

## NON BIS IN IDEM IN TAX MATTERS. QUO VADIS

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**Abstract:** Great interest is given to the application of the principle *non bis in idem* according to the European Convention on Human Rights and the European Court of Human Rights' case law in tax matters these days. This case law is concurrently assumed also by the Court of Justice of the European Union when the European Union law is implemented. However, this case law is affected by the significant change resulting from the unwillingness of member states to accept the previous interpretation of the European Convention on Human Rights in tax matters established by the decision in the so-called A and B case. Therefore, the Court of Justice of the European Union faces the decision whether the current state of the interpretation of the *non bis in idem* principle resulting from the European Court of Human Rights' case law should be preserved or if this court should establish own and broader union concept of *non bis in idem* principle. In the conclusion, the author provides his own opinion on which approach should be chosen with the aim to maintain the legal certainty of the recipients of law.

**Keywords:** *non bis in idem*, competed proceedings, tax law

### INTRODUCTION

The application of the principle *non bis in idem*<sup>1</sup> in tax matters has been an important issue of recent years as the imposition of tax law sanctions has been greatly influenced by the case law of main European courts and by the adoption of principles of penal and administrative sanctions also in tax law regulation.<sup>2</sup> As a result of the activities of some Member States of the European Union (*hereinafter referred to as "Member States"*) in the field of international public law, the tax law regulation in these states forfeits its previous independency, mainly in the case of the application of so-called consequences of the breach of tax law duties. Nowadays, these consequences of illegal activities of taxpayers should be interpreted in accordance with the principles of administrative punishments,<sup>3</sup> therefore some of them should be deemed as a punishment levied in the criminal procedure for the purposes of the application of articles 6 and 7 of the European Convention on Human Rights.<sup>4</sup>

The transformation of tax law punishments was initiated by the ground-breaking decision of the European Court of Human Rights in the case of Lucky Dev versus Sweden, the decision on the application no. 7356/10, in which the European Court of Human Rights

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<sup>1</sup> The impacts of recent case law are analysed by Juliette Lelieur. LELIEUR, J. 'Transnationalising' Ne Bis In Idem: How the Rule of Ne Bis In Idem Reveals the Principle of Personal Legal Certainty? *Utrecht Law Review*. 2013, Vol. 9, No. 4, pp. 198–210.

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<sup>3</sup> This opinion was already taken into account by the Czech Supreme Administrative Court by its decision as of 28 April 2011, f. n. 1 Afs 1/2011-82.

<sup>4</sup> Compare the decision of the Czech Supreme Administrative Court as of 16 December 2015, f. n. 4 Afs 210/2014-70.

emphasized the nature of tax surcharges for the breach of tax law duties by the taxpayer applied in Sweden as a criminal sanction for the purposes of the application of article 6 of the European Convention on Human Rights. This milestone initiated the reclassification of the perception of the principle *non bis in idem* in tax matters in Member States' jurisdiction to avoid any potential breach of the European Convention on Human Rights.

Although the application of the principle *non bis in idem* in tax matters is a topic resulting from the case law of the European Court of Human Rights, the application of this principle was also subjected to the case law of the Court of Justice of the European Union. However, the Council of Europe and the European Union are independent international organizations, therefore the application of this principle evinces some significant deviations from the European Court of Human Rights' case law pursuant to the European Union's legislation. For this reason, the aim of this article is to compare the application of the principle *non bis in idem* according to the case law of both European judicial institutions and to analyse how different approaches in the application of this principle in tax matters by both institutions could affect domestic tax law of Member States. Considering mentioned above, the aim of this article is to evaluate existing relevant case law concerning the *non bis in idem* principle in the case law of the Court of Justice of the European Union and to provide authors suggestion which approach shall be adopted by the current and expected decision in the Menci case as it is described later. Used scientific methods are the analysis, induction, deduction and description.

## I. SANCTIONS ACCORDING TO ARTICLES 6 AND 7 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Neither article 6, nor article 7 of the European Convention on Human Rights defines the term "sanction" explicitly. According to the case law of the European Court of Human Rights, the nature of the sanction imposed for the infringement of law is the relevant criterion to determine whether the procedure performed by a domestic public law authority against the offender was in accordance with the criminal procedure.<sup>5</sup> For assessment purposes, the European Court of Human Rights has established the so-called Engel criteria<sup>6</sup> based on the three criteria examination of the criminal charge for the application of article 6 of the European Convention on Human Rights.

The very first criterion is the examination of the formal definition of the offence and the corresponding punishment according to the legal system of the state, which signed and ratified the European Convention on Human Rights. Pursuant to this criterion, anyone should be able to determine if the particular case belongs to the criminal law regulation, administrative law regulation or both concurrently.<sup>7</sup> Nevertheless, this step does not

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<sup>5</sup> Compare s. 82 of the European Court of Human Rights' decision as of 8 June 1976 in the case of Engel and others versus the Netherlands, the decision on the application no. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72.

