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The Limits of ne bis in idem in Administrative Matters[2]

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Abstract

The study deals with the appearance of *ne bis in idem* in administrative cases, focusing on the cases of the Court of Justice of the European Union. It focuses on newly emerging cases which do not contain an explicit criminal law element and thus have had to decide on the multiple application of sanctions of an administrative nature. It also refers to the Strasbourg Court's practice on criminal charges and *ne bis in idem*, since the key issue for the applicability of the *ne bis in idem* principle is whether the sanction can be considered criminal in nature. The Engel criteria were used to determine this, which provided sufficient guidance in the initial period, but later cases began to apply a much more complex set of criteria.

The paper presents the trends in the EU in the field of multiple administrative sanctions, its twists and turns and the issues raised in the application of the principle from an administrative perspective.

Keywords: concept of administrative sanctions, ne bis in idem principle, complementary procedures, parallel sanctions.

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ZSUZSANNA ÁRVA

Granice zasady *ne bis in idem* w sprawach administracyjnych[3]

Streszczenie

Artykuł dotyczy pojawienia się zasady *ne bis in idem* w sprawach administracyjnych, koncentrując się na przypadkach Trybunału Sprawiedliwości Unii Europejskiej. Autorka skupia się na nowo pojawiających się przypadkach, które nie zawierają wyraźnego elementu prawa karnego, a zatem musiały decydować o wielokrotnym stosowaniu sankcji o charakterze administracyjnym. Odnosi się również do praktyki Trybunału w Strasburgu w sprawach karnych i zasady *ne bis in idem*, ponieważ kluczową kwestią dla stosowania zasady *ne bis in idem* jest to, czy sankcja może być uznana za mającą charakter karny. Kryteria Engel zostały użyte do określenia tego, co zapewniło wystarczające wskazówki w początkowym okresie, ale późniejsze przypadki zaczęły stosować znacznie bardziej złożony zestaw kryteriów. Artykuł przedstawia trendy w UE w zakresie wielokrotnych sankcji administracyjnych, ich zwroty akcji oraz kwestie poruszane w stosowaniu zasady z perspektywy administracyjnej.

Słowa kluczowe: koncepcja sankcji administracyjnych, zasada *ne bis in idem*, procedury uzupełniające, równoległe sankcje.

[3] Badania wykorzystane w artykule nie zostały sfinansowane przez żadną instytucję.

Introduction

Ne bis in idem is among the most extensively analysed principles in criminal law, yet it receives disproportionately little attention in the context of administrative sanctions. Nonetheless, the issue of double (or multiple) sanctioning – particularly when two administrative sanctions are applied concurrently – has increasingly emerged in the case law of the Court of Justice of the European Union (CJEU) and in the judicial practice of national constitutional courts.[4]

Van Bockel, a leading expert on the subject, has primarily examined the criminal law dimensions of the principle,[5] but *ne bis in idem* also has a significant horizontal dimension due to the diversity of legal classifications. The fundamental question is whether the *ne bis in idem* principle should be treated as a matter of criminal law, sanctions law, or constitutional law.[6] This question is difficult to resolve definitively, yet it is clear that many administrative cases initially conflicted with criminal law, as numerous international conventions classify such matters as criminal in nature. Over time, however, cases have emerged that are genuinely devoid of any true criminal element, involving the application of two non-criminal (i.e. administrative) sanctions. Although the *ne bis in idem* principle has been addressed by both the European Court of Human Rights (ECtHR) and the CJEU – as well as by national courts – cases involving double administrative sanctions have primarily arisen in the CJEU's case law.

This paper explores how the *ne bis in idem* principle has been integrated into the practice of international courts in administrative cases. It examines the evolving jurisprudence in so-called "genuine administrative cases," the direction that this jurisprudence is currently taking, and whether this trajectory is sustainable. The current approach – where administrative cases are often classified as criminal due to the punitive nature of the sanctions – appears to be undergoing a shift. This

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4 See J. Kluza, *On the Limits of the Ne Bis In Idem and Lex Retro Non Agit Principles. Remarks in View of the Judgement of the Constitutional Tribunal Regarding the So-Called "Act on Beasts"*, "Krytyka Prawa" 2018, 3, pp. 59–74 or Zs. Árva Zs., *New Ways and Limits of Administrative Sanctioning, in Particular with Regards to the Ne Bis In Idem Principle*, "Pro Futuro" 2024, 1, pp. 1–16.

