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A TAX PENALTY AS A PUNISHMENT? LEGAL ASPECTS OF THE CONCURRENCE OF TAX AND CRIMINAL SANCTIONS

Abstract

Tax crime in the Czech Republic has become increasingly important in recent years. This article focuses on an unintended consequence of tax crime, namely the issue of double jeopardy. In the Czech legal system, tax proceedings and criminal proceedings are conducted separately. The aim of this article is to determine whether it is possible to impose a tax penalty and a penalty in criminal proceedings at the same time without violating the ne bis in idem principle. The hypothesis assumes that the concurrence of these sanctions is possible if the penalty is not considered as a punishment in the sense of criminal law. For these purposes, the legal framework that defines tax and criminal proceedings in the Czech Republic is first analysed. Subsequently, the conditions under which it is possible to conduct these proceedings in the same case are identified, using an analysis of the case law of European and domestic courts. The authors conclude that tax penalties are punitive in nature and therefore the sanctions imposed must be considered. However, the current legal framework in the Czech Republic makes this very difficult, as the tax administrator is not granted discretionary powers when imposing penalties. Therefore, the following

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solutions are proposed: 1) change the legislation and allow discretion in imposing penalties, 2) do not impose penalties at all if a punishment has already been imposed in criminal proceedings, 3) merge the two proceedings and impose one sanction.

Key words: tax penalty, criminal offence, tax evasion, concurrent sanctions, ne bis in idem principle

JEL Classification: K34

1. Introduction

Tax crime in the Czech Republic is a serious and increasingly topical problem that has not only economic but also legal consequences. In recent years, there has been an increase in the volume of tax crime, which is confirmed by statistical data. In 2023, the crime of tax evasion caused a loss of CZK 2.815 billion. This is particularly significant in the context of overall economic crime, which amounted to CZK 12.317 billion in the same period [Report on the activities of the National Rapporteur on Combating Tax Crime for 2023, 3]. This means that tax crime accounts for the largest share of economic offences and has a significant impact on public finances and the fair distribution of tax liability between entities. The key question that arises in this context is whether this increase in detected damage is indicative of a real increase in tax crime or whether it is primarily the result of more effective detection and prosecution of these offences. However, this issue is so complex that it is beyond the scope of this article. Instead, this study focuses on a different consequence of tax crime – namely, the issue of possible duplication in the imposition of sanctions, which is related to the principle of non-double punishment (ne bis in idem).

In the Czech legal system, tax and criminal proceedings are conducted separately. In practice, this leads to situations where a taxpayer is first assessed a tax penalty in administrative proceedings and then the same person is brought before a criminal court for a tax offence. In recent years, however, situations have also arisen where these proceedings are conducted in reverse order. This overlap raises the question of whether it is possible for a tax penalty and a criminal penalty to be imposed at the same time without infringing the principle of ne bis in idem, which prohibits someone from being punished repeatedly for the same offence.

The aim of this article is to determine whether it is possible in the Czech conditions to meet the requirement of mutual consideration of tax penalty and criminal sanction so that the resulting sanction is imposed in a reasonable amount in the sense of the criterion of factual nexus established by the European Court of Human Rights (ECtHR). The authors start from the hypothesis that this requirement can be met only if both sanctions are imposed within the discretionary power of the public authority.

This article uses the analytical-descriptive method to examine in detail the issue of concurrence of tax and criminal sanctions in the Czech legal system with an emphasis on the *ne bis in idem* principle. The research is conducted in several successive phases, each of which focuses on a specific aspect of this issue.

First, a characterisation of tax and criminal proceedings in the Czech Republic is made, with the main emphasis on identifying their specificities. This part of the paper focuses on the structure of both proceedings, their purpose, procedural rules and key differences. Subsequently, a comparison is made of selected institutes of tax and criminal proceedings that are relevant from the point of view of the conduct and implementation of the proceedings. This part of the analysis focuses on issues such as the objective of the proceedings, the burden of proof or the means of proof. The aim is to identify the extent to which these processes overlap.

The next part of the research focuses on the analysis of the case law of the European Courts, namely the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). This analysis examines the decisions that concern the application of the ne bis in idem principle in the field of sanctioning tax offences. The aim is to determine what conditions must be met for the concurrence of tax and criminal sanctions not to be contrary to this principle and how the European courts define the cases in which the imposition of both sanctions may be considered admissible.

Subsequently, the acquired knowledge base is applied to the legal framework of the Czech Republic. This part of the research focuses on how the requirements of the European case law can be met in the Czech legal environment, in particular as regards the possibility of taking into account the sanctions in both proceedings. The key question is to what extent Czech law allows the criminal court to take into account the tax penalty

imposed in administrative proceedings and, conversely, whether the tax administrator reflects the penalty imposed in criminal proceedings when assessing the penalty.

