

## ONDREJ LACIAK

### **Some notes about the legal framework of the principle “ne bis in idem” in the criminal law of the Slovak Republic**

First of all it should be mentioned the legal framework for the ne bis in idem in the area of the Council of Europe countries. The Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms stated the right not to be tried or punished twice in the Article 4 Par. 1: *„No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.“*

In the law of the European Union is the Charter of Fundamental Rights of the European Union very important regulation. The Article 50 states the Right not to be tried or punished twice in criminal proceedings for the same criminal offence as follows: *„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 Constitution of the Slovak Republic, in respect of the abovementioned European regulations, regulates the principle ne bis in idem in the Article 50 Par. 5 as follows: *„When finally convicted or acquitted of a criminal offence, no one may be prosecuted for the same criminal offence again. This principle does not preclude an exceptional remedies, according to the law.“*

In the Criminal Procedure Code is the principle *ne bis in idem* clearly stated in the Article 9 including reasons for Inadmissibility of Criminal Prosecution. The formulation of the provision is as follows: *“The criminal prosecution may not be instituted or, if already initiated, may not continue and shall be stayed if conducted against a person whose previous prosecution for the same offence resulted in a final and conclusive court sentence, or it was lawfully stayed or conditionally discontinued and the accused proved himself, or conciliation has been reached and the criminal prosecution was discontinued unless such decision was declared null and void in a prescribed manner.”* This formulation does not recognize an obstacle to prosecute person who was sentenced guilty in the administrative procedure for the same delicts but in such a procedure qualified as an administrative delict (administrative offence). Looking into the Slovak Criminal Code scrupulously, a full following of the Article

4 of the Protocol No.7 might be covered by the next paragraph g) of the Article 9: „*The criminal prosecution may not be instituted or, if already initiated, may not continue and shall be stayed if so stipulated by a promulgated international treaty*“. According to the Article 7 of the Constitution of the Slovak Republic „*International treaties on human rights and fundamental freedoms and international treaties for whose exercise a law is not necessary, and international treaties which directly confer rights or impose duties on natural persons or legal persons and which were ratified and promulgated in the way laid down by a law shall have precedence over laws.*“. So based on the herein mentioned article from the Constitution might be followed the full wording and meaning of the Article 4 of the Protocol No.7 in the criminal proceedings.

I see the Article 215 par. 2 of the Criminal Procedure Code as not being quiet in compliance with the principle of ne bis in idem. In the Article is stated: *The prosecutor may stay the criminal prosecution if a final decision has already been made in respect of the act committed by the accused by another body in disciplinary proceedings, by a foreign court or agency competent to hear misdemeanours or other administrative torts, if such decision is considered as satisfactory.* In my opinion the full compliance with the principle of ne bis in idem would be fulfilled if there would not be a space for a discretion of the prosecutor but it should be obligatory if a final decision has already been made in respect of the act committed by the accused by another body in e.g. administrative proceedings. Such regulation would followed the Engel criteria. In the case of *Zolotukhin v Russia* the European Court of Human Rights qualified the first administrative offence, by using the Engel criteria, as penal for the purposes of Article 4 of Protocol 7, mostly due to the nature of the offence and the severity of the penalty imposed.<sup>1</sup>

Also in my opinion there should not be a space for a discretion of the prosecutor if a final decision has already been made in respect of the act committed by the accused by a foreign court. These might be a problem to prove and in such a situation the court should see such a judgment issued by the foreign court. This might be very problematic, if the foreign court would be a court from non-EU country. There are many potential procedural difficulties in this matter. But from the perspective of the theory of law and legal principles, the decision of the foreign criminal court about the same act shall be an obstacle as principle ne bis in idem applies.

---

<sup>1</sup> Zolotukhin v Russia, 10 February 2009

As a very important regulation I consider the Article 54 of the Convention implementing the Schengen Agreement<sup>2</sup> - ‘Ne bis in idem’ principle, that stipulates: “A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.”

In this matter it is fitted to mention the case law of the Court of Justice of the European Union. The judgement of the Court (Sixth Chamber) of 22 December 2008 was concerning the criminal proceedings against Vladimir Turanský, a Slovak citizen.<sup>3</sup> Convention implementing the Schengen Agreement<sup>4</sup> - Article 54 - ‘Ne bis in idem’ principle - Scope - Concept of ‘finally disposed of’ - Decision by which a police authority orders the suspension of criminal proceedings - Decision not barring further prosecution and not having a ne bis in idem effect under national law. The *ne bis in idem* principle enshrined in Article 54 of the Convention implementing the Schengen Agreement, which aims to ensure that a person is not prosecuted for the same acts in the territory of several Contracting States on account of his having exercised his right to freedom of movement, does not fall to be applied to a decision by which an authority of a Contracting State, after examining the merits of the case brought before it, makes an order, at a stage before the charging of a person suspected of a crime, suspending the criminal proceedings, where the suspension decision does not, under the national law of that State, definitively bar further prosecution and therefore does not preclude new criminal proceedings, in respect of the same acts, in that State. Therefore, a decision of a police authority which, while suspending criminal proceedings, does not under the national law concerned definitively bring the prosecution to an end, cannot constitute a decision which would make it possible to conclude that the trial of that person has been ‘finally disposed of’ within the meaning of Article 54 of the abovementioned Convention. Under the Slovak Code of Criminal Procedure, police orders such as that in question do not

---

<sup>2</sup> 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 checks at their common borders

<sup>3</sup> Case C-491/07

<sup>4</sup> 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 checks at their common borders

prevent a new proceeding from being opened for the same facts. Therefore, Mr Turanský's position was not 'finally disposed of' as article 54 of the Schengen Convention requires.

At the end I might conclude, that in the area of the Slovak Republic in the daily practice it is respected the principle *ne bis in idem*. As everywhere, there are many potential procedural situations, in which occur matters of discussion if the principle *ne bis in idem* is an issue in the particular case or not. In my opinion the most potential cases where this discussion might appear are the tax crimes or tax evasions because mostly in such cases were, before the criminal authorities, active the tax authorities, national and also authorities from another EU member states.