5 W.B. van Bockel, *The ne bis in idem principle in EU law: a conceptual and jurisprudential analysis*, Leiden 2009.

6 The issue is closely linked to the ne bis in idem principle, which Judge Pinto de Albuquerque has described as a fundamental principle of European legal culture. Case of *A and B v. Norway* (App no. 24130/11 and 29758/11) dissenting Opinion of Judge Pinto de Albuquerque, para [79].

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invites the question: have we reached the limits of *ne bis in idem* in the administrative context?

The Roots of the Problem: *Ne Bis In Idem* as a Constitutional Principle?

Ne bis in idem is closely linked to the concept of *res judicata*. While *res judicata* is primarily associated with its substantive element (unchallengeability), *ne bis in idem* pertains to the formal element (immutability).[7] Among the earliest references to the principle is a statement by Demosthenes, and it also appears in Roman law, notably in the *Corpus Iuris Civilis* of Justinian. A similar principle first emerged in the common law tradition in the 12th century, in the dispute between Bishop Thomas Becket and King Henry II over the jurisdiction of ecclesiastical courts.[8] From the 18th century onwards, the principle began to appear in several constitutions – first in the French Constitution of 1791, then in the Fifth Amendment to the United States Constitution (also 1791). It was later incorporated into Article 103(3) of the Basic Law of the Federal Republic of Germany and Article 31 of the Constitution of Slovenia. However, in all these cases, the principle was framed within the context of criminal law, criminal procedure, or criminal offences.[9]

The principle was later codified in Article 4 of Protocol No. 7 to the European Convention on Human Rights (ECHR), signed on 22 November 1984, under the title "Prohibition of Double Jeopardy" (hereinafter: A4P7).

Within the EU legal framework, *ne bis in idem* first appeared in Article 54 of the Convention implementing the Schengen Agreement, using the term[10] "act" instead of "offence" or "crime." It was later reaffirmed in Article 50 of the Charter of Fundamental Rights of the European Union (hereinafter: CFR). The objective of the *ne bis in idem* guarantee under the CFR is to harmonise the rights established in diverse forms across EU Member States, particularly in cross-border contexts. Although A4P7 is binding only within individual Member States, it remains relevant in EU

7 G. Coffey, *A History of the Common Law Double Jeopardy Principle: From Classical Antiquity to Modern Era*, "Athens Journal of Law" 2022, 3, pp. 253–278.

8 See more *ibidem*, pp. 258–261.

9 D.S. Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy*, "William & Mary Bill of Rights Journal" 2005, 14, pp. 198–226.

10 "A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party." Article 54 of the Convention Implementing the Schengen Agreement.

law through Article 52(3) of the CFR, which mandates consistency with the ECHR in the interpretation of fundamental rights.

Strasbourg Rulings on Delimitation Issues in the Sanctions Regime

Since the applicability of *ne bis in idem* in administrative cases is closely tied to the classification of the sanction in question, a key starting point is the practice developedunder Article 6 of the ECHR, which has enabled the European Court of Human Rights (ECtHR) to define the scope of the concept of a "criminal charge" in its early case law. In this respect, the frequently cited case in this context is *Engel and Others v. the Netherlands*,[11] in which the so-called *Engel criteria* were formulated – widely referred to by national and international courts alike. According to this ruling, while each state has the autonomy to define what constitutes a criminal offence under its own legal system, the Court must also consider the nature of the act and the severity of the penalty imposed. In accordance with the principles of the rule of law, custodial sentences are generally regarded as criminal, but sanctions that are perceptibly punitive or retributive in nature, duration, or method of execution may also fall within the scope of criminal law.[12]

Cases involving *ne bis in idem* before the ECtHR typically arise in the context of criminal offences (*Zolotukhin v. Russia*[13]), tax matters (*Jussilia v. Finland*[14] or *Nykänen v. Finland*[15]), or other administrative and financial cases. Perhaps the most influential ruling in light of the subsequent CJEU judgments is *A and B v. Norway*, which is often cited in administrative cases. In this case, the ECtHR held that if a state wishes wishes to implement a sanctioning system that spans multiple legal areas, it must be designed to operate in a complementary fashion (e.g. in the areas of tax or traffic regulations), with the detailed implementation left to the discretion of the Member State.[16] Such procedures must be interconnected, as the establishment of the same facts does not in itself constitute a breach of the prohibition against double jeopardy.

