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Ne bis in Idem - the Charter and ECHR

Possible affects of the latest interpretation by the ECJ of the
Ne Bis in Idem principle in the Haparanda Case.

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ABBREVIATIONS

The Charter	The Charter of fundamental rights of the European Union
The ECHR	The European Convention for the protection of human rights and fundamental freedoms
The ECtHR	The European Court of Human Rights
The ECJ	The European Court of Justice
The EU	The European Union
NJA	Nytt Juridiskt Arkiv
Protocol no 7	Protocol no 7 to the convention for the protection of Human Rights and fundamental Freedoms
SkBrL	Skattebrotts lagen 1971:69
Skv	Skatteverket – the Swedish Tax authorities
The Supreme Courts	The supreme administrative court and the supreme court
TEU	Treaty of the European Union
TFEU	Treaty of the functioning of the European Union

SUMMARY.

Ne bis in idem is an evolving and current topic of EU law¹ where recent case law has affected its application. The Swedish tax system contains administrative proceedings that can result in fines that can thereafter be followed (or initiated) with a criminal offence proceeding. The ECtHR² revised its view on the Ne bis in Idem in *Zolothukin v Russia* and concluded that the Identity of the facts was decisive for if two proceedings concerned the same- Idem.

The Swedish Supreme courts weighed this new practice and acknowledged it when they delivered verdict in NJA 2010 s 168 I & II but they made the assessment that they needed “klart stöd” (clear support) from the ECHR or the ECtHR³ case law to be able to reject the system of dual proceedings within Swedish tax laws. This decision was both criticized and debated.

The principle of Ne bis in Idem received a broader base for interpretation with the recent judgment from ECJ in the case of *Åkerberg Fransson C-617/10*, the so called Haparanda Case,⁴ in the area of administratively imposed fines. It discusses both the nature of the proceedings, the offence and the “klart stöd” doctrine. The findings by the ECJ are likely to affect both Swedish tax laws as well as other areas of dual proceedings and administratively imposed fines within the European Union.

1. INTRODUCTION

Recent cases from the ECJ and ECtHR imply that their relation to the principle of Ne Bis in Idem have changed and evolved with a result affecting many areas of law. This is a limited analysis of the principle of Ne bis in Idem in the light of the recent judgment from ECJ in, the Haparanda Case in the area of administratively imposed fines.

¹ European Union Law, further referred to as the EU law

² European court of justice of Human Rights, further referred to as ECtHR

³ European Convention for the Protection of Human rights and Fundamental Freedoms

⁴ *Åkerberg Fransson C-617/10* further referred to as the Haparanda case

The Lisbon treaty became active first of December 2009 and with it the European Union became a sui generis entity and as such it is according to article 6 TEU going to accede to the European Convention for the Protection of Human rights and Fundamental Freedoms⁵ in the near future. Human Rights were already before recognized as general principles of law within the EU law. With the Lisbon treaty the Charter of fundamental rights of the European Union⁶ became an encoded version of those principles and is almost identical with the ECHR. The Charter was also given status as EU law.⁷ The ECHR were also given a new status through the article 52(3) of the charter as will be discussed further below.

With the pending accession to the ECHR the European Union have to find ways to adapt to the existing case law of the ECtHR to avoid future conflict.

The principle of Ne bis in Idem has a somewhat unclear meaning within both the Charter and the ECHR. The latest case-law regarding this principle came out of the ECJ in February this year. The Haparanda case⁸ casted some light into how the principle is interpreted in EU law in connection to the Charter and its relation to the ECtHR.

In the famous case of Zolothukin v Russia⁹ it has been considered that the ECtHR changed its previous practice and harmonized their field in the area of the Ne bis in Idem principle. The ECtHR position was revised into an understanding that the double punishment prohibition was now to be considered as a prohibition from a second trial or prosecution, if that meant that a second offence got tried on substantially the same or identical facts as the first offence. The Haparanda case¹⁰ was the first case on the Ne bis in Idem principle to come out of ECJ after the Zolothukin judgment.

Previous to the Haparanda- case the Swedish supreme court had through case law concluded that, still after the Zolothukin case, there were no existing conflict between the

⁵ Further referred to as the ECHR

⁶ Further referred to as The Charter

⁷ article 6(1) TEU gives the Charter the same legal value as the treaties

⁸ Åkerberg Fransson C-617/10 further referred to as the Haparanda case

⁹ Sergey Zolothukin v. Russia no 14939/03 further referred to as Zolotukhin.

¹⁰ Åkerberg Fransson C-617/10

Swedish Tax System giving a person tax surcharges administratively by SKV¹¹ at the same time (or before or after) as the same person gets punished by the Swedish court for tax offences based on the same information.¹² According to the Supreme courts¹³ it was not a violation of the Ne bis in Idem principle¹⁴ since they interpreted the idem to be different in the parallel proceedings.

The Ne bis in Idem principle is incorporated in various international laws and treaties, amongst them article 6 and 7 of the ECHR and also article 4 of protocol no 7 to the ECHR and article 50 of the Charter, that all three have status as legal sources in Swedish law.

The view taken by the Swedish supreme courts have been far from uncontroversial and have been criticized from several different sources¹⁵ claiming that the view of the Supreme Court in Sweden and the combination of tax surcharges and proceedings for tax offences is not compatible with the principle of the Ne bis in Idem. Several lower courts in Sweden have even decided to go against the praxis from the higher court, a practice that became known as the HD-uprising in Sweden.¹⁶ Many were hoping that the preliminary rulings in the Haparanda case, which rose out of a district courts referral to ECJ,¹⁷ were going to finally put an end to the discussions about the Swedish surcharges. The question is if it really did and what can actually be deducted from wordings by the ECJ in the Haparanda case and also if any parallels can be drawn from prior case-law on the Ne bis in Idem principle, from both the ECJ and the ECtHR.

The Swedish system contains of two separate procedures for not supplying the authorities with information or supplying them with false information that could or have led to that the commission is losing tax. One procedure is carried out by the Swedish tax authority, SkV, by which they are adding tax surcharges as a penalty for false information without any consideration to weather it was done with intent or by mistake. This is

¹¹ Skatteverket – the Swedish tax authority further referred to as SKV

¹² NJA 2010 p168 I and II

¹³ Amongst others NJA 2010 p168 I and II

¹⁴ When someone have been convicted of the offence by the SkbrL, skattebrottslagen and than afterwards also receives the administrative tax surcharges.

¹⁵ Artiklar och böcker samt skiljande meningar

¹⁶ HD is the abbreviation in Sweden for the Swedish Supreme court.

¹⁷ Tingsrätten in Haparanda, a first instance court

considered to be an administrative procedure within Sweden. Another separate procedure takes place if the incorrect information is also found to be a serious enough breach of Swedish Tax Laws to be suspected of being a tax offence. This is criminal proceedings, taking place in front of a court, where except for the incorrect information also a certain amount of guilt or at least negligence is needed to cast a verdict. The sentencing in the criminal court takes no regard to the facts of previous tax surcharges or not, regardless of their size. If the administrative proceedings start after the criminal proceedings have reached a verdict that has become final. The SkV¹⁸ has a possibility to reduce the tax surcharge if it would be offensive otherwise, but it is rarely applicable since the administrative procedure often foregoes the criminal proceedings and for the SkV to be able to reduce the tax surcharges the criminal proceedings have to have ended and reached a verdict which has become final.

The Ne bis in Idem principle does not only affect the area of taxes when it concerns the combination of administrative fines and other punishments, many countries and the commission for example are using similar parallel proceedings of both administrative type and penalty for offences in a way that might become affected in various ways of this latest ruling over the Ne bis in Idem principle.

1.1 QUESTION AND PURPOSE

As the Charter became part of EU law it meant that all EU reforms and also domestic laws had to adapt and become in line with the rules of the Charter. The enhanced value of the human rights within the EU law through the Charter and the principle of Ne bis in Idem have been widely discussed but the situation is still far from clear. The fact that most member states are already part of the ECHR from which the Charter is modeled does not seem to have rendered it uncontroversial. The EUs pending accession¹⁹ to the ECHR might also affect the interpretations by the ECJ in this field. The recently delivered judgment from the ECJ in the case of Åkerberg/Fransson C-617/10,²⁰ called the Haparanda case, have

¹⁸ The Swedish tax authority further referred to by its Swedish abbreviation SkV

¹⁹ Article 6(2) TEU

²⁰ Åkerberg/Fransson C-617/10 further referred to as the Haparanda case

implications for the application of Swedish tax laws and combined administrative fines without the European Union.

This thesis will try to investigate what the Haparanda case could mean for the Ne bis in Idem principle from the perspective of the Swedish tax system with combined administrative proceedings and criminal proceedings for certain tax offences. To be able to investigate that question the thesis will have to start with a brief explanation into the principle of Ne bis in Idem itself. What status does it have, when and how is it applicable within respectively EU legal order and the ECHR?

What was the opinion of the Supreme court in Sweden previous to the Haparanda case on the application of the principle of Ne bis in Idem and then finally by going through and interpreting the judgment in the Haparanda case in the light of previous case law and interpret what it might mean for the future application of the Ne bis In Idem principle, especially on combined administrative fines and other criminal punishment.

1.2 METHOD AND MATERIALS:

Method used is a traditional legal dogmatic method. It is carried out by comparing and analyzing case law and the status of existing law in the matter at hand.

The focus is on the principle of Ne bis in idem in EU law and its relationship to ECHR and the Member states domestic laws, mainly the Swedish tax system with tax surcharges in combination with criminal sanctions.

Article 6 (3) TEU states that the ECHR is general principles of EU law and article 6(1) TEU that the Charter shall have the same legal value as the treaties²¹ therefore I will look at both

²¹ Article 6 TEU

1. The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and

case law from the ECtHR and the ECJ and also look after any relations between judgment in the ECJ and previous judgments in the ECtHR.

Many books have been consulted to both find a deeper understanding of EU law and specific areas and several articles have been used to look at how the legal discussions surrounding the principle of Ne bis in Idem, particularly in relation to tax law and the new Haparanda case.

1.3 TERMINOLOGY

The Lisbon treaty meant that a lot of articles got new numbering and I will use the new article numbering throughout this essay and concepts that changed names will use the present concepts.²²

With the ECJ I refer to the highest court within the European Union.

Supreme Court in Sweden refers to the highest court in Sweden in that area.

Supreme administrative court refers to the highest court in Sweden in the area of administrative decisions.

Supreme Courts in Sweden refers to both supreme courts mentioned above

Within the EU law the concept of Ne bis in Idem is often referred to as the prohibition of Double jeopardy, but I will consistently use the Ne bis in Idem – principle in its place except for in quotes.

with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

²² Ex common market are now referred to as the Internal market.

The Court will refer to the court of the ECJ or ECtHR depending on the case discussed and the domestic court to the referring domestic court at all levels.

1.4 DELIMITATIONS

The principle of Ne bis in Idem is an old concept and it is used in several international laws, treaties and have had many different layers of meaning through time and cultures. To investigate the impact of the principle in its whole would not be possible in a thesis like this one, not even the concept within a field of EU law is possible within the scope of this essay.