Given that the principle of ne bis in idem is anchored in international law as one of the fundamental legal principles, it is not surprising that publications on this topic are quite extensive. The concurrence of tax and criminal proceedings is the subject of both international and Czech authors. Among foreign works, we can mention, for example, Peeters, who asks the question of the consistency of the legal conclusions of the ECJ and the ECtHR [Peeters 2018: 182–185]. Vetzo deals with a similar problem when he follows the development of the decision-making practice of these courts, analysing the past and the present while predicting the future [Vetzo 2018: 55–84]. It can be stated that foreign literature most often focuses on the discrepancies between the decision-making of the highest judicial bodies at the European level. In the case of Czech authors, we can mention, for example, the work of Kotlán dealing with problematic aspects in the area of tax criminality [Kotlán 2017: 68–81], the contribution of Šimánová, where the author focuses on the jurisprudence of European courts in the area of the ne bis in idem principle [Šimánová 2019: 342] or the contribution of Radvan, who dealt with this issue even before the fundamental decisions of European courts [Radvan 2015: 20–27]. However, it should be added that the combination of penalties from criminal proceedings and tax proceedings has received rather subordinate attention.

2. Characteristics of tax proceedings and their specifics

2.1. Tax proceedings as a wrapper

In tax proceedings, it is necessary to distinguish how the legislator interprets this concept in the Tax Code and how it is understood by legal doctrine. Tax proceedings can be defined as a procedure established by law for the parties to the proceedings to ensure the realisation of rights and obligations arising for tax subjects from tax relations [Bakeš 2003: 334]. This definition is rather broad and would be more in line with what the Tax Code, as the basic procedural regulation, refers to as tax administration, i.e. a process aimed at the correct determination and assessment of taxes and ensuring their payment [Daňový řád (Tax Code): Art. 1].

From a different perspective, the tax procedure is defined by Lichnovský, who states in his work that it is the period of time from the filing of the tax return to the termination of the right to assess the tax (Article 148 of the Tax Code), or until the termination of the payment obligation (tax liability), unless this termination occurs earlier [Lichnovský 2016: 505]. The second definition corresponds to the legislator's concept of tax proceedings. Tax proceedings are conducted for the purpose of correctly ascertaining and assessing the tax and ensuring its payment and end with the fulfilment or other extinction of the tax liability [Daňový řád (Tax Code): Art. 134]. The concept of the tax procedure chosen by the legislator also corresponds to the very purpose of tax administration, which is conducted with the aim of correctly determining the tax and ensuring its payment. Tax proceedings consist of partial proceedings in which individual decisions are issued.

Although tax proceedings are referred to in legal terminology as "proceedings", they are not in fact proceedings in the formal sense. As Kopřiva states, tax proceedings are rather a framework process ("wrapper") within which a series of sub-proceedings take place which are already proceedings in the formal sense, and which pursue the same objective as the tax proceedings themselves [Kopřiva 2022: 629–633]. Thus, within the tax procedure, there is an interplay between the proceedings at the level of assessment and those at the level of payment, and in addition to these basic proceedings, there may also be processes relating to extraordinary remedies or supervisory remedies.

The very term "proceedings" in the context of tax proceedings may therefore be somewhat misleading when compared with proceedings under the procedural rules of other branches of law, such as criminal or judicial proceedings. In general, proceedings are understood as a process in which administrative authorities actively deal with natural or legal persons, either at the initiative of a party or on their own initiative. However, the Tax Code defines the concept of tax proceedings more as a period during which the actual proceedings may or may not take place – i.e. the initiation of one of the partial proceedings. It follows that the tax administrator is not entitled to intervene in the rights and obligations of the tax subject solely based on the existence of tax proceedings as such, but only based on specific partial proceedings. Once such a partial proceeding has been initiated, it must also be duly terminated, either by a decision, by discontinuance of the proceeding or in any other manner provided for by law.

2.2. The principle of auto-application

A specific feature of the method of legal regulation of tax law is the so-called principle of auto-application. Unlike administrative or financial law, in tax proceedings there is no administrative action between the tax administrator and the taxpayer at the first stage. Instead, it is assumed that the tax subject has sufficient knowledge and orientation in tax law. The taxpayer himself applies the relevant legal rules to his situation – he determines the tax base, applies the appropriate rate and applies any corrective elements. The tax return thus completed is then submitted to the tax authorities, who will assess the tax unless there are any doubts as to the correctness or completeness of the return [Radvan 2008: 295–304].