<sup>6</sup> This test is named after the first case dealing with its application by the European Court of Human Rights. Compare s. 30 of the European Court of Human Rights' decision as of 23 November 2006 in the case of Jussila versus Finland, the decision on the application no. 73053/01.

<sup>7</sup> Compare s. 82 of the European Court of Human Rights' decision as of 8 June 1976 in the case of Engel and others versus the Netherlands, the decision on the application no. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72.

constitute anything else than the basic initial point for the analysis of two remaining Engel criteria, because the result of the application of this first criterion does not necessarily mean that national domestic regulation, which is applied in this particular case, corresponds with the general legal framework represented by the European Convention on Human Rights for all states, which signed and ratified it without any relevant opt out.<sup>8</sup> Therefore, it is more important to put much more emphasis on the nature of the criminal activity and the possible sanction imposed itself.<sup>9</sup> The second criterion is devoted to the assessment of the substantive nature of the offence, which is a more relevant factor when the examined public law case is based on the existence of a criminal charge.<sup>10</sup> It is obvious that the examination of this criterion should be exercised on the individual basis and in the particular application of the relevant legal institute. The last, third criterion is based on the assessment of the nature and the severity of the sanction which could be imposed on the offender for the infringement of law.<sup>11</sup> In case of application of the tax law instrument constituting the consequence for the breach of tax law obligation of the taxpayer is decisive, if this consequence represents the monetary recovery of damages caused to the state or other public law entity by the breach of tax law or, if it is a penal sanction discouraging from the recidivism.<sup>12</sup> The conclusion, that the imposed sanction is a criminal sanction by its nature, is the aspect of the purpose of this sanction. If the purpose of imposed sanction is the punishment and discouraging from the committed offence, this purpose is a typical attribute of any penal sanction and due to this fact, it is necessary to conclude that the imposed sanction has the nature of criminal sanction.<sup>13</sup>

Moreover, the assessment of the second and the third Engel criterion is alternative. This means that for the assessment of the existence of the criminal charge in a particular case, it is sufficient to fulfil one of these criteria. However, it does not exclude the cumulative application of the second and the third Engel criteria, if the independent analysis of each of them does not allow to draw a clear conclusion if the criminal charge of the offender exists in a particular case.<sup>14</sup>

For some European jurisdictions whose legal order is similar to Czech, it is significant that illegal activity of the taxpayer breaching the norm of tax law should be sanctioned by tax law instruments,<sup>15</sup> but if such act would constitute a serious tax fraud, it could be also sanctioned by criminal law.<sup>16</sup> The general rule in case of concurrence of tax law and crim-

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<sup>8</sup> Ibid.

<sup>9</sup> Compare s. 30 of the European Court of Human Rights' decision as of 23 November 2006 in the case of Jussila versus Finland, the decision on the application no. 73053/01.

<sup>10</sup> Compare s. 53 of the European Court of Human Rights' decision as of 10 February 2009 in the case of Sergey Zolotukhin versus Russia, the decision on the application no. 14939/03.

<sup>11</sup> Compare s. 82 of the European Court of Human Rights' decision as of 8 June 1976 in the case of Engel and others versus the Netherlands, the decision on the application no. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72.

<sup>12</sup> Compare s. 47 of the European Court of Human Rights' decision as of 24 February 1994 in the case of Bendenoun versus France, the decision on the application no. 12547/86.

<sup>13</sup> Compare s. 55 of the European Court of Human Rights' decision as of 10 February 2009 in the case of Sergey Zolotukhin versus Russia, the decision on the application no. 14939/03.

<sup>14</sup> Compare KOSAŘ, D. Zolotukhin proti Rusku: ne bis in idem. *Přehled rozsudků Evropského soudu pro lidská práva*. 2009, Vol. 12, No. 2, pp. 103–112.

<sup>15</sup> By the administrative sanction *sensu lato*.

<sup>16</sup> In particular, as an evasion of tax, levy and similar obligatory payment pursuant to section 240 of the Czech Criminal code.

inal law proceedings is that a wider range of illegal activities, irrespective of their seriousness or social harmfulness, could be penalised pursuant to tax law regulations. Contrary to that, only more serious of these illegal activities could be punished by criminal sanctions imposed in a criminal procedure *sensu stricto*. Thus, illegal activities punished in criminal proceedings constitute the subset of the plurality of illegal conducts according to tax law regulation. Based on the abovementioned, it is clear that the concurrence between tax proceedings and criminal proceedings dealing with the same facts of the same illegal activity of the taxpayer can occur in serious cases of breach of tax law regulations. As it is found by the European Court of Human Rights, in these cases, the question of the application of the principle *non bis in idem* pursuant to article 4 of Protocol No. 7 to the European Convention on Human Rights comes to the fore.<sup>17</sup>

