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EUROPEAN COURT OF HUMAN RIGHTS REFINES *NE BIS IN IDEM* PRINCIPLE

In a judgment of 9 July 2026 (*Jesus Pinhal v. Portugal*, No. 48047/15 and 2276/20), the Grand Chamber of the European Court of Human Rights ('ECtHR') refined in two important respects the *ne bis in idem* principle under Article 4 of Protocol No. 7. First, the Court tightened the *idem* criterion: identity of facts now requires that the material facts be identical – mere similarity no longer suffices. Second, the Court confirmed and clarified the "integrated system" approach from *A and B v. Norway*, holding that parallel criminal and administrative proceedings leading to sanctions of a criminal nature remain permissible where proceedings form a coherent whole.

Applying these principles to the case at hand – where a former Vice-Chairman of Banco Comercial Português faced criminal proceedings and parallel administrative proceedings before the Bank of Portugal ('BdP') and the Securities Market Commission ('CMVM') – the Court held, by fifteen votes to two, that there was no violation of *ne bis in idem*.

FACTUAL BACKGROUND

Jesus Pinhal, born in 1946, served as a member of the Board of Directors of Banco Comercial Português ('BCP') from 1994, then as Vice-Chairman of the Board, and later became Chairman of its Executive Committee in 2007. Between 1999 and 2007, the BCP Board had implemented a "circular trading" strategy involving multiple groups of offshore companies to inflate the value of BCP shares artificially. Substantial loans were granted to these entities to enable them to buy and sell BCP shares, thereby manipulating the securities market. The scheme resulted in significant losses which BCP attempted to conceal through various financial operations and by omitting relevant information from its accounting reports.

Following a report by a shareholder in November 2007, three separate proceedings were initiated against the applicant between late 2007 and 2008:

(i) criminal proceedings by the Lisbon Public Prosecutor's Office for crimes including falsification of documents, stock market manipulation and qualified fraud;

(ii) administrative proceedings by the BdP for regulatory offences relating to the provision of false or incomplete information to the supervisory authority and false accounting; and

(iii) administrative proceedings by the CMVM for offences relating to the dissemination of false or incomplete information to the market.

The BdP proceedings concluded in 2015, with the acquittal of the applicant on the charges which were not time-barred. The criminal proceedings concluded in 2016 with the applicant's conviction for market manipulation (the falsification charges having been absorbed as an aggravating factor), resulting in a two-year prison sentence, suspended on the condition of payment of EUR 300'000 to charity, plus ancillary sanctions including a four-year disqualification from exercising administrative, executive or supervisory functions in a credit institution or financial firm. The CMVM proceedings resulted in an administrative fine of EUR 480'000, which became final in November 2020. Throughout these proceedings, the applicant raised *ne bis in idem* objections before the domestic courts, which were rejected on the basis that the proceedings related to different legal interests.

ECtHR DECISION

The ECtHR first examined *proprio motu* whether Portugal's declaration ("reservation") to Protocol No. 7, limiting the scope of Article 4 to offences classified as "criminal" under domestic law, was valid. The Court concluded that the declaration was invalid on two grounds: first, it was incompatible with the object and purpose of Article 4, which protects every individual against double jeopardy as an absolute, non-derogable right; second, it failed to contain the required "brief statement of the law" then in force, thereby not meeting the formal requirements of Article 57 § 2 of the Convention.

The ECtHR further examined whether the three sets of proceedings were "criminal" in nature for the purposes of Article 4 of Protocol No. 7. This threshold question is decisive: Article 4 of Protocol No. 7 applies only to proceedings that are "criminal" in nature, regardless of their domestic classification. Applying the *Engel* criteria – (1) the legal classification of the offence in domestic law, (2) the nature of the offence and (3) the severity of the potential penalty – the Court found that all three proceedings were criminal in nature. The second and third criteria are alternative rather than cumulative, though a cumulative approach is not excluded. The Court noted in particular that the administrative sanctions were not limited to a specific group of persons with a particular status, pursued both preventive and repressive objectives, and carried substantial penalties (fines of up to approximately EUR 100'000 per offence before the BdP and up to EUR 2.5 million before the CMVM, plus ancillary sanctions including disqualification from office). The Court expressly confirmed that it will continue to apply the *Engel* criteria for determining whether a proceeding is "criminal" under Article 4 of Protocol No. 7, noting the convergence of this approach with CJEU jurisprudence applying the same criteria under Article 50 of the EU Charter of Fundamental Rights.