Auto-application, which is based on the principle of two stages. As Radvan states, in the first stage, the taxpayer applies the law on his own and on his own responsibility for the correctness of the result of the application (the auto-application stage), while in the second stage there is a standard power application of tax law in the form of a specific procedure before a public authority, which ends with the issuance of an individual administrative act [Radvan 2016: 13–38]. The application of tax law does not only consist in the correct assessment and payment of tax, but also in the correct application of the obligation to file a tax claim (whether there is an obligation to file, by what deadline, etc.).

2.3. Denial of the principle of res iudicata

The primary and desired result of a taxpayer's auto-application of the tax rules to its tax liability is a simple assessment of the tax liability in accordance with the taxpayer's assertion. Such an assessment is not even communicated to the taxpayer, as the related payment order is merely put on the file, thereby treating the tax liability as finally determined. The tax administration subsequently acts as a power or supervisory authority which ex post evaluates the fulfilment of these obligations and, if necessary, intervenes in a superior manner in the result of the self-assessment. However, the tax authority is generally not bound by specific time limits for such actions, except for the standard time limit for the assessment of tax [Daňový řád (Tax Code): Art. 148].

It follows that the tax authority has the power to intervene repeatedly in the amount of the tax liability and is limited only by the time limit for the determination of the tax. The taxpayer also has the right to change the amount of the tax liability repeatedly. This is done through the assessment procedure. This concept would not be possible if the general principle of res iudicata applied. However, this is excluded by the law, since the Tax Code provides that "the legal force of previous decisions on the assessment of a tax shall not preclude its subsequent assessment" [Daňový řád (Tax Code): Art. 143], thus expressing the fundamental difference between tax proceedings and other administrative proceedings. The method of regulating tax law consisting in the so-called self-application is one of the reasons why this principle was established. The tax administration must have a mechanism for subsequently amending the taxpayer's primary alleged tax liability when doubts arise about its correctness after the fact. The exclusion of the final judgment barrier and its reflection in the potential assessment of tax is also essential for the concurrence with criminal proceedings. If the outcome of the criminal proceedings precedes the tax proceedings, the related conclusions must also be reflected in the tax obligations. Even if the tax has been finally assessed in the past, the assessment of tax following criminal proceedings is possible, even within the extended assessment period, even if the original three-year period has already expired. In such a case, the tax must be assessed by the end of the year following the year in which the criminal court's decision became final.

3. Criminal proceedings

3.1. Characteristics of criminal proceedings

Criminal proceedings can be defined as a procedure regulated by law by the law enforcement authorities, which takes place in the presence of other persons as provided by law. The aim of these proceedings is, in accordance with the provisions of [Trestní řád (Criminal Procedure Code): Art. 1], to ensure that offences are duly established, and their perpetrators are justly punished in accordance with the law. The legal doctrine also draws attention to the necessity of a decision on the victim's claim for compensation for damage, non-material damage or the release of unjust enrichment, provided that such a claim is duly and timely asserted.

One of the most important principles of substantive criminal law is the principle of subsidiarity of criminal repression [Trestní zákoník (Criminal Code): Art. 12]. This principle reflects the concept of criminal law as a means of ultima ratio, which means that criminal liability may be invoked only in socially harmful cases where liability under other legal provisions cannot be invoked. Criminal proceedings therefore follow in response to the most serious offences. In the event that, in the course of criminal proceedings, it turns out that the act under consideration does not constitute a criminal offence but is a less serious violation, such as a misdemeanour or a disciplinary offence, the Criminal Procedure Code provides for appropriate mechanisms to ensure that criminal proceedings are not brought for less serious breaches of the law, for example by referring the case to the competent authority or by dropping the case.

However, this is not entirely true in the case of a breach of the obligation to remit tax. If the facts of a tax offence are not established (e.g. there is no intent), it is desirable and perfectly permissible to reflect the findings in the tax proceedings and to sanction the offence through tax mechanisms. On the other hand, a tax assessment in tax proceedings does not preclude criminal proceedings for the same offence, which is a very specific situation that must be assessed in the light of the ne bis in idem principle. The conditions under which both proceedings are admissible are discussed below.

3.2. Tax offences

Tax offences refer to unlawful acts in the field of tax administration and payment that are punishable under criminal law. These include the offences of evasion of tax, duty and similar compulsory payments, failure to pay tax, social security contributions and similar compulsory payments, failure to comply with the reporting obligation in tax proceedings, breaches of the regulations on labels and other articles used to mark goods, forgery and alteration of articles used to mark goods for tax purposes and articles proving compliance with the tax obligation. This group also includes the offence of breach of the obligation to make a true declaration of assets and the offence of misrepresentation of the state of the economy and assets, which are clearly linked to tax administration.

As a rule, intentional culpability is required to constitute the offence. However, if in some cases negligence is sufficient, this must be expressly stated

in the description of the offence. It should be added that all tax offences require intentional fault on the part of the perpetrator, whether direct or indirect.

