

*Jakub Kawka*

Jagiellonian University, Poland

**THE PROBLEMS OF APPLYING BOTH  
CRIMINAL AND ADMINISTRATIVE PENAL  
SANCTIONS IN LIGHT OF ARTICLE 50  
OF THE CHARTER OF FUNDAMENTAL RIGHTS  
OF THE EUROPEAN UNION**

The problem of the simultaneous application of both criminal and administrative sanctions has never been straightforwardly regulated, either in the primary law of the European Union or in the legal acts of secondary law. The European Union's legislation clearly lays down the rule of *ne bis in idem* – the prohibition to punish twice for the same offence, but only in criminal proceedings. It was included in Article 50 of the Charter of Fundamental Rights of the European Union<sup>1</sup> (hereinafter referred to as “the Charter”), which, as stated in Article 6 section 1 of the Treaty on the Functioning of the European Union<sup>2</sup> (hereinafter referred to as “TFEU”) is a part of the primary law of the EU. According to Article 50 of the Charter, no one can be prosecuted or punished in criminal proceedings twice for the same penal act under the threat of punishment, in relation to which they were already proven innocent or sentenced with a final judgement within the territory of the Union. Regardless of the fact that the literal interpretation of the quoted regulation seems to suggest an objective scope of the prohibition of double punishment only with regard to the proceedings in criminal courts, there are doubts in the case-law of the member states' courts in practice whether the said prohibition also applies to cases in which criminal proceedings overlap with administrative proceedings. In order to settle this dispute, the member states' courts made references to the Court of Justice of the European Union (hereinafter “CJEU”) for a preliminary ruling and initiated procedures that resulted in several important rulings regarding Article 50 of the Charter.

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<sup>1</sup> Journal of Laws of the European Union, C 202, 7<sup>th</sup> June 2016, p. 389.

<sup>2</sup> *Ibidem*, p. 13.

## 1. ACCEPTABILITY OF PARALLEL SANCTIONING AND THE PROBLEM OF THE CRIMINAL NATURE OF SANCTIONS

The first ruling in which the CJEU addressed Article 50 of the Charter in the context of the overlap of criminal liability and administrative liability was passed by the Grand Chamber on 26<sup>th</sup> February 2013 in case No. C-617/10.<sup>3</sup> It concerned the criminal proceedings against Hans Åkerberg Fransson, an individual entrepreneur dealing with fishing and fish selling.<sup>4</sup> The Swedish prosecutor's office (Åklagaren) had charged him with breach of the local criminal tax legislation, based on the fact that he had filed a false tax statement and therefore exposed the Swedish fiscal authorities to a potential loss of revenue from the income tax and VAT tax by 319–143 SEK in 2004 and by 307–633 SEK in 2005. Hans Åkerberg Fransson was also charged with not having filed the employer contribution declarations for October 2004 and October 2005. Therefore, the Swedish social insurance institution never received the due amounts of 35–690 SEK and 35–862 SEK, respectively. The total value of depletions was assessed as significant and, therefore, the accused was charged with a grievous tax offence punishable with six months to six years of imprisonment. However, the described procedure was not the only one that the Swedish authorities carried out in the matter of irregularities in the payment of public liabilities found on the part of Fransson. The local tax office (*Skattenverket*), by decision of 24<sup>th</sup> May 2007, imposed additional tax obligations on him in the total amount of SEK 112–219. Interest on arrears was charged, as well. Fransson did not appeal against the decision. In view of the fact that the accused had been prosecuted in administrative proceedings, the criminal court (*Haparanda*) came to the conclusion that from the point of view of the *ne bis in idem* principle – defined, among others, in Article 50 of the Charter – the admissibility of the accused also being prosecuted in criminal proceedings was dubitable. In order to obtain an answer to this question, the Swedish court referred to the CJEU for a preliminary ruling and stayed the pending criminal proceedings.

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<sup>3</sup> Judgement of the CJEU of 26<sup>th</sup> February 2013, C-617/10, ECLI:EU:C:2013:105.