If the application of the principle *non bis in idem* should take place, it is necessary to deal with three issues according to the European Court of Human Rights. The first issue is the finding whether two or more proceedings related to the same illegal activity are held (the examination of the attribute “*bis*”).<sup>18</sup> The second issue is the examination of the existence of criminal charge within the meaning of articles 6 and 7 of the European Convention on Human Rights in both proceedings, as it was drawn above. The last, third issue is the analysis of the illegal activity and the conclusion if both proceedings are dealing with the same facts of the illegal activity of the taxpayer (the examination of the attribute “*idem*”).<sup>19</sup>

Concerning the attribute of *idem*, there have been three different approaches in the case law of the European Court of Human Rights<sup>20</sup> since the harmonising (unifying) decision of the European Court of Human Rights in the case of Sergey Zolotukhin versus Russia, the decision on the application no. 14939/03, was adopted. According to this decision, article 4 of Protocol No. 7 to the European Convention on Human Rights should be interpreted in the sense that it prohibits the criminal prosecution for the second criminal offence in so far as it arises from identical facts or facts, which are substantially the same.<sup>21</sup> Be so, the *idem* attribute exists pursuant to the European Court of Human Rights if the facts constitute “*a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space*”.<sup>22</sup>

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<sup>17</sup> Compare s. 47 of the European Court of Human Rights’ decision as of 27 November 2015 in the case of Lucky Dev versus Sweden, the decision on the application no. 7356/10.

<sup>18</sup> Compare s. 107 of the European Court of Human Rights’ decision as of 10 February 2009 in the case of Sergey Zolotukhin versus Russia, the decision on the application no. 14939/03.

<sup>19</sup> Compare s. 70 of the European Court of Human Rights’ decision as of 10 February 2009 in the case of Sergey Zolotukhin versus Russia, the decision on the application no. 14939/03.

<sup>20</sup> The first approach is based on the definition of the *idem* attribute respecting the decision in the case of Gradinger versus Austria. The second approach uses for the definition of the *idem* attribute existence of identical or substantially the same facts of the illegal activity of the offender, but it admits that the offender could be punished in different proceedings held by different state authorities. This approach was found in the decision in the case Oliveira versus Switzerland. The last approach is based on the decision in the case Fischer versus Austria and for the *idem* attribute, it constitutes the necessity of the existence of identical or substantially the same facts of the illegal activity of the offender at least. Original text of these decision is accessible from: <http://hudoc.echr.coe.int>.

<sup>21</sup> Compare s. 82 of the European Court of Human Rights’ decision as of 10 February 2009 in the case of Sergey Zolotukhin versus Russia, the decision on the application no. 14939/03.

<sup>22</sup> Compare s. 84 of the European Court of Human Rights’ decision as of 10 February 2009 in the case of Sergey Zolotukhin versus Russia, the decision on the application no. 14939/03.

For the assessment of the *bis* attribute, if the two proceedings are held for identical facts or facts which are substantially the same, it is decisive whether the one proceeding was finished by a final irrepealable decision,<sup>23</sup> because only the final decision with the effect of *rei iudicatae* constitutes the barrier to conduct second criminal proceedings pursuant to the principle *non bis in idem* according to article 4 of Protocol No. 7 to the European Convention on Human Rights.<sup>24</sup> In so far, this article 4 of Protocol No. 7 to the European Convention on Human Rights contains three guarantees, that no one should be liable to be tried, tried or punished for the same offence for which he has already been acquitted or sentenced by a final decision.<sup>25</sup> It should be summarized that the *non bis in idem* principle pursuant to article 4 of Protocol No. 7 to the European Convention on Human Rights should be applied in case of existence of two independent proceedings on the criminal charges based on the identical facts or facts which are substantially the same, if one of those proceeding was finished by the final irrepealable decision with the effect of *rei iudicatae*.

As mentioned before, legal orders of some Member States enable to carry out tax law and criminal law proceedings related to the identical facts. It used to seem that this state of legislation would be unsustainable regarding to the European Court of Human Rights' case law, but this court has changed its constant ruling while reviewing the "Sergey Zolotukhin" case in 2016.<sup>26</sup> The European Court of Human Rights has concluded that article 4 of Protocol No. 7 to the European Convention on Human Rights does not strictly prohibit to conduct two parallel proceedings and admitted that it is possible to conduct parallel criminal (administrative) and tax proceedings resulting into the imposition of the criminal penalty and tax surcharge, but just in case if following conditions are cumulatively met:<sup>27</sup>

- Imposed tax surcharges were taken into account by the criminal court, therefore the imposed punishment by the criminal court should be proportionally decreased with respect to the imposed tax surcharge. Basically, the first sanction must be considered by the public law authority in the second proceedings.
- Both sanctions must be foreseeable to the taxpayer (offender).
- Both proceedings held by the tax administrator and the criminal court or other public law authority are held parallelly and they are connected to that extent, that the criminal court and tax administrator cooperate in both proceedings and provide each other with information and evidence regarding the case of the offender. It means that it is prohibited to duplicate the collection and assessment of the evidence, therefore it is necessary to use facts gathered in the first proceedings in the second proceedings with the aim to impose proportional sanction to the breach of law. The conclusion is that only authorized public law authorities can conduct two proceedings in a parallel

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<sup>23</sup> *Ibid.*, p. 107.