This judgment marked a significant shift in ECtHR jurisprudence and effectively endorsed a two-step enforcement approach, in which the complementary

11 Case of *Engel and Others v. The Netherlands* (App no. 5100/7.; 5101/71; 5102/71; 5354/72; 5370/72).
12 *Ibidem*, para [81-83].
13 Case of *Zolotukhin v. Russia* (App no. 14939/03).
14 Case of *Jussilia v. Finland* (App no. 73053/01).
15 Case of *Nykänen v. Finland* (App no. 11828/11).
16 Case of *A and B v. Norway* (App no. 24130/11 and 29758/11) judgment, para [121].

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nature of administrative and criminal procedures does not automatically violate the *ne bis in idem* principle. The Court laid out four key criteria for determining whether the principle is respected in dual criminal–administrative proceedings:

- "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 ("*in 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 and in the assessment of the evidence, notably through adequate interaction between the various competent authorities to ensure that the establishment of the facts in one set of proceedings is replicated in the other;
- 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 the situation where the individual concerned is in the end made to bear an excessive burden".[17]

It is notable, however, that the Court considered the chronological order of the two proceedings irrelevant[18] and did not offer specific guidance on the criteria by which the complementarity of proceedings should be established. Questions concerning proportionality – which the Court requires in some instances but not consistently[19] – as well as the admissibility and transfer of evidence, also remain open. Increasingly, the Court appears to accept the transfer of evidence collected in administrative proceedings for use in subsequent criminal cases, even though substantial procedural differences exist between the two systems, particularly with respect to the presumption of innocence and the right to a fair trial.[20]

The first milestone in the development of this case law was the definition of "criminal charge," which has remained relatively consistent since the *Engel* ruling. The next step involved the principle of *ne bis in idem* itself, which was initially interpreted broadly – classifying nearly all sanctions as criminal due to their deterrent effect. This approach was later tempered by a shift toward a more functional analysis based on the principle of effectiveness. Nonetheless, cases involving

17 *Ibidem*, para [132].
18 Case C-524/15, *Menci*, Opinion of Advocate General, ECLI:EU:C:2017:667.
19 Case of *Matthildur Ingvarsdottir v Iceland* (App no. 22779/14).
20 Case of *Nodet v France* (App no. 47342/14).

two administrative sanctions are still rare in ECtHR jurisprudence. The Court's interpretation of the scope of criminal law, however, remains rather expansive.

The Practice of the European Union

The Starting Points: the Criminal Charge

Similar issues to those addressed by the ECtHR have begun to arise occassionally in the practice of the Court of Justice of the European Union (CJEU), particularly regarding administrative sanctions. The concept of criminal prosecution and the principle of *ne bis in idem* have been key topics in this context. The common starting point for addressing these fundamental issues has been the protection of the individual and the safeguarding of guarantees.[21] These principles have roots in national legal systems and the provisions of the Charter of Fundamental Rights (CFR), which closely interact with the principles of the European Convention on Human Rights (ECHR). At the same time, the CJEU has frequently taken an autonomous approach, with an emphasis on the effectiveness of EU law.

In the initial period, the application of the *Engel* criteria to administrative sanctions seemed relatively straightforward. Based on these criteria, higher monetary sanctions were considered criminal,[22] especially if they could potentially be substituted with imprisonment. Tax surcharges and administrative fines were also treated as criminal sanctions in this context.[23] However, in the case of *Käserei Champignon Hofmeister*, the situation was less clear-cut, as an element of fault had to be established. The sanction at issue was a reduction in export refunds, which represented a clear financial disadvantage and was essentially the reverse of a surcharge.[24] The Court based its decision on the principles of fair procedure and *nulla poena sine culpa* as set out in Article 6 of the ECHR.[25] It also referred to the doctrine of national sanctions and its previous case law, in which it had held that the principle of *nulla poena sine culpa*, and by extension, the principle of *in dubio pro reo*, did not apply to certain administrative sanctions.[26] Therefore, it concluded that the principle of

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21 A. de Moor-van Vugt, Administrative sanctions in EU law, *Review of European Administrative Law*, issue 1/2012, p. 9.