<sup>4</sup> It should be noted that this judgement was important not only from the point of view of the subject of this study, but also in the context of such problems of European law as the possibility to invoke the Charter of Fundamental Rights in domestic proceedings and the mutual relations between this Charter and the Convention on the Protection of Human Rights and Fundamental Freedoms. The CJEU expressed its position there that it is possible to refer directly to the provisions of the Charter of Fundamental Rights in national proceedings when a Member State applies EU law in the course of a given procedure. The CJEU also pointed out that as long as the European Union does not become a party to the Convention on the Protection of Human Rights and Fundamental Freedoms, this document cannot be a direct basis for adjudication by the CJEU, although the Convention's norms themselves also constitute general principles of EU law.

In the judgement of 26<sup>th</sup> February 2013, the CJEU ruled that Article 50 of the Charter does not prevent a Member State from imposing in parallel for the same act consisting in a failure to comply with declaration obligations in the field of VAT, sanctions under tax law and criminal sanctions. The Member States have the freedom to choose sanctions in order to ensure the collection of full revenue from VAT, and thus the protection of the Union's financial interests. Nevertheless, the *ne bis in idem* principle would apply to criminal proceedings of such kind as the proceedings conducted by the Swedish court only if the sanctions already applied to the accused by way of a final administrative decision were of a criminal nature. This matter is, however, to be resolved by the national court. The CJEU only noted that the criminal nature of tax sanctions should be assessed with three criteria in mind. The first is the legal classification of the breach in national law, the second – the very nature of the infringement, and the third – the nature and severity of the sanction concerned.

When discussing these criteria, the CJEU referred to its judgement of 5<sup>th</sup> June 2012 in case C-489/10.<sup>5</sup> This ruling was delivered in response to a preliminary inquiry made by the Polish Supreme Court. In this case, farmer Łukasz Marcin Bonda was convicted by the District Court in Goleniów for a so-called subsidizing fraud (Article 297 (1) of the Polish Penal Code). It was supposed to consist in extorting subsidies based on a fraudulent certificate regarding the agricultural area used. The ruling was revoked by the Regional Court in Szczecin, which discontinued the criminal proceedings, considering that the accused had already been punished for the act by the administrative decision of the head of the Office of the Agency for Restructurization and Modernization of Agriculture. This decision deprived the accused of the right to receive grants during three subsequent years following the year in which the false statement was made. What is important, the decision was issued on the basis of EU law, i.e. Article 138 (1) of Regulation No. 1973/2004.<sup>6</sup> When considering the appeal, the Supreme Court had doubts whether the administrative penalty based on the EU regulations can be considered as a punishment within the meaning of criminal law, and thus whether the fact of its prior imposition constitutes a negative premise in the form of *res judicata* (Article 17 (7) of the Polish Code of Criminal Procedure). In answer to the question referred for a preliminary ruling, the CJEU decided that the sanction was not of a criminal nature. Citing the judgement of the European Court of Human Rights in Strasbourg of 8<sup>th</sup> June 1976 in *Engel and Others v. The Netherlands*,<sup>7</sup> the CJEU repeated after this court the three criteria for determining the criminal nature, that is the classification of sanctions under national law, its repressive

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<sup>5</sup> Judgement of the Court of Justice of the European Union of 5<sup>th</sup> June 2012 in case C-489/10, ECLI:EU:C:2012:319.

<sup>6</sup> EU Official Journal L 345, 20<sup>th</sup> November 2004.

<sup>7</sup> Judgement of the ECtHR (Grand Chamber) of 8<sup>th</sup> June 1976 in *Engel et al. v. the Netherlands* (complaints No. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72), series A 22, para. 82.

function and the degree of severity for the punished citizen.<sup>8</sup> The CJEU – like the Strasbourg Court – found that the occurrence of even one of these criteria was sufficient to establish the criminal nature of the sanction. Referring to the decision issued in the case of Łukasz Marcin Bonda, the CJEU indicated that, from the point of view of EU law, the sanction imposed by the decision was not adjudicated in the criminal proceedings and did not perform a repressive function, as it only temporarily excluded the farmer from the system of payments in case of a possible application. The CJEU also recognized that the administrative penalty applied was not sufficiently severe, since the only consequence of its imposition was the short-term deprivation of the farmer of his right to the subsidy.