I have chosen to focus on how the principle can be understood through a limited amount of very specific cases and its evolvement between the ECtHR and the ECJ through them, even if the thesis by no means should be interpreted as a record of a finished and clear development of the Ne bis in Idem principle, rather it should be seen as a snapshot of the situation at the moment and possible further development.

My main focus will be on the latest Haparanda case and the relation between the Charter and the ECHR in the area of tax law and Swedish surcharges in the light of new praxis from ECJ and ECtHR.

Since the principle has a wide application through EU law I will also make a contextual analysis of how ECtHR and ECJ have discussed about fines in competition regarding the application of the Ne bis in Idem principle and the meaning of Idem.

1.5 OUTLINE

In the first chapters of this thesis the European taxsystem in general is explained to give a background to how the tax laws are integrating between domestic laws and harmonized area of EU law. That is followed by the referral process to the ECJ and what demands that EU law puts on the member states that are connected to the tax field.

Then the Chapter of Ne bis in Idem is trying to give an overview of the principle in itself and how it is expressed through ECHR, EU law and the Swedish domestic law to explain key elements before explaining the cases.

Before going in to the Cases it is also necessary to get an understanding and brief background into the Swedish tax system and both the parallel proceedings of administrative fines and criminal punishment and also the doctrine of Klart Stöd that the Supreme Court in Sweden is using to decide when a rule should be declared invalid due to its possible incompatibility with ECHR.

Then the recent development between the ECHR and EU Law is briefly touched upon before the descriptions of the Engels criterions that are used by both the ECtHR and the ECJ to investigate the nature of an act or omission.

That is followed by an explanation to the notion of idem – how is the word the same in the principle of Ne Bis in Idem interpreted In general and what will the accession to the ECHR mean for the tax field and the Ne bis in Idem.

That is followed by a study of the relevant case law presented through the ECtHR cases in order of delivery and then followed by two cases of major importance from the ECJ with the main focus on the Haparanda case.

The finishing chapters are analyzing the development through the case law presented of the interpretations of the criminal heading and then the Idem. The thesis is ended with general conclusions of the development between the ECHR, the Charter and the EU law discussing possible reasons for the judgments and also discussing the implication it might have for the Swedish tax system and possible future development.

2. GENERALLY ABOUT EU AND TAXES.

Already in the famous cases of *Vand Gend en Loos* and *Costa v. ENEL* the ECJ made it clear that the membership in the European Union meant that the member states would have to adapt to far reaching consequences within their own legal systems.²³ The member states have all signed over part of their sovereignty to the EU by signing the different treaties. The latest treaty signed is the Lisbon treaty which was signed in the year of 2007 and became active from first of December 2009, thereby the EU became a sui generis- entity and the Charter was given the same legal value as the treaties themselves.²⁴ This means that EU law and the Charter is now superior to domestic law in the Member States. This have far reaching consequences on all territories of domestic law and so also on tax laws, as will be explained briefly later in this essay.

Even if a country in theory is free to adopt whatever taxes it wants, how it wants and the jurisdiction to apply taxes are considered a manifestation of countries sovereignty that is not the case in reality. Taxes are influenced by neighboring countries tax policies, by tax agreements and by other agreements that have the effect of limiting the scope of the tax applications and it is also affected by basic rights of international law.

In the case of *Avoir Fiscal*²⁵ it became clear that the field of direct taxation also could be affected and have to adapt to European Law, as the ECJ established that taxes that limited the freedom of establishment could be in violation of the treaties. *Avoir Fiscal* was decided upon in the early eighties and since then this interpretation has been developed further and it is today clear that taxes do not contain a free zone for member states to regulate as they see fit. The treaties put limits to this freedom and now also the Charter.

The EU law is designed to protect situations of a cross border character and therefore only applies to situations where European Union law is somehow applicable.

²³ *Vand Gend & Loos* C-26/62 and *Costa v. ENEL* C-6/64

²⁴ Article 6(1) TEU

²⁵ *Avoir Fiscal* C-270/83

A cross border situation that is protected exists if the situation violates the treaty freedoms and also if it leads to negative consequences in the cross border situation compared to wholly internal situation of similar kind.

To suffer more taxes due to a cross border situation but where none of the member states involved is in fact treating the subject in the cross border situation worse than an internal situation, does breach of the EU law. States are allowed to use parallel taxation even when it is burdensome for the cross border active party. But they cannot target them directly or indirectly.

The EU law is divided into primary and secondary law. Primary law contains of the treaties and their amendment that is negotiated and ratified by the member states, and is superior to EU secondary law. Whereas the secondary law is created by decisions made by the different EU institutions and the central legal acts are mentioned in article 288 TFEU.

2.1 INDIRECT AND DIRECT TAX- HARMONIZATION ARTICLE 113-115 TFEU

In the field of taxation there are regulations, directives and recommendations that can be used to harmonize the field for all member states. The tax field is divided between direct taxation and indirect taxation.

Article 113 TFEU directly gives orders to the council to make decisions that harmonizes the indirect taxation field within the EU and it has used that competence extensively. The Vat directive²⁶ leaves little room for the member states own ways of implementation. The area is so harmonized that it can almost be seen as a law in itself.

According to article 115 TFEU the Council is to create directives that makes the laws of the different member states more harmonized, it is a general harmonization clause. Article 115 probably makes it impossible to create any directives, regulations and similar that moves in opposite direction. Considering the strict interpretation of the wording in article

²⁶ Council directive **2006/112/EC** of 28 November 2006 also referred to as the VAT directive

114 TFEU by the ECJ in the Tobacco advertising case²⁷ one can expect that since article 115 consists of stricter wordings than article 114 that implies that it also should be implied strictly, meaning that article 113 and 115 TFEU cannot be used to harmonize the tax field in areas of national tax measures that are not considered as trade barriers within the scope of the treaties.²⁸

All kind of decisions²⁹ by the council in tax matters have to be made unanimously and this grows increasingly harder and more difficult as more member states annexes. The growing number of member states slows down the process of harmonization in the field of taxation and suggestions have been made by the commission at several occasions to change this at least in parts to a qualified majority instead, but so far without success.³⁰

2.2 DIRECT TAXATION IN EU LAW

Direct taxation is mainly a non harmonized field within EU law. The ECJ have in several cases found domestic direct taxation in conflict with the treaties in areas like free movement of capital and non discrimination which can lead to the domestic rule being invalid.

The field of direct taxation is mostly regulated through the courts case law, often with a reference to the Member States that they should exercise their competence over the direct tax field in consistency with Union Law, which is respect to the free movement rights that taxpayers have and also to observe State aid prohibitions.³¹

The member states view direct taxation as an important part of their sovereignty and there is very little interest from politicians to harmonize this part of the tax field. But that reluctant participation has lead to consequences like *“a large and rapidly expanding body of casuistically and thus uncoordinated case law of the Court of Justice of the EU, often fatal for the*

²⁷ Tobacco Advertising C-380/03

²⁸ Traditional and alternative routes to European Tax Integration edited by Dennis Weber 2010 IBFD p18

²⁹ Com v. Council C-338/01

³⁰ European Tax Law Ben.J.M.Terra, Peter J. Wattel Wolter Kluwer Law & Business 2012, sixth edition chapter 2

³¹ European Tax Law Ben.J.M.Terra, Peter J. Wattel Wolter Kluwer Law & Business 2012 p 10

*national direct tax measure at issue because of incompatibility with the TFEU freedoms.*³² The fact that it is not an harmonized area of EU law means that the cases are variegated and covers several different but small areas where a conflict have taken place between a specific domestic rule in a member state and EU law. This leaves a lot of gray and unclear zones and as of yet not specified areas between domestic direct taxation and EU law that are waiting to be interpreted.

3. REFERRAL TO THE ECJ

The Commission or a member state can start a procedure according to article 258 and 259 TFEU. The principle of *Jura novit curia* does not apply in a domestic court if a matter of EU law is in question. Instead there is an obligation to refer unless it is an *Act Claire* or an *Acte Éclair*.³³

Under article 267 TFEU domestic courts can transfer cases for preliminary rulings to the ECJ.

The possibility to refer cases for preliminary rulings is only available for courts. Tax authorities like *Skatteverket*³⁴ cannot ask for preliminary rulings but they are still expected not to breach any of the EU laws regardless of if the situation has previously been clarified or not.

This leads to certain complications for the tax authorities in situations which is not clear to them on how it should be interpreted when it comes to the relationship with the EU treaties.³⁵

3.1 DEMANDS FOR CONFORMITY

³² European Tax Law Ben.J.M.Terra, Peter J. Wattel Wolter Kluwer Law & Business 2012 p 5

³³ CILFIT C-283/81; only if an interpretation of EU law is so clear that all states and the ECJ would reach the same conclusion can a member state neglect to refer and decide over the result of the interpretation of the effect of a EU law. There is no room for doubt. If the question has already been referred in a previous matter and decided upon by the ECJ then the question doesn't need to be referred again.

³⁴ *Skatteverket*, the Swedish Tax Authority, further referred to as SKV

³⁵ Ex case C-134/97 *Victoria film*

The EU law has to be interpreted in conformity in all member states. This principle was established in the Von Colson case and in the Marleasing amongst others.³⁶

The tax authorities (and other public authorities of the member states with similar influence and decision power) are also required to interpret EU law within this conformity even though they cannot ask for a preliminary ruling in case of confusion. Since the authorities that are not qualified for preliminary ruling (the ones not regarded as courts or tribunals in the view of EU law)³⁷ they are left to interpret unclear EU law as best they can. Only after a decision has been complained about to a court by the person who is subjected to the decision, first then can that court ask for a preliminary ruling on the matter.

The ECJs requirement of conformity in interpretations of a directive allows for interpretations within the national laws interpretation rules. But the interpretations within the national laws are limited by general principles of law³⁸ such as legal certainty and non retroactivity. This should mean that new interpretations should always be made in favour of the taxpayer, but there are cases that are giving another impression.³⁹

National courts should ex officio in their judgment apply rules with direct effect and interpret them ex officio.⁴⁰ When it comes to different interpretations of secondary law it does not matter if one interpretation seem more logical to the wording than the other, the version that will prevail is the one closest to the will of the treaties.⁴¹

3.2 AN ILLUSION OF NON INTERFERENCE

³⁶ C-14/83 Von Colson, C-106/89 Marleasing,

³⁷ Article 267 TFEU

³⁸ EU skatterätt 3 upplagan Kristina Ståhl mfl Iustus förlag Uppsala 2011 p 37 refers to C-371/02 Björnekulla - even against the preparatory works

³⁹ cases 369/04 Hutchinsonson 3G and C321/05 Kofoed mainly AG but not contradicted by ECJ. - opinions on this in EU skatterätt 3 upplagan Kristina Ståhl mfl Iustus förlag Uppsala 2011 p37-38

⁴⁰ When should a national court ex officio interpret EU law - C-312/93 PeterBroeck and C 430/93 Van Schijndel

⁴¹ purpose of the directive – read out from the treaty Denkavit C-292/94

The principle of shared competence mean that the ECJ should not rule over the interpretation of domestic rules in itself, instead they should only have opinions on the compatability with the EU law and its interpretation.⁴²

But usually they will have to say something about the domestic rule as well to be able to answer the question or questions that were referred, this gives of an illusion of that the ECJ is not interfering with domestic law per se. Guidance is though thorough and limit's the room for navigation for the national court considerably.⁴³

The ECJ never replies to hypothetical questions. All questions referred have to concern real situations otherwise the workload of the court would be immense.⁴⁴

The hard evidence of a case is a matter for the national courts to investigate and rule upon, not anything for the ECJ to decide about; therefore they are not making a stand either way neither on the proof of a coincidence or on an event.⁴⁵ The ECJ assumes that the parties involved in a case know their own domestic law and therefore the ECJ does not investigate if the domestic laws mentioned does actually apply, exists or should be interpreted as suggested in front of them. If parties to a case come unprepared about their own domestic situation before the ECJ they can cause misunderstandings about their national laws that can mean serious delay.⁴⁶

3.3 ABUSE AND TREATY ACCESS

Abuse of rights to circumvent other rules through EU law does not affect access to court but can affect the outcome.⁴⁷

The ECJ have lately been in pursuit of tax avoidance, especially the attempts to avoid tax laws and directives by using other directives. Any attempts or suspicions of misuse seem to

⁴² C-62/97 BP soupergaz + many more.

