

## REGULATING THE NE BIS IN IDEM PRINCIPLE IN THE NEW CODE OF CRIMINAL PROCEDURE. TERMS AND LEGAL EFFECT

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*Abstract: Stipulated at first in article 14, paragraph 7 of The International Pact on Civil and Political Rights [1], which was, further, developed in art. 4 of the Protocol no. 7 at the European Convention for the Protection of Human Rights and Fundamental Freedoms [2] and included in multiple international instruments of cooperation [3], the principle "ne/non bis in idem" reflects a person's right to not to be prosecuted, trialed or convicted again for the same offence. In other words, this principle guarantees the interdiction of prosecution, criminal trial and punishment of a person twice for committing the same crimes. With the entry into force of the new Code of Criminal Procedure [4] the above rule has been expressly analyzed in art. 6, making it, along with the other fundamental ideas on which the entire structure of the criminal procedure law is built on, a core principle with sine qua non value for all phases of the process. This study aims to highlight, on the one hand, the importance and the application of this rule in the Romanian criminal trial, and on the other hand puts into discussion and argues the rules that are to be followed in case of the existence of foreign elements whose causality is due mainly to international judicial cooperation in criminal matters. Last but not least, the analysis is supported by reference to domestic and international jurisprudence - particularly the European Court of Human Rights and the Court of Justice of the European Union - in terms of the interpretation and application of this fundamental rule.*

*Keywords: principle, criminal offense, criminal prosecution, trial, judicial cooperation.*

### Introduction

In the recent decades the regulations in the field of human rights were widespread and standardized in stages, along with exceeding the limits imposed by traditional principles specific to public international law, according to which the quality of subject of international law of the States was the only one recognized. At the same time, the socio-political discourse and the current European jurisprudence constantly bring in the foreground the imperative necessity of respecting human rights and fundamental freedoms, field that has the virtues of an essential standard in order to appreciate any State as being democratic.

The European Convention on human rights and fundamental freedoms (hereinafter referred to as the Convention) was the first and the main legal instrument at this level that gave the opportunity to individuals to become subjects of international law by putting them on equal grounds with the State positions whose victims they claimed to be, in the situations of alleged violation of the rights recognized. The above aspect was strengthened and regulated including by the International Covenant on Civil and Political Rights and other treaties and conventions subsequently issued at the European level, to which Romania is a part of, including in criminal matters [5].

This fact is the effect of the appreciation and recognition of the inalienable nature of human rights, by accepting the opinion that the fulfilment of these rights cannot be refused to any person, and their loss is morally impossible because the human being cannot be devoid of them and live at the same time [6].

Among the fundamental rights regulated by the Convention a special place is occupied by the right to not be tried or punished twice for the same crime. The inclusion in the Convention was achieved through article 4 of Protocol No. 7 according to which nobody can be criminally prosecuted or punished by the jurisdictions of the same State for committing the crime for which he has already been acquitted or convicted by a final decision in accordance with the criminal law and procedure of that State. From this rule, the Convention has established two situations that admit the possibility of reopening the criminal process, namely

the existence of new facts, recently discovered or a fundamental flaw that can affect the decision rendered. Previously, this right was included in article 14, paragraph 7 of the International Covenant of ONU on Civil and political rights, and thus the formalization of one of the fundamental rights in the field of criminal proceedings is achieved.

### **The scope and application conditions**

The explicit stipulation of the right in question in the internal regulations was made through the new Code of criminal procedure whose article 6 provides that no person can be prosecuted or judged for the commission of an offence, if for the same deed a final criminal judgement was pronounced even under another legal qualification. This fundamental rule is consecrated by the phrase, “*ne bis in idem*”. This does not lead to the conclusion that in the old regulation of the criminal procedure law the recognition and effects of this principle were not found [7], but there were no explicit consecration, in the form of a general binding rule for all stages of the criminal process, according to the text of the Convention. The express inclusion of this rule into domestic law was expressly achieved, for the first time, in the field of international judicial cooperation in criminal matters [9], about which we will talk later.