4. Comparison of selected institutes of tax and criminal procedure

4.1. Objective of the proceedings

The basic procedural regulation for criminal proceedings states that the purpose of the Criminal Procedure Code is *to regulate the procedure of the criminal law enforcement authorities so that crimes are duly detected, and their perpetrators are justly punished in accordance with the law. In doing so, the procedure must have the effect of strengthening the rule of law, preventing and combating crime, and educating citizens in the spirit of consistent observance of the law and the rules of civil coexistence and the honest performance of their duties to the State and society*. In addition, the Tax Code establishes very simply that the aim of tax administration is *to assess the tax correctly and to ensure that it is paid.*

It follows that criminal and tax proceedings are not intertwined and there is not de jure or de facto relationship between them. In this context, the Supreme Administrative Court has stated that "*the fact that a taxpayer has or has not committed a criminal offence is not decisive for the outcome of tax proceedings. Tax law is not criminal law. The world of tax law and criminal law is separate, and the finding of a tax crime is certainly not a condition for the assessment of tax. The actions of the law enforcement authorities and the tax authorities are not conditional. The conclusions of the activities of the law enforcement authorities cannot be mechanically drawn into the tax sphere without any further consideration, even though the underlying business transaction may be the same or related*'" [Supreme Administrative Court, 6 Afs 125/2021-56]. On the other hand, it is difficult to imagine that the outcome of criminal proceedings would not be reflected in tax proceedings, especially in view of the much higher standard of proof in criminal proceedings, which the authors discuss below.

4.2. Evidence standard

In both tax and criminal proceedings, the correct determination of the facts is crucial, but the standards of proof and the distribution of the burden of proof in these proceedings differ fundamentally. In tax proceedings, the tax

administrator is obliged to establish the relevant facts as fully as possible but is not bound by the taxpayer's submissions alone. The main burden of proof lies with the taxpayer, who must prove all the facts stated in his/her tax claim, supplementary claim or other submissions [Daňový řád (Tax Code): Art. 92]. The tax administrator then proves only specific facts, such as the notification of his/her own documents or the grounds for doubting the accuracy of tax records and accounting (Art. The specifics of the evidence in tax proceedings originate precisely from the principle of self-application, where the tax subject primarily determines the tax, itself based on the facts which it knows best. This self-application is compensated by the legal provisions by the superiority of the tax authority in respect of disputes on questions of fact [Janderová 2022: 134–149]. In contrast, in criminal proceedings, the principle of investigation applies, which requires the criminal prosecution authorities to establish the facts in such a way that there is no reasonable doubt about them, to the extent necessary for the decision [Trestní zákoník (Criminal Code): Art. 12]. The burden of proof thus lies not with the accused but with the prosecutor and the prosecution authorities, who must prove the guilt of the accused beyond reasonable doubt.

The fundamental difference between these two processes is that in tax proceedings the burden of proof lies primarily with the taxpayer, while in criminal proceedings the burden of proof lies with the state, which must actively gather all evidence to decide whether the accused is guilty or not. The logical consequence is that the criminal authorities are not bound by the conclusions of the tax authorities, who, given the lower standard of proof, may not always conclude that the tax is missing. It is also theoretically possible that the tax administrator may make a procedural error which leads to the decision to impose the tax being overturned by an appeal body or a court. This will lead to situations where the tax is not assessed in the tax proceedings, but the evasion is only detected in criminal proceedings. As stated by the Supreme State Prosecutor, this situation is quite legally permissible because "*the criminal prosecution authorities are not bound by the tax authorities' statement on the amount of tax or by the results of the tax proceedings, including final and enforceable decisions on the extent of the tax liability. Even different conclusions can be reached in criminal proceedings from those reached by the tax authorities in tax proceedings. This results from the difference in the method of proof. In tax proceedings, the tax administrator*

has discretion or is not bound by the obligation to prove and clarify the circumstances to the same extent as in criminal proceedings [Supreme Court, 15 Tdo 832/2016].

4.3. Means of evidence

In criminal proceedings, anything that may contribute to the clarification of the case, in particular statements of the accused and witnesses, expert opinions, objects and documents relevant to the criminal proceedings and examinations, may serve as evidence [Trestní řád (Criminal Procedure Code): Art. 89]. Evidence may be sought, submitted or proposed by either party, and the fact that it has not been sought or requested by the prosecuting authority shall not be a ground for refusal. Tax Code provides that all documents which may be used as evidence to establish the true situation and to verify the facts relevant to the correct determination and assessment of the tax may be used, if they have not been obtained in breach of the law [Daňový řád (Tax Code): Art. 93]. Evidence includes statements by the taxpayer, documents, expert opinions, witness statements and inspection of the property. It is also possible to use documents submitted to the tax administrator by other public authorities and obtained for the proceedings conducted by them, as well as documents taken from other tax proceedings or obtained during tax administration of other tax entities.

