JURISPRUDENTIAL ASPECTS REGARDING THE APPLICATION OF THE *NE BIS IN IDEM* PRINCIPLE IN THE AREA OF FREEDOM, SECURITY AND JUSTICE WITHIN THE EUROPEAN UNION

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Abstract

The establishing of the Area of Freedom, Security and Justice represents one the main features which individualizes EU among other international intergovernmental organizations and it contributes to the integration of the Member States „with respect for fundamental rights and for the different legal systems and traditions of the Member States".

The Third Part of the Treaty on the functioning of the European Union, named „Area of Freedom, Security and Justice" (AFSJ), regulates the policies on border checks, asylum and immigration, judicial cooperation in civil matters, judicial cooperation in criminal matters and police cooperation which are covered by the shared competence of the Union with the Member States.

As it is stated in the Treaty, this field is regulated at European level taking into account the national systems of law, including common law principles and „traditions" of the Member States; one of these principles is ne bis in idem provided for by different types of rules within the EU Law on: the Area of Freedom, Security and Justice, the Schengen Area, the European Arrest Warrant, the EPPO, and also the provisions of the Charter of Fundamental Rights of the European Union.

These rules have been interpreted by the CJEU, which has established the content of the principle applied in the Area of Freedom, Security and Justice and, also, the conditions regarding the restrictions which could be brought to this principle.

The analysis of the jurisprudential findings underlines that the interpretation made by the Court of Luxembourg is compulsory for the European institutions, the Member States and the citizens and also the companies, and it is pronounced with the respect of the limits of the EU competencies and in line with the ECtHR decisions.

Keywords: *ne bis in idem principle, area of freedom, security and justice (AFSJ), shared competence, CJEU, restrictions.*

1. Introduction

The *ne bis in idem* principle represents a general legal principle found in various national legal systems, including EU law, which means that no one can be prosecuted or punished twice for the same crime.

Regarding the application in the EU law, we consider useful both the clarification regarding the wider context of its application, as well as the outline of the relevant CJEU jurisprudence. As it is stated, the interpretation given by the CJEU to the sources of EU law is binding *erga omnes* and represents itself an essential source of law, which will be connected with the interpreted rule or principle. Within the EU, which is an integration international intergovernmental organization, the CJEU holds the monopoly on the interpretation of EU law, being the unique benchmark for interpretation, so necessary in a system that is based on the integration method, which involves the harmonization of national rules and uniformity of application of the European rules and is based on the uniformity of the interpretation of EU law.

The principles represent a very important source of law for EU law, being, according to the jurisprudence of the CJEU, on second place in the hierarchy of sources of EU law, after primary law (EU Treaties)[1]. In this

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[1] M.-A. Dumitrașcu, *Dreptul Uniunii Europene I*, Universul Juridic Publishing House, Bucharest, 2021, p. 223-227.

framework, the *ne bis in idem* principle is a principle that comes from domestic and international law, having, at the same time, a specific representation in the matter of EU law.

Thus, through this paper, we aim to achieve the following aspects: underlining the type of competence that the EU has in the AFSJ and, implicitly, in the matter of the criminal cooperation; the legislative consecration of the principle in EU law and territorial application; correlation with the ECtHR jurisprudence; defining the content and establishing the conditions for restricting the application of this principle, the purpose being to identify the specificity of the interpretation of the CJEU from the perspective of EU competences in criminal matters.

2. Shared competence between the EU and the Member States in the AFSJ

The Treaty of Lisbon, entered into force in 2009, which eliminates the three-pillar structure of the Union, establishes, for the first time in an European Community/Union Treaty, the categories of the European Union[2] s competences to which it allocates a series of fields, the AFSJ being attributed to the shared competence of the EU with the Member States, according to art. 4 para. 2 lit. (j) TFEU. It has its origins in the 3rd pillar - *Justice and internal affairs* established by the Maastricht Treaty within a Union created initially without legal personality; this pillar of intergovernmental cooperation is similar with the one regarding the *Common Foreign and Security Policy* (CFSP), these two pillars being different from the community one (the first pillar) subject to integration. The Treaty of Amsterdam, entered into force in 1999, brings a first important change to the 3rd pillar, in the sense that it applies the integration method to a part of its domains, namely visa, asylum, immigration and cooperation in civil matters; consequently, only the police and judicial cooperation in criminal matters remains in the field of intergovernmental cooperation[3].