<sup>24</sup> *Ibid.*, p. 83.

<sup>25</sup> Compare s. 58 of the European Court of Human Rights' decision as of 27 November 2015 in the case of Lucky Dev versus Sweden, the decision on the application no. 7356/10.

<sup>26</sup> Compare the decision of the European Court of Human Rights as of 15 November 2016 in the case of A and B versus Norway, the decision on the application no. 24130/11 and 29758/11.

<sup>27</sup> Compare the s. 50–77 of the European Court of Human Rights' decision as of 15 November 2016 in the case of A. and B versus Norway, the decision on the application no. 24130/11 and 29758/11.

way, but consecutive proceedings on the same breach of law by taxpayer are still prohibited.

- The domestic legal order must establish an offsetting mechanism between criminal and tax law penalties to grant the imposition of proportionate penalties, tax surcharges and other punishments. It is evident that in a case when domestic law does not entitle the competent tax administrator with the discretion right over the amount of possible imposed tax surcharge like it is in Norway or the Czech Republic, this sanction must be imposed as first because it is just the criminal court who is entitled to consider the levied tax surcharge in the amount of the imposed punishment and therefore to preserve the requirement for the proportional sanctions imposition.

However, practice shows us that it is considerably difficult for Member States to maintain these requirements for parallel proceedings in tax matters (the criminal and tax law one) because usually both proceedings are not conducted in parallel, but rather subsequently. This problem is quite burdensome in the legal system of the Czech Republic, because the procedural tax law represents the general procedure for the payment of most of the payment obligations of individuals (taxes, levies, charges, repayment of subsidies etc.). Therefore, this issue concerns not only tax evasion and tax avoidance but also for example the regulation of the budgetary rules, budgetary responsibility and distortion of the competition in some Member States' regulations.

## II. CRUCIAL DECISION OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

It seems that the *non bis in idem* question from the tax law perspective is a marginal issue in the Court of Justice of the European Union's case law because only two decisions of this court are worth mentioning, but currently this court is dealing with the fundamental question in case C-524/15, whether it will follow the opinions of the European Court of Human Rights or whether it will establish its own concept of the application of the *non bis in idem* principle in tax law matters. The importance of the existing case law of the Court of Justice of the European Union consists in their unifying nature which roofs the universally applicable findings of its case law and in the creation of a referential framework for their application in tax law. Nobody can be surprised by the fact that the particular tax law field affected by both decision is the value added tax.

The first decision, considered as a breakthrough one, however from different reasons than the application of the principle *non bis in idem* in tax law, is the decision of the Grand Chamber of the Court of Justice of the European Union as of 23 February 2013 in the case *Åklagaren v Hans Åkerberg Fransson*, f. n. C-617/10, published in the electronic case collection (hereinafter referred to as "*Åkerberg Fransson case*"). According to facts of this case, the tax surcharge was levied on Mr. Åkerberg Fransson for the evasion of the personal income tax from his economic activity (business activity), value added tax and employers' contributions in 2007.<sup>28</sup> Besides that, Mr. Åkerberg Fransson was accused of a serious tax

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<sup>28</sup> Compare s. 13 of the decision in the *Åkerberg Fransson* case.

offence resulting into a criminal charge of Mr. Fransson and related criminal proceedings on serious crime of Mr. Fransson in 2009.<sup>29</sup> The substantive question the court had to deal with from the perspective of the *non bis in idem* principle was the assessment of the tax surcharges' nature, whether they are a criminal sanction by their nature or not, while the potential criminal nature of these surcharges could prevent Mr. Fransson from criminal proceedings due to the *rei iudicatae* of his case.

Similar facts were dealt with in the second relevant case, recently finished by the decision of the Court of Justice of the European Union as of 5 April 2017 in joint cases of criminal proceedings against Massimo Orsi and Luciano Baldetti, f. n. C-217/15 and C-350/15, published in the electronic case collection (hereinafter referred to as "*Orsi case*"). However, this decision was devoted to one substantial difference from the facts in the Åkerberg Fransson case. In this case, the value added tax and related tax surcharges in the amount of 30 % of the levied value added tax were levied on a business corporation whose managing directors were Mr. Orsi and Baldetti and then the criminal proceedings against these two men were initiated, so the tax law proceedings were conducted against business corporations, but the criminal proceedings were held merely against their managing directors.<sup>30</sup> In the Orsi case, the substantive question was if the tax law proceedings and the criminal proceedings conducted against different persons had been dealt with identical facts or facts which are substantially the same.