⁴³ 258/95 Julius Fällibeck Söhne, C-231/94 Faaborg - Gelting Linen

⁴⁴ Amongst others C-384/08 Attanasio group p 28, C-478/07 Budvar p 64

⁴⁵ Hard evidence, not for ECJ cases - 230/94 Renate Enkler, 127/86 Yves Ledoux, 320/88 SAFE, 230/87 Naturally yours cosmetics.

⁴⁶ EU skatterätt 3dje upplagan Kristina Ståhl mfl Iustus förlag Uppsala 2011 p 32 ex Verkooijen C 35/98

⁴⁷ From the centros case to Halifax. Many cases and still a gray area.

start a response from the ECJ where legitimate expectations gets less protection than otherwise when it is weighed against the protection of the tax systems in the union.⁴⁸ If someone is misusing the system it will lead to a loss of protection, but it does not lead to a loss of access. The ECJ leaves it to the national courts to investigate potential misuse, since that has to be done by evaluating the evidence of the case.⁴⁹ The functioning of the market is linked to harmonization within the Lisbon treaty which in the field of taxation has shown to be more problematic than most other areas.

Legitimate expectations are important for the ECJ,⁵⁰ there should always be a real possibility to understand the consequences of your actions before you choose the path of your actions. This is also why retroactivity in law making cannot be accepted.

⁴⁸ Cadbury Schweppes, Thin Cap, Halifax (196/04, 524/04, 255/02)

⁴⁹ C-425/06 Part Service

⁵⁰ C-110/94 INZO (loss project killed) Interesting case Garage Molenheide C 405/95 (286/94, 340/95, 401/95)

4. NE BIS IN IDEM – PRINCIPLE

Ne bis in Idem is a Latin expression meaning “not twice the same” and has been a part of most legal systems since before the modern legal systems that still exists today. It is usually understood as a prohibition to sentence someone twice for the same offence, but the nuances of what that actually means varies.

The meaning and rationale behind the principle have varied over time and within different systems and therefore the principle have been interpreted and incorporated differently in different member states and there have also been inconsistencies between the Charter and the ECHR.

It is applicable to situations if both proceedings resulting from the same idem⁵¹ are considered to be of a criminal nature. Within both the case law from the ECtHR and the ECJ the criterions for determining if a proceeding is of a criminal nature is decided by applying the so called Engels criterions, first developed in the case of Engels and Others v the Netherlands⁵² by the ECtHR.

If a proceeding is found to be of a criminal nature and has become final, the principle of Ne bis in Idem is considered to preclude a second proceeding regarding the same idem. The notion of Idem is not completely clear or obvious and differ within the interpretations of the ECtHR and the ECJ as will be explained further towards the end.

4.1 NE BIS IN IDEM IN THE ECHR

Within the ECHR the principle is laid down within the amendment of article 4 in protocol no 7, that was added later and opened for ratification 1984 and a few member states to the EU have not ratified it yet.⁵³

Article 4 of protocol no 7 reads;

⁵¹ The same something -act, omission or event, is called Idem and will be explained below.

⁵²Case of Engel and Others v the Netherlands no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 further referred to as the Engels Case

⁵³ At the time of the Toshiba case it was the United Kingdoms, Belgium, Germany and the Netherlands

Article 4 – Right not to be tried or punished twice

*No one shall be liable to be tried or punished again in **criminal proceedings under the jurisdiction of the same State** for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal **procedure of that State**.*

*The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure **of the State concerned**, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.*

No derogation from this Article shall be made under Article 15 of the Convention.

The principle seems to apply only to domestic criminal proceedings and not to situations that contains a cross border situation since article 4 p 1 say that “*criminal proceedings under the jurisdiction of the same State*” and then the article continue to refer to a one state situation “*procedure of that state*” and also Article 4 p 2 that also concerns the penal procedure “*of the state concerned*” .

4.2 NE BIS IN IDEM IN RELATION TO EU LAW

In EU law the principle is laid down within the article 50 of the Charter which says that:

“Right not to be tried or punished twice in criminal proceedings for the same criminal offence

*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 wordings of article 50 of the charter is not clear, for example it only applies to criminal offences and criminal proceedings, but what is considered a criminal proceeding or offence is not explained and the same goes for what lays behind the wording of “*finally acquitted or convicted*” and it is therefore something that the ECJ has to interpret.

4.2.2 ARTICLE 52(3) OF THE CHARTER

“In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”⁵⁴

Considering that the EU law is applicable towards cross border situations but does not cover entirely domestic situations at the same time as the rule in 52(3) of the Charter leaves the ECHR as the minimum standard but the relevant articles in the ECHR covers same state situations, it clearly leaves an area of interpretation left for the ECJ to clear.

One should see the application of ECHR within the EU law as a matter of substance, what the ECHR demands is the minimum standard for the EU law in substance but it does not apply the same territory of application. The place of possible application differs.

This relation between the ECHR and the Charter should lead to the conclusion that the ECtHR interpretation of the principle of Ne bis in Idem is the minimum criteria and that only a deviation towards a interpretation that leads to a more extensive protection for the individual can be allowed under EU law, though with the limitation of that article 52 (3) of the Charter only refer to parts of the ECHR as far as the Charter contains rights that corresponds to those rights.

4.3 THE PRINCIPLE OF NE BIS IN IDEM WITHIN SWEDEN

The discussion about the Swedish tax system and its compatibility with the Ne bis in Idem principle have though regarded the possibility to apply both a procedure with tax surcharges and another one for tax offence given that the same information and fault is used as the base for both procedures.

After the Zolothukin case the Swedish supreme courts have still persisted that there is no conflict between the Swedish system giving a person tax surcharges administratively by SKV⁵⁵ at the same time (or before or after) as the same person undergoes criminal

⁵⁴ Article 52(3) of the Charter.

⁵⁵ Skatteverket – the Swedish tax authority further referred to as SKV

proceedings by the Swedish court for tax offences based on the same information.⁵⁶ These decisions have been controversial and debated.⁵⁷

The Supreme court in Sweden decided on the 22nd of February 2013 to give leave for appeal to a case⁵⁸ originating from the first court of appeal⁵⁹ that concerns the principle of Ne bis in Idem.⁶⁰ It will be interesting to see if they will change their position on the Ne bis in Idem when that judgment eventually comes since it will be the first judgment on tax surcharges and Ne bis in Idem after Haparanda case within Sweden. Unfortunately neither that case nor another case that is pending before the ECtHR will be decided upon in time to be part of this thesis.

⁵⁶ NJA 2010 p168 I and II

⁵⁷ Not only in the doctrinal debate but also with descending judges in cases like NJA 2011s444 and several district court decisions, one of which is the case that is now pending before the Supreme Court in Sweden.

⁵⁸ The Swedish Supreme court case no B 4946-12 during 2013

⁵⁹ District court over Skåne and Blekinge from 2012-10-08 Case no B2102-11

⁶⁰ 2013-05-22 <http://www.hogstaforvaltningsdomstolen.se/Provningstillstand/Skattemal/>

5. THE SWEDISH TAX SYSTEM

5.1 STATUS OF THE SWEDISH TAX SYSTEM WITH SURCHARGES

The principle of legality is part of Swedish constitution⁶¹ and is also valid for tax legislation. No tax can be charged that is not supported by law or that is contrary to existing law. The European Union law and the ECHR are valid as law within Sweden.

Any new taxes⁶² have to be decided directly by the Swedish Parliament⁶³ but it also have to comply with the European union treaties, ECHR and The Charter. The tax authorities in Sweden are allowed to make enforcement regulations as long they are not changing anything so it becomes materially different in the taxation.⁶⁴

Tax surcharges are now regulated in chapter 49 ff of SKL and can be added for failure to report taxes, mistakes in information given or deliberate given false information in the declaration of taxes.

Tax surcharges after giving false information is regulated in SKL 49:11 and 49:15 and is added by a fixed amount of 40% upon the final taxation that otherwise would have been missed or on the decided arbitrary assessment if the false information had not been discovered, and 20% if it regards other forms of tax such as VAT etc. There is a possibility for the tax authority in 51:1 SKL to reduce the amount to less or nothing if it would otherwise be unreasonable or excessive, or if the person have also been sentenced for a tax offence under SkbrL⁶⁵ and the combination would amount to an unfair, not proportionate or excessive punishment.

⁶¹ The Convention of Sweden 1:1 RF all offentlig makt utgår från lag

⁶² Municipal authorities can influence levels of taxation but cannot affect what is taxable.

⁶³ They can delegate to the government to decide upon duty taxes alone.

⁶⁴ prop 1973:90 s 203 Konstitutionell Skatterätt. Robert Pålsson 2a upplagan, Iustus förlag Uppsala 2011 P 26

⁶⁵ Skattebrottslagen SFS 1971:69

5.2 CRIMINAL SANCTIONS WITHIN SKBRL⁶⁶

§2 and 4 of SkBrL says that a person intentionally providing false information⁶⁷ or fails to submit its declaration and by doing so have risked that the community will lose tax or even credit and repay incorrectly taxes to the person can be sentenced to two years imprisonment and if it is considered to be serious the sentence will be between 6 months to 6 years of imprisonment.

5.3 KLART STÖD- CLEAR SUPPORT DOCTRINE WITHIN SWEDISH LAW

The doctrine of Klart stöd (Clear support directly translated) have been developed through the praxis from the Supreme Courts in Sweden to a qualification ground needed to be able on background of ECtHR declare a Swedish internal legal rule to be invalid.

The demand for “klart stöd” have according to the Supreme Court judge Stefan Lindskog⁶⁸ been inspired from a rule in the constitution called the “Uppenbarhets rekvisit” that is no longer part of Swedish law.⁶⁹

The doctrine has nothing to do with the ECHR in itself and is only a rule for application of the ECHR developed within the Swedish legal system.

