# CONSIDERATIONS ABOUT OVERLAPPING CRIMINAL AND ADMINISTRATIVE LIABILITY FOR THE SAME OFFENSE

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**Abstract**
*The ne bis in idem principle is one of the fundamental principles of a criminal trial in a state of law. This paper focuses on the question whether a possible overlapping between criminal and administrative liability for the same offense is or not a violation of this principle. Both the national and the European Court of Human Rights jurisprudence were investigated. By reporting to the European case we concluded that such a situation represents a case of bis in idem.*

***Keywords****: criminal liability, administrative liability, overlapping two kind of legal liability, non bis in idem, res judicata*

## Introduction

1. This paper focuses on the problem of frequent overlapping from the Romanian jurisprudence of criminal liability and administrative liability for the same antisocial fact. It is a common situation in the jurisprudence, in some particular situations being considered as mandatory. Specifically, we refer to the *crimes by habit* whose essential condition can be practically proved only by reports concerning minimum three contraventions of the same nature. But there are other situations, generally accepted, which involve the overlapping of criminal liability over the administrative liability, without being perceived as a *bis in idem*.

2. From our point of view it is very important that these situations be studied, because their reporting to the European Court of Human Rights (ECHR) jurisprudence have the ability to be considered violations of the *ne bis in idem* principle. Moreover, the European Court stated that the meaning of "criminal responsibility" is different from the one we find in our national law doctrine and jurisprudence. The perpetuation of the overlapping practice of criminal liability over the administrative liability for the same illicit act may cause further convictions of Romania in the cases brought in front of the European judicial body.

3. In our study we show, from a national point of view, what is the relationship between crime and contravention and which are the penalties that are applicable to each of them. Equally, we will reveal the Romanian doctrine statements on the matter of overlapping criminal liability over contravention liability for the same antisocial act.

In counterweight, we will investigate the ECHR decisions on cases of overlapping of the two forms of legal liability. Comparing the two systems will result that there is no identity between them, and the internal reality requires a mandatory reconsideration.

4. In terms of the Romanian doctrine in the field of interest, the present study has a different position regarding the qualification as a *bis in idem* situation the overlaps of the criminal and administrative liability for the same fact. This happens because traditionally, in the Romanian doctrine the possibility of overlapping the two types of legal liability was admitted. Reconsideration of these opinions should be made now in the light of ECHR decisions.

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***Res Judicata* and *Non Bis in Idem* in Romanian Criminal Law**

In the Romanian criminal procedural law, one of the reasons which justify the use of the extraordinary appeal against a court ruling is the violation of *res judicata* rule by the fact that two final judgments for the same criminal offense[1] were delivered against the same person. Such a situation is possible when the perpetrator did not know about the existence of the first decision, because otherwise there would be invoked on the occasion of the second trial, or when the perpetrator did not know about the second trial and he could not invoke *res judicata*. For the appeal to be admitted it is sufficient to prove the existence of two final[2] decisions, regardless the reason that caused this *bis in idem*. The condition is considered fulfilled even if for the same offense two courts have given a different legal qualification (eg one considered it a fraud and the other one embezzlement).

Also in Romanian doctrine it is shown that *non bis in idem* rule requires three conditions to be fulfilled: a) to have a final conviction, acquittal or termination of criminal proceedings decision[3], b) the same person, c) the same object (the fact itself is important and not its legal qualification, because giving a different legal classification would make it possible to circumvent the rule[4]).

An express indication of the *non bis in idem* principle in Romanian legislation is more recent and is found in the field of international judicial cooperation in criminal matters. Under this name, the principle was introduced in 2006[5] in Article 10 of the Law no. 302/2004 on international judicial cooperation in criminal matters[6]. According to the paragraph (1) of this legal text, whose *nomen juris* is *non bis in idem,* the international judicial cooperation is not admissible if in Romania or in any other state has been held a criminal trial for the same offense and if: a) by a definitive decision was ordered the acquittal or the cessation of the trial, b) the penalty imposed in the case by issuing a final decision was executed or was the subject of a total or partial amnesty. However, these exemptions do not operate where the judicial assistance is requested to review a final decision in an extraordinary appeal for any reason under the Romanian Criminal Procedural Code. The text does not apply if an international treaty to which Romania is a contracting party contains provisions more favorable concerning the principle *non bis in idem*.

**THE *NON BIS IN IDEM* PRINCIPLE AT EUROPEAN LEVEL**

At European level, the consecration of the *non bis in idem* rule is found in both the legal instruments adopted under the aegis of the European Union and those written under the auspices of the Council of Europe.