The shared competence is defined, according to art. 2 para. (2) TFEU, as follows: *„The Union and the member states can legislate and adopt legally binding acts in this field. Member States exercise their competence to the extent that the Union has not exercised its competence. Member States exercise their competence again to the extent that the Union has decided to stop exercising it".*[4]

However, as stated in the doctrine, „the nature of the sharing of competence between the EU and the Member States can only be discovered by examining the detailed provisions of the respective field. Sharing is not the same in all AFSJ domains"[5]; thus, the exact competence of the Union can only be identified by referring to the specific provisions of Title V, Third Part of the TFEU, entitled „Area of Freedom, Security and Justice" within art. 82 para. (1) is relevant in our analysis[6]: *„Judicial cooperation in criminal matters within the Union is based on the principle of mutual recognition of court judgments and judicial decisions. The European Parliament and the Council, deciding in accordance with the ordinary legislative procedure, adopt the measures regarding: (a) the establishment of rules and procedures to ensure the recognition, throughout the Union, of all categories of court rulings and judicial decisions; (d) facilitating cooperation between the judicial or equivalent authorities of the Member States in matters of criminal prosecution and execution of decisions*".

In conclusion, it can be noticed that „more and more fields, such as security, immigration, asylum issues (sensitive issues, also related to the sovereignty of the state and its royal functions) cease to be resolved by each state in isolation. With the progressive establishment of a Common Foreign and Security Policy and the Area of Freedom, Security and Justice, they are subject to common deliberative and decision-making procedures"[7] which lead to the adoption of legislative acts, at the Union level, binding for the Member States as a result of the attribution of competence to the EU.

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[2] Exclusive competence (art. 3 TFEU), shared competence (art. 4 TFEU), coordination competence (art. 5 TFEU) and competence to support, coordinate and complement the action of the member states (art. 6 TFEU).

[3] A. Fuerea, *The European Public Prosecutor's Office in the institutional architecture of the European Union*, in *Challenges of the Knowledge Society*, Bucharest, May 20th 2022, 15th ed., *http://cks.univnt.ro/articles/16.html*, p. 270-271.

[4] M.-A. Dumitrașcu, O.-M. Salomia, *Dreptul Uniunii Europene II*, Universul Juridic, Publishing House, Bucharest, 2020, p. 52 *et seq.*

[5] P. Craig, G. de Búrca, *Dreptul Uniunii Europene. Comentarii, jurisprudenţă şi doctrină*, Hamangiu Publishing House, Bucharest, 2017, 6th ed., p. 1097.

[6] Craig, de Búrca, *Dreptul Uniunii Europene. Comentarii, jurisprudenţă şi doctrină*, 1106: „The Treaty of Lisbon has solved some problems regarding the EU's sphere of competence vis-à-vis criminal law, although there are still some difficult problems of interpretation. (...) Article 82 is currently the central provision in this field".

[7] V. Constantinesco, S. Pierré-Caps, *Drept constituțional*, Universul Juridic Publishing House, Eunomia Collection, Bucharest, 2022, p. 357.

3. Enshrining the principle - provisions regarding: Area of Freedom, Security and Justice, Schengen Area, and also the provisions of the Charter of Fundamental Rights of the European Union (CFREU)

At European level, under the Council of Europe rules, the establishment of the *ne bis in idem* principle was achieved through Protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 22. XI.1984[8], whose art. 4 entitled *The right not to be tried or punished twice* provides that „*no one can be prosecuted or punished criminally by the jurisdictions of the **same State**[9] for the commission of the crime for which he was already acquitted or convicted by a final decision according to the law and the criminal procedure of this State*„, as well as the fact that „*no derogation from this article is permitted under*" the Convention.

Subsequently, art. 54 of Chapter 3 entitled „Application of the *ne bis in idem* principle" of the *Convention implementing the Schengen Agreement of 14 June 1985* between the governments of the states of the Benelux Economic Union, the Federal Republic of Germany and the French Republic *on the gradual abolition of border controls common*, signed in Schengen on June 19, 1990 and entered into force on March 26, 1995 (OJ 2000, L 239, p. 19, special ed., 19/vol. 1, p. 183, hereinafter referred to as „CISA")[10] provides: „*A person against whom a final judgment has been rendered in a trial in the territory of a Contracting Party may not be the subject of criminal prosecution by another Contracting Party for the same acts, provided that, in the situation where a penalty has been rendered, it to have been executed, to be in the process of being executed or to be no longer enforceable according to the laws of the contracting party that pronounced the sentence.*"

Currently, alongside this EU primary law rule from the Schengen acquis, art. 50 CFREU, entitled *The right not to be tried or convicted twice for the same crime* enshrines the fact that „no one can be tried or convicted for a crime for which he has already been acquitted or convicted **within the Union**, by final court decision, in accordance with the law".