Turning to the identity of the offences (*idem* criterion), the ECtHR decided to adopt a more rigorous approach than that established in *Sergey Zolotukhin v. Russia*. While *Zolotukhin* held that Article 4 of Protocol No. 7 prohibits prosecution for a second offence arising from "identical facts" or facts "in substance the same", the Court now clarified that the "in substance the same" standard is insufficient. The *idem* condition will henceforth be satisfied only if the material facts underlying the first offence are *identical* to those giving rise to subsequent proceedings – mere similarity is not enough. The Court specified that identity of material facts means a set of concrete circumstances arising from events that are, in substance, the same, involving the same perpetrator and inextricably linked together in time and space. Where factual sets do not fully coincide, the condition may still be met if the material facts relating to the essential elements of the offence are identical. Although the factual sets in the three proceedings in the present case did not overlap entirely, the Court found that the essential elements concerning the dissemination of false information to the market, supervisors and the public were identical.

The central question addressed by the Court was whether parallel criminal and administrative proceedings constituted a prohibited "repetition" of proceedings (*bis* criterion). The Grand Chamber confirmed and refined the "calibrated" approach adopted in *A and B v. Norway*. Article 4 of Protocol No. 7 does not prohibit legal systems that address harmful conduct through an "integrated" approach, prosecuting it by means of parallel proceedings conducted by different authorities for different purposes. However, a fair balance must be struck between protecting the individual's rights under the *ne bis in idem* principle and enabling society to regulate harmful conduct through calibrated measures.

The Court articulated refined criteria for the determination of whether mixed proceedings form a sufficiently coherent whole, distinguishing between *material link criteria* and a *temporal link criterion*. The material link criteria require: (a) that the proceedings protect different legal interests or social values – a formulation that more directly addresses the substance of the sanctioned conduct, rather than merely requiring "complementary purposes", (b) the predictability of the duality of proceedings in law and in practice, (c) that domestic law contains clear and effective rules ensuring coordinated conduct of proceedings, which preserves defence rights, and the application of a proportionate global sanction, and (d) the actual conduct of proceedings in a coordinated manner, with the global sanction being proportionate to the gravity of the conduct. Crucially, the Court emphasised that the proportionality of the global sanction is a "prominent, if not decisive" criterion for establishing a sufficient material link between proceedings. The temporal link criterion requires that the proceedings present a sufficiently close temporal link so that the individual is not left in a state of uncertainty and delay; the closer the temporal link, the lower the level of explanation the State must provide for any delays.

Applying these criteria to the present case, the Court found that the three proceedings protected different legal interests: the criminal proceedings protected public confidence in the validity of the information available to guide financial investment choices; the BdP proceedings protected the stability of the banking industry and the national economy; and the CMVM proceedings protected the proper functioning and integrity of the financial market as a whole. The dual-track system was clearly provided for under Portuguese law and was foreseeable to the applicant. The domestic courts consistently ensured coordination between the proceedings, regularly exchanging information and considering the progress and outcomes of parallel proceedings. The global sanction was proportionate to the gravity of the applicant's conduct, given his senior position and the scale and length of the misconduct. The three proceedings were initiated close in time and conducted largely in parallel, satisfying the temporal link criterion.

In conclusion, the Court held, by fifteen votes to two, that there had been no violation of Article 4 of Protocol No. 7 to the Convention.

COMMENTS

In the financial sector, criminal proceedings are often accompanied or preceded by administrative proceedings before supervisory authorities. This ECtHR decision confirms that dual-track enforcement systems combining criminal and administrative sanctions remain permissible under Article 4 of Protocol No. 7, provided that the proceedings form a sufficiently coherent "integrated system".

The Court's articulation of specific criteria – different legal interests, foreseeability, clear coordination rules, actual coordination and proportionate global sanctions – provides clearer guidance for national authorities designing and operating enforcement systems. The emphasis on the proportionality of the global sanction as a "prominent, if not decisive" criterion is particularly significant: if an "integrated" system is permissible, it must not impose an excessive burden on the individual.

