

# The Prohibition Against Repeated Criminal Proceedings According to the ECHR Protocol 7 Article 4

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## 1 Introduction

The European Convention on Human Rights (hereafter abbreviated to ECHR) Protocol 7 was adopted by the Committee of Ministers of the Council of Europe 22 November 1984. The background of the Protocol was a desire to extend the Human Rights protection according to ECHR to include some provisions from the International Covenant on Civil and Political Rights of 16 December 1966. One of the rights that were implemented in the European Human Rights protection by this Protocol, is the right not to be tried or punished twice (the prohibition against repeated criminal proceedings or “double jeopardy”). This right is enshrined in Protocol 7 Article 4, which provides:

*Right not to be tried or punished twice*

1. 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.
2. The provisions in 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.
3. No derogation from this Article shall be made under Article 15 of the Convention.

This provision, which is modelled upon the International Covenant on Civil and Political Rights Article 14 (7), imposes on the member states to give more closely defined decisions in criminal cases binding effect – the effect of *res judicata*. When a person who has been charged with a criminal offence, is finally acquitted or convicted, he cannot be prosecuted again for the same offence (“*non bis in idem*”). It follows from the provision that the decision by which the accused is finally acquitted or convicted, shall constitute a hindrance for further criminal proceedings against him.

The warranties of legal certainty which the ECHR Article 6 provides for persons charged with a criminal offence, do not only apply in cases handled as criminal cases according to national law, but also when sanctions of punitive character are imposed on individuals in administrative proceedings. According to the case law of the European Court of Human Rights (hereafter called the European Court) the question whether a trial shall be considered as criminal, depends on an assessment of (1) the characterisation of the proceedings and the sanction under national law, (2) the nature of the infringed provisions or the provisions that give the authority to impose the sanction (“the nature of the offence”) and (3) the nature and degree of severity of the penalty risked.

Because of the fact that the first judgment of the European Court in which these criteria were formulated, was the judgment of 8 June 1976 in the case of *Engel and others v. the Netherlands*, these criteria often are referred to as the

“Engel Criteria”. In several later judgments the European Court has emphasized that these criteria at the point of departure are alternative, but that a trial also can be considered as criminal on the basis of the cumulative effect of more than one of the criteria.

Since the Engel Criteria at the point of departure are alternative, a case must normally be deemed to be criminal if one of the criteria is fulfilled. Only in exceptional cases the imposition of a sanction satisfying one of the Engel Criteria, will not be considered as a criminal trial. But there are a few cases where the European Court has concluded that the proceedings are not of a criminal character although the sanction is characterized as a criminal penalty under national law.<sup>1</sup>

This Article will not go into details concerning the content of the Engel Criteria.<sup>2</sup> Regarding the second of the Engel Criteria, it should, however, be pointed out that it is not sufficient to characterize a sanction as a criminal penalty that the sanctioned conduct is covered by a provision in penal law.<sup>3</sup> The decisive is whether the specific rule to which the disputed sanction is attached, is of a criminal character.

The topics I will discuss in this Article, is firstly the applicable field of Protocol 7 Article 4. In what kind of proceedings does the prohibition against repeated proceedings apply (section 2 below)?

Secondly I will discuss the conditions for provoking the prohibition. What kind of decisions will give the individuals a protection against a new prosecution, and from what time does the prohibition come into force (section 3 below)?

Thirdly I will investigate what is to be considered as the same offence (section 4 below).

Finally I will give a short summary of the conclusions in this Article (section 5).<sup>4</sup>

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1 See e.g. decision of 15 June 1999 in the case of *W.S. v. Poland* and decision of 9 October 2003 in the case of *Szott-Medynska v. Poland*.

2 They are thoroughly discussed by Johansen, Jon Petter Rui, *Det materielle straffebegrepet i Den europeiske menneskerettighetskonvensjonen*, Tidsskrift for Rettsvitenskap 2005 p. 294–369.

3 See e.g. judgment of the Norwegian Supreme Court in *Norsk Retstidende* (Norwegian Law Report) 2004 p. 1343 (withdrawal of a doctor’s licence).

4 This Article is based on an two earlier articles in Norwegian on this subject – Skoghøy, Jens Edvin A., *Forbudet mot gjentatt straffefølgning i Den europeiske menneskerettshetskonvensjon protokoll 7 artikkel 4 nr. 1 (“ne bis in idem”)*, Tidsskrift for Rettsvitenskap 2003 p. 1–39 and Skoghøy, Jens Edvin A., *Omfanget av den negative rettskraft av avgjørelser om straff etter Den europeiske menneskerettshetskonvensjon protokoll 7 artikkel 4*, in *Festskrift til Per Henrik Lindblom, Stockholm 2004*, p. 627–644.

## 2 In what Kind of Cases does the Prohibition against Repeated Proceedings Apply?

### 2.1 Introduction

The question on the scope and extent of Protocol 7 Article 4 can be divided into two issues:

- In what kind of proceedings must the precluding decision have been made?
- What kind of proceedings does the blocking decision prohibit?

Pursuant to Article 4 (1) the decision which provokes the prohibition against repeated proceedings, must have been made “in accordance with the law and penal procedure” of the state in question, while the prohibited proceedings are defined as “criminal proceedings under the jurisdiction of the same State”.