Although there is a de facto overlap in the scope of possible evidence in the two proceedings, the key difference lies in the ways in which the evidence can be obtained. The Code of Criminal Procedure provides law enforcement authorities with much broader possibilities in obtaining evidence, for example through searches, wiretaps, surveillance of persons and things or the use of means of operational search. In the context of tax proceedings, the possibility of obtaining evidence is considerably narrower, and it is therefore not uncommon for the tax administration to turn to the legal possibility of taking evidence from other proceedings, specifically from criminal proceedings. The relationship between criminal and tax proceedings has been repeatedly addressed by the Supreme Administrative Court, in particular the question whether and under what conditions statements and other documents obtained in criminal proceedings can be used as a basis for a decision in tax proceedings. On this topic, the Supreme Administrative Court has adopted a legal opinion according to which, under certain conditions,

"*documents from which the content of witness statements from other proceedings is apparent*" may be part of tax proceedings. However, such documents must be obtained "*independently of the relevant tax proceedings (i.e., in particular, they must not be obtained in other proceedings for the purpose of avoiding the tax administrator's obligation to allow the taxpayer to be present during the examination of the witness and to ask questions). Furthermore, in those other proceedings, they must be lawfully taken"* and must also have reached the tax authorities *"in a lawful manner*". This means that it is not possible to use as evidence documents which are part of a file to which the tax authorities do not have access under the law.

Another condition set out in the judgment is that these documents be made available to the taxpayer so that he "*may acquaint himself with their contents and, where appropriate, propose further evidence which would clarify, correct or refute the findings resulting from the documents in question*". If the statements of witnesses recorded in those documents contradict other evidence taken in the tax proceedings, "*those contradictions must be resolved and, if it is possible to call the witness in question, the most appropriate way will usually be to question the witness and put the ambiguities to him"* [Supreme Administrative Court, 2 Afs 24/2007–119].

A separate issue is the taking over of wiretaps conducted in criminal proceedings. From the general construction of the Tax Code, which allows the taking of evidence from other proceedings, it could be inferred that wiretaps can also be used. However, this extensive conclusion has been contradicted by the now-established case-law of the administrative courts, which has reached the opposite conclusion [Supreme Administrative Court, 1 Afs 186/2018–45], as well as by academia [Martiník 2023: 134–143]. However, the inapplicability of wiretapping is rooted in the rules of criminal procedure, where the invasiveness of this instrument makes its use in criminal proceedings conditional on the fulfilment of other conditions. On this issue, the Court concluded that "*if the Criminal Procedure Code itself significantly limits the applicability of (properly obtained) interceptions and recordings of telecommunications traffic even in criminal proceedings, it is all the more impossible to use such evidence in tax proceedings*" [Regional Court in Prague, 59 Af 9/2022–78].

5. Concurrence of tax and criminal proceedings

The Latin principle of ne bis in idem translates as "not twice about the same thing" or "not twice in the same matter". The precise definition of this principle is not easy, as it is enshrined in various international and national legal norms, and its interpretation may vary depending on the specific legal system. In interpreting this rule, it is important to focus on its two key elements – "bis" and "idem". The term bis means 'twice' and refers to the repetition of a legally relevant action, such as a prosecution or a decision in a case. In contrast, idem can be understood as 'the same' and must always refer to a specific act, conduct or set of facts [Geiß: Ne bis in idem]. The fundamental purpose of this principle is therefore to prevent the same person from being prosecuted, tried or punished twice for the same act. However, the application of the concepts of bis and idem is not always clear-cut, which is illustrated by the fact that their interpretation is often the subject of case law of the courts, particularly the European Court of Human Rights.

On European ground, the principle is regulated by the normative work of the Council of Europe, specifically in the Convention for the Protection of Human Rights and Fundamental Freedoms. The latter does not itself contain the ne bis in idem rule, but it can be found in Additional Protocol No. 7. There it states: "*(1) No one may be prosecuted or punished in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been acquitted or convicted by a final judgment under the law and criminal procedure of that State. (2) The provisions of the preceding paragraph shall not preclude a retrial under the law and criminal procedure of the State concerned if new or newly discovered facts or a material defect in the previous proceedings may have affected the decision in the case*" [Convention for the Protection of Human Rights and Fundamental Freedoms: Art. 4]. We should not forget the regulation contained in the Charter of Fundamental Rights of the EU, where the principle of *ne bis in idem* is reflected in this article "*No one shall be prosecuted or punished in criminal proceedings for an offence for which he has already been acquitted or convicted in the Union by a final criminal judgment in accordance with law*" [Charter of Fundamental Rights of the EU: Art. 50]. There are also views that an explicit enshrinement of this principle is not strictly necessary,. as they are part of EU law per se [Tomášek 2013: 107], which has been inferred in the past by the European judicial apparatus in the absence of a written one [ECJ, C-289/04].