The doctrine for “klart stöd” was first mentioned by the Supreme Court in NJA 2000 s 622 where the court concluded that to be able to declare an internal Swedish rule invalid on basis of the ECHR when the convention in its wording does not give any support to declare it invalid, there should exist a need for a clear support for that interpretation by the praxis from the ECtHR. In the later case NJA 2010 s 168 I and II the Supreme court referred back to NJA 2000 s 622 and remained on the position that there was a need for “klart stöd” in the ECHR before a internal Swedish legal rule can be declared invalid.

⁶⁶ Skattebrottslagen SFS 1971:69

⁶⁷ Orally given false information is excluded

⁶⁸ <http://www.infotorgjuridik.se/premium/mittjuridiken/reportage/article155709.ece> 21 maj 2013

⁶⁹ The Swedish constitution 11:14

6. RECENT DEVELOPMENT BETWEEN THE CHARTER⁷⁰ AND THE ECHR.⁷¹

With the Lisbon Treaty it became clear that the EU is planning to accede to the ECHR within a foreseeable future according to article 6 TEU so the questions regarding compatibility between the two protective legislations of Human rights needs to be solved before the accession to avoid discrepancies in application that could cause legal uncertainty.

The principle of Ne bis in Idem in ECHR is regulated by the amendment in article 4 of protocol no 7⁷² and explained in the explanatory comments to it that article 4 refers to the National level.⁷³ Within the European Union it has long been regarded as part of the general principles of law and with the encoding of the general principles in the Charter, that was given the same legal status as the treaties by the Lisbon treaty , the ECHR is given status as the minimum level of fundamental rights.⁷⁴ In competition it is also recognized as a fundamental principle of community law and the PVC II case also mentioned article 4 of protocol no 7 for the first time in relation to competition.⁷⁵

This kinship between them affects all areas of EU law. The interpretations of EU law become different after an new development have been interpreted by a case from the ECtHR case since the ECHR is in corresponding parts the minimum standard for the Charter⁷⁶ and the parts that does not have a correspondence in the Charter have already since before been declared to be fundamental principles of general law. The ECJ though does not that

⁷⁰ The Charter of Fundamental rights, further referred to as the Charter

⁷¹ The European Convention on Human rights, further referred to as ECHR

⁷² A few member states to the EU have not yet ratified this protocol

⁷³ <http://conventions.coe.int/Treaty/EN/Reports/HTML/117.htm> 23 maj 2013

⁷⁴ The Charter article 52(3) see previous chapter on the principle of Ne bis in Idem

⁷⁵ PVC II joined cases C-238/99 P - Limburgse Vinyl Maatschappij and Others v Commission (Joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P) paragraph 59.

⁷⁶ Article 52(3) the Charter

often make reference to ECtHR case law even in cases where they are following them obviously.

The question of *Ne bis in Idem* in competition is handled in a similar way as it is in relation to taxes. Certain procedures leading up to fines of a certain character that is added before a criminal proceeding, points to that the fines could receive the character of a criminal penalty pushing it towards the more protected area of hard core criminal law and then be incompatible with the ECHR. If they reach certain burdensome amounts or is stigmatizing in some way that would also qualify them under the *Engels* criteria as a punishment for a crime.

The *Toshiba* case also points towards a discrepancy in opinions between the judges when it comes to the application of *Idem* and the use of the *Aalborg* criterions⁷⁷ within the ECJ since the Advocate General Kokott arrived at the same end result but in a very different manner in her opinion than the ECJ later did in their judgment.

In the *Haparanda* case the ECJ for the first time gives access to a case that concerns an internal situation and not a cross border situation, be that it included rules that is harmonized within the EU. In this case the VAT system.

These two latest cases from the ECJ seem to point towards that the ECJ is slowly adjusting within the EU to prepare for the accession to the ECtHR, an opinion I will develop in my conclusions.

⁷⁷ Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* paragraph 338-340 further referred to as the *Aalborg* case

7. THE ENGELS CRITERIONS.

Ne bis in Idem applies to situations where two proceedings fall under the criminal heading based on the same information and to decide if a penalty should be seen to fall under the criminal heading both the ECJ and the ECtHR have referred to the so called Engels criteria.

In the case of *Engels and Others v the Netherlands*⁷⁸ the so called Engel criteria was first formulated by the ECtHR and are a set of three basic conditions that if they are filled (together or separately) the punishment falls under a criminal heading:

*“ The starting-point for the assessment of the applicability of the criminal aspect of Article 6 of the Convention is based on the criteria outlined in Engel and Others (Engel and Others v. the Netherlands, judgment of 8 June 1976, Series A no. 22, p. 34-35, § 82-83): (1) the domestic classification; (2) the nature of the offence; (3) the severity of the potential penalty which the person concerned risks incurring”.*⁷⁹

7.1 THE FIRST CRITERION

The first criterion is according to the ECtHR the domestic classification. It should only serve as a starting point and is of relative weight. It is only relevant if domestic law classifies something as criminal but not if it does not, instead the court should than *“examine the substantive reality of the procedure in question”*⁸⁰ to determine this first criterion.

7.2 THE SECOND CRITERION

⁷⁸*Engel and others v Netherlands* (Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72) available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57479>

⁷⁹ For key case law on article 6 EKMR and each of the Engels Criteria from The ECtHR see http://www.echr.coe.int/NR/rdonlyres/B4F32DE3-8D21-403C-87D6-22A2F0FC34B3/0/COURT_n1946214_v2_Key_caselaw_issues_Article_6_Notion_of_criminal_charge2.pdf, further referred to as :the Article 6 Notion of “criminal Charge” from the ECtHR. Published 2006, downloaded 2013-05-20

⁸⁰ P 5 of the General principles in the Article 6 Notion of “criminal Charge” from the ECtHR.

The second criterion is of larger importance and it has been further explained by the ECtHR in amongst others the Jussila case that is later explained for this essay.⁸¹ When deciding on the nature of the defense it should be taken into account:

- if the rule is addressed to a specific group or has a general binding character.
- It also should be investigated whether the proceeding in question were instituted by a public body that also have statutory powers of enforcement.
- The legal rule that is questioned does it have a punitive or deterrent purpose
- Is *“the imposition of any penalty is dependent upon a finding of guilt”*⁸² and how is comparable procedures classified in other states?⁸³
- If it causes a criminal record might be of relevance but is not decisive.

7.3 THE THIRD CRITERION

The third criterion should be determined by looking at how much the maximum penalty of the relevant law can lead to.⁸⁴

According to the ECtHR the second and third criteria are alternative and not necessarily cumulative, instead it is suffice *“that the offence in question is by its nature to be regarded as “criminal” from the point of view of the Convention, or that the offence made the person liable to a sanction which, by its nature and degree of severity, belongs in general to the “criminal” sphere”*⁸⁵ for Article 6 to be held applicable. The ECtHR recommend a cumulative approach to reach a conclusion in situations where it is not possible to reach a clear conclusion of the nature of the offence as a criminal charge or not, by separate analysis of the Engels criteria.⁸⁶ But the criterions are not otherwise meant to be read cumulatively.⁸⁷

All three criterions have been developed further through extensive case law.

⁸¹ *Jussila v. Finland* no. 73053/01, § 38

⁸² P 6 of the General principles in the Article 6 Notion of “criminal Charge” from the ECtHR.

⁸³ Means other Council of Europe Member states

⁸⁴ Third criterion in p 7 ff the General principles in the Article 6 Notion of “criminal Charge” from the ECtHR.

⁸⁵ P 8 Ibid

⁸⁶ P 8 ibid

⁸⁷ *Ezeh and Connors v. The United Kingdom*, Application No. 9665/98; 40086/98

8. THE NOTION OF IDEM

Idem in the Ne bis in Idem relates to what is supposed to be decisive for what is supposed to be considered the same. The ECJ and the ECtHR have developed this principle over time.⁸⁸ In the case of *Rosenqvist v Sweden*⁸⁹ the identity of the crime was according to ECtHR the decisive aspect but in the later case of *Zolothukin* the ECtHR developed its argumentation. It was the first case where they went beyond article 6 ECHR and in to article 4 of protocol no 7 and the principle of Ne bis in Idem directly.

Since there had been different interpretation of Idem in different case law in different field the ECtHR concluded that there was a need for clarity on the issue for the sake of legal certainty. In *Zolothukin* the identity of the facts of the case, based on the same or substantially the same facts became decisive for Idem.

In the case *Van Esbroeck*⁹⁰ the ECJ interpreted idem in the same way as the ECtHR in the *Zolothukin* and the result in praxis seemed to point to that the identity if the crime had shifted to the identity of the facts. In the *Toshiba* case, which concerned the principle within the field of competition, the ECJ though based their interpretation of idem not on the identity of the facts of the case but in relation to the identity of the facts of the crime, that took place in different territories under a different time span but related from the same cartel. Thus they linked Idem to the old case law of *Jussila* rather than the new *Zolothukin* case.

The ECJ uses three criterions to interpret Idem that comes from the *Aalborg* case.⁹¹ The threefold condition of identity of the facts, unity of offender and unity of the legal interest protected, however there are discrepancies of how these are used compare to ECtHR.

⁸⁸ SvJT 2013 s343 Svensk Jurist tidning, Dag, Victor

⁸⁹ *Rosenqvist v Sweden* no 60619/00

⁹⁰ C-436/04 *Van Esbroeck*

⁹¹ *Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P Aalborg Portland and Others v Commission* paragraph 338-340 further referred to as the *Aalborg* case

9. WHAT ACCESSION MIGHT MEAN FOR THE TAX FIELD

Article 6 ECHR about fair trial affects the amount of time waiting for trial that's allowed, innocence until sentenced, proportionality between crime and punishment. In the tax field it has by now been clarified by the ECtHR that administrative fees due to untrue information given in the declaration (Sweden), is an accusation of a crime in the sense that activates the protection of article 6 ECHR.

The ECHR previous position in *Ne bis in Idem* was revised in the case of *Västberga taxi*⁹² read in combination with *Janosevic*.⁹³ In them ECtHR concluded that tax surcharges are covered by article 6 ECtHR because they are deterrent and punishing and results from a general rule, but even if the surcharges are covered by the ECHR there still seemed to be no problem with surcharges, before they looked beyond article 6 ECHR and into the principle of *Ne bis in Idem* as it is enshrined in article 4 of protocol no 7 ECHR, since they were looked at as different crimes resulting from the same event which is not precluded. The elements of the crime were decisive for if it was the same crime or not.

Västberga Taxi and *Janosevic* 34619/97 did cause changes in the Swedish tax law,⁹⁴ mostly that the grounds for remission was expanded.

Criteria for what is the same offence have received a new wider meaning now and this new development should affect the surcharges within the Swedish tax system.