The granting the value of EU primary law of this principle is also accompanied by underlining the federative element of the EU construction because, if at the ECHR level, the principle is applied within **the same State**, the CFREU establishes the obligation to respect this principle **within the Union**, the territorial domain of application being extended to all Member States.

Regarding the application of the *ne bis in idem* principle based on the Schengen Convention, the Court of Luxembourg emphasized the fact that it „has been recognized as a fundamental principle of Community law by jurisprudence"[11].

At the national level, art. 6 CPP regulates the *ne bis in idem* principle, to which are added the provisions of art. 8 of Law no. 302/2004 on international judicial cooperation in criminal matters, republished, with subsequent amendments and additions, as well as art. 135 of the same law being part of the category of provisions for the implementation of the Convention of June 19, 1990 implementing the Schengen Agreement of June 14, 1985 on the gradual abolition of controls at common borders, Schengen: „(1) *A person in respect of whom a definitive judgment has been rendered on the territory of a member state of the Schengen area, it cannot*

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[8] *http://ier.gov.ro/wp-content/uploads/2018/11/Protocolul-nr-7.pdf*.

[9] The phrase „by the jurisdictions of the same state" limits the application of the article to the national level. Through therefore, the organs of the Convention declared inadmissible the heads of request regarding the repetition of the procedure criminal offenses in different countries [*Gestra v. Italy, Commission* decision; *Amrollahi v. Denmark* (Dec.); *Sarria v. Poland* (Dec.), § 24, *Krombach v. France* (Dec.), §§ 35-42].

In *Krombach v. France* (Dec.), the applicant had been convicted in France of crimes for which he claimed he had previously been acquitted in Germany. It also appreciated that the fact that both France and Germany are EU member states and that European Union law gives the *ne bis in idem* principle a trans-state dimension at the Union level does not affect the applicability of art. 4 of Protocol no. 7. Next, he emphasized that, pursuant to art. 53, the Convention does not prevent States Parties from granting more extensive legal protection to the rights and freedoms they guarantee, including in accordance with their obligations under international treaties or EU law. Through its mechanism of collective guarantee of the rights it enshrines, the Convention strengthens, according to the principle of subsidiarity, the protection offered at the national level, without imposing limits on this protection (point 39).

[10] CISA was included in Union law through the Protocol on the integration of the Schengen acquis within the European Union, annexed to the Treaty on European Union and to the Treaty establishing the European Community through the Treaty of Amsterdam (OJ 1997, C 340, p. 93, hereinafter referred to as the „Schengen Protocol"), with the title „Schengen acquis", as it is defined in the annex to the said protocol. See M.-A. Dumitrașcu, *Dreptul Uniunii Europene I*, *op. cit.*, p. 101.

[11] CJEU judgment of March 9, 2006, *Criminal proceedings against Leopold Henri Van Esbroeck*, C-436/04, ECLI:EU:C:2006:165, para. 40. See O.-M. Salomia, *Instrumente juridice de protecție a drepturilor fundamentale la nivelul Uniunii Europene,* C.H. Beck Publishing House, Bucharest, 2019, p. 86.

be prosecuted or tried for the same facts if, in case of conviction, the judgment has been executed, is in the process of being executed or can no longer be executed according to the law of the state that pronounced the sentence".

4. The content of the principle in the light of the CJEU jurisprudence

The analysis of the principle and, respectively, of its essence can be carried out according to the rules that established it, the Court of Luxembourg ruling by referring to it, but also to the entire legal system of the EU and to the ECtHR jurisprudence; also, the CJEU ruled both on what „bis" and „idem" means.