In the following I will first discuss in what kind of proceedings the precluding decision must have been made (section 2.2). Thereafter I will discuss what kind of proceedings which are prohibited (section 2.3).

### 2.2 The Character of the Precluding Proceedings

According to the natural meaning of the wording of Protocol 7 Article 4 (1) the precluding decision must have been made pursuant to the rules governing the prosecution for offences that are defined as criminal offences under national law (“in accordance with the law and penal procedure of that State”). The preparatory works of the International Covenant on Civil and Political Rights Article 14 (7), which as earlier mentioned has served as a model for Protocol 7 Article 4, pulls in the same direction.<sup>5</sup>

The traditional opinion in Scandinavian jurisprudence on criminal procedure has been that the main purpose of rules on *res judicata* in criminal cases is to protect the need of the accused of leaving the case behind and secure legal certainty and foreseeability.<sup>6</sup> If this is the purpose of Protocol 7 Article 4, there is no reason to grant decisions in administrative proceedings blocking effect. It is only if the case has been dealt with by the authorities which the state has established to handle criminal offences, that the individual can have reason to believe that he is finished with the case and will not be tried again in connection with the conduct at stake. But on several occasions the European Court has pointed out that the purpose of Protocol 7 Article 4 is “to prohibit the repetition of criminal proceedings that have been concluded by a final decision”.<sup>7</sup> The purpose of this provision is not only to protect legal certainty, but more widely

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5 See e.g. reports from the meetings in the 3rd committee of the General Assembly of the United Nations 26 November 1959 para 15, 27 November 1959 para 20 and 3 December 1959 para 49 and 64.

6 See e.g. Andenæs, Johs., *Norsk straffeprosess*, Volume I, 3rd Edition, Oslo 2000, p. 423.

7 See e.g. the judgment of 28 September 1995 in the case of *Gradinger v. Austria* and the judgment of 29 May 2001 in the case of *Fischer v. Austria* para 22.

to exempt an individual who once has been tried in criminal proceedings, from the burden of again being tried again. This wider purpose of the double jeopardy clause can be used as an argument for giving the prohibition against repeated criminal proceedings the same field of application as the guarantees of legal certainty in Article 6 of the Convention.

The question on how Protocol 7 Article 4 shall be interpreted in this particular, was presented before the Norwegian Supreme Court in a case which were adjudicated in a plenary session 3 May 2002. The Supreme Court held 8 to 5 votes that the prohibition against repeated criminal proceedings is not only provoked in cases which are handled as criminal cases according to national law.<sup>8</sup>

The disputed issue in this case was whether a taxpayer on whom the tax authorities had imposed a tax surcharge of 60 % for deliberately or with gross negligence having given incorrect information about his incomes, subsequently could be accused by the prosecution authorities for the same offence. The majority of the Supreme Court was not sure whether the concept of “penal” in Protocol 7 Article 4 fully corresponds with the concept of “criminal” in Article 6 of the Convention, but argued that these concepts because of a need for a coherent interpretation ought to be conformal. In the vote of the majority it is also pointed out that the purpose of Protocol 7 Article 4 is not primarily to protect expectations of having laid the case behind, but to protect the individual against the burden of being tried repeatedly. Since tax surcharge is of a typical punitive character, the majority concluded that a final decision imposing a tax surcharge on a taxpayer because of incorrect information to the tax authorities, blocks for a criminal prosecution for the same offence.

When this judgment of the Norwegian Supreme Court was delivered, there existed no decision by the European Court where the Court expressly had ruled whether a punitive administrative sanction blocks for a subsequent criminal prosecution. But shortly afterwards the European Court in its judgment of 2 July 2002 in the case of *Göktan v. France* stated that Protocol 7 Article 4 does not require that the precluding decision is taken in proceedings which are criminal according to national law and expressed that the notion of penalty should not have different meanings under different provisions of the Convention (para 48). This interpretation is maintained by the Court in its later decisions.<sup>9</sup> In the decision of 14 September 2004 in the case of *Rosenquist v. Sweden* the Court expressed:

The first issue that arises is whether the proceedings relating to the 40 per cent tax surcharge could be viewed as “criminal” for the purposes of Article 4 of Protocol no. 7. In this connection, the Court reiterates its findings in *Janosevic v. Sweden* (no. 34619/97, 23 July 2002, §§ 68-71 ECHR 2002-VII) and *Västberg Taxi Aktiebolag and Vulic v. Sweden* (no. 36985/97, 23 July 2002, §§ 79-82) that the proceedings in question were “criminal” although the surcharges cannot be said to belong to criminal law under the Swedish legal system, and in *Mannasson v*

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8 *Norsk Retstidende* 2002 p. 557.

9 See e.g. decision of 8 April 2003 in the case of *Manasson v. Sweden* and decision of 14 September 2004 in the case of *Rosenquist v. Sweden*.

Sweden ((dec.) no. 41265/98, 8 April 2003) that proceedings involving tax surcharges were "criminal" not only for the purpose of Article 6 of the Convention, but also for the purpose of Article 4 of Protocol no. 7 to the Convention. Moreover, in its judgment in the case of *Göktan v. France* (no. 33402/96, § 48, ECHR 2002-V) concerning Article 7 of the Convention and Article 4 of Protocol no. 7, the Court held that the notion of penalty should not have different meanings under different provisions of the Convention.