## **2. ADMINISTRATIVE PENALTY AS AN EXTENUATING CIRCUMSTANCE IN IMPOSING THE PUNISHMENT**

Coming back to Frasson's case, it is impossible not to mention the opinion of the Advocate General of the Court of Justice of the European Union, Pedro Cruz Villalon.<sup>9</sup> He drew attention to one extremely important aspect. Addressing the issue raised by the Swedish court, the Advocate General wrote that Article 50 of the Charter does not result in the fact that the previous final and binding administrative penalty permanently excludes the possibility to initiate proceedings before the criminal court. However, it expressly provided that the principle of fair trial, inherent in the rule of law, gives rise to an obligation on the part of national legislation to enable the criminal court to take into account the previous administrative penalty in order to commute the penalty. The Advocate General even stressed that it would be unacceptable for the criminal court to completely ignore the fact that the act under assessment was already the subject of the administrative penalty.

According to the Advocate General, Article 50 of the Charter would preclude the Member States from initiating proceedings before the criminal court in relation to factual circumstances which had previously been the subject of final and binding administrative penalties. The problem of treating an administrative penalty as an extenuating circumstance in imposing the sentence in criminal proceedings has not yet been discussed by the Court of Justice of the European

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<sup>8</sup> In the *Engel et al.* case, the Strasbourg Court dealt with complaints lodged by Dutch soldiers punished by military disciplinary courts. It then assessed whether the judgements of these courts were of a criminal nature and thus whether Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms was applicable to them.

<sup>9</sup> Opinion of the Advocate General Pedro Cruz Villalon of 12<sup>th</sup> June 2012 in case C-617/10, ECLI:EU:C:2012:340.

Union itself, although it undoubtedly concerns an extremely important issue for the practice of the criminal courts.

### 3. THE LIABILITY OF A LEGAL PERSON AND THE LIABILITY OF ITS REPRESENTATIVE

With the preliminary ruling of 5<sup>th</sup> April 2017 in the joint cases C-217/15 and C-350/15, the Court of Justice of the European Union addressed the issue of the possibility to prosecute a legal person who acts as the legal representative of an entity who has previously been subject to an administrative penalty.<sup>10</sup> The judgement was delivered as a result of the questions referred for a preliminary ruling by an Italian criminal court (*Tribunale di Santa Maria Capua Vetere*). Two proceedings were pending in this court. In one of them, the file was charged against Massimo Orsi, representative of the S.A. COM Servizi Ambiente e Commercio Srl, and in the other one against Luciano Baldetti, representing the company Evoluzione Maglia Srl. Both men were accused of tax offences in the form of non-payment of the due VAT on time. In the criminal cases concerning both men – Massimo Orsi and Luciano Baledetti – VAT arrears due to the Italian tax authorities from the companies represented by the accused men amounted to over EUR 1 million. However, what is most important from the point of view of the discussed problem, the companies represented by the accused had already been penalized by the Italian tax authorities (*Agenzia delle Entrate*) and the administrative penalty had been imposed on them in the form of the payment of 30% of the due tax. As a result, the criminal court which was to rule on the liability of the representatives of these companies had doubts as to whether the potential conviction of the accused would be in accordance with EU law.

When giving an answer, the Court of Justice of the European Union emphasised that the application of the *ne bis in idem* principle presupposes in the first place that applicable penalties or criminal proceedings concern the same person. Meanwhile, the records of the examined cases indicated that the tax penalties were imposed on two companies with legal personality, i.e. S.A. COM Servizi Ambiente e Commercio and Evoluzione Maglia. The criminal proceedings which were the subject of the question referred for a preliminary ruling were conducted in the cases of Massimo Orsi and Luciano Baldetti, who were natural persons. The Court of Justice of the European Union concluded that the pecuniary sanction and the criminal proceedings concerned different persons and therefore the condition for the application of the *ne bis in idem* principle did not seem to be met.