Thus, in a definition of this principle, «after examining the scope of the right not to be tried or punished twice for the same crime, as stated in various international instruments (International Pact on Civil and Political Rights, the Charter of Fundamental Rights of the European Union, the American Convention of Human Rights) and noticing that the approach that emphasizes the legal framing of the two crimes is too restrictive in terms of a person's rights, the Court of Strasbourg considered that art. 4 of Protocol no. 7 must be interpreted as prohibiting the prosecution or trial of a person for a second „crime", to the extent that it is based on identical facts or facts that are „essentially" similar to those that are at the origin of the first crime [points 79-82, see also *A and B v. Norway (MC)*, § 108]». [12]

4.1. The definition of" bis" by the Court of Luxembourg

The definition of „*bis*" is taken up by the CJEU in the judgment of March 22, 2022, *bpost SA v. Autorité belge de la concurrence*[13], issued in a request for a preliminary ruling on the interpretation of art. 50 CFREU. The dispute between bpost SA, on the one hand, and the Autorité belge de la concurrence, on the other, concerned the legality of a decision by which bpost was obliged to pay a fine for committing an abuse of a dominant position (art. 102 TFEU). In this case, the CJEU states that „from the findings made by the referring court it appears that the decision of the regulatory authority in the postal sector was annulled by a decision that acquired *res judicata* authority, according to which bpost was acquitted in the criminal proceedings in which it been judged, based on the postal sectoral regulation. Subject to verification by the referring court, it thus follows that the first procedure was completed by a final decision, in the sense of the jurisprudence mentioned in the previous point (point 30)".

In the conclusions of the Court of Luxembourg, at point 29, it shows that «as regards the condition „*bis*", in order to be able to consider that a court decision has been definitively pronounced regarding the facts that are the subject of a second procedure, it is necessary not only for this judgment to have remained final, but also for it to have been pronounced following a resolution on the merits of the case (see by analogy the Judgment of June 5, 2014, *M,* C-398/12, EU:C: 2014:1057, points 28 and 30)».

So, in order to define what „*bis*" means, **these two cumulative conditions** must be met, in our opinion: the trial of the merits of the case and the existence of a final decision, pronounced accordingly.

However, the analysis of the definition of „*bis*" cannot be limited only to the determination of these two conditions, but **the cumulation of sanctions** that can be pronounced, justifiably, without violating the essence of these notions, must also be highlighted.

Thus, influenced by the practice of some national courts that allows the joint imposition of administrative and criminal sanctions regarding the same conduct, the two Courts of Luxembourg and Strasbourg „revised their approach to the notion of *bis* and significantly reduced the protection offered by the principle *ne bis in idem*"[14]; thus, this interpretation was established by the judgment of the European Court of Human Rights in the case of *A and B v Norway*, followed by the judgment of the CJEU in the cases of *Menci, Garlsson and Di Puma and Zecca*. Under intense pressure from Contracting States defending their practice of two-track enforcement systems, in the case of *A and B v. Norway*, the Grand Chamber redefined the notion of *bis* and admitted that, in certain circumstances, a combination of criminal and administrative proceedings does not constitute a duplication of the procedures prohibited by art. 4 of Protocol no. 7 of the ECHR[15].

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[12] ECtHR, Guide on art. 4 of Protocol no. 7 to the European Convention on Human Rights, The right not to be tried or punished twice, updated on April 30, 2020, p. 12, *https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_7_RON.pdf*.

[13] ECLI:EU:C:2022:202.

[14] G. Lasagni, S. Mirandola, *The European ne bis in idem at the Crossroads of Administrative and Criminal Law,* in *https://eucrim.eu/articles/european-ne-bis-idem-crossroads-administrative-and-criminal-law/*.

[15] *Ibidem*.

In the four Italian cases, the Court of Luxembourg is asked to interpret this principle within the VAT Directive (Council Directive 2006/112/EC of 28.11.2006 on the common system of value added tax) and the Financial Markets Directive (Directive 2014/65/EU of the European Parliament and of the Council of 15.05.2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU):

1) in case C-524/15, *Menci*, according to the factual situation, the Italian Financial Administration applied an administrative sanction to Mr. Luca Menci for non-payment of VAT for the year 2011; subsequently, Mr. Menci was prosecuted for the same acts before the Tribunale di Bergamo (Bergamo Court, Italy)".