Hence, the conclusion is quite clear: The prohibition against repeated criminal proceedings does not only apply in cases which are characterized as criminal under national law, but in all cases which are considered as criminal according to the Engel Criteria.

After some uncertainty in judgments delivered in the course of the autumn of 2002 and the spring of 2003,<sup>10</sup> this interpretation of Protocol 7 Article 4 is subsequently without exceptions followed by the Norwegian Supreme Court. Since the autumn 2003 the Norwegian Supreme Court has consistently maintained that the concept of punishment in Protocol 7 Article 4 is the same as in Article 6 of the Convention.<sup>11</sup>

### 2.3 *The Prohibited Proceedings*

The proceedings that are prohibited after a final conviction or acquittal, are "criminal proceedings under the jurisdiction of the same State".

Already in its report of 19 Mai 1994 the European Commission of Human Rights presupposed that the prohibition comprises all kinds of proceedings that are deemed as criminal according to the Engel Criteria.<sup>12</sup> After the ruling of the European Court in its judgement in the case of *Göktan v. France* that the precluding effect of Protocol 7 Article 4 is provoked by convictions or acquittals in all kind of proceedings considered as criminal according to the Engel Criteria, it is quite clear that the prohibited proceedings must be defined in the same way.

As pointed out by the European Court in its judgment of 29 May 2001 in the case of *Fischer v. Austria* para 29, Protocol 7 Article 4 "is not confined to the right not to be punished twice but extends to the right not to be tried twice". This is a natural consequence of the fact that the provision shall protect against the burden of being repeatedly prosecuted. Consequently the provision is infringed already when an earlier convicted or acquitted person is being charged again with the same offence.

According to the case law of the European Court the prohibition against repeated criminal proceedings only applies if the proceedings following a conviction or acquittal are to be considered as a new prosecution.<sup>13</sup> Protocol 7 Article 4 does not prohibit parallel criminal proceedings. However it is not

10 See e.g. *Norsk Retstidende* 2002 p. 1216, 2002 p. 1271 and 2003 p. 1221.

11 See e.g. *Norsk Retstidende* 2003 p. 1100, 2003 p. 1827, 2004 p. 927, 2004 p. 1343, 2004 p. 1368 and 2004 p. 1500.

12 See para 73 compared with para 44.

13 See decision of 30 May 2000 in the case *R.T. v. Switzerland* and judgment of 6 June 2002 in the case of *Sailer v. Austria*.

sufficient to clear the prohibition against repeated criminal proceedings that the new prosecution has commenced before the precluding decision has become final.<sup>14</sup> To my knowledge there exists no decision of the European Court defining the line between parallel and repeated proceedings. In my opinion the prohibition of repeated criminal proceedings is probably not infringed if there in the parallel prosecution is made a decision in the first instance before the blocking decision has become legally binding (final).

It follows from the wording of Protocol 7 Article 4 that the prohibition against repeated criminal proceedings only applies new proceedings within the same state. Accordingly a conviction or acquittal has no international *res judicata* effect.

In a judgment published in *Norsk Retstidende* 2002 p. 1216 the Norwegian Supreme Court held that it is necessary to distinguish between the conviction and the sentencing, and that it is not contrary to Protocol 7 Article 4 to carry out the sentencing process step by step. But the conditions for accepting a sentencing step by step are that the question of guilt is not tried again, and that the system of sentencing step by step is well known, or that the accused in connection with the first sentencing is notified about the next one. It must also be a condition for accepting such a system that the new sentencing is carried out within a reasonable time after the finishing of the first one.

The above mentioned judgement of the Norwegian Supreme Court concerned a conviction for a breach of the Road Traffic Act. In the first step of the proceedings the driver was convicted for a breach of the Road Traffic Act and sentenced to imprisonment. In the next step the driving licence was revoked. Under Norwegian law revocation of driving licence because of infringements of the Road Traffic Act is not characterized as a criminal penalty. At the material time the decision of revocation of the driving licence was made by the police after the conviction for the breach of the Road Traffic Act had become final. The Supreme Court argued that the decision on revocation of the driving licence could not be considered as a new prosecution, but as a continuing of the sentencing process which followed upon the conviction for the breach of the Road Traffic Act.<sup>15</sup>

The Norwegian Road Traffic Act has now been altered. Revocation of driving licence because of infringements of the Road Traffic Act is still not characterized as a criminal penalty, but to day the question on revocation of the driving licence is adjudicated by the courts in conjunction with the conviction for the breach of the act and the imposing of fines or penalty of imprisonment.

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14 See judgment of 6 June 2002 in the case of *Sailer v. Austria*.

15 At this point the Supreme Court drew a parallel to the argumentation of the European Court in the judgment of 5 July 2001 in the case of *Philips v. United Kingdom* concerning the presumption of innocence.