Semantically, the expression *non/ne bi in idem* literally translates from Latin through the phrase, “not twice for the same (guilt)” and is a legal concept originating in the roman civil law, whose essence equates the doctrine established in common law jurisdictions concerning the double risk (double jeopardy).

In legal terms this rule involves the application of a single sanction for the same illegal act as a violation of the law should correspond to a single legal sanction. In other words the person who, through his conduct, violated the legal order will respond once for the illegal deed. Under criminal aspect we must take into account the act, in its materiality, and not the retained offence whose framing can be wrong.

As well as it was appreciated by the doctrine [8], for the application of the right to not be tried or punished twice the following conditions must be met:

1. The existence of a final sentencing court ruling of a criminal punishment, the waiver of sentencing application, deferral of the penalty’s application, acquittal or cessation of the criminal process against a person against which an accusation in criminal matters was formulated;

2. the decision in question must be final in accordance with the criminal procedure of that State. This fact imposes the specification that the decision should enjoy the authority of a final decision (*res iudicata*) regardless of the manner it was obtained in (exhaustion of ordinary ways of attack or their non-exercise). If the decision can be subject to appeal in accordance with the procedural internal/national norms, then the condition is not fulfilled. From the point of view of the roman criminal procedural law the decisions remain definitive under the conditions of article 551 and 552. One of the main effects of the definitive court ruling consists in the impossibility of capitalizing the right to action in a material sense, with actual consequences regarding the prevention of new criminal prosecutions (implicitly judgements) concerning the same act and against the same person. From this point of view, if a court will ascertain the existence of an irrevocable court decision, it will have to imperatively accept the irrevocable solution and respect the interdiction to judge or to pronounce itself in such a cause. By complying with this rule the court prevents situations that can occur if different final rulings will apply different sanctions for the same or different nature, by one or more courts, in connection with the same offence and person.

3. The competent judicial authorities must make again the same accusation on the same criminal acts and against the same person. This is irrelevant if in the second procedure the facts coincide or differ as legal qualification.

From the territorial point of view, this right has a limited scope to the territory of the state whose authorities have pronounced the decision final in question, aspect which results

from the text of the Convention (which refers only to those procedures performed in front of jurisdictions - judicial bodies – of the same State).

The principle does not preclude the possibility of the simultaneous superposition of multiple forms of legal liability concerning the illegal deed of the same person if the latter violates a plurality of rules of legal nature. In these situations the sanctions associated with each field of law - specific to the rules broken - accumulate and, consequently, the same effect extends over all forms of legal liability.

The rule also excludes the possibility of applying to the same person, for a single and the same illicit deed of two or more identical sanctions as nature, because the restoration of the rule of law imposes for every violation of the legal rules, the application of a single specific sanction which depends exclusively on the nature of the legal rule infringed. When there is a multiple violation of the rules of social life that aims at legal norms whose nature is different and if the overlay of two or more sanctions of the same nature that would be applied to the same person, for a single illicit deed does not take place, the rule of law is not violated. Per a contrario, in a situation where a person commits an offence within the sphere of criminal matters, he can not be held responsible also from an administrative point of view for the same offence because an offence cannot be simultaneously both felony and misdemeanor. From this point of view the cumulation of the criminal liability with the administrative one is excluded.

The solution is not the same in the case of overlapping criminal liability and disciplinary liability. Thus, if in the execution of the contract of employment the employee commits an illicit deed constituting simultaneously both crime and misconduct, then the punishment stipulated by the criminal law, as well as the disciplinary sanction can be applied. Such statements do not constitute a violation of the principle of non bis in idem as we are dealing with two types of responsibility of different nature, which require the application of different sanctions.

#### **Effects**

The main effect of the application of this rule is the impossibility of overlapping penalties for an offence of the same nature.