5.1. European case law

The issue of assessing the concurrence of tax and criminal proceedings in the context of the ne bis in idem principle has undergone a rather turbulent development. It can be stated that in the ECtHR decisions it is possible to detect a long-term trend towards finding a way to allow criminal and tax proceedings for the same act. As an example, the judgment in *Nilsson v. Sweden*, where the ECtHR mentions the desirable element of temporal and spatial continuity of both proceedings, predictability and non-repetition of proceedings, but rather the parallel conduct of these proceedings [ECtHR, Nilsson v. Sweden, no. 73661/01]. On many occasions, the ECtHR has held that the second proceedings were inadmissible because the sanctions were imposed in two proceedings which were not linked in any way and the sanctions were not taken into account [ECtHR, Glantz v. Finland, no. 37394/11]. Thus, although the ECtHR did not give the green light to the conduct of both proceedings for the same act, it gradually provided guidance as to what the desired situation might look like, which was subsequently reflected in the landmark decision below.

In 2016, there was a breakthrough that set the assessment of this issue in a unified direction. In the Grand Chamber's November 2016 decision in *A and B v. Norway*, the ECtHR concluded that, if the enumerated conditions are cumulatively met, parallel proceedings for both tax and criminal proceedings for the same act are permissible [ECtHR, A and B v. Norway, no. 24130/11 and 29758/11]. The European Court of Human Rights considers the following conditions to be crucial:

1) Pursuit of complementary objectives – the two proceedings must pursue different but complementary objectives.
2) Predictability of the legislation – the subjects concerned must be able to foresee that the two proceedings may be conducted simultaneously or in conjunction with each other.
3) Non-repetition of evidence – evidence obtained in the first proceedings should be considered in the second proceedings, thus avoiding unnecessary repetition of evidence.
4) Considering the sanction imposed in the first proceedings – the sanction imposed in the first proceedings should be considered when imposing a sanction in the second proceedings [Šimánová 2019: 342].

If all these conditions are met, the ECtHR concludes that there is a sufficient factual link between the two proceedings. In addition, there must also be a sufficient temporal link between them. This condition cannot, however, be interpreted so strictly that the two proceedings must take place entirely simultaneously. It is necessary, however, that the connection between them should be sufficiently close to protect the individual from uncertainty, unnecessary delay and excessive length of proceedings.

This decision was followed by the CJEU, which until then had advocated the impossibility of conducting both proceedings, which it argued on the basis that two criminal sanctions could not be imposed for the same act [CJEU Grand Chamber, Åklagaren v. Hans Åkerberg Fransson, C-617/10]. In *Menci*, the CJEU adopted a conclusion in 2018 that corresponds in principle to, or certainly does not contradict, the ECtHR's approach above [CJEU Grand Chamber, Menci, C-524/15]. The scholarly community has, however, detected partial differences [Vetzo 2018: 55–84 or Lasagni, Mirandola 2019], noting that the CJEU's failure to explicitly mention the parameter of "substantial temporal connection" and speculating whether this is an attempt to abolish one of the ECtHR's most unpredictable criteria.

5.2. Implementation of European case law into the judicial activity of Czech courts

The 2017 decision of the Supreme Court of the Czech Republic, which corrected the previous practice, can be considered a fundamental reflection of the conclusion of *the A and B vs. Norway* decision. In particular, the lower courts had until then very often resorted to the fact that criminal proceedings should be discontinued after the tax proceedings had been conducted. In its resolution, the Supreme Court dealt quite carefully with the individual criteria defined by the ECtHR, but it should be added that it does not push these further in terms of interpretation. It concluded that "*the relevant factors for determining whether a sufficiently close factual connection exists include: whether the two separate proceedings pursue a complementary objective, that is to say, whether they concern, not merely in abstracto but also in concreto, different aspects of the offence in question whether the combination of the proceedings is a foreseeable consequence of the same conduct, both in law and in fact whether the relevant proceedings are conducted in such a way as to avoid repetition as far as possible in the collection and evaluation of evidence, in particular, by means*

of appropriate cooperation between the various competent authorities, so that the facts established are used in the second procedure and, above all, whether the penalty imposed in the first procedure is taken into account in the last procedure, with a view to avoiding that the individual concerned is ultimately subjected to an excessive burden" [Supreme Court of the Czech Republic, Grand Chamber, 15 Tdo 832/2016].