### **3 The Content of the Precluding Decision, and from what Time will the Prohibition come into Force?**

#### **3.1 *Introductory Remarks***

For hindering a new prosecution, the outcome of the first prosecution must have been that the accused is convicted or acquitted, and the prohibition against new proceedings has effect from the time when the conviction or acquittal becomes final. The following section will deal with the first mentioned of these conditions (section 3.2 below). Thereafter I will discuss the second one (section 3.3 below).

#### **3.2 *The Content of the Precluding Decision***

According to the wording of Protocol 7 Article 4 a decision only has blocking effect if the accused is “acquitted or convicted”. It follows from this that a decision of the court that dismisses the case, does not constitute a hindrance for a new prosecution. The result must be the same if the proceedings are dropped by the prosecuting authorities because of lack of evidence.<sup>16</sup> But if the proceedings are concluded by a decision stating guilt, the decision must have blocking effect even if it is made by the police or a prosecuting official. This cannot only be the case when the decision of the police or the prosecuting authority imposes a fine, but also when a decision stating guilt is combined with a withdrawal of the charge.

An investigation for a criminal offence can also be concluded by a decision of the prosecution stating that no crime has been committed. If the proceedings are concluded by such a decision, I think that the suspect can only be liable to be tried again if the conditions of reopening are fulfilled.

#### **3.3 *The Prohibition comes into Force when the Blocking Decision has become Final***

The prohibition of repeated criminal proceedings has effect from the time when the blocking decision has become final. In the preparatory works of the Covenant of Civil and Political Rights article 14 (7) it is pointed out that the time of finality must be determined on the basis of national law.<sup>17</sup> A decision is final when the convicted person no longer can appeal against it. An opportunity of a superior authority to review the decision cannot postpone the time of finality. Neither can the fact that national law allows another authority to carry out another kind of criminal proceedings give reason to say that the decision is not final.<sup>18</sup> In the meaning of Protocol 7 Article 4 a decision must be deemed to be final when the convicted person no longer can challenge it with ordinary methods of judicial review.

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16 See e.g. decision of the European Court 20 November 2005 in the case of *Wassdahl v. Sweden*.

17 See minutes from the meetings of the 3rd Committee of the General Assembly 26 November 1958 para. 15, 27 November 1959 para. 20 and 3 December 1959 para. 49.

18 The judgments of the Norwegian Supreme Court in *Norsk Retstidende* 2003 p. 1221 and 2004 p. 927 are incorrect in this particular.



## 4 The Criteria for what shall be Deemed to be the Same Offence

### 4.1 *Introductory Remarks*

Protocol 7 Article 4 prohibits new criminal proceedings for the same “offence” as the previous proceedings.

Within Europe there are different approaches to define the effect of *res judicata* in criminal cases. In some countries the effect of *res judicata* is attached to the (factual) conduct with which the accused has been charged. This is the situation for example in Sweden. According the Swedish Procedural Code (“Rättegångsbalken”) 30:9 people cannot be tried again for the same conduct (“samma gärning”). According to Swedish jurisprudence the effect of *res judicata* must be defined on the basis of the description of the conduct in the indictment.<sup>19</sup> In Norway there are set up two conditions to preclude a new prosecution. Firstly the new prosecution must concern the same conduct. Secondly the applicable rules have to be identical from a legal point of view. On the assessment of this issue it is an important criterion whether the rules in question protect the same kind of interests.<sup>20</sup>

When deciding whether the defendant is tried again for the same offence, the European Court has an approach similar to the Norwegian way of thinking. Protocol 7 Article 4 prohibits a new prosecution for the same factual conduct (section 4.2 below) on the basis of the same or a similar provision (section 4.3 below).

### 4.2 *The Prohibition is Confined to a new Prosecution for the same Factual Conduct*

Protocol 7 Article 4 does only forbid a new prosecution for the same factual conduct.<sup>21</sup> Thus the provision does not make any hindrance against prosecuting a person for different acts in consecutive criminal proceedings. This is true even if the latest proceedings concern a conduct committed prior to the first trial

Sometimes it can be questioned whether separate criminal proceedings relate to the same factual conduct. This must be decided on the basis of the reality. Does the new indictment really refer to the same event?

Normally the question on what is the same conduct, must be answered on the background of the factual event to which the indictment refers, and the scene and the time of crime. But a new prosecution is not allowed on the basis of an altered opinion of the way of doing the impugned conduct or the exact time or place of the offence. Nor is a new prosecution allowed if the described conduct must be deemed as an integrated part of the act that was the object of the first proceedings.

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19 See e.g. Ekelöf, Per Olof, Bylund, Torleif and Boman, Robert, *Rättegång*, Volume III, 6th Edition, Stockholm 1994, p. 159.

20 See e.g. Andenæs, *op.cit.* p. 425-428.

21 See e.g. judgment of 28 September 1995 in the case of *Gradinger v. Austria*, judgment of 29 May 2001 in the case of *Fischer v. Austria* and judgment of 11 February in the case of *Hüseyin Gözutok and Klaus Brügge v. Germany*.

### 4.3 *The Prohibition only Applies when the Provisions which Authorize the Sanctions, do not Differ in their Essential Elements*

According to the case law of the European Court it is not sufficient to bar a new prosecution that the new prosecution relates to the same event. Protocol 7 Article 4 does only prohibit new criminal proceedings for the same conduct on the basis of the same or a similar provision of the criminal law of the state concerned. If the provisions “differ in their essential elements”, new criminal proceedings are allowed. New proceedings are only forbidden if there are both factual and legal identity between the new and the earlier proceedings.

