

#23: Double jeopardy European style

The non bis in idem principle gives the right not to be prosecuted or to be punished twice for the same facts. This principle is acknowledged in article 4 of Protocol No. 7 to the European Convention on Human Rights. But also in article 14, sub 7, of the International Covenant on Civil and Political Rights and article 50 of the European Convention. This principle is thus widely accepted in the Europe Union. Although this principle is recognized as one of the basic principles in our law system, the interpretation of this principle is exposed to developments. It is even possible that the European Court for Human Rights (ECtHR) and the European Court of Justice (ECJ) will give a different interpretation to this principle. We hereby give you a brief overview of some recent developments in the case law of the ECtHR and the ECJ.

In the case [A. and B. versus Norway](#) the ECtHR gave on 15 November 2016 a judgement about the bis-aspect of the non bis in idem principle. This case concerned two taxpayers who submitted that they had been prosecuted and punished twice – in administrative and criminal proceedings – for the same facts. The applicants stated that the tax authorities imposed a tax penalty which they paid and that they were indicted for the same facts by the public prosecutor. In this case there was no discussion that the administrative and the criminal procedure concerned the same facts.

A violation of the ne bis in idem principle can be enacted if the following requirements have been met:

1. Both procedures qualify as a 'criminal charge' in the sense of article 6 ECHR;
2. The two punitive procedures concern the same (legal) person;

3. Both procedures regard the same facts (*idem*);
4. De first punitive procedure is irrevocable;
5. There is a cumulation of punitive procedures.

The last requirement is called the *bis* aspect. In [A. and B. versus Norway](#) the ECtHR judged that there are no cumulating procedures if these procedures are sufficiently close connected in substance and in time. The Court considers in this respect that the two proceedings have been foreseeable as the two applicants must have known that criminal prosecution and imposing tax penalties were possibilities. The Court observed moreover that the administrative and criminal proceedings had been conducted in parallel and were interconnected. An important aspect for the Court was moreover that the sentence imposed in the criminal trial had taken the tax penalty into consideration. The Court therefore concluded in this case that the non *bis in idem* principle was not breached.

A recent example of a case in which a violation of article 4 of Protocol No. 7 to the ECHR was upheld is the case of [Jóhannesson and Others v. Iceland](#) of 18 May 2017. This case also considered the complaint that two individuals have been tried twice for the same offence since a tax fine had been imposed and they were indicted for the same criminal offence. In this case the court considered that the applicants had been tried and punished twice for the same conduct. Therefore the non *bis in idem* principle was breached. In particular, since the two sets of proceedings had both been “criminal” in nature. They had been based on substantially the same facts and they had not been sufficiently interlinked for it to be considered that the authorities had avoided a duplication of proceedings. The Court however reiterates that article 4 of Protocol No. 7 does not exclude the carrying out of parallel administrative and criminal proceedings in relation to the same offending conduct, but that the two sets of proceedings must have a sufficiently close connection in substance and in

time to avoid duplication. In this specific case however there was no sufficiently close connection between the two procedures.

We believe that the protection of the principle by this jurisprudence of the Court is diminished and does not give enough protection to prevent the right to be tried twice (ne bis vexari). For this reason we hope that the European Court of Justice will not follow this example.

In the case Luca Mendi [Advocate General Campos Saánchez-Bordona](#) gave an advice to the ECJ. He is of the opinion that the ECJ should not follow the line of the ECtHR as set out in A. and B. versus Norway. He states that an interpretation of Article 50 of the European Convention which rests on the degree of the substantive and temporal connection between one type of proceedings (criminal proceedings) and another (administrative proceedings in which a penalty is imposed) would add significant uncertainty and complexity to the right of individuals not to be tried or punished twice for the same acts. The fundamental rights recognized in the Convention must be easily understood by all and the exercise of those rights calls for a foreseeability and certainty which, in his view, are not compatible with that criterion. We could not agree more.

We therefore hope that at least the ECJ protects the ne bis in idem principle as required.

Do you have any questions about this subject or are you confronted with a related issue and would you like to discuss this with us? Please feel free to contact us via boezelman@hertoghsadvocaten.nl and boer@hertoghsadvocaten.nl.