From the criminal procedural point of view the effects are different depending on time, trial phase and ascertaining conditions authority of a final decision. Also for the argumentation of the effects of this rule of law article 16, paragraph 1, letter i, of the CPC is necessary. Thus, if the authority of res judicata is established:

a) prior to the commencement of the criminal prosecution (but after referral) or during the criminal prosecution, the only solution will have to be the termination of the prosecution in accordance with article 314, paragraph 1, letter a in conjunction with article 16, paragraph 1, letter I of the CPC;

b) in the preliminary room, the judge will have to acknowledge it and to rule by reasoned ruling in the council chamber and without the prosecutor and the defendant in accordance with art. 345, paragraph 1, CPC and implicitly to return the case to the Prosecutor according to article 346, paragraph 3, letter b, CPC, excluding all the evidence administrated during criminal prosecution. After receiving the file the Prosecutor will have to pronounce the solution at point a);

c) in the judgment phase, the Court will have to order the cessation of the criminal process in accordance with art. 396, paragraph 6 reported at art. 16, paragraph 1, letter I of the CPC.

#### **International judicial cooperation in criminal matters**

The incidence of this rule in the area mentioned was concretely introduced in 2006 by the former article 10 of law no. 302/2004 [9], at present article 8 due to the re-publication of the above mentioned law in 2011, whose name is, the “ne bis in idem”.

In accordance with paragraph 1 of the legal text mentioned, international judicial cooperation is non admissible if in Romania or in any other State, a criminal trial for the same offence took place and if the person was either acquitted or the criminal process was terminated (we appreciate that the other solutions mentioned in the conditions laid down in paragraph 1 of this paper are applicable, if any one of those solutions was disposed by an instance of Romania) or if the punishment applied in question was executed or made subject to amnesty or pardons in its totality the unexecuted part times. Previous alternative solutions must be as the Foundation for a final court ruling. The above shall not apply if the judicial international cooperation assistance is requested to review the final decision in, for one of the reasons that justify the promotion of one of the extraordinary remedy provided for by the criminal procedure code, if Romania is party to an international treaty containing provisions which are more favourable as regards the principle of non bis in idem. Previous non-imperative within the courts and prosecution has the obligation to examine ex officio and in situations in which they find violations of these rules, to order the cessation of the criminal process. Also, according to article 129 of Law 302/2004, a persona about which it was pronounced a final ruling on the territory of a Member State of the Schengen space can not be prosecuted or judged for the same acts if, in case of conviction, the decision was executed, is being enforced or can no longer be executed under the law of the State which has pronounced the sentence. Exceptions to this rule are mentioned in paragraph 2 under which the facts covered by the foreign decision were committed in whole or in part on the territory of Romania, the facts covered by the foreign decision constitute a crime against the State' security or against other essential interests of Romania or the facts covered by the foreign decision were committed by a roman clerk by violating his work duties. Paragraph 3 of the same article in conjunction with sentence 2 of paragraph 2, letter a, represents an exception to the exception (so, rule) in the sense that, if the facts of a foreign decision were committed in part in the territory of the Member State where the decision has been pronounced or if for the same facts, the concerned Member State asked to take over the criminal prosecution times or has granted the extradition of the person in question, the latter can no longer be prosecuted or judged for the same facts.

