of the existence of a systemic error in the way in which the possibility of simultaneous or successive conduct of the misdemeanor and criminal proceedings is regulated, if the perpetrator in both proceedings is chargedfor the same or basically the same fact.[63]

The former practice of the courts of the Republic of Serbia is the attitude that there is no violation of the principle of bis in idem in criminal proceedings for the offense of insult, when, due to the same event, a misdemeanor procedure for the

[60]*Menci*,C-524/15, par. 63
[61]*Ibid*, par. 49
[62]*Zolotukhin v. Russia*, §33-38
[63]*Milenkovic in Serbia*, app. no. 50124/13, §38.

violation against public order and peace has been terminated against the defendant, because it is not the same protection object.[64]Our courts had also a rigid approach in which they were examining whether there wasabsolute identity offacts in two proceedings, in order to determine the violation of the principle of ne bis in idem. [65]

Following the aforementioned ECtHR judgments, our courts have changed their approach in examining the identity of acts and have accepted the standards of the ECtHR. The Constitutional Court of RS in its decisions stated that "... one essentially a unique event...can be viewed temporarily and substantionaly as two separate entities, that is, as two different facts, one in misdemeanor and the other in criminal proceedings. In this case, the perpetrator would not be charged with the same fact in the misdemeanor and criminal proceedings, so the principle of ne bis in idem would not be violated.[66]This approach of the RS Constitutional Court is close to the earlier approach of the European Court of Human Rights as set out in the case of *Oliveira v Switzerland*.[67]The courts of the Republic of Serbia also pointed out that by narrow interpretation of the criteria of the material identity, established in the *Zolotukhin* judgment,[68] may endanger conventional obligations of each member state, and above all, the protection of the victim's right to life and the rights to inviolability of physical and mental integrity.With this argumentation, in addition to the established criteria of the factual identity of the work, the Serbian courts also introduce corrective criteria: 1) the identity of the protected object and the severity of the consequences of the criminal offense; and 2) the identity of the sanction, in order to answer the question of whether the acts for which the complainant persecuted or convicted in different proceedings the same.[69]

After thejudgment in the case of *A and B v Norway*, judicial practice in our country has changed. National courts in their newest judgments followed newly established practice of the ECtHR.When examining whether the duplication of the proceedings has occurred, the criteria that proceedings have been conducted successively is no longer sufficient.[70] Namely, as already explained, the ECtHR takes the view that the "combined" proceedings, which meets the criteria of complementarity and compliance, does not constitute a violation of the principle of *ne bis in idem.*

[64] Judgment of the Appellate Court in Belgrade, Kž1. 2183/2012 from 09.10.2012.

[65] See: Judgment of the Appellate Court in Niš Kž.2334 / 11 of 07.10.2011, Judgment of the Supreme Court of Cassation, Kzz no.576 / 2014 of 26.6.2014. The Supreme Court of Cassation stated that the case was not adjudicated, i.e., that there was no basis for passing a verdict rejecting the charges on that basis, if the description of the misdemeanor where the misdemeanor procedure was conducted against the defendant, does not relate to the same event and completely the same the facts and actions of the defendant.

[66]Constitutional Court Decision Už.br. 11106/2013, dated 19.05.2016, para.6.22.

[67]*Oliveira v Switzerland*, app. no. 25711/94, §26-29.

[68]*Zolotukhin v Russia*, app. no. 14939/03.

[69]Judgment of the Appellate Court in Nis Kž.1.br.800/16 of 04.08.2016. The Appellate Court in Nis compares the maximum penalty for a misdemeanor offense amounting to 10,000 dinars with the prescribed penalty for a qualified form of criminal offense, which amounts to 2-10 years in prison, and thus concludes that the offense does not have a criminal connotation.

[70]Judgment of the Appellate Court in Niš Кж1 623/17 од 20.09.2017.

Conclusion

The legal doctrine of the *ne bis in idem* principle, guaranteed in the right of the Council of Europe and the European Union is almost identical. The ECtHR and the CJEU interacted through their case law which, over the years, have been sensitive and receptive to human rights developments. By bringing quite controversial judgement in the case of *A and B v Norway*, ECtHR challenged the CJEU in answering the questions that have been submitted to it in four Italian cases, concerning the imposition of administrative and criminal sanctions on the same individuals in the context of securities market manipulation, insider dealing and non-payment of VAT. As the case with similar facts with facts in *A and B v Norway*, we have analyzed the newest decisions of the CJEU in the *Menci* case, where this Court brought the justification for the limitation of *the ne bis in idem* principle. What is interesting to notice is that CJEU in the *Menci* case doesn't follow the "sufficiently close connection in substance and time", the test established by the ECtHR in *A and B v Norway*, which opens the question whether this Court rejects that approach in a hidden way, having in mind institutional respect towards the ECtHR.

As to the case law of Republic of Serbia, after the judgment in the case of *A and B v Norway*, judicial practice in our country has changed. National courts in their newest judgments followed newly established practice of the ECtHR and now they are examining whether there is "combined" proceedings, which meets the criteria of complementarity and compliance.