From the conventions point view the criteria for what is the same crime was before unclear but was clarified and given new meaning by the *Zolothukin* case.⁹⁵ The principle about *ne bis in idem* does not exclude the possibility of a later sentence for the same event as long as it is a different offence. What matters is if identity of the facts or *Idem* is substantially the same elements or not.⁹⁶

⁹² *Västberga Taxi* no 36985/97

⁹³ *Janosevic* no 34619/97

⁹⁴ For example 5kap 14§ *Taxeringslagen*. prop 2002/03:106

⁹⁵ *Zolothukin* no 14939/03 further referred to as the *Zolothukin* case

⁹⁶ the *Zolothukin* case

The Swedish supreme court agrees with the view of the ECtHR that a punishment due to an accusation of a crime but the Supreme Court also claims that it does not go against the principle of ne bis in idem per se, since in their view the tax surcharge and the tax offence is two separate events since they are not built on the same facts of the crime. The Supreme Court mean that this can be drawn from the fact that to be sentenced for the tax offence also intent is needed whereas the tax surcharges in the Swedish tax system contains a presumption of bad behavior it does not require any form of intent needed.⁹⁷

ECHR position in Ne bis in Idem was revised in the Zolothukin case read in conjunction with the earlier case of Janosevic the criteria for what is the same offence has been given a new meaning.

⁹⁷ NJA 2004 s. 510 I och II

10. THE CASES

The control of taxes is considered to be within the sovereignty of the state and tax proceedings are still considered to be under the hard-core of private law,⁹⁸ and thus ECHR and/or EU law is not applicable unless something outside of the tax matter gives it access, like a cross border situation or a situation within a harmonized field.⁹⁹

I will present the cases in the order they were delivered with the ECtHR case law first, this is to make the analysis of the development through them that comes after more logic.

10.1. JANOSEVIC

The ECtHR in Janosevic¹⁰⁰ considered tax surcharges to be of a criminal nature and therefore the domestic court had breached article 6 ECHR when they denied Janosevic an oral hearing¹⁰¹ and since the tax surcharges was considered of a criminal nature it activated the access to court within the scope of civil rights and obligations¹⁰² Already in the Janosevic case the applicant had applied for a judgment over alleged breach of the Ne bis in Idem principle within article 4 of protocol no 7 of the convention, but since it was omitted too late in the proceedings the court did not look into the question in its judgment from 2002.

After the cases of Janosevic vs Sweden and Västberga Taxi AB¹⁰³ it was clear that rules of surcharges in Sweden falls within article 6 ECHR since they are based on a general rule and is meant both to be deterrent and also to punish the offense, mainly within the second Engels criteria.¹⁰⁴ The character of the Swedish surcharges have been acknowledged by the Swedish supreme court¹⁰⁵ even though they deems the surcharges and the tax offences as two separate events that are not built on substantially the same facts since the tax offence also requires intent.

⁹⁸ Ferrazzini v. Italy application no. 44759/98, Further referred to as Ferrazzini

⁹⁹ The Happaranda case

¹⁰⁰ Janosevic v. Sweden application no 34619/97, Further referred to as Janosevic judgement

¹⁰¹ Janosevic judgement, Paragraph 59-71

¹⁰² Janosevic judgement.

¹⁰³ Västberga Taxi no 36985/97 further referred to as Västberga Taxi

¹⁰⁴ See previous comments on the Engels criteria.

¹⁰⁵ NJA2004s 510

10.2 THE JUSSILA CASE¹⁰⁶

The Jussila case regarded a Finish tax case where the applicant after errors in his bookkeeping was ordered to pay tax surcharges based on the finish authority's arbitrary assessment of his income, which was deemed to be higher than the income he had declared. The applicant asked for an oral hearing and for some witnesses in his benefit to be heard. The Administrative court in Helsinki though decided after taking in some written statements that an oral hearing was unnecessary due to that the parties in their opinion had supplied all necessary information in writing and also rejected the applicant's claims.

The applicant then leaned on Article 6 ECHR to appeal against the Finish republic to the ECtHR with the main argument that he was denied a fair hearing when the court had denied him an oral hearing and that they thereby de facto had placed the burden of proof on him.¹⁰⁷

The court started by assessing if proceedings concerning the tax surcharges could be considered to be criminal within the autonomous reading of article 6 ECHR. The court came to the conclusion that by using the Engels criterion's¹⁰⁸ that even though the tax surcharges according to Finnish law was not considered criminal the tax surcharges they were imposed on the applicant as a punishment to deter from reoffending, which means they have both a deterrent and punitive purpose, within the second Engels Criteria. These conclusions lead to the Court deciding that in this part it gives the offence a criminal nature.¹⁰⁹ *"The minor nature of the penalty renders this case different from Janosevic and Bendenoun as regards the third Engel criterion but does not remove the matter from the scope of Article 6. Hence, Article 6 applies under its criminal head notwithstanding the minor nature of the tax surcharge"*.¹¹⁰

¹⁰⁶ Jussila v Finland Application No. 73053/01 further referred to as the Jussila case.

¹⁰⁷ Paragraph 1-23 Jussila, Concerning background and application

¹⁰⁸ As established in Engels and others v. The Netherlands

¹⁰⁹ Paragraph 31-39 Jussila v Finland

¹¹⁰ Paragraph 39 Jussila v Finland

Thereafter the Court could considered whether the Finish government had ensured a fair public hearing in accordance with article 6, the obligation to hold a public hearing is not absolute and after listing reasons for when it was not obliged they concluded that tax surcharges are outside of the hardcore of criminal law “*consequently, the criminal-head guarantees will not necessarily apply with their full stringency*”.¹¹¹ Since the finish court had not denied the applicant the possibility to request an oral hearing, it was deemed to be a case outside the hardcore of criminal law regarding a small amount of money and the finish court had taken the request into consideration but then decided it to be unnecessary to hold an oral hearing the Court agreed that the oral hearing in this case was not a necessity.¹¹²

10.3 THE CASE OF ZOLOTUKHIN¹¹³

In 2009 the ECtHR finally did get in to a discussion about the principle of Ne bis in Idem in the case of Zolothukin.¹¹⁴

Zolothukin concerned both administrative and criminal proceedings that was brought against mr Zolothukin due to his disorderly conduct when he unauthorized brought his girlfriend into a military compound. He was arrested and according to the police report a drunk mr Zolothukin tried to escape and used obscene language, therefore the district court sentenced him to three days detention for “minor disorderly acts”, but he was also charged under the Criminal code for the disorderly conduct that took place before arriving to the police station and also in relation to his behavior during his arrest and was found guilty for some of the charges he was tried for under the criminal court.

The ECtHR ruled that Article 4 of protocol no. 7 imposes a prohibition to try or to punish a individual twice for the same offence in criminal proceedings and even if the Russian district courts first proceedings in the national law was classified as administrative, they

¹¹¹ Paragraph 43 Jussila v Finland

¹¹² Paragraph 48 Jussila v Finland

¹¹³Sergey Zolothukin v Russia no 14939/03 further referred to as the Zolothukin case

¹¹⁴ The Zolothukin case.

were still to be considered as criminal proceedings on account of (especially) the nature of the offence and the severity of the penalty given.¹¹⁵

The ECtHR then considered if the offences were the same and noted that the previous case law from ECtHR had in the past during various approaches placed the main emphasis on either the identity of the facts, irrespective of legal character and then that the same facts could give rise to different offences, or they placed it on existing essential elements that were common to both offences.

This led the ECtHR to decide that the previous different approaches led to legal uncertainty incompatible with article 4 protocol no 7 and therefore decided to in detail define what “*the same offence*” for the purpose of above said article meant.

By examining the principle as it was set forth in different international instruments¹¹⁶ and then they concluded that article 4 protocol no 7 should be understood as prohibiting the prosecution or trial of an individual for a second offence if it arose out of substantially the same facts as those in the first offence.

Since the only different fact in the two different proceedings that Mr Zolothukin was subjected to, was the threat of violence against a police officer both proceedings should therefore be regarded as substantially the same.

The sentence to three days detention was found to not only amount to a final decision since no ordinary appeal laid against it in domestic law but also that the facts that Mr Zolothukin in the end had been acquitted in the criminal proceedings had no bearing on the case before the ECtHR since the facts were that he had been prosecuted twice for the same offence and therefore the acquittal did not deprive him of his status as a victim.¹¹⁷ Mr Zolothukin was found to have been prosecuted twice for essentially the same offence and

¹¹⁵ First Engel criteria combined with the second.

¹¹⁶ For example the United Nations Covenant on Civil and Political Rights, the European Union's Charter of Fundamental Rights and the American Convention on Human Rights

¹¹⁷ Since the acquittal had nothing to do with the fact that there was a previous sentence for the same offence and instead had everything to do with lack of sufficient evidence.

was therefore a victim of a breach of article 4 of protocol no. 7. This approach was confirmed by another case *Ruotsalainen v Finland*.¹¹⁸

This means that the ECHR article 4 of protocol no 7 precludes trial for and sentencing for a second offence if it is build on facts that are identical or substantially identical to the first offence.

10.4 THE MENARINI CASE¹¹⁹

The Menarini case is an Italian case concerning competition fines imposed on the company Menarini pursuant an investigation into a cartel violation regarding market sharing in the area of diabetes tests within Italy. Menarini was deamed to have participated and a decision regarding fines was made by the competition authorities in Italy.¹²⁰ The applicant appealed within the Italian system of law referring to the lack of full jurisdiction of the national administrative courts and that the penalty was illegal.¹²¹ The national Court upheld the decision and the applicant therefore applied to the ECtHR.

The applicant in the ECtHR alleged that their rights under Article 6.1 ECHR was infringed and that they did had not been given their right to a fair, public hearing in Italy. The Italian government contested their claims.

The ECtHR started as in the earlier mentioned *Jussila* case¹²² with investigating if the proceeding that had taken place in Italy concerning Menarini should be considered to be criminal within the autonomous meaning of article 6.1 ECHR by applying the *Engels* criteria on the case.¹²³

And as in the *Jussila* case the Court noticed that fact that the anti-competitive practices did not constitute a criminal offense under Italian law did not have bearing on the case, as previously shown in *Jussila*. The nature of the offence itself “affect the general interests of

¹¹⁸ *Ruotsalainen vs Finland* no 13079/03

¹¹⁹ Case A. *Menarini Diagnostics srl c. Italy* (Application No. 43509/08) Futher refered to as *Menarini*

¹²⁰ Paragraph 5-22 *Menarini*

¹²¹ Paragraph 17 *Menarini*

¹²² See *Jussila v Finland* above

¹²³ Paragraph 38 *Menarini*

society normally protected by criminal law”¹²⁴ and they concluded that the fine imposed was essentially punishing to prevent the repetition of the behavior therefore the fine was based on standards pursuing an aim of both preventive and repressive nature (mutatis mutandis, Jussila, § 38).¹²⁵

Considering the above mentioned and the high amount of the fine imposed the court found the fines to be a punishment of a criminal nature thereby rendering article 6.1 applicable on the case.¹²⁶

The ECtHR then came to the conclusion that the review in Menarini made within the Italian court system was satisfying and that the reviewing court in Italy had full jurisdiction and that they therefore had not infringed on article 6.1 ECHR.¹²⁷

In Menarini the ECtHR confirmed the criminal character of competition law fines and related that both to the size of the amount and to the general character of the offence are criminal, deterring and punishing, but it also accepted administrative enforcement of the fines, provided the existence of a procedure to request a review with another court and as long as such courts have full jurisdiction to do so.