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<sup>10</sup> Judgement of the Court of Justice of the European Union of 5<sup>th</sup> April 2017 in joint cases C-217/15 i C-350/15, ECLI:EU:C:2017:264.

However, the Court emphasised that the final decision on this matter rested with the national court. Article 50 of the Charter must be interpreted in such a way as to not preclude the application of the national provision which renders it possible to conduct criminal proceedings in connection with the non-payment of VAT, if a definitive tax penalty for the same acts has been imposed, provided that the sanction is imposed on a company with a legal personality and the criminal proceedings are initiated against a natural person.

#### 4. EXCEPTIONS TO THE *NE BIS IN IDEM* PRINCIPLE

On 20<sup>th</sup> March 2018, the Court of the European Union passed three judgements relating to the issue of the overlap of criminal liability and administrative liability in the context of the *ne bis in idem* principle. In all these cases, the judgements were passed in response to questions referred for a preliminary ruling by Italian courts. Case C-524/15 concerned criminal proceedings which were pending before the court in Bergamo (*Tribunale di Bergamo*) against Luca Menci, a sole trader, who was accused of a tax offence that involved the failure to pay within the statutory deadline due VAT for the year 2011 in the total amount of EUR 282 495.76.<sup>11</sup> The Italian court found that the administrative proceedings related to the same omission had already been conducted before the initiation of the criminal proceedings. The administrative proceedings had resulted in a final and binding decision of the Italian tax authority, in which Luca Menci had been ordered to pay outstanding VAT as well as an administrative sanction in the form of the payment of 30% of the tax debt, which amounted to EUR 84 748.74. In view of such circumstances, the Italian criminal court had doubts whether according to Article 50 of the Charter, it was permissible to initiate criminal proceedings regarding an act for which the non-actionable administrative sanction had already been imposed on the accused.

As a reply to the Italian court, the Court of Justice of the European Union recalled its earlier ruling in *Fransson's* case. Moreover, the Court decided it was necessary to determine whether the final administrative decision which imposed the tax sanction was of penal nature. Referring these remarks to the Menci's case, the CJEU noted that in Italian law, the proceedings that had concluded by imposing the tax sanction on the accused were regarded as administrative proceedings. Therefore, it would appear that since the criterion of qualification of the proceedings according to the national law was not met, it would not be possible to assume that the tax sanction was of penal nature. However, the Court stated that the remaining criteria for acknowledging the sanction as a type of punishment

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<sup>11</sup> Judgement of the CJEU of 20<sup>th</sup> March 2018, in Case C-524/15, ECLI:EU:C:2018:197.

were met. In the assessment of the Court, this sanction was primarily intended to serve the repressive purpose. It was not only of compensatory nature. Moreover, the CJEU noted that the tax sanction under review *de facto* took the form of a fine in the amount of 30% of the due VAT. In the opinion of the Court, this circumstance indicated a high degree of severity of this sanction and thus its penal nature as defined in Article 50 of the Charter. Therefore, the Court decided that Menci's case indeed involved a double punishment for the same act.