In this connection, the experts point out that the most serious shortcoming of the above-mentioned order, as well as of subsequent orders, is that it did not deal with the most important aspect of the facts – the consideration of sanctions. It criticises the Court for either simply referring to the fact that the defendant was sentenced at the very bottom end of the range (without stating what significance the imposition of the tax penalty had for the level of the sentence) or stating that the lower courts took the imposition of the tax penalty into account, but without stating how. The Court considers it most significant that this aspect is not examined at all [Kmec 2018: 107–123].

6. Penalty as a punishment

6.1. Character of the penalty payment

The concept of a penalty as an accessory to the tax is a criminal sanction. Czech legislation conceives of a penalty as a one-off sanction, which is determined directly by law without prior proceedings and in the amount of a percentage of the incorrectly claimed tax, tax deduction or tax loss. The penalty is imposed irrespective of the nature of the specific breaches of tax regulations and is not subject to any administrative discretion; on the contrary, the discretionary power of the tax administrator is not at all at issue here, provided that the conditions set out in Tax Code are met. The conclusion regarding the concept of the nature of the penalty was also approved by the Extended Chamber of the Supreme Administrative Court [Supreme Administrative Court, 4 Afs 210/2014-57]. Indeed, the Supreme Court also reached the same conclusion in the resolution, when it stated that "*a penalty under Section 251 of the Tax Code, imposed in tax proceedings for failure to comply with the obligation to claim by a final decision of an administrative authority, has the nature of a criminal sanction, albeit sui generis, and therefore Article 4(1) of Protocol No. 7 to the ECHR should also be applied to it*" [Supreme Court of the Czech Republic, Grand Chamber, 15 Tdo 832/2016].

6.2. Individualisation of the sanction in the Czech Republic

The last, and probably the most important, of the attributes of factual nexus defined by the ECtHR to avoid a violation of the ne bis in idem principle is the consideration of the first sanction imposed. This is to be done *'with a view to avoiding that the individual concerned is ultimately subjected to an excessive burden, the likelihood of the latter risk being lowest where there is a netting mechanism to ensure that the overall amount of all sanctions imposed is proportionate'* [ECtHR, A and B v. Norway, no. 24130/11 and 29758/11]. The considering of the first sanction imposed in the context of those imposed later should be justified by the public authority. It is clear from the wording of the *a priori* reasoning of the decision itself, which is directed towards a desirable netting mechanism, that it is not impossible for these penalties to stand side by side, but that they must be adequately considered.

6.3. Criminal proceedings after the conclusion of tax proceedings

In cases where there has been a final termination of tax proceedings and the criminal proceedings have subsequently been terminated, the application of the ne bis in idem prohibition requires the criminal court to exercise a greater degree of discretion as to how to consider the penalty imposed and its payment in the context of the individualisation of the penalty. This requirement can be met in theory in the Czech environment, since the criminal court is endowed with discretionary power in its consideration of the sentence. However, in European as well as domestic jurisprudence there is no mechanism to fulfil the condition defined by the ECtHR. This has been noted, moreover, by the Portuguese Judge P. de Albuquerque, who in his dissenting opinion on the ECtHR decision in *A and B vs. Norway* referred to this section as a general proclamation [Albuquerque 2016].

It is not clear what elements should be considered by the second public authority, nor is it clear what threshold should be reflected in the accumulation of sanctions. It seems even more unclear how to take into account the different types of penalties in relation to each other. While a fine will always be a pecuniary penalty, non-monetary penalties (imprisonment, forfeiture of property, prohibition of activity) may also be imposed for tax offences in the Czech Republic. A similar situation was also addressed in the decision in *A and B vs. Norway*, where the ECtHR found that the tax penalty was adequately considered when imposing a penalty in criminal proceedings,

when a sentence of one year's imprisonment was imposed, while the upper limit of the rate was six years. However, this is a model example from which it is difficult to draw generalised conclusions.

6.4. Tax proceedings after the completion of criminal proceedings

However, the situation is completely different if the tax proceedings are finally concluded after the criminal proceedings. In addition to the above-mentioned interpretative ambiguities, in the Czech environment in this factual situation, there are additional obstacles of an objective nature originating in the legislative setting. In fact, the tax administrator is not vested with discretion in the area of penalties, neither in terms of the imposition itself, nor in terms of the amount of the penalty, which is determined by the statutory mechanism, How and under what conditions the tax administrator is to take into account final decisions of criminal courts when individualizing the penalty, when the law (the Tax Code) does not grant him the discretion to proceed in this way, was considered by the Supreme Administrative Court in a recent judgment [Supreme Administrative Court, 10 Afs 26/2024-62]. The conclusion of the 10th Chamber is based on the premise that the possibility of individualizing the penalty is preserved, because the element of discretion can be transferred to the level of projecting the given penalty.