### III. FIELD FOR APPLICATION OF NON BIS IN IDEM PRINCIPLE IN EUROPEAN UNION LAW

One of many aims of the European Union is to preserve and develop indivisible, universal values of human dignity, freedom, equality and solidarity, therefore it is considered as an important task by the European Union to strengthen the protection of human rights by the codification of fundamental rights deriving from the constitutional traditions and international commitments common to Member States, from the European Convention on Human Rights, from conventions devoted to social rights adopted by the European Union and Council of Europe and finally, from the case law of the Court of Justice of the European Union and the European Court of Human Rights so far, this protection respects competences and aims of the European Union.<sup>31</sup> From this point of view, decisive of how to apply the *non bis in idem* principle is the determination which way the rights granted by the Charter of Fundamental Rights of the European Union should be exercised and what is the relation among this charter, the European Convention on Human Rights, European Union law and the national legislation of any particular Member State.<sup>32</sup> The default thesis could be found directly in the Charter of Fundamental Rights of the European Union in article 51 regulating the field of its application, according to which "[t]he provi-

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<sup>29</sup> Compare s. 12 of the decision in the Åkerberg Fransson case.

<sup>30</sup> Compare s. 10–13 of the decision in the Orsi case.

<sup>31</sup> Compare the Preamble of the Charter of Fundamental Rights of the European Union, f. n. 2012/C 326/02.

<sup>32</sup> LAVRANOS, N. The ECJ's Judgments in Melloni and Åkerberg Fransson. *European Law Reporter*. 2013, i. 4, p. 133.

sions of this Charter are addressed to the institutions and bodies 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.” However, Member States are bound by the obligation to respect the fundamental rights defined by the European Union only in case they are dealing with matters in the scope of the European Union law<sup>33</sup> and when any authority of any Member State implements European Union’s rules.<sup>34</sup>

The first issue the Court of Justice of the European Union must deal with in any particular case, is whether the European Union law is implemented in this case. The relatively clear definition, when the European Union law is implemented and when it is not, is offered by the decision in Åkerberg Fransson case. As it was mentioned, the tax law sanction was levied on the taxpayer, who was prosecuted pursuant to the criminal charge later, based on the identical illegal behaviour of the taxpayer, who had not fulfilled his obligation to value added tax, in both proceedings. It is thereby appropriate to mention that the Council directive 2006/112/EC of 28 November 2006 on the common system of value added tax (hereinafter referred to as “*the directive on the common system of value added tax*”) does not constitute any tax law offences, punishments and other sanction measures for the breach of the taxable persons’ duties under this tax. This directive just includes the very non-specific provision of article 273, pursuant to which “*[m]ember States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.*”

It had been a matter of time until the Court of Justice of the European Union decided to interpret this general prescription of Member States’ obligation and authorization. According to its interpretation, this mentioned article means that any prescription of tax law sanctions and conduct of criminal proceedings for the tax evasion related to the provision of false information to the tax administration must be considered as the implementation of the European Union law.<sup>35</sup> Concurrently, it is decisive that the national legal regulation of Member States adopting these tax law sanctions and allowing to conduct parallel or consecutive criminal and tax law proceedings was not adopted with the aim of the implementation of the directive on the common system of value added tax since their purpose is to penalize the violation of European Union law.<sup>36</sup> The adoption of such

<sup>33</sup> Compare the explanation relating to the Charter of Fundamental Freedom, article 51, f. n. C 303/17.

<sup>34</sup> Compare s. 37 of the Court of Justice of the European Union’s decision as of 13 April 2000 in the case of Kjell Karlsson and Others, f. n. C-292/97, published in the report of cases of 2000 as the case no. I-02737.

<sup>35</sup> Compare the s. 27 of the decision in the Åkerberg Fransson case.

<sup>36</sup> The provision of false information is namely the breach of article 250 of the directive on the common system of value added tax, pursuant to which “*[e]very taxable person shall submit a VAT return setting out all the information needed to calculate the tax that has become chargeable and the deductions to be made including, in so far as is necessary for the establishment of the basis of assessment, the total value of the transactions relating to such tax and deductions and the value of any exempt transactions.*”

sanctions also represents the fulfilment of the Member State's obligation pursuant to article 325 of the Treaty on the Functioning of the European Union, which prescribes an obligation to adopt measures tackling frauds and any other illegal activities affecting financial interests of the European Union by every Member State, and such measures should act as a deterrent and be such as to afford effective protection of these interests. It is true that the own revenues of the European Union are also composed of the share on the value added tax according to European Union rules, therefore there exists a direct connection between the collection of the value added tax by the Member State and the provision of the corresponding share on the value added tax revenue to the European Union.<sup>37</sup> The Court of Justice of the European Union says as afterthought soon, *“where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised.”* Therefore, the Member States are not capable of departing from the union level of fundamental rights protection by the adoption of a lesser standard of their protection because every Member States is obliged to maintain at least the Union level of their protection if they implement the European Union law. On the contrary, nothing forbids the Member States to apply the national standards of the fundamental rights protection if this standard is firmer (broader) than the Union standard.