However, the Court of Justice of the European Union allowed such situation, stating that the *ne bis in idem* principle is not of absolute nature. This results from Article 52 (1) of the Charter. According to this provision, all restrictions on the exercise of rights and freedoms recognized in the Charter must be provided for by law and must respect the essence of these rights and freedoms. Moreover, subject to the principle of proportionality, restrictions on these rights and freedoms can only be introduced if they are necessary and meet the objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others. According to the CJEU, Article 50 of the Charter can therefore be interpreted in such a way that it does not preclude national provisions on the basis of which it is permissible to initiate criminal proceedings against a person for non-payment of VAT due within the statutory period, even if a non-appealable administrative sanction of a criminal nature has been imposed on the same person for the same act. In its answer to the inquiry referred, the CJEU, however, listed three obligatory conditions. First, such provisions must pursue a general interest objective of combating VAT offences. This objective, in the CJEU's view, justifies the accumulation of various proceedings and sanctions, although the fact that they are separate also implies the necessity that they at the same time serve as additional reference objectives. It therefore seems that, in the assessment of the CJEU, it is permissible to conduct both criminal and administrative proceedings in relation to the same act if each of these proceedings is to carry out different functions. The diversity of the objectives was observed by the CJEU in the scope of the fight with VAT offences. It emphasized that the Member States try on the one hand to discourage any failures to observe the rules for declaring and collecting VAT and to punish them by imposing administrative sanctions on a lump-sum basis, and on the other hand, to discourage serious offences against these rules more severely. If these failures are particularly socially harmful, in the CJEU's opinion, they justify conducting additional criminal proceedings, despite previous or parallel application of administrative sanctions aimed at counteracting any irregularities in this regard. To sum up, the CJEU's ruling shows that administrative sanctions may concern all offences with regard to fulfilling tax obligations. In relation to culpable and particularly harmful faults, it is possible to hold the obliged liable also for criminal offence under Article 50 of the Charter.

As a second condition for the admissibility of a regulation cumulating the sanctions, the CJEU pointed to the existence of rules ensuring such co-ordination

which limits the additional burden borne by the persons concerned as a result of a cumulation of proceedings to what is strictly necessary. In the case of Menci, the CJEU considered that this condition was met, because the Italian law limited the criminal liability punishable by imprisonment only to the most serious offences in the payment of VAT (i.e. over EUR 50 000), and these provisions obliged the courts to consider the fact that the payment of overdue tax with the additional amount imposed as part of the administrative penalty was made in advance, as a mitigating circumstance.

The third condition that according to the CJEU allowed for an accumulation of sanctions was the existence of rules that render it possible to ensure that the severity of all imposed sanctions is adapted to the seriousness of the offence. However, the CJEU left the analysis of this issue in its entirety to the national court.

## 5. CRIMINAL JUDGEMENTS AND SUBSEQUENT ADMINISTRATIVE SANCTIONS

All the previously discussed rulings were delivered on the basis of cases in which national criminal courts considered admissibility of delivering a judgement of conviction after the person involved had been punished with a final and binding administrative sanction. However, in the remaining judgements delivered on 20<sup>th</sup> March 2018, the CJEU had the opportunity to analyse different situations, i.e. those in which the criminal proceedings ended first. The CJEU expressed its position in reference to both cases concluded with the delivery of a conviction as well as those concluded with acquittal.

The issue of the impact of the previous acquittal on the admissibility of a possible further sanctioning in administrative proceedings emerged in the joined cases No. C-596/16 and C-597/16. The CJEU answered the questions asked by the Italian Court of Cassation (*Corte suprema di cassazione*) dealing with complaints regarding the legality of fines imposed by the stock exchange supervisor (*Commissione Nazionale per le Società e la Borsa* – the so-called Consob) to Enzo di Puma and Antonio Zecca.<sup>12</sup> Both men were charged with unlawful use of confidential information in transactions carried out on the stock market (so-called *insider trading*). In particular, namely Enzo di Puma and Antonio Zecca were considered to have purchased 2375 shares of Permasteelisa SpA company based on knowledge on the planned takeover of the control over this company by another entity, while such knowledge was out of reach of the remaining participants on the market. Antonio Zecca held such information due to the position and responsibilities he

<sup>12</sup> Judgement of the CJEU of 20<sup>th</sup> March 2018 in Case No. C-524/15, ECLI:EU:C:2018:192.