In its judgment of 23 October 1995 in the case of *Gradinger v. Austria* the European Court seems to have presupposed that the decisive for the application of Protocol 7 Article 4 is whether the new proceedings concern the same factual act. In the first case Mr. Gradinger was convicted for having caused death by negligence, which is caught by Article 80 of the Austrian Criminal Code, and was sentenced to pay a fine. Subsequently he was on the basis of the Road Traffic Act section 5 ordered to pay a fine for driving under the influence of alcohol.

According to the Austrian Criminal Code Article 80 causing death by negligence normally is punishable by maximum one year’s imprisonment, but pursuant to Article 81 paragraph 2 the maximum possible penalty is increased to three years if the offence is committed by a person who has allowed himself “even if only negligently, to become intoxicated ... through the consumption of alcohol”. Under an irrebuttable presumption applied by the criminal courts, a driver with a blood alcohol level of 0,8 grams per litre or higher is regarded to be “intoxicated” for the purpose of Article 81 paragraph 2 of the Criminal Code.

In the first case Mr. Gradinger was prosecuted for having caused death under the aggravating circumstances referred to in Article 81 paragraph 2. The court however held that he indeed had been drinking before the accident, but not to such an extent as to be caught by this provision. Therefore he was only convicted for breach of Article 80.

The European Court found that there had been a violation of Protocol 7 Article 4. The reasoning of the court is as follows:

In reply to Mr Gradinger’s arguments ... the Government affirmed that Article 4 of the Protocol No. 7 (P7-4) did not preclude applying the two provisions in issue consecutively. The latter were different in nature and pursued different aims: whereas Article 81 para. 2 of the Criminal Code punished homicide committed while under influence of drink, section 5 of the Road Traffic Act punished the mere fact of driving a vehicle while intoxicated. The former was designed to penalise acts that cause death and threaten public safety, the latter to ensure a smooth flow of traffic.

The Court notes that, according to the St Pölten Regional Court, the aggravating circumstance referred to in Article 81 para.2 of the Criminal Code, namely a blood alcohol level of 0,8 grams per litre or higher, was not made out with regard to the applicant. On the other hand, the administrative authorities found, in order to bring the applicant’s case within the ambit of section 5 of the Road Traffic Act, that the alcohol level had been attained. The court is fully aware that the provisions in question differ not only as regards the designation of the offences but also, more importantly, as regards their nature and purpose.

It further observes that the offence provided for in section 5 of the Road Traffic Act represents only one aspect of the offence punished under Article 81 para. 2 of the Criminal Code. Nevertheless, both impugned decisions were based on the same conduct. Accordingly, there has been a breach of Article 4 of Protocol No. 7 (P/-4).<sup>22</sup>

From this judgment it seems to appear that Protocol 7 Article 4 prohibits repeated criminal proceedings for the same factual act irrespective of the legal designation of the offences and their nature or purpose.

The first judgment where the Court ruled that Protocol 7 Article 4 only precludes repeated criminal proceedings that are identical from a legal point of view, is the judgement of 30 July 1998 in the case of *Oliveira v. Switzerland*. Driving on a road covered with ice and snow, Mrs. Oliveira lost control over her car and collided with another vehicle. The driver of the other vehicle was seriously injured. After having been ordered to pay a fine of 2 000 Swiss francs for failing to be in control of her vehicle, Mrs. Oliveira was prosecuted for negligently causing physical injury. The European Court held that this did not constitute a breach of Protocol 7 Article 4 and argued:

The Court notes that the convictions in issue concerned an accident caused by the applicant on 15 December 1990. She had been driving on a road covered with ice and snow when her car veered onto the other side of the road hitting one car and then colliding with a second, whose driver sustained serious injuries. Mrs Oliveira was firstly ordered to pay a 200 Swiss franc (CHF) fine by the police magistrate for failing to control her vehicle as she had not adopted her speed to the road conditions ... Subsequently, the Zürich District Court and then the Zürich Court of Appeal imposed a CHF 1.500 fine (from which, however, was deducted the amount of the initial fine) for negligently causing physical injury ...

That is a typical example of a single act constituting various offences (*concur idèal d'infractions*). The characteristic feature of this notion is that a single criminal act is split into two separate offences, in this case the failure to control the vehicle and the negligent causing of physical injury. In such cases, the greater penalty will usually absorb the lesser one.

There is nothing in that situation which infringes Article 4 of Protocol No. 7 since that provision prohibits people being tried twice for the same offence whereas in cases concerning a single act constituting various offences (*concur idèal d'infractions*) one criminal act constitutes two separate offences.<sup>23</sup>

The reasoning leading to the court's decision is followed up by the Court in its later judgments and decisions.<sup>24</sup> One of the most important of these is the judgment of 29 May 2001 in the case of *Fischer v. Austria*.

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22 See judgment of 23 October 1995 in the case of *Gradinger v. Austria* paras 54 and 55.