#### IV. NON BIS IN IDEM PRINCIPLE IN EUROPEAN UNION LAW

The basic positive source of law regulating the application of the *non bis in idem* principle in the field of European Union law is the Charter of Fundamental Rights of the European Union, which in its article 50 states that *“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”*. The Charter of Fundamental Rights of the European Union is not only one of the sources of European Union law governing this principle, quite the contrary, this principle represents so important part of the rule of law that it is already included in European Union law as a general unwritten legal principle.<sup>38</sup> For this reason, the application of this principle in the European Union law does not demand its application by the Member State only during the criminal proceedings conducted by the authority of this Member State, but the nature of this principle emphasizes that any judicial decision should be accepted by another Member State due to the necessity of the existence of the mutual trust in its criminal justice

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<sup>37</sup> Compare s. 72 of the Court of Justice of the European Union's decision as of 15 November 2011 in the case of European Commission v Federal Republic of Germany, f. n. C-539/09, published in the report of cases of 2011 as the case no. I-11235.

<sup>38</sup> SCHÜTZE, R. *European Union Law*. Cambridge: Cambridge University Press, 2015, p. 431 and following.

notwithstanding the different assessment of the subjected case by the national law of the accepting Member State.<sup>39</sup>

This time, the Court of Justice of the European Union following the interpretation of article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 deduced that the only relevant criterion for the application of this principle is constituted by constituent elements of the offence which are understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together.<sup>40</sup>

However, it is necessary to insist that it does not matter what the legal qualification of these constituent elements of the offence or of the protected legal interest according to the legislation of the Member State is.<sup>41</sup> Naturally, the evaluation of such constituent circumstances inextricably linked together belongs just and only to the competence of the national court of the Member State.<sup>42</sup> Still, there is the issue how to define the term “same acts”, i.e. the element *idem of non bis in idem* principle. This definition could not be provided by judicial authorities of a particular Member State, but the requirement for the unitary application of the European Union law demands to establish its definition by the autonomous and uniform manner for the whole European Union.<sup>43</sup> Concerning the attribute *bis* of such principle, the Court of Justice of the European Union assumes a different approach how to define this attribute<sup>44</sup>, because it is up to the Member State to determine which decision is final and therefore takes effect of *rei iudicatae*.<sup>45</sup> In general, it is clear that article 50 of the Charter of Fundamental Rights of the European Union does not prohibit the Member State from the imposition of the combination of the criminal and tax law sanction for the breach of harmonised field of legal order if the tax law sanction is not a criminal one by its nature and therefore it does not establish the obstacle to conduct criminal proceedings for the same acts due to its finality.<sup>46</sup>

However, the situation is complicated by the unclear determination of the level of protection of fundamental human rights in the European Union since the three pillars of this protection have been recognized, which are the protection of fundamental human rights under general legal principles, the Charter of Fundamental Rights of the European Union

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<sup>39</sup> Compare s. 33 of the Court of Justice of the European Union's decision as of 11 February 2003 in the joint cases of criminal proceedings against Hüseyin Gözütok and Klaus Brügge, f. n. C-187/01 and C-385/01, published in the report of cases of 2003 as the case no. I- 01345.

<sup>40</sup> S. 36 of the Court of Justice of the European Union's decision as of 11 February 2003 in the case of criminal proceedings against Leopold Henri Van Esbroeck, f. n. C-436/04, published in the report of cases of 2006 as the case no. I-02333.

<sup>41</sup> S. 29 of the Court of Justice of the European Union's decision as of 18 July 2007 in the case of criminal proceedings against Jürgen Kretzinger, f. n. C-288/05, published in the report of cases of 2007 as the case no. I-06441.

<sup>42</sup> MANGO, T. The European *ne bis in idem*. In: *europeanrights.eu* [online]. 2011 [2017-12-30]. Available at: <<http://www.europeanrights.eu/index.php?funzione=S&op=5&id=503>>.

<sup>43</sup> Compare s. 38 of the Court of Justice of the European Union's decision as of 16 November 2010 in the case Gaetano Mantello, f. n. C-261/09, published in the report of cases of 2010 as the case no. I-11477.

<sup>44</sup> Concerning the different approaches of the *bis* attribute definition, compare VAN BOCKEL, W. B. *The ne bis in idem principle in EU law. A conceptual and jurisprudential analysis*. Alphen aan de Rijn: Kluwer Law International, 2010, p. 287.

<sup>45</sup> Compare s. 46 of the Court of Justice of the European Union's decision as of 16 November 2010 in the case Gaetano Mantello, f. n. C-261/09, published in the report of cases of 2010 as the case no. I-11477.