performed within Deloitte Financial Advisory Services SpA. On the other hand, it was clear from the actual findings that Enzo Di Puma could not have known that this information was confidential. Consob decided that both men were guilty of illegal use of confidential information and imposed administrative sanctions on them by an administrative decision. Both Antonio Zecca and Enzo di Puma disagreed and appealed to the Milan appellate court (*Corte d'appello di Milano*). The court dismissed the action brought by Enzo di Puma and upheld the action brought by Antonio Zecca. This resulted in appeals to the highest instance in both cases. Enzo di Puma referred to the final judgement of the criminal court in Milan (*Tribunale di Milano*), which had acquitted him of the charge of committing the same act that Consob currently attributed to him in the administrative proceedings. Likewise, Antonio Zecca pointed out the previous acquittal. Therefore, the court of final instance that considered the complaints had doubts whether the sanctions imposed by Consob violated the *ne bis in idem* principle under Article 50 of the Charter of Fundamental Rights.

Referring to the problem put forward by the Italian court, the CJEU stated at the outset that the protection afforded by the *ne bis in idem* principle is not limited to the situation in which a person was convicted by a criminal sentence, but also refers to the previous acquittal of the person. Therefore, the subsequent imposition of an administrative pecuniary sanction based on the same acts constitutes a restriction of the fundamental right guaranteed in Article 50 of the Charter. The CJEU noted, however, that such a restriction of the application of the *ne bis in idem* principle may be justified on the basis of Article 52 (1) of the Charter by the general purpose, which is the need to protect the integrity of the financial markets and to protect public confidence in financial instruments. However, in the case presented by the Italian court, the CJEU found that such necessity was not in place. Imposing an administrative pecuniary penalty obviously went beyond what is necessary to effectively protect the stock market, as by virtue of acquittal, it was found that it did not satisfy the criteria of a crime against the functioning of this market. In such a procedural system, the CJEU considered the subsequent administrative proceedings as unfounded. Therefore, the CJEU's reasoning leads to the conclusion that the acquittal judgement definitively determines that no act has been committed, and thus it is pointless to consider whether an exception to the *ne bis in idem* principle in such a case is justified in the light of Article 52 (1) 1 of the Charter.

In its reply to the Italian court, the CJEU also referred to Article 14 (1) of Directive 2003/6/EC of the European Parliament and of the Council of 28<sup>th</sup> January 2003 on the use of confidential information and market manipulation (market abuse). Pursuant to that provision, irrespective of the possibility to adjudicate in criminal proceedings, Member States should ensure that appropriate, effective, proportionate and dissuasive administrative measures can be taken or administrative sanctions can be imposed on those responsible for a failure

to apply the provisions adopted in the implementation of the Directive.<sup>13</sup> Therefore, the established regulation practically allows for breaking the *ne bis in idem* principle. However, the CJEU ruled that it does not preclude national provisions that do not allow for the possibility to carry out an administrative penalty payment proceedings after the criminal court has issued a final acquittal, stating that the offence does not satisfy the criteria of the offence specified in the provisions on the use of confidential information. This conclusion was drawn by the CJEU based on the interpretation of Article 50 of the Charter.

On the other hand, in case C-537/16, the CJEU raised the issue of the admissibility of applying an administrative sanction in respect of an act for which a previous conviction was handed down.<sup>14</sup> This time it also replied to the Italian court of highest instance on the basis of a case concerning fraud in stock exchange transactions.

In the proceedings pending before the Italian court, the already mentioned Consob, by way of administrative decision, imposed on Stefano Ricucci, Magiste International S.A. and Garlsson Real Estate S.A. in liquidation, jointly and severally, an administrative fine of EUR 10.2 million. Consob accused Stefano Ricucci of committing acts that constitute a manipulation in the market causing deviation from the normal quotation of securities to the benefit of other entities. In the meantime, criminal proceedings were brought against Stefano Ricucci for the same act. They ended with the tribunal in Rome (*Tribunale di Roma*) on 10<sup>th</sup> December 2008 dismissing charges with manipulating transactions on the stock market. In the course of the administrative proceedings, the defendants appealed against the decision of the Consob to the Court of Appeal in Rome (*Corte d'appello di Roma*). This court, in the judgement of 2<sup>nd</sup> January 2009 – despite the existence of a final criminal judgement – only reduced the administrative penalty imposed on the appellants to the amount of EUR 5 million. This resulted in the lodging of appeals to the court of highest instance, on the basis of which a preliminary question was addressed to the CJEU. The appellants based their arguments on the infringement of Article 50 of the Charter of Fundamental Rights consisting in the imposition of administrative sanctions on them for an act for which a final conviction had been passed. The Italian court of highest instance decided that the resolution of this issue required a ruling of the CJEU.