The Court, however, did not take into account the statutory conditions for remission, which makes the conclusion problematic. First, the Tax Code provides that remission of the tax or the corresponding tax is not possible if the tax subject or a person who is a member of its statutory body has seriously violated tax or accounting legislation in the last three years [Daňový řád (Tax Code): Art. 259c]. This is an exclusionary condition which, if met, precludes the waiver of penalties. If the taxpayer has been convicted in criminal proceedings for acts which in fact amount to a breach of tax or accounting legislation, this legal condition excludes him from the possibility of obtaining a waiver. The second loophole in the conclusion is that the remission, and therefore the individualisation of the penalty, does not occur automatically ex officio. It always requires procedural activity on the part of the taxpayer, who must apply for a waiver of the penalty. Moreover, the application for remission is subject to an administrative fee.

7. Conclusion

Criminal and tax proceedings related to a single act are a challenge faced by many EU countries, and the Czech Republic is no exception. While a relatively rich body of case law provides guidance on how to avoid violating the ne bis in idem principle, it is by no means a guide that would provide universal protection for Member States, and especially its citizens, from the possible undesirable consequences of this situation.

Apart from comparing the two proceedings, i.e. tax and criminal proceedings, this article deals primarily with the question of how and whether it is possible in the Czech legal system to comply with the attribute given by European case law, according to which it is necessary, among other things, to take into account the previously imposed sanction when imposing the latter. Given that the penalty in the Czech Republic is not subject to discretionary power either in terms of the imposition or the amount of the penalty, the hypothesis of the article was refuted. It follows that in the Czech legal order, in the current legislative setting, it is virtually impossible, or very difficult, to meet the requirement imposed by European case law concerning the mutual consideration of penalties. Although the Supreme Administrative Court found a way to take this step in terms of waiving penalties, where some discretion is offered to the tax administrator, the article identified problems with this solution. These consist in the need for the taxpayer to request the waiver, as well as in the charge for this request. Equally important is the fact that the procedural conditions for the waiver prohibit the reduction of penalties for those taxpayers who have seriously breached accounting and tax rules in the last 3 years. What else can be subsumed under the vague legal concept of 'tax infringement' other than the commission of a tax offence?

Considering the above conclusions, the authors suggest three possible solutions that would allow to comply with the positive conditions for the imposition of sanctions by the European case law. First, the *de lege ferenda* proposal takes the simplest route – to respect the conclusion of the Supreme Administrative Court that considering the criminal sanction can be done by waiving it in the context of the penalty. In this respect, it would be necessary to remove the undesirable procedural conditions, which are: 1) the administrative fee for the application, 2) the possibility of automatic remission of a certain part of the penalty in proceedings initiated ex officio, 3) the abolition of the exclusionary condition for the assessment of a serious

breach of tax legislation. Incidentally, it should be added that this is the solution chosen by the legislator in the Czech Republic and an amendment to the Tax Code is expected to come into force from 1 July 2025, which responds to the decision of the Supreme Administrative Court [Parliamentary press no. 784/0].

The second option is to resort to not imposing the penalty if a criminal sanction has already been imposed. This solution assumes that the criminal court itself has already imposed a sanction 'at the limit of what is possible' appropriate to the offence and the offender's circumstances, so that a further sanction would be contrary to the appropriateness of the sanction. Although the authors are aware that the imposition of penalties is based on a mandatory rule of tax law that does not allow the tax authorities to depart from it, such cases have occurred in the past, albeit in a different area, namely interest on tax deductions. The reason for this was precisely the conflict with EU legislation, which meant that the legal norm enshrined in the Czech legislation was not applicable [Supreme Administrative Court, 7 Aps 3/2013-34]. If the administrative authority had found that the criminal sanction imposed in the criminal proceedings was already adequate for the act in question and that the imposition of the penalty in the tax proceedings would have resulted in a disproportionate interference with the property rights of the convicted person, the administrative authority would have had grounds for not imposing the penalty on the grounds of a conflict with the constitutionally guaranteed individual rights, which are not only provided for by domestic law but also by European law.

Finally, the authors take the liberty to bring a solution that would be able to eliminate the problems with the double track of criminal and tax proceedings for one act. This is the institutional merger of the proceedings, in terms of a single authority discovering the unrecognised tax obligations and therefore one procedure and one sanction for one act. However, this idea has wide-ranging implications, as it is based on the merger of the administrative and criminal authorities and therefore the need to deal with the nature of the proceedings, as well as other related issues. This last option, rather than a solution, is thus an idea that the authors believe deserves to be developed further in the future.

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