23 Judgment of 30 July 1998 in the case of *Oliveira v. Switzerland* paras 25 and 26.

24 See e.g. judgment of 29 May 2001 in the case of *Fischer v. Austria*, judgment of 30 May 2002 in the case of *W. F. v. Austria*, judgment of 6 June 2002 in the case of *Sailer v. Austria*, decision of 8 April 2001 in the case of *Manasson v. Sweden* and decision of 14 September 2004 in the case of *Rosenquist v. Sweden*.

The question in this case was whether the imposing of a fine according to the Road Traffic Act for driving under the influence of alcohol, constitutes a hindrance against prosecuting the driver for causing death by negligence after having allowed himself to be intoxicated through the consumption of alcohol, as prescribed in the Austrian Criminal Code Article 81 § 2. In Austrian courts Mr. Fischer was convicted for having caused death by negligence under the aggravating circumstances referred to in this provision, and he was sentenced to six months' imprisonment. The European Court found that Protocol 7 Article 4 was violated "since the administrative offence of drunken driving under sections 5 (1) and 99 (1)(a) of the Road Traffic Act, and the special circumstances under Article 81 § 2 of the Criminal Code, as interpreted by the courts, do not differ in their essential elements".<sup>25</sup> The relationship to the judgments in the cases *Oliveira v. Switzerland* and *Gradinger v. Austria* was explained in this way:

The court observes that the wording of Article 4 of Protocol No. 7 does not refer to "the same offence" but rather to trial and punishment "again" for an offence for which the applicant has already been finally acquitted or convicted. Thus, while it is true that the mere fact that a single act constitutes more than one offence is not contrary to this Article, the Court must not limit itself to finding that the applicant was, on the basis of one act, tried or punished for nominally different offences. The Court, like the Austrian Constitutional Court, notes that there are cases where one act, at first sight, appears to constitute more than one offence, whereas a closer examination shows that only one offence should be prosecuted because it encompasses all the wrongs contained in the others (see paragraph 14 above). An obvious example would be an act which constitutes two offences, one of which contains precisely the same elements as the other plus an additional one. There may be other cases where the offences only slightly overlap. Thus, where different offences based on one act are prosecuted consecutively, one after the final decision of the other, the Court has to examine whether or not such offences have the same essential elements.

This view is supported by the decision in the case of *Ponsetti and Chesnel v. France* (nos. 36855/97 and 41731/98 ECHR 1999-VI, [14.9.99]), relating to separate convictions for two tax offences arising out of the failure to submit a tax declaration, where the respondent Government also argued that this was an example of one act constituting more than one offence. Nevertheless, the Court examined whether the offences differed in their essential elements.

It can also be argued that this is what distinguishes the *Gradinger* case from the *Oliveira* case. In the *Gradinger* case the essential elements of the administrative offences of drunken driving did not differ from those constituting the special circumstances of Article 81 § 2 of the Criminal Code, namely driving a vehicle having a blood alcohol level of 0,8 grams per litre or more. However, there was no such obvious overlap of the essential elements of the offences at issue in the *Oliveira* case.

As it appears from this quotation, the concept of "same offence" is described in the same way in the *Fischer* judgment as in the *Oliveira* judgment, but the result is quite surprising. The fundamental condition for being convicted for violation of Article 81 paragraph 2 of the Austrian Criminal Code is that someone's death

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<sup>25</sup> See judgment of 29 May 2001 in the case of *Fischer v. Austria* para 31.

is caused by negligence. This condition differs essentially from the conditions for being convicted for drunken driving. The fact that it under Article 81 paragraph 2 is an aggravating circumstance that the perpetrator has committed the offence after having allowed himself to become intoxicated, does not deprive Article 81 paragraph 2 of the Criminal Code from being quite another provision than section 5 of the Road Traffic Act. These provisions really do differ in their essential elements!

Because of the lack of consistency between the European Court's general description of the concept of "same offence" and the concrete judgment in the Fischer case, it is not easy to foresee how the practice of the Court will develop. In two judgments the Norwegian Supreme Court has ruled that if the difference between two penal provisions is so small that they cannot be applied together in the same case (in exact concurrence), they can not constitute the basis for different prosecutions.<sup>26</sup> But even if the provisions are so different that they could be applied together in the same case, Protocol 7 Article 4 still bars for a new prosecution if there is a large degree of legal identity between the provisions at stake. According to the practice of the Norwegian Supreme Court the determination whether two offences differ in their essential elements, must be based on a total assessment of the legal designation of the offences, the purposes of the provisions and the interests they are supposed to protect.<sup>27</sup>

In the judgment in *Norsk Retstidende* 2004 p. 1368 a boy who at the material time was 17 years old, was charged with a robbery, some grave thefts and use of drugs. By a coercive measure of the children's care authorities he was for a period of up to 12 months placed in a children's care institution for treatment and education. The legal basis for the placing was section 4-24 of the Children's Care Act. According to this provision the children's care authorities for a period up to 12 months are empowered to place a child who by committing serious or repeated crimes has shown serious behaviour problems, in an institution for treatment and education. In the current case the factual basis for the placing was the acts with which the boy were charged. On the basis of the same acts he subsequently was prosecuted before the courts for robbery, grave thefts and use of drugs. The Supreme Court found that Protocol 7 Article 4 did not preclude the prosecution. In an earlier decision the court had ruled that the placing of the boy in the children's care institution had the character of a penalty for the purpose of the ECHR.<sup>28</sup> This view was maintained. When the court found that Protocol 7 Article 4 did not exclude the prosecution, the reason was that the two forms of proceedings did not concern the same offences. By this assessment the court firstly referred to the fact that is a necessary, but not sufficient condition for being placed in a children's care institution that the child is guilty of criminal offences. In addition it is a requirement that the child has shown serious

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26 See *Norsk Retstidende* 2003 p. 1376 and judgment of the Norwegian Supreme Court of 29 June 2006 (HR-2006-01159-A).