„The objective of guaranteeing the full collection of the VAT due on the territories of the Member States is likely to justify an accumulation of procedures and sanctions of a criminal nature (*Menci* 44 and 63). As regards the national regulation that allows the initiation of criminal proceedings even after the application of a definitive administrative sanction of a criminal nature, the Court observes, subject to verification by the referring court, that this regulation allows in particular to ensure that the respective set of proceedings and sanctions it authorizes does not exceed what is strictly necessary to achieve the objective (*Menci* 57)" [16].

2) in case C-537/16, *Garlsson Real Estate and others* - in 2007, the Italian National Commission for Companies and Stock Exchange (Commissione Nazionale per le Società e la Borsa, „Consob") applied an administrative sanction to Mr. Stefano Ricucci for market manipulation, which challenged this decision before the Italian courts. In his appeal to the Corte Suprema di Cassazione, he argued that he had already been definitively sentenced in 2008 for the same acts to a criminal sanction that was extinguished by amnesty. Through requests for preliminary decisions, it is requested to assess the compatibility of the cumulation of procedures and sanctions with the *ne bis in idem* principle.

„In this judgment, the Court finds that the objective of protecting the integrity of the Union's financial markets and public confidence in financial instruments is likely to justify an accumulation of procedures and sanctions of a criminal nature (*Garlsson* 22, 46). However, it observes, subject to verification by the national court, that the Italian regulation sanctioning market manipulation appears not to respect the principle of proportionality"[17].

3)-4) in the joint cases C-596/16 and C-597/16, *Di Puma and Zecca* – in the factual situation, in 2012, the same competent authority Consob applied administrative sanctions to Enzo Di Puma and Antonio Zecca for misuse of information confidential; they showed that, in the criminal procedure for the same facts initiated in parallel with the administrative procedure, the criminal court found that the abusive uses of the confidential information were not proven. The Supreme Court of Italy asks CJEU to determine whether, taking into account the *ne bis in idem* principle, the Financial Markets Directive opposes such national regulation; this directive imposes for the Member States the obligation to provide effective, proportionate and dissuasive administrative sanctions for violations of the prohibition on the misuse of confidential information.

Thus, the Court ruled that „such a national regulation is not contrary to Union law, taking into account the principle of *res judicata* authority, which has a significant importance both in the legal order of the Union and in the national legal orders[18].

Moreover, previously, CJUE had ruled that „the *ne bis in idem* principle enunciated in art. 50 CFREU does not prevent a member state from imposing, for the same acts of non-compliance with declaration obligations in the field of VAT, successively, a sanction tax and a criminal sanction to the extent that the first sanction does not have a criminal character, an aspect that must be verified by the national court"[19].

In conclusion, in line with these judgements, it should be mentioned that Romanian specialized doctrine also states that this principle «is not limited only to judgments in criminal matters (...) As a result of the analysis

[16] Judgments in cases C-524/15 *Luca Menci*, C-537/16, *Garlsson Real Estate SA and others/Commissione Nazionale per le Società e la Borsa (Consob)* and joint cases C- 596/16, *Enzo Di Puma v Consob* and C-597/16, *Consob v Antonio Zecca*, *https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-03/cp180034ro.pdf*.

[17] Press Release no. 34/18, Luxembourg, Judgments in cases C-524/15 *Luca Menci*, C-537/16, *Garlsson Real Estate SA and others/Commissione Nazionale per le Società e la Borsa (Consob)* and joint cases C- 596/16, *Enzo Di Puma v Consob* and C-597/16, *Consob v Antonio Zecca*, *https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-03/cp180034ro.pdf*.

[18] Judgments in cases C-524/15 *Luca Menci*, C-537/16, *Garlsson Real Estate SA and others/Commissione Nazionale per le Società e la Borsa (Consob)* and joint cases C- 596/16, *Enzo Di Puma v Consob* and C-597/16, *Consob v Antonio Zecca*, *https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-03/cp180034ro.pdf*.

[19] CJEU, 26.02.2013, *Åklagaren v. Hans Åkerberg Fransson*, C-617/10, ECLI:EU:C:2013:105, para. 37.

of the indicated criteria, the scope of the notion of „accusation in criminal matters" and „criminal sanction" can be extended, for example, to problems of a fiscal or administrative nature».[20]

4.2. The definition of „idem" by the Court of Luxembourg

In the doctrine, it is emphasized that the element or notion «„*idem*" is conditioned by the identity of the facts, the identity of the offender and the identity of the legal interest protected by the respective norms being the same».[21]

In the *Kossowski* case[22], the Court considered that the decision of the public prosecutor's office (in Poland, in this case) to definitively terminate the criminal prosecution, subject to its reopening or cancellation, without any penalty having been applied, cannot be considered a final decision in line with art. 54 of the *Convention implementing the Schengen Agreement of 14 June 1985 between the governments of the states of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of controls at their common borders*, signed in Schengen (Luxembourg) on 19.06.1990, interpreted in accordance with art. 50 CFREU, if from the reasoning of this decision it follows that „the procedure was closed without a detailed investigation having been carried out; in that regard, the fact that neither the victim nor a potential witness was interviewed is an indication that no such investigation took place".