22 Case of *Ravnsborg v. Sweden* (App no. 14220/88).

23 *Case* C-45/08 *Spector Photo Group NV, Chris Van Raemdonck v Commissie voor het Bank-, Financie – en Assurantiewezen (CBFA)* ECLI:EU:C:2009:806.

24 Judgment of 11 July 2002, *Case* C-210/00, *Käserei Champignon Hofmeister* (ECLI:EU:C:2002:440), para [18].

25 *Case* C-210/00, *Käserei Champignon Hofmeister*, para 27-35.

26 See also Case C-137/85, *Maizena v BALM*, (ECLI:EU:C:1987:493), para [14].

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fault was not applicable in this case, primarily due to the contractual nature of the relationship between the parties.

This line of reasoning was further applied in the influential *Bonda* case, where the question of *ne bis in idem* was also raised. However, the CJEU did not consider the exclusion from aid as a criminal sanction, drawing on its earlier judgments[27]. The Court subjected the relevant legislation to the *Engel* test and explicitly considered whether it fell within the scope of criminal procedure under Article 4 of Additional Protocol No. 7 (A4P7) to the ECHR. In doing so, the Court referred to the *Engel* and *Zolotukhin* cases, following the line of reasoning established in those decisions. Ultimately, it held that the legislation in question was not criminal, nor did it regard the sanction as retaliatory, since its purpose was primarily to safeguard the management of EU funds.[28]

This issue has also been explored in the legal literature, both in criminal and administrative contexts.[29] While Article 52(3) of the CFR provides that rights derived from the CFR should have the same content and scope as corresponding rights under the ECHR, contradictions between the practices of the ECtHR and the CJEU can be identified. These discrepancies arise largely because, while the ECtHR typically addresses the issue from the individual's perspective, applying guaranteed criteria to evaluate the various elements, the CJEU tends to focus more on the protection of the financial interests of the European Union. Moreover, the ECtHR's practice is not always uniform, and no case has yet been brought before it in which it has examined sanctions in aid cases in light of the *Engel* criteria.

While it is evident from the previous discussion that the CJEU has not applied the *Engel* criteria with the same consistency in all cases, this divergence has become especially apparent in recent practice, particularly in tax cases. In Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, the Advocate General's Opinion highlighted that it is common practice in EU Member States to apply both administrative and criminal sanctions to the same act in areas such as taxation, environmental protection and public safety.[30]

In a related tax case, the CJEU clarified its position on the application of the *Menci* criteria. The Court stated 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 due within the time limits

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27 Case C-137/85 *Maizena v BALM*, para [13], Case C-240/90 *Federal Republic of Germany v Commission*, para [25], and *Case* C-210/00 *Käserei Champignon Hofmeister*, para [43]. Case C-489/10 *Bonda*, para [26-35].

28 *Ibidem*, para [37-44].

29 See also K. Karsai, *Ne bis in idem*, [in:] A. Jakab, M. Könczöl, A. Menyhárd, G. Sulyok (eds.), *Internet Encyclopedia of Legal Studies*. Available from: http://ijoten.hu/szocikk/ne-bis-in-idem 2023..

30 *Case* C-617/10, *Åklagaren v Hans Åkerberg Fransson,* Opinion ECLI:EU:C:2012:340, para [70].

stipulated by law, although that person has already been made subject, in relation to the same acts, to a final administrative penalty of a criminal nature for the purposes of Article 50 of the Charter, on condition that that the legislation:

- ❑ pursues an objective of general interest which is such as to justify such a duplication of proceedings and penalties, namely combating VAT offences, it being necessary for those proceedings and penalties to pursue additional objectives,
- ❑ contains rules ensuring coordination which limits to what is strictly necessary the additional disadvantage which results, for the persons concerned, from a duplication of proceedings, and
- ❑ provides for rules making it possible to ensure that the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned"[31]