10.5 THE TOSHIBA CASE¹²⁸

A number of companies had been working together in a cartel covering several member states and the commission imposed infringement proceedings based on the Article 81 EC (now 101 TFEU) and article 53 of the EEA agreement in conjunction with regulation No 1/2003 where the companies were penalized with high fines. The Czech National

¹²⁴ Paragraph 40 Menarini, freely translated which further reference (Stenuit c. France, cited above, § 62(menarini authors note).

¹²⁵ Paragraph 40 Menarini

¹²⁶ Paragraph 41-44 Menarini

¹²⁷ Judgment of the Menarini. (Judge Pinto had a dissenting opinion in the matter).

¹²⁸ C-17/10 Toshiba corporation and others v Úřad pro ochranu hospodářské soutěže, further referred to as the Toshiba Case

competition Authority (NCA)¹²⁹ started proceedings in national court to impose fines on them for the infringement of national competition rule. The cartel had been in action both before the Czech republic became a member state of the EU.

The case eventually got referred to the ECJ. A big part of the case became about the application of Ne bis in Idem since the companies had already been fined for their cartel in several member states by the Commission and the same cartel was the reason for the proceedings in national court- The NCA related to the anti-competitive behavior that took place within the Czech territory prior to their accession to the European Union so the time and territories were different. The question was in part also what happened with the allocation of competences between the Commission and the national competition authorities due to the accession to the EU when an international cartel like this had existed both before and after? What infringement were the companies actually fined for in the Commission fines?

The companies had been working together and formed a cartel for the worldwide market of gasinsulated switchgears but the cooperation between them preceded the accession by the Czech Republic to the EU.

The NCA in Czech Republic only wanted to impose fines due to the implementations of the cartel within their territory and only for the time prior to the accession to the EU, however the proceedings were started after the accession and after the entry into force by the applicable regulation 1/2003. The question was if the accession and entry into force of the regulation prohibited the Czech NCA from introducing infringement proceedings. The court came to the conclusion that article 81 EC and article 3(1) in Regulation 1/2003 did not preclude the Czech Republic to start infringement proceedings based on infringement in their territory that took place prior to their accession.

But the ECJ also found that the Commission opening proceedings against a cartel under regulation 1/2003 does not cause the NCA of the Member States to lose their power¹³⁰ to apply national competition laws and fine the anti-competitive behaviors and this case the

¹²⁹ National competition Authority will be referred to as NCA

¹³⁰ Article 11(6) of Regulation No 1/2003, read in combination with Article 3(1) gave that impression

NCA was not in breach of the Ne bis in Idem principle according to the ECJ since the Commission fines were based on the effects of the cartel within the EU whereas the NCA of the Czech Republic was concerned with the effects within its specific territory.

According to the ECJ the application of the Ne bis in Idem principle requires the threefold rule¹³¹ that they first mentioned in the Aalborg case¹³² and in the case at hand the identity of the facts were missing.¹³³ The ECJ based the conclusion surrounding the Identity of the facts of that the Commission referred to the consequences of the cartel within the member states of the time of the European union and the EEA and the Commission also stated before the court that their fines was not related to findings within the Czech territory prior to its accretion in May 2004¹³⁴ something that also became apparent when the court looked at the base for the calculation of the fines.¹³⁵

In the Opinion by the Advocate General Kokott investigates the applicability of the Ne bis in Idem principle.¹³⁶ She stated that for the competition field the Ne bis in Idem principle precludes “ *an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has been penalized or declared not liable by a previous unappealable decision*” .¹³⁷

Concerning the application of Idem she has a differing opinion than the ECJ as she discusses that the temporal applicability of the principle relates to when the proceedings are initiated and not when the crime actually took place and since the Czech Republic was already a member state within the EU when they initiated proceedings in 2006 they according to her should also be required to observe the EU-law principle of Ne bis in Idem.¹³⁸ She also meant that identity of the facts from the Aalborg case conditions was not at a

¹³¹ threefold condition of identity of the facts, unity of offender and unity of the legal interest protected

¹³² Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P Aalborg Portland and Others v Commission paragraph 338-340 further referred to as the Aalborg case

¹³³ Article 97-98 of the Toshiba case

¹³⁴ Paragraph 41 of the Toshiba Case

¹³⁵ the basis for calculation the turnover were based on the figures achieved by the members of the cartel within the EEA during 2003, that means that the figures were prior to the accession of the Czech Republic

¹³⁶ Paragraph 101-145 of the AG Opinion in C-17/10

¹³⁷ Paragraph 111 of the AG Opinion in C-17/10

¹³⁸ Paragraph 109 of the AG Opinion in C-17/10

lacking issue, contrary to what ECJ later ruled, instead she wanted the court to apply the unity in legal interest protected – the third criterion that had not previously been applied to the competition law of the Union which she meant led to detrimental effects for the unity of the EU legal order and that same criteria should apply in all areas of EU law. That also lead her to conclude that to understand the identity of Idem one have to start with its source for EU law which is that it is in large modeled on the ECHR convention and if one applies the importance of the third Aalborg condition also to competition law, it will lead to that there is an importance of homogeneity requirements that becomes applicable¹³⁹ and therefore the interpretations by ECtHR in the Zolothukin should be applied to the Toshiba case even if it is a competition case. Her perspective is to look at the Idem from the perspective of the material act which leads to that NCA and the Commission is punishing different time and territory, thus not infringing on the principle.

The ECJ contrary to Kokott in her opinion does not at all consider the third Aalborg criterion of unity in legal interest protected. The ECJ find that the issues is in the first criterion, identity of the facts. For the ECJ there was not important when the proceedings were initiated but rather for what the proceedings where initiated. Therefore the Court found that the first Aalborg criterion was lacking.¹⁴⁰ Since there is a difference in time and territory they found that the two proceedings does not concern the same Idem.

In essential the Advocate general and the ECJ arrives to the same conclusion but they have very different routes to the goal.

11. THE HAPARANDA CASE¹⁴¹

11.1 BACKGROUND TO THE HAPARANDA CASE

¹³⁹ Paragraph 115-120 of the AG opinion in C-17/10

¹⁴⁰ Paragraph 95 of the Toshiba case

¹⁴¹ C-617/10 Åkerberg Fransson 26 februari 2013 further referred to as the Haparanda Case

A Swedish roe fisherman mr Åkerberg Fransson, active in the Swedish North Sea had failed to declare his taxes, both in the aspect of VAT, income tax and social security charges. The SKV taxed him a tax surcharge that he paid and did not challenge so it became final. In Sweden the tax surcharges are considered to be of a administrative order.

The Swedish prosecutor than started proceedings against mr Åkerberg Fransson for tax fraud with the possible outcome of imprisonment, a criminal sanction. Mr Åkerber Fransson then appealed to the civil court that in essence the Ne bis in Idem principle as it could be read from the ECHR article 4 of protocol no 7 and the Charter article 50 together with article 52(3) and the case law form ECtHR would preclude the Swedish court system from starting a second proceeding since it would lead to double punishment for the same crime.

Since the Supreme court in Sweden had previously applied a very restricted¹⁴² and criticized approach to these question resulting in the HD uprising and due to the possible application of EU law through a harmonized area, VAT the Haparanda district court referred the case for preliminary ruling.

11.2 THE ECJ JUDGMENT IN THE HAPARANDA CASE.

The first issue to come around was access to the court.

The Advocate General Cruz Villalón did not want to give the case access to the ECJ¹⁴³ and neither did The Swedish, Czech and Danish Governments, Ireland, the Netherlands Government and the European Commission¹⁴⁴ based on that they considered it was wholly internal situation, i.e. the lack of a cross border situation. The ECJ said that they could only give interpretation to situations that were governed by European Union law,¹⁴⁵ but not outside such situations. The charter is applicable to situations only when the Member States is implementing European Union Law.¹⁴⁶ But also that if national legislation falls within the scope of European Union law they must, when requested, provide all the guidance as to the

¹⁴² Highlights & Insights on European taxation Year 6 no.4 Brokelind, Cecile article p 5

¹⁴³ Advocate General Cruz Villalóns Opinion in the Haparanda Case

¹⁴⁴ Paragraph 16 of the Haparanda case

¹⁴⁵ Paragraph 19 of the Haparanda case

¹⁴⁶ Paragraph 17 of the Haparanda case

interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights. The ECJ then concluded that “ *In the case in point, it is to be noted at the outset that the tax penalties and criminal proceedings to which Mr Åkerberg Fransson has been or is subject are connected in part to breaches of his obligations to declare VAT.*”¹⁴⁷ The VAT directive¹⁴⁸ gives the member states an obligation to penalize abuse¹⁴⁹ and thereby the national courts may, and in some cases must, make a reference to the Court of Justice. In paragraph 29 of the judgment they are also saying that national authorities and courts remains free to use their own national standards of fundamental rights upon areas where the action of the member state is not entirely determined by the European Union law is but only provided that “*level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of the European union law are not thereby compromised*”¹⁵⁰ and they referred to paragraph 60 of criminal case decided upon at the same time called Melloni C399/11. The Court concluded that “ *It follows from the foregoing considerations that the Court has jurisdiction to answer the questions referred and to provide all the guidance as to interpretation needed in order for the referring court to determine whether the national legislation is compatible with the ne bis in idem principle laid down in Article 50 of the Charter.*”¹⁵¹ And so they went against the AG opinion and gave access to the case.

Haparanda tingsrätts main questions¹⁵² was whether the “*ne bis in idem principle laid down in Article 50 of the Charter should be interpreted as precluding criminal proceedings for tax evasion from being brought against a defendant where a tax penalty has already been imposed upon him for the same acts of providing false information*”.¹⁵³

The decision has to become final and the prosecution has to be of a criminal nature to be prohibited by the ne bis in idem principle as it is laid down in article 50 of the charter.

¹⁴⁷ Paragraph 24 the Haparanda Case

¹⁴⁸ Article 2, 22(4) and (8) of Directive 2006/112 EC (reproduced the old sixth directive on VAT) read in conjunction with article 4(3) TEU

¹⁴⁹ Paragraph 25 of the Haparanda case

¹⁵⁰ Paragraph 29 of the Haparanda Case

¹⁵¹ Paragraph 31 of the Haparanda case

¹⁵² Question 2,3,4 laid down in paragraph 15 of the Haparanda case

¹⁵³ Paragraph 32 of the Haparanda case, concluded by the Court

The ECJ states that a combination of tax penalties and criminal penalties due to non compliance with declaration obligations are not precluded per se and that the member states are free to choose the applicable penalties that can take both the form of either administrative penalties, criminal penalties or both.¹⁵⁴ But a tax penalty that has become final and which is of a criminal nature, for the purpose of article 50 of the Charter, precludes another criminal proceeding against the same person based from the same acts.¹⁵⁵

To be able to decide if a tax penalty is criminal in its nature or not they refer to three criterions.¹⁵⁶ *“The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur (Case C-489/10 Bonda [2012] ECR I-0000, paragraph 37)”*.¹⁵⁷ The Bonda case actually refers not only to the Zolothukin case but also to the original Engels case¹⁵⁸ and the so called Engels criteria that are not meant to be read cumulatively. This directly connect the ECJ cases with the ECtHRs case law.