It could be considered that the Court of Luxembourg does not only define the notion of „*idem*", **but it also defines what a „deep criminal investigation" means**, *i.e.,* the hearing of the victim or a witness, which demonstrates the already exercise of the Union's shared competence in criminal matter and its limits.

«Very recently, in *Mihalache v Romania*, 13 this requirement of a detailed investigation has been taken up by the ECtHR as well for determining whether a decision to discontinue the proceedings constitutes an „acquittal" for the purposes of art. 4 of Protocol no. 7 ECHR[23]».

5. Restriction of the ne bis in idem principle. The CJEU jurisprudence

Article 52 CFREU provides that „any restriction of the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the substance of these rights and freedoms" and refers to the observance of the principle of proportionality as a fundamental principle of EU law [art. 5 para. (4) TEU].

The compatibility of art. 54 CISA with this provision is the subject of a preliminary request made by a court in Germany, in the *Spasic* case[24]; more precisely, «the referring court essentially asks to determine whether art. 54 CISA, which subjects the application of the *ne bis in idem* principle to the condition that, in the situation in which a sentence has been pronounced, it „has been executed" or to be „enforceable" or no longer enforceable (hereinafter referred to as the „enforcement condition"), is compatible with art. 50 CFREU, which guarantees this principle».

The Court of Luxembourg showed not only that art. 54 CISA is compatible with art. 50 CFREU, but also with art. 52 since „it is certain that it must be considered that the restriction of the *ne bis in idem* principle is provided by law, within the meaning of art. 52 para. (1) CFREU, since it results from art. 54 CISA" (point 57). „However, it must be verified whether the restriction implied by the condition on enforcement provided for in art. 54 CISA is proportionate, which makes it necessary to examine, first, whether this condition can be considered to meet an objective of general interest, within the meaning of art. 52 para. (1) CFREU, and, in the case of an affirmative answer, if it respects the principle of proportionality, within the meaning of the same provision" (point 60).

The court emphasizes that the general objective of establishing the Space of Freedom, Security and Justice, as provided by art. 3 para. (2) TUE and of art. 67 para. (3) TFEU, is ensured by art. 54 CISA, because „the condition regarding the execution provided for in art. 54 CISA is included in this context since it aims, as mentioned in point 58 of this decision, to avoid, in the area of freedom, security and justice, the impunity that could be enjoyed by persons convicted in a member state of the European Union through a final criminal judgment" (point 63).

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[20] A. Crișu, *Drept procesual penal. Partea generală*, 5th ed., Hamangiu Publishing House, Bucharest, 2021, p. 87.

[21] P. Harrison, M. Zdzieborska, B. Wise, *Ne Bis in Idem: The Final Word?,* (Sidley Austin LLP)/April 7, 2022.

[22] C-486/14, *Kossowski*, 26.06.2016, ECLI:EU:C:2016:483. See A.-M. Conea, *Politicile Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2019, p. 118.

[23] Lasagni, Mirandola, *The European ne bis in idem at the Crossroads of Administrative and Criminal Law*.

[24] CJEU Judgement, 27.05.2014, case C-129/14 PPU, *Zoran Spasic*, ECLI:EU:C:2014:586.

Also, after mentioning the main European instruments in the field of criminal cooperation, the Court underlines the fact that „as a result, the condition regarding the execution provided for in art. 54 CISA does not go beyond what is necessary to avoid, in a cross-border context, impunity persons convicted in a member state of the European Union by a final criminal decision" (point 72).