This principle was notably applied in a high-profile case involving bpost. To summarise, it can be concluded that EU sanctions, while heavily influenced by the practices developed by the ECtHR, diverge from them due to the primacy of the Union's financial interests. Furthermore, EU law faces increasing challenges related to coordinating administrative and criminal proceedings, as well as delimiting sanctions and interpreting *ne bis in idem* in relation to the concept of the criminal charge. While the ECtHR allows complementary procedures, it applies the aspect of temporality to these procedures, a principle that the CJEU does not adopt. Instead, the CJEU introduces the somewhat ambiguous principle of proportionality.[32]

The differences between the two courts can be attributed to a variety of complex reasons. Among these are the differing legal traditions of EU Member States, particularly in areas such as human rights protection, safeguarding the individual from state abuses, justice, proportionality, legal certainty, due process, and the concept of *res judicata*.[33]

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31 *Case* C-524/15 *Luca Menci,* ECLI:EU:C:2018:197, para [63].

32 G. Lasagni, S. Mirandola, *The European ne bis in idem at the Crossroads of Administrative and Criminal Law*, "Eucrim. The European Criminal Law Association's Forum" 2019, 2, pp. 126–135.

33 T. Araceli, *Ne bis in idem in European Law: A Difficult Exercise in Constitutional Pluralism*, "European Papers" 2020, 3, pp. 13–43.

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"Real" Administrative Cases

The principle of *ne bis in idem* in purely administrative cases initially emerged mainly in the context of competition law, but its scope is expected to broaden in the near future. Although the issue was already raised in the case of *Walt Wilhelm et al.*, the Court then avoided a substantive ruling, making *Toshiba*[34] the first case to address the parallel application of administrative sanctions in earnest. In *Toshiba*, the Court held, in general terms, that the principle of *ne bis in idem* does not prevent a national competition authority from applying national competition law. It further established that the application of the principle depends on the fulfillment of three cumulative conditions: identity of the facts, unity of offender, and unity of the legal interest protected.[35] In the case at hand, these conditions – specifically the identity of the facts – were not met.

For a long time, *Toshiba* was regarded as a benchmark in the field. However, more recent case law has introduced additional considerations, leading legal scholars to conclude that *Toshiba* was effectively overruled by 2022.[36] In that same year, several significant cases were referred to the CJEU, one of which was the *Volkswagen* case.[37] It concerned the criminal nature of an administrative fine imposed by a national consumer protection authority. The background was as follows: in 2016, the Italian Competition Authority (AGCM) fined Volkswagen EUR 5 million for unfair commercial practices. Meanwhile, in Germany, the public prosecutor's office in Braunschweig issued a final decision imposing a EUR 1 billion fine under the German Administrative Offences Act (OWiG) for misleading consumers about vehicle emissions. Once the German decision became final, Volkswagen appealed in Italy, arguing that its rights under *ne bis in idem* had been violated, and asserting that the administrative fines imposed had reached the threshold of criminal law.

The CJEU found that the infringement had indeed occurred, concluding that the Italian administrative fine constituted a criminal penalty in light of its punitive purpose and severity. The classification of the sanction was based on the *Engel* criteria, especially the scale of the penalty. Thus, although the sanctions were formally administrative, they were deemed criminal in substance. It should be noted, however, that this case may not represent a true instance of conflicting administrative proceedings in the strict legal sense, since the ECtHR has consistently treated German

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34 Case C-17/10 Toshiba Corporation and Others, ECLI:EU:C:2012:72.

35 Case C-17/10 Toshiba Corporation and Others, Opinion ECLI:EU:C:2011:552 para [114-115].

36 J. Dewispelaere, T. Ghysels, *The Duplication of Proceedings and Penalties under Sectoral Rules and Competition Law Recast: Toshiba Is Dead, Long Live Bpost?*, "European Competition and Regulatory Law Review CoRe" 2022, 3, pp. 278–283. https://doi.org/10.21552/core/2022/3/15

37 Case *C-27/22, Volkswagen Group,* ECLI:EU:C:2023:663.

administrative offences under the OWiG as criminal in nature since the landmark *Öztürk* case. Therefore, *Volkswagen* cannot yet be considered a clash between two genuinely administrative proceedings in a dogmatic sense.