#### **The jurisprudence of ECHR and of the CJEU [10]**

As was properly appreciated by doctrine [11] the most efficient activity in terms of emphasizing the field of applicability of the principle non bis in idem or ne bis in idem (according to references in the EU) is that of the Court of Justice of the European Union. In 2003 the mentioned Court made its first ruling concerning the interpretation of the Convention implementing the Schengen Agreement (CISA). The cause was called Gozutok and Brugge and actually represents two reunited folders by the European Court and registered with the numbers 187/01 and 385/01. In particular, a Turkish citizen who had been living in the Netherlands where he was administering a cafe was discovered with a few kilograms of hashish and marijuana. The Dutch Public Ministry proposed a transaction under the national criminal law, in the sense of paying of a sum of money to avoid condemnation. Mr. Gozutok complied and paid the sum of money. In the same period, German authorities have sentenced him to one year and five months in prison, based on an information given by a bank in this country in connection with suspicions of involvement in drug trafficking. Both the convict and the Public Ministry attacked the decision pursuant to article 54 CISA because the decision taken by the Dutch authorities had the value of re judicata, thus producing a double conviction for the same Act. In the other case, a German citizen - Mr. Brugge - caused a Belgian citizen bodily injury as a result of which he became incapable of working. The Prosecutor, who led the investigation, had proposed a deal in exchange for a sum of money. The fine was paid, and the Prosecutor has ordered the termination of the process. However, the author was convicted because the victim had introduced a separate action in a Belgian Court which

decided to suspend the proceedings and to ask the Court of Justice for a preliminary issue. The Court of Justice of the European Union considered that the decision of the Public Ministry of terminating the procedure is a form of administering justice. Moreover, the Court made it clear that this type of procedure penalizes the antisocial conduct of the accused, similar to the situation of a person who has been definitively convicted and executed the punishment. This Court considered that the implementation of the principle of non bis in idem means that States have mutual trust in their criminal justice systems and that each of them recognises the criminal rules enshrined in other States, even when they are different from ones own.

In the period that followed, the CJEU, through the resolutions pronounced, managed the interpretation of some notions tightly connected by the application field of the principle of non bis in idem, with profound implications upon the regulations of the Member States [12].

The European Court of human rights had and still has a particularly important contribution concerning the interpretation and application of the ne bis in idem principle. Thus the first case with implications on the principle invoked is *Gradinger v. Austria* [13]. In this present case the plaintiff before the Court, who drove a vehicle under the influence of alcohol, caused a traffic accident resulting in the death of a cyclist and was convicted by an Austrian Court for the crime of homicide by imprudence. The Austrian Court did not remember, the aggravation of the commission of crime under the influence of alcohol considering the fact that the threshold has not been surpassed to justify the legal deepened punishment. Later on, the district's administration in which the accident has taken place took against the complainant a "criminal decision", through which the offender was sanctioned with a fine for driving a motor vehicle on public roads intoxicated. At the end of the proceedings the Court ruled in its favour motivating in essence that the two separate decisions of the Austrian Court, respectively of the district administration, were built on the same behaviour of the author. In addition, the Court found that the crime provided and punished by the Austrian road code is but one aspect of the offense punished by the text corresponding to the Austrian criminal code. Although the European Court settled multiple causes with incidence on the interpretation and application of the ne bis in idem principle, but due to objective conditions we do not propose to detail these situations [14].

As it was correctly appreciated [15] article 4 of Protocol No. 7 to the ECHR has incidence only in criminal matters and solely aims the prohibition of a double criminal imposition. The criminal character of offences or sanctions end according to the autonomous rules imposed by the ECHR, in close connection with the jurisprudence relating to article 6 of the Convention. Moreover, the Convention did not restrict the cumulation of criminal liability with other forms of liability (disciplinary, civil) for the same offence, but the qualification of liability is made in relation to the ECHR jurisprudence and not with respect to the domestic laws regulations.

Without exhaustively addressing the issues specific to the different legal situations which may be subject to the non bis in idem principle, taking into consideration the objective limitations imposed, this study is intended to be a beginning in explaining the mode of interpretation and application of this rule in accordance with the new Romanian provisions of the criminal procedure law. On the other hand the socio-political-legal evolution with concrete reference to the rights and obligations arising from the accession to the European Union, requires the knowledge of both rulings issued by the CJEU and particularly those emanating from the ECHR, taking into account the fact that the need for uniformity of community law tends to gradually replace more and more institutions of national law.

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