At the outset, the CJEU noted that the files submitted by the Italian court showed that the provisions on the basis of which the appellants had been punished were intended to protect the integrity of the Union's financial markets and to protect public confidence in securities. Therefore, the possible accumulation of proceedings to fight against market-based crime would be justified if each of the sanctions applied would also fulfil additional objectives. The CJEU considered it

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<sup>13</sup> Official Journal No. L 096, 12/04/2003 .

<sup>14</sup> Judgment of the CJEU of 20<sup>th</sup> March 2018 in Case C-537/16, ECLI:EU:C:2018:193.

legitimate to apply a solution with which a Member State is seeking to discourage any infringement, whether intended or not, of the prohibition of market manipulation by imposing administrative sanctions and, on the other hand, to discourage serious violations of these rules and to sanction them in criminal proceedings. The CJEU emphasized that these should be particularly serious infringements and thus justify the adoption of more stringent criminal sanctions than only administrative ones. The CJEU thus expressed a view identical with the position taken in other judgements issued on 20<sup>th</sup> March 2018. The ruling of the CJEU once again leads to the conclusion that the *ne bis in idem* principle of Article 50 of the Charter is not absolute. At this point, the CJEU referred to the aforementioned Article 52 (1) of the Charter. However, it clearly indicated that the permissible accumulation of proceedings and sanctions should not violate the principle of proportionality of the measures applied. The accumulation of sanctions should, therefore, be accompanied by rules ensuring that the severity of all sanctions imposed corresponds to the seriousness of the infringement in question, since such a requirement results not only from the said Article 52 (1) of the Charter, but also from Article 49 (3) of the Charter, which stipulates the principle of proportionality of penalties. According to the CJEU, both these rules should impose on competent authorities the duty to ensure that the severity of all imposed sanctions does not exceed the seriousness of the violation.

Following the above interpretation, the CJEU came to the conclusion that in a situation where the sentence imposed by a final judgement is an effective, proportionate and deterring response to the crime, then conducting proceedings aiming to impose an administrative fine goes beyond what is strictly necessary to achieve the general objective of protecting the proper functioning of the stock market. In this case, Article 50 of the Charter is an obstacle to imposing an administrative sanction on a person who has been previously punished with a final judgement of conviction. In the opinion of the CJEU, however, it is for the national court to ultimately re-examine this matter in the context of a specific case.

## 6. CONCLUSIONS

Summing up, it should be pointed out that it is clear from the previous case-law of the CJEU that the application of Article 50 of the Charter is not limited to conducting criminal proceedings several times in the same case. This provision also applies to situations in which national law admits the possibility of parallel sanctioning of unlawful acts committed by the same entity by means of both criminal and administrative law instruments. The problem of applying Article 50 of the Charter does not occur in cases in which the punished entities are not legally identical.