In the *bpost* and *Nordzucker* cases, both adjudicated on the same day, the issue of the cumulative application of administrative sanctions was again brought to the fore. In *bpost*, the dispute concerned the imposition of sanctions by two Belgian authorities. First, the national postal services regulator penalised the company for applying a discriminatory discount scheme. Subsequently, the national competition authority sanctioned the same practice as an abuse of dominant position.

Advocate General Bobek, following the logic of *Walt Wilhelm* and *Toshiba*, proposed the application of the *Menci* criteria, arguing that the level of protection under Article 50 of the Charter of Fundamental Rights of the European Union must not fall below the standard provided by Article 4 of Protocol No. 7 (A4P7) to the ECHR.[38] He emphasised that the general standard under Article 50 must apply across the Union – horizontally (between Member States) and vertically (between Member States and the EU) – since the principle, as a foundational element of EU law "which enjoys the status of a fundamental right means that its content must not be substantially different depending on which area of law is concerned."[39] Nevertheless, this does not exclude the existence of specific regimes within EU law offering higher levels of protection.

The Advocate General likened offences to "chameleons" that can be presented in the guise of administrative sanctions and thus proposed the continuation of the current practice of substantive analysis over formal classification.

In contrast, the CJEU ruled that "Article 50 of the Charter, read in conjunction with Article 52(1) thereof, must be interpreted as not precluding a legal person from being fined for an infringement of EU competition law where, on the same facts, that person has already been the subject of a final decision following proceedings relating to an infringement of sectoral rules concerning the liberalisation of the relevant market, provided that there are clear and precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties, and also to predict that there will be coordination between the two competent authorities; that the two sets of proceedings have been conducted in a sufficiently coordinated manner within a proximate timeframe; and that the overall penalties imposed correspond to the seriousness of the offences committed."[40]

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38 See more J. Callewaert, *Do we still need Article 6(2) TEU? Considerations on the absence of EU accession to the ECHR and its consequences*, "Common Market Law Review" 2018, 6, pp. 1685–1716.

39 Case C-117/20, Opinion of Advocate General Bobek, ECLI:EU:C:2021:680. para [122].

40 Case C-117/20, bpost SA, Judgement, ECLI:EU:C:2022:202. para [58].

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It should be recalled that the CJEU has consistently stressed that the principle of *ne bis in idem* must be observed in competition law when imposing fines.[41] In this instance, however, as Balázs Gellér aptly notes, the judgment is difficult to reconcile with a meaningful distinction between VAT-related conduct and unlawful behaviour amounting to market manipulation.[42]

The decision has drawn criticism in the international legal literature for its lack of coherence and its heavily fact-specific reasoning.[43] Some commentators maintain that the *ne bis in idem* principle is intended to prevent multiple prosecutions and sanctions against undertakings – not to permit conduct to go unpunished. Others have observed that the protection afforded by the principle has shifted from *ex ante* to *ex post*.[44] What is clear, however, is that the application of the principle within EU law has never been more unsettled.[45]

The scope of administrative cases continues to expand, and administrative authorities increasingly face the issue of parallel sanctions, especially in fields such as communications or consumer protection. A noteworthy pending case is *Engie România SA v Autoritatea Națională de Reglementare în Domeniul Energiei* (C-205/23), where both a consumer protection authority and an energy regulator fined a natural gas supplier based on different legal provisions. The judgment had not been delivered at the time of writing. However, the Advocate General observed that the case presents an important opportunity for the CJEU to clarify its approach to *ne bis in idem* in administrative proceedings.

In this context, the Advocate General was required to distinguish between administrative sanctions and additional corrective measures. While acknowledging the retributive and preventive purposes of the fines imposed on Engie, he emphasised their reparative function and thus advocated for their classification as non-punitive. The objectives of the sanctions were also examined in light of *bpost*, which established that a cumulative application of punitive measures may be justified if they pursue complementary goals—addressing different aspects of the same infringement and offering parallel legal responses to a broader social

41 Case C-17/10 Toshiba Corporation and Others, Opinion ECLI:EU:C:2011:552 para [114-94].

42 B. Gellér, *The conflict of jurisdictions and branches of law in the light of the European interpretation of the ne bis in idem principle*, [in:] A. Menyhárd, I. Varga, *350 years of the Faculty of Law and Political Sciences of Eötvös Loránd University*, Volume II, Budapest 2018, p. 1379.