The Court than concludes that it is not for them but for the national court to based on the Engels criterions to investigate whether the present combination of tax penalties and criminal penalties are contrary to those standards, *“as long as the remaining penalties are effective, proportionate and dissuasive”*.¹⁵⁹

The fifth question asked was dismissed due to its hypothetical nature.¹⁶⁰

The last question to reply for the court was the first question asked where the Haparanda district court asked if the doctrine of “klart stöd” was compatible with European Union law, i.e. to have an obligation for the national court to disapply any provisions that were found contrary to fundamental rights guaranteed by either ECHR or the Charter. The ECJ replied that even though article 6(3) TEU confirms that the fundamental rights in the

¹⁵⁴ Paragraph 33 and 34 of the Haparanda Case referring to previous case law such as C- 68/88 *Commission v Greece*, C-213/99 *de Andrade*, C-91/02 *Hannl-Hofstetter*

¹⁵⁵ Paragraph 34 of the Haparanda case

¹⁵⁶ These are almost word for word the same as the original Engels Criteria

¹⁵⁷ Paragraph 35 of the Haparanda case

¹⁵⁸ *Engels and Others v the Netherlands*

¹⁵⁹ Paragraph 36 of the the Haparanda case

¹⁶⁰ Paragraph 38-42 The Haparanda TR asked about an alternative procedure that does not exist at present in the Swedish system.

ECHR are general principles of Union law and that article 52 (3) of the Charter says that *“rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law”*¹⁶¹ meaning that the ECJ cannot govern a member states relations between its national law and that of the ECHR. The ECJ can only investigate the questions between provisions of domestic law and that of the Charter and in that aspect it is already settled case law that a national court should by its own motion dismiss any conflicting provisions of national legislation without the need to await its setting aside by legislative or constitutional means.¹⁶²

The ECJ also concluded that the *“ European Union law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the text of the Charter or the case-law relating to it, since it withholds from the national court the power to assess fully, with, as the case may be, the cooperation of the Court of Justice, whether that provision is compatible with the Charter”*.¹⁶³

12.DEVELOPMENT THROUGH THE CASES

12.1 ANALYSIS OF THE DEVELOPMENT OF WHAT IS CONSIDERED A CRIMINAL OFFENCE

As explained under the chapter on the Engels Criteria of this thesis the criteria for interpreting if a proceeding is Criminal in its nature is based on the Engels Criteria that was first mentioned in the Engels case¹⁶⁴ by the ECtHR.

In the beginning of this millennium Janosevic and Västberga through the ECtHR developed the reasoning surrounding the second Engels criterion and afterwards it was clear

¹⁶¹ Paragraph 44 of the the Haparanda case

¹⁶² Paragraph 43 -49 of the the Haparanda case

¹⁶³ Paragraph 49 of the Haparanda case

¹⁶⁴ Engel and Others vs the Netherlands

that the proceeding of Swedish Tax surcharges had the character of a punishment of criminal nature, since it were both based on a general rule that wanted both to punish the offender and also to deter him from reoffending. Jussila confirmed that tax surcharges¹⁶⁵ derived out from a criminal proceeding, but also added two important things about the proceeding. First thing was that the minor nature of the penalty in this case¹⁶⁶ did not affect its place under the criminal head by the application of the Engels criterion. The second was that the Tax Surcharges were outside the hard core of criminal law which led to that the full stringency of article 6 ECHR does not necessarily apply. It was clear that it was not only an issue of whether the proceedings under the Engels criterions were found to have a criminal nature or not. There seemed to exist a sliding scale from hard core to outside hard core criminal law that affected the level of protection from ECtHR with a higher level of protection the higher up towards hard core criminal law the situation or fine is deemed to be, and apparently the size of the amounts were one factor weighing in on the scale.

The Swedish Supreme Court accepted the reasoning about tax surcharges in itself but decided that the idem between tax surcharges and tax offence differed due to the requirements of intent for the criminal tax offences.

In Zolothukin the ECtHR for the first time went into the discussion about the Ne bis in Idem principle as laid down in article 4 of protocol no 7 to the ECHR. Previous case law only looked at article 6 ECHR.

Zolothukin regarded an administrative procedure within domestic law and a following proceeding for criminal offences. It confirmed that what the classification of the proceeding within national law was not decisive of its actual character, something that was also confirmed in the Menarini. The ECtHR got into not only the nature of the offence when investigating the actual character but is also looking at the severity of the penalty given, which for mr Zolothukin was three days imprisonment, a more sever punishment than receiving a fine. The ECtHR also made it clear that it was the existence of the second

¹⁶⁵ In this case it was added tax due to arbitrary assessment by the Finish State

¹⁶⁶ the Court in paragraph 39 of its judgment separates the minor nature of the penalty in Jussila from the penalty in Janosevic, which e'contrario can be read as Janosevic being a reference value for what is at least not considered to be of minor nature.

prosecution of a criminal nature that was precluded under article 4 protocol no 7 ECHR not the outcome of the proceedings. Mr Zolothukin was a victim even if the outcome of the second proceedings acquitted since he had to undergo a second proceeding. This was also confirmed through *Routsalainen v Finland*.¹⁶⁷

In *Menarini* the ECtHR weighed in the high fines on the scale to find that the punishment was of a criminal nature thus article 6.1 ECHR was applicable, but in the later cases of *KME/Chalkor*¹⁶⁸ and *Toshiba* where high amount of anti-competitive fines had been induced the ECJ did not discuss the amount of the fines. The Advocate General Sharpston discusses the fines in her opinion to the *KME/Chalkor* and concluded that she could not see them fitting within the hard core of criminal law.¹⁶⁹ But on the same time the ECJ in *Toshiba* seems to have decided that the Commission proceedings and fines are of a criminal nature and therefore the principle applies if the first decision is unappealable and that there is no need to investigate where on the scale of hard core criminal law it exists.¹⁷⁰

In *Haparanda* the ECJ went into the question of whether the administrative penalties per se was prohibited in parallel proceedings with criminal penalties and concluded that the member states was free to choose applicable penalties for non compliance in tax matters and can thereby use one or both of those penalties¹⁷¹. But they then limited the application by first stating that if a tax penalty have become final and is of a criminal nature, article 50 of the Charter precludes a second proceeding against the same person based on the same facts – i.e. *idem*.¹⁷²

The court also said it was for the domestic court to based on three criterions to interpret if the proceedings and penalties are of a criminal nature or not, as long as the remaining penalties will be effective, proportionate and dissuasive.¹⁷³ The criterions they referred to is

¹⁶⁷ *Ruotsalainen vs Finland* no 13079/03

¹⁶⁸ *Joined cases Cases C-272/09 P KME Germany AG and Others, C-386/10 P Chalkor AE Epexergasias Metallon and C-389/10 P KME Germany AG and Others v Commission*

¹⁶⁹ *Advocate General Opinion in the KME/Chalkor*

¹⁷⁰ Paragraph 94- 95 of the judgment in *Toshiba* C-17/10

¹⁷¹ Paragraph 33-34 of the *Haparanda* case

¹⁷² Paragraph 34 of the *Haparanda* case

¹⁷³ Paragraph 36 of the *Haparanda*

identical with the Engels criterions and they also referred back to a case called Bonda that directly referred to both the Zolothukin and the Engels case.¹⁷⁴

12.2 ANALYSIS OF THE DEVELOPMENT OF IDEM THROUGH THESE CASES

As explained under chapter 6 in this thesis the Idem is decisive for if the Ne bis in Idem principle applies to the situation once it is clear that the situation contains two proceedings of criminal nature. Not twice the same – makes an investigation into what is the same or idem of major importance. Even though already in Janosevic it was clear that proceedings adding the tax surcharges were of a criminal nature the idem was not found to be the same. The administrative proceedings of tax surcharges, was in the eyes of the Swedish Supreme court, concerned with an idem of different identity due to that the second criminal proceeding of the tax offences was required to at least also cover intent by the tax offender.

In Zolothukin the ECtHR examined Ne bis in idem and tried to clarify their interpretation on idem. They went through several international instruments as well as their own case law and then concluded that article 4 of protocol no 7 ECHR precludes a prosecution in a situation where it arises out of substantially the same facts as those in a previous prosecution. Before it had been a bit unclear what was considered the same and it had been thought to be the identity of the Act or omission that was decisive but in Zolothukin the ECtHR shows that they are instead looking at the identity of the facts, that does not have to be identical but substantially the same.

In Toshiba the ECJ is also looking closer at the question of idem through the Aalborg criterions¹⁷⁵ that they developed in the Aalborg case regarding the Idem. Advocate General Kokott took the view from the perspective of the ECtHR findings in the Zolothukin that the issue at hand were not in the identity of the facts and focused on the third Aalborg criterion about unity in legal interest protected even though the ECJ had never applied this criterion to the competition field before. She then went into a discussion about the origin of the principle of Ne bis in Idem and arrived to the conclusion that the same criteria should apply

¹⁷⁴ Paragraph 35 of the Haparanda →refers to paragraph 37 of the Bonda case C-489/10

¹⁷⁵ Identity of acts, unity of the offender and/or unity of the legal interest protected

in all areas of EU law, homogeneity is required and therefore the interpretations by ECtHR in the Zolothukin should be applied to the Toshiba case even if it is a competition case. She then looks at the Idem from the perspective of the material act in which the Commission and the Czech NCA is punishing different time and territory, thus not infringing on the principle.

The ECJ does not follow her reasoning in this. They are not taking up the third Aalborg criterion of unity in legal interest protected at all instead they find that the issues is in the first criterion, identity of the facts. Whereas the AG started by looking at the temporal applicability and finding that it was when the proceedings was initiated and not when the act was committed that mattered the ECJ took a opposite view and said that the importance was rather for what the proceedings was initiated for then when they were initiated, and thereby they found the first Aalborg criterion was lacking.¹⁷⁶ Since there is a difference in time and territory they found that the two proceedings does not concern the same Idem.

In the Haparanda case there were no need to investigate the Idem of the case since they pushed the question back to the national court already on the issue of if the Swedish tax surcharges were criminal or not.

¹⁷⁶ Paragraph 95 of the Haparanda case

13. Conclusions

Clearly there are still discrepancies between both the application and the interpretation between the Charter and the ECHR that leads to that certain areas of EU law and also domestic law needs to be adjusted before the accession of the EU to ECHR can be done somewhat smoothly.

The Haparanda case was the first case where the ECJ gives access to a case that concerns an internal situation and not a cross border situation, be that it included rules that is harmonized within the EU. In this case the VAT system, but the case implies that the access to court have been broadened to other harmonized rules within the EU that might not be of a clearly cross-border situation. In the future there is a possibility that the access might focus on whether the case at hand regards a pure domestic situation or if it contains elements applicable to EU law, rather than weather the situation covers a cross-border situation clearly covered by EU law.

Part of the problem with the EU accession to ECHR is that EU law only covers cross border situations and not pure internal situations whereas the ECHR only covers pure internal situations. With the logic from the Haparanda case obligations by the Member states can give access to the court in the future¹⁷⁷ and for the first time internal situation might have the right of access if it contains any substance of EU law.