For example, from the European Union instruments, article 50 of the Charter of Fundamental Rights concerns a fundamental right of EU citizens: "the right not to be tried twice for the same offense". Based on this text, "nobody can be tried or convicted for an offense that has already been acquitted or convicted within the Union by final judicial decision in accordance with law."

In the same way, the Council of Europe, in the 7th Protocol of European Convention of Human Rights, in article 4, defines the *"right not to be tried or punished twice",* so nobody can be prosecuted or punished by the criminal jurisdiction of the same state for an offense for which has already been acquitted or convicted by a final decision under the criminal law and criminal jurisdiction of that state. However, these provisions do not prevent the reopening of the trial,

[1] V. Dongoroz, S. Kahane, G. Antoniu, C. Bulai, N. Iliescu, R. Stănoiu, Theoretical Explanations of Romanian Penal Code, Special Part, vol. II, Academiei Române Publishing House, Bucharest, 1978, p. 249

[2] N. Volonciu, Criminal Procedural Law, Paideia Publishing House, Bucharest, 1994, p. 328

[3] E Unless the decision to terminate criminal proceedings on the basis of art. 10 par. f of the Romanian Criminal Procedural Code.

[4] Gr. Theodoru, Criminal Procedural Law, Hamangiu Publishing House, Bucharest, 2008, p. 830.

[5] The Law no. 224 / 2006, published in the Romanian Official Journal, Part I, no. 534 of 21 June 2006.

[6] Published in The Romanian Official Journal, Ist Part, no. 594/2004. It was successively amended, including by Law no. 222/2008.

according to the law and penal procedure of that state, whether new or newly discovered facts appear or a fundamental flaw is discovered in the previous proceedings which might affect the solution. The importance of this rule is revealed once more by the fact that under the article 4 paragraph 3 of the same bill any exception to the rule is allowed. This principle has been included in other legal instruments adopted also by the Council of Europe and which impact in the field of cooperation in cases of certain segments of specialized crime. For example, the European Convention on Extradition adopted in 1957, in article 9 stipulates that extradition will not be granted when the person has been definitively judged by the competent authorities of the requested party for the offense or offenses for which the extradition is requested. Similarly, the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990, in article 18 paragraph 1 item 3 indicate among the situations in which cooperation may be refused the one when "the requested Party considers that the measure sought would be contrary to the principle of *ne bis in idem*".

**THE *NON BIS IN IDEM* RULE IN ROMANIAN DOCTRINE**

Generally accepted, Romanian doctrine states that *res judicata* does not operate where there is identity of material facts, but the fact is described differently in terms of legal nature: once as the contravention and then as a crime[7]. This is because, under trial as a contravention it has not pursued a criminal action which seeks criminal liability of those who committed a crime and, consequently, no criminal action could be extinguished. Because the criminal action was not ended, a definitive judgment of an administrative court in which for the same act it was applied to the offender a contraventional sanction would not operate as a barrier to starting the penal trial[8]. Such a statement should be reconsidered because of the European Court of Human Rights jurisprudence.

**ABOUT THE CUMULATION OF CRIMINAL AND CONTRAVENTIONAL LIABILITY IN ECHR JURISPRUDENCE**

The ECHR, in a particular case[9], had to answer to this particular question. In this instance, the case started from a citizen's complaint, who after being contraventionally fined in a conflict in which he broke a neighbor's door then struck him, he was convicted for the same act by the criminal court for trespassing and battery or other violent acts. In this context, in front of the European Court, the plaintiff claimed violations of Articles 6 of the European Convention on Human Rights and article 4 of the Protocol no.7 to the Convention (which guarantees the right not to be tried or convicted twice for the same acts - *non bis in idem*).

The Court, in its Judgment delivered on 14 January 2010, found violations of both articles. About the article 4 of Protocol 7 to the Convention, the Court stated that: the contraventional sanctions applied for the committed acts can be considered as having a criminal nature in the autonomic sense that the Court gave to this concept, considering that on the one hand, the prohibition imposed by the violated legal text has an *erga omnes* opposability and that, on the other hand, the purpose of the applicable sanction is to punish and to prevent the future commission of similar acts.

In addition, it was stated that there is identity of facts that were considered contravention and those which have generated the criminal proceeding against the applicant, regardless of the legal definition that domestic law gives to the contravention and the to crimes. In this context, it was found that there was an overlapping of legal proceedings against the plaintiff, given that criminal proceedings were preceded by the payment of an administrative fine for the same fact.

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[7] I. Neagu, Treaty of Criminal Procedure Law, Special Part, Gobal Lex Publishing House, Bucharest, 2008, p. 347.

[8] I. Poenaru, Aspects of the relationship between criminal responsibility and liability offenses, the DRR no. 6 / 1973, p. 82.