43 T. Whal, *CJEU Clarified Duplication of Punitive Administrative Proceedings in Competition Law*, "Eucrim" 2022, 2, pp. 116–118.

44 Ne bis in idem and the DMA: the CJEU's judgments in bpost and Nordzucker – Part II. Available from: https://theplatformlaw.blog/2022/03/29/ne-bis-in-idem-and-the-dma-the-cjeus-judgments-in-bpost-and-nordzucker-part-ii/

45 P. Rossi-Marciano, *A Reasoned Approach to Prohibiting the Bis in Idem*, "Eucrim" 2021, 4, pp. 270–271.

issue. In the case of *Engie*, such a complementary objective may lie in the need to ensure a high level of consumer protection.

Conclusion

In light of the foregoing, it is worth questioning whether the Advocates General's consistent emphasis on the origins of administrative sanctions – namely, that they are sanctions detached from criminal law – was necessarily the correct approach. In the early period, the ECtHR often dealt with cases involving misdemeanours, making this argument largely convincing: misdemeanours in most 20th-century legal systems were minor criminal offences subject to distinct procedural guarantees, which appropriately raised concerns about the applicability of *ne bis in idem*. The *Engel* judgment and its corresponding criteria, however, opened the door to a significantly broader scope of applicability for the *ne bis in idem* principle. In particular, it was the third *Engel* criterion – the punitive or retributive nature of a sanction – that paved the way for the inclusion of unequivocally administrative sanctions, with no criminal law roots, within the scope of such assessments.

This conceptual misalignment was already discernible in the Strasbourg tax case law, where the Court did not consider classical criminal law guarantees to be essential in the context of relatively minor penalties (as in the *Jussila* case). However, it was before the CJEU that the most intriguing questions emerged. There, the issue of *ne bis in idem* was raised in the context of the cumulative application of two administrative sanctions. In this context, the line of reasoning presented in the Opinions of the Advocates General – emphasising the criminal law origins and arguing, in effect, for a unified system of sanctions with only a gradual distinction between criminal and administrative penalties – remains highly relevant and worthy of further reflection. The judgments themselves, however, have refrained from such a comprehensive analysis and have remained relatively silent on the nature of administrative sanctions.

Where possible, the Court has avoided addressing the issue head-on by relying on jurisdictional distinctions (*Walt Wilhelm* and *Toshiba*), although it has also shown a degree of openness towards bringing administrative sanctions within the scope of *ne bis in idem*. Subsequently, in cases such as *Volkswagen* and *bpost*, the Court allowed greater leeway for administrative sanctions serving distinct objectives, thereby incorporating additional considerations and placing a stronger emphasis on enforcement.

The current state of affairs stops short of explicitly declaring that the *ne bis in idem* principle is inapplicable to the combined application of two classic administrative

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sanctions. Nonetheless, there is a discernible sense of hesitation. This ambiguity is likely to persist for some time, as the Court may continue to decide cases on procedural grounds where possible, thereby avoiding substantive pronouncements on the *ne bis in idem* issue. However, the question remains unresolved, and its resolution is difficult without a comprehensive inquiry into the foundations of the administrative sanctioning regime. A major obstacle is the absence of a uniform set of criteria across the Member States for distinguishing between criminal and administrative sanctions, as well as the lack of consensus on whether administrative law possesses a distinct system of sanctions at all.[46] The Advocate General typically argues against this latter view. As a first step, it is worth re-evaluating the continued application of the *Engel* criteria in genuinely administrative cases. For, if one accepts that the general purpose of administrative sanctions is retribution, then all such sanctions – apart from reparative ones – would be classifiable as criminal. The unsustainability of such a classification is becoming increasingly evident.

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[46] See more M. Nagy, A közigazgatás szankciórendszere, [in:] A. Jakab, M. Könczöl, A. Menyhárd, G. Sulyok (eds.), *Internetes Jogtudományi Enciklopédia*, 2019. Available from: http://ijoten.hu/szocikk/a-kozigazgatas-szankciorendszere

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