The judgment of the ECtHR also serves as a reminder that reservations or declarations limiting the scope of Convention rights may be invalidated if they are incompatible with the object and purpose of the right or fail to meet the formal requirements of Article 57. Practitioners should not assume that national declarations will shield domestic proceedings from ECtHR scrutiny.

As a result of this significant ECtHR decision, we note in practical terms that:

- The autonomous definition of "criminal" is of critical importance. The ECtHR's continued application of the *Engel* criteria means that proceedings classified as "administrative" under domestic law may nonetheless be "criminal" for Convention purposes – thereby triggering *ne bis in idem* protection. Defence counsel should consider at the earliest stage whether administrative proceedings may qualify as "criminal" under these criteria, as this determination governs the applicability of the *ne bis in idem* guarantee in its entirety.
- The Court claims that it is tightening the *idem* criterion by now requiring *identical* material facts, rather than facts that are merely similar. However, upon closer examination of its definition (see para. 224 of the decision), we fail to identify any material difference with current practice: the requirement of "identical" facts ultimately relies on a set of concrete circumstances arising from events that are "in substance" the same, involving the same perpetrator and inextricably linked together in time and space. This formulation closely mirrors the *Zolotukhin* standard, which required "identical facts or facts that are substantially the same" – suggesting that the purported tightening may be more rhetorical than substantive.
- The refined *bis* analysis places disproportionate cumulative sanctions and deficient coordination at the heart of any successful challenge. Where proceedings lack a genuine temporal nexus – leaving the individual in prolonged uncertainty – or where the global sanction exceeds what is commensurate with the gravity of the conduct, the "integrated system" defence will falter. Defence counsel should adduce evidence of excessive cumulative burden, procedural fragmentation and any failure by the sanctioning authority to account for penalties already imposed.
- From an enforcement-risk perspective, the judgment signals that regulatory authorities in banking, securities and financial services may continue to pursue parallel proceedings provided they can demonstrate sufficient coordination and proportionality. Clients facing regulatory scrutiny should be advised of the limited protection offered by the "integrated system" exception where the State can show that proceedings targeted different protected interests, were foreseeable, followed clear domestic rules and resulted in a proportionate global sanction. Early mapping of potential overlapping proceedings – and proactive engagement with each authority – may be advisable to mitigate cumulative sanction risk.
- The judgment was not unanimous. Two judges issued dissenting opinions that merit attention. Judge Pavli, in a partly dissenting opinion, would have found a violation of Article 4 of Protocol No. 7 as between the criminal and CMVM proceedings. He criticised the majority for transforming the double jeopardy guarantee from an *ex ante* prohibition on repeated prosecution into "*simply an ex post protection against the disproportionality of combined or aggregated sanctions*". Judge Serghides, in a full dissent, went even further: he argued that the "integrated system" approach developed since *A and B v. Norway* is fundamentally incompatible with the absolute, non-derogable character of the *ne bis in idem* guarantee enshrined in Article 4 of Protocol No. 7. For practitioners, these dissents signal that the current framework remains doctrinally contested. In future cases – particularly where coordination between parallel proceedings is less meticulous or where the cumulative sanction burden appears excessive – defence counsel may find receptive ground by invoking these critiques to argue that the "integrated system" exception was improperly applied.
- Finally, the judgment confirms convergence between ECtHR and CJEU jurisprudence on *ne bis in idem*. The Court expressly noted that the CJEU applies the same *Engel* criteria in interpreting Article 50 of the Charter of Fundamental Rights, reinforcing a harmonised approach across European courts. Defence counsel in cross-border or EU regulatory matters should therefore expect consistent application of these principles.

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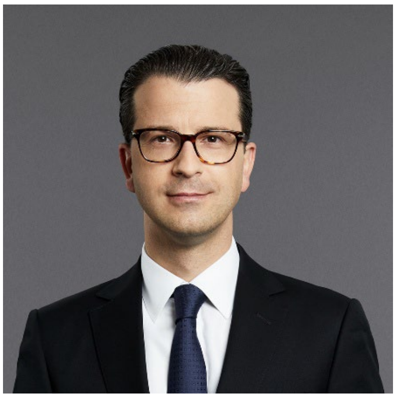

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