The Toshiba case also points towards a discrepancy in opinions between the judges within the ECJ when it comes to the application of *Idem* and the use of the Aalborg conditons¹⁷⁸ that is used by the ECJ to arrive to weather the same *Idem* is in question or not.

Advocate General Kokott arrived at the same end result in the Toshiba case but in a very different manner than ECJ did.

These two latest cases from the ECJ seem to point towards that the ECJ is slowly adjusting within the EU to prepare for the accession to the ECHR but on the same time there

¹⁷⁷ Paragraph 25 of the Haparanda case

¹⁷⁸ Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P Aalborg Portland and Others v Commission paragraph 338-340 referred to as the Aalborg case

is a lot of political sensitive issues to handle discreetly, since it will affect internal laws for all member states as well and some countries have not yet ratified all amendments to the ECHR which means that their internal domestic law is not previously adapted to the ECHR in some areas. Even small changes in law can lead to large economic consequences for the Member States.

The Advocate General in the Haparanda case did not want to give the case access to the ECJ¹⁷⁹ and neither did The Swedish, Czech and Danish Governments, Ireland, the Netherlands Government and the European Commission¹⁸⁰ based on that they considered it a wholly internal situation, i.e. the lack of a cross border situation. The fact that some of those countries have similar parallel proceedings as the Swedish Tax system points to the fact that the judgment in Haparanda might lead to both legislative and economic consequences for some countries.

The ECJ uses three conditions to interpret Idem that comes from the Aalborg case.¹⁸¹ The threefold conditions are identity of the facts, unity of offender and unity of the legal interest protected, however there are discrepancies of how these are used compared to ECtHR.

In the case Van Esbroeck¹⁸² the ECJ interpreted idem in the same way as the ECtHR in the Zolothukin and the result in praxis seemed to point to that the identity of the crime had shifted to the identity of the facts from which the proceedings is initiated¹⁸³. In the Toshiba case, which concerned the principle within the field of competition, the ECJ though based their interpretation of idem not on the same kind of identity of facts as in the Zolothukin but instead the facts in relation to the identity of the facts of the crime, that took place in different territories under a different time span but related from the same cartel. Thus they linked Idem to the old case law of Jussila rather than the new Zolothukin case.

¹⁷⁹ AG Opinion in the Haparanda case paragraph 22 -65

¹⁸⁰ Paragraph 16 of the Haparanda case

¹⁸¹ the Aalborg case

¹⁸² C-436/04 - Van Esbroeck

¹⁸³ SvJT 2013 s343 Dag, Victor

Identity of the facts from the interpretations made with the Zolothukin case leads to complications in the Swedish tax field since the punishment for a tax offence in a criminal court is based in large on the same information that gave rise to tax surcharge.

I have to agree with those who have previously criticized the way that the Supreme courts in Sweden have handled the topic of tax surcharges, in my view it should be remembered that Sweden has already ratified the ECHR and should follow the ECtHR guidance in their interpretations of their own articles. The Swedish supreme courts have admitted that the tax surcharges have a status as fitting under the criminal head of article 6 ECHR but have been hiding behind the doctrine of “klart stöd” to avoid the consequences of applying the full stringency of the Ne bis in Idem as laid down in the article 4 of protocol no 7.

The doctrine of “klart stöd” is a pure domestic doctrine to be applied on Swedish rules in conflict with the ECHR, but it has no support in the ECHR but the doctrine has still been used to apply or rather to not apply the rules within the ECHR in Sweden.

With the judgment in Haparanda the ECJ clearly states that the doctrine of “klart stöd” cannot be applied to EU laws in any kind of conflict with domestic law. The EU law is superior and conflicting rules in domestic law is invalid. The Advocate General in his opinion also says that even if the EU can only interpret EU law during the integration process that has to proceed the accession¹⁸⁴ of the EU to the ECHR this will change once the EU accedes, thus he implies that also in relation to the ECHR articles “klart stöd” would not be accepted in the future. To apply the doctrine of “klart stöd” to any valid EU law is clearly not compatible with the obligation to refer any situations affecting EU law that is not an act clair or acte éclair as was clarified long time ago in the CILFIT case.¹⁸⁵

Both the ECtHR and the ECJ are talking about a sliding scale of what is administratively induced punishments that is considered hard core criminal law¹⁸⁶ and there is implications of that the Ne bis in Idem applies to the whole scale but with less stringency towards the soft

¹⁸⁴ Paragraph 109 of the Advocate general opinion in Haparanda

¹⁸⁵ See earlier discussions on the referral to ECJ.

¹⁸⁶ AG opinion in the KME/Chalkor case and the ECtHR in Menarini

core criminal law end, where at least small fines like the ones in Jussila seems to reside. In the other end of the scale are punishments like the imprisonment in Zolothukin.

Menarini implies that high fines in competition can push the punishment from the Jussila side of soft core criminal law towards the other end even if the advocate general Sharpstone in KME/Chalkor could not see the fines in that competition case to fit under the criminal head due to their character of soft core criminal law. The ECJ seems reluctant to by its own motion discuss the issue and avoided it in both KME/Chalkor and in the Toshiba case. But both of those concerned fines in competition for anti competitive behavior by companies. A behavior that is covered in intent and also threatens the economic stability and goes counter to all the values and basic treaty rules of the Union. A private person that receive a very big fine in the light of the effects on the individuals private life balanced against the fact that the economic effect for the Union from a single individual behavior is considerably less dangerous than that of a cartel, might also weigh in to push such a situation further up towards the hard core criminal law end of the scale and thus render it more protected.

In paragraph 36 of the Haparanda Case the ECJ seems to leave some room to maneuver within for the Member States to be able to keep certain fines even if they are not really compatible with the Ne bis in Idem – as long as they are effective, proportionate and dissuasive. Thus they are implying that the amount of the fines should be proportionate not only to the offence but also to the subject of them. This might be of great importance during the integration process that the Advocate General Cruz villalón talks about in his opinion,¹⁸⁷ to protect the member state domestic law from standing with big gaps in legislation that can be abused.

The fact that the ECJ sends the question about the surcharges character back to the national court to investigate is probably part of the integration process where the national courts will have to adapt their own law and find new solutions before accession without stirring up to much political dust. It is a politically sensitive issue since it is not only Sweden that has this kind of parallel administrative and punishing systems. Hard evidence is not for the ECJ to examine so that gives them a possibility to avoid direct comments on the issue,

¹⁸⁷ Paragraph 109 of the opinion in the Haparanda case

but implicitly they seem to say that a second proceeding is prohibited by the Ne bis in Idem principle, since they give very specific instructions on how the domestic court is to evaluate the character by referring to the Engels criteria. By pushing the last judgments over parallel systems back to national courts, each country is forced to revise their own system which also give some time to adapt instead, which will make for a smoother change, than if the ECJ would to declare them all invalid immediately through one case.

When the Haparanda came from the ECJ it might have seemed at the first reading of the case that it contained a ruling that does not change much or differ a lot from status quo, and perhaps that was the reason why some Swedish media reported the same day it came out that the Swedish system with surcharges could remain as it was. They probably read paragraph 34 of the judgment that concludes that article 50 of the Charter does not prohibit Member States from using a combination of tax penalties and criminal penalties and then they seemed to have been satisfied and stopped reading the case because after a more in depth reading of the judgment it does not lead to a conclusion that any form of this combination is cleared.

The ECJ are not saying that all kinds of surcharges are criminal but they are not saying that they are not either, rather they are saying that it depends on the circumstances surrounding the penalties.

Instead the ECJ is pointing to the nature of the first penalty that becomes final and says that if that has a criminal nature article 50 of the Charter applies and the Ne bis in Idem principle prohibits a second proceeding or penalty of a criminal nature. They are also saying that what legal label the national law chooses to sort the penalty under does not matter instead the Engels Criteria¹⁸⁸ are decisive for a conclusion on whether they are of a criminal nature or not. And this is where the ECJ connects its praxis for the Charter article 50 with ECtHR praxis for the ECHR article 6 and article 4 of the 7th protocol. Together with the ending conclusions of the case, ruling the application of the doctrine of "klart stöd" invalid in connection with any aspects of EU law it means change.

¹⁸⁸ By referring to C-489/10 Bonda, a Case where they previously referred to the Engels criteria.

For the Swedish Tax surcharges it seems to result in that the tax Surcharges, which the Swedish Supreme court already have acknowledged as being criminal in nature under the Engels Criterion, will be subject to the Ne bis in Idem principle where the Idem have to be interpreted following the Zolothukin logic, to be based on the same or manifestly the same identity of facts and since the need for intent in the criminal proceeding will not be sufficiently different to give an interpretation of two different offences and since article 4 of protocol no 7 takes the backdoor through the ECJ the Supreme Court can no longer apply the doctrine of Klart stöd in order to not apply the interpretation of Idem, at least not in relation to the harmonized areas of tax law, i.e VAT. The decisions of Tax surcharges that have become final must be seen as precluding in many cases from later criminal proceeding due to the criminal nature of the first proceeding and probably the amount of the fines will affect the outcome as well.

Not all tax surcharges will be invalid due to this since the ECJ in paragraph 36 of the Haparanda case left the possibility to keep some tax surcharges to be able to maintain and effective, proportional and dissuasive system. At least until the accession is followed through. How that should be interpreted in connection to the Swedish tax surcharges remains to be seen but it is clear that the previous position has to be revised and that new aspects have to be weighed in to the picture before a decision is made.

I would also argue that this means that different courts in different countries will have to handle the question differently and eventually and probably there will be new cases from the ECJ on the issues of Ne bis in Idem and what administrative proceedings should be counted as criminal proceedings and which if they remain an administrative procedure.

It seems that the ECJ has established a road for closing the gap between the ECHR practices on article 6 ECHR by avoiding to rule the existing differences invalid but semantically moving around the issues and slowly closing the net. It almost resembles a harmonization process of a directive where there is a certain amount of time and lead way to reform one's own laws and practices to fit within the "new EU demands".

By sending it back to the domestic court to make the redefining cases, will have the consequence of new issues of unclear practice that due to the obligation to refer will give the ECJ new opportunities to further close the gap another inch.

Both courts (ECtHR) and ECJ are careful not to rule against each other, and in parts where the two are not ready to meet yet they try to find other more diplomatic roads to their rulings.

Once the EU has acceded to the ECHR it will be a member of that convention on the same merits as other members, with a possible result that decisions made by the ECJ could be appealed to the ECtHR unless the EU laws have been harmonized towards the ECHR by then.

W.Wills suggested in an article¹⁸⁹ that this could mean that the accession will open the possibility for anyone claiming that his or her rights under the Convention have been violated by the European Commission or the EU Courts reviewing the Commission's decision and they could thereby bring an application against the European Union before the ECtHR after all remedies before the EU Courts have been exhausted.¹⁹⁰

This will most probably be something the ECJ would like to avoid or even prevent.

¹⁸⁹ 2011, Woutar Wills, EU Antitrust Enforcement Powers and HR,

¹⁹⁰ 2011, Woutar Wills, EU Antitrust Enforcement Powers and HR,

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