In the doctrine it is mentioned that „The existence of a legal basis [criterion (i)] was not considered especially critical in such cases, since all the examined systems were clearly provided for by national law (and, in the case of market abuse, also by EU legislation). The considerations of the Court with regard to the second criterion (ii), concerning the respect of the essence of the right at stake, appear in contrast rather more controversial for the value of the double jeopardy clause in EU law. Under this perspective, in fact, the CJEU seemed to deduce from the mere circumstance that national legislation allows for a duplication of proceedings and penalties „only under certain conditions which are exhaustively defined", the consequence that „the right guaranteed by art. 50 is not called into question as such" and therefore is respected in its essential content. The Court thus appeared to overlook the fact that even limitations provided only upon specific conditions can transform the nature of the double jeopardy clause from an individual fundamental right to a mere organizational rule, and that this does represent a violation to the essence of the original scope of art. 50 CFREU. Especially interesting, in a comparative perspective with ECtHR jurisprudence, is the third criterion (iii) that describes the proportionality requirement[25]".

In the judgments in the aforementioned cases *Menci* and *Garlsson*, CJEU specifies, in order not to restrict the principle that the national regulation that authorizes a combination of procedures and sanctions of a criminal nature must:

- „aim at an objective of general interest to justify such a cumulation of procedures and sanctions, these procedures and sanctions having to have goals complementary (*Menci* 44, 63; *Garlsson* 46);
- establish clear and precise rules that allow the litigant to foresee which acts and omissions can be subject to such a combination of procedures and sanctions (*Menci* 47; *Garlsson* 49);
- ensure that the procedures are coordinated with each other in order to limit them to what is strictly necessary the additional burden resulting for data subjects from an accumulation of procedures (*Menci* 53, 63; *Garlsson* 55), and
- ensure that the severity of the set of sanctions is limited to what is strict necessary in relation to the seriousness of the crime in question (*Menci* 55, 63; *Garlsson* 56)". [26]

„At first glance, it may thus seem that in the *Garlsson* case the CJEU introduced a stricter proportionality requirement than that promoted by the ECtHR, with a kind of primacy of the criminal process over the administrative (punitive) one. The initiation of the criminal action after the imposition of an administrative (punitive) sanction, as in the case of *Menci*, on the contrary, was not considered problematic as such by the Court".[27]

Consequently, according to the doctrine, if a second investigation or sanction imposed in respect of the same conduct does not take into account the first investigation and/or sanction, there may have been a violation of the *ne bis in idem* principle.

6. Conclusions

In line with the doctrine, it is obvious that the CJEU stated that „to ensure that robust *ne bis in idem* protection is properly administered, the authorities must cooperate to ensure that overall penalties imposed with respect to the same conduct are proportionate to the seriousness of any offences committed[28]".

In any case, we agree that „the purpose of applying the *ne bis in idem* principle in judicial proceedings is to respect the security of legal relationships".[29]

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[25] Lasagni, Mirandola, *The European ne bis in idem at the Crossroads of Administrative and Criminal Law*.

[26] Press Release no. 34/18, Luxembourg, Judgments in cases C-524/15 *Luca Menci*, C-537/16, *Garlsson Real Estate SA and others/Commissione Nazionale per le Società e la Borsa (Consob)* and joint cases C- 596/16, *Enzo Di Puma v Consob* and C-597/16, *Consob v Antonio Zecca*, *https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-03/cp180034ro.pdf*.

[27] Lasagni, Mirandola, *The European ne bis in idem at the Crossroads of Administrative and Criminal Law*. „Negative conclusions regarding the proportionality requirement were also drawn by the CJEU in the *Di Puma* and *Zecca* cases (again in the field of market abuse), where the possibility of bringing an action for a punitive administrative fine as a result of the acquittal in the criminal trial for the same behavior was also considered to exceed the necessity required by the principle of proportionality".

[28] P. Harrison, M. Zdzieborska, B. Wise, *Ne Bis in Idem: The Final Word?, op. cit.*

[29] A. Crișu, *Drept procesual penal. Partea generală*, 5th ed., Hamangiu Publishing House, Bucharest, 2021, p. 87.

In our opinion, the principle of *ne bis in idem* is one the general principles having an European dimension which underlines the fact that „at present, the good administration of justice in the EU seems to be unavoidably linked to a multiple subsidiarity applied in the relationship between national courts, the European Court of Human Rights and the Court of Justice of the European Union”[30]. In the meantime, the application and the interpretation of this principle by the Court of Luxembourg could illustrate the extension in the future of the limits of the EU competences in the field of cooperation in the criminal matter.

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