<sup>46</sup> Compare s. 34 of the decision in the Åkerberg Fransson case.

and the European Convention on Human Rights, alongside the relations between these sources of fundamental human rights protection still remain unclear.<sup>47</sup> After all, the Charter of Fundamental Rights of the European Union has also among others the so-called reception function and it should assume the commitments arising from the European Convention on Human Rights,<sup>48</sup> therefore the essential standard of the protection of fundamental human rights regulated by the Charter of Fundamental Rights of the European Union should be the same or broader than the protection granted by the European Convention on Human Rights.<sup>49</sup> For this reason, concerning the examination of the nature of the imposed sanction as a criminal one, the Court of Justice of the European Union factually assumes the doctrine based by the European Court of Human Rights, while European Union law should be necessarily defined as a national law for the purposes of the application of the European Convention on Human Rights.<sup>50</sup> Likewise, the crucial framework for the assessment of the nature of the levied sanction and the existence of the criminal charge in the particular case in European Union law constitutes Engel criteria examining three attributes of the criminal charge, namely the qualification of the breach of law by the national regulation, the nature of the breach of law and finally, the nature and severity of the sanction which is possible to impose on the offender.<sup>51</sup> Regarding the parallel or consequent proceedings on the levy of the tax law and criminal sanction, the same circumstances must be inextricably linked together as well by the same offender affected by both proceedings for the application of the *non bis in idem* principle.<sup>52</sup> Therefore, the legal regulation allowing the imposition of the tax law sanction to the business corporation with the status of the taxable person in tax law proceedings and conduct of the criminal proceedings against the managing director of such business corporation is in accordance with article 50 of the Charter of Fundamental Rights of the European Union.

It could be deduced from the current case law of the Court of Justice of the European Union that European Union law assumes the interpretation of the *non bis in idem* principle the same as the European Court of Human Rights interprets it. Yet, it is obvious that the Court of Justice of the European Union is aware of the inconsistent case law of the European Court of Human Rights unable to find final consolidated opinion of the application of the *non bis in idem* principle in tax law matters, hence has referred that the national court is obliged to examine the existence of both proceedings for the same acts according to the Engel criteria.<sup>53</sup> Nevertheless, the question concerning the application of the *non bis in idem* principle in tax matters opens again in the case *Menci Luka*, f. n. C524/15 (hereinafter referred to as “*Menci case*”).

The advocate general reacts to the decision of the European Court of Human Rights as of 15 November 2016 in the case of *A and B versus Norway*, the decision on the application

<sup>47</sup> SCHÜTZE, R. *European Union Law*. Cambridge: Cambridge University Press, 2015, p. 430.

<sup>48</sup> TICHÝ, L. a col. *Evropské právo*. Praha: C. H. Beck, 2014, p. 99.

<sup>49</sup> Compare art. 52 para. 3 of the Charter of Fundamental Rights of the European Union.

<sup>50</sup> Compare s. 36 and 38 of the Court of Justice of the European Union's decision as of 5 June 2012 in the case of criminal proceedings against Łukasz Marcin Bonda, f. n. C-489/10, published in the electronical report of cases.

<sup>51</sup> Compare s. 35 of the decision in the Åkerberg Fransson case.

<sup>52</sup> Compare s. 25 of the decision in the Orsi case.

<sup>53</sup> Compare s. 36 of the decision in the Åkerberg Fransson case.

no. 24130/11 and 29758/11 (this case hereinafter referred also just “*A and B case*”), allowing the conduct of the parallel criminal and tax law proceedings under particular conditions and proposes the different interpretation of the *non bis in idem* principle. According to his opinion, the Court of Justice of the European Union should not follow the substantial change of the European Court of Human Rights’ case law established by the *A and B case*, mainly because:<sup>54</sup>

- he finds it difficult to abandon the protection of fundamental human rights reached by the Åkerberg Fransson case solely because the change of the interpretation of article 4 of Protocol No. 7 to the European Convention on Human Rights;
- the change of the interpretation of the *non bis in idem* principle in the *A and B case* is based on the concession to the states unwilling to accept the application of this principle;
- the fundamental human rights granted by the Charter of Fundamental Rights of the European Union should be easily understood and their exercise must be foreseeable and legally certain, but an acceptance of conclusions under the *A and B case* would cause opposite impact.