Pursuant to Article 50 of the Charter, the EU legislature does not prohibit Member States to apply the accumulation of sanctions ruled in separate proceedings, provided, however, that the administrative penalty is deprived of penal nature typical of the sanctions imposed in criminal proceedings. Assessment of this character in accordance with the case-law of the CJEU needs to be based on three criteria: the classification of a given procedure in domestic law, the existence of a repressive function of the measure adjudicated under the procedure and the degree of its severity. The fulfilment of any of them essentially determines the criminal nature of the measure. However, even in such a situation, a prohibition under Article 50 of the Charter will not always be absolute. The EU legislative authorities has allowed restrictions to the use of the rights granted by the Charter (see Article 52 (1) of the Charter). It is therefore possible to double sanction a given act with measures of a penal nature, if it is justified by general objectives such as the protection of the tax system or the regularity of stock exchange trading, and each of the proceedings performs its own specific additional objectives. Administrative sanctions are meant to counteract any transgressions, and criminal sanctions are limited to the most serious, culpable abuses. However, the accumulation of sanctions must be based on the principle of proportionality. This means that the Member States should regulate the mutual influence of both proceedings, so as not to punish the same behaviour too severely and so that the sanctions applied jointly are absolutely necessary. EU law excludes the possibility of bringing a given entity to administrative responsibility in the event that it was legally acquitted of committing the same offence with a final judgement. This issue, however, is quite debatable, because it cannot be ruled out that the given act will remain an administrative tort, despite the lack of prerequisites of criminal liability, such as the intention to commit a prohibited act.

## **THE PROBLEMS OF APPLYING BOTH CRIMINAL AND ADMINISTRATIVE PENAL SANCTIONS IN LIGHT OF ARTICLE 50 OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION**

### **Summary**

The aim of this study is to present the case law of the Court of Justice of the European Union (CJEU) regarding the admissibility of parallel punishments in proceedings conducted separately before criminal courts and administrative authorities.

Pursuant to Article 50 of the Charter of Fundamental Rights of the European Union, 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 *ne bis in idem* principle).

According to the CJEU, this principle does not constitute a legal obstacle to the application of sanctions for the same unlawful conduct of the same person in both criminal and administrative proceedings, if the sanction imposed by the administrative authority does not have the nature of a criminal penalty (the case C-617/10 *Fransson*). Assessment of such a nature in accordance with the case law of the CJEU (influenced by the judgment of the European Court of Human Rights in the *Engel* case) needs to be based on three criteria: the classification of a given procedure in domestic law, the existence of a repressive function of the measure adjudicated under the procedure and the degree of its severity (the case C-489/10 *Bonda*).

In the opinion of the CJEU, the *ne bis in idem* principle mentioned in Article 50 of the Charter is also not absolute, because the restrictions on the use of the rights granted by the Charter are allowed pursuant to Article 52 (1) of the Charter. Therefore, according to the CJUE, it is possible to double sanction a given behaviour with measures of a penal nature, if it is justified by general objectives such as the protection of the tax system or of the regularity of stock exchange trading, provided that each of the proceedings performs its own specific additional objectives and that the accumulation of sanctions is based on the principle of proportionality. While administrative sanctions could be meant to counteract any transgressions, criminal sanctions should be limited to the most serious, culpable abuses. Moreover, the Member States should regulate the mutual influence of both proceedings, so as not to punish too severely the same behaviour and so that the sanctions applied jointly are absolutely necessary (the case C-545/15 *Menci*, the case C-537/16 *Garlsson Real Estate and Others*).

On the other hand, according to the CJUE, Article 50 of the Charter excludes the possibility of bringing a given entity to administrative responsibility in the event that it had already been legally acquitted of committing the same offence with a final court ruling, because the acquittal judgement definitively determines that no act has been committed, and thus it is pointless to consider whether an exception to the *ne bis in idem* principle in such a case is justified in the light of Article 52 (1) of the Charter (joint cases C-596/16 and C-597/16, *Enzo Di Puma and Consob*).

Finally, the CJUE states that Article 50 of the Charter must be interpreted in such a way that it does not preclude the application of the national provision which allows for conducting criminal proceedings, if a definitive administrative penalty for the same acts has been imposed on a company with a legal personality and criminal proceedings have been initiated against a natural person (joint cases C-217/15 and C-350/15, *Orsi, Baldetti*).

## KEYWORDS

*ne bis in idem*, European Union

## SŁOWA KLUCZOWE

*ne bis in idem*, Unia Europejska