[9] Tsonyo vs Tsonev vs Bulgaria 2376/03, 14 January 2010, www.echr.coe.int

The solution took into account the provision of art. 4 of Protocol 7 which refers only to „the law and the criminal procedure of a state", but the Court frequently gave a different content to the term "penal" compared to the national law. To identify this term sense there were considered some alternative criteria: the legal qualification of criminal issue in the national law, the kind of penalty, the severity of the penalty applicable[10].

Even when an act is not qualified considering the first criterion as penal (it is an administrative illicit fact) it must be reported also to the other criteria. In particular, it is important to observe the kind of penalty, especially who exactly is addressed to the legal rule in question: to a small group especially characterized or on the contrary, is a general disposition[11].

The third criterion, (the severity of the penalty applicable) has a low importance in the decisions on which the European Court has sentenced on several occasions. So, even in a case against Romania[12], it was established that the minor offence fine of 59 euros can be considered a penal sanction according to the Convention.

**CONTRAVENTION AND CRIME IN THE DOMESTIC DOCTRINE AND JURISPRUDENCE**

In Romania, the general regime of administrative liability is regulated by the Government Ordinance no. 2 from 2001[13]. In the first article of this law it is stated that „the contravention law defends social values which are not protected by the penal law".

Throughout the legal definition, the contravention is the act committed with guilt, established and sanctioned by law, ordinance or governmental decision, or as appropriate, by the decision of the local council.

In consideration of this definition, to correct it, in doctrine is laid out that this kind of antisocial act should fulfill three primary conditions[14]: a) to commit with guilt an antisocial act; b) the act should be less socially harmful than a crime; c) the act should be defined as appropriate and sanctioned by the law into force.

From these features, the second one is no longer found in the law, but was kept in doctrine and it is known as the feature able to make the difference between contravention and crime. The requirement removal was made according to the specialists' observations in which the interrelated crime-contravention social danger is no more relevant for the difference between one and another, especially when in some cases the punishments for contraventions were tougher than those for crimes[15].

Also in order to make the difference between contravention and crime it can be used the provision from article 1, paragraph l, sentence I of O.G. nr. 2/2001 in accordance with „the contravention law defends social values which are not protected by the penal law". But, the stipulation above-mentioned is not really useful because the laws in force abound in texts describing contraventions in a very similar way to those which describe the legal content of crimes. Manny cases we can find in Law no. 61/1991 on punishing the acts of disrespect community life rules, public order and social peace. The social value protected by this law is the same as the one protected by articles which describes crimes affecting community life from Title IX$^{th}$ Special part of the

[10] Cases Engel and Others v. the Netherlands, Ozturk v. Germany, Jussila v. Finland

[11] Eggs v. Switzerland, comp. Weber v. Switzerland

[12] Anghel v. Romania, 28183/03, 4 October 2007.

[13] Published in the Romanian Official Journal Part I, no. 410/2001, approved by Law no. 180/2002, as amended by Law no. 202/2010.

[14] Ioan Alexandru, Mihaela Cărăuşan, Sorin Bucur, Administrative Law, Lumina Lex Publishing House, Bucharest, 2005, p. 470.

[15] Antonie Iorgovan, Administrative Law Treaty, Nemira Publishing, Bucharest, 1996, p. 247.

Criminal Code in force. The same situation can be observed in the field of forestry contraventions described by Law nr.31/2000 in comparison to offences definitions contained in the Law 46/2008, The Forestry Code.

In these cases it appears clearly that the social value is the same, and its protection is mentioned in penal provisions and also in administrative provisions. The only factor that differentiates the two behaviors is, in fact, a different antisocial importance.

Other notes made in administrative law doctrine on how to make the correlation between the difference of gravity and penalties applied are also supported by legislative realities. This problem can be solved in a very appropriate way by respecting the requirement that any new legal regulatory edict shouldn't be contrary to the rules of the system that follows to integrate in. In this way, towards the systemic interpretation, there will no longer appear situations such as those reported.

For committing an offense it may be applied a sanction from those indicated by article 5 from O.G. no. 2/2001: main (warning, administrative fine, community service[16]); complementary (the seizure of property which was used or resulted from offenses; the abeyance or cancellation of permit, approval or authorization for exercising an activity; closing the unit; blocking the bank account; the suspension of trader activity; the withdrawal of license or approval for certain operations or activities of foreign trade, temporarily or permanently; the demolition of the work and bring the land to its original state).