27 See e.g. *Norsk Retstidende* 2003 p. 1100 para 57, 2004 p. 1368 para 33 and 2004 p. 1500 para 52 and judgment of the Norwegian Supreme Court of 29 June 2006 (HR-2006-01159-A).

28 See *Norsk Retstidende* 2003 p. 1827.

behaviour problems, and that the child is in need of a long-lasting treatment. Secondly the court put weight on the different purposes of punishment and the placing of a child in a children's care institution. While punishment mainly is justified by the deterrent effect of the penalty and the protection of the society, a decision to place a child in a children's care institution has to be based on an assessment of what is to the child's best. Thirdly the court emphasized that the protected interests are different. The Children's Care Act protects the interests of the children, while the criminal provisions in issue partly protect the interests of the victim and partly protect the interests of the society and more general interests.

The question in the judgment in *Norsk Retstidende* 2004 p. 1500 was whether an administrative decision where a tradesmen's licence to buy fish was provisionally revoked, hindered a subsequent prosecution by the prosecution authorities for violation of the Act on Registration of Buyers of Fish. The Supreme Court established that the provisional revocation of the licence to buy fish had a clear punitive character and therefore had to be looked upon as a criminal sanction. The Court also found that the revocation made a hindrance against the prosecution for violation of the Act on Registration of Buyers of Fish. The reason was that both kinds of proceedings were based on the same factual acts, and that the purpose of and the conditions for criminal responsibility for breach of the Act on Registration of Buyers of Fish and the purpose and conditions for revocation of the licence to buy fish were the same. After having stated that the two kind of proceedings were based on the same acts, the Court more generally expressed:

The decisive then is whether there are any essential difference between the provisions on which the proceedings are based – if they differ “in their essential elements”, see e.g. the judgment of the European Court of 29 My 2001 in the case of *Fischer v. Austria* para 29. The Supreme Court has in several decisions held that the main element of this assessment is whether the objective conditions for imposing the sanctions are essentially the same, see latest the decision of 10 September 2004HR-2004-01501-A para 33 (*Norsk Retstidende* 2004 p. 1368). But as the judge voting first in this judgment points out, it will not always be efficient to compare the current rules of conduct (“the descriptions of the offences”). Also other conditions for imposing the sanctions may be taken into consideration, and it is also necessary to look upon the purposes of the provisions and what kind of interests they shall protect. This is no less true for administrative encroachments which are not punitively founded, but which nevertheless for the purpose of the ECHR must be considered as criminal sanctions.<sup>29</sup>

While the Supreme Court of Norway in several decisions has presupposed that differences in subjective requirements play a subordinate role by the assessment whether two trials concern the same offence,<sup>30</sup> the European Court in its decision of 14 September 2004 in the case of *Rosenquist v. Sweden* at first sight seems to

29 See *Norsk Retstidende* 2004 p. 1500 para 52.

30 See e.g. *Norsk Retstidende* 2002 p. 497, 2003 p. 394 para 22, 2004 p. 1368 para 33 and 2004 p. 1500 para 33.

have attached considerable weight to this point. A taxpayer who had failed to submit necessary information about his incomes to the tax authorities, was imposed a tax surcharge of 40 % of the tax he had tried to evade. Subsequently he was convicted for aggravated tax fraud and sentenced to two years' imprisonment. The European Court found that tax surcharge for the purpose of the ECHR had to be considered as a criminal penalty, but despite this statement the application for breach of Protocol 7 Article 4 was declared inadmissible because the two forms of proceedings did not concern the same offence. The Court reasoned as follows:

With respect to the conduct attributed to the applicant in the two proceedings, the Court notes that he was finally convicted by the Court of Appeal on 24 April 2003 pursuant to sections 2 and 4 of the Tax Offences Act for having failed to file his tax return to the income year 1991 with the intent of evading part of the tax due, amounting in total to SEK 2 336 723. The tax surcharge, however, were imposed on him by the tax authorities and the administrative courts pursuant to chapter 5, section 2 of the Taxation Act because he had failed to file his tax return for the fiscal year 1991, resulting in the tax authorities having to make a discretionary assessment of the applicant's income for the said year.

The Court observes that the fulfilment of the conditions for the 40 per cent tax surcharge was not sufficient for criminal liability for (aggravated) tax fraud under sections 2 and 4 of the Tax Offences Act. Pursuant to the latter it was a condition that it could be established that the failure to submit correct information or to file a tax return was the result of criminal intent or gross negligence on the applicant's part.