The advocate general emphasizes that the European Convention on Human Rights can grant a broader protection of fundamental human rights and the court should consider this measure since the European Court of Human Rights has tried to limit the guarantees of an individual derived from article 4 of Protocol No. 7 to the European Convention on Human Rights.<sup>55</sup> It is true, that “[t]he duality of parallel (administrative and criminal) proceedings, regardless of their degree of closeness in time, and of the associated penalties of a criminal nature at the end of those proceedings imposed by the punitive authorities of the State which rule on the same unlawful acts, is not a necessary requirement permitting the limitation of the right protected by the principle *ne bis in idem*, even if it has the laudable aim of protecting the Union’s financial interests and ensuring that serious fraud does not go unpunished”.<sup>56</sup> However, there is not any restriction preventing Member States to impose administrative and criminal penalty in respect to the same acts if the administrative penalty is not of a criminal nature, therefore the Court of Justice of the European Union should maintain the clarity of the application of the *non bis in idem* principle as it was established by the Åkerberg Fransson case<sup>57</sup>, even some Member States prefer to subordinate the protection of fundamental human rights to their financial consideration.<sup>58</sup>

Nonetheless, the Italian legislation similar e. g. to the Czech one subjected to the assessment in the *Menci case* does not constitute the necessary coordination of parallel criminal and tax proceedings, it does not oblige the state authorities conducting these proceedings to cooperate with each other with the aim to prevent the offender from the inappropriate infringement of his fundamental human rights. For this reason, even if the Court of Justice of the European Union will decide to incline to the European Court of

<sup>54</sup> Compare s. 69–73 of the Opinion of advocate general in the *Menci case*.

<sup>55</sup> Compare s. 77 of the Opinion of advocate general in the *Menci case*.

<sup>56</sup> S. 88 of the Opinion of advocate general in the *Menci case*.

<sup>57</sup> Compare s. 89 of the Opinion of advocate general in the *Menci case*.

<sup>58</sup> Compare s. 78 of the Opinion of advocate general in the *Menci case*.

Human Rights' conclusion in the A and B case, the legal system, as the Italian or the Czech is, will not successfully pass the application of the *non bis in idem* principle.

## CONCLUSION

Almost all attention is focused on the application of the *non bis in idem* principle in tax matters pursuant to the case law of the European Court of Human Rights based on the assessment of the Engel criteria in every case afflicted by two proceedings dealing with identical facts or facts, which are substantially the same. Since the interpretation of the relevant article 4 of Protocol No. 7 to the European Convention on Human Rights has changed substantially with the decisions in the A and B case, we must ask the question how this issue should be taken into account for the purposes of the European Union's law application. The principle *non bis in idem* is possible to find in its codified as well as uncodified form in the European Union legislation, despite that it is still relevant to divide the competences between the European Union and Member States through the universal inapplicability of article 51 paragraph 1 of the Charter of Fundamental Rights of the European Union, because it is applicable just in case when European Union law is implemented by the Member State. After all, the implementation of European Union law is interpreted extensively, therefore it also covers such situation, when European Union law does not prescribe explicitly the measures which should be adopted by the Member State by their transposition into the national legal order, but allows the Member State to decide what sanction measures will be adopted. Hence, the national legal norm prescribed by the national tax procedural code must be interpreted as the implementation of European Union law if it is applied on the case of the breach of harmonised taxes.

The content of the *non bis in idem* principle itself is due to the European Union conception of fundamental human rights protection similar to the conception adopted by the European Court of Human Rights interpreting the European Convention on Human Rights so far. Therefore, the Engel criteria are decisive for the implementation of European Union law and the assessment, whether the particular case is conducted based on the criminal charge and so the imminent sanction has the criminal nature. However, the Court of Justice of the European Union probably faces the task to decide what should be the interpretation of fundamental human rights in the European Union law in the Menci case with a definitive effect. The first potentially adoptable approach is to assume the substantial change of European Court of Human Rights' case law in the A and B case and to derive that the Member States could adopt the legislation allowing to conduct parallel criminal and tax law proceedings. This approach enables the European Union to accede to the European Convention on Human Rights in future, but on the other hand, it suffers from the negatives such as the legal uncertainty of the application of fundamental human rights caused by the failure of the European Court of Human Rights to adopt a universal consolidated interpretation of the *non bis in idem* principle for more than the last three decades.

Thus, according to my opinion and the opinion of the advocate general Campos Sánchez Bordona, the preferred approach is to establish an own broader conception of the *non bis in idem* principle applied within the implementation of European Union law. There are still some negatives connected with this approach. If the Court of Justice of the European Union adopts this approach, the Member States will face a double standard of

the application of the *non bis in idem* principle in tax matters, therefore they should distinguish between cases where European Union law is implemented (for instance the sanctioning of the breach of harmonised tax law regulation by the taxable person) and where it is not. Still, the way how to overcome this negative aspect of this approach is quite simple if the Member State decides to adopt a broader fundamental human rights protection established by the Charter of Fundamental Rights of the European Union and by the case law of the Court of Justice of the European Union concerning the application of the *non bis in idem* principle in all tax matters of the Member State. Lastly, the European Court of Human Rights itself acknowledges that a single procedure imposing the penalty for the breach of tax law is a better way of preventing the breach of the *non bis in idem* principle than the case of dual criminal and tax law proceedings.<sup>59</sup>

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<sup>59</sup> Compare s. 130 of the decision of the European Court of Human Rights as of 15 November 2016 in the case of A and B versus Norway, the decision on the application no. 24130/11 and 29758/11.