The quoted text creates, however, the possibility to establish other principal and supplementary penalties, namely by special laws. This is the reason to raise some question marks on respecting the legality principle in applying administrative sanctions. At the same time, however, paragraph 5 of art. 5 O.G. no. 2/2001 provides that always "applied penalty must be proportionate to the seriousness of the committed fact."

Crime, as an antisocial act with a high level of social danger, is defined by the Penal Code in force since 1969 as being a "socially dangerous act, committed by guiltiness and provided by the criminal law." At the same time, the code expressly provides that "crime is the sole basis for criminal liability." In consideration of this definition, it has been shown in the doctrine of criminal law that a fact must meet three key features to be considered an offence: to present a social danger, to be committed by guilt and to be provided by the criminal law. Also, it is shown that in order to represent an essential feature of crime, social danger must be criminal, that is, to some degree, specific crime as criminal unlawful, distinguishing it from other forms of illicit facts (administrative, civil, etc.) and lead to a sentence[17].

From these elements of doctrine it can be seen that there is no very clear criteria to make a line of demarcation between infringement and offence. Moreover, the problem is not clarified from this point of view by the jurisprudence, either. For example, in forestry legislation[18] field, the same act of cutting standing tree can represent an infringement or an offence, based on the specific damage created by committing it or, alternatively, on the observation of persistence in the antisocial behavior over a period of two years. In some cases, it can be seen the first act of illegal cutting of trees, applied a sanction for an infringement, and upon finding indicated repeated infringement within two years to carry out criminal liability for the offence. The situation is permitted under national doctrinal acceptance regarding the *res judicata*, but, in our point of view, contrary to the ECHR rulings.

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[16] Contraventional Prison Sanction was abolished from the system of administrative law.

[17] Al. Boroi, Criminal Law, Special Part, C.H. Beck Publishing House, Bucharest, 2008, p. 80.

[18] The law that settles this field is Law no. 46/2008 (Published in the Official Gazette, First part, no. 238 on 27 March 2008).

In the case of the so called *offences by habit* the situation could be similar. This is because, practically, the proof of recurrence of antisocial behavior, as a fundamental element of a crime of this nature, is the report on sanctioning same nature contraventions. Specifically, in the case of the prostitution offence (Section 328 of the Penal Code.), repeated acts of sexual intercourse that finally make up the concrete element of the crime is proved by the report on punishing the contravention defined by article 2 paragraph 6 of Law no. 61/1991. In fact, the legal content of this contravention is very close to the crime of prostitution (attracting people, under any form, committed in restaurants, parks, on streets and other public places, in order to practice sexual intercourses with them to obtain material benefits).

**IMPACT OF ECHR JURISPRUDENCE ON THE SITUATIONS OF OVERLAPING CRIMINAL LIABILITY AND ADMINISTRATIVE FOR THE SAME ACT FROM DOMESTIC LAW**

From what we have presented above, it is clear that the current Romanian legislation, as in the correspondent jurisprudence, there is a series of cases which are considered either contraventions or crimes, according to their specific ability to exceed the level of social risk specific to a crime. This level of risk is marked on the lack of clarity, and from this reason it generates frequent overlaps of the criminal liability and the administrative liability for the same act.

Given the ECHR decisions on this issue, we believe that it should produce a reconsideration of the boundary of the two types of antisocial acts in relation to the meaning of "criminal" term as autonomic defined by the European Court.

Moreover, the practice of administrative and judicial authorities in Romania must also undergo a shift in order to prevent the qualification of an antisocial behavior as a crime and as a contravention, at the same time, and the overlapping of two types of legal liability in the same occasion. The prohibition concerning this kind of overlap is so radical that if the act in question has already determined the application of an administrative sanction, it does not even allow the prosecution to begin against the person who was the subject of that punishment.

## Conclusions

1. Both in Romanian doctrine and law it is not considered to be violated the principle of *non bis in idem* in those cases in which for the same act there are applied both criminal and administrative punishments. The solution flagrantly contradicts the ECHR decisions in this domain, which gave a more extended sense of the term "criminal" to national settlements, and regardless of their qualifications.

2. The implications of this situation on the Romanian law are among the most important, requiring a reconsideration of many elements traditionally accepted. Such efforts to align the national legislation to the requirements arising from the ECHR have been made by abolishing the punishment of contraventional imprisonment from the system of administrative penalties, but also by references to the need to comply with the proportionality rule concerning the seriousness of the act and the punishment found within GO no. 2/2001.

3. Such a research opens the perspective of a detailed investigation about the way it can be reached to a fair correlation of national reality with ECHR decisions. Such a research should identify, in the first place, a clear criteria to delimit a crime from a contravention that should permit preventing the situations of *bis in idem* in which one of the punishments is an administrative and the other a penal one.

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