In other words, culpable intent or gross neglect, which was not a condition for a tax surcharge, was an essential condition for criminal conviction for (aggravated) tax fraud under section 2 and 4 of the Tax Offences Act. It served not only a deterrent but also a penal purpose.

The Court is further mindful of the Swedish Supreme Court's judgment of 29 November 200, and the Supreme Administrative Court's judgment of 13 September 2002. It notes in particular that "taxation in Sweden is largely based on information given by the individual and certification by him or her of information received from other sources. The purpose of the tax surcharge is to emphasize, *inter alia*, that the individual is required to be meticulous in fulfilling the duty of filing a tax return and the related obligation to submit information. In principle, carelessness is not acceptable. Furthermore, the taxpayer must normally have an understanding of what information is of relevance to the examination of a claim in order to avoid the risk of incorrect information being considered to have been given and a surcharge imposed. In other words, the taxpayer is required to have a certain knowledge of the tax rules". Moreover, "a tax surcharge is a general and standardized sanction the purpose of which is, *inter alia*, to prevent inaccuracy when complying with the legal obligation to complete a tax return. Provided there is no ground for remission it is always set at one of two fixed percentages. It is imposed regardless of intent or negligence."

The Court thus notes that the purpose of the criminal offence within sections 2 and 4 of the Tax Offences Act differed from the purpose of the imposition of a tax surcharge. The purpose of the latter was to secure the fundament of the national tax system; control and sanctions being necessary devices for ensuring efficient compliance by millions of tax subjects with their fundamental duty to

provide extensive and accurate factual information and material for their tax assessment.

In the light of the above considerations, the Court finds that the two offences in question were entirely separate and differed in their essential elements (see *Ponsetti and Chesnel v. France* (dec.), nos. 36855/97 and 41731/98, ECHR 1999-VI). Against this background, the Court does not find that the proceedings at issue disclosed any failure to comply with the requirements of Article 4 of Protocol no. 7 to the Convention.

In my opinion this decision is problematic for two reasons. Firstly, as pointed out by Per Ole Träskman, it is hard to distinguish between deterrent and punitive purpose.<sup>31</sup> In Scandinavian jurisprudence it is held that the main reason to punish is the deterrent effect of the punishment.<sup>32</sup> Also in earlier judgments of the European Court it is pointed out that punitive and deterrent aims are “not being mutual exclusive”, but both are “recognised as characteristic features of criminal penalties”.<sup>33</sup> Secondly, there are good reasons to question whether two provisions with the same objective designation of the criminal offence, but with different requirements of subjective guilt, really differ in their essential elements.<sup>34</sup> In my opinion requirements of subjective guilt may say something about the purpose and character of the provision in issue, but cannot be looked upon as an independent criterion by the assessment whether two trials concern the same offence. At first sight The European Court in the Rosenquist case seems to have put considerable weight on the differences between the requirements of subjective guilt, but the decision can also be read in that way that this difference is treated as an element by the determination of the purpose and character of the provisions. My view is that the decision should be understood in the latter way. By assessing whether two provisions differ in their essential elements, different requirements of subjective guilt ought to play a subordinate role.

#### **4.4 Protocol 7 Article 4 Allows Reopening**

The prohibition against repeated criminal proceedings of Protocol 7 Article 4 is not absolute. Paragraph 2 of Article 4 allows reopening “if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could have affected the outcome of the case”.

This provision regulates the conditions the contracting states may set for reopening the case in disfavour of the accused. On the request of the accused the states can allow reopening without any limitations.

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31 See Träskman, Per Ole, *Förbudet mot dubbelbestraffning och skillnaden mellan brottslig gärning och brott*, Juridisk tidsskrift vid Stockholms universitet, 2004/2005:4, p. 862–872 (p. 869).

32 See Andenæs, Johs., *Alminnelig strafferett*, 5th Edition by Magnus Matningsdal and Georg Fredrik Rieber-Mohn, Oslo 2004, p. 82–91.

33 See e.g. judgment of 9 October 2003 in the case of *Ezeh and Connors v. The United Kingdom* para 105 (Grand Chamber) with further references.

34 See Träskman, *op.cit.* p. 872.



For allowing reopening to the disadvantage of the accused it is, however, not sufficient that the conditions for reopening do not violate the limitations of paragraph 2 of Article 4. As mentioned in the provision, there is also a presupposition that the conditions for reopening are more closely described by national law of the state concerned.

Protocol 7 Article 4 does not forbid the states to prescribe more narrow limitations for reopening than prescribed in this article. If only the conditions for reopening lies within the limitations of para 2 of Article 4, the states may to set up different conditions for reopening different kinds of acquitting or convicting decisions.

## **5 Summary**

The prohibition of repeated criminal proceedings in Protocol 7 Article 4 applies in all kinds of proceedings that are to be defined as criminal according to the Engel Criteria. But the prohibition is limited to new proceedings that are based both on the same facts and on a provision that from a legal point of view is identical with the provision that was the basis for the first proceedings. The last limitation is not least necessary because of the wide scope of the concept of “criminal”. The determination whether the provisions are legal identical, must be based on a total assessment of the conditions for imposing the sanctions in issue, the purpose of the provisions and the interests they protect.